

**Liability of the Crown:
Are Immunities Unnecessary in Québec?**

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Abstract

The Crown has extensive powers and can sometimes cause injuries to those it governs through the use or misuse of these powers. Since there is no legislative scheme in place in Québec to create a specific regime for compensating these injured parties, the Crown is generally subject to the law of the land just like any other subject of the law.

The separation of powers in Canada limits the power of the courts to review and evaluate Crown actions. The deference they must exercise in this review ensures that courts do not encroach on the legislative's will to endow the Crown with its sovereign powers. This deference is relatively well understood in public law when it comes to declaring whether the use of these sovereign powers by the Crown was legal and within its mandate.

The same principle of deference also applies to civil lawsuits in compensation. In Québec, the current form this deference takes is that the Crown is immune from normal rules of civil liability when it uses its core policy powers (such as regulatory powers), unless these powers were exercised in bad faith. This judicial scheme, however, appears unnecessary and needlessly complex. The definition of bad faith has been construed by the Supreme Court to include any action that would constitute a gross fault under the Québec civil law regime; in practice, the exercise of policy powers would command deference even if the standard was that of a simple fault. This means that the immunity only protects the Crown from injuries caused by the sort of action that it would not be liable for under the private law regime, making the immunity unnecessary.

Résumé

La Couronne dispose de pouvoirs étendus et peut parfois causer préjudice à ses sujets par l'utilisation à bon ou mauvais escient de ces pouvoirs. Puisqu'il n'y existe pas de régime législatif spécifique au Québec visant la compensation de ces préjudices, la Couronne est généralement assujettie au régime de droit commun comme tout autre sujet de droit.

Au Canada, le principe de séparation des pouvoirs impose une limite au pouvoir des cours de justice de réviser les actes de la Couronne. La déférence dont ils doivent faire preuve dans l'exercice de ce pouvoir de révision empêche les tribunaux d'empiéter sur la volonté législative d'octroyer des pouvoirs souverains à la Couronne. Cette déférence est relativement bien comprise en droit public et est utile pour déterminer quand l'utilisation de ces pouvoirs souverains est effectivement légale et à l'intérieur du mandat de la Couronne.

Le même principe de déférence est également applicable aux recours de droit civil en compensation contre la Couronne. Au Québec, la déférence prend la forme d'une immunité empêchant l'application des règles usuelles de responsabilité civile à l'encontre des décisions de politique générale (comme par exemple les pouvoirs réglementaires), à moins que ces décisions ne soient empreintes de mauvaise foi. Ce régime juridique semble toutefois superflu et inutilement complexe puisque la définition de mauvaise foi a été interprétée par la Cour Suprême comme incluant toute action qui constituerait une faute lourde en vertu du régime de droit commun québécois de la responsabilité civile; en pratique toutefois, même le standard de faute simple pourrait suffire. Cela signifie que l'immunité protège la Couronne uniquement contre les dommages causés par le type d'actions qui n'engageraient pas sa responsabilité en vertu du régime de droit commun, ce qui rend l'immunité superflue.

To the friends and family who were part of this journey,

With thanks to my mentors and advisors.

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Of course, it is not a tort for the government to govern...

- Dalehite v. United States,

346 U.S. 15 at 57 (1953) (Justice Jackson, dissenting)

Introduction

When is the Crown liable for injuries it causes? Are the rules applicable to private parties appropriate and relevant to the Crown? Should a private interest seeking compensation be favoured over the public interest of letting the Crown execute its mandate without interference?

This question of the application of private law to a public entity is a frequent and timeworn one in Canadian and Québec jurisprudence. In some cases, it is agreed that the Crown should be treated as an ordinary citizen. After all, the rule of law dictates that the Crown is not above

the law of the land, and therefore the Crown should be liable towards private parties the same way other private parties are. In other cases, however, it is agreed that the Crown is not an equal among peers, but rather their sovereign; a special creature invested with extraordinary powers to fulfill an equally extraordinary mission.

Canadian legislatures have so far opted not to adopt special, public law liability regimes to reconcile this clash between private and public law, preferring to rely on the *jus commune* (the civil law in Québec and common law elsewhere), which itself builds on the rule of law and the idea of equality. This *jus commune* regime evolved from a situation where the Crown had a much more limited role in everyday life, and, therefore, opportunities for the Crown to cause injuries were fewer. In the late 19th century, for instance, the Crown was not the purveyor of services it is known as today, as the prevailing attitude regarding state intervention was more libertarian¹.

Nowadays, governments have more power than ever, and their impact on the everyday life of citizens they govern is greater and more far-reaching than Justice Wendell Holmes could have imagined - even when they stay well within the limits of these powers. Modern governments have tremendous reach. It is well known within the legal discipline that “the government's activities have ramifications throughout all aspects of life in society.”²

The defence, security, health, education, social care, energy, transport, and income support services on which we rely for the purpose of sustaining social ordering are all provided through

¹ Oliver Wendell Holmes, *The Common Law* (Boston: Little Brown, 1881) at 96.

² *143471 Canada Inc v Quebec (Attorney General); Tabah v Quebec (Attorney General)*, [1994] 2 SCR 339 at 355.

administrative arrangements. The government's reach extends further still: the quality standards of the air we breathe, the water we drink, the food we eat, the goods we consume, the professional services we use are all regulated by administrative agencies³.

This evolutionary process entailed various trials and errors as judges attempted to deliver justice in a structured way⁴. The contemporary result of the evolution of the common law of Crown liability is a complex framework that offers little guidance to judges tasked with its application, and little previsibility to potential plaintiffs seeking compensation from the courts. Indeed, cases of liability of the Crown in Canada have a reputation for being unpredictable. Cases become longer and more numerous⁵ as neither party is confident to settle nor is capable of defining the basic issues. As Professor Sawyer put it many years ago: “[t]he uncertainty is unfortunate, because this is an area of law where certainty and predictability are more important than flexibility.”⁶ This results in frustrating delays and costs both to parties and the Crown, including the added weight to the judiciary. Professor Macdonald described this confusion best:

Today, almost all commentators are agreed that the legal regime governing the liability of public authorities in delict and tort is a model of confusion, if not incoherence. In part this confusion results from the diversity of its sources. These include (i) general principles of delictual or tort liability, (ii) the common law of Crown prerogative and Crown immunity, (iii) the panoply of rules defining the concept of jurisdiction, and (iv) inadequately explored assumptions about the appropriate means for distributing social benefits and burdens in a democracy - all married by a patchwork of legislative provisions exposing the Crown and its agencies to civil liability in specific, but random, circumstances⁷.

³ Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press) at 447.

⁴ For a review of different approaches attempted by courts, see Roderick A Macdonald, “Jurisdiction, Illegality and Fault: An Unholy Trinity” (1985) 16 RGD 69–100.

⁵ In her introductory remarks at the 2013 Conférence des Juristes de l’État, Québec Chief Justice Nicole Duval-Hesler remarked that over half the cases pending in the Court of Appeal involved the state in one manner or another.

⁶ Geoffrey Sawyer, “Shield of the Crown” (1957) 1 Melb U L Rev 137 at 140.

⁷ Macdonald, *supra* note 4 at 72.

Such complexity results in confusion among jurists tasked with carrying out the legal regime of liability of the Crown, and this confusion translates in an unpredictability of outcomes. As the Supreme Court pointed out in its famous *Dunsmuir* case, unpredictability can lead to undue costs and delay, as well as loss of confidence in the litigation system. This explains in part why the Court then decided to re-examine its highly complex pragmatic and functional analysis:

[133] People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied [...]. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. [...] Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features⁸.

As the number of Crown interventions and actions increases⁹, the problems caused by the unpredictability of our regime of extracontractual liability of the Crown will correlatively intensify. With that intensification, the amount of "unproductive lawyer talk" that prompted the Supreme Court to reformat judicial review could justify that we revisit of our rules pertaining to the liability of the Crown.

The Crown has a great impact on the life of its citizens. Its actions will sometimes cause injury to private parties. The courts are ultimately responsible for deciding whether these private parties can seek compensation for such injury. In so doing, courts have often decided to adapt the ordinary laws of the land and apply those to Crown actions when determining liability. The

⁸ *Dunsmuir v New Brunswick*, [2008] 1 SCR 190.

⁹ Nicole Duval-Hesler, *La déontologie et les juristes de l'État* (XXe Conférence des juristes de l'État, 2013) at 16–17.

challenge therefore lies in carefully adapting the ordinary laws of the land to account for the extraordinary nature of the Crown's powers and of its mission.

One current answer to this challenge is the incorporation of special devices called immunities into the conceptual framework for determining Crown liability. As their name implies, these devices are meant to carve exceptions to the ordinary law of the land in certain circumstances to account for the Crown's extraordinary powers and mission of public interest. In other words, immunities are meant to substract the Crown from liability where it would otherwise have been held liable (in Québec, this would be because it committed a civil law fault)¹⁰: “'Immunity' suggests a special rule that protects one from liability that would have been incurred but for the rule [...]”.¹¹

More specifically, whereas the ordinary law of the land in Québec states that everyone ought to compensate injuries caused by their own fault,¹² the Crown is immune from the consequences of the injury it causes when it creates policy, unless this policy had been created in bad faith. This solution has been under fire since its inception, notably because it represents a vestigial privilege of the Crown dating back from the days of complete immunity, and exempting it from the civil consequences of its actions. Such privileges, some argue, are now outdated: “Most of the Crown's remaining privileges and immunities are vestiges of outdated

¹⁰ Kevin Woodall, “Private Law Liability of Public Auhorities for Negligent Inspection and Regulation” (1992) 37 McGill L J 83–143 at 95.

¹¹ *Ibid.*

¹² Art. 1457 C.C.Q.

notions of kingship or sovereignty and could be eliminated without injury to the task of government.”¹³

This is doubly true in Québec, where the private law principles originating in common law that shape this area of the law are not easily understood or applied by either civil law trained judges or counsel:

There is no need to dwell on the increasing complexity of this area of the law over the past few years, which has resulted, inter alia, from the introduction of the planning/execution distinction. This distinction is especially difficult to apply in Quebec, as it is related to the tort of negligence, a concept that has no equivalent in Quebec private law. To understand the scope of immunity for “policy” decisions in Quebec, a Quebec jurist must inquire whether compensation for the harm caused in a given case could have been awarded in common law jurisdictions in an action based on negligence. The problems with such an inquiry are immediately apparent¹⁴.

Moreover, confusion between rules originating in public law and those with roots in private law is particularly crucial when it comes to the applicability of those rules in Québec. In principle, the only common law rules applicable in Québec are those of public law origin.¹⁵ The process of importing private common law rules into Québec jurisprudence is difficult and delicate, and can create redundancies that only serve to complexify matters further.¹⁶ Worse yet, in cases of liability of the Crown, fundamental notions and premises in the traditional regimes of civil liability in Québec and in the rest of Canada each influence the outcome of Crown liability cases, and the Supreme Court then has to face the difficult task of trying to

¹³ Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 10.

¹⁴ Pierre-André Côté, “The ‘French Model’ and the Reform of the Law of Government Tort Liability in Canada” 6 *National Journal of Constitutional Law* 57 at 57.

¹⁵ Louis-Philippe Pigeon, “Rédaction et interprétation des lois” in *Collection Études juridiques* (Québec: Éditeur Officiel, 1978) at 50.

¹⁶ For example, see *Prud’homme c Prud’homme*, [2002] 4 SCR 663.

reconcile these differences in each of the two Canadian legal systems. The discussion in this thesis will focus on the state of law in Québec, though it will rely on an analysis of rules applicable in common law jurisdictions to draw out the origin and the design philosophy behind the immunities.

More to the point, the immunities that protect the Crown from civil liability have proven difficult to apply across Canada, and especially difficult to integrate in Québec. Harmonisation between the two Canadian legal systems poses a particular hurdle, because decisions at the Supreme Court in matters of civil liability of the Crown in either jurisdiction often involve principles of public law that will then apply as a precedent in both. These public law principles later have to be adapted in a different case, and that adaptation also becomes part of Canadian public law, creating a feedback system that can further confusion in both systems.

This thesis will demonstrate a possible solution to lessen this confusion in cases of civil liability of the Crown in Québec and to reconcile the divide between public law and private law in these cases. This solution is to simply accept that immunities are already unnecessary.

The main reason why immunities are unnecessary is that, as this thesis will attempt to show, the standard of simple fault can express the same standard of evidence as the standard of bad faith which is sometimes required in cases of Crown liability. In other words, the immunity as it currently exists only protects the Crown against actions that would not trigger its liability if ordinary rules of extracontractual civil liability were applied. This thesis will demonstrate that the current impact of the immunity in Québec is nil: if in a given case the Crown is at fault,

then no immunity will save it, whereas if it is not at fault, then the immunity does apply but does not matter. The challenge lies in the formulation of a conceptual framework for cases of liability of the Crown that accounts for special privileges of the Crown but does not rely on the immunity.

This thesis submits that the immunity is an expression of the public law concept of deference in a civil law context. However, courts could show the same level of deference through the ordinary process of adjusting the standard of fault to account for all relevant circumstances. This method of showing deference would simplify cases of liability for the Crown and better respect the cohesion of the Québec legal system. This way, the complex regime of the immunity could be completely set aside without consequence on the fundamental rules of civil liability of the Crown, as long as the standard of fault applied by judges to the Crown is adapted to the Crown's circumstances. Under this suggested conceptual framework, the crux of the problem would become whether the Crown is at fault (or met the applicable standard of care) in the circumstances, rather than whether the Crown was immune from the suit.

For this to work, the courts would have to identify the particularised essential attributes of the norm of diligence imposed to the Crown, as opposed to a private party.¹⁷ The suggested methodology to identify these essential attributes is to study deference through the eye of administrative law and with the help of its accumulated wisdom. In administrative law, no Crown action is ever immune from judicial scrutiny – this could lead to acts of “unfettered

¹⁷ Jean-Denis Archambault, *La responsabilité extracontractuelle de l'État: le politique et l'opérationnel* (Cowansville: Éditions Y. Blais, 1996) at 97.

discretion,”¹⁸ which does not exist in the Canadian legal system. The same should go for Crown actions that cause injury – the Crown should not be immune, but its behaviour should be examined fairly with regards to its extraordinary powers and mission:

There are no non-justiciable “political questions” in Canadian administrative law. All governmental powers can be subjected to judicial scrutiny. It is only in the area of state liability, where the policy/operational distinction holds, that areas of official action are off-limits to judicial oversight. The continued existence of the distinction is an oddity given the retreating boundaries of non-justiciability¹⁹.

In order to demonstrate the ideas above, it will not be necessary to analyse every single case of liability of the Crown since the beginning of records in England, as such an endeavour would require a few decades of research. Instead, case law (mainly from the Supreme Court of Canada) will be used as factual or empirical examples to demonstrate different types of reasoning and their respective consequences. Some cases will still sometimes be cited as authoritative when their *ratio decidendi* is not a point of contention.

This demonstration involves a conventional analysis of existing jurisprudence on various facets of liability of the Crown²⁰. The objective of this analysis is twofold: to identify the rule of law upon which the judgement revolves (the *ratio decidendi*), and to pry beyond the expressed reasoning and identify the more philosophical answer to the following question: what made the court think the Crown should be liable in this case? The result of each analysis

¹⁸ *Roncarelli v Duplessis*, [1959] SCR 121 at 141.

¹⁹ “The Policy/Operational distinction - a View from Administrative Law” Paul Daly, University of Cambridge - SSRN Working Paper 2515742 (28 October 2014) at 16.

²⁰ The terminology “conventional research” is used here as defined by Consultative Group on Research and Education in Law, *Law and Learning* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983). [the *Arthurs report*]: “research designed to collect and organize legal data, to expound legal rules, and to explicate or offer exegesis upon authoritative legal sources”.

will then contribute to the larger objective of this thesis, which is to develop a more comprehensive legal theory of the application of rules of liability of the Crown in Québec.²¹ In order to prove that the immunity is unnecessary, it will be useful to deconstruct certain factual cases and compare A) the result of the case with the immunity, and B) the (hypothetical) result without the immunity. An absence of difference in outcome would suggest that the immunity is unnecessary.

Certain words or expressions will be used throughout this thesis with some consistency and will therefore be defined here:

- the word “Crown” is used as a general term to represent the Administration, the executive branch of government, the government, and its representatives, except where noted otherwise. This expression was chosen as much for its ubiquity in older doctrine (as well as its persistence in new doctrine) as for the reminder it provides us of the origins of all government actions in English law.
- the expression “liability”, as used in the title of this thesis, is generally used in the sense of “tortious liability” or, in Québec, “extracontractual liability” owed by the Crown to its citizen in virtue of the rules of private law applicable to it. Other uses of the expression will be properly qualified or identified (such as “democratic liability”).
- the “burden of evidence” refers to the quantity and quality of evidence that must be established by a litigant to establish its claim or part of its claim. For instance, the

²¹ The terminology "legal theory" is used here as defined by the *Arthurs report, id.* p. 66: "research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application in particular cases evaluated and controlled; this type [of research] would include scholarly commentary on civil law, usually referred to as doctrine".

burden of evidence to establish that a plaintiff (in a Crown liability case) suffered an injury could include a medical expert report, receipts, and the testimony of the plaintiff themselves. Some burdens of evidence are more difficult to establish than others; this is usually perceived as an important difference between “bad faith” and “negligence”.

This being said, it is beyond the scope of this thesis to answer every question and untie every knot related to civil liability of the Crown in Canada or even in Québec. It is meant to address only matters of civil, extracontractual liability of the Crown at the provincial (including municipal) level in Québec, although the common law regime will be drawn upon as a source of law or a point of comparison. The thesis does not address questions of penal or criminal liability. Moreover, the thesis is not going to dwell on the matter of Charter remedies, which constitute an important source of Crown liability but which follow different rules and underlie different social policies than the more general regime of extracontractual liability. For the same reasons, it will not specifically discuss no-fault regimes that may be applicable to the Crown, other than in an anecdotal context or to illustrate a point. Likewise, given the existence of special regimes dedicated to these questions, it makes no specific treatment of expropriation - even though some cases may flirt with the border between extracontractual liability and expropriation²² - because the legal regimes framing expropriation are complex and involve different considerations than the more general questions of civil liability. Neither does this thesis specifically address the matter of the liability of the Crown as an employer (or a “principal²³”) for the actions of its employees or of its more-or-less decentralised bodies and

²² Such as *Manitoba Fisheries Ltd v The Queen*, [1978] 1 SCR 101.

²³ Article 1463 C.C.Q.

agents. Except for the identified deviations, for simplicity's sake, this thesis treats the Crown as a unified body and deals with the general questions applicable to Crown liability. Finally, it does not discuss the execution of judgements condemning the Crown in civil liability. The way the law stands – that the Crown is immune from forced execution, but is generally obliged by statutes to satisfy judgements rendered against them²⁴ - does not seem to be the source of legal problems or practical difficulty.

This thesis focuses on legal doctrine and strives for a better system of Crown liability. In this context, “better” means a system of Crown liability that offers greater predictability and clearer guidelines for courts to deliver good decisions. It is not about the appropriateness or wisdom of having big or powerful governments, nor is it about the appropriateness or wisdom of any specific public decision or body. This thesis is about the consequences of the use of these powers. It is also about the legitimate systems we have in place to judge these actions and, where appropriate, make governments liable for them. This thesis does not advocate that the Crown should be held liable more or less often, or for a broader or narrower category of actions. While it has been argued numerous times that Crown immunities should not be extended to the various public bodies created by the modern state²⁵, this is not what this thesis is about either. It is not about the political or ideological argument surrounding liability, but rather about the fair and consistent execution of a system of liability to the Crown.

²⁴ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 76 and Chapter 3 generally.

²⁵ Robert Flannigan, “Crown Agent Status” (1988) 67 Can Bar R 230–257 at 231, note 7.

The thesis is divided in two parts. Part 1 examines deference in general, its purpose, and how this public law interface between the courts and the Crown has been shaped and is being used by courts in cases other than extracontractual liability. This first part covers the Crown's right to govern, the rules applicable to it, and the role of the judiciary in establishing limits and consequences to Crown governance.

Having established the role, purpose and methods of deference, Part 2 delves into the role of deference in cases of extracontractual liability of the Crown. After a historical overview of the different methods used by courts to incorporate deference in cases of extracontractual Crown liability, Part 2 describes the inner workings of immunities, through which the courts are currently accounting for deference in these cases. It then describes how the Québec standard of fault could be used instead of immunities to the same purpose, and therefore why immunities could be considered unnecessary. This last part will also demonstrate that previous jurisprudence would have been greatly simplified if the immunity were taken away from the framework of Crown liability, and will conclude with an examination of alternative forms of public liability in order to demonstrate that justice of some form is possible even where a Crown decision is considered non-justiciable.

Part 1 The Crown, The Courts, and Deference

Deference is at the heart of this thesis, and this first part establishes its role in the Canadian constitutional order. In a nutshell, judicial deference is a constitutional, public law imperative regulating the interface between the courts and the Crown; it represents the constitutional imperative that the courts may not usurp sovereign powers granted to the Crown.

The Crown is not an ordinary citizen: it has a monopoly of executive powers, and is bound to use those powers to fulfill the mission bestowed upon it by the democratically elected legislature. Because of this monopoly, the Crown is recognized as a special subject of the law (Chapter 1), even though it is nonetheless subject to the law of the land as well as to special rules of public law (Chapter 2). The judicial branch, through the courts, is responsible for the application of those rules. It must, however, be careful not to overstep its own powers and inadvertently exercise executive power themselves; in other words, it must show a certain deference towards Crown action (Chapter 3).

This overview of the Crown, its right to govern and of the role of the courts in the control of Crown action will inform the further study of how rules of extracontractual liability can apply to it in Part 2.

Chapter 1 The Crown as a Special Subject of the Law

What is the Crown, and why should it benefit from different rules of extracontractual liability than other legal subjects? What makes it so special?

Defining the Crown is a difficult endeavour. This part of the thesis provides an overview of definitions proposed in the past in an effort to find common characteristics and identify elements that may explain contemporary phenomena such as sovereignty, justiciability and Crown liability in both public and private law. This thesis will look at the Crown from different angles in an effort to discover some of its boundaries.

Section 1 The Ineffable Nature of the Crown

Both the nature of the Crown and its mission of public interest have a determining impact on how to address its civil liability. As the executive branch of the state, the Crown is tasked with the guardianship and the furtherance of public interest and public policy on behalf of the legislative branch, be it the Québec National Assembly or the Canadian Parliament. These roles necessarily require a certain freedom of action from judicial intervention. This section will identify what is so unique about the Crown that it warrants special treatment when it comes to its civil liability.

The word “Crown” literally refers to the monarch’s crown, which itself symbolises their sovereign powers in a constitutional monarchy. The word is also of standard use in English to refer to the state as embodied by the Sovereign, more specifically its executive branch. French Canadian doctrine often either directly translates the term (“la Couronne”), or uses the French term “l’Administration” (whence “administrative law” takes its name). According to the Canadian *Interpretation Act*, the Crown “means the Sovereign of the United Kingdom,

Canada and Her other Realms and Territories, and Head of the Commonwealth²⁶”, which is virtually identical to its definition in the Québec *Interpretation Act*²⁷.

In the context of this thesis, the Crown refers to the executive branch of the Canadian state, much the same way the word “l’Administration” is used in French legal literature. As stated in the introduction, the word Crown will be used to address both the Canadian Crown and the Québec provincial Crown (unless otherwise indicated expressly or by context), though each refers to a distinct body of government²⁸.

The Crown is no ordinary legal subject: It is tasked with extraordinary²⁹ responsibilities, in the sense that no ordinary citizen is expected to carry them out, and is granted equally extraordinary powers to fulfill those responsibilities. It is because of that extraordinariness that normal rules of civil liability cannot apply to the Crown as it does to ordinary citizens. To properly decide how these rules should be adapted to the Crown and its special status, we need to explore the source and the *raison d’être* of this special status.

The premise of the definition of the Crown is factual: there exists, in Québec and in Canada, a complex system of government by which the people are organised, that determine the

²⁶ RSC 1985, c. I-21, s. 35.

²⁷ CQLR c. I-16, s. 61 (1).

²⁸ *Responsible Government and the Divisibility of the Crown*, Sydney Law School Research Paper No 08/137, by Anne Twomey, papers.ssrn.com, Sydney Law School Research Paper No 08/137 ID 1301166 (Sydney: Sydney Law School, 2008) at 8.

²⁹ The term “extraordinary” is used here to refer to administrative decisions relying on the Crown’s sovereign powers. The term “extraordinary” was chosen as a parallel to “extraordinary remedies” that can be used to undo such powers.

allocation of resources between them, and that administer various duties and services binding them together. This social fact may be easily observed, but is difficult to explain, let alone define, especially when considering the evolutive nature of this network of arrangements.

At one time, this social organisation was based on religion. The King of England ruled by divine right, which is how the business of governing came to be associated with the top of the King's crown. With time this monopoly of sovereignty got fragmented and the master of the state gradually allocated his powers down to an army of servants:

Idealization of the office was the precondition of its institutionalization. This transition is illustrated by comparing Louis XIV's seventeenth-century claim, *L'Etat, c'est moi*, with that of Frederick the Great's assertion in the eighteenth century that he was the 'first servant of the state'.

Institutionalization of the office of the sovereign led, in turn, to its corporatization, accomplished through internal differentiation. The 'sovereign' powers of government—what Bodin had called the 'marks of sovereignty'—no longer inhered directly in the person of the ruler, but came to be exercised variously through the King-in-Parliament, the King-in-Council, the king's ministers, and the king's courts. This principle is clearly evident in the British doctrine that the King-in-Parliament is sovereign, but institutionalization also occurred in so-called 'absolutist' regimes. Sovereignty came to mean the absolute legal authority of the ruling power in its corporate capacity.³⁰

This institutionalisation and further corporatisation of the Crown meant that the physical body of a ruler was no longer necessary for the valid exercise of executive power. Unlike Louis XIV, who was both King and state, powers of sovereignty are now trickled down to a massive body of servants who can each embody the state and exercise its extraordinary powers in the performance of their duties, but then act as private citizens at the end of the workday. In this

³⁰ Loughlin, *supra* note 3 at 185 (citations omitted).

theory, the state itself has no will of its own and must rely on the individual intentions of its agents³¹:

Duguit's realist theory is founded on certain assumptions. The most basic is that, lacking a personality, the state possesses no will: 'there are only individual wills of those governing' and, although we might speak of 'the national spirit, of the personality of the nation and of the state', these are 'the purest metaphors' and 'are not expressions of reality scientifically established by observation'³².

Of course, these servants are not free to act however they please when they are acting on behalf of the Crown; if this were the case, every new public servant would be a licensed despot. It is instead expected of them that they will exercise the public powers and duties bestowed upon them (in their capacity as a public figure) in the spirit for which these powers exist and within the letter of the law giving them that power, whether they were created by statute or simply stem from the common law. They may still act for their own, private, benefit (using their "ordinary" powers as citizens) only when they are not representing the Crown.

When the Crown was merged with an individual, it was difficult to distinguish between the King's personal interest and the state's interest. This confusion made arbitrariness unavoidable. However, such absolute and arbitrary view of the King's powers had to give way after 1689, following the Glorious Revolution. With the transfer of executive powers to a civilian government, it became important to differentiate between the power-holder's personal interest and the state's. A particularly interesting example of this process of differentiation can

³¹ This theory was also adopted by the Supreme Court when it rejected the concept of "administrative bad faith", which would mean bad faith of an institution despite the good faith of its individual decision-makers: see *infra* p. 170.

³² Loughlin, *supra* note 3 at 403, citing Léon Duguit, "The Law and the State" (1917) 31 Harvard Law Review 1–185 at 162.

be found in the *Roncarelli* case³³: Maurice Duplessis, premier of Québec during the mid-20th century, had ordered the Commissaire aux Liqueurs to revoke the liquor license of Frank Roncarelli because the latter had taken the habit of paying the bail of Jehovah's Witnesses who had been arrested for distributing tracts, which was then prohibited by Montreal by-laws. Interestingly, Duplessis honestly believed he was acting for the public interest of Québec, and that by quelching Jehovah's Witnesses he was protecting the morals of his catholic province³⁴. The Supreme Court had to decide, among other things, whether this "honest belief" that he was carrying out his public duties meant that he was indeed acting in the public interest. The majority of judges ended up deciding this was not the case, and that public interest must be inferred (by the judiciary) from the statutes granting public officials their extraordinary powers:

The issue is as to whether those acts were "done by him in the exercise of his functions." For the reasons already given in dealing with the second of the four points under discussion, I do not think that it was a function either of the Prime Minister or of the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.

Is the position altered by the fact that apparently he thought it was his right and duty to act as he did? I do not think that it is. The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those functions, but must be determined according to law. The respondent apparently assumed that he was justified in using any means he thought fit to deal with the situation which confronted him. In my view, when he deliberately elected to use means which were entirely outside his powers and were unlawful, he did not act in the exercise of his functions as a public official.³⁵

³³ A more thorough analysis of this seminal case can be found *infra* at p. 132.

³⁴ The following quote from Duplessis is insightful as to his intentions: "The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice" *Roncarelli v. Duplessis*, *supra* note 18 at 137.

³⁵ *Ibid* at 158.

By granting the Supreme Court the ultimate say in what constituted public interest, the *Roncarelli* case marked a decisive turning point in the expanding role of the judiciary in Canada and in Québec (and in the *common law*). Traditionnal public law doctrine held that the executive was ultimately in charge of protecting “the good of Society”:

Locke’s position on the executive is more nuanced than the standard liberal account suggests. While adopting the principle of legislative supremacy, Locke also accepts the need for the executive to maintain extensive prerogative powers. Recognizing there are many things that the law cannot provide for, Locke contends that ‘the good of Society requires, that several things should be left to the discretion of him, that has the Executive Power’.³⁶

In the citation above, Loughlin uses the word “prerogative” to refer to the more-or-less unbounded well of executive power into which the Crown can tap when it needs to protect its citizens or otherwise take an action that is not explicitly authorised by Parliament³⁷.

Of course, the exact nature of the good of the people can be a point of contention. One theory used to acknowledge that Parliament and its democratically-elected members hold formal sovereignty (and legitimacy) over such matters; however, if and when the slow and unsteady parliamentary process would be a hindrance to the good of the people, it becomes the Crown’s duty to intervene. Locke thus drew a difference between what he called “ordinary” sovereign authority, which encompasses the sovereign powers exercised by the Crown granted to it by legislative statutes, and “extraordinary” sovereign authority³⁸, or “prerogative”, for those

³⁶ Loughlin, *supra* note 3 at 383; citing John Locke, *Locke: Two Treatises of Government [1680]*, Peter Laslett, ed., Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1988), §159.

³⁷ Loughlin, *supra* note 3 at 384; citing Locke, *supra* note 36, §158, §160.

³⁸ Note that Locke’s definitions of “ordinary” and “extraordinary” Crown actions differ from those used in the rest of this thesis.

sovereign powers the Crown must exercise but for which it does not have explicit statutory permission³⁹.

Although Locke was right that it was impossible for Parliament to address all future problems with broad legislation, the need for a broad underlying executive power was considerably lessened with the statutory granting of “discretionary powers”: by this legislative technique, a statute could grant the Crown both an explicit power and sufficient leeway to determine when and how this power should be used. With this technique, the Crown could now react to unforeseen situations while staying within the statutory powers granted to it by the legislative.

With time, Parliament adopted an increasing number of statutes that granted more and more responsibilities and powers to the Crown and thus changed its role: the Crown is no longer responsible only for security and cohesion of the social order, but also for supplying a host of administrative, civil and social services⁴⁰:

The modern state stands as a representation of the people and, in light of its democratic foundation, is placed in the service of the people. Since the state now concerns itself with whatever appears to hold humans together as a collective association, its governing institutions have become highly intricate. This modern notion of the state has grown alongside the emergence of civil society, conceived as a sphere of individual autonomy and energy. Although the relationship between society and government is a factor which shapes the way the state is conceived, the rise of civil society does not lead to the decline of government. Since the workings of markets and individual action possess the power to destroy as well as create, such operations stand in need of regulation by government. For government to realize these responsibilities, an extensive administrative apparatus is needed: the modern state becomes an administrative state.⁴¹

³⁹ Loughlin, *supra* note 3 at 386; Locke, *supra* note 36, §210; see also Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (University of Chicago Press, 2005) at 5, Google-Books-ID: MXP7149s9sC.

⁴⁰ Loughlin, *supra* note 3 at 435.

⁴¹ Martin Loughlin, “The State, the Crown and the Law” in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown* (Oxford University Press, 1999) 33 at 435.

The new role of the Crown and its new responsibilities meant it needed new powers to execute its mission. First of all, to this end, the Crown can use non-sovereign (“ordinary”) powers such as those possessed by its subjects and thus act like a “normal” person (for example, when it contracts or hires help). The Crown can also use its sovereign (or “extraordinary”) powers, such as those granted to it by statutes (for example, the granting of permits and licenses)⁴². This distinction is important in that it determines whether administrative law applies to the Crown’s action – procedural fairness, for instance, only applies to extraordinary, administrative decisions⁴³, while private law applies to ordinary actions⁴⁴.

Extraordinary powers can further be divided in legal (or administrative) powers and absolute (or policy) powers. Legal powers exist to attribute resources among private citizens, settle disputes, and generally determine what each citizen is entitled to. Absolute powers do not exist for the benefit of private citizens; they are the ability of the Crown to act for the public good – *salus populi* – even sometimes to the detriment of individuals⁴⁵.

This distinction has traditionally had an impact on the right of private citizens to question the Crown’s decision. As King James expressed: “As for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer, nor is lawful to be disputed⁴⁶”. Where the good of the people is concerned, the Crown’s judgement should not and could not be impeached

⁴² Woodall, *supra* note 10 at 110.

⁴³ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, par. 20.

⁴⁴ See *MJB Enterprises Ltd v Defence Construction (1951)*, [1999] 1 SCR 619.

⁴⁵ Loughlin, *supra* note 3 at 378.

⁴⁶ James VI and I, “Speech to Star Chamber of 20 June 1616”, Johann P Somerville, ed, *Political Writings* (Cambridge: Cambridge University Press, 1994) at 204, 214.

(that is, not before the *Roncarelli* case). This makes sense: where the Crown's absolute (policy) power is meant to be used for the public good (as opposed to private interests), private citizens should not be allowed to seek private remedies against its use. In a sense, these private interests lack standing to attack the legitimacy of the use of the Crown's absolute power, since the Crown is the only legitimate source of public authority⁴⁷.

Although Blackstone implied that things had changed, when he came to analyse the prerogative he conceded, in the very terms of his definition, the special nature of these powers. 'By the word prerogative', he stated, 'we usually understand that special pre-eminence which the king hath, over and above all other persons, *and out of the ordinary course of the common law*, in right of his regal dignity'.

To conclude on this section, the Crown's wishes in matters of public interest will sometimes infringe on individual, private wishes. Where the good of the people is concerned, the Crown's wishes should (and do) supersede its individual citizen's wishes.

Section 2 The Legal Status of the Crown

Despite the indispensable importance of knowing exactly what the Crown is as a legal subject, there still exists debate and controversies on this question in doctrine and in jurisprudence.

There is, however, consensus on the general rights and duties that arise out of its nature:

It is accepted that the state, which by its legislature makes statutes, may itself be bound by those statutes; and it is accepted that the state, which by its courts settles disputes, may itself be bound by judicial decrees; and it is accepted that the state may be the subject of proprietary, contractual and tortious rights and duties. In short, it is accepted that the Crown in right of Canada and of each province is a legal person analogous to a corporation⁴⁸.

⁴⁷ Loughlin, *supra* note 3 at 381; citing William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765) at 230–232.

⁴⁸ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 17.

Legal doctrine describes the Crown as both a natural person and as a corporation. Where the flesh-and-blood Queen herself is, of course, a physical person⁴⁹, the Crown (in the sense of “government”) is described as a *corporation sole*, belonging to the sovereign, and whose patrimony includes the public treasury⁵⁰. This means that the Crown represents, as a corporation, the state itself⁵¹.

These theories – Crown-as-a-person and Crown-as-a-corporation – combine to empower the Crown to accomplish both extraordinary actions, by virtue of statutory empowerment or through old-fashioned prerogative, and purely civil actions available to any other person under the Crown’s authority, such as signing contracts⁵².

To add to the confusion, it is said that the Crown is both divisible and indivisible. It is divisible in the sense that different governments (or levels of government) each represent a distinct Crown⁵³; for example, even though Canada and the United Kingdom are under the rule of the same sovereign, the British treasury is not liable for claims against the Canadian government, nor are Canadian finances at risk when a claim is presented against a provincial government⁵⁴. Although each is “the Crown”, they are in practice distinct legal and political entities. To

⁴⁹ See notably *Verreault (JE) & Fils Ltée v Attorney General (Quebec)*, [1977] 1 SCR 41 at 47: “Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of apparent mandate, would not be applicable to her”, said in relation to the delegation of powers to the Governor General and the Lieutenant-Governor.

⁵⁰ Patrice Garant, *Droit administratif*, 6th ed (Cowansville: Yvon Blais, 2010) at 29.

⁵¹ *Ibid* at 30.

⁵² *Verreault (J.E.) & Fils Ltée v. Attorney General (Quebec)*, *supra* note 49.

⁵³ See generally Twomey, *supra* note 28.

⁵⁴ *Province of Ontario v Dominion of Canada*, [1909] 42 SCR 1, a contrario.

clarify the distinction between the Queen as a person and the Crown as the government, the judiciary will frequently use the expression “The Crown in right of⁵⁵...” to mean “the government of...”. This distinction will help distinguish between the Crown of different governments.

The Crown is also indivisible in the sense that legally speaking, the public identity of the central government is collapsed under a single Crown. Beside their own, private selves, the Lieutenant-Governor and her delegates (including each minister) do not each possess a public personality with their separate portion of the public patrimony (known in Québec as the consolidated revenue fund⁵⁶). Instead, they are, together, “the Crown”: a single entity possessing a single patrimony, the public treasury.

The *Constitution Act* of 1867 officially grants executive powers to the Queen⁵⁷, who then delegates them to the Governor General of Canada and to the Lieutenant-General⁵⁸ of the provinces. These individuals personify the Crown and the executive power in their respective territories⁵⁹. They must act on the counsel of the Cabinet or the executive committee, constituted of the elected official (the prime minister), his team (the ministers) and of their

⁵⁵ For instance, in *Her Majesty in right of the Province of Alberta v Canadian Transport Commission*, [1978] 1 SCR 61.

⁵⁶ *Financial Administration Act*, CQLR c A-6.001, s. 5(1): “The Consolidated Revenue Fund consists of all money received or collected from any source over which Parliament has the power of appropriation.”

⁵⁷ Section 9: “The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.”

⁵⁸ Respectively sections 12 and 58.

⁵⁹ René Dussault & Louis Borgeat, *Traité de droit administratif*, 2d ed (Québec: Presses de l’Université Laval, 1984) at 64.

own committees (such as the Treasury Board), who effectively hold the executive power. Together, they are the Crown, and benefit from all its powers and privileges.

In Canada and Québec, ministries are customarily created by law, despite the fact that prerogative would suffice in the English tradition⁶⁰. The minister is the sole source of policy within the ministry; his signature binds the Crown and the actions of his public servants implicitly or explicitly flow from him⁶¹. Therefore, the minister is liable for most actions of his ministry.

In addition to this central government, various branches of decentralised governments can be created by statute or otherwise. These can include specialised entities (such as the Energy Board), and local government including municipalities and school boards. These decentralised forms of government usually are granted their own patrimony and are therefore not collapsed under the Crown.

Since the Crown is indivisible, however, and the minister is part of the Crown, who is the defendant if a specific minister is sued in a civil liability suit? Various statutes address this confusion in part by expressly designating a defendant: proceedings involving rights and duties of the Crown must be directed against the Attorney General of Canada⁶² or of Québec⁶³;

⁶⁰ Pierre Issalys & Denis Lemieux, *L'action gouvernementale*, 3d ed (Cowansville: Yvon Blais, 2009) at 351.

⁶¹ Dussault & Borgeat, *supra* note 59 at 109–110.

⁶² *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s. 23

⁶³ *Code of Civil Procedure*, CQLR c. C-25.01, art. 96.

however, proceedings against separate public bodies acting in the public interest must be taken against that decentralised body.

Finally, it is generally useful to think of the Crown itself as a disembodied entity. Although the Crown and its powers are sometimes embodied in the Sovereign, the Crown and the executive powers are more aptly thought of as a general, more-or-less unified will that can act through various officers and servants. In practice, however, the Crown, as the executive branch of the state, is constituted of individuals – ministers, public servants, police officers, etc. – who take every decision and accomplish every action in its stead. In other words, if the Crown's liability is to be incurred, it has to be incurred vicariously through the act of one of its spokespersons, vessels, bodies or servant.

In its various incarnations, the Crown remains a subject of the law even as it is tasked with enforcing it. Since it has to speak and act through these vessels, it is sometimes complex to distinguish whether it was truly the Crown expressing itself or if its human vessel wrongfully appropriated the Crown's apparent legitimacy to further individual goals, rather than the Crown's sole mission of public interest.

Chapter 2 The Rule of Law

Despite the special nature of the Crown identified in the previous chapter, the Crown is still bound by the law. In fact, in the Canadian legal system, the Crown is nearly powerless without statutes, and owes much of its powers to specific legislative initiatives granting it specific powers in order to fulfill specific missions. Where no particular limit is imposed on the Crown

as to the exercise of these powers, courts have to apply various fundamental principles of public and private law in order to determine the boundaries of Crown action.

Section 1 Public Law and the Extraordinary Powers of the Crown

The Crown's powers can be divided in "ordinary" and "extraordinary" powers, where the former are those that can be exercised by any legal person whereas the latter are those public powers that are flowing from the Crown's sovereignty. These kinds of sovereignty-enabled powers have received many different names within different contexts; here they are dubbed "extraordinary" since they go beyond the "ordinary" rights possessed by private citizens.

Extraordinary powers are sometimes referred to simply as "administrative powers". For example, the Supreme Court considered that a duty of procedural fairness only applies "every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual⁶⁴". Here the Supreme Court was making a distinction between "administrative powers" on one hand and ordinary powers on the other, such as the power to conclude contracts.

⁶⁴ *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653; See also *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 43, par. 20.

Later in the *Cyr* case⁶⁵, the Supreme Court referred to a similar notion of “police powers” to decide whether a Crown action could be targeted by rules of procedural equity, which only apply to “decisions concerning a permit or licence or other authorization of like nature⁶⁶”.

This terminology is well-known to political science, where “police powers” are studied and categorised:

The main body of Freund’s work is devoted to a detailed and comprehensive account of the categories of the police power differentiated according to social and economic interests. Powers to protect social interests fall under the categories of peace and security from crime (including riot, vagrancy, and immigration), public safety and health (including dangerous substances, activities and working conditions, and the regulation of births, deaths, and marriages), public order and comfort (controls over commerce, highways, building, and development), public morals (such as restrictions on gambling, alcohol, obscenity, prostitution, and cruelty to animals), and dependency (including regulations concerning insanity, education, and poverty). Powers to protect economic interests fall under the categories of protection against fraud (weights and measures, food safety, and trading standards), protection of debtors (usury and bankruptcy arrangements), labour protection (employment conditions, wage regulation, and union recognition), and control of corporations (incorporation procedures, anti-trust, price-fixing, and monopolistic practices).⁶⁷

The following subsections will further define these extraordinary powers by looking at two possible sources of such powers: tethered (§1) and untethered (§2).

§ 1 Tethered powers: Discretion, Arbitrariness, and the Role of the Judiciary

The bread and butter of administrative actions, discretionary powers are the most readily available example of the Crown acting as the Crown. Administrative discretion is a concept familiar to Canadian administrative law. As summarized by Justice L’Heureux-Dubé in *Baker*:

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

⁶⁵ *Société de l’assurance automobile du Québec v Cyr*, [2008] 1 SCR 338.

⁶⁶ This phrasing comes from section 5 of the *Act Respecting Administrative Justice*, CQLR c. J-3, which codifies common law rules enacted by the Supreme Court in previous judgements, such as *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 43.

⁶⁷ Loughlin, *supra* note 41 at 426.

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.⁶⁸

Discretionary powers are thus opposed to “non-discretionary” powers, called “pouvoirs liés” in French doctrine⁶⁹. These powers account for situations where the public body or official must take action and has no range of possibilities; there is a single acceptable outcome or available action. The Québec *Interpretation Act*⁷⁰ broadly identifies them thusly:

51. Whenever it is provided that a thing “shall” be done or “must” be done, the obligation is imperative; but if it is provided that a thing “may” be done, its accomplishment is permissive.

The difference between discretionary and non-discretionary powers is an important one as it directly influences the attitude of the court towards its exercise (that is, how deferential the court should be⁷¹).

Discretionary powers must also be distinguished from “arbitrary powers”. While a non-discretionary power denotes the absence of discretion, arbitrariness refers to the absence of limits imposed on discretion. Arbitrary powers are, therefore, foreign to Canadian public law since these kinds of powers would deny the rule of law⁷²:

A grant of statutory discretion may appear on its face to be virtually unfettered, but, in a legal system governed by the rule of law, all discretionary authority has limits. On this view, however broadly a grant of discretionary authority may be worded, there ought to be no conception of the exercise of public authority entirely outside the reach of the rule of law.⁷³

⁶⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 43.

⁶⁹ See *Sinclair v Quebec (Attorney General)*, [1992] 1 SCR 579 at 588.

⁷⁰ CQLR c. I-16

⁷¹ *Infra* p. 59.

⁷² *Reference re Secession of Quebec*, [1998] 2 SCR 217, par. 70.

⁷³ Lorne Sossin, “The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law” (2009) 55:3 McGill Law Journal 661 at 669.

When the Crown makes a policy decision, for example, to assume a service towards a group or subgroup of citizens, it does not assume an individual, personal duty towards each member of the group, but rather creates a sort of right *in rem* to the benefit of users of the service. It ensues that those users benefit from the right that the exercise of discretion associated with this service will stay within its boundaries.

These protections against arbitrary powers mean that all exercise of executive power is inherently limited, and defining those limits to discretion is a difficult but necessary task that befalls the judiciary. The importance of the limits placed on discretionary power was famously summed up by Dworkin: “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction⁷⁴”. But where do those limits lie – where does the hole end and the donut start?

This donut hole encapsulating administrative power is usually, and more seriously, referred to as the Crown’s competence. The statutes creating a discretionary power define its main limits; in that way, the legislative branch can set limits to the Crown’s discretion at the outset. However, it is then the judicial branch which must interpret these statutes and enact those limits: “Discretion, as we have said, is not self-defining; it does not arise parthenogenetically from ‘broad phrases’. Its contour is determined by the courts, which must define its scope and its limit⁷⁵.” This is not to say that judges create zones of discretion, but rather that they define

⁷⁴ Ronald Dworkin, *Taking rights seriously* (Harvard University Press, 1978) at 31.

⁷⁵ Louis L Jaffe, “Judicial Review: Question of Law” (1955) 69:2 Harvard Law Review 239–276 at 261.

them⁷⁶. The zones themselves are created either by the statute creating the power, but it is up to judges to put in place the elements that give life to the rule of law:

My claim is that in a constitutional state, one that is committed to government under the rule of law, judges have to put in place three elements or constitutional fundamentals. First, they have to be committed to the view that the rule of law has content - law is not a mere instrument of the powerful. Rather it is constituted by values that make government under the rule of law something worth having. Second, judges are entitled to review both legislative and governmental decisions in order to see whether these comply with the values. Third, the onus is on both the legislature and the executive to justify their decisions by reference to these values.⁷⁷

How do courts define those limits? Discretion can mean different things in different contexts: it can be influenced by the hierarchical role of the decision maker, the number of options available to him, the level of expertise required to make the decision⁷⁸, or by the leeway created by the wording of the statute creating the power.

The first limit to discretionary powers is the Constitution. Since a statute from the legislative branch cannot grant the executive branch more powers than the legislative branch itself has, no discretionary power may exist, or be exercised, in contravention of constitutional principles. This includes Charter principles⁷⁹ as well as other constitutional principles⁸⁰.

⁷⁶ Sossin, *supra* note 73 at 663.

⁷⁷ David Dyzenhaus, “The Deep Structure of *Roncarelli V. Duplessis*” (2004) 53 *University of New Brunswick Law Journal*, 111 at 134.

⁷⁸ Woodall, *supra* note 10 at 91.

⁷⁹ *Doré v Barreau du Québec*, [2012] 1 SCR 395, par. 42: “The same is true, it seems to me, in the administrative law context, where decision makers are called upon to exercise their statutory discretion in accordance with Charter protections”.

⁸⁰ For instance in *Air Canada v BC (AG)*, [1986] 2 SCR 539 at 545: “All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives”.

The second limit to the scope of discretion, already mentioned above, is the language used by the legislature itself when it creates the power. The exact language is used both to determine the limits of the competence granted by this power and the purpose of the power. A municipality, for example, may only exercise powers that are granted to it by statute and may only exercise those powers for “a municipal purpose⁸¹”, which is to say, a purpose that is compatible with the goal and object of its framing statute.

A third limit is the motive with which the extraordinary power is used: all administrative powers are also framed by good faith. The motivation behind the exercise of those powers must comply with the legislative (or policy) objectives justifying those powers:

“Discretion” necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any departure from its lines or objects is just as objectionable as fraud or corruption⁸².

Moreover, the common law requirement that administrative action be carried out in good faith has been codified⁸³ in Québec’s *Administrative Justice Act*⁸⁴:

4. The Administration shall take appropriate measures to ensure
(1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with the norms and standards of ethics and discipline governing its agents and with the requirements of good faith;
[...]

This is especially important considering that discretionary powers are, by nature, extraordinary and emanating from public law. If the Crown is acting as the Crown, it can only act in the

⁸¹ *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 275, 277.

⁸² *Roncarelli v. Duplessis*, *supra* note 18 at 140.

⁸³ Denis Lemieux, “Le rôle du Code civil du Québec en droit administratif” (2006) Actes de la XVIIe conférence des juristes de l’État 359–383 at 374.

⁸⁴ CQLR, c. J-3.

Crown's interest – in other words, it can only act in the furtherance of its mission of public interest. As such, specific administrative authorities (such as ministers or public servants) who wield discretionary powers may only do so in their official capacity; the discretionary power is not considered to be granted to the person or to become part of that person's patrimony, but rather it is exercised by a person on behalf of the Crown. In exercising this power, such person must refrain from using the extraordinary means granted to it for personal reasons and must instead wield the power in the furtherance of the mission of public interest that belies the existence of the power.

In this way, discretion is not only limited by competence but also by intent. The decision maker must take *relevant* facts under consideration, and not take into consideration irrelevant facts⁸⁵. He may not contort meaning or adjust his perception of reality to private or public interests.

A discretionary power exercised lawfully (i.e. exercised within its limits) should be shielded from court intervention. The legislative branch having conferred such power to the executive, courts should avoid substituting their opinion to that of the executive, insofar as the executive exercised this power lawfully⁸⁶:

53 [...]. In my opinion, these doctrines incorporate two central ideas -- that **discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction.** These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. **However,**

⁸⁵ *Oakwood Development Ltd v St-François Xavier*, [1985] 2 SCR 164 at 175.

⁸⁶ See generally *infra* p. 59 for a more thorough discussion of deference and justiciability.

discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law [...], in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* [...].⁸⁷

That is not to say that a discretionary power exercised within its limits is non-justiciable, since the judicial branch will still always have the opportunity to examine the decision and decide whether it was effectively within the competence of the administrative authority⁸⁸.

The exact scope of the judicial's branch power to review the use of extraordinary powers by the Crown will be examined below⁸⁹.

§ 2 Untethered, or Prerogative powers

Prerogative powers are an irreducible exception to the rule of law – or so they seem. Where parliamentary sovereignty dictates that the Crown has no power other than that conferred upon it by a competent legislature, the Common law insists that some Crown powers exist independently of any official statutory grounding. These untethered powers are known as prerogative powers, and are the leftover princely powers that William the Conqueror used to govern Britain in 1066 and that have not since been appropriated or explicitly eliminated by Parliament⁹⁰.

⁸⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 43, par. 53 (my emphasis).

⁸⁸ *Woodward Estate v Minister of Finance*, [1973] SCR 120 at 127; see also *Crevier v AG (Québec) et al*, [1981] 2 SCR 220.

⁸⁹ *Infra* p. 67.

⁹⁰ *Canada v Operation Dismantle Inc*, [1983] 1 FC 745, par. 71.

Examples include powers related to foreign affairs, war and peace, treaty-making, defence and armed forces, passports, mercy, and various others⁹¹.

Powers of prerogative are a legitimate expression of public authority. Despite the fact that they are not tethered by statute, powers of prerogative are still “extraordinary” in the sense that they are expressions of sovereignty. After all, private persons cannot claim to be able to declare wars or bestow honours.

However, just because these powers are untethered by statute does not mean they are limitless or non-justiciable. Decisions made by virtue of prerogative are generally subject to the same constitutional limitations⁹² as those owing their existence to a valid statute, such as *Charter* limitations⁹³.

The Crown is also limited by administrative law rules in the exercise of prerogative powers. For example, although the prerogative power to grant honours is generally understood to be unreviewable, a decision on such matter made in contravention of procedural fairness may be reviewed⁹⁴.

⁹¹ Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 75.

⁹² *Air Canada v. B.C. (A.G.)*, *supra* note 80.

⁹³ *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, par. 36.

⁹⁴ *Black v Canada (Advisory Council for the Order)*, 2013 FCA 267, where the plaintiff wanted the Advisory Council to grant him an audience instead of simply having the opportunity to provide written arguments. His request was based on the Council’s “Policy and Procedure for Termination of Appointment to the Order of Canada” which, as recognized by the court, created a legitimate expectation that those procedures would be followed (par. 5). However, plaintiff’s case was ultimately dismissed for other reasons.

Indeed, the judicial branch of the state, acting through the courts, can enforce those limits and cancel Crown decisions based on prerogative through judicial review. For instance, in *Operation Dismantle*, the Supreme Court decided that a government decision to allow the United States to test cruise missiles in Canada (at the height of the cold war) could be reviewed by courts insofar as they might affect the rights of Canadian citizens, regardless of it being based on prerogative:

I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.⁹⁵

As for the review of tethered powers, untethered powers of prerogative can only be reviewed for their legality, not their opportunity. In other words, the court is competent to insure that the Crown effectively had the power to make an action or a decision, but is powerless to give its opinion as to whether the decision was the best one or how the judge would have handled the situation⁹⁶.

Section 2 Private Law: the Idea of Equality and Ordinary Powers of the Crown

The idea of equality is an essential part of Canadian constitutional law as inherited from the British tradition⁹⁷. The idea is that the Crown is subject to the Law of the Land. In other words, it posits that the Crown is not so fundamentally different from the individuals it governs that

⁹⁵ *Operation Dismantle v The Queen*, [1985] 1 SCR 441, par. 64; see also Daly, *supra* note 19 at 15.

⁹⁶ See *infra* p. 70.

⁹⁷ Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville: Yvon Blais, 2014), par. IX.14-IX.38.

it should instead be subjected to a completely different branch of law. This approach is typically English and is different from the usual continental European traditions:

It is evident too in A.V. Dicey's assertion, made in *Law of the Constitution*, that in Britain 'the constitution is the result of the ordinary law of the land'. Indeed, in the course of writing that book, Dicey acknowledged privately that he had been struck by 'the essential difference' between continental and English approaches to the constitution, observing that in France 'they seem to me to start from the notion of the state' whereas in England 'we start from the rights of the individual & hardly recognise the state or Crown as having rights of its own'.⁹⁸

The idea of equality would therefore be part of the "fundamental law" of Canada, since it is a foundational principle upon which the unwritten Constitution of England is based and was in consequence included in the Constitution of Canada by the founders, who wished to adopt "a Constitution similar in Principle to that of the United Kingdom"⁹⁹. As such, the idea of equality became an integral part not only of federal Canadian public law, but of every province as well, including Québec.

The idea of equality postulates that the Crown should be subject to the same law as everybody else under its rule. In its most basic formulation, the idea of equality would suggest that the Crown is liable for its actions as laid out by the common law of torts, no more, but no less:

IX.26 – Pour Dicey, la *rule of law* signifie aussi l'égalité de tous devant le droit, ou l'égale soumission de tous au droit. Elle exclut l'idée que certaines personnes puissent être dispensées de l'obéissance au droit qui gouverne l'ensemble des citoyens. Personne n'est au-dessus du droit, pas plus le gouvernement, ses agents, civils ou militaires, que les citoyens ordinaires.

IX.27 – Est-ce à dire que personne ne pourra jamais prétendre qu'une loi ne s'applique pas à lui? Est-ce à dire que le gouvernement ne jouit d'aucune espèce de prerogative? Évidemment non. La *rule of law* exclut plutôt l'existence de toute dispense générale qui placerait le gouvernement au-dessus du droit, de même que toute dispense particulière qui ne trouverait pas son fondement dans le droit.¹⁰⁰

⁹⁸ Marc D Walters, "Is Public Law Ordinary?" (2012) 75:5 *The Modern Law Review* 894–913 at 895, references omitted.

⁹⁹ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, preamble (1st paragraph).

¹⁰⁰ Brun, Tremblay & Brouillet, *supra* note 97.

Reality, however, has a way of resisting such simplifications. The idea of equality is based on the premise that the Crown is no different than its subjects, and that it is itself a subject of the law. From this premise, it rightly asks why the Crown should get special privileges. But this premise is not entirely valid, as was established in the previous section, since the Crown is endowed with extraordinary powers far beyond what private citizens – even the richest or most powerful of them – could ever wield. In consequence, the idea of equality can only truly apply where the Crown might find itself in similar situations to those of its citizens. In other situations, a question arises: does the idea of equality end when the Crown’s extraordinary power begin? Is the Crown only subject to the laws applicable to its citizen when it is itself acting like a citizen?

One postulated answer to these questions is that the Crown is not equal to its citizens when it is governing them. In other words, “a good case can still be made for restricting the liability of all public authorities to acts or omissions that would be tortious if done by a private party¹⁰¹”, meaning that any “[p]eculiarly governmental activity¹⁰²” would effectively be outside the reach of the law of torts, and could only lead to Crown liability if the legislator enacted a specific public law regime for that purpose. For example, the Crown could be liable in negligence where it failed to alert to the danger of a product it is manufacturing and selling, but not for the adoption or enactment of regulations, because private citizens could be held liable for the first one but would never be in a situation to be liable for the second one.

¹⁰¹ Bruce Feldthusen, “Unique Public Duties of Care: Judicial Activism in the Supreme Court of Canada” (2016) 53:4 Alberta Law Review 955–975 at 965.

¹⁰² Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 261.

This is not my understanding of the idea of equality. I believe instead that equality, as a tenet of the rule of law, means that the same general rules of liability should apply to the Crown even to actions that know no equivalent in the private realm. This would mean that the Crown has two obligations when exercising extraordinary powers: the public law imperative to stay within the attribution of its power, and the private law duty not to cause harm through their fault. Neither of these obligations should appear excessive, nor should they risk a “chilling effect” preventing the Crown from effectively pursuing its mission of public interest. This interpretation of the idea of equality is in line with its application by the Supreme Court, who does not acknowledge (especially in recent years) that the Crown is fundamentally immune from all suits based on the exercise of its extraordinary powers. Moreover, this interpretation involves that the Crown must meet a higher level of lawfulness than ordinary citizens, which seems supported by the idea of equality as formulated by Dicey:

[...] all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.¹⁰³

That is not to say that the idea of equality negates the specialness of the Crown, its powers and its missions. On the contrary, it is severely curtailed in the realm of public law.

The idea of equality, for example, was never meant to be translated into the language of administrative law. By definition, only the Crown is subject to administrative law; private citizens do or do not, and their decisions cannot be overturned or reviewed (as to their validity)

¹⁰³ Albert V Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed (New York: Springer, 1985) at 194, Google-Books-ID: lqevCwAAQBAJ.

by a court. Only the Crown can wield executive powers and, with it and the legitimacy of its democratic footings, make decisions that can (and often will) have wide consequences for large populations. This legitimacy, which empowers the Crown, also shackles it: everything the Crown does must stay within its competence as framed by the legislator. In this respect, the Crown is not the equal of the citizen but an altogether different creature, at once its master and its servant.

Moreover, by their nature, these extraordinary powers are meant to be shielded from judicial intervention; by virtue of the principle of separation of powers, the executive branch of government is meant to hold a monopoly on the exercise of powers conferred unto it by the legislative branch, which has a monopoly on the decisions as to which powers the executive will be allowed to yield. The judiciary, in this model, is there to ensure (among other things) that the executive does not abuse its powers or otherwise exercise them in a way inconsistent with the mission entrusted to it by the legislative branch.

The same questions arise when Crown actions are filtered through the sieve of tort law. How should the Crown be judged when it is accomplishing actions no private party is empowered to? For example, when a public servant decides to reject one application for a visa but grants another, or when a municipal council decides to change a zoning by-law, some of the people affected by these decisions are likely to suffer some sort of harm. How, then, can the courts apply the “ordinary”, private common law principles of tort to these “extraordinary” Crown powers?

The answer to this question is a complex one that this thesis will investigate in detail. The basic idea of equality remains true, and the law of tort does apply to the Crown, but with various caveats. One of these caveats is that in common law jurisdictions, the action taken by the Crown needs to be associated with one of the various common law torts: usually negligence, misfeasance in public office, or malicious prosecution¹⁰⁴. The latter two are relatively recent legal constructs that were created exclusively to account for the Crown's extraordinary power – they are effectively judicially-created special liability regimes for public officials – and they both include an element of intentionality so that the Crown will only be held liable if it deliberately caused harm (among other elements); they are sometimes referred to as “public law torts”, although more on the subject will be said in the following chapters. The former, the tort of negligence, is a “private law tort”, applicable in principle to the Crown the same as to everyone else. However, the leading case law has made certain allowances to account for the Crown's extraordinary powers, chief of which is the immunity for policy actions, to account for the Crown's “specialness”.

The compromise between the idea of equality and the separation of powers has been criticized from various angles, but it is undeniable that sometimes Crown actions should not be second-guessed by courts. These actions may or may not cause harm, but it is dubious whether the Crown can be held liable for damages arising out of a “normal” use of its extraordinary powers (whether such actions constitute faults in a civil law sense or not will be subject to analysis later on¹⁰⁵).

¹⁰⁴ *Infra* p. 101.

¹⁰⁵ *Infra* p.224.

Where the idea of equality advocates the application of (private) common law to the Crown, the question laid out in the previous paragraph (as to whether the Crown action under scrutiny constitutes one of those *raisons d'État* which should be subtracted from judicial second-guessing) is undeniably one of public, fundamental law. This question is one of justiciability, where the court must ask itself whether or not it is competent in the first place to review the Crown action in the first place. This is partly why the torts of misfeasance in public office and of malicious prosecution, as well as the question of whether policy-related immunity applies, are considered questions of public law.

§ 1 Dicey's Idea of Equality in Québec and Canada

The principles of extracontractual liability that apply to ordinary citizens are premised on the idea that the rights of one citizen are not greater or more important than the rights of another citizen, hence the compensatory devices of the law of extracontractual liability¹⁰⁶. But how have these principles been applied to the Crown?

The answer that seems to have had the most impact on Canadian doctrine and jurisprudence is Albert Venn Dicey's "idea of equality", which posits that the Crown should be held to the same rules (and the same standards) as its subjects:

We mean in the second place, when we speak of "the rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

¹⁰⁶ *Infra* p. 83.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limits. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person. Officials, such for example as soldiers or clergyman of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow-countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact is in no way inconsistent with the principle that all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.¹⁰⁷

Insofar as the current application of the laws of liability apply to the Crown, the idea of equality has had one important and significant impact in Canada: no Canadian jurisdiction has enacted a general legal regime addressing Crown liability in order to subtract it from the common law (*droit commun*, or *jus commune*) of extracontractual liability as applies to everybody else¹⁰⁸. As such, it could be said that the idea of equality is, at least in one of its understandings, the prevailing theory applied in Canada with regards to liability of the Crown.

Instead, in Québec and in Canada, the relevant legislatures have adopted specific statutes or sections of laws subjecting the Crown to provincial rules of extracontractual liability, effectively declaring the Crown equivalent to a capable person of age.

¹⁰⁷ Dicey, *supra* note 103 at 193–194.

¹⁰⁸ There are a few specific regimes, such as no-fault regimes, that have been enacted for instance in Québec in matters of car accident and work injuries. As much as these regimes create an exception within the realm of personal liability, they do not apply different rules to the Crown as they do to private parties.

In Québec, the *Civil Code of Québec*¹⁰⁹ lays down common rules for all private persons in the province, effectively codifying private *jus commune*. This code contains such an incarnation of the idea of equality in its article 1376, which dictates that the rules contained in this code in matters of obligations (mainly torts and contracts) apply to the (provincial) Crown except where a specific public law rule dictates otherwise:

1376. The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.

Procedure-wise, the petition of rights was abolished in Québec a long time ago, and the *Code of Civil Procedure*¹¹⁰ recognizes that the Crown can be the subject of a lawsuit in the same way as other private persons. Claims in Québec follow the same rules and process as any other “demande introductive d’instance”, regardless of the nature of the defendant. Certain specific rules still apply to the Crown, but those rules do not mean to subtract the Crown from the general regime:

76. In any civil, administrative, penal or criminal case, a person intending to question the operability, the constitutionality or the validity of a provision of an Act of the Parliament of Québec or the Parliament of Canada, of any regulation made under such an Act, of a government or ministerial order or of any other rule of law must give notice to the Attorney General of Québec.

Such notice is also required when a person seeks reparation from the State, a state body or a legal person established in the public interest for an infringement or denial of their fundamental rights and freedoms under the Charter of human rights and freedoms (chapter C-12) or the Canadian Charter of Rights and Freedoms (Part I of Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

Again, such notice is required when a person intends to raise, in a proceeding, the issue of the navigability or floatability of a lake or watercourse or the issue of the ownership of the bed or banks of a lake or watercourse.

No such application may be ruled on unless such notice has been validly given, and the court may only adjudicate with respect to the grounds set out in the notice.

¹⁰⁹ SQ 1991, c. 64 (hereafter “C.C.Q.” or the “*Civil Code of Québec*”).

¹¹⁰ CQLR c. C-25.01 (hereafter “C.C.P.” or “*Code of Civil Procedure*”).

96. An application pertaining to the rights and obligations of the Government must be directed against the Attorney General of Québec.

An application pertaining to the rights and obligations of a public body or of a public officer or office holder who is called on to make changes to an act or a register must be directed against the body or person concerned.

Strangely, however, the new *Code of civil procedure* did not incorporate article 94 of the previous one, although there is no doubt, as a matter of jurisprudence, that the same rules still apply to the Crown:

94. Any person having a recourse to exercise against the government may exercise it in the same manner as if it were a recourse against a person of full age and capacity, subject only to the provisions of this chapter.¹¹¹

The laws applicable to the liability of the federal government are laid out in the *Crown Liability and Proceedings Act*¹¹², which also subjects the Crown to the same legal regime that is applicable to normal, private parties, albeit with a few exceptions. Again, this can be considered a practical application of the idea of equality as no distinct regime has been put in place to account for Crown liability. In theory, this legislative intervention modified the basic common law principle immunizing the Crown from delictual liability¹¹³.

- 3.** The Crown is liable for the damages for which, if it were a person, it would be liable
- (a) in the Province of Quebec, in respect of
 - (i) the damage caused by the fault of a servant of the Crown, or
 - (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and
 - (b) in any other province, in respect of
 - (i) a tort committed by a servant of the Crown, or
 - (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

8. Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the

¹¹¹ *Code of civil procedure*, CQLR, c. C-25 (repealed).

¹¹² RSC 1985, c C-50.

¹¹³ A history of Crown liability is presented starting at p. 123.

exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

Statutory immunities such as the one created by section 8 will be studied later¹¹⁴. It is interesting to note, however, that it has been considered that this immunity does not apply “si l’exercice du pouvoir est fautif¹¹⁵” (which raises the question as to the relevance of the immunity in the first place).

Although provincial statutes are usually not enforceable against the federal government, section 3 of the *Crown Liability and Proceedings Act* has “been interpreted as incorporating by reference the law of torts of the province in which the cause of action arose¹¹⁶”. The federal statute is thus considered to include a reference to the provincial provisions regarding liability, making them enforceable against the Crown¹¹⁷.

Just as in Québec, no special writ or procedure is necessary in cases of liability of the Crown. Instead, the general “statement of claim” (if in the federal court) is the preferred procedural vehicle. The federal court has concurrent jurisdiction with provincial superior courts for matters of liability of the Crown, as laid out by the *Federal Courts Act*¹¹⁸.

¹¹⁴ *Infra* p. 186.

¹¹⁵ René Dussault & Louis Borgeat, *Traité de droit administratif*, 2d ed (Québec: Presses de l’Université Laval, 1989) at 819.

¹¹⁶ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 436.

¹¹⁷ For example in *The King v Murphy*, [1948] SCR 357.

¹¹⁸ RSC 1985, c. F-7, section 17

In conclusion, the idea of equality is well entrenched in Canada and has been accepted by legislatures across the country. However, it remains a challenge to effectively apply certain rules of private liability to the Crown.

§ 2 Public Law, the Idea of Equality, and the Civil Code of Québec

The bijuridical province of Québec provides an interesting case study for the idea of equality, as jurists there have to juggle two distinct legal regimes formulated on opposing sides of the English Channel. Where definitions of public law versus private law may be academic (if not esoterical) questions in common law jurisdictions, the difference between public common law and private civil law becomes a very practical – and difficult – one in Québec.

In Québec, there is no denying that the fundamental public law is of English origin. This has several consequences: not only does it mean that Québec is fundamentally structured with the same foundational principles as the United Kingdom (and that the same public common law rules apply to it); it also means that its provincial legislature (the National Assembly) is sovereign and thus, within the bounds of the Constitution and its underlying principles, can adopt statutory provisions modifying the state of its public law. This can be done with specific laws (such as the *Charter of Human Rights and Freedom*¹¹⁹) or with independent sections of various other Acts.

One fundamentally important statute in Québec that embodies its French tradition is the *Civil Code of Québec*. The Act is more than a simple statute since it mainly purports to establish the

¹¹⁹ CQLR c. C-12.

fundamental private law principles for which the province has exclusive jurisdiction¹²⁰, such as personal integrity, civil rights (including property, contracts and civil liability), incorporation of companies, successions, hypothecs, etc. However, in the carrying out of this objective, the *Civil code of Québec* also adapts parts of the public law applicable in the province with the enactment of some of its articles. For example:

PRELIMINARY PROVISION

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

[...]

300 Legal persons established in the public interest are primarily governed by the special Acts by which they are constituted and by those which are applicable to them; legal persons established for a private interest are primarily governed by the Acts applicable to their particular type.

Both kinds of legal persons are also governed by this Code where the provisions of such Acts require to be complemented, particularly with regard to their status as legal persons, their property or their relations with other persons.

[...]

1376 The rules set forth in this Book¹²¹ apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.

The code effectively replaced certain rules that traditionally came from the common law¹²². Professor Lemieux cites, among others, the example of article 1464 C.C.Q. which broadened the common law doctrine of “mandat apparent” regarding liability of the state for the acts of its employees. The *Civil Code of Québec* also created new public law rules applicable

¹²⁰ By virtue of section 92(1)11°-13°, 16° of the Constitution Act of 1867.

¹²¹ This refers to Book Five: Obligations, which codifies the rules of contracts and civil liability.

¹²² Lemieux, *supra* note 83 at 366.

exclusively to the Crown, such as articles 916(2) (regarding appropriation of Crown property) and 2724(1)¹²³ (regarding legal hypothecs on Crown claims for fiscal debts) , among others¹²³.

So if the fundamental law set out in public common law decides which rules apply, and the *Civil Code of Québec* can change public common law rules (within the bounds of the Constitution) and therefore establish its own fundamental law, how can we determine which laws apply to the Crown in Québec? The answer to that question is dictated by public law, which itself may be shaped by the code¹²⁴.

The preliminary provision indicates the special place of the code in the provincial legal hierarchy. The code is the “basic general law in Québec¹²⁵”, including in matters of (civil) liability of the Crown; in effect, the code not only modifies certain rules of public law but also changes some fundamental public law, including the matter of which rules the Crown is to be subject to:

26 The coming into force of the *Civil Code of Québec* had a significant impact on the rules governing the civil liability of governments and public bodies in Quebec. This change was the result of the new position assigned to the *Civil Code* in the hierarchy of the sources of law in matters within the legislative jurisdiction of the Quebec National Assembly. As this Court has had occasion to note in the past, the effect of the preliminary provision of the *Civil Code* is that it became the *jus commune* of Quebec. In addition, under art. 1376 C.C.Q. the law that applies as a general rule to the contractual undertakings and delictual liability of governments is the law set out in the *Civil Code*, subject to the rules of public law; the relevance of those rules to the conduct of the business of public bodies is recognized by art. 300 C.C.Q.[...]

27 As a rule, an examination of the liability of governments begins with the application of the rules of liability established by the *Civil Code of Québec*. However, art. 1376 C.C.Q. states that the *Civil Code* applies only “subject to any other rules of law which may be applicable to them”. This reserve on the part of the legislature reflects the specific nature of governments, and the diversity and complexity of the duties assigned to them. Very often, the assessment of a public body’s

¹²³ *Ibid* at 367.

¹²⁴ *Prud’homme c. Prud’homme*, *supra* note 16, par. 24.

¹²⁵ *Gilles E Néron Communication Marketing Inc v Chambre des notaires du Québec*, [2004] 3 SCR 95, par. 56.

conduct and decisions that a court might make based on the simple, straightforward application of the rules of the *jus commune* would not provide it with the freedom it needs in order to perform its functions. That is why this Court recognizes that general principles or specific rules of public law may either prevent the general rules of civil liability from applying altogether or substantially alter the rules by which they operate [...]¹²⁶

This new hierarchy set out in the *Civil Code of Québec* was explicitly recognized by the Supreme Court in the *Prud'homme* case: Justice Lebel said on the impact of article 1376 that “[i]t relieves an individual who brings proceedings against a public authority from the obligation to identify a rule of public common law that makes the civil law applicable to his or her action¹²⁷.” At the same time, the Supreme Court also confirmed that article 1376 C.C.Q. effectively creates a public law rule¹²⁸.

To recap, the idea of equality lays down the principle that the law applicable to questions of liability of the Crown must fundamentally be the same as those applicable to everybody else. What that applicable law is will vary from province to province according to their private law tradition: the *Civil Code of Québec* in Québec and private common law everywhere else. However, the idea of equality has its limits and courts need to take into account the fact that the Crown sometimes must take extraordinary actions that were never intended to be subjected to the “ordinary (private) law of the land”; in these situations, certain allowances must be made to respect the rule of law and the separation of powers. What these allowances are must be determined by public, fundamental law, which the provinces can modify by statute. In effect,

¹²⁶ *Finney v Barreau du Québec*, [2004] 2 SCR 17.

¹²⁷ *Prud'homme c. Prud'homme*, *supra* note 16, par 27; see also par. 31.

¹²⁸ *Ibid.*

the way courts currently account for the separation of powers is by the use of public law immunities.

§ 3 Ordinary Powers – the Crown Acting as a Citizen

The idea of equality has to be softened or adapted when the Crown is not acting as a citizen. Dicey never suggested that the idea of equality be applied, for instance, to Parliament: by its nature, Parliament is not the equal of those it governs since it exercises sovereign powers over them. In much the same way, can the idea of equality fully apply to Crown actions that are a pure exercise of sovereign power? To answer this question, we must first distinguish between

- 1) actions that exist independently of official empowerment (either by statute or by the common law), simply by virtue of the Crown being a natural person or, in the case of some public bodies, a corporation (or “*personne morale*”); and
- 2) actions that exist because of official empowerment and that represent an exercise of sovereign power.

These former rights, or “acts [...] of purely private nature¹²⁹”, sometimes dubbed “natural person powers¹³⁰”, are not an expression of sovereignty by the Crown; they are an application of the same rights shared by all legal subjects, including the Crown. They are part of the “law of the land”, which not only binds the Crown but also empowers it. The Crown can exercise certain rights on the mere basis that it is a natural person, in addition to being the Crown – such as the rights to conclude contracts, interact with the physical world (through its servants

¹²⁹ Art. 529(1)3^o of the *Code of civil procedure*.

¹³⁰ See *Communities Economic Development Fund v Canadian Pickles Corp*, [1991] 3 SCR 388.

or agents), or spend money. The nature of the power the Crown exercises may have an impact on whether its action can be source of civil liability¹³¹.

Though they are both “untethered”, these natural person powers are different from powers of prerogative¹³². Unlike powers of prerogative that are based on the Sovereignty of the Crown, the Crown’s capacity to exercise natural person rights is explained by the cascade of delegations of the civil rights of the natural person that is the Sovereign. In Québec, Crown corporations and other public law entities that benefit from legal personality can, for their part, claim the benefit of those civil rights by virtue of article 300 C.C.Q.

Deciding whether a Crown action or decision was enabled by its powers of Sovereignty or by basic civil rights is tricky and is a deciding factor on whether public or private law applies to the Crown’s decision:

The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component (as the *Wiswell* case determined) and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty¹³³.

Civil law theory traditionally distinguishes between two ways to change one’s own legal relationships¹³⁴: Juridical acts, by which a person changes their legal relationships voluntarily (such as contracts, wills, donations, etc.), and juridical facts, by which a person creates or

¹³¹ *Infra* p. 237.

¹³² *Supra* p. 35.

¹³³ *Welbridge Holdings Ltd v Greater Winnipeg*, [1971] SCR 957 at 968.

¹³⁴ Baudouin Jean-Louis & Jobin Pierre-Gabriel, *Les obligations*, 7th ed (Cowansville: Yvon Blais) par. 46-48.

changes their rights and duties through their actions (such as punching someone or having one's dog bite a stranger)¹³⁵, whether or not such action was deliberate.

This distinction is important in the case of liability of the Crown because it will help determine which legal regime applies to this change of legal relationships. Where the Crown intended to change its legal relationships towards a citizen (for example, through a contract), civil law will undoubtedly apply and the Crown will not be able to invoke its status or derogative public law rules in an effort to avoid the consequences of this decision. In these cases, the Crown will have to fulfill its end of a contract even if it entered into a contract for reasons of policy or of public interest – there is then no immunity or other mechanism to free the Crown from liability. It is only where a Crown action constitutes a juridical fact that courts will have to determine whether this particular juridical fact should change the Crown's legal relationships or not.

Compounding this confusion between legal acts and legal facts is the practical reality that the Crown itself is a disembodied entity that can hardly be at the origin of any juridical fact. The Crown can express its will to change its own legal relationships easily enough, through the adoption of municipal resolutions, decrees, Orders in Council, and so on. However, the Crown itself does not drive a car, or use pepper spray on its citizens, or fail to upkeep fire hydrants (to name but a few legal facts that hold the potential to change the Crown's legal relationships to some of its citizens). Instead, agents and servants of the Crown undertake these actions on

¹³⁵ This distinction is not merely academic as it was recognized by the Supreme Court in *Fortin v Chrétien*, [2001] 2 SCR 500, par. 29.

its behalf, and thus these become a manifestation of the hand of the Crown that can trigger its liability¹³⁶.

But how can the Crown exercise “natural person powers” if it is not strictly a natural person? The Supreme Court once held that the Crown received its powers not only from statutes but also from a private law mandate by Her Majesty the Queen, a physical person, to the Lieutenant-Governor and the Governor General, who then sub-delegate to their respective levels of government:

Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of apparent mandate, would not be applicable to her. In this respect the position of ministers and other officers of the government is fundamentally different from that of municipal employees. In our system municipalities are the creatures of statute, and the *ultra vires* doctrine must accordingly be applied in its full rigor.¹³⁷

How then do we distinguish between the application of public law or private law to a Crown action?

Section 3 Distinguishing Between the Application of Private and Public law

The preceding sections dealt with the rules that apply to the Crown despite its special status. The Crown is endowed by the legislative branch with some powers of sovereignty in the pursuance of its mission of governance. These extraordinary powers of sovereignty must only be used in the pursuance of such mission. It has also been demonstrated that the Crown is capable of using the same private right as its subjects, and that in so doing it must be held to the same legal principles as them.

¹³⁶ *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, par. 84.

¹³⁷ *Verreault (J.E.) & Fils Ltée v. Attorney General (Quebec)*, *supra* note 49 at 47.

The application of public or private law is not exclusively dependant on the private or public nature of the body making a decision. Public bodies can use private rights (such as their capacity to contract) in the pursuance of their mission of public interest. In *Laurentide Motels*, the majority of the Court had ruled that “[t]he civil law applies to [municipalities] only exceptionally¹³⁸” because municipalities, as public bodies, are “governed by the public law”. The applicability of private or public law, according to Justice Beetz, was a matter of public law¹³⁹. In Québec, for instance, the contractual liability of municipalities (or any other public body) is already determined by the public law rule set forth in article 1376 C.C.Q. As for extracontractual (or “delictual”) liability, it would seem to also fall within the purview of article 1376 C.C.Q., except that there exists a derogatory rule of public common law, which establishes a difference between categories of Crown actions (operational and policy acts)¹⁴⁰. In other words, if the Crown action is of a policy nature, article 1376 C.C.Q. does not apply and a different set of rules takes the place of Book 5 of the *Civil Code of Québec*.

If the public body’s nature is insufficient to determine the law applicable to it, one must then look at the manner in which its action is being reviewed by the courts: the reviewing of the justification and the legality of the Crown action is subjected to public law (through principles of judicial review), whereas the consequences of the Crown action on private parties, and the legal qualification of the Crown action as a fault (and the consequences of this qualification) would belong to private law. These are two separate realms of judicial oversight of Crown action.

¹³⁸ *Laurentide motels ltd v Beauport (City)*, [1989] 1 SCR 705 at 724.

¹³⁹ *Ibid* at 724–725.

¹⁴⁰ *Supra* p. 148.

The *Dunsmuir* case provides an example in a contractual matter. It involves the judicial review of the decision of a labour arbitrator regarding the dismissal of an employee of the New Brunswick's Department of Justice. Since this arbitrator held his power of arbitration from a statute, there was no doubt that his decision was subject to public law in the form of judicial review (the Supreme Court ended up quashing his decision). However, one of Mr. Dunsmuir's arguments was that the Department of Justice, with regards to the termination of his employment, should have respected the rules of procedural equity. The Supreme Court rejected this argument on the grounds that the termination of an employment contract did not constitute the exercise of extraordinary executive powers and consequentially was not subjected to public law: "If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way."¹⁴¹

Private law would then apply to the Crown whenever it is not using a power of sovereignty, no matter its motive. In the *Dunsmuir* example, the application of public or private law would be unrelated to whether the New Brunswick Department of Justice was acting in good faith (or for a purpose congruent with its mission of public interest) or in bad faith (for instance as a result of a personal vendetta against Mr. Dunsmuir). The determination of motive (good or bad faith) would however undoubtedly still be relevant after this stage, when the court considers Crown liability or the legality of Crown actions.

¹⁴¹ *Dunsmuir v. New Brunswick*, *supra* note 8, par. 103.

Moreover, the decision to apply public or private law depends on the exact remedy sought. Ultimately, the application of private or public law to the Crown rests onto the shoulders of the judge presiding a specific trial, in which not only is a specific Crown action under review by the court, but a plaintiff is asking for a particular remedy. The choice of this remedy is the prerogative of the plaintiff, and this choice will govern from which angle the court considers the Crown action. For example, a Crown decision refusing to issue a licence could be reviewed under the lens of public law in the context of a writ in judicial review, in which the plaintiff (to whom a licence has been refused) asks for such refusal to be cancelled and possibly for a permit to be issued. However, if the plaintiff instead considers the refusal to be wrongful and asks for damages, the court will have to review the decision under the lens of private law. For example, in the TeleZone case:

[79] TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself¹⁴².

In Québec, the lens of private law is codified in the *Civil Code of Québec*, which contains rules for determining extracontractual liability following a wrongful act. This is especially relevant since, as stated earlier, Canadian law does not include a separate set of public law rules¹⁴³ for determining liability of the Crown – whenever a plaintiff seeks a compensatory remedy based

¹⁴² *Canada (Attorney General) v TeleZone Inc*, [2010] 3 SCR 585, par. 79.

¹⁴³ With some exceptions, such as the tort of malicious prosecution.

on their individualised relationship with the Crown, the courts will have no other method of addressing this claim than by applying private law rules.

The problem is that private law, however legitimate, was not conceived as a response to the challenges of government. The private law rules of extracontractual liability require the judge to weigh the impugned action against some standard of the reasonable person placed in the same circumstances¹⁴⁴, but how can such a standard be applied to the Crown? It is therefore necessary, when applying private law rules to the Crown, to adapt them to the realities of governance. Fortunately, courts have been working out such adaptations for centuries in the parallel context of public law with the rules of judicial deference.

Chapter 3 Judicial Deference

To account for the realities of governance and the Crown's specialness described in Chapter 1, the judicial branch has developed a methodical approach to deference to insure that it does not infringe on the legitimate use of Crown powers. This approach allows the judiciary to inquire whether the impugned Crown action was indeed exercised within the limits of the Crown's powers; if so, the courts will consider that the use of the power was legitimate and that judicial intervention would be illegitimate – or in other words, that the matter is non-justiciable (Section 1). This matter of justiciability of government action translates into different concepts in public law (Section 2), where it is better articulated than in private law (Section 3).

¹⁴⁴ For more on this, see *infra* p. 86

Section 1 Deference and Justiciability

Because of the principle of separation of powers, courts are restricted in their ability to review Crown actions. It would not do, after all, for unelected court officials to usurp the role of the legitimate executive power, given to it by a democratically elected legislature, under cover of judicial review of the legality of Crown's actions. In this context, judicial deference refers to the respectful attitude courts adopt when reviewing certain Crown actions. Even though judicial review is a consequence of separation of power and of the rule of law, the courts in its exercise must respect the will of the legislative branch that the Crown (the executive branch) be exclusively responsible for carrying out its mission in the public interest. Or, in the words of the Supreme Court:

[48] [...] What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference “is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers” [citation omitted]....

[49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”: [...] . In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.¹⁴⁵

The exact requirements of deference, however, vary from case to case. In certain cases, no deference at all is required, and inversely so in other cases where the courts must declare themselves completely incompetent to act. Even when circumstances call for deference, the

¹⁴⁵ *Dunsmuir v. New Brunswick*, *supra* note 8, par. 48, 49.

court may find that the violation is such that it warrants judicial intervention nevertheless. So, what influences the degree of deference?

§ 1 Qualifying Deference

This question was mostly answered in the “pragmatic and functional analysis” (officially defunct, but whose components were reprised in the new “standard of review analysis”), which formally identified four factors that may influence how much deference is warranted in a given situation¹⁴⁶: the presence of absence of a privative clause in the enabling Act, the degree of expertise of the administrative decision maker, the purpose of the enabling Act and provision, and the nature of the problem at hand. Each are briefly explained below¹⁴⁷, and will be useful again in the evaluation of the amount of deference owed to the Crown in a civil law context¹⁴⁸.

Privative Clause - Privative clauses are an express indication in a statute that the Crown (or some specific Crown servant) is meant to have the final word regarding the determination of some consideration of opportunity. This clause can sometimes be reinforced by a “clause de renfort” (reinforcement clause), such as section 27(2) of the *Transport Act*:

27. Except on a question of jurisdiction, no remedy under article 33 of the Code of Civil Procedure (chapter C-25) or extraordinary recourse within the meaning of that Code may be exercised and no injunction may be granted against the Commission or against any of its members acting in their official capacity.

A judge of the Court of Appeal may, upon a motion, annul by a summary proceeding any proceeding brought or decision rendered contrary to the first paragraph.¹⁴⁹

¹⁴⁶ Summarized in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

¹⁴⁷ See Stéphane Rochette, *La norme de contrôle judiciaire: Synthèse et recueil d'arrêts* (Cowansville: Yvon Blais, 2007) at 10–21 for a thorough explanation of these criteria.

¹⁴⁸ *Infra* p. 237.

¹⁴⁹ CQLR c. T-12.

Since legislative power is sovereign and, as it is vested in democratically-elected bodies, legitimate, the courts have always recognized the importance and impact of such clauses. However, federal or provincial legislatures cannot completely exclude the judiciary's overview of Crown action, nor can they refrain courts from examining whether a given public body stayed within the limits of its competence¹⁵⁰.

Expertise - Likewise, courts will be hesitant to interfere with decisions of an administrative decision maker who is more qualified than they are regarding some factual question. For example, a labour arbitrator's decision regarding customary expectations of an employer would be considered well within their specialisation, and a reviewing court would do well to approach such matter deferentially. Moreover, the matter of expertise sometimes comes up in defence of decisions taken by democratically elected public bodies (such as municipalities and school boards) to reflect their relative autonomy¹⁵¹.

Purpose - An analysis of the broader purpose of the act under review and, more particularly, of the enabling provision(s) for the attacked decision can help the court decide whether the legislator intended the administrative action in question to be final and of an executive nature. Generally, this will be the case where the public body has the ability not only to make specific

¹⁵⁰ *Crevier v. A.G. (Québec) et al.*, *supra* note 88 at 238.

¹⁵¹ For a discussion and critique of this approach, see Geneviève Cartier, "Le contrôle de l'exercice du pouvoir discrétionnaire: le difficile passage de la théorie à la pratique" in Conférence des juristes de l'État, ed, *Actes de la XVIe Conférence des juristes de l'État* (Cowansville: Yvon Blais, 2006) 187.

decisions but also to regulate an industry in a larger scale, or where it regularly has to maintain a delicate balance between various interests (“polycentricity¹⁵²”).

Nature of the problem - Last but not least, the nature of the problem refers to the exact questions under review before the court. One case can contain many questions, and each question may have its own standard of review. This is where the court determines not only what the legal knot seems to be, but also qualifies it: is it primarily a factual question, or the exercise of a discretionary or quasi-judicial power, or a question of law about a constitutional matter or other legal matter of fundamental importance? The qualification of the problem will largely determine the applicable standard of review; in fact, *Dunsmuir* made this the main criterion in 2008.

Ultimately, and in the light of these factors, the reviewing court is able to determine whether the administrative action should inspire a deferent attitude or not. In the former case, the court will recognize that more than one decision were possible (there was a “range of possible outcomes¹⁵³”) and apply the “standard of reasonableness”, meaning it will avoid interference unless the decision was unreasonable; otherwise, it will apply the “standard of correctness”, meaning the court will intervene as soon as the administrative decision maker made a mistake¹⁵⁴.

¹⁵² *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra* note 146, par. 37.

¹⁵³ *Dunsmuir v. New Brunswick*, *supra* note 8, par. 47.

¹⁵⁴ *Ibid*, par. 50.

Without going into details, the Supreme Court now presumes that a certain degree of deference exists towards Crown actions¹⁵⁵. To simplify matters, the new standard of review analysis further suggests a set of legal presumptions arising out of the nature of the question before the court¹⁵⁶:

- The standard of reasonableness applies to the review of
 - Questions of fact,
 - Questions of law within the normal mandate or the expertise of the administrative decision maker, and
 - Questions of law not specifically targeted by the standard of correctness.
- The standard of correctness applies to the review of
 - Constitutional questions (including the *Charter* and matters of division of powers),
 - Questions of law of importance to the entire judicial system (and lying outside the expertise of the administrative decision maker¹⁵⁷), and
 - Matters related to the determination of the decision maker's own competence.

The underlying theme of deference is that courts should not prevent the government from governing. What they seek instead is the best way to ensure that the legislator's will is best enforced:

¹⁵⁵ *Canadian National Railway Co v Canada (Attorney General)*, [2014] 2 SCR 135, par. 59.

¹⁵⁶ *Dunsmuir v. New Brunswick*, *supra* note 8.

¹⁵⁷ *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616, par. 35.

In using restraint, the courts do not refuse to enforce statutory duties imposed upon the governing bodies of the university. They simply exercise their discretion in such a way as to implement the general intent of the Legislature¹⁵⁸.

§ 2 Justiciability

Often the reviewing court will refuse to intervene and let the Crown's decision stand. In so doing, the reviewing court can convey two distinct messages:

- The judiciary **agrees** with the merits of the decision: The court can, implicitly (especially if it is applying the standard of correctness) or explicitly, signal that it agrees with the reasoning and the resulting Crown decision and therefore let the decision stand;
- The judiciary is **deferent** regardless of the merits of the decision: Whether the court agrees with the merits or not, it considers that the decision was one that only the Crown was entitled to make and declares itself incompetent to intervene.

In this latter case, where the court refuses to intervene purely out of deference, the court effectively (but usually implicitly) declares the matter “non-justiciable”, meaning that the matter under consideration is not one for the judiciary to decide. In this context, justiciability refers to the competence and appropriateness of the courts to make a decision.

Justiciability is an elusive concept, but generally is held to refer both to the capacity and legitimacy of courts to undertake the adjudication of a matter. There are two germane questions before any court making a determination of justiciability. First, can the matter be determined according to objective, judicially cognizable standards and evidence? Second, is the matter appropriate for adjudication given the constitutional, political, and legal systems in Canada? In other words, does the court have the capacity and legitimacy to decide the case¹⁵⁹?

¹⁵⁸ *Harekin v University of Regina*, [1979] 2 SCR 561 at 595–596.

¹⁵⁹ Lorne Sossin, “The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*” (2002) 47 McGill Law Journal 435 at 447.

For example, a (reasonable) decision taken by the Crown within the limits of its statutory discretion is beyond the purview of the courts. Inversely, the questions of what the limits of this discretion are, or of whether the decision was taken inside the limits of this discretion, are justiciable matters. The same principles apply to the use of prerogative powers¹⁶⁰.

Matters of “high policy”, such as “executive decisions to sign a treaty or to declare war”, would necessarily be outside of the court’s competence to intervene¹⁶¹, but only because their subject matter falls within the executive power’s legitimate range of discretion¹⁶²:

At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch".¹⁶³

The exercise of prerogative is thus an excellent example of two different operations: 1) determining the limits of discretion (whatever the source – statutory or prerogative – of this discretion) on the one hand, and 2) examining the substantive aspect of the decisional process that happens within those limits. In that second step, courts do not hesitate to declare the matter non-justiciable¹⁶⁴. It is probably so whenever the court refuses to intervene because it deems the administrative decision within the bounds of reasonableness.

¹⁶⁰ *Canada (Prime Minister) v. Khadr*, *supra* note 93, par. 36.

¹⁶¹ *Operation Dismantle v. The Queen*, *supra* note 95, par. 52.

¹⁶² Rebecca Moosavian, “Judges and high prerogative: the enduring influence of expertise and legal purity” (2012) Public Law 724 at 731.

¹⁶³ *Black v Canada (Prime Minister)*, [2001] OJ No. 1853, par. 50.

¹⁶⁴ Or “The kind of discretion that is not reviewable by the courts”: *Ibid*, par. 63.

Although the courts have no power to order the Crown to exercise its prerogative¹⁶⁵ or to exercise prerogative in its place, they are always able to ensure that prerogative was indeed exercised within its limits. Under the rule of law no public power is shielded from the courts ability to judge on its existence or its limits¹⁶⁶.

As a last note on this subject, non-justiciability should never be a reason why the court cannot intervene, but rather the result of its non-intervention: “the doctrine of justiciability should not be used as a shield to protect executive officials from the reach of the rule of law¹⁶⁷”. In other words, non-justiciability of a Crown action cannot be invoked as a defense to protect a government decision, but rather surfaces as a consequence of the judiciary’s decision, based on the rule of law, not to intervene.

Section 2 Judicial Review: In matters regarding the legality of its decisions

Those general principles of deference find concrete application in public law matters, when the courts are specifically asked to examine the legality of Crown action.

§ 1 When Judicial Review Applies

Interestingly, although judicial review is fundamental to Canadian public law, there is no clear common legal test to determine whether it applies or not to a given situation¹⁶⁸. In the absence of a common law test devised by courts, federal and provincial legislatures have attempted to

¹⁶⁵ *Canada (Prime Minister) v. Khadr*, *supra* note 93, par. 36.

¹⁶⁶ Sossin, *supra* note 159 at 450.

¹⁶⁷ *Ibid* at 455.

¹⁶⁸ Derek McKee, “The Public/Private Distinction in *Roncarelli v. Duplessis*” (2010) 55 McGill L J 461–491 at 486.

summarise and categorise these public law recourses in their respective procedural laws, such as sections 2 and 18.1 of the *Federal Courts Act* and article 529 of Québec's new *Code of Civil*

Procedure:

2. [...]

“federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867* ;

18.1. [...]

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.¹⁶⁹

529. In a judicial review, the Superior Court may, depending on the subject matter,

(1) declare inapplicable, invalid or inoperative a provision of an Act of the Parliament of Québec or the Parliament of Canada, a regulation made under such a law, an order in council, a minister's order or any other rule of law;

(2) evoke, on a party's application, a case pending before a court, or review or quash a judgment rendered by a court or a decision made by a person or body under the authority of the Parliament of Québec, if the court, body or person acted without jurisdiction or in excess of jurisdiction, or if the procedure followed was affected by some serious irregularity;

(3) direct a person holding an office within a public body, a legal person, a partnership or an association or another group not endowed with juridical personality to perform an act which they are by law required to perform, provided the act is not of a purely private nature; or

(4) dismiss a person who, without right, is occupying or exercising a public office or an office within a public body, a legal person, a partnership or an association or another group not endowed with juridical personality.

Except in the case of lack or excess of jurisdiction, judicial review is available only if the judgment or the decision cannot be appealed or contested.

¹⁶⁹ *Federal Courts Act*, RSC 1985, c F-7

An application for judicial review must be served within a reasonable time after the act or the fact on which it is based.

Of course, since these remedies are a concrete application of the rule of law and are essential to the Canadian constitutional order, they would exist without an express, legislative codification. Judicial review is only codified, not created, by the *Code of Civil Procedure*¹⁷⁰.

The power of courts to review Crown actions arises out of section 96 of the *Constitution Act* of 1867 (and, one could argue, of the preamble) and as such cannot be suppressed or unduly restricted by federal or provincial legislation. Legislative bodies may express a desire that a decision be reserved to the exclusive competence of the executive powers (through a privative clause in the enabling Act), but such statutory measures may not preclude the court from deciding whether the Crown acted within its jurisdiction¹⁷¹. Using this broad appellation of “excès de juridiction”, the Supreme Court in 1969 summarised thusly the rights of Canadian citizens in matters of judicial review:

Il s’ensuit que la Cour supérieure possède toujours cette autorité dont elle hérita, par statut, de la Cour du Banc du Roi en 1849, de sorte que toute personne qui se prétend lésée dans ses droits, par suite d’un excès de juridiction de la part d’un organisme fédéral, peut, afin de les faire reconnaître et en assurer le respect, recourir à cette autorité.¹⁷²

¹⁷⁰ *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 SCR 326 at 358.

¹⁷¹ *Crevier v. A.G. (Québec) et al.*, *supra* note 88 at 234: “In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court.”

¹⁷² *Three Rivers Boatman Ltd v Conseil canadien des relations ouvrières*, [1969] SCR 607 at 618.

§ 2 Arbitrariness, Competence, and the Control of Public Authority

As described in the previous sections, the Crown is at liberty to accomplish a wide range of actions through an array of extraordinary powers. These powers, however, are always limited, arbitrariness being foreign to Canadian public law¹⁷³. How and to what extent these powers are limited, however, depends on different factors.

This aversion to arbitrariness is a well-rooted English tradition as well as a necessary prelude to the establishment of a constitutional government¹⁷⁴. The notion of arbitrariness is incompatible with that of the rule of law; a constitutional regime that would enable arbitrary actions could allow itself to turn into a tyranny as the sovereign can accomplish certain actions without review. There are many different forms of arbitrariness:

The first has to do with whether power-wielders are subject to any routine, regular control or limit or accountability to something other than their own ‘will’ or ‘pleasure,’ to use traditional terms of suspicion, or caprice, or desire. [...]

A second sense of arbitrariness, often but not necessarily allied with the first, occurs where power is exercised in ways those affected by it cannot know, predict or obey when they are deciding how to act. That is the form typically taken up in the various lists of the rule of law so beloved by contemporary analytic philosophers of law, and it is true that if one has no way of knowing how power is to be exercised, because its grounds are secret, retrospective, too variable to know, vague beyond specification, impossible to perform, exercised in ways unrelated to the rules that purport to govern them and so on, then one has been treated arbitrarily. [...]

For a third way would be the exercise of power, whether or not controlled and/or predictable, where there is no space or means made available for its targets to be heard, to question, to inform, or to affect the exercise of power over them¹⁷⁵.

Arbitrariness must be distinguished from simple discretion. The wide berth granted to the Crown through the use of large discretionary powers could be seen as eroding the rule of law

¹⁷³ *Roncarelli v. Duplessis*, *supra* note 18 at 140.

¹⁷⁴ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed (New York: Cornell University Press, 1947).

¹⁷⁵ Martin Krygier, “Tempering Power” in Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin, eds, *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge: Cambridge University Press, 2017) 34 at 40–41.

since it may create uncertainty as to extent of citizen's rights and duties. However, the power to rule by discretion has long been recognised as a necessary tool for the modern state¹⁷⁶.

Administrative law generally recognizes that the executive branch, the one using these discretionary powers, cannot itself define their own limits; doing so would effectively authorize the existence of a limitless, thus arbitrary, power. In all cases the exercise of discretion must be subjected to the scrutiny of the courts through the lens of judicial review¹⁷⁷. Fundamentally and constitutionally, the goal of judicial review is to empower the courts (judicial branch) to review Crown action (executive branch) and ensure it stays within its bounds – be it discretionary powers exercised within their statutory limits, prerogative powers exercised within their common law limits, or even ordinary “natural person powers” within their public and private law limits.

Judicial review has continuously evolved during the 20th century as courts strove to find a useful middle ground on the judicial intervention spectrum: complete submissiveness to the Crown on one end, which would effectively result in the executive branch wielding arbitrary power, and unhibited interference with government action on the other end, which would infringe on the principle of separation of powers by effectively granting the judiciary the ability to govern. This quest for a useful legal test is further complicated by the fact that complex-

¹⁷⁶ Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan & Co., 1959) at 188, 413.

¹⁷⁷ *Crevier v. A.G. (Québec) et al.*, *supra* note 88 at 234.

but-complete analyses are difficult for the trial courts to apply consistently¹⁷⁸, while simple approaches (such as simple categories) lack refinement¹⁷⁹.

Over time, the Supreme Court established a rough distinction between matters of law (or legality) and matters of policy (or discretion). In the former case, courts could intervene, while in the latter, they would refrain from imposing their personal opinions over the legitimate use of executive powers¹⁸⁰. An increasingly sophisticated method of distinguishing between decisions that were exposed to judicial interference from those that should be shielded arose, leading to the “pragmatic and functional analysis” pioneered in the *Bibeault* case¹⁸¹ and summarised above¹⁸². Deemed too complex, this method was simplified in the more easily explained “categorical” approach used today - the “standard of review analysis¹⁸³”. The new method is based on the same core principles as the old analysis.

The standard of review analysis sets the rule that courts should show no deference towards a public body’s attempt to define the delimitation of its own competence¹⁸⁴. There are, however, many contextual factors that can influence a court as it attempts to delimitate discretion. One such factor is competence; others are the relative expertise of the decision maker (or their

¹⁷⁸ This was the main problem with the pragmatic and functional analysis: *Dunsmuir v. New Brunswick*, *supra* note 8, par. 32, 34, 41.

¹⁷⁹ Daly, *supra* note 19 at 6: “Categorical approaches persist because they are attractive in their simplicity, but this simplicity is superficial”.

¹⁸⁰ Cartier, *supra* note 151 at 192–193.

¹⁸¹ *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048.

¹⁸² *Supra* p. 67.

¹⁸³ *Dunsmuir v. New Brunswick*, *supra* note 8, par. 29.

¹⁸⁴ *United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City)*, [2004] 1 SCR 485, par. 5.

institutional legitimacy) and their hierarchical importance. All three can lead courts to grant bearers of discretion appreciable leeway in self-determining the limits of their own discretion.

About competence: how and when can courts intervene when a public body has to make a decision regarding its own power to act? It can sometimes be difficult to distinguish between situations where the public body is defining the limits to its own discretion from those where it is weighing various policy considerations. For instance, in the case *Shell v. Vancouver*¹⁸⁵, a majority of Supreme Court justices considered that the City of Vancouver did not have the competence to adopt a resolution boycotting *Shell* product as a way to force the company out of South Africa during the apartheid, a decision made pursuant to the City's general power to enact any measure for "municipal purposes". Conversely, in *Surrey*, where a school board had opted to reject school books depicting same-gender families, the majority of the Supreme Court considered that while the school board was better situated than the courts to decide what the best interest of its community was, the Supreme Court was better situated than the school board to defend human rights,¹⁸⁶ and ultimately that the school board's decision was unreasonable since it rested on considerations foreign to the relevant *School Act*¹⁸⁷.

As to situations where the decision maker's expertise stays the interventionary hand of the court, the Supreme Court applied the standard of reasonableness to a decision of the British-Columbia Securities Commission regarding the interpretation of its home statute: the question in this case was whether the "event" alluded to by the statute was a misconduct or rather a

¹⁸⁵ *Shell Canada Products Ltd. v. Vancouver (City)*, *supra* note 81.

¹⁸⁶ *Chamberlain v Surrey School District No 36*, [2002] 4 SCR 710 par. 10, 11.

¹⁸⁷ *Ibid*, par. 72-73.

settlement agreement with a Securities Commission of a different province¹⁸⁸. The result of this statutory interpretation would eventually determine whether the B.C. Securities Commission was outside the limitation period of six years, and, consequentially, whether it was competent to make the decision in question¹⁸⁹. In other words, the Supreme Court recognized that there were many possible acceptable outcomes in the interpretation of the statute on this matter; the Securities Commission was considered competent to determine whether or not it was competent.

Another factor that may influence the court as it is deciding the limits of discretion is the hierarchical position of the administrative authority: the scope of executive discretion effectively increases as one climbs up the administrative ladder. The reviewableness of a discretionary decision depends partly on the hierarchical role of the decision maker in the Administration: ministers will have greater leeway whereas more specialized public servants will be more strictly supervised. This is particularly important when the court has to decide whether a decision is effectively creating policy.

§ 3 Public Law Remedies

The new *Code of civil procedure* reorganized all previous public law remedies against the Crown under the heading “Judicial review” (articles 529-535). These remedies were explained in greater detail and complexity under Title VI of the previous code¹⁹⁰, “Certain Extraordinary

¹⁸⁸ *McLean v British Columbia (Securities Commission)*, [2013] 3 SCR 895.

¹⁸⁹ Note that the court never refers to the concept of competence in the judgement.

¹⁹⁰ *Code of civil procedure*, CQLR c. C-25 (repealed).

Recourses”, the adjective “extraordinary” referring to the fact that these were public law remedies of judicial review.

The new code explicitly codifies various *common law* remedies in its article 529, including the declaratory recourse, nullity, *certiorari*, prohibition, *mandamus*, and *quo warranto*. In article 34, it also acknowledges the constitutional imperative of the exclusive competence of the Superior Court on matters of judicial review; theoretically, this Court would be competent to hear any other extraordinary remedy not explicitly codified.

In essence, the public law remedies codified in those articles that are relevant to this thesis are *certiorari*, nullity, and *mandamus*. The first two enable a plaintiff with sufficient legal standing to obtain an order from the Superior Court cancelling general or individual decision by a public authority (such as a law, by-law, revocation of a permit, etc.) and, if applicable, negate the legal consequences of that decision to the plaintiff. The recourse in *mandamus* can be granted by the courts to force the use of a public power by its legitimate holder.

In normal cases of judicial review, the principle of separation of powers dictates that a court of law may not substitute its opinion to that of the administrative body tasked with the carrying out of a legislative mission:

Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature¹⁹¹.

¹⁹¹ *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 775.

Instead, the remedy granted by courts is to cancel, or quash, the administrative decision or action, declaring it void. Since this places the parties back in the position where no decision has yet been taken, the court will re-empower the competent administrative body to make the decision anew, within the new framework as clarified by the court's judgement: "Consequently, once it has been determined that an administrative tribunal has exceeded its jurisdiction by rendering an unreasonable decision on a matter within its jurisdiction, the case must, in theory, be sent back to it¹⁹²".

Section 3 Crown Liability: In matters regarding the injuries caused by its decisions

Matters of private law involving the Crown involve a greater challenge: not only is this territory less well charted than in public law matters, but one could argue it involves greater levels of complexity since private law does not habitually consider the public law principles of deference. This section will demonstrate that deference, separation of powers, and other principles of judicial review that are so familiar to public law, can and should similarly inform the law of liability of the Crown. It will also focus on deference in contractual matters, while Part 2 of this thesis will consider matters of extracontractual liability. Judicial review is the method used by courts to exercise their constitutional duty to ensure the executive branch stays within the mandate given to it by the legislative branch. However, the exact boundaries of this mandate can be difficult to delineate. This problem is particularly acute when the Crown action

¹⁹² *Giguère v Chambre des notaires du Québec*, [2004] 1 SCR 3, par. 65. (Deschamps J, dissenting). The majority judgement did not address this aspect of the case and consequently did not overturn this rule, which stems from constitutional principles.

under review is not exclusively based on the Sovereign power of the Crown but rather on ordinary rights protected by private law. Judicial review has no control over matters governed or enabled by private law, since the principles of separation of power and of deference have no direct equivalent in civil law when courts are tasked with intervening in the lives of ordinary citizens.

To further complicate matters, many areas of Crown action rely in part on its sovereign powers (and so on public law) and in part on private law. This is the case, for example, in matters of government procurement, where public law rules apply to the Crown's decision-making process leading up to the contract (such as the Crown's decision to procure new printers), but then private law applies to the conclusion of the contract itself and to its execution.

Moreover, confusion on the boundaries between public and private law are easily introduced in such matters since the Superior Court is equally competent to hear both public and private law recourses in the same case. For example, in a public procurement case, the same court has been required to apply the following to the same tendering procedure:

- rules of public law and of deference regarding a public body's decision to only buy recycling bins featuring wheels bigger than 280 millimeters – the court found that a public body is competent to identify its own needs, but that its discretion in such matter is not unlimited¹⁹³;

¹⁹³ *Distribution Jean Blanchard inc c Régie de gestion des matières résiduelles de Manicouagan*, 2016 QCCS 4417, par. 36-37.

- rules of private and contractual law to the bidder's right to demonstrate the conformity of his bid to the tendering documents, and to the ultimate non-conformity of his bid¹⁹⁴;
- rules of private law and deference to the public body's decision (in the public interest) to cancel the tendering process by virtue of a clause to this effect in the tendering document¹⁹⁵.

This section will rely on broadly accepted rules in contractual liability as an illustration of private law rules applicable to the Crown. The rest of the thesis will focus on the Crown as a subject of law for its extracontractual liability. The rules applicable to the Crown when it concludes a contract provide an enlightening, alternate point of view to those imposed upon it in matters of extracontractual liability. This section will not delve into the minutiae of contractual recourses against the Crown, but will raise a few useful points of comparison with the law of extracontractual liability.

Interestingly, in contractual matters in Québec, the idea of equality applies without reservation. The Crown cannot invoke a special regime protecting it from liability¹⁹⁶; it is instead subject to the standard rules of liability laid out in Book 5 of the *Civil Code of Québec*:

The rules respecting the liability of the Crown therefore differ depending on whether the source of the obligation is contractual or legislative. The Crown is bound by a contractual obligation in the same manner as an individual, whereas as a general rule it is not bound by an obligation resulting from the law alone unless it is mentioned in it. This also means that subject possibly to a limited number of exceptions which would not apply here in any event, the rights and prerogatives of the Crown cannot be invoked to limit or alter the terms of a contract, which comprises not only what is expressly provided in it but also everything that normally results from it according to usage or the law.
[...]

¹⁹⁴ *Ibid*, par. 64-76.

¹⁹⁵ *Ibid*, par. 84-86.

¹⁹⁶ *Thomas v. R.*, (1874-5) 10 Q.B. 31, 43.

The principle whereby “The King should [not] suffer by the negligence of his officers, or by their compacts or combination with adverse party” has no place in matters of contractual liability; accepting it would amount to negating, for all practical purposes, the principle of the contractual liability of the Crown, since the latter acts only through mandataries or agents¹⁹⁷.

This makes sense. When it enters into a contract, the Crown is not exercising an extraordinary power by virtue of a statute or of its nature. Concluding a contract is a legal act (as opposed to a legal fact) well within the competence of any (capable) private citizen; and the expression of will leading to the conclusion of the Crown’s contracts is no different than that emanating from a private citizen. The Crown entering into a contract must follow the rules laid out by the *Civil Code of Québec*; for example, the conclusion of a contract must follow the “offer-acceptation” procedures outlined in the *Civil Code of Québec*¹⁹⁸, meaning the Crown is liable for breach of contract just like any other contracting party¹⁹⁹.

That is not to say, however, that public contracts are exclusively governed by private law; only the conclusion of the contract and the effects of the contract between the parties (and possibly some third parties) are subject to the rules of the *Civil Code of Québec*. The decisional process leading to the conclusion of the contract that happens entirely within a public body is still subject to administrative law. Unlike a private party, who benefits from general freedom to do whatever they please unless restricted by law, the Crown can only act in the public interest (as defined by statutes and judicial interpretation) and, therefore, a public body can only decide to

¹⁹⁷ *Bank of Montreal v Attorney General (Quebec)*, [1979] 1 SCR 565 at 574, 575; see also *Adricon Ltée v East Angus (Town of)*, [1977] 1 SCR 1107 at 1120: “A municipal corporation is a political body, which falls within the control of the civil law in its relations, in certain aspects, to individual members of society”.

¹⁹⁸ See art. 1388-1397 C.C.Q.; *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 111 at 119.

¹⁹⁹ *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, *supra* note 44.

conclude a contract (no matter with whom) if doing so would further its mission in the public interest. For example, where a private citizen could decide to buy an enormous television for his or her own enjoyment (provided doing so is not illegal) even if concluding such a contract would be economically irresponsible, a public body could only procure such item if it was in the public interest to do so. The public body must be able to justify how this contract would help it in its state-sponsored mission.

This demonstrates that the nature of the decision maker (either the Crown or a private party) is not sufficient in itself to determine whether public law applies, since private law can apply to actions of the Crown. Moreover, the ordinary or extraordinary source of the decision does not tell the full story either – concluding a contract, on its surface, would be a matter of private law, but some parts of this process are covered by public law. The true test of whether public law or private law applies has more to do with the part of the decision being reviewed, and the remedy sought. A plaintiff seeking compensation for an alleged breach of contract by the Crown would call for the application of private law, whereas a plaintiff asking the court to review and, ultimately, quash a Crown decision to go into a contract (for example, on the grounds that the Crown was not competent to go into such contract) would require the application of public law.

A last relevant observation regarding the rules applicable to Crown contracts is the absence of immunity-like devices in the liability process. Unlike our current understanding of extracontractual liability, no “public law rule²⁰⁰” can interfere with the application of

²⁰⁰ As required by art. 1376 C.C.Q.

traditional rules of contractual liability to the Crown. The Supreme Court once determined that good faith, for instance, could not be a valid defence for a public body when it is being sued for breach of contract:

The respondent's argument of good faith in considering the Sorochan bid to be compliant is no defence to a claim for breach of contract: it amounts to an argument that, because it thought it had interpreted the contract properly, it cannot be in breach. Acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract²⁰¹.

While the line between private law and public law is fairly bright in the context of Crown contracts, it has proven to be much murkier in extracontractual matters, when the Crown's actions are usually much less deliberate. The next chapter will briefly cover the history of solutions and of angles that the judiciary has taken to grant relief to private citizens over the years.

²⁰¹ *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, *supra* note 44, par. 54.

Part 2 Deference in Extracontractual Liability of the Crown

Extracontractual liability of the Crown is not interested in whether the Crown acted legally or whether it strayed outside of the boundaries of its extraordinary powers. It is rather interested in whether the Crown's action is so wrongful that the Crown ought to compensate a private individual for the injury they suffered as a result of that action. In order to effectively answer this question, courts need to apply the law of the land, with an additional dose of deference to account for the Crown's special status and mission.

Whether the court is applying public law rules in the context of judicial review or private law rules in the context of a lawsuit in extracontractual liability of the Crown does not change the constitutional relationship between the Crown and the courts, and the latter's duty to show deference towards certain Crown actions.

This final part of the thesis will examine how courts can incorporate deference in the conceptual framework applicable to cases of liability of the Crown. To this end, Chapter 1 provides background information about the law of the land in matters of extracontractual liability, including some comparative comments between Québec and the rest of Canada. These explanations will be especially useful in understanding some confusion related to importing the immunity into Québec law²⁰². Chapter 2 will then show how immunities are the current paradigm for accounting for deference in extracontractual liability, and Chapter 3 will demonstrate how civil law can better account for deference instead.

²⁰² *Infra* p. 245.

Chapter 1 The Law of the Land: Normal Rules of Extracontractual Liability

Crown liability can only be understood in the context of the general liability regime. What is the role of the law of civil liability? What does it seek to address, or to redress? Moreover, an effective threshold for cases of liability of the Crown will have to account for differences in our bijuridical legal system – what are the main differences between the liability regimes between Québec and the rest of Canada? In both regimes, civil liability is characterised by the requirement of some breach of a standard of care, known as a fault in Québec. This chapter will examine how this standard fits in the conceptual framework of civil liability.

Section 1 The Role of Extracontractual Liability

Extracontractual liability is a set of rules meant to translate into the legal realm a set of cultural expectations. More specifically, extracontractual liability is the subset of expectations about personal responsibility for harm wrongly caused to others: it contains the expectation that if person A causes harm to person B, person A will be responsible for making person B whole again. In Québec, the set of expectations that has been re-codified in 1991 in the new *Civil Code of Québec* had existed for decades and centuries before, first as simple customs, then as the codification done under the *Code Napoléon*, and then (from 1866 to 1994) under the *Civil Code of Lower Canada*. In fact, the cultural expectation that one ought to be responsible for his actions or inactions could likely be traced back through many civilisations. For example, the famous Code of Hammurabi contained specific “laws” on one’s personal responsibility and the duty to compensate the harm one causes:

53. If any one be too lazy to keep his dam in proper condition, and does not so keep it; if then the dam break and all the fields be flooded, then shall he in whose dam the break occurred be sold for money, and the money shall replace the corn which he has caused to be ruined.

54. If he be not able to replace the corn, then he and his possessions shall be divided among the farmers whose corn he has flooded.

55. If any one open his ditches to water his crop, but is careless, and the water flood the field of his neighbor, then he shall pay his neighbor corn for his loss.²⁰³

The principles of extracontractual liability are compensatory, in that they mean to create mechanisms for the victim (the plaintiff) of an injury to claim compensation from the person having caused the injury (the defendant). Extracontractual liability only indirectly purports to impose a certain course of action unto a person or body. It comes into effect after an injury is suffered, seeking to compensate the victim of a loss, where that loss was caused by a wrongful behaviour:

In fact, in Quebec civil law, the primary function of the rules of extracontractual liability is to compensate for prejudice. This objective requires that there be compensation for the loss suffered or the opportunity for profit lost because of the wrongful conduct, regardless of whether the victim is capable of enjoying the substitute pleasures.²⁰⁴

Moreover, despite its retrospective nature, the law of extracontractual liability, unlike criminal law, is not punitive; it does not (usually) directly aim to punish the person at fault, nor does it directly seek to reduce the occurrence of certain actions or behaviours in the future within the broader community.

La loi civile ne punit jamais l'auteur d'un délit ou d'un quasi-délit; elle accorde une compensation à la victime pour le tort qui lui a été causé. La punition est exclusivement du ressort des tribunaux correctionnels. Le dommage moral, comme tout dommages-intérêts accordés par un tribunal, a exclusivement un caractère compensatoire.²⁰⁵

Much like in the common law of torts, the *Civil Code of Québec* organises these principles in its article 1457 by creating a wide-ranging “duty to abide by the rules of conduct incumbent to

²⁰³ “Law Code of Hammurabi”, (10 January 2018), online: *Law Code of Hammurabi (1780 BC)* <<http://mcadams.posc.mu.edu/txt/ah/Assyria/Hammurabi.html>>.

²⁰⁴ *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at 243.

²⁰⁵ *Chaput v Romain*, [1955] SCR 834 at 841 (emphasis in the original).

[a person], according to the circumstances, usage or law, so as not to cause injury to another”, also known as the general duty of prudence and diligence. Correlatively, it could be argued that the *Civil Code of Québec* creates a right for everyone not to be the victim of another's faulty behaviour:

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

The *Civil Code of Québec* goes on to create what could be qualified as a secondary duty, arising only where the primary one discussed above has been trespassed, for a person to “make reparation for the injury” he causes “by such fault”. This duty is qualified as secondary since it does not exist unless the primary duty – the duty not to cause harm through a fault – has been breached. The correlative secondary right here would be the right to be compensated for the injury suffered due to the fault of another, within the boundaries defined by the *Civil Code of Québec*. The primary duty, therefore, would be a duty *in rem* (“droit réel”) not to act in default to the rules of conduct incumbent to the situation, , whereas the secondary duty would be a personal duty, (“droit personnel”), opposable only to the person having suffered from the breach of the primary duty²⁰⁶.

In essence, the law of extracontractual liability is meant to enforce the right of every citizen to compensation from harmful acts that were aberrant from the circumstantial rules of conduct.

²⁰⁶ Wesley N Hohfeld, *Fundamental Legal Conceptions as applied in Legal Reasoning* (New Haven: Yale University Press, 1964) at 94.

Whether and how this idea of compensation can and should apply to the Crown has already been discussed with the rule of law and the idea of equality²⁰⁷. How this logic has been adapted and applied to the Crown will be the focus of the next chapter.

Section 2 Civil Law Extracontractual Liability

The rules of extracontractual civil liability in Québec are mostly laid out in Book 5 of the *Civil Code of Québec*, with case law acting both as a primary source where the code is silent and as a secondary source with its thousands of illustrations. Unlike the common law of torts, with its multiple recourses and varying constitutive elements, Québec uses a unified recourse for all suits in extracontractual liability, no matter the behaviour at their origin.

Québec's private law originates from French law since its colonisation in 1608, a tradition that was only interrupted for a short period after the English conquest. The London Parliament soon adopted the *Quebec Act*²⁰⁸ in 1774, creating a bijuridical system in Québec: the existing French-inspired civil law would prevail in matters of property and civil rights, whereas the Canadian Common law of English descent would prevail in matters of public and administrative law. In consequence, the *jus commune* applicable to matters of civil liability is, by default, civil law, whereas common law rules over matters of public law. The *Civil Code of Québec* rules all *jus commune* in Québec, including certain matters of public law:

Le Québec étant une juridiction de droit mixte, tant par les origines de son droit que par le système juridique applicable, il convient de se demander à quel «droit commun» faire appel. Ainsi, depuis 1774, il faut faire appel pour les matières civiles à la tradition de droit civil et, depuis la codification, surtout au Code civil. Le nouveau Code civil, entré en vigueur en 1994, a mis fin à une controverse et il s'applique tant en droit privé qu'en droit public, non seulement en vertu de la disposition préliminaire mais aussi en vertu des articles 300 et 1376. Ainsi après quelques années de débats où certains ont voulu faire appliquer la common law en droit public, la question est

²⁰⁷ *Supra* p. 43.

²⁰⁸ *Quebec Act*, 1774 (UK) 14 George III c. 83, s. VIII.

maintenant tranchée et le Code civil est clairement le lieu principal d'expression du droit commun en matière civile, y compris en droit public²⁰⁹.

The recourse in extracontractual civil liability in Québec requires a demonstration of three fundamental elements: a fault, which acts as a “trigger” for the application of extracontractual liability; damages, about which we only need say a few words, and causality between the fault and damages. For the sake of completeness, a fourth fundamental element, the defendant’s capacity, is also important but will not be discussed in this context since the Crown is deemed a capable person of age.

§ 1 Fault

The notion of fault is introduced in article 1457 of the *Civil Code of Québec*²¹⁰ and is described as a duty, by every person, to “abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another”.

This general notion of a fault in Québec knows no direct equivalent in the law of torts, applicable elsewhere in Canada, but could be compared to the notion of the breach of an established standard of care, where article 1457 creates a general duty of care in the province.

Essentially, a fault is not directly related to the transgression of positively laid out rules of law (although these are taken into account); rather, it is meant to be a fluid notion against which to

²⁰⁹ Matthieu Juneau, *La notion de droit commun en droit civil québécois* (LL.M. Thesis, Université Laval, 2009) [unpublished] at 80.

²¹⁰ See *supra* p. 85 for full citation.

measure a full range of acceptable human behaviours according to “circumstances, usage or law” as well as foreseeability:

29. The notion of fault is a flexible and adaptable concept, fashioned by jurisprudential tradition. The jurisprudential tradition of Quebec clearly shows that this concept has shown a remarkable capacity to evolve, fluctuate, and adapt itself constantly to the changing social, cultural, and economic context and new legal developments.²¹¹

A fault, in the sense of “being at fault”, is the failure of a person to follow relevant rules of conduct (statutory, customary or otherwise applicable) that would have prevented them from causing injury, had they followed them. This unique and comprehensive notion of fault does not distinguish actions from omissions, nor intentional from unintentional (although this may be important to determine the attribution of punitive damages).

To determine whether such an intangible rule of behaviour has been trespassed, Québec jurisprudence consistently applies an abstract test known as the “reasonable person test”. The court “will compare the conduct of the defendant to an abstract model, that is, to a person reasonably prudent and diligent²¹²”. This abstract model citizen is not entirely removed from the factual situation, however: the court will place this person in “the same circumstances” as the parties were in the case. This allows the court to apply an adapted version of the same liability regime to specific circumstances. For instance, in the context of medical liability, the court will be justified to wonder what a reasonable doctor (or other specialist), placed in the same circumstances and possessing the same information, would have done. This is of course

²¹¹ Jean-Louis Baudouin, “Tort Law in Canada: Québec” in Ingrid Boone, ed, *International Encyclopedia for Tort Law* (Kluwer Law International).

²¹² *Ibid* par. 44.

necessary, considering that no reasonable person would perform surgery without the required training.

In the context of liability of the Crown, the interaction between statutory norms of behaviour and customary ones can be particularly important. This interaction is subtle, and has not given rise to flourishing jurisprudence. The consensus is that violating a statutory duty is not necessarily a fault (unless it would have been a fault regardless of its statutory source), while following the statutory norm is not (usually) an acceptable defence from suits in civil liability:

43. Conversely, the simple fact that a person has complied with statutory norms does not necessarily mean that he or she can always escape civil liability because the intensity of the duty imposed by courts can, in certain circumstances, be higher than the minimum standard set forth by the legislator.²¹³

In plain language, it is not a fault to fail to follow regulations, unless the court finds that it would be a fault regardless of its normative shape. As an example of such regulatory fault, it is usually recognised that the violation of rights protected by the Québec *Charter* are equivalent to a fault²¹⁴.

To help differentiate between statutory norms whose non-observation will incur liability and those that will not, one has to distinguish between simple “police regulation²¹⁵”, which has no

²¹³ *Ibid.*

²¹⁴ *Béliveau St-Jacques v Fédération des employées et employés de services publics inc*, [1996] 2 SCR 345, par. 120.

²¹⁵ In *Volkert v Diamond Truck Co*, [1940] SCR 455, the unanimous Supreme Court held that a section of the Québec’s Motor Vehicle Act prohibiting the leaving of a vehicle unattended with its key in the switch was a “police regulation” and was not intended to trigger civil liability.

bearing on civil liability, and regulations that aim to impose elementary security measures²¹⁶ or, albeit in a civilist context, otherwise create a duty of care. Non-observation of police regulations could trigger an administrative or penal consequences, but no civil fault²¹⁷. Regulatory measures enacting elementary norms of prudence, however, can trigger liability through article 1457 C.C.Q.

Regulations of the second, more important category can be difficult to identify. One author insists that this only applies to truly “elementary” norms of caution: “N’est-il pas hautement probable que même en l’absence d’une disposition spécifique, le tribunal civil aurait adopté la même norme de prudence?²¹⁸”. Prior statutory obligation is in no way a necessary condition of a civil fault in Québec: for instance, in the *Gagné* case there was no statutory obligation to light up an animal-dragged cart during the night, yet it was considered a fault²¹⁹. Baudouin seems to agree, and gives the following examples:

1-191 – *Violation d’un devoir légal spécifique* – La transgression d’un devoir spécifique imposé par une loi ou un règlement constitue en principe une faute civile, puisqu’il y a alors violation d’une norme de conduite impérativement fixée par le législateur. Il demeure que l’assimilation de la faute statutaire à la faute civile ne s’impose pas toujours et que, même lorsque c’est le cas, la responsabilité de l’auteur n’est pas nécessairement engagée puisqu’il importe de relier cette faute au préjudice. Ces deux éléments doivent être distingués.

En ce qui concerne la faute, la Cour suprême dans l’arrêt *Morin c. Blais* a jugé que lorsque le devoir légal exprime une norme élémentaire de prudence, sa violation constitue une faute civile. Ces propos ont été diversement compris tant par la doctrine que la jurisprudence. [...] Dans l’arrêt *Ciment du Saint-Laurent* la Cour suprême semble avoir tranché en refusant toute assimilation de la faute statutaire à la faute civile et ce, quelque soit le contenu du devoir légal. La faute, rappelle la Cour suprême, correspondant à une obligation de moyens il est nécessaire d’évaluer les circonstances de la violation de la norme légale ou réglementaire afin de déterminer si celle-ci est fautive, c’est-à-dire découle d’un comportement contrevenant à la norme de prudence et diligence. La Cour nuance toutefois son affirmation en posant que le contenu de la norme peut influencer le

²¹⁶ *Morin v Blais*, [1977] 1 SCR 570 at 579–580.

²¹⁷ Pierre-Gabriel Jobin, “La violation d’une loi ou d’un règlement entraîne-t-elle la responsabilité civile?” (1984) 44:1 *Revue du Barreau* 222–232 at 225.

²¹⁸ *Ibid* at 228–229.

²¹⁹ *Gagné c Côté*, [1965] BR 98.

tribunal dans son appréciation de la prudence et de la diligence requises dans un contexte donné.
[...]

[...]

1-192 – *Effets* – Inversement, étant donné l'existence d'un devoir général de prudence et de diligence à l'égard d'autrui, le simple fait qu'à propos d'un incident le défendeur ait respecté les normes législatives ou réglementaires n'exclut pas automatiquement la possibilité que sa responsabilité puisse malgré tout être retenue en vertu du régime de droit commun. Les dispositions réglementaires n'ont donc pas pour effet de limiter l'obligation générale de se bien comporter à l'égard d'autrui et, en contrepartie, il n'est pas nécessaire de démontrer la violation d'une règle statutaire ou légale pour engager la responsabilité d'autrui.²²⁰

A further subtlety related to the notion of fault is that these are sometimes classified in various categories depending on their gravity. As noted above, the *Civil Code of Québec* does not differentiate between acts and omissions. Article 1457 C.C.Q. itself does not distinguish between different degrees of faults, either. However, in the development of extracontractual liability case law since 1866, jurisprudence has come up with a ladder of increasingly negative behaviours. In order of most forgiving to gravest, these are: *faute légère* (light fault), *faute simple* (simple or normal fault), *faute lourde* (heavy fault, or gross fault), and *faute intentionnelle* (intentional fault). This ladder is worth studying since it may serve to better understand the burden of evidence of “bad faith” that is currently imposed upon the plaintiff in Crown liability cases. These various degrees of fault are briefly explained below; however, these various categories are not perfectly hermetic and so are difficult to define in any exact manner²²¹.

²²⁰ Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La responsabilité civile*, 8th ed (Cowansville: Yvon Blais, 2014), references omitted.

²²¹ *Finney v. Barreau du Québec*, *supra* note 126; citing Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La responsabilité civile*, 6th ed (Cowansville: Éditions Yvon Blais, 2003) at 123–124.

The *faute légère* is not acknowledged anywhere in the *Civil Code of Québec*, but occasionally appears in case law. It denotes a reproachable behaviour that flies just below the threshold for a proper fault that would be necessary to trigger liability, and usually has a minor or accessory character. It has mostly fallen into disuse in Québec²²².

Article 1457 C.C.Q. requires a *faute simple*, or just fault, combined with damages and causality, to trigger liability – this constitutes the “law of the land” in Québec. The simple fault is the default burden of evidence²²³ (and the most commonly used one by far), unless specified otherwise by a rule of law, be it in the *Civil Code of Québec* (such as the various vicarious liability regimes starting at article 1459 C.C.Q.), or when a rule of public law, imported from the common law, would override the law of the land in virtue of article 1376 C.C.Q. This might be the case, for instance, when a rule of public law requires a proof of bad faith to trigger the Crown’s extracontractual liability²²⁴.

The gross fault is defined in article 1474 C.C.Q. as “a fault which shows gross recklessness, gross carelessness or gross negligence”. It is thus recognized by the *Civil Code of Québec*, which expressly relies on it in a few instances in order to make it more difficult for the plaintiff to meet their burden of evidence. The gross fault denotes a more damning behaviour than the simple fault, or, in other words, a more obvious departure from reasonable norms of conduct, thus requiring a more important burden of evidence and being harder to prove. Merely acting

²²² Baudouin, Deslauriers & Moore, *supra* note 220, par. 1-190.

²²³ The idea of “burden of evidence” was defined in the introduction as referring to “the quantity and quality of evidence that must be established by a litigant to establish its claim or part of its claim”.

²²⁴ On the concept of bad faith, see *infra* p. 209.

in a way that a reasonable person would not have is not enough to commit a gross fault. Perhaps a useful synonym would be “shocking fault” or “appalling fault”.

The gross fault as a burden of evidence is useful in that it clearly grants the judge the possibility to express a form of deference towards the actions of the defendant. For instance, gross fault is necessary to consider liable the guardian of a person of full age who is not endowed with reason for damages caused by the latter (article 1461 C.C.Q.). By requiring gross fault (or intentional, see below) to be established, as opposed to a simple fault, the legislator is effectively telling the judge to exercise restraint in the condemnation of the guardian. In a way, the breadth of acceptable behaviours should be wider in the case of such a guardian than for other cases of civil liability.

The *faute intentionnelle* (intentional fault) is also recognized by the *Civil Code of Québec*, although the clarity of its name spared it from being officially defined by the legislator. Intentional fault refers to the subjective purpose of the person committing the action, and so arguably involves the heaviest burden of evidence and is the most difficult type of *fault* to establish. The criterion of intention to cause an injury is usually used to determine whether punitive damages should be awarded, in virtue of section 49(2) of the Québec *Charter of human rights*²²⁵. This level of fault was considered at least equivalent to malice in a malicious prosecution case from Québec²²⁶.

²²⁵ *Charter of Human Rights and Freedoms*, CQLR c C-12.

²²⁶ *Proulx v Quebec (Attorney General)*, [2001] 3 SCR 9, par. 35.

Intentional fault is often used as an alternative burden of evidence to gross fault, for instance in article 2301 C.C.Q.: “[...] the liability of the innkeeper is unlimited where the loss of property brought by a guest is *caused by the intentional or gross fault* of the innkeeper...” (my emphasis). The two burdens differ in their content since gross fault is more objective and does not necessarily imply or include the deliberate commission of a wrongful act, focusing instead on the distance between the action and the threshold of social acceptability. Moreover, an intentional fault is deemed to be of a greater gravity than the gross fault, and therefore all intentional faults are necessarily gross faults as well, whereas gross faults are not necessarily intentional.

Once the appropriate degree of fault has been determined, in order to decide whether any kind of fault has been committed, the judge needs to determine what behaviour or actions were appropriate in the circumstances in which the defendant found himself. In this analysis, the judge can take into consideration a vast array of evidence pertaining to the exact situation under review: the professional status of the defendant, the environment he operated in, the (reasonable) assumptions he was operating under, the time of day, visibility, and any other relevant consideration.

2508. En général, la faute civile peut être définie comme l’erreur de conduite qui n’aurait pas été commise par une personne avisée placée dans les mêmes circonstances externes. La faute est appréciée selon une norme de conduite abstraite, donc objective, laquelle norme doit être relativisée à la lumière des caractéristiques particulières tenant à l’auteur de la conduite reprochée ainsi qu’aux faits extérieurs ayant entouré cette dernière. Ainsi, une conduite ne sera pas nécessairement uniformément appropriée en toutes circonstances. La présence de produits ou d’outils dangereux peut, dans cet ordre d’idées, nécessiter plus de précautions et imposer un devoir de prudence et de diligence particulier. Outre l’état des lieux, l’éclairage ainsi que la familiarité de la victime avec l’environnement du lieu du dommage, l’emploi, le type de travail ou l’occupation de l’auteur du dommage de même que le moment où l’acte reproché a été commis sont autant

d'indices ayant été par ailleurs retenus par les tribunaux pour apprécier le caractère imprévisible de l'événement et d'escompter la conduite conforme de la personne raisonnable²²⁷.

What follows are two examples of a broader set of circumstances that courts know need to be recognized for the determination of a fault to make any sense: these are the cases of medical liability and of defamation. These examples will be useful points of reference when it is suggested that similar adaptations could be made to Québec's liability regime to account for Crown actions²²⁸.

First, the rules surrounding the professional liability of doctors provide a useful illustration of how circumstances can shape the burden of evidence resting on the plaintiff's shoulders. In cases where a doctor is sued in extracontractual liability because of a professional action or decision, members of that profession are only considered at fault when their behaviour does not measure up to that of a hypothetical reasonably prudent and diligent doctor placed in the same circumstances²²⁹, instead of that of the usual "reasonable person" (presumably the law assumes that no reasonable person would accomplish medical procedures without being medically trained). This "reasonable doctor" is presumed to apply relevant accepted industry practices (*règles de l'art*) in their profession. The circumstances here can include the state of medical knowledge at the time of the action²³⁰, as well as the particular specialisation of the

²²⁷ Vincent Karim, *Les Obligations* (Wilson & Lafleur, 2015) at 1056–1057 (references omitted).

²²⁸ *Infra* p. 237.

²²⁹ Pierre Deschamps, "L'obligation de moyens en matière de responsabilité médicale" (1990) 58 *Assurances* 575 at 577.

²³⁰ See *Kastner c. Royal Victoria Hospital*, REJB 2000-17478 (QCCS), conf. by REJB 2002-30041 (QCCA).

doctor²³¹ (for instance, a cardiologist would be compared to a hypothetical reasonably prudent and diligent cardiologist placed in the same circumstances):

45. Courts will not, however, apply this abstract model as such, but rather use it in close relation to the particular factual situation of each case. For instance, to determine whether or not a physician is liable for malpractice, courts will compare the behaviour of the defendant to that of a normally prudent and diligent physician of the same specialization and take into consideration all particular circumstances: Was it a situation of emergency? Was the illness difficult to detect? Was the prescribed treatment generally regarded as valid by scientific standards?

46. The factual background of each case plays a determining role in the evaluation by courts of the conduct of the defendant. For instance, the degree of previsibility that can be expected from individuals may vary considerably. This does not mean, however, that courts have abandoned the objective standard of comparison, but rather that they set it against the specific context of the case.²³²

Moreover, the Québec civil law regime recognises that medical professionals are not responsible for the condition of their patient, but rather for their own actions and decisions and for the quality of the care they provide their patient. Jurisprudence qualifies their duty as an obligation of means²³³ (*obligation de moyen*), as opposed to an obligation of results (*obligation de résultats*). In other words, they are expected to do their best to the full extent of their abilities, but they are not (usually) responsible for reaching any particular outcome²³⁴ - they are responsible for their own actions, but they are not the insurer of their patient.

As a last comment on medical liability, courts have shown themselves deferent towards the professional judgement of medical professionals: “Canadian courts have evinced a reluctance

²³¹ See *Ter Neuzen v Korn*, [1995] 3 SCR 674.

²³² Baudouin, *supra* note 211.

²³³ See *Lapointe v Hôpital Le Gardeur*, [1992] 1 SCR 351.

²³⁴ *Neuzen v Korn*, [1993] 6 WWR 647, par. 98.

to ‘second-guess’ physicians in the practice of their profession²³⁵’. This deference has been known to extend to other professional fields, such as police officers:

Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.²³⁶

The second example of adapting circumstances to determine fault is defamation. Québec law does not recognize a separate head of liability for such cases, and judges instead apply the general rules of liability codified in article 1457 C.C.Q²³⁷. In this context, it is necessary for the plaintiff to establish a fault²³⁸, as well as damages and causality, in order to obtain compensation. As usual with faults, this can mean either a deliberately harmful act as well as a more passive, careless or negligent one²³⁹. This does not mean, however, that the law of defamation in Québec is without nuances. Determining whether the defaming words constitute a fault require a contextual analysis of the facts and circumstances, and establish a balance between freedom of speech and the right to reputation²⁴⁰.

The determining test, as with all faults, is that of a reasonable person (or a reasonable journalist²⁴¹, or editorialist, or radio host, or public speaker) placed in the same

²³⁵ Allen M Linden, “Tort Law in Canada: Common Law Canada” in Ingrid Boone, ed, *International Encyclopedia for Tort Law* (Kluwer Law International) at 122 par. 319.

²³⁶ *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, par. 54.

²³⁷ See most notably *Prud’homme c. Prud’homme*, *supra* note 16, par. 32.

²³⁸ *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, *supra* note 125, par. 62.

²³⁹ Baudouin, Deslauriers & Moore, *supra* note 220, par. I-297.

²⁴⁰ *Proulx c Martineau*, 2015 QCCA 472, par. 26.

²⁴¹ *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, *supra* note 125, par. 62.

circumstances²⁴². For example, the presiding judge will take into account whether the defaming remarks are in the form of an editorial or journalistic comment²⁴³, or if they are mistaken or fabricated facts²⁴⁴; whether the author is a journalist acting in that capacity²⁴⁵; whether the plaintiff is a public personality²⁴⁶; the exact language and level of language used (and whether it was caricatural or satirical²⁴⁷); the environment in which the words were used²⁴⁸; whether the verbal “attack” happened in the context of a public debate²⁴⁹; whether the comment is based on true or false information²⁵⁰; whether the comment was made in the public interest²⁵¹ (for example, to inform the public of a fraud or dangerous situation); and, in theory, any other circumstance considered relevant by the judge.

Unlike the common law tort of defamation, the legal debate is not articulated on formal defenses, like so many distinct attacks and parries, but rather on arguing that in that particular context, it was globally a fault (or not) to use those words or to make such comment:

[...] The rules of civil liability already provide that a defendant may rely on all the circumstances that tend to demonstrate the non-existence of fault. Because the criteria for the defence of fair comment are precisely the circumstances to be taken into consideration in determining whether a fault has been committed, those criteria are already an integral part of Quebec civil law. It

²⁴² Jean-Denis Archambault, *Le droit (et sa répression judiciaire) de diffamer au Québec* (Cowansville: Éditions Yvon Blais, 2008) at 522.

²⁴³ *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, *supra* note 125, par. 61.

²⁴⁴ *Genex Communications inc c Association québécoise de l'industrie du disque*, 2009 QCCA 2201, par. 30.

²⁴⁵ For example, see *Gestion finance Tamalia inc c Garrel*, 2012 QCCA 1612, par. 18.

²⁴⁶ *Arthur c Gravel*, [1991] RJQ 2123.

²⁴⁷ *Proulx c. Martineau*, *supra* note 240, par. 38.

²⁴⁸ In *Confédération des syndicats nationaux c Jetté*, 2005 QCCA 1238, par. 46-59, the Court of Appeal concluded that union-employer discourse was notoriously tense and liable to dip into excess and hyperbole.

²⁴⁹ *Bouffard c Gervais*, [2004] RJQ 1782, par. 61.

²⁵⁰ *Prud'homme c. Prud'homme*, *supra* note 16.

²⁵¹ For example, *Bou Malhab v Diffusion Métromédia CMR inc*, [2011] 1 SCR 214.

therefore serves no purpose to mechanically apply the criteria for the defence of fair comment. At the risk of repetition, the rules of civil liability are flexible and require that whether a fault has been committed be determined by examining all of the circumstances.²⁵²

In conclusion on matters of defamation and fault, the exact definition (and the associated burden of evidence) of what constitutes a fault in Québec will vary greatly according to the circumstances of each case. Article 1457 C.C.Q. does not require the defendant to prove particular or formal defenses (such as that of fair comment), instead requiring them to inform the court of all relevant circumstances. For that reason, such formal defenses have literally been deemed useless by the Supreme Court in *Prud'homme*²⁵³. Finally, especially interesting in *Prud'homme* is the fact that the public functions of the defendant was one of the circumstances taken into account by the Supreme Court:

42 In a defamation action against an elected municipal official, freedom of expression takes on singular importance, because of the intimate connection between the role of that official and the preservation of municipal democracy. Elected municipal officials are, in a way, conduits for the voices of their constituents: they convey their grievances to municipal government and they also inform them about the state of that government (Gaudreault-Desbiens, *supra*, at p. 486). Their right to speak cannot be limited without negative impact on the vitality of municipal democracy...²⁵⁴

§ 2 Injury

After the existence of a fault has been duly established, evidence of an injury is required for liability to exist. Even the grossest of faults will not constitute the basis of civil liability (although it may give rise to criminal liability) if it did not cause any damages. As discussed above, damages claimed in the context of a civil liability suit are mainly compensatory in

²⁵² *Prud'homme c. Prud'homme*, *supra* note 16, par. 63 (emphasis in the original).

²⁵³ This approach has been criticised, however. See *infra*, The Immunity is Difficult to Import and Apply in Québec, p. 245.

²⁵⁴ *Prud'homme c. Prud'homme*, *supra* note 16, par. 42.

nature²⁵⁵, but can sometimes be punitive as well. Damages in Québec are described in article 1611 C.C.Q.:

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.
Future injury which is certain and assessable is taken into account in awarding damages.

Moreover, the victim of a fault must attempt to avoid aggravating the injury, as they will not be able to claim for damages that could have been avoided (s. 1479 C.C.Q.). In the context of Crown liability cases, this could mean that a plaintiff wishing to seek compensation for harm caused by a Crown action would have to take appropriate recourses²⁵⁶ to limit that harm. For example, a plaintiff in a situation similar to Frank Roncarelli's, whose liquor license had been revoked in bad faith²⁵⁷, would be expected to take appropriate legal action to cancel the decision to revoke his license, and in so doing, limit the damage done by this illegal decision²⁵⁸.

1479. A person who is bound to make reparation for an injury is not liable for any aggravation of the injury that the victim could have avoided.

Finally, punitive damages can sometimes be granted in civil liability cases, but only when the law provides that possibility. Punitive (also called exemplary) damages serve a different purpose than compensatory damage: as their name imply, punitive damages seek to reprimand the defendant, in the hope that the financial consequences brought on by the verdict will prevent future reproachable behaviour. Moreover, since judgements are public affairs, it is

²⁵⁵ *Supra* p. 83.

²⁵⁶ *Supra* p. 74.

²⁵⁷ *Roncarelli v. Duplessis*, *supra* note 18.

²⁵⁸ This can have an impact on the relevant delays for the plaintiff to seek an administrative redress to the Crown action.

sometimes hoped that punitive damage will act as a “chilling effect” of other subjects of law.

The amount of punitive damages that can be claimed is described in the *Civil Code of Québec*:

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose. Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the reparatory damages is wholly or partly assumed by a third person.

In the context of Crown liability, an author has proposed that exemplary damages should be typical rather than an afterthought. For example, in the context of legal abuses against the francophone population of Winnipeg in the 1970s :

City Council, in its arrogant disregard for the rule of the law, merits severe reprimand to censure its reprehensible conduct and to deter other public authorities from similar acts. Municipal councils, because of their close proximity to the community, have an endemic propensity towards bending the rules. For this reason, exemplary damages should probably be the first recourse in an action against a municipal authority, not a last afterthought²⁵⁹.

Section 3 Common Law Torts

Liability of the Crown in common law jurisdictions is adjudicated according to various sources of liability, known as torts. Suing the Crown in English Canada can take a number of different paths, and there exist a corresponding number of common law torts for dealing with various possible Crown wrongdoings. The first and most obvious is the tort of negligence (§1), which is used against private citizens and against the Crown alike (with a few alterations), but other common law torts also arose to address specific Crown behaviours, such as the the tort of misfeasance in public office (§2). Other torts exist, such as the tort of malicious prosecution, but will not be the object of specific analysis in this thesis.

²⁵⁹ Joseph E Magnet, “Administrative Delicts: A Case Study in Unlawful Municipal Administration” (1985) 16 RGD 153 at 163.

This multitude of recourses is a defining characteristic of the common law of torts, as opposed to Québec's unified extracontractual liability regime. These different common law recourses all have different constitutive elements that can account for different situations or claims against the Crown, whereas in Québec, the main regime of *fault-damages-causality* is meant to be adapted to all these different situations.

In the common law torts system, the concept of a public law immunity for “core policy decisions²⁶⁰” only applies to the tort of negligence. The “public law torts” of misfeasance in public office and of malicious prosecution were not meant to apply to the Crown as well as to private interests, like the tort of negligence was. Instead, they were built from the ground up exclusively to address Crown issues. These public law torts inherently require some form of bad faith or other difficult burden of evidence for the Crown to be held liable.

§ 1 The Tort of Negligence

The tort of negligence is the tort that applies by default when no other specific category of “intentional” tort applies, such as battery or, more appropriately for the Crown, misfeasance in public office.

As such, negligence is an unintentional tort that can recognise a duty to compensate for harm caused by one's negligent behaviour. The Supreme Court described negligence as: “[...] the failure to use the care a reasonable [person] would have exercised under the same or similar

²⁶⁰*Supra* p. 174.

circumstances²⁶¹”. More specifically, the core elements (or the burden of evidence) of this tort can be summarized as such²⁶²:

1. Does the defendant owe a duty of care to the plaintiff? In other words, “a defendant is not liable in negligence unless the law exacts an obligation in the circumstances to take reasonable care²⁶³”.
2. Did the defendant fail to meet the standard of care related to this duty of care?
3. What damages were caused to the plaintiff by this breach of the duty of care?

This tort ostensibly revolves around the establishment of a specific duty of care between a defendant (the negligent party) and a plaintiff (the victim of this negligence): “The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss of the plaintiff²⁶⁴”. Unlike civil law, there is no single universal duty not to cause harm through a fault, but rather a myriad of individual duties:

Civil lawyers beware: as Lord Atkin’s speech suggests, the common law does not recognize any general duty to take care. Rather, duties are imposed only in the context of specific relationships [...]. Here the libertarian underpinnings of the common law can be perceived: individual autonomy is prioritized over duties to others²⁶⁵.

To this end, the common law uses an objective test based on an abstract “reasonable person”:
Would a reasonable person have known that their action or inaction might have an impact on

²⁶¹ *Thompson v Fraser*, [1955] SCR 419 at 429.

²⁶² Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 221.

²⁶³ *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 par. 45.

²⁶⁴ *Peabody Fund v. Sir Lindsay Parkinson Ltd.* [1985] 1 A.C. 219, 240-241; see also Donald Galloway, “The Liability of Government: Just, or Just and Reasonable” (1991) 41 *Administrative Law Reports* 133 at 81.

²⁶⁵ Paul Daly, *Torts: Texts and cases* (Montréal: Éditions JFD, 2015) at 202.

the defendant? However, the common law does not allow the judge to adjust the reasonable person's behaviour according to the circumstances in which the actual defendant was placed:

It is also an error for the judge to tell the jury to 'put themselves in the place of a defendant in a negligence action' or to ask whether the defendant did what the jury would have done in the circumstances, or even what the judge would have done.²⁶⁶

[...]

Even if a person negligently causes loss to another, there may be no liability to that person if the actor owed no duty to avoid that harm. A person may be as negligent as he or she pleases toward the whole world if he or she owes no duty to them. The duty concept, which is unknown to the civil law, permits common law courts to restrain trial judges and juries from being overly generous to claimants. The concept of duty is a control device that enables courts, as a matter of law, to deny liability where reasons of policy make it appear desirable to do so²⁶⁷.

One of the main keys in deciding whether such a duty of care exists between the parties is the idea of "proximity" or "neighbourhood" (used here as synonyms), this latter term here being used in its biblical sense (such, "You shalt not covet your neighbour's wife...²⁶⁸"). These notions are not self-explanatory, however, and have received many interpretations in the hands of thousands of judges and jurists over time. It has been described as a "nexus or closeness that differentiates the plaintiff from the public as a whole"²⁶⁹.

The original concept of neighbourhood was defined when the tort of negligence itself was established in the foundational *Donoghue v Stevenson* case, where Mr. Stevenson fell ill after drinking a bottle of ginger beer – brewed by Mr. Donoghue – in which a dead snail was

²⁶⁶ Linden, *supra* note 235 at 106, par. 292, citing *Eyers v. Gillis & Warren Ltd* [1940], 4 D.L.R. 747 at 751 (Man. C.A.).

²⁶⁷ *Ibid* at 112 par. 304. In theory, the civilist regime can incorporate notions of previsibility and even of specific duty in the evaluation of a fault.

²⁶⁸ *The Bible*. Authorized King James Version, Oxford UP, 1998, Exodus 20:17.

²⁶⁹ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 232–233.

decomposing. Mr. Stevenson sued Donoghue in liability, but since none of the then-existing torts applied to this situation, the House of Lords created a new one:

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.²⁷⁰

The “lawyer’s question” to which Lord Atkins refers in the quote above is the one from the parable of the Good Samaritan, which Jesus used in answer to this lawyer’s question “And who is my neighbour?” whom Leviticus says should be loved²⁷¹.

Jesus answered, "A certain man was going down from Jerusalem to Jericho, and he fell among robbers, who both stripped him and beat him, and departed, leaving him half dead. By chance a certain priest was going down that way. When he saw him, he passed by on the other side. In the same way a Levite also, when he came to the place, and saw him, passed by on the other side. But a certain Samaritan, as he travelled, came where he was. When he saw him, he was moved with compassion, came to him, and bound up his wounds, pouring on oil and wine. He set him on his own animal, and brought him to an inn, and took care of him. On the next day, when he departed, he took out two denarii, and gave them to the host, and said to him, 'Take care of him. Whatever you spend beyond that, I will repay you when I return.' Now which of these three do you think seemed to be a neighbour to him who fell among the robbers?" He said, "He who showed mercy on him." Then Jesus said to him, "Go and do likewise."²⁷²

Although ideally the Crown should indeed love its subjects and act neighbourly towards them, according to the common law of negligence, the normal relationship between the Crown and its subject is not automatically considered sufficient to meet the criteria of neighbourhood

²⁷⁰ *Donoghue v Stevenson*, [1932] AC 562 at 580.

²⁷¹ *The Bible*, *supra* note 268, Leviticus 19:18.

²⁷² *Ibid*, Luke 10:25-37.

necessary to create a duty of care between them; in effect, the Crown may love its subject but is not, by default, considered sufficiently proximal to “[give] rise to an “obligation to be mindful of the plaintiff’s legitimate interests” while engaging in conduct that poses a risk of harm”²⁷³.

The common law is still trying to answer this new lawyer’s question: Considering the overarching powers of the government, who, then, is the Crown’s neighbour?

[76] There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, “the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions”: *Just*, at p. 1239. The challenge, to repeat, is to fashion a just and workable legal test.²⁷⁴

One famous attempt to describe how to determine whether a duty of care exists between the Crown and one of its subjects was made in the *Anns* case²⁷⁵. Lord Wilberforce built on the concept of neighbourhood and reformulated the duty of care test from *Donoghue* to add a second step regarding policy matters, which can negate a duty of care even where sufficient proximity exists²⁷⁶.

As discussed in Part I²⁷⁷, that second part of the *Anns* test marks the birth of the public law immunity for policy decisions in the United Kingdom; this test was incorporated in Canada later in the 20th century. With the *Anns* test, reasons of policy do not exactly confer an

²⁷³ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 232–233.

²⁷⁴ *R. v. Imperial Tobacco Canada Ltd.*, *supra* note 136, par. 76.

²⁷⁵ *Anns v Merton London Borough Council*, [1978] AC 728.

²⁷⁶ *Ibid* at 751–752.

²⁷⁷ *Supra* p. 148.

immunity upon the Crown. Where an immunity would protect the Crown from liability despite findings that it should otherwise be liable, reasons of policy with the *Anns* test effectively protect the Crown from liability by preventing the creation of a duty of care in the first place, without which there can be no liability: “Techniquement, la distinction politique/gestion ne fonde pas, en common law, une immunité de responsabilité, car la question de la responsabilité ne se soulève même pas lorsqu’il n’y a pas de *duty of care*²⁷⁸”. Another interesting difference with the policy immunity is that the *Anns* test does not allow for the Crown to be held liable despite the existence of a policy reason when the Crown’s decision was taken in bad faith. Reasons of policy targeted by the second step of the *Anns* test are, fundamentally, those with their roots not in the relationship between the Crown and the plaintiff, but in public interest:

10 If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general²⁷⁹.

The *Anns* test was eventually reformulated into its current state (the *Cooper/Anns* test) in *Cooper v. Hobart*²⁸⁰, in which the British Columbia Registrar of Mortgage Brokers waited too long before taking measures against a delinquent broker; one of the broker’s clients then sued the Registrar in negligence²⁸¹. There, the Supreme Court of Canada decided that the duty analysis was not necessary when a previous case already established a duty of care in a

²⁷⁸ Pierre-André Côté, “La détermination du domaine du droit civil en matière de responsabilité civile de l’Administration québécoise – Commentaire de l’arrêt Laurentide Motels” (1994) 28 *Revue Juridique Thémis* 414 at 425.

²⁷⁹ *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562, par. 10.

²⁸⁰ *Cooper v Hobart*, [2001] 3 SCR 537.

²⁸¹ See *infra* p. 164 for a fuller discussion of this case.

homologous context. If there is no such case, the judge then has to go through the multistage *Cooper/Anns* test for establishing a new duty of care, in which case the Supreme Court put the initial emphasis on proximity and foreseeability²⁸².

The difference between the tests for a duty of care in *Anns* and *Anns/Cooper* may seem minimal, but it is very real. It has been described as a “difference of emphasis”, where the emphasis went from the second part of the test (the policy/operational distinction) to the first (proximity and foreseeability), and therefore from reasons of public interest to reasons of private interests between the parties.

On the face of it, the *Cooper* approach is hardly revolutionary. It is little different from the framework adopted in *Anns v Merton London Borough Council* and widely followed in Canada thereafter. Both decisions speak of proximity and both deal also with policy immunity. The difference is one of emphasis. In *Anns* and the cases that followed it before *Cooper*, the emphasis was on the policy-operational immunity issue. In *Cooper* and the cases that follow it the emphasis has been on proximity. The question of policy immunity remains relevant after *Cooper*, but only at the second stage of the analysis. Rarely does immunity affect the outcome of the case once proximity is resolved. Sometimes the court does not even raise the immunity question at all.²⁸³

Another conceivable consequence of this shift in emphasis is that it displaces a greater proportion of the burden of proof onto the plaintiff, who is required to establish sufficient proximity and with it the existence of a duty of care. The Crown, as a defendant, sees its burden lessened, as there is less importance on it establishing the existence of a sufficient policy reason:

The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji*. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it²⁸⁴.

²⁸² Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 231.

²⁸³ Bruce Feldthusen, “Simplifying Canadian negligence actions against public authorities - or maybe not” (2012) 20 Tort L Rev 176 at 178.

²⁸⁴ *Childs v Desormeaux*, [2006] 1 SCR 643, par. 13.

The Supreme Court had to put these principles into application in the recent *Livent v. Deloitte* case. The Court proceeded to evaluate both proximity and foreseeability at the first step of the *Anns/Cooper* test in the context of a reliance relationship, and in so doing, identified two criteria for a finding of reasonable foreseeability:

[...] It follows that an injury to the plaintiff will be reasonably foreseeable if (1) the defendant should have reasonably foreseen that the plaintiff would rely on his or her representation; and (2) such reliance would, in the particular circumstances of the case, be reasonable (*Hercules*, at para. 27). Both the reasonableness and the reasonable foreseeability of the plaintiff's reliance will be determined by the relationship of proximity between the parties; a plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable.²⁸⁵

One could argue those two criteria would generally apply to the relationship between the Crown and its subjects²⁸⁶, but this theory of “general reliance” on the Crown is not the law in *English Canada*²⁸⁷ as of this writing.

In the second stage of the duty analysis, the Supreme Court stated that policy exceptions should be “narrowly [...] relied upon²⁸⁸”, since such exceptions involve denying a duty of care in the face of findings of both proximity and foreseeability. As an example of sufficient grounds for

²⁸⁵ *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 , par. 39.

²⁸⁶ *Childs v. Desormeaux*, *supra* note 284, par. 40: “Finally, there is a reasonable expectation on the part of the public that a person providing public services, often under licence, will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public”.

²⁸⁷ See *infra* p. 118 for how this theory could apply in Québec.

²⁸⁸ *Deloitte & Touche v. Livent Inc. (Receiver of)*, *supra* note 285, par. 41.

the policy exception, the Supreme Court mentioned policy decisions or quasi-judicial decisions by governmental bodies²⁸⁹.

The notion of neighbourhood specifically aims to individuate the relationship between the parties. It is particularly difficult to prove the existence of a private law duty of care between a private party and the Crown in the context of the exercise of the latter's public law powers in the public interest, especially when this public law power takes the shape of a general and impersonal decision. Such was the case in *Welbridge*: “the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care”²⁹⁰.

On the other hand, an individuated relationship between the Crown and a private party – and therefore a private duty of care – is easier to establish “[w]hen an agency induces a particular plaintiff to rely on its inspections, and when the plaintiff does rely on the inspections and reasonably alters his or her conduct because of that reliance²⁹¹”. According to the “specific detrimental reliance theory”, a public authority creates a private law duty of care in the benefit of a private party when it orchestrates a specific dependency from a private party towards the public authority:

The reliance issue is, I think, a central concept in the decision to impose a legal duty on the bureaucrat. It reflects the overriding corrective justice philosophy which operates in this area, in that it demands a bilateral relationship. The bureaucrat or bureaucracy assumes responsibility for a certain activity which creates a reciprocal sense of trust and dependence. More generally, we may be able to see a more general interest in compensating disappointed individuals whose

²⁸⁹ *Ibid*, par. 41.

²⁹⁰ *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra* note 133 at 969–970.

²⁹¹ *Woodall*, *supra* note 10 at 127.

expectations were created by a governmental, institutional arrangement, and who relied on that arrangement to protect their interest²⁹².

Once a duty of care has been properly established, the plaintiff must still demonstrate that the public authority breached the specific standard of care created by the applicable duty of care²⁹³. This can be a difficult thing to prove, especially when the alleged breach of duty involves a negative fact – or nonfeasance. Nonfeasance is distinguished from misfeasance in that it implies the lack of having done something that should have been done, whereas misfeasance implies a deliberate action that caused damages as a consequence. Not only is it difficult to present evidence of nonfeasance, this sort of behaviour further complicates the relationship between the duty of care and its breach and forces judges to require some “special link” between the plaintiffs to establish that the Crown should have acted in those specific circumstances²⁹⁴.

Another complication of the breach of a duty of care by nonfeasance on the part of the Crown is that the behaviour described by nonfeasance can be explained both by negligence in the carrying out of a policy and by a lax policy. This problem presented itself under different forms in various cases of extracontractual liability of the Crown, including *Laurentides Motels*²⁹⁵: were the damages caused by a failure to carry out inspections or by the lack of a policy setting

²⁹² David S Cohen, “The Public and Private Law Dimensions of the UFFI Problem: Part II” (1984) 8 Canadian Business Law Journal 410 at 434.

²⁹³ On the difference between the duty of care and the specific standard of care, see *Just v British Columbia*, [1989] 2 SCR 1228 at 1243–1244.

²⁹⁴ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 256.

²⁹⁵ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138.

out more numerous inspections? In the former case, how many inspections can the court reasonably decide were implicit within the decision to create a firefighting force?

In the case of an obviously dead tree, should it make any difference that the tree had not been removed because of negligence in the carrying out of inspections or a failure to have a system of inspection in place? Should the answer to that question further depend on whether the failure to have a system of inspection in place resulted from an explicit budget allocation decision or a failure to deploy workers for that purpose?²⁹⁶

To recap, as a recourse against the Crown, the tort of negligence hinges on the existence of an individualised relationship of neighbourhood between the Crown and the plaintiff; such a relationship having imposed upon the Crown a duty of care towards the plaintiff, this latter must then demonstrate that the Crown breached this duty either by act or by omission.

§ 2 The Tort of Abuse of Power and Misfeasance in Public Office

The tort of abuse of power and misfeasance in public office is meant to deal with situations of abuse of public authority by holders of such powers. It applies to harmful, unlawful and deliberate decisions; this latter criterion, in principle, ostensibly removes this tort from the scope of the tort of negligence.

The cases *McGillivray* and *Roncarelli* are sometimes used as early examples of this tort. In *McGillivray*²⁹⁷, a public authority had unlawfully revoked a pilot's licence in the absence of a statutory required complaint, and without the mandatory process involving notice, investigation or hearing. The Supreme Court concluded that the licensing authority had acted maliciously towards the pilot and so was liable for damages incurred as a consequence of their

²⁹⁶ Gus Van Harten, Gerald Heckman & David J Mullan, *Administrative Law: Cases, Text, and Material*, 6th ed (Toronto: Emond Montgomery Publications, 2010) at 1287.

²⁹⁷ *McGillivray v Kimber*, [1915] 52 SCR 146.

decision. As was previously established, in *Roncarelli*²⁹⁸ the then Premier of Québec, Maurice Duplessis, had ordered his liquor commissioner to revoke Mr. Roncarelli's license for the avowed reason that this restaurant owner had been paying bail for Jehovah's Witnesses. The Supreme Court condemned Duplessis to \$25,000 in damages on the grounds that he was acting maliciously, outside his official functions²⁹⁹. The tort of misfeasance entered mainstream contemporary Canadian tort law with the *Roncarelli* case³⁰⁰.

The purpose of this tort is mainly to recognize the duty of public officials to exercise their powers "only for the public good":

The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior or improper purposes³⁰¹.

The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty³⁰².

Of course, judicial review also exists as a limit on the arbitrary or harmful use of public powers³⁰³.

²⁹⁸ See *supra* p. 132 for a full discussion of this case.

²⁹⁹ It is worth noting that since the *Roncarelli* case originated from the province of Québec, it is doubtful whether it can truly be considered a point of origin for a common law tort; however, there is no denying that it constitutes a memorable example of abuse of power. Justice Iacobucci, noting this, went on to mention that this case is nonetheless regarded as having established the tort in Canada: see *Odhavji Estate v. Woodhouse*, *supra* note 263, par. 19.

³⁰⁰ Linden, *supra* note 235 at 144 par. 375.

³⁰¹ *Three Rivers District Council v Bank of England (No 3)*, [2000] 2 WLR 1220; cited in *Odhavji Estate v. Woodhouse*, *supra* note 263, par. 26.

³⁰² *Garrett v Attorney-General*, [1997] 2 NZLR 332 at 350; cited in *Odhavji Estate v. Woodhouse*, *supra* note 263, par. 26.

³⁰³ *Supra*, p. 74.

After all, public officials are not granted free reign to exercise their administrative powers for whatever purpose; these powers are not granted to them at all but are rather exercised through their authorised agency.

The constitutive elements of this tort include the following:

- (1) the public official must exercise public functions;
- (2) the public official must act unlawfully;
- (3) the state of mind of the public official must involve intentional wrongdoing;
- (4) the unlawful act must cause the plaintiff damages; and
- (5) the measure of damages.³⁰⁴

The first element is to establish that the public official was exercising public functions. What this element refers to is the ordinary or extraordinary nature of the power exercised; in essence, whether the function exercised was of public or private nature. For this element courts seem to refer intuitively to the officially-abandoned functions test³⁰⁵.

The second element is to prove that the public official was acting unlawfully. This includes:

- the abuse of a power that the public officer actually has,
- *ultra vires* acts committed while in office,
- acts committed outside of the defined bounds of the power conferred upon the official,
- and
- actions carried out in bad faith.

³⁰⁴ Harry Wruck, “The Continuing Evolution of the Tort of Misfeasance in Public Office” (2008) 41 UBCL Rev 69–100 at 76; see also Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 197.

³⁰⁵ Patrice Garant & Gilles Leclerc, “La qualité d’agent de la Couronne ou de mandataire du gouvernement” (1979) 20 C de D 485.

Acting unlawfully includes the unlawful accomplishments of powers that the public official does possess and of those he does not.

It is not necessary to prove that the public officer abused a power specifically granted to him by statute or prerogative; the abuse of any sort of public power (or of any power for a seemingly public purpose) can meet the criteria for the tort³⁰⁶. For example, taking for granted that *Roncarelli* is effectively an example of the tort of abuse of power, Maurice Duplessis obviously did not have the power to deny a licence, yet he was found to have abused his public power. This test of “unlawfulness” appears effectively borrowed from the administrative law test of judicial review³⁰⁷:

The test for unlawfulness is, as Lord Hobhouse pointed out in *Three Rivers*, “the same as or similar to that used in judicial review.” However, Lord Hobhouse expanded the meaning of unlawful act to include any act contrary to law. It could also include, for example, tortious acts and breaches of contract.³⁰⁸

It is worth mentioning that the unlawful action can include positive actions as well as passive omissions (such as a failure to act, or to carry out a statutory duty): “the tort can be constituted by an omission by a public officer as well as by acts on his part³⁰⁹”, so long as the other elements of the tort are met, including the element of intentionality. Moreover, it is interesting that the Crown is the one liable for such unlawful action despite the fact that the public official – the Crown’s servant – was acting without authority and without authorisation³¹⁰.

³⁰⁶ *Odhavji Estate v. Woodhouse*, *supra* note 263, par. 19.

³⁰⁷ *Supra* p. 67.

³⁰⁸ Wruck, *supra* note 305 at 78.

³⁰⁹ *Three Rivers District Council v. Bank of England (No. 3)*, *supra* note 302 at 1267; cited in *Odhavji Estate v. Woodhouse*, *supra* note 263, par. 21.

³¹⁰ *Racz v Home Office*, [1994] 2 AC 45.

The third and final element specific to the tort of misfeasance in public office is that of intentionality – the public official must either be trying to cause harm or act in such a way that harm is likely, knowing that he has no authority to do so³¹¹.

This element of intentionality serves to establish the bad faith, or malice, of the public official. This implies that not only must his action be unlawful, the public official must have known that he was acting unlawfully or have acted with the intention of injuring the plaintiff. This latter intention would, in principle, make the action unlawful in itself, since no public power is created for the purpose of causing harm to a specific individual³¹².

By having this element of intentionality built directly into its core, the tort of misfeasance in public office eschews the complexity associated with the policy immunity (the *Anns* test) used in the context of the tort of negligence. In effect, the tort of misfeasance in public office always necessitates proof of bad faith, and the immunity is therefore unnecessary. Indeed, the immunity is not used in conjunction with this tort, since doing so would be asking for a redundant proof – once bad faith has been established in a case, it is unnecessary to ask for it to be established again.

Moreover, unlike the tort of negligence, this tort does not require the plaintiff to establish some sort of duty of care from the public official towards them. Instead, it is presumed that public

³¹¹ *Odhavji Estate v. Woodhouse*, *supra* note 263, par. 22.

³¹² Stephen Simblet, “Abuse of Power and Vicarious Liability” (1994) *Cambridge Law Journal* 430–433 at 432.

powers need to be exercised in accordance with the public interest. Public officials have an inherent duty not to cause deliberate harm through the use of their extraordinary powers. Of course, in a case of misfeasance by way of omission or of failure to act by the public official, a plaintiff would still need to establish the necessity to act or that it was unlawful not to act in the circumstances, in effect establishing a more particularised duty for each case. In such a case, the plaintiff would have a heavy burden of demonstrating the subjective awareness of this unlawfulness by the public official, since it would be insufficient to prove that the public official “ought to have known” that such omission would cause damages³¹³.

For the same reasons, since it is not necessary to establish the existence of a duty of care, the tort of misfeasance in public office does not require evidence of proximity or neighbourhood, rendering the *Anns* test superfluous in this context. Again, it seems that such a relationship is presumed or otherwise integrated in the tort of misfeasance in public office

However, since this tort requires that members of the judiciary give judgement on administrative actions, courts recognize their duty to try to avoid overstepping their own powers³¹⁴:

[2] But for reasons that are perhaps obvious, the tort must be used cautiously. Otherwise, the courts risk straying into the arena of political decision-making, bypassing the normal restraints associated with judicial review, and becoming the arbiters of the personal thought processes of public officials. [...] To avoid dangers of this kind, a balance must be sought between curbing unlawful behaviour on the part of governmental officials on the one hand, and on the other, protecting officials who are charged with making decisions for the public good, from unmeritorious claims by persons adversely affected by such decisions.³¹⁵

³¹³ *Odhavji Estate v. Woodhouse*, *supra* note 263, par. 38.

³¹⁴ *Wruck*, *supra* note 305 at 75.

³¹⁵ *Powder Mountain Resorts Ltd v British Columbia*, 2001 BCCA 619, par. 2.

This cautionary note, as real as the risks are, does not need to be included as an additional element within the tort. The common law expects judges to know they have to be careful with this balancing of the separation of powers, and this weighing of public versus private interest (where it is necessary) is instead considered to be part of the spirit of the tort.

Section 4 Significant Points of Comparison Between Common Law and Civil Law

The previous sections have described significantly different methods for establishing whether someone has a duty to compensate another for the harm caused by their action. Both these methods are legitimate in their respective jurisdictions and evidently work to establish a reliable and satisfying justice system. When it comes to civil liability of the Crown, however, the differences between these systems make it difficult to consistently apply the same rules across jurisdictions. This section will examine some of these differences.

The most important difference is that Québec does not apply different conceptual frameworks to different causes of actions, or torts. Québec knows only one tort, as defined by article 1457 C.C.Q. This general cause of action groups together all sources of liability, including misfeasance and nonfeasance (or negligence). This lack of distinction between deliberate causes of action and those based on omissions or negligence can be explained by the fact that article 1457 C.C.Q. effectively creates a single, general duty to everyone in Québec “to abide by the rules of conduct incumbent on [them], according to the circumstances, usage or law, so as not to cause injury to another”. If circumstances, usage, or law calls on a subject of the law to refrain from taking action, they must do nothing. If circumstances, usage, or law calls on a subject of the law to act in order to prevent an injury, they must act. The *jus commune* of

Québec makes no distinction between misfeasance and nonfeasance and applies equally to both. By virtue of article 1376 C.C.Q., the Crown is a subject of the law and is subject to that same duty, unless some other rule of public law prevents it or changes this duty. This means that the Crown in Québec always has a duty of care towards its citizens, the same way that every citizen has a duty of care towards other citizens. This makes Québec jurisprudence in this matter unusable as precedent in similar common law cases:

Both cases, in my view, provide little assistance in deciding the present appeal. There is no question that Lacombe and Jauvin provide some support for the proposition that police officers owe suspects a duty of care. However, three things are worth noting in this regard. First, in both Jauvin and Lacombe the duty owed arises primarily out of the codified provision in art. 1457 of the Civil Code of Québec. Thus, while interesting, neither case directly supports the proposition that police should owe suspects a common law duty of care. [...] ³¹⁶.

In Québec, the question is not whether a party owed a duty of care to another – they did – but whether the impugned action constituted a “fault”, or in other words, whether the action did breach the duty of care that applied in the circumstances. To ensure that justice is served under a unique cause of action, this standard of fault is extremely flexible³¹⁷ and allows the court to tailor the exact standard applicable to a defendant depending on the subjective circumstances of the case.

A significant consequence of the general duty of care in Québec is that proximity is not a directly relevant legal concept in Québec. Evidence related to proximity will be considered relevant by the court if it constitutes a circumstance that can help determine the standard of fault in a particular case. Even when proximity is a relevant issue in a case, it would not be used to determine whether the defendant owed a duty to the plaintiff, but rather whether a

³¹⁶ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236, par. 186.

³¹⁷ *Infra* p. 237.

reasonable person placed in the same circumstances would have acted differently considering the lack of proximity.

More consequently in the context of liability of the Crown, the Québec liability regime does not distinguish between various causes of actions (other than contractual versus extracontractual³¹⁸), whereas the common law not only differentiates various categories of behaviours (such as assault, negligence, or abuse of power and misfeasance in public office) but accepts that new categories may be created when necessary. This means that certain common law tools may be difficult to directly import from the common law to Québec, especially when such tools are limited to one such category of wrongful behaviour:

En effet la *common law* publique, bien qu'elle ait indubitablement importé en droit canadien et québécois la distinction politique-opérationnel et ses conséquences sur le régime de responsabilité extracontractuelle d'une autorité publique, ne fait pas de cette distinction un usage universel. La dichotomie politique-opérationnel a été conçue par la *common law* publique et ne s'y applique que dans le cadre du *tort* de *negligence*, où la distinction a facilité l'imposition, à l'Administration, d'une obligation de diligence (*duty to care*). Peut-être faut-il rappeler que les *torts* de la *common law* privée ne reposent pas, contrairement à la responsabilité extracontractuelle de notre droit civil québécois, sur un axiome aussi vaste et souple que celui de la faute génératrice de dommages³¹⁹.

The general duty of care in Québec also entails that all subjects of the law can generally rely on others to conform to their own duty to abide by the rules of conduct applicable to them so as not to cause harm. Since article 1376 C.C.Q. provides that this general duty applies to the Crown unless some public law exception prevents it, this means that the Crown's subjects in Québec can have an expectation of general reliance on the Crown to abide by that duty.

³¹⁸ Articles 1457 and 1458 C.C.Q.

³¹⁹ Jean-Denis Archambault, "Les sources juridiques des immunités civiles et de la responsabilité extra-contractuelle du procureur général à raison d'accusations pénales erronées: le mixte et le mêlé" (1999) 59:1 R du B 59 at 82; See also Jean-Denis Archambault, *supra* note 17 at 1.

Therefore, in a case like *Rothfield*, the question would likewise not have been whether the plaintiffs were entitled to rely on the municipality to enforce its bylaws and to ensure of safety of buildings³²⁰, but rather whether the inspector enacting those bylaws met the standard of the reasonable person placed in the same circumstances when he failed to see from the specifications that the project was inadequately designed³²¹.

These characteristics of the Québec regime of extracontractual liability defuse the debate surrounding liability of the Crown and unique public duties in this province. This argument is questioning whether there should exist (in common law provinces) duties of care specific to the Crown: “once a public defendant begins to exercise a discretionary power, it then comes under a duty to exercise the power with reasonable care³²²”. According to the public duties of care theory, this ends up imposing additional duties upon the Crown when compared to ordinary citizens, for whom there is no duty and for whom it is certainly not a fault not to provide gratuitous services:

Once a public defendant begins to exercise a discretionary power, it then comes under a duty to exercise the power with reasonable care. This is a unique public duty. The idea that a Good *Private* Samaritan should incur legal responsibilities simply by beginning to offer a benefit, while one who does nothing would not, has never been established in private party negligence law, except in the case of professionals like doctors and lawyers³²³

³²⁰ *Rothfield v Manolakos*, [1989] 2 SCR 1259 at 1268.

³²¹ *Ibid* at 1270.

³²² *10 Reasons to Reject Unique Public Duties of Care in Negligence*, Ottawa Faculty of Law Research Paper No 2017-22, by Bruce Feldthusen, papers.ssrn.com, Ottawa Faculty of Law Research Paper No 2017-22 ID 2973896 (Ottawa: University of Ottawa, 2017) at 3.

³²³ Bruce Feldthusen, “Bungled Police Emergency Calls and the Problems with Unique Duties of Care” (2017) 68 *University of New Brunswick Law Journal*, 169 at 190.

This way of assessing duties does not translate in the Québec extracontractual liability regime because of the general duty of care created by article 1457 C.C.Q. By virtue of this general duty, in Québec there is nothing wrong or shocking with the idea of a “private Samaritan” incurring legal liability for having offered a benefit, provided their actions are faults³²⁴.

Moreover, the unique public duty approach is premised on the historical immunity the Crown enjoyed from all suits; since no statute has been enacted to repeal this common law immunity, the Crown has therefore not accepted to be bound by all manner of private law³²⁵. This thesis instead relies on the perceived change in Canadian common law, based on the lack of mention of such broad immunity in Supreme Court jurisprudence over the past several decades, to the effect that the Crown no longer benefits from such immunity, but that instead questions of liability of the Crown must be answered in a context coherent with the separation of powers. Moreover, such broad immunity threatens any attempt at harmonization between the law in Québec and in the rest of Canada, since it has long been recognized that the Crown has no such immunity in Québec³²⁶.

Chapter 2 Immunities as a Form of Deference in Private Law

Because the Crown can exercise extraordinary powers, it is not always possible to apply to it the ordinary rules of extracontractual liability without making adjustments. For example, can

³²⁴ For example, in *BNP Paribas (Canada) c Ikea Property Ltd*, 2005 QCCA 297, the Québec Court of Appeal considered that a bank was liable for the incorrect information that it volunteered to the plaintiff.

³²⁵ Feldthusen, *supra* note 101 at 975.

³²⁶ *The King v Cliche*, [1935] SCR 561.

traditional rules of extracontractual liability apply to the Crown when it is exercising discretionary powers, prerogative powers, or regulatory powers?

The current paradigm in Québec and in common law jurisdictions is that the law of the land should apply to the Crown as long as it is not exercising policy powers, in which case the Crown may only be liable if it acted in bad faith. This chapter will first present a historical overview of solutions proposed by the courts (Section 1) to account for deference in extracontractual liability, which resulted in the evolution of immunities as we know them today (Section 2). Finally, it will conclude with an analysis of the impact of immunities on cases in Québec as well as in common law jurisdictions. This mechanical analysis will pave the way for the next chapter, which will argue that the civil law notion of fault is better situated than immunities to take deference into account.

Section 1 History of Solutions in Extracontractual Liability

Should the Crown be bound by the same rules it enforces towards its subjects, and if so, when and how? This question has been at the forefront of discussions around liability of the Crown for decades. Different solutions have been suggested and temporarily accepted, to be replaced a few years or a few centuries later as ideas evolved and culture changed. Our cultural understanding of the Crown and of its mission is also continually fluctuating, which in turn feeds into our legal formula for determining its liability. This is why this thesis will not ultimately claim that a specific iteration of that formula is objectively best, but merely that one such iteration is more appropriate in a given geographical and historical context.

The history of the current immunity for policy actions by the Crown is effectively the history of a quest by the common law (and therefore led by the judiciary) to reconcile principles of ordinary justice for individuals and the idea of equality with the acknowledged necessity that the Crown needs extraordinary leeway for the use of its extraordinary powers.

This story is shaped in great part by two different problems that courts had to struggle with. The first is the substantive difficulty of making the Crown accountable for the use of its extraordinary powers, and the second is the procedural matter of holding the Crown accountable despite its considerable political power. Those problems were often intertwined as courts strove for ideal fairness towards private parties while maintaining sufficient deference towards Crown action.

As a result of this evolution, in Québec and Canada (unlike in France and elsewhere in continental Europe where special regimes have been instituted), liability of the Crown is treated roughly the same way as that of a private individual, with various built-in exceptions to account for the extraordinary nature of the Crown.

§ 1 The King Can Do No Wrong

The history of Crown privileges with regards to extracontractual liability in Québec and in Canada begins with early English law. As the ultimate bearer of all executive power, the Crown once held much more concentrated and unchecked power than it does now. The King of England had the duty and divine right of governing England, then Great Britain, then the Kingdom of Great Britain and Ireland, and then the Commonwealth. In order to fulfill this

duty, he benefitted from a sort of absolute immunity protecting him from the legal repercussions of his actions. As summarized by Justice L'Heureux-Dubé:

Similarly, I shall touch only briefly on the question of the immunity of public bodies, which is the basis of the immunity applicable to public corporations. This immunity has its origins in the maxim "The King can do no wrong" at a period when all power resided in the monarch. The consequence of recognizing the rule of law as a check on the acts of government officials has brought about the erosion of the principle of the Crown's absolute immunity. It is now recognized that the state is subject to supervision of the legality of its acts and to extra-contractual liability to compensate for its wrongful acts³²⁷.

This absolute immunity manifested itself under various forms in English law: the institutional matter of whom holds authority over the King, and the more substantive matter of actually recognizing whether the King had made a mistake. Of course, as long as the law and the courts were of the opinion that no one had authority over the King, the substantive matter was irrelevant.

The judicial system slowly evolved in England from a feudal court structure, where a Lord had competence over his subjects. By definition, the King had no (mortal) lord over him and could not be tried in his own court as he could not be his own subject³²⁸. Interestingly, it was actually possible in the Middle Ages to obtain remedy against certain actions of the King. Since the King was source of all justice, he was endowed with the power to answer to legitimate demands of his subjects and could accept to offer reparation. Though the King could not conceivably authorise a *writ* against himself, he could ask a special commission to first verify the

³²⁷ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138 at 787.

³²⁸ André Braën, "La responsabilité du Monarque: Du nid de poule à Walkerton" (2002) 32 RGD 617.

allegations against himself and then, if necessary, authorise the *writ* and submit the matter to common law courts³²⁹.

Eventually, “‘The King hath no lord but God’ became ‘the King can do no wrong’, and it was in terms of that maxim that Crown immunity was recognised in *M. v. Home Office*³³⁰ by Lords Templeman and Woolf³³¹”. Some form of liability remained, however: as the expanding English government received increased powers from Parliament, those powers were often given directly to the King’s ministers or servants who did not benefit from such immunity themselves and could be personally sued for torts³³².

In 1860, the English Parliament adopted the *Petition of Right Act*³³³ to simplify the process of obtaining certain remedies against the Crown, specifically in matters of contractual damages and of real or personal property (but not tortious liability such as negligence, where the immunity was maintained³³⁴). This meant that the Crown no longer had a special immunity protecting it from money awards, unlike the protection it enjoyed against, for example, injunctions³³⁵; procedurally speaking, it was recognized as early as 1874 that the petition of

³²⁹ Dussault & Borgeat, *supra* note 115 at 706ss and references.

³³⁰ *M v Home Office*, [1994] 1 AC 377.

³³¹ William Wade, “Chapter 2 - The Crown, Ministers and Officials: Legal Status and Liability” in *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) 23 at 24–25.

³³² *Ibid* at 26.

³³³ 1860 (UK), 23 & 24 Vict., c. 34.

³³⁴ See *The Queen v McFarlane*, [1882] 7 SCR 216 at 231, where the Supreme Court decided that “Therefore, deriving his powers from a statute and not because they are given to him by the Crown, Her Majesty cannot be made responsible by petition of right for the improper exercise of those powers”.

³³⁵ Still today, it is generally impossible to obtain a remedy to do something (or abstain from doing something) against the Crown, though exceptions exist.

rights could be used to claim for damages³³⁶. The remaining protection insulating the Crown from negligence claims instead stemmed from the more substantive view that the Crown could not, by definition, commit a tort or a fault. In other words, the Crown could not be sued for negligence because, by definition, ‘The King Can Do No Wrong’.

Such was the state of the law in 1867 at the signing of the first *British North America Act*³³⁷: no private action could be brought against the Crown³³⁸. Still today, Professor Hogg maintains that “[t]he common law rule is that the Crown cannot be sued in any court³³⁹”. The Petition of Right remains, by default, the rule across Canada where it has not been replaced. It has however been decided (albeit in more modern times) that the lieutenant governor’s power to issue or refuse a *fiat* allowing such a petition of right is subject to the rule of law and as such cannot be exercised arbitrarily³⁴⁰.

This rule can be changed by statute, which is what has happened in every province. As early as 1870, the Canadian Parliament started carving out exceptions: the *Act to extend the powers of the Official Arbitrators, to certain cases therein mentioned*³⁴¹ set out a mechanism allowing for claims against the Crown in the case of damages caused by the construction, repair, upkeep

³³⁶ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 32.

³³⁷ 1867 (UK) 30 & 31 Victoria, c. 3

³³⁸ David Cohen & JC Smith, “Entitlement and the Body Politic: Rethinking Negligence in Public Law” (1986) 64:1 Can Bar R 1–57 at 2 and references cited in note 1.

³³⁹ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 485.

³⁴⁰ *Air Canada v. B.C. (A.G.)*, *supra* note 80; There would in fact be a duty for the Lieutenant-Governor to issue the required fiat unless the recourse is futile: *Rykes v Duke of Wellington*, [1846] 9 Beav 579; *In re Nathan*, [1884] 12 QBD 461 at 479.

³⁴¹ S.C. 1870, ch. 23, s. 1

or use of a public structure³⁴². Understandably, a rigid rule such as ‘The King Can Do No Wrong’ does not reflect earthly justice in every situation.

There is an important exception to the general rule of “The King Can Do No Wrong”. The Crown of Québec, according to Hogg, “has never been immune” from extracontractual liability lawsuits³⁴³. Although the Petition of Rights Act would seem to apply to this province as to any other, the Supreme Court decided otherwise in *The King v. Cliche*³⁴⁴. The facts of this case occurred in 1931: an unlit steamroller belonging to the roads department of the province got involved in a road accident with the plaintiff, Joseph Cliche. The Court had to examine article 1011 of the existing *Code of Civil Procedure*³⁴⁵, and concluded that it was similar to other clauses in English law that had been construed to overrule the absolute immunity of the Crown.

To come to this conclusion in the *Cliche* case, the Supreme Court drew inspiration from a statute, the *Crown Suites Ordinance*, which also included a clause allowing the Crown to be sued for negligence. The Privy Council’s decision in *Wemyss*, interpreting this clause, seems to take into account the hazy nature and shifting responsibilities of the Crown, especially in the New World:

Their Lordships are of opinion that the expression claim against the Crown for damages or compensation is an apt expression to include claims arising out of torts and that as claims arising

³⁴² For a more complete overview of early Canadian statutes regarding Crown liability, see Roger Tassé, “Les relations entre l’État et le citoyen: évolution historique, situation actuelle et à venir” (1985) 16 *Revue générale de droit* 5–12.

³⁴³ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 158.

³⁴⁴ *The King v. Cliche*, *supra* note 327.

³⁴⁵ 46 Vict. (1883), c. 27. This section read: Any person having a claim to exercise against the government of this province, whether it be a revendication of moveable or immoveable property, or a claim for payment of money on an alleged contract, or for damages, or otherwise, may address his petition of right to His Majesty.

out of contracts and other classes of claims are expressly mentioned the words ought to receive their full meaning.

In the case of *Farnell v. Bowman* attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which in England are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses³⁴⁶.

In addition to the wording of the *Code of Civil Procedure*, the Supreme Court's decision in *Cliche* included an *obiter dictum* stating that even without the authority of the Privy Council in *Wemyss*, it would have come to the same conclusion based solely on the customs of the Province of Québec:

D'ailleurs, même sans cette autorité [*Wemyss*], nous croirions devoir suivre la coutume acceptée depuis un grand nombre d'années dans la province de Québec et interpréter cet article 1011 C.P.C. comme créant un droit d'action contre la Couronne dans les cas de délits et de quasi-délits en suivant les formalités de la pétition de droit³⁴⁷.

As the size and areas of intervention of the Crown grew, the idea that the Crown could not conceivably be held liable for damages it causes became increasingly unpopular, and more jurisdictions across Canada started following Québec's example to formally repeal the King's absolute immunity.

§ 2 Crown Servants and Designated Defendant

Crown servants and ministers, being apart from the King, could still be held liable for certain executive actions. In Canada, a first bill was passed in 1887 to allow particular claims in

³⁴⁶ *Attorney-General of the Straits Settlements v Wemyss*, [1888] 13 Appellate Cases 192 at 197.

³⁴⁷ *The King v. Cliche*, *supra* note 327 at 565.

damages against the Crown for the negligence of Crown servants³⁴⁸. The doctrine of designated defendant was eventually elaborated to allow the Crown to ask one of its servants to stand in as defendant in a suit so that a plaintiff could seek compensation.

Even before then, torts other than negligence could make Crown servants liable where the Crown itself was immune. A famous English case on the matter is *Entick v Carrington*³⁴⁹, where the defendant Nathan Carrington and his men broke into John Entick's house to search his private papers, prying open locks and bars in so doing. They took away 100 charts and 100 pamphlets related to "very seditious papers, *The Monitor, or British Freeholder*", causing £2000 of damage in the process. Entick sued Carrington for trespass, and the latter claimed as a defense that he was acting under orders from Lord Halifax (the Secretary of State for the Northern Department) and so had authority. The presiding judge, Lord Camden, held that Halifax had no right, by statute or precedent, to issue such warrant, and that he could not act where he had no right:

In that case, the Court of King's Bench ultimately held the juror's decision to condemn Carrington (Lord Halifax's messenger) to pay damages to Entick because the authority upon which he was acting (Lord Halifax's warrant) was found unlawful. Though Carrington was clearly acting in his stead as Lord Halifax's messenger, it appears that Lord Halifax, who was not a defendant in the suit, was not condemned to pay any damages.

³⁴⁸ Act to amend "The Supreme and Exchequer Courts Act", and to make better provision for the Trial of Claims against the Crown, S.C. 1887, c. 16. See Dussault & Borgeat, *supra* note 115 at 730–731.

³⁴⁹ *Entick v Carrington*, [1765] EWHC J98.

A similar case happened in Canada nearly 200 years later and was decided roughly on the same basis: In *Chaput v. Romain*³⁵⁰, police officers, without a warrant, broke up an orderly religious meeting of Jehovah's witnesses that was conducted in plaintiff Chaput's house. The police also seized various items (books and booklets), which were never returned, but did not lay any charge against the participants. The Supreme Court allowed Chaput's appeal and condemned the police officers to pay moral damages of 2000\$. Despite a variety of concurring opinions, all judges agreed that the officers' action was illegal (if not criminal) and that they were not immune from suit by any statutory provision. Moreover, the Supreme Court relied on the concept of good faith in its decision: all judges considered that the police officers were not acting in good faith when they seized the items and otherwise disrupted the meeting:

La bonne foi, c'est en quelques mots un état d'esprit consistant à croire par erreur que l'on agit conformément au droit, et dont la loi tient compte pour protéger l'intéressé contre les conséquences de l'irrégularité de son acte. Il se peut bien, mais il est permis d'en douter, qu'au début il y ait eu chez les intimés une apparence *de bonne foi*, mais je ne puis croire à la possibilité de sa persistance, si elle a jamais existé. Il me semble en effet inexplicable qu'un officier public investi d'assez graves responsabilités, et à qui incombe le devoir, non pas de remplir un rôle de persécuteur, mais bien d'appliquer les lois du pays, ne se soit pas aperçu quand il est arrivé sur les lieux, que tout se passait dans la plus stricte légalité. La situation eut peut-être été différente s'ils eussent été les porteurs d'un mandat, mais ici, Chartrand, instigateur de cette malheureuse randonnée, ne pouvait pas ne pas constater, comme ses compagnons d'ailleurs, qu'ils avaient commis une erreur, et c'était une négligence engendrant une faute que de persister comme ils l'ont fait, malgré la constatation évidente de l'absence de toute illégalité, à saisir les pamphlets et à ordonner l'expulsion des gens que le demandeur avait légitimement conviés dans sa demeure. Ils ont posé un acte fautif, et ils doivent en subir les conséquences. Certainement, ils ne peuvent être absous. Ils n'avaient aucune justification de disperser cette paisible assemblée³⁵¹.

The *Chaput* case established a distinction between the legality of a public official's action and its civil responsibility towards private parties; the latter could only exist where the public

³⁵⁰ *Chaput v. Romain*, *supra* note 205.

³⁵¹ *Ibid* at 844–845.

official had not acted in *good faith*, which is to say that he was acting himself as a private party and not as the Crown.

Even the prime minister could be distinguished in his role as the Crown and as a private party. In the *Roncarelli*³⁵² case, Maurice Duplessis, Premier of Québec during the mid-20th century (1936-1939; 1944-1959), had ordered the Commissaire aux Liqueurs to revoke the liquor license of Frank Roncarelli because the latter had taken the habit of paying the bail of Jehovah's Witnesses who had been arrested for distributing tracts, something that was prohibited by Montreal by-laws. The Supreme Court had to decide, among other things, whether the then-Premier could be held liable for the damages suffered by Mr. Roncarelli as a result of this decision.

Justices Locke and Martland and Chief Justice Kerwin considered that Duplessis's action constituted a fault in Québec civil law and, since this action was *ultra vires*, the Premier could not invoke any immunity and was personally responsible. Interestingly, these judges make no mention of good or bad faith in this analysis:

Similarly here there was nothing on which the respondent could found the belief that he was entitled to deprive the appellant of his liquor permit.

On the issue of liability, I have, for the foregoing reasons, reached the conclusion that the respondent, by acts not justifiable in law, wrongfully caused the cancellation of the appellant's permit and thus cause damage to the appellant. The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justification, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the *Civil Code*.³⁵³

³⁵² *Roncarelli v. Duplessis*, *supra* note 18.

³⁵³ *Roncarelli v. Duplessis*, *supra* note 18 at 159.

For their parts, Justices Rand and Judson, in a concurring opinion, considered that the way in which Duplessis exercised his discretion was beyond the scope of the powers conferred by the *Alcoholic Liquor Act* – in fact, they called it “a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute³⁵⁴”. They held Duplessis liable for his action, since his actions were not merely illegal but also constituted a fault under article 1053 of the *Civil Code of Lower Canada*:

The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas*, and under art. 1053 of the *Civil Code*. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure³⁵⁵.

Justice Rand also offered a large interpretation of the concept of good faith:

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.³⁵⁶

According to Justice Rand, Duplessis could not invoke the immunity of article 88 of the *Code of Civil Procedure* since “the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity³⁵⁷”.

Justice Abbott, also concurring, thought that a public officer should be held liable for actions they take without legal justification, even when acting under their interpretation of the best

³⁵⁴ *Ibid* at 141.

³⁵⁵ *Ibid* at 142.

³⁵⁶ *Ibid* at 143.

³⁵⁷ *Ibid* at 144.

interest of the province: “[Duplessis] was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority³⁵⁸”. For Justice Abbott, the fact that Duplessis acted illegally could be the basis for liability: “[Duplessis] is therefore liable under article 1053 of the *Civil Code* for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority³⁵⁹”. As to the immunity conferred by article 88 of the *Code of Civil Procedure*, Justice Abbott considered that Duplessis did not have reasonable grounds to believe he was acting within authority, and therefore was necessarily acting outside the exercise of his functions³⁶⁰.

Justice Taschereau (dissenting) applied the immunity conferred by article 88 of the *Code of Civil Procedure* (as it existed then) because he considered Duplessis to be acting within the scope of his functions. Justice Taschereau noted that Duplessis “n’a pas agi *en sa qualité personnelle*³⁶¹”, but rather as a protector of the peace in the form of the provincial Attorney-General. Even an error committed by a public official would not strip him of the fact that he was acting in the performance of his duties. Since the Premier was acting as such, he should have benefited from the protection of article 88 of the *Code of Civil Procedure*.

Justice Cartwright (dissenting) thought the cancellation of the liquor license was not an actionable wrong since Duplessis was undoubtedly acting in the “honest belief” that he was

³⁵⁸ *Ibid* at 185.

³⁵⁹ *Ibid*.

³⁶⁰ *Ibid* at 186.

³⁶¹ *Ibid* at 130, italicised in the original.

fulfilling his duty to the province³⁶². Moreover, he believed that the Commission des liqueurs's power to cancel a permit was "unfettered³⁶³" and administrative in nature; in consequence, the Commission could do as it pleased with Mr. Roncarelli's license and its decision, since legal, could not constitute a fault. For these reasons, Justice Cartwright found it unnecessary to examine the impact of the immunity conferred by article 88 of the *Code of Civil Procedure*³⁶⁴.

Finally, Justice Fauteux, dissenting, would have rejected Roncarelli's claim for a more technical reason. He thought, like the majority judges, that the Commission des liqueurs had no right to abdicate its discretion the way it did, that the cancellation of the license was illegal, and that Roncarelli could be entitled to damages under article 1053 of the *Civil Code of Lower Canada*. However, since Roncarelli did not give the early notice required by article 88 of the *Code of Civil Procedure* (regarding actions against public officials acting in the performance of their duties), Fauteux considered the matter moot. Fauteux considered that even though Duplessis's action was illegal³⁶⁵, this illegality did not constitute a fault according to article 1053 of the *Civil Code of Lower Canada*: Duplessis had acted in good faith, in the sense that he was acting in the firm and honest belief that he was fulfilling his public duty:

Il a fait ce qu'il n'avait pas le droit de faire, fermement et sincèrement convaincu, a-t-il affirmé sous serment, que non seulement il en avait le droit, mais qu'il y était tenu pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalité. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions. Sa bonne foi n'a pas été mise en doute...³⁶⁶

³⁶² *Ibid* at 164.

³⁶³ *Ibid* at 167.

³⁶⁴ *Ibid* at 170.

³⁶⁵ *Ibid* at 181.

³⁶⁶ *Ibid*.

Because of his subjective state of mind, Duplessis was still within the performance of his duties³⁶⁷ and his action was therefore protected by article 88: this article, according to Justice Fauteux, “limite la jurisdiction même du tribunal³⁶⁸”.

Ultimately, Duplessis had to personally pay Roncarelli the \$25,000 – as the designated defendant, Duplessis was personally liable and the condemnation was not against the Crown.

Similarly, Crown corporations could be considered a separate defendant to whom the Crown’s substantial immunity does not apply, since the legislative branch granted them their own patrimony and thus their own separate identity. In the *Langelier*³⁶⁹ case, the Conseil des ports nationaux, a public body, together with Shell Canada, were illegally filling a part of the St. Lawrence River in order to create a new patch of land. One of the consequences of this strategy was that it was going to ruin plaintiff Langelier’s property³⁷⁰, who was proactively seeking various injunction remedies to stop this process. A unanimous Supreme Court considered that being an agent or a servant of the Crown, like the Conseil des ports nationaux, did not confer an immunity against torts. Instead, it considered that a Crown agent who acts outside its authority could be held personally responsible³⁷¹.

As the legal culture across the commonwealth became dissatisfied with the notion of an absolute immunity, the “designated defendant” became an increasingly popular practical

³⁶⁷ *Ibid* at 178, 181.

³⁶⁸ *Ibid* at 176.

³⁶⁹ *Conseil des Ports Nationaux v Langelier et al*, [1969] SCR 60.

³⁷⁰ *Ibid* at 62.

³⁷¹ *Ibid* at 70.

exception: the Crown would, by choice, stand behind its faulty servant and pay the damages he incurred in the performance of his duties. That way the Crown itself was not directly liable, yet guaranteed that the plaintiff would not be deprived of remedies if the servant could not afford to pay damages. This method followed the larger policy, as applicable in the private sector, which stated that an employer ought to be responsible for the actions accomplished in its interest³⁷².

When it was impossible to find the servant responsible for the alleged damages, the Crown would go so far as to designate one arbitrarily:

“By the device of the ‘nominated’ defendant (...) a department would ‘find’ an official against whom the action would be brought, but who was simply a departmental nominee not himself actually responsible for the alleged wrongdoing”³⁷³.

This worked well for a number of years and, according to Professor Hogg, may have delayed the adoption of more thorough solutions to the problem of Crown liability:

Indeed the practice of the Crown “standing behind” any servant who committed a tort in the course of employment seems to have been general in all jurisdiction in which the Crown was immune for liability in tort, and the practice was probably the reason why the scandalous gap in the law was not filled much earlier³⁷⁴.

Through this legal fiction it was effectively possible to sue the Crown, albeit by a twisted method, while the Crown itself remained officially immune from suits. However, this method brought confusion and was not entirely satisfying from an academic standpoint, since it

³⁷² See art. 1463 C.C.Q.: “The principal is bound to make reparation for injury caused by the fault of his subordinates in the performance of their duties; nevertheless, he retains his remedies against them.”

³⁷³ John F Garner & Brian L Jones, *Administrative law*, 6th ed (London: Butterworths, 1985) at 199.

³⁷⁴ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 154.

constituted a conspicuous workaround for the more fundamental problem of the Crown's extracontractual liability. The "designated defendant" technique was ultimately rejected by the House of Lords in *Adams v. Naylor*³⁷⁵, when it refused to let the Crown arbitrarily nominate as a defendant an army officer who was not involved in the accident. In this lawsuit, two boys had been injured by an explosive device carelessly left behind by the armed forces.

The public frustration over the irresponsibility of the Crown in *Naylor* revealed how unsatisfactory the designated defendant doctrine was. Following this case, many jurisdictions started adopting specific statutes dealing with Crown liability. The *Crown Proceedings Act*³⁷⁶ in the United Kingdom allowed suits to be brought against the Crown as if it were "a private person of full age and capacity" (s. 2(1)). Before long, Parliaments and legislatures all over the Commonwealth enacted similar statutes regulating (and enabling) liability of the Crown through regular channels as a replacement to the Petition of right. The Crown was now just another defendant, though with a few exceptions, which will be examined below.

The King not only *could* do wrong, but Parliament and provincial legislatures had framed how he could be condemned to damages by the judiciary. The procedural problem of how the Crown could be sued had, for the most part, finally been dealt with by these new statutes.

³⁷⁵ *Adams v Naylor*, [1946] AC 543.

³⁷⁶ 1947 (UK), 10-11 Geo. VI, c. 44

§ 3 Immunity for Discretionary Actions

Having dealt with the institutional matter of making the Crown liable before them, courts now had to contend with substantial problems around Crown liability. The Crown *can* be liable, but *when* and *why* should it? Which of its actions should expose it to liability? While the designated defendant doctrine suffered from theoretical flaws, it conveniently allowed the use of standard liability doctrine since it focused on the liability of a private person, the servant. With the abandonment of this shortcut, courts had to find ways to decide how to impose rules of liability upon the Crown while protecting important parts of its freedom of action – allowing into the law of extracontractual liability, in a sense, some concept equivalent to judicial restraint. An early attempt to account for extraordinary Crown action was to make the Crown impervious to claims involving the use of discretionary powers.

In *Suffolk*³⁷⁷, for example, the East Suffolk Rivers Catchment Board had been granted (by the *Land Drainage Act* of 1930) the power to create works to contain the floodings that occurred along the river Deben. After a particularly abundant flood, the Board endeavoured to repair all 30 breaches that had occurred along the river catchments, including one near the plaintiff's (Mr. Kent's) farm. However, the inefficient methods adopted by the Board to complete these works took 23 weeks instead of the 2 that were reasonably required to repair such a breach. Mr. Kent sought to obtain reparation for damages caused by the salt water on his pastures during those 21 unnecessary weeks.

³⁷⁷ *East Suffolk Rivers Catchment Board v Kent*, [1940] UKHL 3.

The majority of the House of Lords rejected Mr. Kent's claim for a variety of reasons. One of the reasons was lack of causality, since the damage was caused by the flooding itself and not by any positive action by the Board³⁷⁸.

Another opinion was that though damages would have been avoided if it had acted reasonably, the Board could not be held liable since it was given statutory power to act, but not a duty to do so; the extent of the Crown's duties could be found by examining the statute creating its powers:

My Lords, it has been laid down time and again that, in exercising a power that has been conferred upon it, a statutory authority is under an obligation not thereby (i.e., by the exercise of the power) to inflict upon others any damage that may be avoided by reasonable care. But I know of no authority for the proposition that in selecting the time within which, the extent to which, and the method by which its statutory power is to be exercised it owes any duty whatsoever.

[...]

But the Act imposed upon the Appellants no duty of repairing the wall. It merely gave them the power of doing so. Whether or not they should exercise that power was a matter entirely within their own discretion unless and until the Minister of Agriculture intervened under Section 12 of the Act. Had they determined not to effect the repair at all, or not to embark upon the work until (say) the end of the following March, the Respondents would have had no cause of action for the damage entailed upon them by such decision³⁷⁹.

Moreover, one judge considered that the problem was not whether a duty was owed to Mr. Kent, but rather the extent of that duty: once it began work, the Board had a duty to avoid causing (further) damage, but not to remove the water as soon as possible³⁸⁰.

Lord Atkin, in the lone dissenting opinion, rather thought that public bodies were under a general duty to act (whether such act was a power or a duty) without negligence:

³⁷⁸ *Ibid* at 10, Lord Thankerton.

³⁷⁹ *Ibid* at 11–12, Lord Romer.

³⁸⁰ *Ibid* at 15–16, Lord Porter.

I treat it therefore as established that a public authority whether doing an act which it is its duty to do, or doing an act which it is merely empowered to do, must in doing the act do it without negligence, or as it is put in some of the cases must not do it carelessly or improperly. Now quite apart from a duty owed to a particular individual which is the question in this case I suggest that it would be difficult to lay down that a duty upon a public authority to act without negligence or not carelessly or improperly does not include a duty to act with reasonable diligence by which I mean reasonable dispatch. I cannot imagine this House affording its support to a proposition so opposed to public interests where there are so many public bodies exercising statutory powers and employing public money upon them³⁸¹.

The *Suffolk* case hinged on the source of private law duties that can be imposed to the Crown.

According to the majority ruling, the only private law duties that existed against a public body (and hence the Crown) are those that were pre-determined by statutes.

In 1946, the idea that actions taken within the scope of discretionary power should be immune from claims was codified in the American *Federal Tort Claims Act*³⁸², which expressly provided that:

The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. [...]

The provisions of this chapter ... do not apply to ... any act or omission ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty ... whether or not the discretion involved be abused.³⁸³

This act abrogated the general substantive immunity from which the state benefitted against civil law claims and actions, similar to that provided by the *Petition of Rights Act* mentioned above and inspired by the idea that “The King Can Do No Wrong”. It is worth noting that no criterion of bad faith or otherwise existed under this legislation; rather, it provided that the exercise of discretionary power (valid or not) could never constitute the basis of a tort.

³⁸¹ *Ibid* at 6.

³⁸² 28 U.S.C. §2671ff (1946)

³⁸³ 28 U.S.C. §2674 and §2680(a)

This statute was examined by American courts in the case of *Elizabeth Dalehite*³⁸⁴, following a disaster in Texas City in 1947. The Supreme Court of the United States established a distinction between discretionary functions targeted by the *Act* and those actions that are merely at the “operational level³⁸⁵”, thus creating a “discretion/ operational” distinction. The distinction created by this decision was to be immensely influential on the entire commonwealth in the following decades:

Almost all the substantive discussion about immunity and about the policy-operational continuum in the Commonwealth case law is derived from American jurisprudence interpreting the *Federal Tort Claims Act*. But nowhere did the Supreme Court of Canada ever acknowledge that the US decisions were dealing with an immunity derived from US constitutional history and then imposed by US legislation. Nor did the Supreme Court acknowledge that the historical role of government in the US was significantly different from that in Canada. In fact, there is no equivalent provision in Canadian Crown Liability legislation. The Canadian legislation is much more permissive. Our courts have adopted on their own initiative a much broader immunity than our legislatures.³⁸⁶

In England, this distinction took longer to be formally implemented, although after the landmark case *Donoghue v. Stevenson*³⁸⁷, the House of Lords decided that negligent behavior could not benefit from the immunity recognized in *Suffolk*. In *Dorset Yacht Co. Ltd. v. Home Office*³⁸⁸, seven prisoners in a youth detention centre slipped away from the negligent supervision of the centre’s officers and escaped the island on which they were situated. To do so, they commandeered a yacht, colliding it with one of Dorset’s yachts. Dorset thus sued the Home Office for the negligence of its officers. The case hinged on whether the officers could owe a duty of care to Dorset Yacht, and whether the Home Office could be held liable in a

³⁸⁴ *Dalehite v US*, [1953] 346 US 15.

³⁸⁵ *Ibid* at 42.

³⁸⁶ Bruce Feldthusen, “Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified” (2014) 92:2 Canadian Bar Review 211 at 226–227.

³⁸⁷ *Donoghue v Stevenson*, *supra* note 270.

³⁸⁸ *Dorset Yacht v Home Office*, [1970] AC 1004.

negligence claim due to its public status. The House of Lords ultimately held the Home Office liable, since there was no sufficient justification not to apply the usual rules of negligence.

According to Lord Reid for the majority opinion, the officers owed a *prima facie* duty of care because the officers ought to have foreseen that damages were likely to occur to Dorset Yacht if they exercised improper supervision of the inmates. As for the matter of the immunity of the Home Office, Lord Reid considered that the Home Office was only immune for damages caused in the lawful execution of their public duty, but that such immunity did not exist when extraordinary public powers were used negligently and thus caused damages:

I would agree but there is very good authority for the proposition that if a person performs a statutory duty carelessly so that he causes damage to a member of the public which would not have happened if he had performed his duty properly he may be liable. In *Geddis v. Proprietors of Bann Reservoir* 3 App. Cas. 430 Lord Blackburn said (at page 455):

For I take it without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised if it be done without negligence although it does occasion damage to anyone: but an action does lie for doing that which the legislature has authorised if it be done negligently.

The reason for that is, I think, that Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage.

The *Dorset Yacht* case neatly did away with the question of the public nature of Crown actions: Parliament could bestow extraordinary powers to cause damages, but barring such delegation, Parliament's executive agents could not rely or invoke extraordinary powers to cause damages with impunity or to explain away their negligence.

Likewise, in *Dutton v. Bognor Regis Urban District Council*³⁸⁹, a municipal inspector had given the green light to the construction of a house; however, its foundations were defective and the house fell down as it was built on a “rubbish tip” (landfill), a fact the municipal inspector could have discovered by doing the proper verifications. The homeowner then sued the municipal council (among other parties) for negligence. The Court held that since the council had control over the work, it had to assume a responsibility over it. Lord Denning’s decision was mainly based on the idea that the Council had a public responsibility to ensure that houses are properly built:

First, Mrs. Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss³⁹⁰.

He then quickly considered, then dismissed, several arguments against holding the council – a public entity – liable:

- The risk of a chilling effect of a condemnation on the work of the council: “If liability is imposed on the council, it would tend, I think, to make them do their work better, rather than worse”.
- The economic burden that might end up on the council: “It will be very rarely that the council will be sued or found liable. If it is, much the greater responsibility will fall on the builder and little on the council”.

³⁸⁹ *Dutton v Bognor Regis Urban District Council*, [1972] 1 All ER 463.

³⁹⁰ *Ibid* at 475.

- The risk of creating a floodgate of cases alleging liability of the council: “The injured person will always have his claim against the builder. He will rarely allege - and still less be able to prove - a case against the council.”

The *Dutton* case blurred the line between the public duty entrusted to the Council and the private duty of care it owed to private parties who relied on the accurate fulfilment of this public duty. According to Lord Denning, the rights and powers of the Council translated into correlative duties: in other words, *noblesse oblige*. This case was disapproved by *Anns* and then explicitly disavowed in the *Murphy* case³⁹¹ (see below), but can still inspire courts elsewhere in the Commonwealth.

This idea of making the Crown immune within the scope of its discretionary actions had its imperfections, notably because it did not account for how the Crown was exercising this discretion. As worded by Justice L’Heureux-Dubé:

Until recently it appeared that both doctrine and case law, in Quebec as in the common law jurisdictions, by application of public law, were unanimous in concluding that public corporations were not liable if acting in the exercise of their discretionary powers. It is not clear, however, that the necessary distinctions have always been made between liability arising from the failure of a public corporation to exercise a discretionary power and that arising from the exercise of that discretionary power and the manner in which it was exercised. Similarly, it will be noted that there is no distinction made as to whether express legislation is required in the area of implementing the policies of public bodies. The implied obligation of implementation following the exercise of a discretionary power does not appear to have been closely examined in the legal literature, nor do the courts seem to have dealt with it at any length. These are precisely the aspects which are under consideration here and are at the very heart of the debate.³⁹²

³⁹¹ *Murphy v Brentwood District Council*, [1991] UKHL 2.

³⁹² *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138 at 740 (emphasis in the original).

Moreover, discretion as a criteria for liability did not address the question of whether the Crown is acting as the Crown – that is, using its extraordinary powers – or as a person using ordinary ones (such as concluding a contract), since discretion is an inherently vague concept, as evidenced by the difficulty our jurisprudence is having in its quest to find its limits³⁹³. Moreover, the concept of discretion focuses only on the Crown as an actor and ignores the plaintiff’s relationship with the government³⁹⁴. The Supreme Court ultimately recognized that discretion does not represent the essence of what should make the Crown responsible³⁹⁵.

To conclude on the role of discretion on Crown liability, the idea that *intra vires* actions should be protected from the purview of the courts is still relevant and tends to come up in the *ratio decidendi* of contemporary cases. For example, even after the Supreme Court had officially imported the policy-operational distinction in Canadian law, Justice Sopinka was still advocating a “radically different approach³⁹⁶”:

Many public bodies have the power to carry out a function but no duty to do so. In these circumstances, they have a discretion whether to do the thing or not. Conduct within the limits of that discretion gives rise to no duty of care. Conduct outside of these limits may attract a private law duty of care.³⁹⁷

The *bona fide* exercise of this statutory discretion cannot result in liability on the basis of a private law duty of care. The conduct complained of was, as my colleague states, “a preliminary step” preparatory to the exercise of that discretion and cannot be the basis of liability.³⁹⁸

³⁹³ *Supra* p. 67.

³⁹⁴ Woodall, *supra* note 10 at 91–93, 110.

³⁹⁵ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138 at 742.

³⁹⁶ As qualified by Gus Van Harten, Gerald Heckman & David J. Mullan, *supra* note 297 at 1282.

³⁹⁷ *Just v. British Columbia*, *supra* note 293 at 1250.

³⁹⁸ *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445 at 451.

Discretion as a reason to exercise judicial restraint has continued to come up in various cases of liability of the Crown over the years. For example, in *Deniso Lebel*³⁹⁹, plaintiff M. Lebel had bought an industrial sawmill (and afferent immovable and interests) from Abitibi Price, subject to the condition that the Québec Ministry of Energy and Ressources agreed to transfer the appropriate forest concessions along to M. Lebel. The ministry, having heard of other plans for the same sawmill, refused to transfer the forest concessions over to Mr. Lebel and the deal was therefore cancelled. Mr. Lebel sued Abitibi Price and the provincial government for his economic loss, for an amount of about 30 million dollars.

The Québec Court of Appeal held that the granting of such concessions was an exercise of discretionary power, and that the titular of such a forest concession did not own any personal right to the privilege⁴⁰⁰:

The Court further considered that the statutory framework around the concessions and the sawmill permits made it necessary for the purchase to be approved by the minister⁴⁰¹ for the contract to be valid. Furthermore, this framework did not make it mandatory for the minister to approve the contract between Lebel and Abitibi Price⁴⁰². By choosing to grant the concessions to another project, the Crown validly exercised a discretionary power, which does not constitute a fault that can be the basis of an extra-contractual liability case⁴⁰³. In fact, even the incorrect exercise of such a discretionary power would not necessarily give rise to a remedy

³⁹⁹ *Québec (Procureur général) c Deniso Lebel inc*, [1996] RJQ 1821.

⁴⁰⁰ *Ibid* at 21.

⁴⁰¹ *Ibid* at 24.

⁴⁰² *Ibid* at 31.

⁴⁰³ *Ibid*.

in damages⁴⁰⁴. Moreover, the proper exercise of discretionary powers disqualified the Court from intervention:

En principe, dans ce domaine, lorsque l'État exerce un pouvoir véritablement discrétionnaire, le caractère politique de la décision le soustrait à l'appréciation des tribunaux qui ne peuvent exercer un contrôle d'opportunité. Ils ne peuvent que sanctionner la mauvaise foi et l'intention de nuire, une fois celles-ci démontrées. Comme le professeur Garant le rappelle bien, en citant une opinion du juge Cory, la Couronne, à cet égard, n'est pas une personne ordinaire. Son rôle politique exige le respect et la réserve des tribunaux. Elle doit être libre de gouverner, sans encourir pour autant une responsabilité délictuelle, à chaque fois qu'elle pose un acte de puissance publique.⁴⁰⁵

The Court ultimately rejected Mr. Lebel's claim, on the basis that the minister's decision to choose the other project (instead of Lebel's) was a correct exercise of his discretion⁴⁰⁶.

Matters of discretion, it must be said, often intersect with matters of policy. In situations where the legislator grants the Crown sufficient leeway to make judgement calls as appropriate to the situation, the Crown will rely on or create policy to address how this power should be exercised.

§ 4 The Policy/Operational Distinction

The policy/operational distinction is an evolution of the immunity-for-discretionary-acts, which posits that the Crown should only be immune from suits if the action at the source of the alleged damages constitutes the creation of "policy". Operational actions, on the other hand, consist in the enacting of already-created policy and do not benefit from the immunity, even where they include a part of discretion.

⁴⁰⁴ *Ibid* at 32.

⁴⁰⁵ *Ibid* at 36–37 [citation omitted].

⁴⁰⁶ *Ibid* at 40.

In Canada, the idea of a substantial immunity from damage claims had been in the back of many judges' minds. Such an immunity, however, needed to be reformulated.

In *Welbridge*⁴⁰⁷, the appellant company Welbridge Holdings was suing the city of Winnipeg for its negligence on the basis on a complex set of facts: Welbridge had been constructing a 12-story apartment building for which it possessed a building permit granted by the municipality by virtue of a certain municipal bylaw; however, during construction, this bylaw was declared illegal (which was later confirmed by the Supreme Court in a separate case⁴⁰⁸) and the permit was therefore revoked⁴⁰⁹. Welbridge then sued the municipality for the damages this revocation caused on the grounds that the Municipality had a duty of care towards those whom it gave construction permits. A unanimous Supreme Court decided that “a legislative body, or other statutory tribunal with quasi-judicial functions, which in the good faith exercise of its powers promulgates an enactment or makes a decision which turns out to be invalid because of anterior procedural defects⁴¹⁰” cannot owe a duty of care to individual citizens who relied on this decision. In support of this conclusion, the Supreme Court cited the following dissenting comment from the American case *Dalehite*:

When a [municipality] exerts governmental authority in a manner which legally binds one or many, [it] is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such [municipality] shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits.⁴¹¹

⁴⁰⁷ *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra* note 133.

⁴⁰⁸ *Wiswell v Metropolitan Corporation of Greater Winnipeg*, [1965] SCR 512.

⁴⁰⁹ *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra* note 133 at 964 in fine.

⁴¹⁰ *Ibid* at 967.

⁴¹¹ *Ibid* at 967–968.

The Court concluded that decisions (taken in good faith) in the sphere of policy do not give rise to a duty of care (there is no mention of an “immunity” anywhere in the decision⁴¹²):

A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability".⁴¹³

The Supreme Court thus established a distinction between a municipality’s legislative or quasi-judicial powers on the one hand, and “administrative or ministerial, or perhaps better categorized as business powers⁴¹⁴” on the other. A municipality is different when acting at the “operating level⁴¹⁵” than it is at the legislative or quasi-judicial level; only when acting as the former can a municipality:

[...] undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.⁴¹⁶

At the legislative or quasi-judicial level, however, a municipality does not owe individual duties of care even if it acts beyond its powers⁴¹⁷, because “the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care⁴¹⁸”.

⁴¹² Feldthusen, *supra* note 388 at 225.

⁴¹³ *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra* note 133 at 968–969.

⁴¹⁴ *Ibid* at 968.

⁴¹⁵ *Ibid*.

⁴¹⁶ *Ibid*.

⁴¹⁷ *Ibid* at 969.

⁴¹⁸ *Ibid* at 970.

The official origin of the policy/operational distinction in Canadian doctrine is usually credited to the House of Lords's decision in the *Anns*⁴¹⁹ case, where the distinction became synonymous with "the *Anns* test". Though inspired by the distinction between discretionary and operational actions that existed in the United States, *Anns* set out a different way for the common law to deal with cases of liability of the Crown. From there, it spread not only to Canada but to the rest of the commonwealth⁴²⁰. In *Anns*, the municipal council of Merton had the power (but not the duty) to inspect the foundations of new constructions to make sure they were dug three feet or deeper. This authority approved a block of maisonettes that later suffered from structural movements as their foundations were only 2 feet and six inches deep. The Court proceeded to decide whether the municipality owed the owners or occupiers of these houses a duty of care as a result of their inspection powers. The House of Lords applied a two-stage test, to be known as the *Anns* test, in order to determine whether the municipality owed such a duty of care to the occupiers:

Through the trilogy of cases in this House, *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and *Home Office v Dorset Yacht Co Ltd*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise⁴²¹.

⁴¹⁹ *Anns v Merton London Borough Council*, *supra* note 275.

⁴²⁰ On the history of the policy/operational distinction, see generally Woodall, *supra* note 10 at 87; Feldthusen, *supra* note 388 at 225.

⁴²¹ *Anns v Merton London Borough Council*, *supra* note 275 at 751–752.

In the second step of this analysis, the Lords allowed “policy considerations” to intervene: matters of policy could stop a duty of care from existing even where there was a sufficient relationship of neighbourhood between the parties. Initially, the policy-operational distinction was not used so much to determine the existence (or inexistence) of some public law immunity but rather to determine whether the Crown owed some duty of care in the first place⁴²².

In other words, a municipality may not owe a duty of care (and therefore cannot be held liable) for the exercise, negligent or not, of its policy powers, but can owe such a duty (and be liable) for the execution of those decisions. Even in *Anns*, however, Lord Wilberforce was aware that the policy-operational distinction had a glaring weakness: the distinction was not a clear line but a wide grey zone spanning the spectrum of powers a public authority may wield. The distinction could not quite instruct the Court on whether it should exercise restraint or not.

Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion' meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many « operational » powers or duties have in them some elements of « discretion ». It can safely be said that the more « operational » a power or duty may be, the easier it is to superimpose upon it a common law duty of care.⁴²³

The Supreme Court refined this idea when they integrated the *Anns* case – but not yet the *Anns* test – into Canadian jurisprudence. In *Barratt v. Northern Vancouver*⁴²⁴, a case involving damages suffered by a cyclist who hit a pothole on a poorly maintained road, the Court decided that a municipality’s policy regarding highway maintenance could not be a source of

⁴²² Donald Galloway, *supra* note 264 at 140.

⁴²³ *Anns v Merton London Borough Council*, *supra* note 275 at 754.

⁴²⁴ *Barratt v Corporation of North Vancouver*, [1980] 2 SCR 418.

negligence. The establishment of such policy was a matter of discretion, and it was not for the courts to decide what frequency of road inspection the Municipality should have decided on; the relevant statutes gave the municipality the power but not the duty to maintain its highways⁴²⁵. The Municipality could not be held liable simply because damages occurred; the municipality is not the insurer of users of its road system⁴²⁶.

In an interesting *obiter dictum*, the Court goes on to specify that if the Municipality's servants had been negligent in carrying out this policy (in such a way that the negligence had caused damages), the Municipality could have been held liable:

The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another⁴²⁷.

The Supreme Court did not once use the words “immunity” or “proximity” to come to these conclusions, relying rather on the older notion that the Municipality had the power – but not the duty – to maintain the street⁴²⁸.

The *Anns* test was only properly imported into Canadian jurisprudence⁴²⁹ in the *Kamloops v. Nielsen*⁴³⁰ case four years later. The facts were conveniently similar to *Anns*: the plaintiff, Mr.

⁴²⁵ *Ibid* at 426, 428.

⁴²⁶ *Ibid* at 427.

⁴²⁷ *Ibid* at 428.

⁴²⁸ *Ibid*.

⁴²⁹ See Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 225–226.

⁴³⁰ *Kamloops v Nielsen*, [1984] 2 SCR 2; On the importation of the *Anns* test, see also *Rothfield v. Manolakos*, *supra* note 321 at 1266–1267: “By application of the test formulated by Lord Wilberforce in *Anns* and adopted by this Court in *City of Kamloops v. Nielsen*, the city, once

Nielsen, was the second owner of a house that was revealed dangerous when it was discovered that it did not comply with municipal bylaws. However, this noncompliance was explained by the fact that the bylaws had not been enforced by the municipality. The majority of the Supreme Court considered that the decision to create a construction bylaw was a policy decision and that the inspection process was part of the operationalization of that decision. According to the majority, the municipality owed a duty of care to anyone who could be harmed in the carrying out of this policy decision:

It seems to me that, applying the principle in *Anns*, it is fair to say that the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It was in its discretion whether to do so or not. It was, in other words, a "policy" decision. However, not only did it make the policy decision in favour of regulating construction by by-law, it also imposed on the city's building inspector a duty to enforce the provisions of the By-law. This would be Lord Wilberforce's "operational" duty. Is the City not then in the position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the City was sufficiently close that the City ought reasonably to have had him in contemplation?⁴³¹

The dissenting judges' opinion rested on a different interpretation of the facts. They considered that the issuance of a "stop work" order by the municipality constituted sufficient enforcement of its construction bylaw: "[T]he only fault alleged against the City is a failure to enforce the 'stop work' order. Consideration of the City's duty to the respondent Nielsen must be upon that basis⁴³²." The building inspector, in that context, was neither at fault nor negligent. In consequence, the minority judges considered that *Anns* had no authority over this case⁴³³. The municipality's decision not to enforce the "stop order" in courts was a discretionary decision

it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers."

⁴³¹ *Kamloops v. Nielsen*, *supra* note 432 at 12–13.

⁴³² *Ibid* at 44.

⁴³³ *Ibid* at 56.

that could not trigger its liability. It is worth mentioning that again in this decision, the word “immunity” is nowhere to be found.

Things became ever more confusing in 1989’s *Laurentides Motel*⁴³⁴ case when the Supreme Court had to reconcile these notions with Québec’s distinct civil law regime of extracontractual liability. The firefighting service of the city of Beauport failed to extinguish a fire (caused by the negligence of one of the motel’s clients) because the fire hydrants were buried under snow and therefore difficult to find; additionally, once found, these hydrants were either broken or frozen. The evidence demonstrated that had they managed to get access to the hydrants, the firefighters could have prevented most of the damage to the motel⁴³⁵. The Supreme Court decided, firstly, that the *Anns* test was “designed to determine when the private law will apply to public authorities⁴³⁶” and as such was a public law rule applicable in Québec⁴³⁷; secondly, that absent a specific decision by the municipality to create a weak inspection system, the policy decision to create a firefighting department implicitly included a duty to maintain such service⁴³⁸; and thirdly, that the municipality’s failure to maintain its hydrants constituted a fault⁴³⁹.

It is in this context that the word “immunity” finally returns to Canadian jurisprudence, as the Court reshaped the *Anns* test to place even more emphasis on the criterion of policy. In

⁴³⁴ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138.

⁴³⁵ *Ibid* at 807–808.

⁴³⁶ *Ibid* at 723.

⁴³⁷ *Ibid* at 725.

⁴³⁸ *Ibid* at 770.

⁴³⁹ *Ibid* at 727.

Laurentides Motel, the Court does not use the *Anns* test to check for proximity (since proximity is handled differently in Québec⁴⁴⁰ than in the common law of torts) but rather to check for the application of private law – in this case, whether the *Civil Code of Québec* applies. Policy in that case was not used to see whether a duty of care arose in the first place, but to check whether there existed an exception to the general duty to abide by the rules of conduct incumbent to the circumstances by virtue of article 1457 C.C.Q. In other words, the *Anns* test was reworked in such a way that henceforth, in Québec, if the Crown action involved policy, the Crown would be immune from extracontractual liability, as opposed to simply not being proximal enough for a duty to arise by virtue of the relevant rules of the common law. From now on, “the policy-operational distinction is supposed to distinguish the government acting as a government from the government acting as a person.”⁴⁴¹

This version of the policy-operation became the law of the land for the next 20 years, during which it was used as the sole paradigm to decide cases of liability of the Crown.

In *Rothfield v. Manolakos*⁴⁴², Mr. and Mrs. Manolakos were building a retaining wall in their backyard. They obtained a permit from the city’s Chief Building Inspector based on a rudimentary sketch of their project (“the building inspector exercised his discretion not to require plans by a professional engineer”⁴⁴³), but because of their lack of knowledge of the regulations, they did not give the required notice for the city to send a building inspector once

⁴⁴⁰ See *supra* p. 86.

⁴⁴¹ Woodall, *supra* note 10 at 110.

⁴⁴² *Rothfield v. Manolakos*, *supra* note 321.

⁴⁴³ *Ibid* at 1269.

the works had reached a certain stage. In consequence, the inspector was unable to carry out his standard inspection, which would normally have revealed flaws with the project – in fact, the wall did later crack and collapse.

The majority judgement, penned by Justice La Forest, mentioned *Anns* and considered that the Municipality’s decision to adopt a building bylaw “for the health, safety and protection of persons and property⁴⁴⁴” was a policy decision but that the application of that bylaw could give rise to a duty of care towards those who might reasonably “be injured by the negligent exercise of those powers⁴⁴⁵”. The Manolakos were entitled to rely on the municipality to enforce its bylaws and thus ensure the safety of buildings⁴⁴⁶. Justice La Forest noted that the Manolakos were one of those “ratepayers for whose safety the by-law was passed⁴⁴⁷”; like all citizens defraying the costs of the inspection policy:

[they] are justified in saying: "I pay for the provision of an inspection service, and so long as I act in good faith, I should be entitled to rely on the city to exercise reasonable care to ensure that all construction is built according to the standards set out in the by-laws"⁴⁴⁸.

This means that the city was under a duty to exercise reasonable care⁴⁴⁹ to “at least examine the specification of the sketches”, so that the city would only issue permits where the projects are viable⁴⁵⁰. Justice La Forest concluded that in that case, “it was clear from the specifications that the project was inadequately designed⁴⁵¹”. He concluded that the city had been negligent

⁴⁴⁴ *Ibid* at 1266.

⁴⁴⁵ *Ibid*.

⁴⁴⁶ *Ibid* at 1268.

⁴⁴⁷ *Ibid*.

⁴⁴⁸ *Ibid*.

⁴⁴⁹ *Ibid* at 1270.

⁴⁵⁰ *Ibid* at 1269.

⁴⁵¹ *Ibid* at 1270.

and that it should be liable for 70% of the loss⁴⁵². It is on this question of apportionment of liability between the City, the owners, and the contractors that the majority judges and dissident judges split: Justices Cory and Lamer considered that the City should bear no responsibility (because of the owner's failure to summon the inspector in time) while Justices Wilson and L'Heureux-Dubé thought the owners should bear none.

The *Just* case⁴⁵³ was based on a set of tragic facts: a boulder set itself loose from the slopes above a highway during a heavy snowfall and landed on the plaintiff's car, killing his daughter and gravely wounding him. He then sued the Department of Highways for the negligent maintenance of the highway. The Department had a system of inspection in which its employees did visual inspections of the slopes, unless a history of instability required a rock engineer to climb the slope for a more thorough investigation.

The majority judges decided that the Province owed a duty of care to the users of its highways, since the risk of harm was readily foreseeable. They considered that the *Anns* test should apply to such cases "where allegations of negligence are brought against a government agency⁴⁵⁴". However, they do not seem to have applied that test as it was intended: instead of getting through steps 1 (proximity) and 2 (policy) of the *Anns* test, the majority judges first decided that "[...] apart from some specific exemption, arising from a statutory provision or established common law principle, a duty of care was owed by the province to those that use its

⁴⁵² *Ibid* at 1277.

⁴⁵³ *Just v. British Columbia*, *supra* note 293.

⁴⁵⁴ *Ibid* at 1235.

highways⁴⁵⁵”. In other words, the Supreme Court established a presumption that there is sufficient proximity between the Province and users of its highways⁴⁵⁶. The majority then turned to a modified step 2 of *Anns*, which involved two verifications:

- first, a review of the applicable legislation “to see whether it imposes any obligation to maintain its highways or, alternatively, if it provides an exemption from liability for failure to so maintain them⁴⁵⁷” (the Court found no such provisions), and
- second, whether the decisions regarding the inspection system could be qualified as “policy” decisions and thus exempt from liability rules, unless the decision was taken in bad faith⁴⁵⁸ (the Court decided that the inspection system was operational in nature and therefore standard law of torts applied to it; the Court ordered a new trial during which the common law of torts would be applied).

Justice Sopinka, for his part, rejected the *Anns* test altogether, considering that the Department of Transportations had the power to carry out inspections but was under no duty to do so⁴⁵⁹, and that the power to inspect was necessarily discretionary⁴⁶⁰. To be liable, the Department would have had to act outside its delegated discretion to decide whether and how to inspect⁴⁶¹; after all, “[i]f a court assumes the power to review a policy decision which is made in

⁴⁵⁵ *Ibid* at 1236.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Ibid*.

⁴⁵⁸ *Ibid* at 1242.

⁴⁵⁹ *Ibid* at 1250.

⁴⁶⁰ *Ibid* at 1253.

⁴⁶¹ *Ibid* at 1255, 1257.

accordance with the statute, this amounts to a usurpation by the court of a power committed by statute to the designated body⁴⁶²”.

In *Maska Auto Spring*⁴⁶³, the Supreme Court, citing the precedent of *Laurentides Motel*, unanimously adopted the reasons of Justice Chouinard’s dissenting opinion in the Québec Court of Appeal and condemned the municipality to pay Maska Auto Spring the sum of \$29,000. In this case, a building inspector had mistakenly granted a building permit contrary to municipal bylaws. The municipality of Ste-Rosalie later objected to the construction and cancelled the permit. Justice Chouinard decided that the inspector’s mistake had been committed while applying the bylaws, rather than when creating the bylaws, and therefore was operational in nature. This kind of mistake (an operational act) merely necessitated a simple fault to trigger the municipality’s liability. More specifically, Justice Chouinard considered that since the inspector was a public officer whose word and whose decision was the sole information to which citizens have access to when choosing their own actions, the municipality should bear a burden of responsibility⁴⁶⁴.

In *Brown v. British Columbia*⁴⁶⁵, Mr. Brown had suffered damages after losing control of his vehicle due to ice on the road; no employee of the Ministry had thrown sand on the ice despite various accidents in the same place on the same day caused by a lack of structure within the Ministry of transportation. Mr. Brown, the plaintiff, was claiming that the province had been

⁴⁶² *Ibid* at 1252.

⁴⁶³ *Maska Auto Spring Ltée v Ste-Rosalie (Village)*, [1991] 2 SCR 3.

⁴⁶⁴ *Maska Auto Spring Ltée c Ste-Rosalie (Village)*, [1988] RJQ 1576 at 12–13.

⁴⁶⁵ *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420.

negligent in the upkeeping of the section of the road where the accident happened, but the Supreme Court disagreed. Citing *Just*, it held that the province does owe a duty of care to the users of its road system, and did not benefit from a statutory exemption from liability for its negligence in maintaining the highways⁴⁶⁶. However, at the time of the accident (in November 1985), the Department of transportations had decided to maintain a summer schedule, which entailed reduced service. This, by nature, “was a policy decision involving classic policy considerations of financial resources, personnel and, as well, significant negotiations with government unions⁴⁶⁷” that could not give rise to liability, especially since the plaintiff did not claim nor demonstrate that this policy decision was made in bad faith or on irrational grounds⁴⁶⁸. To reach this decision, Justice Cory, for the majority, summarised as such the distinction between policy and operational decisions:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness⁴⁶⁹.

For his part, Justice Sopinka, in a concurring opinion, considered that the province did not owe a duty of care to the users of its road system, since it had the power to maintain highways but had no duty to do so: the decisions involved in the maintenance of the road system were

⁴⁶⁶ *Ibid* at 439–440.

⁴⁶⁷ *Ibid* at 441–442.

⁴⁶⁸ *Ibid* at 436, 442.

⁴⁶⁹ *Ibid* at 441.

discretionary in nature and thus could not be reviewed in the context of a private law suit⁴⁷⁰.

Justice Sopinka concluded his remarks by trying to put an end to the policy/operational test:

I would prefer not to use the "policy/operational" test as the touchstone of liability. This principle, which was formally adopted in *Anns*, was imported from the United States. It has since been rejected by the Supreme Court of the United States and by the House of Lords as an exclusive test of liability. [...] There is some doubt as to its status in Australia. [...] It has been criticized as ineffective and unreliable by academic writers...

[...]

In view of the above, the Court may wish to reconsider at some future time the continued usefulness of this test as an exclusive touchstone of liability.⁴⁷¹

In *Swinamer*⁴⁷², a tree fell on the plaintiff's truck, injuring him, and once again bringing into question the extent of the province's duty to maintain the roads. More specifically, the tree had been weakened by a fungal infection that had gone undetected from a survey by the provincial Department of Transportation; this survey had marked some other 200 trees for removal, and the province had allowed partial funding to do so over a three-year span. The majority of the Supreme Court, relying on *Just*, held that "[there] can be no doubt that a duty is owed by a province to those who use its highways⁴⁷³", and that this duty of care included a duty to do "ordinary maintenance" of those roads⁴⁷⁴. Users of this road system are sufficiently proximate to the Province to benefit from this duty of care. Although the province is under no legal duty to exercise its power to build roads, once it does, it inherits the correlative duty to maintain it. The decision to inspect trees was "a preliminary step in what will eventually become a policy decision involving the expenditure and allocation of funds⁴⁷⁵", and without any evidence of

⁴⁷⁰ *Ibid* at 424.

⁴⁷¹ *Ibid* at 424–425 (citations omitted).

⁴⁷² *Swinamer v. Nova Scotia (Attorney General)*, *supra* note 400.

⁴⁷³ *Ibid* at 457.

⁴⁷⁴ *Ibid* at 458.

⁴⁷⁵ *Ibid* at 464–465.

bad faith, it is exempt from liability. As for the operational aspect of this process, the fact that this specific tree was not identified as dangerous was not considered negligent⁴⁷⁶.

In their concurring opinion, justices La Forest and McLachlin, relying on *Anns*, instead considered that “public authorities owe no private duty to individuals capable of founding a civil action, unless such a duty can be found in the terms of the authority's enabling statute⁴⁷⁷”. They considered a duty of care could only be created in the context of the operational carrying out of the policy decision. Justice Sopinka, in a separate but concurring opinion, referred to his comments in *Brown* and explained that the province had a power but not a duty to maintain highways, and that “[t]he *bona fide* exercise of this statutory discretion cannot result in liability on the basis of a private law duty of care⁴⁷⁸”.

In *Guimond*⁴⁷⁹, the plaintiff had been imprisoned for nonpayments of fines accrued because of violations to the Québec *Highway Safety Code*⁴⁸⁰. He then tried to institute a class action in civil liability against the Québec government on the grounds that his imprisonment was based on unconstitutional statutory provisions⁴⁸¹. The Supreme Court had to decide whether the allegation in Mr. Guimond's claims could justify the conclusions he sought in order to allow the class action.

⁴⁷⁶ *Ibid* at 466.

⁴⁷⁷ *Ibid* at 449.

⁴⁷⁸ *Ibid* at 451.

⁴⁷⁹ *Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347.

⁴⁸⁰ CQLR c. C-24.2

⁴⁸¹ *Guimond v. Quebec (Attorney General)*, *supra* note 481 at 350.

Citing *Welbridge*⁴⁸² and *Potash*⁴⁸³, the Supreme Court decided that the law of civil liability does not usually apply to the government for its lawful enforcement of laws that are later deemed unconstitutional or otherwise invalid, no more than the legislative power is liable for enacting the law in the first place⁴⁸⁴. The Court ultimately rejected Mr. Guimond's action to institute a class action on the basis that it had no reasonable chance of success.

The Supreme Court further refined the *Anns* test in *Cooper v. Hobart*⁴⁸⁵. In this case, the Supreme Court also had to decide whether Mrs. Cooper had a sufficient cause of action for her case to be brought as a class action. Mrs. Cooper, the plaintiff, was suing the Registrar of Mortgage Brokers of British-Columbia (the "Registrar") on behalf of some 3000 investors who had advanced money to a delinquent broker; the Registrar, she alleged, should have suspended the broker's licence earlier in order to avoid damages. To decide whether Mrs. Cooper had a cause of action, the Supreme Court had to determine whether the Registrar owed a duty of care to the swindled investors, or, as the Court put it: "[...] to what situations does the law of negligence extend?"⁴⁸⁶

To reach its decision, the Supreme Court deconstructed the *Anns* test into a series of multistep stages:

At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not

⁴⁸² *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra* note 133 at 969.

⁴⁸³ *Central Canada Potash Co Ltd et al v Government of Saskatchewan*, [1978] 1 SCR 42 at 90.

⁴⁸⁴ *Guimond v. Quebec (Attorney General)*, *supra* note 481 at 357–359.

⁴⁸⁵ *Cooper v. Hobart*, *supra* note 280.

⁴⁸⁶ *Ibid* at 547–548.

be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negate the imposition of a duty of care.⁴⁸⁷

The Court thus distinguished considerations of policy that pertain to the relationship between the parties, which are examined at the first stage, from “residual” policy that pertain to “other legal obligations, the legal system and society more generally⁴⁸⁸”, which are examined in the second stage of the modified *Anns* test. For example, these residual matters of policy could convince the Court to deny liability if it would “raise the spectre of liability to an indeterminate class of people⁴⁸⁹”.

This second stage is also where the policy-operational distinction had to be evaluated. The Court decided that:

It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties⁴⁹⁰.

The Court decided unanimously that the facts of this case were insufficient to establish a duty of care between the Registrar and the investors: the Registrar had no statutory duty of care

⁴⁸⁷ *Ibid* at 550–551.

⁴⁸⁸ *Ibid* at 554.

⁴⁸⁹ *Ibid*.

⁴⁹⁰ *Ibid* at 554–555.

towards the investors, and even though the investors' loss was reasonably foreseeable, there was no sufficient proximity to create a duty of care⁴⁹¹.

Subsidiarily, even if a duty of care had thus been established, broader considerations of policy would have interfered and the Registrar would have been immune from liability for three reasons:

- The Registrar's decision was a policy decision (as opposed to an operational decision): "the Registrar must make difficult discretionary decisions in the area of public policy, decisions which command deference"⁴⁹²
- The Registrar's decision was of quasi-judicial nature: "The Registrar must act fairly or judicially in removing a broker's licence. These requirements are inconsistent with a duty of care to investors"⁴⁹³.
- The Registrar would be exposed to indeterminate liability if a duty of care was recognized, which might become an impossible burden for this public body: "To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public"⁴⁹⁴

Similarly, in *Finney*⁴⁹⁵, the Barreau du Québec was being sued for its negligence in handling the case of a particularly troublesome lawyer. Mrs. Finney, the plaintiff, had lodged several

⁴⁹¹ *Ibid* at 558–559.

⁴⁹² *Ibid* at 560.

⁴⁹³ *Ibid*.

⁴⁹⁴ *Ibid* at 560–561.

⁴⁹⁵ *Finney v. Barreau du Québec, supra* note 126.

complaints to the Barreau regarding that lawyer's services⁴⁹⁶. Despite the fact that that lawyer had been the object of various disciplinary sanctions in the past, the syndic took 3 years to start the proceedings and the lawyer was found guilty of 17 disciplinary counts 4 years later (7 years after Mrs. Finney's initial complaint) and temporarily struck off the Roll of the Order. Mrs. Finney sought reparation for the moral damages she suffered due to the Barreau's inaction and delays. The Barreau was protected by a statutory immunity conferred by section 193 of the *Professionnal Code*, which read:

193. The syndics, assistant syndics, corresponding syndics, the investigators and experts of a professional inspection committee, the members of the Office, of a Bureau, of a committee on discipline, of a professional inspection committee or of a committee of inquiry established by a Bureau, and the members of a tribunal hearing an appeal from a decision by a committee on discipline or by a Bureau, shall not be prosecuted for acts done in good faith in the performance of their duties.

There was no doubt that this provision applied to the claims brought by Mrs. Finney, and the Supreme Court considered that section 193 of the *Professionnal Code* was a rule of public law as defined by article 1376 of the *Civil Code of Quebec*. In consequence, the general liability regime applicable in Québec had to be adapted by requiring the plaintiff to demonstrate not only a fault by the Barreau but also its bad faith⁴⁹⁷.

However, the Supreme Court considered that bad faith in this context was not limited to intentional fault, and that the law of civil liability in Québec tends to accept evidence of "recklessness or serious or extreme carelessness", since narrow interpretations of bad faith can

⁴⁹⁶ As an illustration of the lawyer's conduct, one of the complaint alleged that he had "appeared both for the plaintiff and for the defendant in a proceeding thought up in an attempt to create a debt that could be set off against the respondent": *Ibid*, par. 7.

⁴⁹⁷ *Ibid*, par. 40-41.

make this criterion of little practical use⁴⁹⁸. Bad faith, as a legal test, is not limited to malice or the intentional infliction of harm, but rather to the unlawful abuse of public power:

These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised⁴⁹⁹.

More specifically, since the Barreau was under the public law duty to “ensure the protection of the public⁵⁰⁰”, its behaviour was such that it could not invoke the statutory immunity found in s. 193 of the *Professional Code*: “The very serious carelessness it displayed amounts to bad faith, and it is liable for the results⁵⁰¹”, and “the conduct of the Barreau in this matter was not up to the standards imposed by its fundamental mandate, which is to protect the public⁵⁰²”. Finally, in an interesting *obiter dictum*, the Supreme Court noted that the Barreau would have been no less liable if common law rules had been applied instead of an adjusted article 1457 C.C.Q., despite the results of *Cooper v. Hobart*:

The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point⁵⁰³.

⁴⁹⁸ *Ibid*, par. 38; citing Pierre Giroux & Stéphane Rochette, “La mauvaise foi et la responsabilité de l’État” in Service de la formation permanente du Barreau du Québec, ed, *Développements récents en droit administratif (1999)* (Cowansville: Éditions Yvon Blais, 1999) 117.

⁴⁹⁹ *Finney v. Barreau du Québec*, *supra* note 126, par. 39 (references omitted).

⁵⁰⁰ *Professional Code*, CQLR c. C-26, s. 23(1).

⁵⁰¹ *Finney v. Barreau du Québec*, *supra* note 126, par. 42.

⁵⁰² *Ibid*, par. 45.

⁵⁰³ *Ibid*, par. 46.

In *Sibeca*⁵⁰⁴, a real estate developer purchased land at the top of a hill in the hopes of eventually building a recreational development; this use of the land had been approved by the municipality despite opposition by citizens who wished to keep the summit undeveloped. However, the land remained undeveloped for a few years because of the developer's economic situation. A few years later, many of the citizens who opposed the development project got elected to the municipal council and moved to change the zoning law in order to make the development project unfeasible (by that time, the developers' building permits had all expired). As a result, the developer subdivided the land and sold it by piece. He then sued the municipality for loss of profits.

Having recognized that municipalities enjoy broad discretion in the exercise of their regulatory powers⁵⁰⁵, the Court considered that the municipality had a relative immunity against the claim unless it had acted in bad faith or irrationally when it changed the zoning law⁵⁰⁶. Citing *Welbridge*, the Court reiterated that public bodies such as municipalities must have a certain freedom of movement in their political choices:

24 [...] Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law. [...]

⁵⁰⁴ *Entreprises Sibeca Inc v Frelighsburg (Municipality)*, [2004] 3 SCR 304.

⁵⁰⁵ *Ibid*, par. 21.

⁵⁰⁶ *Ibid*, par. 23.

To this end, the onus of proving bad faith was on the developer, unlike in *Boyd Builders* where the Court said that the city of Ottawa had to prove its good faith after it had amended a zoning by-law soon after an application was submitted⁵⁰⁷. Moreover, the modification to the zoning by-law was motivated by a wish to protect the municipality's natural environment, an objective the municipality considered to be in the municipal interest. The Court considered that this legitimate objective did not constitute bad faith merely because the municipality's policy makers were known adversaries of the development project.

Moreover, the Supreme Court in *Sibeca* decided against the existence of "administrative bad faith". A legal person, having no will of its own, can only act through its individual agents⁵⁰⁸ or committee-members; if those agents acted in good faith – in other words, in the pursuit of a legitimate municipal interest – then the legal person (here, the municipality) necessarily acted in good faith as well⁵⁰⁹.

In *Hill*⁵¹⁰, the plaintiff Mr. Hill had been wrongfully convicted of robbery and spent 20 months in prison, and then sued the police force for their negligence in handling the investigation. The majority of the Supreme Court, in an opinion by Chief Justice McLachlin, considered that the police force was not necessarily immune against claims of wrongful investigation. They ruled that the tort of "negligent investigation" could be recognized in Canada and the police therefore

⁵⁰⁷ *City of Ottawa et al v Boyd Builders Ltd*, [1965] SCR 408; see also *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506 par. 30.

⁵⁰⁸ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506 par. 35.

⁵⁰⁹ *Ibid*, par. 38.

⁵¹⁰ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236.

owed a duty of care to suspects⁵¹¹. Indeed, the relationship between these parties was such that it was reasonably foreseeable that actions from the wrongdoer (the police) would cause the victim (the suspects) harm, and their relationship was considered sufficiently proximal⁵¹² to create a duty of care. Interestingly, the majority judges noted that there was otherwise no way to appropriately compensate a victim of negligent investigation (as opposed to victims of malicious prosecution):

On this point, I note that the existing remedies for wrongful prosecution and conviction are incomplete and may leave a victim of negligent police investigation without legal recourse. The torts of false arrest, false imprisonment and malicious prosecution do not provide an adequate remedy for negligent acts. Government compensation schemes possess their own limits, both in terms of eligibility and amount of compensation. [...] To deny a remedy in tort is, quite literally, to deny justice. This supports recognition of the tort of negligent police investigation, in order to complete the arsenal of already existing common law and statutory remedies⁵¹³.

While police officers exercise some discretion as part of their investigative work, this discretion does not constitute a policy reason to negate the duty of care, although it does influence the standard of care applicable to them⁵¹⁴. As Justice McLachlin kept repeating throughout her reasons, recognizing a duty of care in these circumstances would only require “that the police act reasonably in the circumstances⁵¹⁵”. The existence of a duty of care or of a tort of negligent investigation does not presuppose liability; it merely enables it when the right conditions are met. The Court decided that the appropriate standard of care should be, just as for other professionals, “that of a reasonable police officer in all the circumstances⁵¹⁶”, which should be applied “in a manner that gives due recognition to the discretion inherent in police

⁵¹¹ *Ibid*, par. 3.

⁵¹² *Ibid*, par. 39.

⁵¹³ *Ibid*, par. 35.

⁵¹⁴ *Ibid*, par. 51.

⁵¹⁵ *Ibid* par. 58.

⁵¹⁶ *Ibid*, par. 68.

investigation⁵¹⁷”. This means the Court must exercise a form of deference when judging the reasonableness of an officer’s actions⁵¹⁸. The majority judges concluded that there was no evidence that the police officers involved in the investigation failed to meet the standard of “a reasonable police officer in similar circumstances⁵¹⁹”, and so rejected Mr. Hill’s claim. In other words, even though the police were wrong and had apprehended the wrong suspect, the police were not at fault and could not be held responsible for the damages suffered by Mr. Hill.

As to the risk of a chilling effect, the majority of the Supreme Court did not agree that the existence of such a duty of care would interfere with a police officer’s duty towards the public⁵²⁰.

The dissident judges, in an opinion penned by Justice Charron, agreed that the police force should not be held liable, but objected to the existence of a tort of negligent investigation⁵²¹, mostly because the recognition of a private duty of care would necessarily interfere with police officers’ handling of their public duty to investigate crime. They insisted there could not exist a relationship of proximity between officers and suspects⁵²². Justice Charron also included a comparison with the applicable law in Québec:

First, in both *Jauvin* and *Lacombe* the duty owed arises primarily out of the codified provision in art. 1457 of the *Civil Code of Québec*. Thus, while interesting, neither case directly supports the proposition that police should owe suspects a common law duty of care⁵²³.

⁵¹⁷ *Ibid*, par. 73.

⁵¹⁸ *Ibid*, par. 73.

⁵¹⁹ *Ibid*, par. 74.

⁵²⁰ *Ibid*, par. 40.

⁵²¹ *Ibid*, par. 112.

⁵²² *Ibid*, par. 148.

⁵²³ *Ibid*, par. 186.

They concluded that the civil tort system was not an appropriate method of providing compensation to victims of wrongful convictions⁵²⁴.

In *Fullockka*⁵²⁵, during a particularly vicious strike in the Giant Mine in Yellowknife, a disgruntled miner planted a bomb in the mine, which, upon detonating, killed nine other miners. The miners' survivors, including one other miner who was the first on the scene, sued the mine, the security company, and the territorial government for having failed to stop the catastrophe.

The Supreme Court first considered that in these circumstances, the territorial government effectively had a duty of care towards the miner. The specific harm would have been reasonably foreseeable by a reasonable person⁵²⁶, since the government was aware of the various threats and previous bombings. The Court also found that there was sufficient proximity between the victims and the government's inspectors because:

- 1) relevant statutes imposed a duty towards the miners⁵²⁷;
- 2) the inspectors were making daily visits to the mine⁵²⁸, and;

⁵²⁴ *Ibid*, par. 187.

⁵²⁵ *Fullockka v Pinkerton's of Canada Ltd*, [2010] 1 SCR 132.

⁵²⁶ *Ibid*, par. 21-24.

⁵²⁷ *Ibid*, par. 43.

⁵²⁸ *Ibid*, par. 44.

3) citing cases involving building inspectors⁵²⁹, the inspectors had a “duty to inspect and to enforce mine safety laws⁵³⁰”.

The Court also considered that the mine inspectors had the “statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe⁵³¹”. Finally, the Court decided that no residual policy considerations prevented the creation of a duty of care in this specific case⁵³².

However, much like in *Hill*, the Court considered that the government had met the standard of care imposed by this duty of care. In this case, the chief mine inspector had received (and acted upon) legal advice to the effect that he did not have the authority to order the closing of the mine⁵³³. Although this advice was ultimately mistaken, the fact that the mining inspectors acted on it in good faith constituted sufficient evidence that the government had met the standard of care⁵³⁴.

§ 5 Core Policy Decisions

Despite its relatively long lifespan, the policy/operational distinction had its fair share of problems. Among others, the complexity of the distinction made its practical application difficult and unpredictable. Distinguishing “policy” from “operation” was a difficult

⁵²⁹ *Kamloops v. Nielsen*, *supra* note 432; *Rothfield v. Manolakos*, *supra* note 321; *Ingles v Tutkaluk Construction Ltd*, [2000] 1 SCR 298.

⁵³⁰ *Fullowka v. Pinkerton’s of Canada Ltd.*, *supra* note 527, par. 51.

⁵³¹ *Ibid*, par. 55.

⁵³² *Ibid*, par. 75.

⁵³³ *Ibid*, par. 88.

⁵³⁴ *Ibid*, par. 76.

undertaking that prompted authors to say that “[...] the essential truth of the statement is that ‘policy does not exist in any concrete sense’, unless one recognizes the independent judgment of all bureaucratic actors”⁵³⁵, and more abruptly, that “[i]n short, policy is what the court says it is”⁵³⁶.

In fact, some courts in Québec were already hesitant to apply the test as it had been devised by the Supreme Court. For example, in *Montambault*, Justice Deschamps (then of the Québec Court of Appeal) penned an in-depth opinion on the rules that ought to apply to cases of liability of the Crown. The facts of the case are out of the ordinary: Dr. Montambault specialised in geriatrics but mainly exercised administrative duties. In 1988, another doctor who worked alongside him noted that Montambault suffered from a borderline personality disorder, which eventually led Montambault to lose his practicing privileges⁵³⁷. Following many conflicts regarding his job, he committed suicide in 1993⁵³⁸. The Court noted that the urgent suspension of his right of practice might have been the cause of his depression and decline⁵³⁹.

The unanimous Court of Appeal of Québec started with a critique of the policy-operational distinction (which, at the time, was the law of the land):

Du droit public nous vient la distinction entre les actes discrétionnaires de l’administration qui reposent sur des considérations de politique générale, sociale et financière et les actes de pure exécution, distinction qu’auteurs et tribunaux recouvrent sous le vocable *policy/operation*. Si, en apparence, la distinction *policy/operation* semble simple, la revue des décisions sur le sujet révèle

⁵³⁵ Cohen & Smith, *supra* note 339 at 22.

⁵³⁶ Woodall, *supra* note 10 at 105.

⁵³⁷ *Montambault c Hôpital Maisonneuve-Rosemont*, [2001] RJQ 893, par. 15.

⁵³⁸ *Ibid*, par. 25.

⁵³⁹ *Ibid*, par. 27.

rapidement son insuffisance et surtout le fait qu'elle relève probablement d'une interprétation historique erronée⁵⁴⁰.

Justice Deschamps instead suggested that an analysis based on “justiciability”, as is used by English law, would be simple, lucid and in easier agreement with our public law⁵⁴¹.

Based on this approach, Justice Deschamps decided that the hospital official abused its discretionary power when it decided to impose an urgent suspension⁵⁴², and that the omission to conduct a proper inquiry constituted a fault. She therefore awarded damages to Dr. Montambault's family. Had the suspension not been considered an abuse of power, this decision would have been considered non-justiciable and hence immune from suit:

[122] Les trois reproches faits au C.H.M.R. en relation avec la révocation des privilèges ne constituent donc pas des exercices déraisonnables de la discrétion du C.H.M.R. et sont protégés par l'immunité de common law. Selon le vocabulaire utilisé par le Conseil privé, la révocation des privilèges et ses conséquences ne sont pas « justiciables ».

It must be said that Justice Deschamps' approach was rejected a few years later by the Supreme Court: in *Finney*, Justice Lebel thought that this approach risked blurring the lines between legality and liability:

31 Although the result of this method is also recognition of the Barreau's liability, it is preferable to take an approach different from the one taken by the Quebec Court of Appeal. That court declined to apply s. 193, because in its opinion the appellant had failed to exercise its powers for the purposes set out in the Act, that is, the protection of the public. That method has the disadvantage of confusing review of the legality of a public body's decisions with the rules that determine that body's civil liability. Undoubtedly those questions will overlap on occasion, and acts that are illegal and that may be set aside under the rules that govern review for legality may found an action in civil liability. However, this does not often happen, and illegality is not necessarily synonymous with civil fault, or a source of delictual liability [references omitted]⁵⁴³.

⁵⁴⁰ *Ibid*, par. 59.

⁵⁴¹ *Ibid*, par. 76, 77.

⁵⁴² *Ibid*, par. 96-98.

⁵⁴³ *Finney v. Barreau du Québec*, *supra* note 126.

The policy/operational distinction was eventually abandoned in the United States in favour of an approach based on public policy considerations⁵⁴⁴. England has also since abandoned the policy-operational distinction⁵⁴⁵ when *Anns* was overruled by *Murphy*⁵⁴⁶ in 1991. In that case, the Brentwood district council had negligently approved a faulty design for the foundation of a building, which plaintiff Murphy later bought. Because of its faulty foundations, the building suffered severe structural defects, and Murphy eventually had to sell it at considerable loss (considered a purely economic loss), which he then claimed from the Brentwood District Council.

The House of Lords took this opportunity to overturn the *Anns* and *Duttons* precedents on the basis that the test devised and applied in those cases was used to allow recovery of economic losses, which the House thought was wrongly decided and “constituted judicial legislation”:

In my opinion there can be no doubt that *Anns* has for long been widely regarded as an unsatisfactory decision. [...] I think it must now be recognized that it did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation. It has engendered a vast spate of litigation, and each of the cases in the field which have reached this House has been distinguished. [...] These logical implications show that the case properly considered has potentiality for collision with long-established principles regarding liability in the tort of negligence for economic loss. There can be no doubt that to depart from the decision would re-establish a degree of certainty in this field of law which it has done a remarkable amount to upset.⁵⁴⁷

⁵⁴⁴ *U.S.C. v. Gaubert*, 111 S. Ct. 1267 (1991) (United States Supreme Court), 1275: “A discretionary act is one that involves choice or judgment; there is nothing in that description that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level.”

⁵⁴⁵ Woodall, *supra* note 10 at 96.

⁵⁴⁶ *Murphy v Brentwood District Council*, *supra* note 393, which was however rejected by the Supreme Court of Canada; *Canadian National Railway Co v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021.

⁵⁴⁷ *Murphy v Brentwood District Council*, *supra* note 393 at 15–16.

The House of Lords confirmed this decision in *Stovin*⁵⁴⁸. There, the plaintiff Mr. Stovin suffered many injuries when he crashed his motorcycle into Mr. Wise's car. Mr. Stovin then sued Mr. Wise as well as the Norfolk County Council as a third party for their failure to have maintained a junction (where the accident happened) they had allegedly known to be dangerous⁵⁴⁹.

Lord Hoffman, writing for the majority of the House of Lords, rejected the distinction between policy and operational acts, based in part on his critical evaluation of the confusion emanating from the Canadian jurisprudence:

In *Barratt v. District of North Vancouver* (1980) 114 D.L.R. (3rd) 577 the plaintiff was a cyclist who was injured when he rode into a pothole. The local authority had a statutory power, but no duty, to maintain the highway. It had a system of inspecting roads once a fortnight. The pothole had apparently come into existence since the last inspection a week earlier. At first instance, the judge held that the local authority were negligent in not having more frequent inspections. The Supreme Court, applying *Anns*, held that frequency of inspections was a matter of policy and could not form the basis of a charge of negligence. On the other hand, in *Just v. British Columbia* (1989) 64 D.L.R. (4th) 689, frequency of inspections was held to be operational. The plaintiff's car was struck by a boulder which had been loosened by ice and snow and rolled down a hill onto the road. The British Columbia Department of Highways had a statutory power to maintain the highway and had a system of inspection of rock slopes to detect loose boulders. The Supreme Court held that the Department could be negligent if it did not inspect often enough. In *Brown v. British Columbia (Minister of Transport and Highways)* (1994) 112 D.L.R. (4th) 1, the plaintiff was injured when his truck skidded on black ice in cold November weather. He said that the Department of Highways should have put salt and sand on the road to prevent ice from forming. The court held that the Department's decision to continue its infrequent summer schedule of road maintenance into November was a matter of policy. The Department was therefore not negligent even if an earlier adoption of the winter schedule would have prevented the accident. I have to say that these cases seem to me to illustrate the inadequacy of the concepts of policy and operations to provide a convincing criterion for deciding when a duty of care should exist. The distinctions which they draw are hardly visible to the naked eye. With all respect to the majority, I prefer the vigorous dissenting judgments of Sopinka J. in the latter two cases.⁵⁵⁰

⁵⁴⁸ *Stovin v Wise*, [1996] UKHL 15.

⁵⁴⁹ *Ibid* at 15.

⁵⁵⁰ *Ibid* at 30–31.

Instead, Lord Hoffman considered that the existence of a statutory power to remedy a problem does not create or entail a duty to use it (depending on the language used in the statute). Instead, he believed a private duty of care could only exist if there was a “public law duty to act” (meaning, in Canadian administrative law terminology, that the only acceptable outcome in the circumstances for the statutory power is its use to prevent harm), and if the statute implicitly allows for compensation to be paid otherwise:

In summary, therefore, I think that the minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised⁵⁵¹.

Lord Hoffman concluded that no private duty of care could or should be imposed on the highway authority’s power to decide the layout of roads. Such a duty of care would, he thought, have a “chilling effect” on the authority’s ability to do its job effectively since municipalities might decide to “play it safe by increasing their spending on road improvements”⁵⁵². Moreover, Lord Hoffman did not believe that the court was in a position to instruct and judge the appropriateness of road layouts⁵⁵³.

The *Stovin* case sought to greatly restrain the situations in which the Crown (or any public authority) could owe a duty of care to a private person. For Lord Hoffman, the Crown’s duty lies first with the public interest, and only in exceptional circumstances could a specific duty exist towards a private interest.

⁵⁵¹ *Ibid* at 28.

⁵⁵² *Ibid* at 33.

⁵⁵³ *Ibid*.

In 2011, the use of the policy/operational distinction underwent a profound transformation in Canada as well, although whether it can be said that the distinction has been abandoned is up for debate. In *Imperial Tobacco*⁵⁵⁴, the Supreme Court, in a unanimous judgement penned by Chief Justice McLachlin, reworked the immunity test by trying to redefine “policy”. In this case, Imperial Tobacco and other cigarette manufacturers were being sued by consumers of their products for their negligence in labeling cigarettes as dangerous. The cigarette companies were therefore suing the government of Canada as a third party on the grounds that it, too, had made representations to the public regarding low-tar cigarettes and had played a role in the design of a new strain of low-tar tobacco. The Supreme Court held that the tobacco companies’ claims against the Crown should be struck out on the basis that they had no reasonable cause for action.

On the way to reaching this conclusion, the Court decided to rework the policy-operational distinction since, as its many critics had argued, it did not offer a practical test to decide matters of liability of the Crown:

[t]he policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.⁵⁵⁵

[the policy-operational distinction] posits a stark dichotomy between two water-tight compartments — policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.⁵⁵⁶

⁵⁵⁴ *R. v. Imperial Tobacco Canada Ltd.*, *supra* note 136.

⁵⁵⁵ *Ibid*, par. 78.

⁵⁵⁶ *Ibid*, par. 86.

The Supreme Court ultimately decided that only “core” policy decisions should be protected from liability suit. As before, in its rephrasing of the policy test, the Court relied on the *Anns* test as reformulated in *Cooper*⁵⁵⁷ (among other things) to determine whether the Crown owed a duty of care to the tobacco companies:

To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test set out by the House of Lords in *Anns*, and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*.

At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.⁵⁵⁸

Although *Imperial Tobacco* was meant to somewhat clarify the state of the law in matters of liability of the Crown, it is not perfect, and is regularly criticized for its lack of clarity. The new definition of policy, after all, remains vague and subject to interpretation. Most notably, one author expressed concern that the new definition “threatens to wreak further confusion⁵⁵⁹”, and the federal Court of Appeal expressed similar doubt: “If anything, *Imperial Tobacco* leaves us more uncertain than ever as to when the policy bar will apply⁵⁶⁰”.

As for the state of the law in Québec, it is as confusing as ever. The principles outlined in *Imperial Tobacco* are, as always, deeply anchored in the private law of torts, articulated in the parlance of common law negligence and imported from English precedents. However, the reasoning followed by the Court, including the new definition of policy (and the doing away

⁵⁵⁷ *Cooper v. Hobart*, *supra* note 280.

⁵⁵⁸ *R. v. Imperial Tobacco Canada Ltd.*, *supra* note 136, par. 38, 39.

⁵⁵⁹ Daly, *supra* note 19 at 1.

⁵⁶⁰ *Paradis Honey Ltd v Canada*, 2015 FCA 89, par. 110.

with “operational” actions) and its consequences, is meant to be applied across Canada, including Québec.

In *Hinse*, for example, the plaintiff had spent 5 years in prison after being wrongly convicted of armed robbery⁵⁶¹. After obtaining parole, he tried in vain to obtain a pardon and mercy from the minister of Justice and the Governor General in Council, but those requests were denied. He sued all three levels of government implicated in his wrongful imprisonment – federal, provincial (in Québec) and municipal. The latter two settled out of court, and the Supreme Court case only involved the liability of the Attorney General of Canada.

Applying *Imperial Tobacco*, the Supreme Court unanimously decided that the exercise of the power of mercy, which is governed by the *Criminal Code* but derives from royal prerogative⁵⁶², was a “true core policy act⁵⁶³” because in making this decision, the minister

- had to “weigh public policy considerations on the basis of social, political and economic factors⁵⁶⁴”,
- had to take into account “public policy considerations, such as certainty of judgements and judicial independence⁵⁶⁵”, and
- did not “act as a mere public servant working in an administrative or operational capacity⁵⁶⁶”.

⁵⁶¹ *Hinse v Canada (Attorney General)*, [2015] 2 SCR 621, par. 2.

⁵⁶² *Ibid*, par. 27-28.

⁵⁶³ *Ibid*, par. 36.

⁵⁶⁴ *Ibid*, par. 33.

⁵⁶⁵ *Ibid*, par. 34.

⁵⁶⁶ *Ibid*, par. 35.

This decision was therefore immune from liability unless it was exercised in bad faith⁵⁶⁷. However, the Court considered that the standard of bad faith in Québec civil law was “[...] flexible, and its content varies from one area of the law to another⁵⁶⁸”. A standard of bad faith broader than pure malice that includes the deliberate intent to cause harm as well as serious recklessness would “be consistent with the logic of Québec’s principles of civil liability” and “is akin to the concept of gross fault, which includes gross recklessness⁵⁶⁹”. The Court used this opportunity to draw a rare comparison between civil liability and judicial review:

Moreover, it would be paradoxical if the exercise of the Minister’s power of mercy were subject to a reasonableness standard on judicial review while being considered from the standpoint of a simple fault in extracontractual liability⁵⁷⁰.

Under these circumstances, the minister had a duty to make a decision in good faith based on a “meaningful review⁵⁷¹”; however, the statutes granting the discretionary powers of mercy leave a large discretion to the minister and did not require him to conduct an investigation every time⁵⁷². The Court considered that evidence of “institutional inertia or indifference” was insufficient, since the Crown can only be liable through the action (or inaction) of its representatives (such as the minister)⁵⁷³. The Court concluded Mr. Hinse had failed to demonstrate, on a balance of probabilities, sufficient bad faith to lift the Crown’s immunity, since relevant evidence proved that a “certain review” had been conducted⁵⁷⁴. This seems to reflect the very large discretion awarded to the minister.

⁵⁶⁷ *Ibid*, par. 36.

⁵⁶⁸ *Ibid*, par. 48.

⁵⁶⁹ *Ibid*, par. 51.

⁵⁷⁰ *Ibid*, par. 52.

⁵⁷¹ *Ibid*, par. 55-56, 68.

⁵⁷² *Ibid*, par. 61-63.

⁵⁷³ *Ibid*, par. 92.

⁵⁷⁴ *Ibid*, par. 114, 120-121.

This concludes the overview of the history of the public law immunity. The principles identified in *Imperial Tobacco* are the ones applicable today and are the ones that will be more specifically examined in the rest of the thesis.

The end result of this evolution is a fairly complex regime of extracontractual liability of the Crown, especially in Québec, where distinctions must be made between public law and private law. This regime treats cases of liability of the Crown in two phases: it first considers them under the ordinary light of extracontractual liability law, but, if one applies, it might add a filter in the form of an immunity which derogates from normal rules and replaces them with mostly public law ones.

Section 2 Current Solution in Extracontractual Crown Liability: Immunities

The usual rules of extracontractual liability and their goal of compensation are not easy to apply to the Crown. It is one thing to hold a neighbour liable to damages when, for example, they do not de-ice their parking lot; it is a different matter if a municipality does not ensure their roads are clear of ice at all times. Hence, is the Crown bound by the same general duty “to abide by the rules of conduct incumbent on [it]”, considering the vastness of its powers (and the fact that its powers sometimes cannot be used without causing harm)?

The private law of civil liability is built notably around this idea of compensation, and meant to enforce legal relationships between legal subjects; public law, on the other hand, is meant

to organise the state, to fight and contain tyranny, and to protect the public good, among other ends. In a civil law case, courts have no reason to be deferent towards the parties, as it is their role to enforce these legal relationships; in a public law case, the same courts have to keep in mind relevant constitutional limits on their ability to dictate or curtail executive action. How can courts apply private liability regimes to the Crown while accounting for "the special political status of representative institutions, and the relationships among those institutions and the courts"⁵⁷⁵, or in cases when the Crown was engaged in "resource allocation activities over which the courts may be institutionally incompetent to exercise a supervisory jurisdiction"?

Canadian Crown liability regimes have so far reconciled these competing principles of public and private law by incorporating immunities in the test for Crown liability. These immunities are public law rules meant to interfere with the ordinary adjudication of a case according to civil law rules. Immunities, when they apply, change the standard by which courts can evaluate the behaviour of the Crown and its servants; they therefore inject a measure of deference towards Crown action into the adjudication process. Just as courts can be deferent in a public law context towards an administrative decision to interpret a statute or to draw certain factual or legal conclusions, so too can they be deferent towards an administrative action drawing up policy or executing its mission.

This deference takes the form of immunities, either statutory (subsection 1) or by virtue of the common law for policy actions (subsection 2).

⁵⁷⁵ Cohen & Smith, *supra* note 339 at 7–8.

§ 1 Statutory Immunities

The idea of equality states that the Crown should be bound by the same principles of civil law as its subjects⁵⁷⁶. However, very specific limits apply to this idea, some of which are created by the legislative branch of government in the form of “statutory immunities”: explicit sections of laws seeking to remove certain public servants or actions from the usual regime of extracontractual liability. These statutory immunities are used generously by the legislator for the conspicuous motive of allowing Crown servants “to carry out their duties without fear of incurring personal tort liability⁵⁷⁷”.

These immunities come in various shapes and sizes but usually look like this one, taken from the *Public Protector Act*⁵⁷⁸:

30. No legal proceedings shall lie against the Public Protector, the Deputy Public Protectors and the public servants and employees of the Public Protector by reason of official acts done in good faith in the performance of their duties.

This immunity contains a few core ingredients:

- “*No legal proceedings shall lie against...*”: This is the immunity itself, the exception to Dicey’s idea of equality. Since the legislator does not speak in vain⁵⁷⁹, this suggests

⁵⁷⁶ *Supra* p. 43.

⁵⁷⁷ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 282.

⁵⁷⁸ CQLR c P-32

⁵⁷⁹ See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665, par. 69.

that without this statutory immunity, the Crown servant (or other protected person) could have been held liable in this context.

- “... *by reason of official acts...*”: The statutory immunity only protects “official” acts, as opposed to “non-official” ones. This refers to the endowment of public authority onto the public servant more than to the ultimate legality of the action taken. Granting or refusing a licence, for example, implies that the public servant was acting in his official capacity, whether or not the granting or refusing is later considered to be legal or not by a court of law.
- “... *done in good faith...*”: The notion and definition of good faith is at the heart of this thesis and will warrant further discussion below⁵⁸⁰. This usually refers to the subjective intention of the public servant to use his official powers with the objective of furthering the objectives of the Act granting these powers.
- “... *in the performance of their duties*”: This precision aims to limit the immunity to acts performed within the scope of their employment as a Crown servant, as opposed to those performed by them as private citizens. One could argue that this part of the immunity is redundant with a previous one since no Crown servant could exercise an official act if they are not acting in their official capacity.

The above example of statutory immunity does not differ much from the rules applicable to the “policy” immunity created by the common law and that will be discussed below. However, the actual wording of the immunity is extremely relevant, and the legislature can create

⁵⁸⁰ *Infra* p. 209.

different sorts of protection, some of which cover specific actions and, more importantly, some of which provide better safeguards than others. For example, section 40 of the *Canada Post Corporation Act*⁵⁸¹ and section 5.8 of the *Aeronautics Act*⁵⁸² use profoundly different language to protect different actions:

40. (1) Subject to this Act and the regulations, Her Majesty, the Minister and the Corporation are not liable to any person for any claim arising from the loss, delay or mishandling of anything posted.

(1.1) Her Majesty and the Minister of Public Safety and Emergency Preparedness may be liable for any claim arising from the loss, delay or mishandling of anything posted while it is under the custody or control of a customs officer.

(2) Subject to this Act and the regulations, a mail contractor is not liable to any person, other than the Corporation, for any claim arising from the loss, delay or mishandling of any mail in the performance of his duties as a mail contractor.

(3) Notwithstanding any other Act or law, but subject to this Act and the regulations and to the *Canadian Security Intelligence Service Act*, the *Customs Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, nothing in the course of post is liable to demand, seizure, detention or retention.

5.8 No person is entitled to any compensation or costs for any loss, damage, removal or alteration resulting from the application of a zoning regulation to any lands, building, structure or object.

In each case, the court ruling on an issue regarding those immunities would probably adapt or even ignore the general rules applicable to Crown immunities to interpret and apply the specific immunity created in those acts, with respect to the rest of the legal regime in which they exist. This is coherent with the separation of power and the court's duty to enact the will of Parliament. In Québec, a statutory immunity is a rule of public law in the sense of article 1376 C.C.Q., which would preclude the application of Book 5 of the *Civil Code of Québec*.

The conferred immunity can also be of much greater intensity than that the common law immunity. The immunity of those exercising quasi-judicial functions, for example, will be

⁵⁸¹ RSC 1985, c C-10

⁵⁸² RSC 1985, c A-2

much more difficult to overcome. Such immunity is usually conferred using a referral to the immunity granted to the judiciary:

16. The commissioners shall have the same protection and privileges as are conferred upon judges of the Superior Court, for any act done or omitted in the execution of their duty⁵⁸³.

The Supreme Court in *Morier and Boily* accepted that this statutory immunity could confer upon a representative of the executive power (a commissioner) the same immunity as a member of the judiciary, which is to say that no claim can be raised against him except where he acts in bad faith knowing he has no jurisdiction:

On this point, I conclude that appellants enjoy the same immunity as a superior court judge not only with regard to proceedings for examining witnesses but also as regards the report submitted by them to the Attorney General.

[...]

No section equivalent to s. 15 applies to superior court judges, and the latter could only be sued in damages where the qualification made by Lord Bridge of Harwich, or before him by Lord Denning, applies, that is in the formula as stated by the former, a judge who in bad faith did something which he knew he did not have the jurisdiction to do, or as stated by the second, a judge who was not acting in the course of his judicial duties knowing that he had no jurisdiction to act.⁵⁸⁴

Much like a privative clause, statutory immunities are a clear message to the courts, telling them to refrain from interfering with the legislative branch's will and with its carrying out by members of the executive branch. In this sense, statutory immunities call upon the courts to be deferential towards Crown actions.

That being said, how far could legislative power go? Could a legislature completely ban all civil remedies against some Crown action or actor, even in bad faith? This is a difficult question that could warrant its own in-depth inquiry beyond the scope of this thesis, but still

⁵⁸³ *An Act Respecting Public Inquiry Commissions*, CQLR c C-37, s. 16.

⁵⁸⁴ *Morier and Boily v Rivard*, [1985] 2 SCR 716 at 737, 744.

deserves a few key comments. First, the right to own property⁵⁸⁵ is not protected by the Canadian constitution, which makes complete expropriation technically legal (though understandably unpopular) in Canada. Second, it could be argued that depriving a citizen of their private law recourse would seem to constitute a matter of “property and civil rights”, which would be an exclusively provincial jurisdiction⁵⁸⁶:

Moreover, I consider that the question is one of delictual liability, which falls within the scope of property and civil rights, matters of exclusively provincial jurisdiction, when as here the legislator is legislating on the extracontractual liability of the members of a commission which he has the power to appoint.⁵⁸⁷

But that is not all. Unilateral expropriation by an act of Parliament is one thing and can be explained by parliamentary supremacy. However, even Parliament cannot grant the Crown or one of its agents or servants an absolute power to act; if the extent of legal authority knows the limits of the rule of law, then the immunity granted to the Crown must also be limited. In such a case, the agent or servant would be considered to have acted outside its official capacity and be personally liable, while the Crown itself might be unaccountable:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.⁵⁸⁸

⁵⁸⁵ It is generally recognized that personal rights to claims for damages constitute property that is part of a person's patrimony.

⁵⁸⁶ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s. 92(1)13°

⁵⁸⁷ *Morier and Boily v. Rivard*, *supra* note 586 at 737.

⁵⁸⁸ *Roncarelli v. Duplessis*, *supra* note 18 at 140.

Statutory immunities can be an effective legislative counter to the idea of equality and significantly affect the private law regimes of extracontractual liability applicable to the Crown and its public bodies and servants. Well-crafted statutory immunities can help the judge better understand the exact legal regime that the legislator meant to create, and can negate a private person's right to claim while respecting the rule of law. What happens, however, when no such statutory immunity exists? Is the Crown completely subjected to private law rules?

§ 2 Policy Immunity

Even where relevant statutes are silent on the matter of liability, the idea of equality does not necessarily apply fully to the Crown. Perhaps owing to the historical immunity of the Crown, courts have found themselves reluctant to adjudicate certain matters of Crown liability by the same principles as those used in private law. This was most keenly the case where the Crown action entailed "resource allocation activities" which lay squarely within the discretion conferred upon the Crown by the legislative branch, and for which the courts are ill-suited to supervise, and therefore are traditionally deferent in an administrative law context. Common law itself contains a much broader⁵⁸⁹ public law rule that can remove certain Crown actions from the purview of the courts, and the courts themselves are responsible for defining and enforcing it. This common law rule is better known as the Crown immunity for core policy decisions.

The immunity for core policy decisions applies when the court determines that the Crown action under scrutiny (the one having allegedly caused the damages) was in fact a "core policy

⁵⁸⁹ Feldthusen, *supra* note 388 at 227.

decision”. This ruling challenges the idea of equality and places the decision beyond the reach of the usual rules of private law (hence the “immunity”); the court may then only hold the Crown accountable for its policy decision where this decision was taken in bad faith. In other words, the Crown cannot be liable for its core policy decisions unless those decisions were taken in bad faith.

When exactly does the common law immunity protect the Crown from suit? This exception to the idea of equality hinges on the concept of “core policy decision”, which must be properly defined for the regime to make sense. To this end, comparing these decisions with the more familiar notion of discretionary power helps to frame it within administrative law logic. It is then useful to compare it with other Crown actions that are understood to fall outside of core policy decisions. Unfortunately, there is an impressively large body of jurisprudence grappling with the ineffable notion of policy, so this thesis will not strive for completeness in this matter. Besides, the legal regime is meant to leave judges a fair amount of discretion in determining what constitutes policy.

As discussed previously⁵⁹⁰, the idea of “core policy decisions” was first introduced in the *Imperial Tobacco* case in 2011. In it, Chief Justice McLachlin defined them as “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors”⁵⁹¹. This definition is meant to capture administrative actions that are the result of the weighing of various interests that the Crown was entitled (or

⁵⁹⁰ *Supra* p. 174.

⁵⁹¹ *R. v. Imperial Tobacco Canada Ltd.*, *supra* note 136, par. 90.

mandated) to balance; these are necessarily the kind of extraordinary powers that flow from the sovereignty of the Crown⁵⁹², as opposed to ordinary, day-to-day governance. It also excludes other kinds of discretionary powers; although these afford a number of “acceptable outcomes⁵⁹³” to the decision maker in the context of individual decisions, they do not necessarily imply the weighing of such factors (economic, social and other policy considerations) on a general scale.

The restatement of the policy/operational distinction in *Imperial Tobacco* did not make a significant impact on the state of the law in this matter. As professor Paul Daly puts it:

However, a core is inevitably surrounded by something that is not core; the existence of a “core” is dependent on the existence of a “non-core”. This is simply to restate the policy/operational distinction in slightly different form⁵⁹⁴.

Before *Imperial Tobacco* redefined the concept of core policy decisions, previous jurisprudence contrasted “simple” policy decisions with operational decisions; this way, policy decisions were sometimes defined negatively as decisions that were not merely operational acts. Despite the change in vocabulary brought upon by *Imperial Tobacco*, examples of policy decisions can still help understand what is now meant by core policy decisions. For example, in *Just*, the Supreme Court mentioned that although such decisions are usually made by people higher up the administrative ladder, “[t]he characterization of such a decision rests on the nature of the decision and not on the identity of the actors⁵⁹⁵”. Justice Cory further cited the

⁵⁹² *Supra* p. 48.

⁵⁹³ *Dunsmuir v. New Brunswick*, *supra* note 8, par. 47, 74.

⁵⁹⁴ Daly, *supra* note 19 at 5.

⁵⁹⁵ *Just v. British Columbia*, *supra* note 293 at 1245.

examples of “decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions⁵⁹⁶”.

In earlier proceedings in the same *Just* case, then-trial judge Beverley McLachlin of the British Columbia Supreme Court made five observations regarding the nature of policy decisions that still seem valid today⁵⁹⁷:

1. It involves planning and consideration of priorities (such as, in the *Just* case, the decision as to what slopes to inspect);
2. It involves “allocating resources and balancing factors such as efficiency or thrift”, and is essentially legislative in nature;
3. “[t]he greater the discretion conferred on the decision-making body, the more likely the resultant decision is to be a matter of policy rather than operational”, even though operational decisions may involve a degree of discretion;
4. “where there are standards against which conduct can be evaluated, a decision may move into the operational area and immunity should not be granted”, since the setting of the standard would in this case be the policy function;
5. “the fact the person or body making the decision is working in the field does not prevent it from being a policy decision”, when policy-making powers have been delegated to those “charged with dealing with problems on a day-to-day basis”.

⁵⁹⁶ *Ibid* at 1246.

⁵⁹⁷ *Just v R in Right of BC*, [1985] 5 WWE 571, par. 14-18.

In short, according to Justice McLachlin, matters of policy involve drawing up general instructions for others or oneself in the pursuit of the mandate drawn up by the legislative body. For example, in the *Just* case, which concerned the liability of highway maintenance crews regarding their decision as to which parts of the highway deserved inspections, Justice McLachlin (as a trial judge) concluded that their decisions fell within the sphere of policy and as such could not be reviewed by the court. This conclusion was to be overturned by the Supreme Court, on the grounds that the “manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue⁵⁹⁸”.

A few years later, Justice Cory summarized the nature of policy decisions by insisting on the protection of decisions that imply the weighing of social, political and economic factors in the context of delicate resource-management carried out by the Crown:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints⁵⁹⁹.

Decisions about where to concentrate subsidies, or which social group to help or promote, then, would be examples of Crown decisions that are not subject to a judicial ascertainment of liability in the absence of bad faith.

⁵⁹⁸ *Just v. British Columbia*, *supra* note 293 at 1245.

⁵⁹⁹ *Brown v. British Columbia (Minister of Transportation and Highways)*, *supra* note 467 at 441.

In recapitulation, the above definitions and examples seem to outline one particular characteristic of core policy decisions: they are general decisions in the sense that they are not individualised. These decisions inherently lack immediate proximity, or a “nexus of closeness”, with any particularised defendant⁶⁰⁰. Such decisions should necessarily involve the balancing of various interests dictated by political, financial, or social factors. Even if it involves a fair bit of discretion, an individualised decision (such as the granting or revoking of a permit) can still be operational in nature.

What then is the difference exactly between discretionary powers and core policy decisions? Those two categories of Crown decisions are focused on different qualities of the decision. The discretionary/non-discretionary (“pouvoir lié”) dichotomy hinges on the freedom, or lack thereof, granted to the holder of the power to consider various factors in its exercise, or even in the freedom he has to exercise this power or not. Core policy decisions, as defined above, are not characterized by the amount of discretion, but rather on their object and by their far-reaching impact. The Supreme Court in *Imperial Tobacco* qualified policy as “a narrow subset of discretionary decisions”⁶⁰¹.

These definitions do intersect, however. By their nature, all policy decisions are discretionary powers⁶⁰², but not all discretionary powers are about policy⁶⁰³. In this sense it can be useful to think of policy powers as “regulatory” powers – these kinds of powers involve a broader-than-

⁶⁰⁰ *Supra* p. 104

⁶⁰¹ *R. v. Imperial Tobacco Canada Ltd.*, *supra* note 136, par. 88.

⁶⁰² Jean-Denis Archambault, *supra* note 17 at 139.

⁶⁰³ *R. v. Imperial Tobacco Canada Ltd.*, *supra* note 136, par. 88.

usual discretion and are meant to have a general impact. On the other hand, some discretionary powers can involve case-by-case decisions such as the granting of a permit to an applicant based on the decision maker's appreciation of specific, factual aspects of the application. Furthermore, a policy decision may yet confer upon follow-up decisions further discretion in the execution and enforcement of the policy decision (although it may not broaden that discretion):

Thus, the fact that a "policy" decision was taken to inspect buildings tells us nothing whatsoever about the discretionary nature of subsequent implementation decisions, or whether courts ought to refrain from second-guessing those decisions⁶⁰⁴.

Despite its official abandonment by the Supreme Court in *Imperial Tobacco*, it is useful to retain the notion of "operational acts" in the judicial glossary, for it describes a type of Crown decision otherwise unnamed. Operational decisions or actions are, of course, those that are not of a "policy" nature, under the pre-*Imperial Tobacco* doctrine where policy and operational decisions represented the full range of government decisions. Sample attempts by the Supreme Court to define this concept include these:

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness⁶⁰⁵.

The characterization of the acts and omissions of the city of Beauport's firefighters poses no difficulties: they are clearly operational in nature. Doubtless there exists a discretion in the execution of the firefighters' operational activities. But this discretion exists in the operational rather than the policy sphere, and the exercise of this discretion is itself an operational decision. Here too, private law standards apply.⁶⁰⁶

⁶⁰⁴ Woodall, *supra* note 10 at 110.

⁶⁰⁵ *Brown v. British Columbia (Minister of Transportation and Highways)*, *supra* note 467 at 441.

⁶⁰⁶ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138 at 727.

In essence, operational decisions are concerned with the execution and implementation of a general policy (stated either at the statutory, regulatory or administrative level), whereas policy is involved in crafting a program and distributing resources at an impersonal level. Moreover, although jurisprudence is divided on the issue, it would appear that failing to create policy is not, in itself, a policy decision but rather an operational decision⁶⁰⁷, making it easier to successfully sue the Crown for negligence in those instances.

In conclusion, operational decisions are those that, by nature, can be subjected to the normal private law of extracontractual liability (whereas, as discussed above, policy decision trigger the application of the common law immunity). Where the Crown decision does not meet the definition of “core policy”, no immunity applies and the normal rules (be it extracontractual liability in Québec or torts in the other provinces) apply normally to the Crown. This way, core policy actions are protected from the application of private law because they represent the purest expression of the Crown's extraordinary powers; they therefore command deference from the courts:

Nous croyons plutôt, sauf erreur, que l'acte politique, évidemment discrétionnaire, n'est pas contrôlable en droit privé parce qu'il est la manifestation même du Pouvoir, des desseins économiques, budgétaires et sociaux du Prince, autrement dit, des choses de l'État; tous phénomènes collectifs qui, chez nous, relèvent des organisations démocratiques; tous phénomènes collectifs qui, chez nous, relèvent des organisations démocratiques. Une cour de justice n'en peut mesurer et sanctionner, sous l'égide du droit privé, que la mauvaise foi de son auteur, car elle émane de l'intention, de l'état d'esprit ou de la réflexion d'individus observés au singulier ou institutionnellement⁶⁰⁸.

⁶⁰⁷ Woodall, *supra* note 10 at 100; *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138 at 726; *Kamloops v. Nielsen*, *supra* note 432 at 24.

⁶⁰⁸ Jean-Denis Archambault, *supra* note 17 at 139.

But if the common law immunity does apply, is the Crown completely protected from all claims?

Section 3 What Immunities Do

Immunities do not entirely live up to their name. The various statutory immunities or the public law immunity designed by the Supreme Court do not offer a total and complete imperviousness from liability that the word “immunity” evokes. Instead, they provide a relative protection from suit, on the condition that the Crown’s behaviour was not too shocking. Instead of barring any recourse, they are effectively meant to raise the bar (or in other words, increase the burden of evidence) that must be met for the Crown to be liable.

Immunities behave somewhat differently in common law (section 1) and in civil law (section 2). Practically speaking, however, they end up having the same impact on the burden of evidence in a case (section 3).

§ 1 In Common Law: Denying the Duty of Care

According to the reformulated *Cooper/Anns* test⁶⁰⁹, in common law jurisdictions, the public law immunity does not make the Crown immune from claims it would otherwise have been liable for. Instead, its impact on a case is to deny the existence of a duty of care between the Crown and its subject. In common law, the rationale of the policy immunity is that the Crown cannot owe a duty of care to its subjects when it was acting on its policy powers.

⁶⁰⁹ In private common law, the immunity only applies in suits involving the tort of negligence – other torts already incorporate an element of bad faith on the part of the Crown, making the immunity useless already: See *supra* p. 102.

This approach is not without merit. Where the Crown is juggling conflicting matters of public interest or is otherwise forced to allocate resources to competing interests, one could argue that there does not exist a particularised relationship between the Crown and any individual subject. Unless, of course, there is sufficient evidence that in a specific context this particularised relationship exists: this will be the case if the Crown acted in bad faith in the exercise of its policy powers; for instance, if it deliberately used those powers to harm one of its subjects. In such a case, common law courts will find that, in the circumstances, there existed a sufficiently proximal relationship between the parties, and the Crown therefore owed a duty of care to its subject.

The Supreme Court gave matters of policy a double role in its decision in *Cooper v. Hobart*⁶¹⁰. Since this case, policy intervenes at two different levels. For the Crown to be held liable under the law of torts, an eventual plaintiff has to go through a number of steps:

- First, the traditional proximity test: was the injury suffered by the plaintiff a reasonably foreseeable consequence of the Crown's action? This stage focuses on the particular relationship between the parties (the Crown and the plaintiff), and can involve broad questions of policy insofar as they hinder foreseeability or otherwise interfere with proximity.

⁶¹⁰ *Cooper v. Hobart*, *supra* note 280, especially p. 550-555.

- Second, despite the establishment of sufficient proximity at the previous step, is there a reason not to apply the regular law of torts in this case? This second step deals with considerations outside of the relationship between the parties that would make the Crown's action non-justiciable; this is how the court can invoke considerations of public law to deny the application of private law to the matter.

In *Livent*, the Supreme Court insisted that phase two of this test is only concerned with matters of policy that are unrelated with the relationship between the parties – such matters having been addressed during phase one of the test⁶¹¹.

It would appear that true immunity does not exist in common law, in the sense that courts do not recognize a rule to the effect that the Crown should not be held liable even when it failed to meet the standard of care applicable to a duty of care it had towards one of its subjects. I could find no precedent where the Supreme Court decided that the Crown 1) had a duty of care (that is to say that the case passed stages 1 and 2 of the *Cooper/Anns* test) and 2) failed to meet the standard of care applicable to it, but 3) nevertheless was not held liable by virtue of a “policy”-related (or other) immunity.

⁶¹¹ *Deloitte & Touche v. Livent Inc. (Receiver of)*, *supra* note 285, par. 38.

§ 2 In Québec Law: Adapting the Applicability of Civil Law

In Canada's only civil law jurisdiction - just as in common law jurisdictions - the public law immunity does not make the Crown immune from claims it would otherwise have been liable for. However, since Québec knows no equivalent to duties of care or to proximity, immunities cannot and do not have the exact same impact as in common law jurisdictions. This legal concept has had to be adapted to fit into the civil law regime. As a consequence, in Québec, the immunity is used to deny the application of private law (s. 1376 C.C.Q.) and, as a result, the Crown cannot be held liable for lack of grounds for a suit.

As discussed above⁶¹², the concept of proximity is foreign to Québec civil law; article 1457 C.C.Q. creates a general duty to abide by the circumstantial rules of conduct so as not to cause injury to others. This general, private law rule applies to everyone including the Crown: the various articles of the *Civil Code of Québec* include various public law rules that dictate the application of private law to the Crown, such as article 1376 C.C.Q., "subject to other rules of law which may be applicable to [it]".

In this context, the policy immunity constitutes one of the "other rules of law" applicable to public bodies that article 1376 C.C.Q. dictates must override the application of Book 5 of the *Civil Code of Québec*. As the logic goes, when the immunity applies, the Crown cannot be held liable even in the presence of a simple fault because article 1457 C.C.Q. does not apply. Instead of article 1457 C.C.Q., a different public law rule of jurisprudential origin applies in

⁶¹² *Supra* p. 86.

order to determine Crown liability – this is the rule that the Crown shall only be held liable if it acted in bad faith.

It is worthwhile to insist that this overriding regime exists by virtue of public (as opposed to private) common law and does not constitute an application of the tort of negligence in Québec. The *Civil Code of Québec*, which is the ordinary law of the land in the Province of Québec, is effectively replaced by a different Canadian public law rule⁶¹³ created by the Supreme Court, which restricts liability of the Crown to cases of bad faith. This is different than if a public law rule simply suspended the application of the *Civil Code of Québec*, and the private common law of torts were to apply by default. The distinction is that other out-of-province jurisprudence specific to the law of torts does not then start applying in Québec. This means that, to the relief of Québec-trained counsel:

- The plaintiff does not have the burden of selecting which tort should apply according to the circumstances;
- No question of proximity arises: even when the Crown benefits from the relative immunity for policy actions, it is still considered proximal to its subjects in Québec and the plaintiff does not have to demonstrate that proximity.

Besides, this would raise a conundrum: by virtue of what would the tort of negligence apply to Québec? Simply suppressing the application of article 1457 C.C.Q., or even of the entire

⁶¹³ *Prud'homme c. Prud'homme*, *supra* note 16, par. 31.

Book 5 of the *Civil Code of Québec*, does not legitimize the application of foreign private law in Québec. The private common law tort of negligence is not a Canadian rule so much as a provincial rule everywhere else in Canada by virtue of each of these other provinces' constitution according to section 92(14) of the *Constitution Act of 1867*. The public law rule of the policy immunity is of jurisprudential origin and, as such, may not change the Constitution by allowing the courts to dictate the source law applicable to "Property and Private Law in the Province".

It seems that instead of applying the tort of negligence in Québec (or any other concept of common private law), the impact of the policy immunity is limited to replacing the standard of care of "simple fault" to that of "bad faith" (the next section will explore this question more deeply), while the rest of the Québec framework of civil liability stays in place. In other words, the Crown, just like any other private party, is still considered to owe a duty of care to all other private parties in the Province; there is no need to establish a particular duty of care owed by the Crown, and the Crown will therefore be held liable if 1) it acted in "bad faith"; 2) the plaintiff suffered some injury; and 3) this injury was caused by the Crown's action.

§ 3 In Both Jurisdictions, the Immunity is Relative

The statutory or policy immunity protecting the Crown from liability is not absolute. Sometimes, the Crown will be held liable for its policy decisions despite the immunity (specifically, where the policy decision was made in bad faith). This is why it is referred to as

a “relative” immunity⁶¹⁴. As discussed above, in common law jurisdictions the immunity only applies in the case of the tort of negligence, not for intentional torts⁶¹⁵. However, no such distinction exists in Québec.

First of all, what is an immunity?

The word immunity as used by the Supreme Court could usually be defined as a complete, or absolute, protection from suit, at least within the scope of the immunity. An example of such absolute immunity would be the one granted to members of Parliament (the *privilège parlementaire*) for words spoken in chamber or within one of its commissions or subcommissions:

44. No Member may be prosecuted, arrested or imprisoned by reason of anything said or done or any document tabled by him in the carrying out of his parliamentary duties in the Assembly or in any committee or subcommittee.⁶¹⁶

One of the tenets of the principle of separation of powers is that the courts must avoid any and all interference with the work of legitimately elected legislators:

[249] Le privilège est exorbitant du droit commun et se limite pour ce qui nous occupe aux paroles prononcées par M. Mulcair au Salon bleu de l'Assemblée nationale. C'est pourquoi la Cour se fait un devoir de ne pas commenter les paroles prononcées par les députés Mulcair, Paradis et Dupuis en Chambre. Non plus que celles de la majorité gouvernementale de l'époque.⁶¹⁷

It is easy to imagine how the absence of such immunities might have a “cooling effect” on the behaviour of elected officials. These immunities guarantee the free exchange of ideas among

⁶¹⁴ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506, par. 23.

⁶¹⁵ *Supra* p. 101.

⁶¹⁶ *An Act Respecting the National Assembly*, CQLR c A-23.1

⁶¹⁷ *Duhaime c Mulcair*, [2005] RJQ 1134, par. 248.

these elected officials. The adoption of a valid legislation may never incur the extracontractual liability of the members of the legislature who passed it⁶¹⁸, even if the Act was passed in bad faith, or was blatantly unconstitutional and the result of gross negligence. The only remedies against such actions are 1) a public law judicial remedy, where courts declare the Act unconstitutional, and 2) democratic, where the electorate would have the choice of voting out whomever is deemed responsible.

The common law immunity protecting the Crown from liability, however, is not absolute like the legislative immunity. Rather, it is a relative immunity, which means it can be overcome if the plaintiff (against the Crown) manages to present the court with the right evidence.

The phrase “relative immunity” is an unfortunate oxymoron, like a “vulnerable impenetrable armor”. The common understanding of the word “immunity” is coherent with the definition of an absolute immunity as it implies complete invulnerability: either one is immune or one is not, and an exception to an immunity implies that there was no immunity. The Crown’s relative immunity is closer to a defence, or a safeguard, against liability – or to a privilege.

Once a court has found that the public law immunity or a statutory immunity applies⁶¹⁹, it will consider that the Crown cannot be held liable for damages caused by its policy decision unless the plaintiff can demonstrate that the policy decision was tainted by bad faith. In other words, the Crown can be sued even when it would be immune, but it cannot be liable unless the

⁶¹⁸ *Roman Corp v Hudson’s Bay Oil & Gas Co*, [1973] SRC 820 at 829.

⁶¹⁹ The same reasoning can be applied as well to most statutory immunities discussed at page 186.

plaintiff overcomes a qualitatively more difficult burden of evidence. In an extracontractual liability case under Québec law, this means that instead of having to demonstrate that the Crown committed a (simple) fault, the plaintiff would have to somehow demonstrate that the Crown acted in bad faith.

In summary, the current conceptual framework applicable to cases of liability of the Crown in Québec is as follows: the Crown is liable to lawsuits just like any other person (the “idea of equality”), except where it is sued on the basis of one of its policy decisions, in which case it can only be liable if it made that policy decision in bad faith. Since that framework is not always simple or intuitive to apply, judges sometimes adapt or invent a different framework for a specific case⁶²⁰, either based on the common law or in equity, which can result in further confusion.

Chapter 3 Québec Civil Law and Deference

Having established where immunities come from and exactly how they operate, we can now turn to the titular point of this thesis: there exists another way for the courts to take into account the particular nature of policy-level Crown actions which, if used, would make immunities unnecessary. The reasoning for this assertion is that the immunity only protects the Crown from policy decisions that were not made in bad faith, but such policy decisions would not be

⁶²⁰ For example, in *Montambault c. Hôpital Maisonneuve-Rosemont*, *supra* note 539 Justice Deschamps applied a criterion based on justiciability of Crown actions; In *Paradis Honey Ltd. v. Canada*, *supra* note 562 the federal Court of Appeal applied a criterion based on the range of acceptable outcomes, based on the framework developed by administrative law.

considered civil law faults unless taken in bad faith. Therefore, the civil law fault – a legal concept already familiar to Québec jurists – would be a better suited tool than to incorporate deference into the court’s evaluation of the Crown’s behaviour than an immunity is.

This modification to the conceptual framework in cases of liability of the Crown would have several advantages:

1. It is workable, in the sense that it would easily and obviously integrate with existing rules of civil liability, which are already known and comfortable to practicing counsel, and without the need to create a parallel system for adjudicating Crown liability⁶²¹;
2. It would be less complex and confusing, which would hopefully translate to easier trials, more effective negotiation and settlements out of courts, and consequently a greater access to justice; and
3. It would reconcile Dicey’s idea of equality with the Crown’s mission of public governance without the introduction of new legal principles which may not integrate well with Québec’s existing legal framework.

This chapter will begin by providing explanations about the standard of bad faith, and demonstrating how this standard is now equivalent to the standard of fault in Québec (Section

⁶²¹ Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *supra* note 13 at 503: “The legal culture in Canada, mirroring the political culture, has never accepted a special regime of law for the Crown, and has always pushed, steadily and effectively, for the subjection of governmental liability for injury or loss to the same private law as governs everyone else.”

1). It will then argue that the standard of fault is effectively equipped to account for public law deference (Section 2), and that this would be a better way of importing the public law concerns surrounding deference in cases of Crown liability (Section 3). As a useful exercise, it will then apply the proposed conceptual framework to existing Supreme Court cases that have been examined in detail earlier in order to demonstrate that it would deal effectively with each of these cases without the needless complications brought upon by the involvement of an immunity (Section 4).

Section 1 The Modern Equivalence of Fault and Bad Faith

As described above⁶²², the relative immunity for policy actions is effectively meant to raise the burden of evidence that rests on the plaintiff from that of proving a simple fault (the equivalent to a breach of the applicable standard of care) to that of proving bad faith on the part of the Crown. This latter burden of evidence is implicitly understood as considerably more difficult for the plaintiff. However, this section will demonstrate that over time, courts have broadened the definition of bad faith to include gross fault. This thesis will further argue that in the context of Crown liability, there is no practical difference between the standard of "bad faith" and that of a civil law fault. As a consequence, normal rules of liability should effectively apply to the Crown. In other words, the relative immunity has been construed out of its usefulness and is now a confusing oxymoron: in the end, the Crown is only immune from situations where it is not at fault in the first place.

⁶²² See *supra* p. 204

To demonstrate all this, this section will first examine the various definitions and interpretations of “bad faith” that have been proposed over the years (§1). It will then look at the ways in which courts have received evidence of bad faith (§2), to ultimately conclude that there is no practical difference between evidence of bad faith and evidence of wrongdoing.

§ 1 The Expanding Definition of Bad Faith

The idea of “bad faith” readily invokes the image of a conniving villain or a fraudster, promising something while having no intention of fulfilling their part of the bargain. In public law, however, the concept of bad faith is somewhat more insubstantial. Bad faith can actually refer to various states of mind, and is not limited to evidence of an intentional fault:

37 What, then, constitutes bad faith? Does it always correspond to intentional fault? The courts do not appear to equate the state or acts of bad faith squarely with a demonstrated intent to harm another or, consequently, to require evidence of intentional fault. That direct linkage is made only in the case law relating to punitive damages under s. 49 of the *Charter of Human Rights and Freedoms*. For example, in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, this Court adopted a narrow definition of intentional fault, based on the nature and function of that type of action. The actual consequences of the wrongful conduct must have been intended (para. 117). Proof of recklessness is not sufficient (paras. 114 and 121). This approach has been followed in subsequent decisions of this Court.⁶²³

When it is exercising public law powers, the Crown is bound by statutes, by the limits of prerogative, or at least by the Constitution. Since these various extraordinary powers only exist by virtue of legitimate sources of power (such as Parliament), the Crown can only exercise these powers with the intent to serve the public interest. In this context, for the Crown, to be acting in bad faith means to be pursuing a different end than the fulfillment of its mission of public interest:

⁶²³ *Finney v. Barreau du Québec*, *supra* note 126, par. 37.

Dans l'exercice d'un pouvoir discrétionnaire, la mauvaise foi suppose chez l'agent public un parti pris, une attitude discriminatoire et parfois une démarche irrationnelle dont la finalité est incompatible avec l'exercice de ses fonctions publiques⁶²⁴.

Similarly, Garant uses the criteria of the finality of the law giving the public servant his powers. It is usually presumed that the public servant has knowledge of the finality of the law they are applying, which would entail that the Crown could not defend itself against an allegation of bad faith by arguing that it did not know what the Legislator's intent was when it conferred upon the Crown such extraordinary powers.

The classic example of bad faith in matters of liability of the Crown is when the Crown acts maliciously, which means with the subjective intention to cause harm. It has been described as the “baseline” definition of bad faith by the Supreme Court on a number of occasions, including by Justice Lebel in *Finney*⁶²⁵ and Justice Deschamps in *Sibeca*⁶²⁶. This conception of bad faith as “malice” was perhaps most famously expressed by Justices Rand and Judson in *Roncarelli*:

Malice in the proper sense is simply acting for a reason and a purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtual vocation outlawry⁶²⁷.

⁶²⁴ Dussault & Borgeat, *supra* note 115 at 485.

⁶²⁵ “Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*” *Finney v. Barreau du Québec*, *supra* note 126, par. 39.

⁶²⁶ “[T]he concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith...” *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506, par. 26.

⁶²⁷ *Roncarelli v. Duplessis*, *supra* note 18 at 141.

Malice is the most exacting definition of bad faith. Because it requires evidence of a subjective intention to cause harm, the burden of evidence it places on the shoulders of a party is exorbitant:

Ajoutons qu'exiger la revue de la conscience subjective de l'illégalité est particulièrement inappropriée lorsque l'autorité publique est accusée d'avoir commis un abus de pouvoir. Abuser de ses pouvoirs, c'est en somme violer l'esprit de la loi, mais pas la lettre. En effet, un fonctionnaire peut commettre un tel abus sans outrepasser les limites apparentes de ses pouvoirs et dans le respect intégral des formalités prescrites par la loi, s'il détourne cette loi de sa finalité ou prend sa décision sur la base de motifs non pertinents. Prouver la violation volontaire de l'esprit de la loi, voilà une tâche exorbitante pour un simple particulier⁶²⁸.

Perhaps because of its exorbitant nature, this strict standard has been relaxed by the Supreme Court even in cases when actual malice – not mere bad faith – was the required burden of evidence, as was the case with the tort of malicious prosecution. Even though “malice” is one of the constitutive elements of this tort, courts have accepted a “wider meaning than spite, ill-will, or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage⁶²⁹”.

Malice is deliberately meant to be a stricter standard than recklessness. In Québec, malice would be the equivalent of an intentional fault, which is stricter than a gross fault⁶³⁰:

As such, a suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. In the civil law of Quebec, this is captured by the notion of “intentional fault”⁶³¹.

⁶²⁸ Pierre Giroux & Stéphane Rochette, *supra* note 500 at 169.

⁶²⁹ *Nelles v Ontario*, [1989] 2 SCR 170 at 193.

⁶³⁰ *Supra* p.92.

⁶³¹ *Proulx v. Quebec (Attorney General)*, *supra* note 226, par. 35.

This marks a difference between malice and bad faith as separate burdens of evidence: bad faith can include the higher standard of malice but, since at least 2004, can now also include some form of negligence and recklessness. This change of policy was effected by Justice Lebel in paragraphs 38 and 39 of *Finney*, reproduced here in full despite their length because of their vital importance:

38 Outside the context of claims for punitive damages, the law of civil liability in Quebec does not, however, appear to take such a narrow view of the content of the concept of bad faith. It appears, rather, to accept evidence of conduct described as “*l’insouciance ou l’incurie grave ou déréglée*” (recklessness or serious or extreme carelessness), expressions that reflect an attempt to translate into French the legal concept of “recklessness” that is familiar to legal English. The application of that concept to the civil liability of governments has been debated. It has been observed that the interpretations applied to that concept have been varied and sometimes irreconcilable. In some cases, overly broad interpretations threatened to unduly extend the scope of public liability and deny administrative decision-makers the latitude and discretion they need in order to discharge their duties. In others, the interpretation was so narrow that bad faith was of very little practical use as a source of liability (P. Giroux and S. Rochette, “La mauvaise foi et la responsabilité de l’État”).

39 These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised (Dussault and Borgeat). This Court seems to have adopted a similar view in *Chaput v. Romain*. In that case, provincial police officers were held liable for breaking up a meeting of Jehovah’s Witnesses. Although the police had been granted immunity by a provincial statute for acts carried out in good faith in the performance of their duties, Taschereau J. concluded that the police officers could not have acted in good faith, as there was no other explanation for their negligence. Moreover, the fact that actions have been dismissed for want of evidence of bad faith and the importance attached to this factor in specific cases do not necessarily mean that bad faith on the part of a decision-maker can be found only where there is an intentional fault, based on the decision-maker’s subjective intent (see, for cases dealing with intentional fault: *Deniso Lebel Inc.; Directeur de la protection de la Jeunesse v. Quenneville*.⁶³²

By describing Crown recklessness as a “fundamental breakdown in orderly exercise of authority”, and by asserting that “[g]ross or serious recklessness is incompatible with good

⁶³² *Finney v. Barreau du Québec*, *supra* note 126, par 38-39.

faith⁶³³”, Justice Lebel effectively broadened the definition of bad faith to incorporate cases where the Crown has failed to exercise its extraordinary powers when it should have. In other words, in certain situations, the Crown will be considered to have a duty to act, and failure to do so would be a form of recklessness so uncaring it would amount to bad faith. Bad faith now also includes *faute lourde*.

Même en analysant le régime général de la bonne foi post-*Finney* on réalise que le régime des immunités législatives peine à se démarquer du droit civil québécois. En exigeant de l’administré qu’il prouve un comportement d’insouciance ou d’incurie grave de la part de l’Administration, la bonne foi ne fait que reproduire une notion déjà bien connue en droit civil : la faute lourde. Les deux normes reprennent le même concept d’écart marqué avec le comportement raisonnable. Elles sont simplement identiques.⁶³⁴

Beyond recklessness, bad faith is now also understood as an action so far removed from statutory objectives that they cannot possibly be considered to have been made in good faith. In *Sibeca*, the Supreme Court explicitly stated that the definition of bad faith now extends beyond malice and includes “acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith⁶³⁵”.

This means that the judicial interpretation of bad faith matches the academic idea that bad faith is anything that is not made in good faith; and the Crown is only acting in good faith when it is acting in the pursuance of its mission of public interest as conferred upon it by the

⁶³³ *Ibid*, par. 40.

⁶³⁴ Vincent Ranger, *La notion de bonne foi dans les immunités législatives au Québec : entre imprécision et redondance* (Ph.D. Thesis, Université de Montréal, 2015) [unpublished] at 130.

⁶³⁵ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506, par. 26.

Legislature and by the Constitution. In the *Roncarelli* case, for example, Duplessis was acting in bad faith for two reasons:

- **Intentional Harm:** He deliberately meant to harm Roncarelli through the extraordinary power that is the revocation of the latter's liquor license; and
- **Improper Motive:** He used the extraordinary power of licence-revocation for an end other than that for which the power exists, which is to control the liquor traffic in Québec, presumably for reasons of public interest such as safety and morality⁶³⁶.

The concept of “improper use of an extraordinary power” has been referred to in other cases in the past under different names. In an *obiter dictum* in *Brown*, for instance, the Supreme Court had hinted that it would have considered that a decision was made in bad faith (insofar as it would make the Crown liable for a policy decision) if it “was so irrational that it could not constitute a proper exercise of discretion⁶³⁷”.

The importance of making a decision for a proper motive extends to cases of wrongful behaviour (as in *Roncarelli*) as well as cases of negligence (as in *Finney*, where the Barreau had failed to discipline a delinquent lawyer despite a number of complaints). Failure to make a policy decision, or the decision not to implement a policy decision, must itself be in the furtherance of the Crown's mission of public interest. As an illustration, Justice Wilson in *Kamloops* considered that:

⁶³⁶ The *Roncarelli* decision contains many references to the “object and purpose” of the *Liquor Act*, without explicitly stating what the object and purpose of the Act were.

⁶³⁷ *Brown v. British Columbia (Minister of Transportation and Highways)*, *supra* note 467 at 442.

I do not think the appellant can take any comfort from the distinction between non-feasance and misfeasance where there is a duty to act or, at the very least, to make a conscious decision not to act on policy grounds. In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care. I conclude therefore that the conditions for liability of the City to the plaintiff have been met.⁶³⁸

Bad faith is therefore a dynamic concept, whose definition is known to be adapted by courts to ensure justice is done in any given case. This elasticity of the notion of bad faith as a burden of evidence is reminiscent of another fundamental civil law concept: the simple fault, which includes a form of good faith as a rule of conduct that must be obeyed at all times⁶³⁹.

In Québec civil law, a general duty to act in good faith is codified in various sources. First and foremost, in accordance with the idea of equality and by virtue of the preliminary provision of the *Civil Code of Québec*, the Crown is subject to the law of the land, of the *jus commune*. Most importantly in this regard, this means that the Crown is subject to articles 6 and 7 of the *Civil Code of Québec*:

6. Every person is bound to exercise his civil rights in accordance with the requirements of good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

In conclusion, bad faith as a burden of evidence to hold the Crown liable extracontractually has been defined in many ways over the years: malice, or intentional harm; recklessness in the use (or non-usage) of public powers, and use of a public power for an improper or sufficiently irrational motive. Bad faith, it seems, is the terminology used by courts to denote Crown

⁶³⁸ *Kamloops v. Nielsen*, *supra* note 432 at 24–25.

⁶³⁹ *Lemieux*, *supra* note 83 at 380.

behaviour that ought to trigger its liability, more than a strict test that can be applied formally and fairly in every instance.

§ 2 Evidence of Bad Faith

Bad faith can also be defined not as a theoretical concept, but as a more tangible burden of evidence. How does one establish that the Crown acted in bad faith?

The Crown, just like any other legal subject, benefits from the presumption of good faith codified in article 2805 C.C.Q. This presumption retains all its importance in public law considering the doctrine that all Crown actions must be presumed valid, and remain in force until declared null by a court of law⁶⁴⁰. These dual presumptions are fundamental to the entirety of public law, since it is a recognition of the executive power's legitimacy to act.

As a corollary to the presumption that Crown decisions are valid, public servants making those decisions must be presumed to understand the intention of the Legislature and to have the intent to exercise their powers accordingly. In support of this presumption, it is worth remembering that the Crown has at its disposal considerable resources, and that its servants have been well trained and possess some expertise, or follow detailed policies guiding the use of their extraordinary powers:

Parce que l'État « exerce des fonctions de puissance publique », la Couronne ne peut être assimilé à un « simple particulier ». Il faut toutefois pousser le raisonnement jusqu'au bout. Même en période d'austérité budgétaire, l'État dispose de ressources incomparables. Ses fonctionnaires s'acquittent avec professionnalisme de responsabilités spécifiques, dont très tôt ils deviennent des spécialistes. Ils sont conseillés par des juristes qui ont développé une expertise certaine dans les domaines du droit où ils concentrent leur pratique. L'une des tâches de ces juristes est de préparer

⁶⁴⁰ *Breslaw v Montreal (City)*, [2009] 3 SCR 131, par. 23 (references omitted).

le texte et les amendements des projets de loi soumis au Parlement. N'est-il pas naturel, dans le contexte propre d'un État moderne gouverné par le principe de la primauté du droit, de présumer que les autorités publiques connaissent la finalité de la loi? N'est-il pas légitime de s'attendre à ce que l'Administration ne prenne aucune décision de nature à affecter des droits sans avoir au préalable identifié les motifs qu'elle a le droit de considérer? Peut-on vraiment croire à la bonne foi d'un fonctionnaire qui commet un abus de pouvoir manifeste?⁶⁴¹

Providing direct evidence of bad faith is notoriously difficult insofar as it can involve a degree of subjectivity and intentionality. In the context of a civil law case, Justice Baudouin said:

La bonne foi est, comme on le sait, une notion difficile. Elle demande d'apprécier une conduite par rapport à un ensemble souvent complexe de circonstances qui ne sont jamais les mêmes d'une cause à l'autre. Elle exige de tenir compte de la nature et de la qualité des rapports entre les contractants, du type de convention, de l'expertise des parties en la matière et du déroulement factuel de leurs relations, entre autres choses.⁶⁴²

There is another hurdle to the establishment of bad faith in cases of liability of the Crown: oftentimes, Crown decisions are not attributable to a single person with their own subjective motives (such as the Premier in the *Roncarelli* case), but to an administrative body (such as a municipal council in the *Sibeca* case). Even in the latter case, the reason why the Crown does anything is decided by the human elements that constitute it. The motive of the Crown when it does or decides something is assimilated to that of its individual (human) components, as the Crown itself cannot, as an institution, have its own motivation:

[...] There is no such concept as administrative bad faith. A legal person can act only through its agents, and can have no intention separate from theirs. If a municipal council, comprised of councillors acting in good faith, adopts a by-law, it will be considered to have acted in good faith.⁶⁴³

As a point of contrast, the traditional definition of a fault (or of the breach of a duty of care) is usually mostly objective – the allegedly wrongful behaviour would typically be compared to

⁶⁴¹ Pierre Giroux & Stéphane Rochette, *supra* note 500 at 168, references omitted.

⁶⁴² *Société de récupération, d'exploitation et de développement forestiers du Québec c Gestion Grand Remous Inc*, [1999] EYB 1999-12452 .

⁶⁴³ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506, par. 35.

that of a (theoretical) reasonable person placed in the same subjective circumstances⁶⁴⁴. Evidence of an intention to cause harm is difficult to find but, once successfully administered before the court, has the potential to turn even a legal and innocuous action into a fault. For example, in the context of a defamation suit under Québec law, broadcasting damaging but accurate information about a person is not necessarily a fault, unless such broadcast was made with the intent to cause harm, or in other words, if the broadcast was made in bad faith.

Since bad faith is meant to be a difficult standard, the evidence presented to support its assertion has to be more than doubts and suppositions⁶⁴⁵, but tangible evidence. How does one demonstrate the mindset of another person? When an explicit admission of guilt (as was arguably the case in *Roncarelli*) is not available, subjective bad faith can still be proven through inferences from actions or statements from the Crown actor⁶⁴⁶.

Evidence of behaviours other than malice are acceptable to refute the presumption of good faith. In other words, proving the absence of good faith fills the same burden of evidence as proving the existence of bad faith. By demonstrating sufficient circumstances incompatible with good faith⁶⁴⁷, a plaintiff can effectively create a factual presumption to the effect that the Crown was acting in bad faith, as the Supreme Court expressed in *Sibeca* and *Finney*:

What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.⁶⁴⁸

⁶⁴⁴ *Supra* p.87 and 102.

⁶⁴⁵ *Wilfrid Nadeau inc. v R*, [1977] 1 FC 541, 557 (FC), confirmed by [1980] 1 FC 808 (FCA)

⁶⁴⁶ See generally Pierre Giroux & Stéphane Rochette, *supra* note 500.

⁶⁴⁷ *Ibid* at 140 and following.

⁶⁴⁸ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506, par. 26.

For example, bad faith has been presumed by courts in the following circumstances:

- Where a municipality had modified its zoning bylaw *after* having received a demand for a permit⁶⁴⁹: this situation can lead a court to presume that the bylaw was not adopted in the public interest but rather for discriminatory motives, although the municipality may then try to convince the court that the presumption should not apply⁶⁵⁰.
- In a case of government procurement, where the criteria inserted in the tendering documents were meant to give one of the bidders an unfair advantage⁶⁵¹;
- Moreover, after bad faith or partiality has been proved concerning one Crown decision, one may presume that the following decisions taken by the same person in the same general context were also taken in bad faith:

Ce qui commence et se poursuit dans l'abus et la mauvaise foi reste vicié jusqu'à la fin, à moins que l'on ne démontre un changement de circonstances et de sentiments qui indique la survenance de la bonne foi. Les résolutions menant au règlement du 6 décembre 1966 établissent le comportement initialement abusif et injuste de la Ville relativement à la propriété de Lucien Landreville. Dès lors, à mon avis, c'est à la Ville qu'il incombait de prouver que les choses avaient changé par la suite. Elle ne l'a pas fait.⁶⁵²

Of course, it is ultimately the purview of the trial judge to draw inferences and to decide when the cumulative evidence becomes convincing enough for the court to presume bad faith on the part of the Crown. Courts have been known to draw such inferences when faced with decisions

⁶⁴⁹ *City of Ottawa et al. v. Boyd Builders Ltd.*, *supra* note 509.

⁶⁵⁰ *Carrières TRP c Mirabel (Ville)*, EYB 1979-135833, par. 20.

⁶⁵¹ *Therrien c Blainville*, JE 97-1970 at 10.

⁶⁵² *Landreville v Town of Boucherville*, [1978] 2 SCR 801 at 811.

that were irrational to a point⁶⁵³, or given the gravity of an injustice suffered by the Crown's subject, or an "injustice grave équivalant à la mauvaise foi"⁶⁵⁴.

It has been long recognized that evidence of the illegality of a Crown action is not, in itself, evidence of bad faith. It is possible for the Crown to stray from its mission of public interest and make an illegal decision without being in bad faith. Proof of illegality will only provide evidence of bad faith if other elements in the case support this bad faith:

J'estime néanmoins que le simple fait de ne pas agir conformément à la loi ne saurait *per se* constituer de la mauvaise foi. Si la mauvaise foi peut aussi se traduire par la connaissance qu'un acte est contraire à la loi, ce ne peut être qu'*in concerto* en tenant compte de toutes les circonstances d'exercice de la discrétion, traduit en l'espèce, il faut le rappeler, moins par une activité positive que par l'omission de trouver plus rapidement un remède à l'illégalité de l'inégalité.⁶⁵⁵

How then can courts reconcile the idea, on one hand, that illegality does not (necessarily) demonstrate bad faith, and on the other hand, that the Crown is presumed to understand the limits of its own powers? Does the latter presumption mean that the judge should also presume that all illegal actions were a deliberate abuse of power on the part of the public servant? When can an illegal action be considered evidence of bad faith?

First, even if the illegality of a Crown action may not be indicative of bad faith, compelling evidence of bad faith is always indicative of illegality. The existence of some degree of correlation between evidence of illegality and evidence of bad faith is a normal part of the Canadian public law system.

⁶⁵³ See *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506, par. 23.

⁶⁵⁴ *Taylor c Île-Cadieux (Ville de l')*, 2012 QCCS 2126, par. 27; citing *Dorval c Sanguinet Automobile ltée*, [1960] BR 706 at 712–713.

⁶⁵⁵ *Daishowa inc c CSST*, JE 98-722 at 51.

Second, the evidence required to conclude that a Crown action is illegal is usually an objective demonstration that the action or the decision lies outside of the Crown's competence⁶⁵⁶, either 1) by reason of a breach of procedure (such as a failure to respect procedural fairness), or 2) by reason of a legal or factual interpretative mistake. A Crown decision will also be considered outside of its competence upon subjective evidence that 3) the decision was made for motives unrelated to the Crown's mission of public interest. In contrast, in the private law of civil liability, the applicable standard of care is simply to compare the impugned behaviour to that of a reasonable person in all the same circumstances. In the context of a liability suit against the Crown, the only evidence relevant to both legality and liability are those that speak both to a) the infringement of some public law principle and b) the divergence from the behaviour of a reasonable person placed in the same circumstances.

In the end, the trial judge in any given case will have to decide where each piece of evidence lands in the context of the case. Evidence of illegality may or may not help establish bad faith. Evidence of bad faith will always help establish illegality. Crown servants who carry out their public duties will always, at the very least, be expected to be aware of the mission of public interest promulgated by the Statute granting them their power, and courts will expect them to be trying to fulfill this purpose⁶⁵⁷.

⁶⁵⁶ See the discussion on Crown powers, *supra* p. 70.

⁶⁵⁷ *Chaput v. Romain*, *supra* note 205 at 844–845 (emphasis in the original).

§ 3 The Impact of Bad Faith on a Case

As stated above, bad faith as a burden of evidence is meant to represent a higher standard than that of a simple fault, in order to restrict cases where the Crown will be held liable. This section has attempted to explain and illustrate when a Crown action can be considered to have been accomplished in bad faith. In the light of this analysis, can it be said that the standard of bad faith is, indeed, making the plaintiff's burden more difficult?

In other words, is it possible to imagine a case where the Crown is at fault, but is nonetheless protected because of the applicable (relative) immunity? Given the conceptual framework in cases of liability of the Crown, can the court decide that the Crown acted in a way incompatible with the standard of a reasonable person placed in the same circumstances, but cannot be liable because it did not act in bad faith?

For example, in what situation could a court find that a municipality, in adopting a bylaw (which is necessarily a policy decision), 1) committed a fault by failing to act in the same way a reasonable municipality would have acted in the same circumstances, but 2) was not acting in bad faith in the sense that there is no indication it acted for a purpose other than its mission of public interest? What would be the difference between these definitions? How could the municipality be at fault if it acted in good faith in the public interest? Can a municipality still be acting in the public interest if it causes damages by acting in a way no reasonable municipality would have? Even if it did not act with the intent to cause harm, how could this behaviour not qualify as the kind of recklessness the *Barreau du Québec* exhibited in

*Finney*⁶⁵⁸? Does the municipality need to be immune from suits for damages caused by its good faith decisions if these decisions, by definition, do not constitute a fault?

Considering the nature of the Crown actions that the relative immunity is meant to protect, it will always be necessary for the court adjudicating the case to take relevant discretion into consideration when ascertaining fault. This brings into question the relevance of the relative immunity: is the immunity really useful if the Crown is liable in essentially every case that it is at fault?

Section 2 The Fault is an Appropriate Standard to Judge Crown Action

In order to be liable in Québec, the originator of the injury must have behaved in a reproachable manner, which is to say he must have committed a fault. It does not suffice that an injury happened, the injury must have been caused by a fault⁶⁵⁹. In Québec civil law, an injury that was caused by a perfectly legitimate or appropriate action, or even by a simple mistake, cannot be compensated⁶⁶⁰. To be liable, the Crown (or any other private defendant) must have acted in a way incompatible with the behaviour of an abstract, objectively reasonable person placed in the same subjective circumstances⁶⁶¹.

⁶⁵⁸ This argument will be explored further in the next section.

⁶⁵⁹ See *infra*, p. 83

⁶⁶⁰ As an example of an error in judgement that would not be a fault, see *MD c Plante*, 2009 QCCS 6113 .

⁶⁶¹ See generally *supra* p. 87.

This “reasonable person” test already involves a fair amount of deference, even in entirely private law matters. “Deference” in this context refers to court's own recognition of their institutional role and limitations. For example, it is not the role of the court to tell citizens how to act and what to think – rather, it is their role to tell citizens when they have crossed certain thresholds, just as it is the role of the court to tell the Crown when it has done the same. More to the point, the court will be careful to exercise considerable restraint, meaning an increased level of deference, when evaluating the behaviour of someone exercising specialised action in a particular context, such as a professional:

2513. Lors de l’appréciation des faits, la Cour doit tenir compte de la nature de l’obligation et de son étendue. Sa conclusion quant à l’existence d’une faute dépend de loin de la nature de l’obligation qui incombe au débiteur, que l’on soit en présence d’une responsabilité délictuelle ou contractuelle. Ainsi, dans le cas de certains professionnels tenus seulement à une obligation de moyen, la constatation d’une erreur ne permet pas de conclure nécessairement à une faute génératrice de responsabilité. Pour qu’elle engage la responsabilité de son auteur, l’erreur doit être non conforme au standard de conduite attendu d’une personne raisonnable ou d’un professionnel compétent et prudent placé dans la même situation et en présence des mêmes circonstances que celles dans lesquelles le défendeur se trouvait. Ainsi, l’erreur du médecin ne constitue pas nécessairement une faute puisque cela équivaudrait à transformer son obligation de moyens en obligation de résultat⁶⁶².

Even in a common law context, the same argument was articulated by Chief Justice McLachlin in *Hill* when the court was tasked with examining the behaviour of a servant of the Crown – in this case a police officer. The nature of the work done by this public servant required the court to exercise the same sort of restraint in their evaluation of the servant’s action as those of a professional would have warranted:

53 Police are not unlike other professionals in this respect. Many professional practitioners exercise similar levels of discretion. The practices of law and medicine, for example, involve discretion, intuition and occasionally hunch. Professionals in these fields are subject to a duty of care in tort nonetheless, and the courts routinely review their actions in negligence actions without apparent difficulty.

⁶⁶² Karim, *supra* note 227 at 1059–1060.

54 Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.⁶⁶³

Civil law is significantly different from the common law in various regards. As demonstrated earlier⁶⁶⁴, in Québec the *jus commune* is that the Crown does not have a general immunity, and that citizens are generally entitled to rely on the Crown as on any other private party placed in similar circumstances.

This section argues that the appreciation of these subjective circumstances and the ascertainment of the behaviour of an objective reasonable person are sufficient ways of including public law deference into the decision making process in Crown liability cases. Subsection 1 argues that the standard of fault is an appropriate standard to apply to Crown actions, then Subsection 2 demonstrates how the flexibility of the fault can be used to account for public law deference.

§ 1 The Civil Law Standard of Fault Applied to Crown Action

The civil law standard of fault can be applied to the Crown without interfering with the separation of powers or with other relevant principles of public law. This subsection presents three arguments in support of this assertion. The first is that applying the standard of fault is not the same as enabling the judiciary to hold the Crown liable based on a reasonableness

⁶⁶³ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236, par. 53-54.

⁶⁶⁴ *Supra* p. 118.

standard. The second argument is to the effect that the civil law standard of fault does not supersede any rule of public law. The third argument is that the standard of fault has effectively been applied to the Crown in Québec for a long time. This subsection will conclude with some comments on the effective difference between gross fault and simple fault in the context of Crown liability.

1) The fault is not a strict reasonableness standard

One possible concern with applying the civil law standard of fault to Crown action is that the courts could abuse this standard to usurp sovereign powers delegated to the Crown by the legislature:

Once a court bases liability instead on the alleged failure to exercise a discretionary power "reasonably", unless there exists a meaningful analogy to private party negligence law, the court is usurping discretionary powers that belong to the government. This is simply wrong. A prohibition on unique public duties of care would prevent this.⁶⁶⁵

The standard of fault in Québec civil law does incorporate an important element of reasonableness, but it is not limited by that element and it exhibits important differences with the standard of reasonableness used in public law. Whereas the judge in a judicial review case would assess reasonability based on the range of possible acceptable (legal) outcome and intelligibility of the decision⁶⁶⁶, in a civil law case he would compare the impugned behaviour to that of an objective reasonable person placed in the same subjective circumstances. The

⁶⁶⁵ Bruce Feldthusen, "Negligent By-Law Enforcement: Let's Uber Anns Right Out of Town" (2017) 47 *Advocates' Quarterly* 255 at 264.

⁶⁶⁶ *Supra* p. 74.

public law test is designed to evaluate the legality of a decision, whereas the civil law test is designed to assess whether the Crown should be liable for the consequences of that decision.

In the appreciation of all the circumstances in the application of the civil law test, courts may be tempted to establish some bridges between the idea of the legality of a decision versus that of liability. It could be argued that the old maxim, “The King can do no wrong,” applies even today, albeit in a different form. One reading of the phrase could be to the effect that, with respect to extracontractual liability, the King does not have the mission or the power to commit wrongdoings, nor to authorize the commission of wrongdoings by another. In this sense, the modal “can” would refer to a theoretical impossibility: by definition, the King cannot even want to commit a wrongdoing – if this was the case, its decision would be *ultra vires* and cancelled on the grounds that it was not the King’s desire.

This temptation to establish bridges between legality and liability should be resisted. When a private party commits a fault, there is hardly ever any inquiry as to the legality or lack thereof of their action. For instance, filing an unfounded complaint against a lawyer can be a source of liability, but is not prohibited by law⁶⁶⁷; the same goes for the failure of a restaurant to clear out their sidewalk of ice⁶⁶⁸. An illegal action does not necessarily double as a wrongful action. A legal action by the Crown may also be wrongful and form the basis of liability: it is possible that the Crown does have the competence to accomplish this action, but that in the circumstances, a reasonable Crown would not have used this power in this way. The criteria

⁶⁶⁷ *Séigny c Mongrain*, 2005 QCCA 968.

⁶⁶⁸ *Robertson Barquerro c 9144-4844 Québec inc*, 2013 QCCS 5061.

for legality is not the same as that of liability, and those two should be kept separate⁶⁶⁹. For example, a municipal inspector who made a mistake applying a by-law could have his decision corrected by a court, while private compensation would be denied if the inspector nevertheless acted as a reasonable person in the circumstances – such as in the *Welbridge*⁶⁷⁰ case.

Just like in cases of contractual liability, the question of liability or legality of a Crown action depends on the nature of the claim against the Crown, rather than on the Crown action itself. In Crown contractual liability, public law and principles of legality apply to the Crown's decision to adjudicate a contract and on the choices it made regarding the product or service, but private law (either in Québec or in the rest of common law) applies to the Crown's contractual dealings with bidders and, eventually, contractors⁶⁷¹. Similarly, in extracontractual matters, the validity of the Crown's decision to adopt a bylaw or make a decision is subject to relevant principles of public law, whereas the consequences (more specifically the damages) caused by this decision is subject to private law principles, such as fault in Québec, or negligence elsewhere.

As a final comment on this argument, the subject of the inquiry is different in judicial review and in civil liability lawsuits. In judicial review, the analysis is focused on the disembodied administrative decision or action and its legality, whereas in a civil liability lawsuit, the analysis is directed at the behaviour of the Crown servant who made the decision or took the action. In a civil liability lawsuit, it is impossible to adduce evidence that the Crown as a

⁶⁶⁹ *Finney v. Barreau du Québec*, *supra* note 126, par. 31.

⁶⁷⁰ *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra* note 133.

⁶⁷¹ *Supra* p. 76.

disembodied entity was acting with an intent separate or with a different legal qualification than that of its representatives⁶⁷². In other words, a court would not have to decide whether the Crown or “the government” as an abstract entity acted as a hypothetical reasonable government would have in the same circumstances, but rather if the tangible public servant or public body acted like a reasonable person placed in the same circumstances.

2) The fault standard does not supersede rules of public law

The use of the standard of fault in civil liability cases against the Crown does not prevent or suspend the application of any rule of public law. The standard of fault is not in conflict with principles of judicial review or other considerations of public law. In practice, as noted above⁶⁷³, the application of one set of civil law rules or public law rules will depend on what is being claimed by the plaintiff in a particular suit and in the context of his particular set of facts.

Moreover, as will be discussed at greater length in the next subsection (§2), since the notion of fault is flexible, it can account for various circumstances particular to the Crown and its extraordinary powers. In practice, this means that proper exercise of extraordinary powers, including the reasonable exercise of discretionary powers as well as other non-justiciable Crown actions, cannot be qualified as faults. For example, in *Deniso Lebel*, when a plaintiff was seeking compensation from the Crown for a refusal to grant him a permit to exploit an industrial sawmill, the Court of Appeal of Québec considered that the valid exercise of

⁶⁷² *Supra* p. 218.

⁶⁷³ *Supra* p. 55.

discretion by the ministry could not constitute a fault⁶⁷⁴. By definition, good governance is never a fault, even if damages are suffered as a result.

As an example, in *RNE Realty*, the Québec Court of Appeal considered that actions of a municipality that were not taken for an illegitimate purpose and that instead aimed to fulfill objectives coherent with the municipality's mission could not trigger its liability. This is not a matter of immunity, but rather of lack of fault:

[...] la ville et son maire souhaitaient, en adoptant le règlement de 1991 et en interdisant l'activité de stationnement commercial dans la zone litigieuse, favoriser le développement optimal des terrains entourant l'aéroport Montréal-Trudeau, ce qui en rehausserait la valeur et maximiserait, par le fait des taxes, les revenus municipaux. Il n'a pas vu que les intimés aient cherché par là à nuire aux intérêts particuliers des appelantes et à bloquer spécifiquement leur projet; il n'y a pas vu non plus d'intention malicieuse ou de fin impropre, s'agissant plutôt d'assurer la réalisation d'objectifs légitimes et cohérents.⁶⁷⁵

Applying the standard of fault instead of a relative immunity does not have an impact on the justiciability of Crown action. A court declaring whether a Crown action was a fault or not approaches justiciability in much the same way as it would by declaring a Crown action to be taken in bad faith or not. In both cases, justiciability cannot be invoked as a defence by the Crown, but instead represents the results of the court's refusal to interfere in the Crown's affairs⁶⁷⁶.

3) This standard is already being applied in Québec

⁶⁷⁴ *Québec (Procureur général) c. Deniso Lebel inc.*, *supra* note 401.

⁶⁷⁵ *RNE Realty Ltd c Dorval (Ville de)*, 2012 QCCA 367, par. 33.

⁶⁷⁶ *Supra* p. 67.

Now that the Supreme Court has reformulated the standard of bad faith to include gross recklessness (in certain circumstances), it could be argued that the standard of fault already applies to the Crown in Québec. In every case of liability of the Crown in this province, the court has to consider whether the action was a core policy action or not (in other provinces, this question only arises when the Crown is sued in negligence). If the answer is no, then the normal rules of liability applies, which include the standard of fault. If the answer is yes, then in every case the court must decide whether the action was taken in bad faith, and the definition of bad faith includes a form of recklessness. This standard of recklessness necessarily involves comparing the Crown's behaviour to that of an objective, reasonable person.

The idea that the Crown, or even elected officials such as municipal counselors, must act within the boundaries of the reasonable person test, is not new. Courts have been comparing the conduct of the Crown to that of a reasonable person for a number of years already. The standard of the reasonable person is often used in other contexts as well:

27 From this analysis, it may be concluded that the public law immunity that attaches to an exercise of legislative and regulatory power can be incorporated into the rules of liability applicable to public bodies. In light of the wording of art. 1457 of the *Civil Code of Québec*, an applicant can be required to establish that the public body acted in bad faith, or in circumstances leading to a conclusion that it acted in bad faith⁶⁷⁷.

45 Accordingly, while elected municipal officials may be quite free to discuss matters of public interest, they must act as would the reasonable person. The reasonableness of their conduct will often be demonstrated by their good faith and the prior checking they did to satisfy themselves as to the truth of their allegations. These are guidelines for exercising their right to comment, which has been repeatedly reaffirmed by the courts⁶⁷⁸.

73 I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due

⁶⁷⁷ *Finney v. Barreau du Québec*, *supra* note 126, par. 27.

⁶⁷⁸ *Prud'homme c. Prud'homme*, *supra* note 16, par. 45.

recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results⁶⁷⁹.

The standard of fault is already the appropriate standard for all operational actions⁶⁸⁰, which can include discretionary actions. If comparing the behaviour of the Crown to that of a reasonable person (or a reasonable Crown) placed in the same circumstances raised a fundamental problem, it can be expected that the Supreme Court would have refused to apply this standard for all operational acts since *Laurentides Motels*⁶⁸¹. Moreover, the standard of fault has been applied to Crown action in other cases as well throughout history, even in cases of misfeasance (as opposed to negligence or nonfeasance). For example, Duplessis was condemned to pay Roncarelli \$25,000 in damages based on this standard⁶⁸².

There is no constraint inherent to the standard of fault that prevents it from applying to policy actions. The standard of fault has been designed to apply equally to cases of misfeasance and nonfeasance, and there is no reason it would not be appropriate as a standard for policy-like

⁶⁷⁹ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236, par .73 (references omitted).

⁶⁸⁰ *Supra* p. 202. See also Jean-Denis Archambault, *supra* note 17 at 188: “Par contre, on peut discerner la présence d’une discrétion, essentielle à l’acte politique, chez un acte opérationnel lorsque, notamment, le législateur l’a expressément inscrite dans une disposition habilitant. Alors la rigueur de l’acte opérationnel discrétionnaire se mesure à l’aune du raisonnable eu égard à toutes les circonstances”.

⁶⁸¹ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138.

⁶⁸² *Roncarelli v. Duplessis*, *supra* note 18.

measures. For instance, it would not only be the appropriate standard, but the only standard, against which to evaluate policy-like decisions adopted by private parties such as corporate campuses (for example, a miner's or lumberjack's camp) or a condominium association⁶⁸³.

It also cannot be said that the Crown in Québec can only be held liable for its policy actions on evidence of subjective intention to harm. By broadening the definition of bad faith as it did in *Finney* to include gross recklessness⁶⁸⁴, the Supreme Court allowed the weighing of Crown action against an objective standard. How can recklessness be defined other than by comparing the behaviour to that of a reasonably diligent person placed in the same circumstances⁶⁸⁵? In light of the demonstration in the previous section that the standard of bad faith includes gross negligence and recklessness, Crown behaviour is already being evaluated using the standard of the reasonable person placed in the same circumstances.

The Supreme Court's *Hinse* case (where Mr. Hinse, having been wrongfully convicted of armed robbery, was claiming compensation from the federal Minister of Justice for their failure to correctly review his case and issue a pardon) provides a useful example of how the standard of fault could be used in the context of a broad discretionary power. In this case, the Court

⁶⁸³ In *Drolet c Syndicat des copropriétaires Châteaux de la Rive-Boisée phase XIII*, 2014 QCCS 219, the Superior Court applied the standard of fault to a policy adopted by a condominium association regarding snow removal, and considered that the policy did not constitute a fault despite the injury it caused the plaintiffs.

⁶⁸⁴ *Supra* p. 210.

⁶⁸⁵ In *Finney v. Barreau du Québec*, *supra* note 126, the Supreme Court considered that “The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence”.

decided that the Minister's pardon power represented a policy decision⁶⁸⁶, and further specified that the immunity in Québec could find expression in the standard of gross fault:

51 In our opinion, a standard of bad faith that encompasses serious recklessness as defined in *Finney* and applied in *Sibeca* is consistent with the logic of Quebec's principles of civil liability. Moreover, this standard is akin to the concept of gross fault, which includes gross recklessness: see art. 1474 *C.C.Q.*[...]

52 This standard is of course higher than the standard of simple fault that the trial judge incorrectly applied in the case at bar. A simple fault such as a mistake or a careless act does not correspond to the concept of bad faith that defines the limits of the Crown's qualified immunity. Moreover, it would be paradoxical if the exercise of the Minister's power of mercy were subject to a reasonableness standard on judicial review while being considered from the standpoint of a simple fault in extracontractual liability.

The Supreme Court therefore considers that the standard of gross fault is appropriate (as opposed to the standard of simple fault) because it represents a higher, more difficult standard. As suggested by this thesis, at the end of paragraph 52, the Court likens this additional burden on the plaintiff to the standard of reasonableness in judicial review, which represents the Court's deferential approach to the use of public powers.

The standard of gross fault, however, is not the only way to express this deference in the context of a liability suit. In paragraph 52, the Supreme Court seems to have mischaracterized the standard of simple fault by labeling it as "a mistake or a careless act", hinting that only the standard of gross fault could allow it to express deference. Outside of specific circumstances (such as a obligations of results⁶⁸⁷), mistakes are not necessarily considered simple faults⁶⁸⁸. The standard of simple fault should take all relevant factors into consideration; in the *Hinse*

⁶⁸⁶ *Hinse v. Canada (Attorney General)*, *supra* note 563, par. 33, 36.

⁶⁸⁷ See *supra* p. 96 and next section.

⁶⁸⁸ *Supra* p. 87.

case, this would include public law factors such as the large discretionary berth granted to the Minister in assessing requests for pardon.

Having settled on a standard of gross fault, the Supreme Court determined the exact scope of the Minister's duty at paragraphs 58 and 68: the Minister had a duty to conduct a meaningful review, but not a thorough or extensive investigation based on practices that were put into place at a later time. More specifically, the Court considered that "[i]t goes without saying that, as the AGC agreed at the hearing, a total failure to conduct a meaningful review of an application that is neither frivolous nor vexatious would constitute a breach of the Minister's duty⁶⁸⁹". The standard of simple fault is flexible enough to allow for the setting of such a duty, as will be detailed in the following subsection. Was the immunity necessary, then?

Finally, even though the Supreme Court in *Hinse* shows deference to the Minister's decision through the use of a standard of gross fault (representing the relative immunity for policy decisions), the Court must still proceed by an extensive analysis to determine exactly what the Minister's duty was in light of this deference, and whether the Minister breached that duty. In so doing, there is no denying the Court had to compare the Minister's actions to that of an objective standard.

⁶⁸⁹ *Hinse v. Canada (Attorney General)*, *supra* note 563, par. 68. The Supreme Court later concluded that the Minister did conduct a sufficiently meaningful review of Mr. Hinse's case: par. 80.

§ 2 Fault is Flexible

Fault is a flexible standard that can take into account various considerations, and this flexibility allows it to be an appropriate vehicle even for a public law concept such as deference. It can do this both through accounting for considerations of public law, including for the exercise of extraordinary powers, and by making adjustments to the standard of evidence. In fact, the standard of fault is proving that it is capable to account for deference since it is already accomplishing that task.

In other words, the standard of simple fault is not a static standard but is always adapted to the relevant circumstances. What constitutes a fault for the Crown can be adjusted depending on the circumstances, for example, in the same way that it is for doctors or lawyers or in cases of defamation⁶⁹⁰. The mere demonstration that an injury has been suffered is not sufficient to trigger liability – it must also be demonstrated that the defendant (such as the Crown) did not act according to the rules of conduct applicable in the circumstances.

This very same ability of the courts to show deference to private actors can be used to show deference to public actors, albeit for somewhat different reasons. Courts show this deference towards private citizens in an effort to respect their individual rights and their freedom of thought; the Crown has neither. Instead, the courts show deference based on the same fundamental principles of public law that guide them when applying the rules of judicial

⁶⁹⁰ *Supra* p. 87.

review⁶⁹¹: the rule of law, and an understanding of the principle of separation of powers that recognises the Crown's capacity to govern.

This does not mean that the courts can (or should) define or decide the extent of the Crown's power. The legislative power belongs to legislative bodies – Parliament and the provincial legislatures. Their legislative action can define the Crown's mission and empower it to fulfill this mission. The courts should not – in fact they cannot – exercise legislative powers by virtue of the Constitution and its principle of separation of powers. Courts can neither grant the Crown more power nor take those powers away (unless they find the power-granting legislation itself unconstitutional). Courts are instead tasked with interpreting legislation, which gives them the final say on a legislation's meaning. Once the legislative power has granted the Crown some power to be used “in the public interest”, it is up to courts – not the Crown – to determine what the legislature meant by this “public interest”⁶⁹². The Crown cannot a) decide nor b) interpret the notion of “public interest”. In short, the courts cannot legislate, but they must decide when to confront the Crown's interpretation of its own powers.

1) Appreciation of extraordinary circumstances

By applying the *jus commune* codified at article 1457 C.C.Q., the court can decide which circumstances are relevant in each case. This can include extraordinary (or public law) circumstances, which is to say, circumstances that only apply to the Crown. There is no

⁶⁹¹ *Supra* p. 59.

⁶⁹² *Roncarelli v. Duplessis*, *supra* note 18.

inherent limitation, by virtue of the *Civil Code of Québec* or other rule of civil liability in Québec, to the types of circumstances that courts can take into account. Courts can recognize various kinds of extraordinary circumstances applicable only to the Crown due to its particular nature and its particular mission. What follows are examples of such extraordinary circumstances.

The fact that a Crown action was administrative in nature⁶⁹³ (or, in other words, that it was a use of extraordinary powers), such as the granting of a license or the adoption of a resolution, as opposed to an act of a purely private nature⁶⁹⁴ such as the concluding of a contract⁶⁹⁵, is an extraordinary circumstance that calls for deference. Since extraordinary powers are an expression of sovereignty and must be used for the public good, the courts have to adjust the behaviour of a reasonable person using those powers to bring it more in line with that of an administrator⁶⁹⁶, or a fiduciary⁶⁹⁷.

More generally, the statutory framework surrounding the Crown action constitutes an important extraordinary circumstance to be considered by the court. These statutes, in defining the Crown's mission and granting it the required powers to fulfill it, may reshape the definition

⁶⁹³ This was the language used in *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 43, par. 20 to determine whether procedural equity could apply to a decision.

⁶⁹⁴ See the discussion on this subject, *supra* p. 52.

⁶⁹⁵ See *Dunsmuir v. New Brunswick*, *supra* note 8, par. 103.

⁶⁹⁶ See for example art. 1482-1490 and 2138-2148 C.C.Q.

⁶⁹⁷ For a complete argument of the fiduciary nature of Crown powers, see Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31 *Queen's Law Journal* 259.

of how a reasonable person ought to act in this stead⁶⁹⁸. This statutory framework may include whether the Crown had to balance conflicting considerations of policy or whether the Crown action was of quasi-judicial nature. In this context, the discretionary framework surrounding the Crown action would help shape that deference: were there various possible acceptable outcomes⁶⁹⁹ that would not have resulted in (or would have lessened the) injury, or was the Crown was forced to act the way it did?

The fact that the Crown power is not based on statutes but is instead untethered⁷⁰⁰ may also be a relevant circumstance, notably because this usually indicates a very wide discretion. For example, in *Hinse*, in which the Crown was sued in liability based on its exercise of its pardon power, the Supreme Court considered that evidence of indifference was insufficient to meet the appropriate standard of bad faith considering the very wide discretion awarded to the minister⁷⁰¹.

The exercise of an administrative power outside of the decision maker's competence⁷⁰² (whether that competence is limited by statute or by prerogative) does not necessarily

⁶⁹⁸ *Poupart v Lafortune*, [1974] SCR 175 at 184: “the police officer incurs no liability for damage caused to another when without negligence he does precisely what the legislature requires him to do”; In *Brindle c Canada (Procureur général)*, 2006 QCCS 3981, Justice Tessier considered that “Les « circonstances » de l’article 1457 C.c.Q. sont celles prévues par la loi lorsqu’elles visent l’activité gouvernementale. L’absence de dispositions législatives entraîne l’absence de circonstances de nature à rendre fautive la conduite d’un ministère.”

⁶⁹⁹ *Dunsmuir v. New Brunswick*, *supra* note 8, par. 47 in fine.

⁷⁰⁰ *Supra* p. 35.

⁷⁰¹ *Hinse v. Canada (Attorney General)*, *supra* note 563.

⁷⁰² *Supra* p. 70.

constitute a fault, but it can be a relevant circumstance to evaluate whether a reasonable decision maker placed in the same circumstances would have exercised its administrative power in the same way. An excess of power does not necessarily constitute a fault, for instance if such action was taken in good faith or for good reasons. The wanton or arbitrary use of administrative power, however, could constitute a fault even if the decision maker was exercising a power within its competence. In *Finney*, for example, there is no doubt that the Barreau du Québec had the power to organise its disciplinary action as it saw fit, but the Supreme Court considered that the recklessness with which this competence was exercised could still trigger its liability⁷⁰³.

Other extraordinary circumstances can include factors identified for the defunct pragmatic and functional analysis⁷⁰⁴ such as the relative expertise of the decision maker⁷⁰⁵. In civil law, the defendant's expertise in his field is seen as a relevant subjective circumstance; however, contrary to its function in public law, it serves the purpose of reducing deference towards the defendant, since a more experienced expert should be more aware of the potential consequences of their actions⁷⁰⁶.

⁷⁰³ *Finney v. Barreau du Québec*, *supra* note 126.

⁷⁰⁴ *Supra* p. 74.

⁷⁰⁵ Two other factors are discussed elsewhere: the privative clause does not quite apply to civil liability of the Crown, but the next subsection deals with statutory immunities. The purpose of the statute has been discussed indirectly in the previous paragraph. The last factor, the nature of the question, does not seem to translate to civil liability.

⁷⁰⁶ See for example *Labrie c Tremblay*, REJB 1999-15458, in which it was considered that a lawyer advertising specialised legal services should be held to a higher standard than a general practitioner.

As an example of a public law circumstance that was considered to adjudicate fault, the Supreme Court in *Prud'homme* took into account the fact that the defendant in a defamation case was a municipal councillor who had made the impugned comments in the context of his duties. The Court considered that in the circumstances, his comments did not constitute a fault and were made in the public interest⁷⁰⁷.

2) Adjustments to the standard of care

Not only can the subjective appreciation of circumstances include an analysis of public law considerations, but the fault can also accommodate adjustments to the standard of evidence if specific public law rules command a different one such as malice.

There are many different degrees of faults recognized in the *Civil Code of Québec*⁷⁰⁸ which can be used to that effect, such as in the *Proulx* case where the Supreme Court adequated the standard of malice required by the tort of malicious prosecution to that of an intentional fault:

As such, a suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. In the civil law of Quebec, this is captured by the notion of "intentional fault".⁷⁰⁹

Courts are at liberty to similarly adjust the standard of fault required to trigger the Crown's liability if appropriate rules of public law call for it.

⁷⁰⁷ *Prud'homme c. Prud'homme*, *supra* note 16, par. 84.

⁷⁰⁸ Such as simple fault, gross fault or intentional fault. See *Supra* p. 87.

⁷⁰⁹ *Proulx v. Quebec (Attorney General)*, *supra* note 226, par. 35.

Another way to adjust the standard of fault is by qualifying the Crown's duty as an obligation of means or of results⁷¹⁰. This is a measure of the intensity of the duty applicable to the defendant in the circumstances: for example, a daycare centre is considered to owe an obligation of result regarding the safety of children under its care⁷¹¹, whereas the owner of a sports centre owes an obligation of means to its users regarding their safety from predictable risks⁷¹². Both of these are covered under the standard of simple fault, yet they represent a fundamental difference in how this standard is evaluated. A court could therefore decide, for example, that the Crown has an obligation of means as to the use of its discretionary powers (meaning it has a duty to use those powers reasonably), whereas it has an obligation of results when it comes to enforcing bylaws regarding construction permits⁷¹³. By definition, Crown decisions that entail the weighing of social, economic or political factors (which are usually considered core policy decisions) cannot be the basis for an obligation of results, and therefore a certain deference will have to be shown by the Court. In practice, the only way to fail to meet the standard of fault for such decisions would be to act in bad faith.

The various statutory immunities⁷¹⁴ protecting Crown actions throughout the many Acts attributing extraordinary powers to the Crown may also have an impact on the degree of fault, entailing deference, and therefore have an impact on the expected behaviour of the hypothetical reasonable person. In including such a clause in its statute, the legislature is effectively informing the court that the Crown should not be held liable merely for exercising

⁷¹⁰ See *supra* p. 96 for an example in the context of medical liability.

⁷¹¹ *Roussy c Agence de garde sous le bon toit inc*, EYB 2001-23657 .

⁷¹² 2735-3861 *Québec inc (Centre de ski Mont-Rigaud) c Wood*, 2008 QCCA 723.

⁷¹³ Such as in *Kamloops v. Nielsen*, *supra* note 432.

⁷¹⁴ See *supra* p. 186.

the powers it was granted. Instead, the Crown's action will only be considered a fault if it was not an "official act done in good faith in the performance of [its] duties"⁷¹⁵.

In every case, a plaintiff may try to administer evidence of the Crown's motive⁷¹⁶. Was the servant acting on behalf of the Crown acting in the public good and in the furtherance of public interest, or instead for personal or otherwise divergent motives? In the first case, the decision is most likely not a fault, while in the second, it very well could be, if it was also acting for a motive that was incompatible with the standard of a reasonable person placed in the same circumstances. For example, where municipalities change their bylaws for reasons of public interest; or where inspectors refuse to award building permits because of safety concerns; or where a Commissaire aux liqueurs revokes an alcohol license because of a number of noise complaints, the Crown should not be held liable even though an injury was suffered by a private party. However, where a municipality changes their bylaws to put a business owner at a disadvantage in an expropriation context⁷¹⁷; where inspectors award building permits while neglecting to do the proper verifications⁷¹⁸; or where a Commissaire aux liqueurs revokes a liquor license by order of a third party because of a religious conflict⁷¹⁹, the Crown may be held liable (as it was in each of these cases) because it did not act the way a reasonable person wielding extraordinary powers should have acted in the same circumstances. In certain cases,

⁷¹⁵ This is a sample statutory immunity as used in the *Public Protector Act*, CQLR c P-32, s. 30.

⁷¹⁶ *Supra* p. 217.

⁷¹⁷ *Landreville v. Town of Boucherville*, *supra* note 655.

⁷¹⁸ *Dutton v. Bognor Regis Urban District Council*, *supra* note 391.

⁷¹⁹ *Roncarelli v. Duplessis*, *supra* note 18.

it has been decided that reckless abuse of power could create a presumption of bad faith on the part of the decision maker⁷²⁰.

Simply put, it is not a fault to govern, but the abuse or neglect of governing powers can be a fault. This is why the courts have always recognised that the *bona fide* exercise of public powers could not constitute the successful basis for a claim in damages. The Crown should only be liable for its fault. No more, and no less.

Section 3 The Immunity is Difficult to Import and Apply in Québec

If Québec law has an effective method to incorporate deference into civil suits against the Crown, and especially if that method is already in use, then an argument can be made that the immunity method should not be imported and applied in Québec, or at least not in the way it has been so far.

The framework for this argument was laid out in the *Prud'homme*⁷²¹ case, where a municipal councillor was sued in defamation for his suggestion that some other councillors were bad citizens. In his defence, the councillor argued that the common law qualified privilege protecting municipal councillors' speech while performing their duties was a public law rule that should apply to Québec. This qualified privilege had been incorporated in such cases in the past:

⁷²⁰ *Supra* note 499 and corresponding text.

⁷²¹ *Prud'homme c. Prud'homme*, *supra* note 16.

Those defences were introduced into the civil law some years ago under the influence of an earlier tendency on the part of the Quebec courts to import common law concepts in areas of the law that are governed by both public law and private law rules. In order to determine whether those defences may be applied directly in the civil law, we must determine the nature of the defences. As noted earlier, whether they may be raised depends on whether they are public in nature⁷²².

After concluding that the qualified privilege for such speech was indeed a public law rule applicable in Québec⁷²³ by virtue of article 1376 C.C.Q., the unanimous Supreme Court decided that this privilege should not be imported into Québec law because it was irrelevant in the Québec legal context.

Once a municipal councillor's qualified privilege has been characterized as a principle of public law, this Court must determine whether that defence may be incorporated, in that form, into the rules governing civil liability in Quebec without disturbing the coherence of those rules. It would be extremely unwise to import, *holus bolus*, legal concepts that were developed in another system of law without first determining whether they are compatible with the rules that apply to civil liability in Quebec. This Court has, on occasion, noted the difficulties created by the transposition of blocks of rules from a different legal system, particularly in the law of civil liability. Some of the comments made by Beetz J. in examining a case involving liability for the act of a thing are entirely on point here (*Rubis v. Gray Rocks Inn Ltd.*, [1982] 1 S.C.R. 452, at pp. 467-69). As well, as noted earlier, the *Civil Code of Québec* clearly establishes that the rules governing the extra-contractual liability of public authorities in Quebec are the rules of the *jus commune*, that is, the rules of the civil law. Even where a public common law rule is held to be applicable, the general framework for analysing liability is still the framework proposed by the civil law. Accordingly, a common law rule will sometimes have to be reworked to remedy the contradictions or difficulties that result from superimposing concepts that derive from different legal systems.⁷²⁴

The first step to make this determination was to examine the tort of defamation. The common law rules regarding this tort do not require a plaintiff to establish wrongdoing, but merely that the words might have caused an injury, at which point malice is presumed on the part of the defendant; this presumption may be refuted notably through the qualified privilege, at which point the plaintiff receives the additional burden of establishing bad faith or malicious intent on the part of the defendant. This is very different from civil law rules that presume the

⁷²² *Ibid*, par. 48.

⁷²³ *Ibid*, par. 53.

⁷²⁴ *Ibid*, par. 54.

defendant's good faith⁷²⁵ – regardless of his status as a municipal councillor – and require the plaintiff to establish a *fault*⁷²⁶.

The Supreme Court decided that those differences in the Québec legal framework disrupted the qualified privilege to the point where it became impossible to incorporate it “without disturbing the coherence of its application in the area of public authority liability⁷²⁷”. Those differences were the presumption of good faith and the requirement to establish fault instead of bad faith. Incorporating the qualified privilege would entail reducing defamation to its malicious aspect, which in Québec should also include a negligence aspect.

To avoid that result, while still using legal techniques that are consistent with the methods of the civil law, simply importing qualified privilege does not seem to be the desirable or necessary solution. What we must first determine is whether the Quebec law of civil liability includes rules that are capable of providing equivalent protection to an elected municipal official, and of preserving the societal values and interests that the rule of qualified privilege that applies to an elected municipal official in the common law is intended to preserve. This approach to transposition is based, in this case, on the fact that the concept of fault in Quebec civil law is a flexible one. However, the legal characterization of the conduct, which is based on an objective examination of reasonable conduct, is still determined from the context. This makes it possible to take into consideration the situation of the person who committed the impugned act, and incorporate the values and interests that will be used to determine, when the analysis has been completed, whether a civil fault has been committed. It can be concluded, from the facts that fault is determined from the context and that there is a presumption of good faith, that the application of the rules of the law of civil liability will protect the interests and values that the law respecting public authorities seeks to protect when it defines the status of an elected municipal official. In other words, the defence of qualified privilege has an equivalent in the civil law, and, moreover, that defence must be applied in accordance with the legislative intent expressed in art. 1376 C.C.Q.⁷²⁸

The Court decided that that additional burden to be met by the plaintiff in cases where the qualified privilege would apply should be considered among other circumstances when

⁷²⁵ Art. 2805 C.C.Q.

⁷²⁶ *Prud'homme c. Prud'homme*, *supra* note 16, par. 56.

⁷²⁷ *Ibid*, par. 58.

⁷²⁸ *Ibid*, par. 59 (my emphasis).

assessing fault⁷²⁹. In the same vein, the Supreme Court also considered that it would be “not only unjustified, but pointless” to import the defence of fair comment into Québec private law, because the criteria that this defence add to the plaintiff’s burden are “already an integral part of Quebec civil law⁷³⁰”.

It should be noted that the *Prud'homme* case was heavily criticized by Professor Jean-Denis Archambault, who dedicated a book to the question of defamation in the years following the Supreme Court decision. This criticism was generally based on the impact of *Prud'homme* in Québec, which removed some defences from use in cases of defamation and therefore weakened the right to freedom of expression only in this province⁷³¹ (the most problematic consequence being that, in Québec, factual truth can be the basis for a suit in defamation if the impugned speech was nonetheless a fault). Professor Archambault's criticism was not specifically targeted at the potentiel impact of the *Prud'homme* case on the law of Crown liability in Québec. Nonetheless, Professor Archambault raises a number of points which can apply to liability of the Crown as well.

First, he argues that the civil law fault is not an acceptable or appropriate substitute for the common law qualified privilege that protects municipal councillors during council meetings:

À quel pirouettement intellectuel et juridique le justiciable québécois doit-il se livrer pour arriver à croire que "le préjugé, l'opiniâtre, l'entêté, le stupide, le borné", couvert par l'immunité relative pourvu qu'il soit "honnête", équivaut de quelque manière au "raisonnable" exigé par le droit privé de la faute?⁷³²

⁷²⁹ *Ibid*, par. 60.

⁷³⁰ *Ibid*, par. 63.

⁷³¹ Archambault, *supra* note 242.

⁷³² *Ibid* at 596.

The qualified immunity is meant to protect the unreasonable defamer and the offensive, grossly fallacious opinion, as long as it is an opinion honestly expressed. These would most likely constitute simple faults under article 1457 C.C.Q., since no reasonable person placed in the same circumstances would express themselves in such a form⁷³³. Since the common law qualified immunity involves the right to freedom of speech, they are public law considerations and should therefore apply in Québec. Professor Archambault further argues that the reasonableness analysis of the substance of the offending words required by the standard of fault is itself problematic since it is a form of censorship of the democratic debate that Mr. Prud'homme was engaged in⁷³⁴, whereas the qualified privilege requires an analysis of the subjective state of mind of the offending orator to determine whether he was acting "honestly" (meaning in good faith, in the public interest, or in case of a municipal councilor, in the furtherance of their role as an elected representative).

However, this critique does not apply with the same strength to the Crown's immunity for policy actions, which does not offer the same amount of protection as the defamer's qualified immunity. As exposed above, the Crown's policy immunity is not restricted to a purely subjective standard⁷³⁵, and can require the court to compare the Crown's behaviour to an objective standard.

⁷³³ *Ibid* at 602.

⁷³⁴ *Ibid* at 597.

⁷³⁵ *Supra* p. 210.

Second, Professor Archambault argues that public common law is not a system of law foreign to Québec, but is very much already part of the Québec legal system⁷³⁶. Public common law, where it expresses norms and values enshrined in the Constitution (such as freedom of speech), should prevail on private civil law regardless of the impact it may have on the coherence of the civil law system⁷³⁷. In the context of defamation, this would mean that the presumption of good faith enacted by article 2805 C.C.Q. should not have priority over the public common law qualified privilege, even if the latter disrupts the coherence of the usual framework of civil liability in Québec.

While the Constitution undeniably has precedence over the Civil Code of Québec, and the Crown's immunity for policy action does involve public law considerations of constitutional importance, this thesis has argued that the way these public law considerations can be expressed is not a matter of public common law⁷³⁸ (for example, the choice of a tort of negligence or of misfeasance is a matter of private common law). It must be noted that Professor Archambault did not stand against the general idea that some legal principles of common law origin should not be applied directly in Québec. For example, he readily concedes that private common law remedies, such as the tort of slander "n'a évidemment pas sa place en procédure civile québécoise⁷³⁹". Similarly, the public law considerations underlying the common law immunity for policy actions are unavoidable in Québec. The *Prud'homme* case,

⁷³⁶ Archambault, *supra* note 242 at 587, see note 97.

⁷³⁷ *Ibid* at 593.

⁷³⁸ *Supra* p. 118.

⁷³⁹ Archambault, *supra* note 242 at 977.

however, provides a useful framework to determine whether the immunity in its current form is the most appropriate way to express these public law considerations.

Third, and perhaps more to the heart of his critique, Professor Archambault generally condemned the orthodoxy of the Québec legal community (abetted by the Supreme Court of Canada), whom he describes as attempting to purge all common law from Québec law, public or private⁷⁴⁰, for ideological and political reasons, even at the cost of epistemological integrity. This thesis does not deny that the Québec legal community has a blind spot regarding common law principles and reasonings. However, it suggests a pragmatic approach to this reality in order to solve a problem that has been observed in the courtrooms in matters of liability of the Crown, based on practical considerations, not on politics.

The remainder of this section will attempt to apply the same logic – the *Prud’homme* analysis – to other cases of extracontractual liability of the Crown in Québec.

1) Examine the source of action in Québec and in common law

The first step of the *Prud’homme* analysis to determine whether a foreign legal concept should be imported into Québec civil law is to examine the legal regimes. This has been done earlier in this thesis for both the common law of torts⁷⁴¹ (for negligence and misfeasance in public office) and for extracontractual liability in Québec⁷⁴².

⁷⁴⁰ *Ibid* at 969.

⁷⁴¹ *Supra* p. 101.

⁷⁴² *Supra* p. 86.

In common law, a plaintiff against the Crown would first need to identify whether the tort of negligence or misfeasance in public office (or any other tort) applies to his situation and formulate a recourse accordingly. In the case of the tort of misfeasance in public office, the immunity is unnecessary and does not apply because that tort already incorporates an element of bad faith⁷⁴³. Moreover, if that tort applies, proximity is irrelevant since the Crown is considered, in a sense, to have a general duty not to abuse its powers⁷⁴⁴. If, however, the tort of negligence is selected, the plaintiff will have to establish that there existed some proximity between himself and the Crown; if he meets that standard and establishes a *prima facie* duty of care, the Crown may dispute it at the second stage of the *Anns/Cooper* test by establishing that matters of policy prohibited the establishment of a duty of care⁷⁴⁵.

In Québec, however, the choice of tort is not a relevant step. Proximity is not directly a part of the plaintiff's (or the defendant's) burden; instead, some version of proximity is included in the fault analysis⁷⁴⁶.

2) Examine what the exact role of the immunity is

This difference is as relevant as the presumption of good faith was in *Prud'homme*, and the same argument can be made that the policy immunity cannot be imported without breaking

⁷⁴³ *Supra* p. 112.

⁷⁴⁴ *Supra* p. 118.

⁷⁴⁵ *Supra* p. 199.

⁷⁴⁶ *Supra* p. 118.

with the coherence of the Québec civil law regime. Applying the policy-operational immunity without modifications would result in a confusion as to the choice of a relevant tort (either negligence or misfeasance), since in Québec, both of these are covered by the extracontractual liability regime set out by article 1457 C.C.Q. The immunity also relies on a complex understanding of the concept of proximity, which has no direct equivalent in Québec.

The confusion regarding the choice of a tort in Québec is a fundamental problem. For example, in *Sibeca*, the Supreme Court applied some version of the policy-operations test to a decision by a municipal council to change its bylaw in such a way that a promoter's plan to build a recreational center was thwarted⁷⁴⁷. This is not a negligence case; rather, this could be closer to a misfeasance in public office, for which, again, the only equivalent in Québec is the regime set out by article 1457 C.C.Q. with the relevant adjustments to the matter of fault required.

It is worth mentioning that the policy-operational immunity undoubtedly constitutes a public law rule from the common law, as defined by the Supreme Court in *Prud'homme*⁷⁴⁸ and *Laurentides Motel*⁷⁴⁹: A rule is considered of public law (and therefore the object of article 1376 C.C.Q.) if it only applies to public authorities. This is in contrast to common law rules

⁷⁴⁷ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506.

⁷⁴⁸ *Prud'homme c. Prud'homme*, *supra* note 16, par. 52.

⁷⁴⁹ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138 at 723.

that apply “without distinction to public authorities and to individuals⁷⁵⁰”, which do not constitute a public law rule.

According to this definition, however, the more general principle according to which a plaintiff must select the appropriate tort through which to seek compensation for injury caused by a defendant is not a public law rule, since it applies to public authorities as well as to individuals. Moreover, any attempt to incorporate such principle in Québec civil law would be unrealistic, since this approach is anathema to the fundamental extracontractual liability regime in Québec articulated in article 1457 C.C.Q. No lawyer or judge originating from Québec is trained to consider extracontractual liability on the basis of common law torts.

The broader set of rules regarding proximity are likewise foreign to Québec civil law⁷⁵¹. By the same definition, the *Cooper/Anns* test cannot be considered a public law rule, as it can apply to litigation between private parties as well as to public authorities⁷⁵². The same practical considerations mentioned in the previous paragraph apply to matters of pure proximity in Québec: it would be as shocking to a Québec lawyer to have to juggle and apply matters of proximity as it would be to a common lawyer not to.

⁷⁵⁰ Pierre-André Côté, “La détermination du domaine du droit civil en matière de responsabilité civile de l’Administration québécoise — Commentaire de l’arrêt *Laurentide Motels*” in *Mélanges Jean Beetz* (Montréal: Thémis, 1995) 385 at 401.

⁷⁵¹ *Supra* p. 118.

⁷⁵² For example, *Deloitte & Touche v. Livent Inc. (Receiver of)*, *supra* note 285.

3) Examine what alternative methods could be used

Just as in *Prud'homme*, the immunity, as a public law rule, should be incorporated in Québec by virtue of article 1376 C.C.Q. but in a way that is consistent with the existing framework of extracontractual liability. As demonstrated in the previous section, article 1457 is sufficiently flexible to incorporate the variation in burden of evidence that is meant by the immunity; the existing framework of extracontractual liability in Québec can also incorporate the “societal values and interests⁷⁵³” that the policy immunity seeks to protect. Instead of incorporating the immunity itself in the Québec framework, the suggested method would incorporate those values and interests (more specifically, the idea of deference) underlying this immunity.

This application of the *Prud'homme* test would therefore lead to the conclusion that the public law immunity can be imported in Québec law, but not in the form under which it is known in the common law. Instead, it must be adjusted to harmonise with the existing framework in Québec.

The Supreme Court went through a similar analysis in *Sibeca*, ultimately concluding that article 1457 C.C.Q. can require an applicant to meet a standard of bad faith or its equivalent:

18 [...] When a public law rule is identified and determined to be applicable, it must be incorporated into the law of civil liability. It is therefore necessary to identify the public law rules applicable to municipalities, determine whether they prevail over the civil law rules and, if so, incorporate them into the civil law.

23 [...] A municipality has a margin of legitimate error. In public law, it is protected by what may be called relative immunity. Does that immunity prevail over the civil law rules?

⁷⁵³ *Prud'homme c. Prud'homme*, *supra* note 16, par. 59.

24 [...] The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law. [...] It must therefore be determined how that relative immunity can be incorporated into the civil law.

25 No problem arises when the bad faith test is applied in civil law. That concept is not unique to public law. [...]

27 From this analysis, it may be concluded that the public law immunity that attaches to an exercise of legislative and regulatory power can be incorporated into the rules of liability applicable to public bodies. In light of the wording of art. 1457 of the Civil Code of Québec, an applicant can be required to establish that the public body acted in bad faith, or in circumstances leading to a conclusion that it acted in bad faith.

This thesis concurs with this analysis and suggests the reasoning be taken further. Since article 1457 C.C.Q. is already in use for all operational actions (included those that incorporate various degrees of discretion), and since article 1457 C.C.Q. is also in use for core policy decisions (albeit with the incorporation of the immunity which translates to a higher standard of evidence, meaning that the standard of evidence required is that of bad faith or gross fault), why not do away with the mandatory test for policy or operational actions to instead focus the analysis on relevant circumstances, which can include public law considerations such as the scope of discretion awarded to the Crown? This method would be more compatible with the general economy of Québec rules of extra-contractual liability and would, arguably, achieve the same result with less confusion for civil lawyers.

Put another way, the reasoning steps in a Crown liability case in Québec now are:

Step 1- Is the impugned behaviour from the sphere of true policy actions or not? (this question must be answered whether the behaviour would constitute a tort of negligence or a different tort at common law)

Step 2A- If the action is operational, is it a fault under article 1457 C.C.Q., under the circumstances? (if the action involved the use of discretion, the freedom of action thus granted to the decision-maker is a circumstance that must be taken into account by the Court)

Step 2B - If the action is a core policy decision, is it bad faith or gross negligence under article 1457 C.C.Q., under the circumstances? (a plaintiff can administer evidence of all circumstances attempting to establish a presumption of bad faith, and in any event the court will have to compare the Crown's behaviour to that of a reasonable person).

The first step of this reasoning (and its consequence of splitting the second step) is jarring to civil lawyers because it is unfamiliar to Québec rules of extracontractual liability. This thesis suggests doing away with the relative immunity for core policy decisions, while maintaining its *raison-d'être*, which is to tell courts to be deferent towards Crown decisions that involve policy. The resulting step for a Crown liability case would look like this:

Step 1 - Is the impugned Crown action (or inaction) a fault under article 1457 C.C.Q., taking into account all relevant circumstances? (the standard of evidence can vary depending on the circumstances, and can require bad faith or its equivalent when assessing actions that involve the weighing of financial, social or other public considerations).

The following section proposes, as a thought experiment, to look back at the cases that have been held up for study in this thesis in the new light of the suggested method.

Section 4 Reinterpretation of the Jurisprudence

The previous section outlined a simplified system of Crown liability that should be directive enough to give those to whom it applies sufficiently clear guidelines for it to be predictable, yet flexible enough to give the courts the required leeway in its application. This section will provide numerous illustrations of the reconceptualized system of Crown liability explained in the previous section by doing a second reading of some of the case law discussed earlier in the history section earlier in Part 2⁷⁵⁴. This second reading will focus on how the facts and the legal arguments used in this classic jurisprudence could fit into the proposed conceptual framework, thus providing the same answers in a more straightforward manner. This re-reading of existing case law is not intended to criticize the existing judgements – on the contrary, this re-reading is based on the premise that those decisions came to the right decision. This should convince the reader that the proposed framework is simpler, more workable, and coherent with existing principles of public and private law. Finally, this hypothetical reading of old case law would presume that the facts of the case happened in Québec.

The suggested framework of Crown liability should work seamlessly to situations in which the Crown clearly acted in bad faith. In *Entick v. Carrington*⁷⁵⁵, where Lord Halifax had dispatched his men to ransack John Entick’s house to search for “very seditious papers”, these servants were ultimately condemned to pay Entick damages. Under the proposed framework, 250 years later, a court could contend that Lord Halifax had committed a fault by illegally ordering Entick’s house ransacked, and could therefore hold him personally liable for the

⁷⁵⁴ *Supra* p. 123.

⁷⁵⁵ *Entick v. Carrington*, *supra* note 350.

damages. The court could have taken into account the extraordinary circumstance of Lord Halifax's status and the origin of his powers, but ultimately determined that this was an abuse of his public power. In *Chaput v. Romain*⁷⁵⁶, the Supreme Court held police officers liable for damages they caused when they broke up an orderly meeting of Jehovah's witnesses and seized various books and booklets without a warrant. Using the proposed framework, the court could find that these police officers were at fault, that their action failed the test of the reasonable police officer acting in the same circumstances, and held them similarly liable. The fact that the police officers were not acting for the public good would have been among the relevant circumstances of this case, since police officers continued their actions after they noticed that there obviously was nothing illegal happening at the meeting⁷⁵⁷; in fact, the Supreme Court already applied classic rules of liability in Québec in this case, and decided that it was unreasonable for police officers to persist with their action after determining that the gathering was legal. In *Roncarelli*⁷⁵⁸, where then-Premier Duplessis infamously ordered the Commissaire aux liqueurs to revoke plaintiff Roncarelli's license liquor in order to punish him for bailing out Jehovah's Witnesses (and stopping him from providing further help), the Supreme Court had found Duplessis liable for \$25,000 in damages. Using the proposed test, the court could find that this revocation order was not only illegal, but constituted a fault for the same reason that no reasonable Premier acting in the same circumstances would have done the same. The Court could have considered (as it in fact did) that Duplessis was not acting in the public interest but rather for private reasons. In this way, the courts could have taken into

⁷⁵⁶ *Chaput v. Romain*, *supra* note 205.

⁷⁵⁷ *Ibid* at 844–845.

⁷⁵⁸ *Roncarelli v. Duplessis*, *supra* note 18.

account the public nature of the parties and of their action, but consider them at fault nonetheless because the use of these powers was abusive.

The same proposed framework could have simplified the various home inspection cases such as *Kamloops*⁷⁵⁹ (where the inspection had revealed problems during construction but the bylaws had not been enforced) and *Rothfield*⁷⁶⁰ (where the city had issued a permit for an inadequately designed retaining wall and failed to send an inspector; the subsequent wall later collapsed). In *Kamloops*, the Court decided that the Municipality owed a duty of care (and was ultimately liable) since the failure to enforce a bylaw was considered operational rather than political. Under the proposed framework, the court could have decided that the decision to create the bylaw was not a fault, but that the failure of an inspector to enforce⁷⁶¹ this bylaw was a fault. In *Rothfield*, the Court's majority decision that the municipality ought to bear 70% of the liability for the loss would be justified by the fact that the approval of a badly designed project, followed by a failure to inspect, was not something a reasonable municipal inspector placed in the same circumstances would have done, and, therefore, is a fault on the part of the inspector for which the municipality is liable.

The proposed framework could work just as well in building permit cases. In *Welbridge*⁷⁶², where the plaintiff's building permit had been illegally granted and then revoked, the Supreme

⁷⁵⁹ *Kamloops v. Nielsen*, *supra* note 432.

⁷⁶⁰ *Rothfield v. Manolakos*, *supra* note 321.

⁷⁶¹ This does not mean that every situation in which the Crown does not enforce a bylaw is a fault – merely that according to the Supreme Court in *Kamloops*, it was in these circumstances.

⁷⁶² *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra* note 133.

Court decided that no duty of care was owed where a decision made in good faith was later declared illegal. If an identical case had arisen in Québec, the court could have decided instead that it was not a fault to revoke a permit that had been illegally granted. In fact, since the municipality was rectifying a situation to be in line with the public interest, it could hardly be argued that a reasonable municipality placed in the same circumstances would have acted any differently. The discretionary nature of the municipality's decision to cancel the permit would be a relevant circumstance in the eyes of the court, and through this, the court would have expressed deference towards the municipality. In *Maska Auto Spring*⁷⁶³, the Court had decided that the wrongful issuing of a building permit to a project that did not satisfy the bylaws was an operational mistake for which the municipality (through its inspector's error) could be liable. The court could similarly have decided that a reasonable inspector placed in the same circumstances would not have awarded a building permit that did not respect its own municipality's bylaws.

These two decisions (*Welbridge* and *Maska*) might seem difficult to reconcile. In both cases, the Court indicated that an illegal action was not necessarily a fault, yet only condemned the Crown to pay damages in one. The proposed conceptual framework makes that reconciliation easy since the circumstances of each case were different. Even though the decision to award a permit was illegal in both cases, in *Welbridge* the decision was not a fault in the circumstances, as the inspector who awarded the permit applied all the regulations he knew or ought to have known, whereas the decision in *Maska Auto Spring* was a fault, since the inspector did not

⁷⁶³ *Maska Auto Spring Ltée v. Ste-Rosalie (Village)*, *supra* note 465.

obey the municipal bylaw. In other words, a reasonable building inspector placed in the same circumstances would have awarded the permit in *Welbridge* but not in *Maska Auto Spring*.

Similarly, in *Sibeca*⁷⁶⁴, a real estate's developer's construction project was put to an end when the newly elected municipal council moved to change the municipal bylaws which enabled the use of the land for a recreational complex (the developer's permits having expired before the change in bylaws). The Court considered that an elected municipal body must have sufficient discretion in their political choices, and rejected the developer's claim in compensation. The court might as well have determined that the municipal council's behaviour, in this context, did not constitute a fault, since the municipality's decision rested on the new council's determination of what municipal interests were. In other words, the new council acted in a way compatible with the behaviour of a reasonable municipality placed in the same circumstances. In this way and at the same time, the court would have shown the municipal council the required amount of deference towards its sovereign powers.

The proposed framework would work as well in cases where the Crown was sued over the outcome of the use of its discretionary powers. In *Deniso Lebel*⁷⁶⁵, for instance, where the Ministry of Energy's decision not to transfer forest concessions to the plaintiff caused a deal between the latter and Abitibi-Price to fall through, the Québec Court of Appeal considered that the Crown was not liable for the plaintiff's loss since the minister's decision was based on

⁷⁶⁴ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra* note 506.

⁷⁶⁵ *Québec (Procureur général) c. Deniso Lebel inc.*, *supra* note 401.

the carrying out of other plans for this sawmill. The court could very well have ruled that this use of the Ministry's discretion was consistent with that of a reasonable Ministry placed in similar circumstances. In fact, the Court's finding that the judicious use of the Ministry's discretion made this power non-justiciable would remain as such, and the Court would similarly exercise restraint and not qualify this action a fault. In essence, the Court's decision to the effect that it is not a fault to govern would remain unchanged.

The proposed conceptual framework also works in road maintenance cases, such as *Barratt*⁷⁶⁶ (where a cyclist hit a pothole on a poorly maintained road), *Just*⁷⁶⁷ (where a boulder set loose from the slopes and landed on the plaintiff's car), *Brown*⁷⁶⁸ (where the plaintiff lost control of his vehicle because of the icy road conditions, which were not perfectly well maintained because the city had decided to keep its summer schedule longer in order to save costs), and *Swinamer*⁷⁶⁹ (where road inspectors failed to detect a fungal infection on a tree, which later caused it to fall on the plaintiff's truck). Cases of these nature represent an academic exercise, however, since Québec does not rely on extracontractual liability to administer vehicle operation but rather on a regime of no-fault liability⁷⁷⁰.

In these cases, the Supreme Court could have similarly expressed deference towards the Crown's allocation of resources to their road inspection and maintenance programs, and

⁷⁶⁶ *Barratt v. Corporation of North Vancouver*, *supra* note 426.

⁷⁶⁷ *Just v. British Columbia*, *supra* note 293.

⁷⁶⁸ *Brown v. British Columbia (Minister of Transportation and Highways)*, *supra* note 467.

⁷⁶⁹ *Swinamer v. Nova Scotia (Attorney General)*, *supra* note 400.

⁷⁷⁰ *Automobile Insurance Act*, CQLR c. A-25.

declared that in considering the large discretion involved, the road maintenance programs set up by these cities and municipalities did or did not constitute a fault. For example, in *Brown*, the Court could simply have contemplated whether it is a fault to maintain reduced hours for road maintenance in order to save costs; out of deference, they could similarly have considered that it is not a fault. As to the operationalisation of these road maintenance programs, the Court could have determined that the inspectors had fulfilled their obligation of means, and that their failure to detect one pothole or one infected tree did not constitute a fault in the circumstances. Relevant circumstances in the *Swinamer* case, for instance, could have included the limited resources to conduct the inspection, the amount of territory for each inspector to cover, the seriousness with which the inspection program was carried out, and the good faith of the inspector.

In *Laurentide Motels*⁷⁷¹, the city of Beauport was held liable for the damages suffered by the titular plaintiff because Beauport's firefighting service was badly organised and had failed to find the hydrants in the snow and, once found, to operate them. In that case, after deciding that normal private law in Québec applied to the operational acts of a municipality, and that the inspection of hydrants was of operational nature, the Court already decided that failure to adequately inspect the hydrants constituted a fault, and essentially that the policy decision to create a firefighting service implied the duty to sufficiently maintain it. This conclusion would be the exact same under the proposed framework, except the court would not have to qualify decisions as policy or operational but simply whether, in the circumstances, the action or

⁷⁷¹ *Laurentide motels ltd. v. Beauport (City)*, *supra* note 138.

inaction of the municipality constituted a fault. Hypothetically, if the firefighter's failure to find the hydrant was the result not of negligence in their upkeep but rather of a municipality-wide decision to cut the hydrant inspection program in order to save costs, for example, the court could have determined that in these circumstances the firefighters had not committed a fault.

The same applies for cases where a public entity fails in its mission to protect the public, such as in *Cooper v. Hobart*⁷⁷² (where the plaintiff was seeking permission to institute a class action against the Registrar of Mortgage Brokers on the grounds that the Registrar should have revoked a delinquent broker's license earlier) and *Finney*⁷⁷³ (where the Barreau du Québec similarly took years to strike a delinquent lawyer from the Bar). In *Cooper*, the Court determined that the Registrar did not owe a duty of care to the plaintiffs (who were using the services of brokers under the Registrar's purview) even though the investor's loss was reasonably foreseeable. Under the proposed framework, if the same set of events had occurred in Québec, the Court could have decided that the Registrar's treatment of the delinquent broker's file was not so reproachable as to constitute a fault in the circumstances; these circumstances could include the fact that the Registrar's decision involved the formulation of policy and the exercise of quasi-judicial powers, and that recognizing fault in this context would "raise the spectre of liability to an indeterminate class of people⁷⁷⁴". In *Finney*, the Court noted that unlike in *Cooper*, the *Professional Code* explicitly created a duty for the

⁷⁷² *Cooper v. Hobart*, *supra* note 280.

⁷⁷³ *Finney v. Barreau du Québec*, *supra* note 126.

⁷⁷⁴ *Cooper v. Hobart*, *supra* note 280 at 554.

Barreau to protect the public, and adjusted the standard of bad faith to incorporate the Barreau's behaviour in this case. Under the proposed framework, the same reasoning would apply – the gross recklessness displayed by the Barreau in this case constituted a fault which triggered its liability.

Once again, the disparity in these cases can easily be reconciled, not by saying that the Registrar did not owe the public a duty of care whereas the Barreau du Québec did, but rather, by establishing whether, if placed in similar circumstances, a reasonable Registrar or Barreau would have acted similarly or not.

Finally, in *Hill*⁷⁷⁵, where the plaintiff had spent 20 months in prison because of an alleged negligent police investigation, the majority of the Supreme Court considered that the police did have a duty of care towards the suspects they investigate, but that in the circumstances, the police officers had acted reasonably. In Québec, under the proposed system, this case would be tried identically, except its reasons would be shorter since the Supreme Court could have simply stated that the police investigator's behaviour in the circumstances did not constitute a fault. The same logic would apply to *Fullowka*⁷⁷⁶, where the Court had again found that the Crown was proximal to its subjects in the circumstances but that the mining inspectors had met the required standard of care (in other words, had met the test of the reasonable inspector placed in the same circumstances), and were therefore not at fault.

⁷⁷⁵ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236.

⁷⁷⁶ *Fullowka v. Pinkerton's of Canada Ltd.*, *supra* note 527.

This review of classic jurisprudence raises two points of general consideration:

- **Should an illegal action be deemed a fault?** An illegal action is not necessarily a fault, such as in *Welbridge*, but it can be, as in *Maska Auto* and *Roncarelli*. The burden of evidence to conclude that an action is illegal can overlap with the burden for establishing a fault, but they are fundamentally different burdens (the legality test and the reasonable person test). In other words, the test for legality is not the test for liability⁷⁷⁷. Moreover, meeting one of these burdens does not create a presumption either way in order to meet the other burden.
- **Should an illegal order be obeyed by Crown servants?** Generally speaking, yes, as was the case in *Entick v. Carrington* or *Chaput v. Romain*. Administrative decisions are presumed legal until declared otherwise by a court of law, so servants should not have the burden of resisting and contesting illegal decisions, especially considering their hierarchical subordination to the decision maker. However, they could **share liability** if the court finds that following the order was a fault on its own, for instance, if they execute a clearly illegal action knowing that it was illegal, as was the case in *Chaput v. Romain*, where police officers seized books and booklets from the plaintiffs home without a warrant after having observed that nothing illegal was taking place.

⁷⁷⁷ See *Finney v. Barreau du Québec*, *supra* note 126, par. 31.

This re-reading of the leading jurisprudence should confirm that the proposed system could not only have dealt fairly and consistently with the known jurisprudence but would have greatly simplified the reasons in each case. The burden of evidence required by the notion of fault defined in article 1457 C.C.Q. is flexible enough to include the form of deference that courts should exercise towards Crown decisions.

Conclusion

This thesis asked a difficult question at the outset: when should the Crown be held liable to its subjects for the damages it causes them? As with most legal queries, the answer is: “it depends”. This thesis attempted to address what it depends on.

Applying appropriate rules of civil liability to the Crown is a centuries-old challenge. The Crown is tasked with making decisions that have far-reaching effects on the whole of society. Some of these decisions are bound to cause injury, especially where the Crown is tasked with the mission of regulating an industry or any other important aspect of the life of those it administers – their immigration process, their right to operate a car, their health care, their lawn, their taxes, and many more. Who, then, should be responsible for injuries when they arise? Should the injured individual support their own injuries as an inevitable result of living in an organised society, or should the Crown – and through them, the rest of the public – compensate them for the harm caused? In other words, can the public be privately responsible for private injuries? When should the individual bear the cost of public interest? For instance, when is it acceptable to tell a wrongfully convicted innocent man that he cannot be compensated because the police did its job acceptably well, and effectively contributed to protect society at large⁷⁷⁸?

⁷⁷⁸ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236.

In common law jurisdictions under the tort of negligence, the conspicuous solution has been to try to distinguish cases where the Crown had a particularised relationship with a person from those where it was acting in a more general capacity. In the former case, the Crown could potentially be liable, as it had a relationship of proximity and therefore a duty of care towards specific groups or individuals, whereas in the latter case the Crown could not be held liable, as such a particularised relationship was lacking. This latter case is necessarily the one where the Crown is issuing policy-level decisions, since these, by a certain circular definition, are not meant to create a particularised relationship. As a shortcut, it was decided that policy-level decisions effectively made the Crown immune from claims (unless the Crown acted in bad faith).

Canada's only civil law jurisdiction could not easily apply this reasoning, since its civil law regime does not rely on this idea of proximity as a foundational principle – under the *Civil Code of Québec*, everyone is effectively everyone else's neighbour. In an effort to reconcile the common law idea of an immunity for policy decisions, it was decided that the Crown was indeed proximal to its subjects in Québec, but that it would simply be immune from the damages arising out of policy decisions because private law rules would not apply to it in such circumstances.

These are both sound solutions. The Crown ought not to be liable for every injury it causes, but only for those that should have been avoided by proper administration or that were not inflicted for the public good. The various civil liability immunities are not merely capricious, nor did they purely evolve out of unfair privilege: they are meant to translate a certain freedom

of executive action and shield such action from judicial meddling. They are meant to import into private law fundamental principles of deference that have evolved over centuries to prevent the courts from usurping the role of the Crown.

The problem with these solutions is not their intention or their soundness, but their effectiveness. First, their effectiveness is limited by some of their apparent premises – they are evolved from previous doctrine advocating the irresponsibility of the Crown due to the Crown’s nature and privileges. These solutions mean to carve areas of responsibility as exceptions to the broader doctrine of irresponsibility. However, as a former Canadian deputy minister of Justice said:

S'il peut y avoir encore parfois lieu de dégager l'État de sa responsabilité, ce n'est pas au nom d'un quelconque principe d'irresponsabilité de la Couronne, mais plutôt parce que les pouvoirs publics ont à s'occuper de problèmes qui diffèrent, par leur taille ou leur nature, de ceux des entreprises privées⁷⁷⁹.

The second problem with the effectiveness of these solutions is their complexity. This problem is the one that inspired this thesis and is described with various quotes and references in the introduction⁷⁸⁰. Considering the large number of decisions the Crown makes every day, and the potential for injury associated with most of these decisions, it is of great importance to have a conceptual framework that is easily and, as much as possible, predictably applied by the courts. This predictability would not only help judges do their job effectively, but would also empower parties to negotiate among themselves out of courts on solid ground, using shared expectations created by the framework.

⁷⁷⁹ Tassé, *supra* note 343 at 10.

⁷⁸⁰ *Supra* notes 4-9.

This thesis suggested that courts adopt a different conceptual framework for addressing Crown liability that could solve both these issues. There is at least one way to conceptualise liability of the Crown in Québec that only holds the Crown liable when it ought to be held liable, that is not constrained by the historical irresponsibility of the Crown, and that is simple to apply by judges and counsel. This conceptual framework can be thus summarised: In Québec, the Crown does owe its subject a duty to abide by the rules of conduct incumbent to it in the circumstances – all its subjects, at all times, just as any other subject of the law in this province. This duty does not mean that the Crown is forced to compensate all injuries caused by the exercise of its powers. Rather, the Crown should only be liable when it caused an injury having failed to meet the applicable standard of fault for the exercise of its powers in the circumstances. This applicable standard of fault is to be set by courts according to current doctrine on extracontractual liability; the standard of fault is necessarily going to be higher (and as such a more difficult standard of evidence for the plaintiff to establish) when the Crown is exercising broad, policy powers. In most cases where the Crown is exercising such policy powers, the applicable burden of evidence will be equivalent to bad faith. This is the civil law regime applicable to every other private party in Québec.

This suggested framework of Crown liability simultaneously recognizes the rule of law (and the power of the courts to evaluate Crown action) and incorporates a measure of deference towards Crown actions by allowing the courts to modulate the burden of evidence by adjusting the standard of fault according to the objective test of the reasonable person, and by appreciating subjective circumstances of each case. In some cases, tension between the idea of

equality (which states that the Crown should be bound by the law of the land) and the Crown's duty to govern are irreconcilable, and in those cases courts should consider that the mere act of governance does not constitute a fault on the government's part.

Two arguments often raised as a shield against changes to the current framework of liability of the Crown are the "floodgates" argument and the risk of a "chilling effect". The arguments have been invoked, for instance, against the recognition of a duty of care by police officers towards suspects⁷⁸¹ and against the recognition of a tort of misfeasance in public office:

The courts have, to a large degree, been fixated upon the floodgates concern, and the need to ensure that the tort of misfeasance in public office is being used cautiously. To do otherwise, in the minds of the judiciary, could lead to at least two adverse effects. First, it could interfere with the political decision making process by having courts second guess politicians and public servants. Second, it could interfere with the ability of public servants to discharge their functions and responsibilities if the fear of litigation being commenced against them loomed in the background of every decision made.

These concerns, while legitimate, appear to be unfounded for several reasons. First, there has not over the past few years been a rash of lawsuits brought based on this tort. Second, it is very difficult for a plaintiff to get past the strike-out phase of the litigation because of the need to plead the precise material facts to support a claim that a public official deliberately engaged in wrongful conduct.

Third, the evidentiary burden imposed upon a plaintiff in proving such a claim is a very difficult one to meet.⁷⁸²

The floodgate argument expresses a fear that the rules of Crown liability would now allow for an indeterminate class of potential claimants – or, in other words, that it would open a floodgate of litigation that would threaten to drown both the courts and the Crown. In answer to this concern, it is worth remembering that the suggested conceptual threshold is not inherently meant or designed to increase or decrease the number of claims against the Crown, but rather

⁷⁸¹ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236, par. 56-61.

⁷⁸² Wruck, *supra* note 305 at 100.

to simplify them when they do arise. While this process of simplification itself could conceivably have the effect of increasing the number of cases before the courts (though hopefully this effect would be countered by the increased rate of out-of-court settlements by virtue of the simplified conceptual framework), the alternative of keeping this area of the law deliberately confusing in order to discourage plaintiffs seems to be a dubious judicial policy. On the contrary, a simplification and consolidation of the rules applicable to Crown liability are likely to benefit the administration of justice by improving the rate of out-of-court settlements, simplifying the court's task of deciding early procedural issues (such as early dismissal or other case management issues), and helping to unite the jurisprudence and further reduce confusion.

The “chilling effect” refers to the risk that such a development of the law could adversely influence decision makers by forcing them to be more prudent, more hesitant, or to engage in anticipatory defensive actions. First, it is unclear whether the adoption of the suggested conceptual framework would have this effect; the suggested change merely alters the framework in which cases are examined and does not open new categories of cases to the spectre of litigation. Second, even if the suggested change did have that effect on public servants, “this is not necessarily a bad thing⁷⁸³” as Justice McLachlin said in the context of the liability of police officers. The suggested framework tests the behaviour of the Crown against the standard of a “reasonable person”; it would not be entirely disadvantageous if public servants who might not have done so beforehand started comparing their course of action to that of a reasonable person.

⁷⁸³ *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 236, par. 56.

Another argument against the adoption of the suggested conceptual framework could be that the immunity in its current form is meant to prevent the courts from examining the existence of a fault in the first place; the matter of the “wrongness” of the Crown’s behaviour becomes non-justiciable where the immunity applies. In other words, the “immunity framework” imbues the process with greater deference towards the Crown. This is not quite true, because the immunity protecting the Crown is merely relative⁷⁸⁴, and in every case of Crown liability where this immunity is invoked by the Crown, courts still have to verify that an “immune” action was not made in bad faith. In a public law context, the courts already have the constitutional power and duty to examine the legality of any and all Crown action; there is no such thing as a truly non-justiciable action since courts can always ensure that the action was made within the boundaries of the law. Courts will only declare a matter non-justiciable after they are convinced that the impugned action was effectively within those boundaries. With that in mind, it makes virtually no difference whether the courts examine the justiciability of a Crown action through 1) the combined lenses of the applicability of an immunity followed by the qualification of the action as an act of bad faith; or 2) the single lens of the qualification of an action as a fault. In fact, the suggested framework gives courts a more precise tool to assess the parameters of justiciability for each case in the form of the assessment of subjective circumstances, and of the objective criterion of the “reasonable person”: by deciding that the Crown’s behaviour meets this standard, the court is essentially declaring that it is not the court’s business to decide which single course of action would have been preferable.

⁷⁸⁴ *Supra* p. 204.

This thesis raised several questions that could form the basis of further research. First and foremost is the nature of conceptual frameworks in the legal field: how can conceptual frameworks be studied and qualified? Why can one conceptual framework be said to be “better” than another? For example, what exactly made *Dunsmuir*'s “standard of review analysis⁷⁸⁵” any qualitatively better than the “pragmatic and functional analysis” it replaced? This research could also lead to interesting empirical questions including the impact of “complex” frameworks on the judicial system – can we compare the cost in resources to the judicial system between complex and simple frameworks? This could provide a tool in the analysis of policy that could, in time, shape the evolution of common and statutory law. Without these tools, it is unfortunately impossible to arrive at a definitive conclusion regarding whether immunities are necessary or not in Québec. This thesis endeavoured to demonstrate that the tools of civil liability already familiar to the civil lawyers of Québec can be (and sometimes are already) used to adjudicate cases of liability of the Crown. Presumably, using rules and methods of legal thinking to which they are accustomed would help improve the simplicity and previsibility of legal decisions in this field of law. This thesis cannot demonstrate this conclusively without obtaining information from a test run of the proposed solution, though it did attempt to illustrate how the suggested framework would hypothetically impact existing case law.

⁷⁸⁵ *Dunsmuir v. New Brunswick*, *supra* note 8, par. 63.

Future research (of a shorter nature) could also be done on a comparison between the burden of evidence required by Canadian frameworks in civil liability of the Crown (both common law and civil law) and in the case of Charter remedies, which are meant to be unified across the country⁷⁸⁶. How would the themes identified in this thesis apply to Charter claims, particularly those of justiciability and of judicial deference towards government action?

Another interesting direction of research could focus on the tension between the responsibility of the Crown for the actions of their employees (usually known for private employers as “the cost of doing business”) and the public law question of whom, between the Crown or the private party, should bear the burden of compensation? Should the private party suffer it, should the employee (acting at the occasion of his employment) be personally liable, or should the Crown, as an employer, be liable? This is also distinguishable from the question of the personal liability of a public servant when they are acting *ultra vires* versus when they are acting in the performance of their duties: Maurice Duplessis, for instance, was personally held liable for the damages suffered by Frank Roncarelli, even though, by some accounts, the Premier believed he was acting in the public interest⁷⁸⁷. These questions might find different answers in civil and in common law, and will be easier to tackle using a simplified conceptual framework for the more basic conception of liability of the Crown.

In conclusion, this thesis has suggested an alternative framework for cases of liability of the Crown in Québec; if used, it would make the current immunity framework unnecessary in that

⁷⁸⁶ More specifically under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

⁷⁸⁷ *Roncarelli v. Duplessis*, *supra* note 18.

province. With this in mind, it is time for immunities to go the way of the functional and pragmatic analysis, and to be replaced by something that, hopefully, can help deliver better justice, at least until a better idea comes along. That is an important characteristic of our legal system: the law can change, the law can evolve. No solution is ever perfect, but some are better than others. This is how the law grows.

This does not undermine the law's validity. The degree of indeterminacy is limited, and serves the important purpose of allowing the law to respond to changing circumstances. Viscount Sanky in the Person's Case famously likened the Constitution to "a living tree, capable of growth and expansion". The metaphor describes not only the Constitution, but the law itself. The tree of the law is rooted firmly in the traditions of the past that have made it what it is and continue to nourish it. Its branches remain firm, decade after decade. Occasionally, it is necessary to top off a dead branch; occasionally new twigs emerge – twigs, that if viable may be nurtured until they themselves are branches, bearing new fruit. Occasional uncertainty and the concomitant potential for growth are inherent features of our legal system, not aberrations. To assert otherwise is to fall victim to the myth of legal certainty⁷⁸⁸.

⁷⁸⁸ Beverley McLachlin, *Judging in a Democratic State* (University of Manitoba, 2004).

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