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Ghislain Otis

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Article abstract

In the first part of this article, the author argues that the Supreme Court's exclusion of the judiciary from the ambit of section 32(1) of the Canadian Charter of Rights and Freedoms does not create an immunity from Charter review in favour of courts and judges. He identifies two broad categories of cases where judicial action is indeed subject to Charter scrutiny. In these cases the Charter applies because a basis for review can be found independently of section 32(1) and because there is no risk of a direct intrusion of Charter dictates into the private sphere. In the second part of the paper, the appropriate remedial response to judicial breaches of Charter guarantees is investigated. It is shown that the statutory and common law rules restricting judicial liability cannot dictate when a monetary award is "appropriate and just" within the terms of section 24(1) of the Charter. Personal immunity from constitutional suits, however, appears to be required as an aspect of the constitutional principle of judicial independence.

Judicial Immunity from Charter Review: Myth or Reality?

Ghislain Otis *

L'auteur s'attache à démontrer, dans la première partie de cette étude, que les tribunaux et les juges peuvent être tenus de se conformer aux dispositions de la Charte canadienne des droits et libertés bien que la Cour suprême ait statué que le pouvoir judiciaire n'est pas visé par l'article 32(1). Il propose deux types de situations où les actions du judiciaire peuvent faire l'objet de contestations fondées sur la Charte. Cette dernière pourra dans ces cas être invoquée parce que son application se justifie indépendamment de l'article 32(1) et du fait que la portée des garanties constitutionnelles ne se trouve pas étendue au secteur privé. La deuxième partie de l'étude traite du problème particulier de déterminer la réparation devant être octroyée à la victime d'une violation de la Charte imputable au pouvoir judiciaire. Même si les limites à la responsabilité des juges découlant de la loi et de la common law ne trouvent pas directement application dans le cadre d'un recours fondé sur l'article 24(1) de la Charte, l'immunité personnelle des juges apparaît comme une modalité importante du principe constitutionnel de l'indépendance judiciaire.

In the first part of this article, the author argues that the Supreme Court's exclusion of the judiciary from the ambit of section 32(1) of the Canadian Charter of Rights and Freedoms does not create an immunity from Charter review in favour of courts and judges. He identifies two broad categories of cases where judicial action is indeed subject to Charter scrutiny. In these cases the Charter applies because a basis for review can be found independently of section 32(1) and because there is no risk of a direct intrusion of Charter dictates into the private sphere. In the second part of the paper, the appropriate remedial response to judicial breaches of Charter guarantees is investigated. It is shown that the statutory and common law rules restricting judicial

* Professeur, Université Laval, Québec.

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liability cannot dictate when a monetary award is "appropriate and just" within the terms of section 24(1) of the Charter. Personal immunity from constitutional suits, however, appears to be required as an aspect of the constitutional principle of judicial independence.

There has been some discussion recently in judicial and academic circles as to whether the actions of the judiciary may in certain cases be immune from direct scrutiny pursuant to the *Canadian Charter of Rights and Freedoms* [1]. The issue has arisen in the wake of the ruling of the Supreme Court of Canada [2] in *R.W.D.S.U. v. Dolphin Delivery Ltd.* [3]. In that controversial decision [4], Canada's highest jurisdiction held that the constitutional guarantees

1. Part I Constitution Act, 1982, being schedule B to the Canada Act, 1982 U.K. hereinafter cited as "the Charter".
2. Hereinafter referred to as "the Supreme Court".
3. [1986] 2 S.C.R. 573.
4. For a sample of the often harshly critical academic response to *Dolphin Delivery* see: D. BEATTY, "Constitutional Conceits: The Coercive Authority of Courts", (1987) 37 *Univ. of Tor. L.J.* 183; J.A. MANWARING, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of Dolphin Delivery Ltd.", (1987) 19 *Ottawa L.R.* 413; J.D. GAGNON, "L'arrêt Dolphin Delivery: La porte est-elle ouverte ou fermée?", (1987) 32 *McGill L.J.* 925; B. SLATTERY, "The Charter's Relevance to Private Litigation: Does Dolphin Deliver?", (1987) 32 *McGill L.J.* 905; B. ETHERINGTON, "Constitutional Law — Charter of Rights and Freedoms, Sections 2(b) and 1 — Application of the Charter to the Common Law in Private Litigation — Freedom of Expression — Picketing in

enshrined in the Canadian Charter do not constrain private conduct[5]. The court also determined that the only actors enumerated in section 32(1) are the legislative, executive and administrative branches of the state[6]. The courts, according to their Lordships, do not fall within the ambit of section 32(1) because they cannot be regarded as a branch of government for the purpose of Charter application[7]. While conceding that the courts are certainly bound by the Charter "as they are bound by all laws"[8], Mr. Justice McIntyre indicated that in this situation the Charter extends to them "as neutral arbiters" rather than as party to a dispute[9]. It is, in other words, incumbent upon the courts to uphold the Charter when it binds the parties to proceedings instituted before them. They are then constrained as detached constitutional adjudicators but not necessarily as primary actors whose conduct is subject to direct Charter regulation, and thus exposed to remedial measures pursuant to section 24(1).

Such an interpretation of section 32(1) is highly questionable and should not have been adopted considering the clear possibility of conferring a broader connotation upon the word "government"[10]. But the purpose of this article is not to reiterate the criticism levelled elsewhere by this writer against this aspect of *Dolphin Delivery*[11]. It is proposed instead to show that *Dolphin*

Labour Disputes — *Retail Wholesale and Dep. Store Union Local 580 v. Dolphin Delivery Ltd.*", (1987) 66 *Can. Bar. Rev.* 818; P. HOGG, "The Dolphin Delivery Case: The Application of the Charter to Private Action", (1987) 51 *Saks. L. Rev.* 273; A.C. HUTCHINSON and A. PETTER, "Private Rights/Public Wrongs: The Liberal Lie of the Charter", (1988) 38 *Univ. of Tor. L.J.* 278; E.P. BELOBABA, "The Charter of Rights and Private Litigation: The Dilemna of Dolphin Delivery", in N.R. FINKELSTEIN and B. MACLEOD ROGERS (eds.), *Charter Issues in Civil Cases*, Carswell, 1988, p. 29; P.W. HOGG, "Who is Bound by the Charter?", in G.A. BEAUDOUIN (ed.), *Your Clients and the Charter/Liberty and Equality*, Montréal, Les Éditions Yvon Blais, 1988, p. 15; J.L. BAUDOIN, "Qu'en est-il du droit civil?" *id.*, p. 27; R. TASSÉ, "À qui incombe l'obligation de respecter les droits et libertés garantis par la Charte canadienne des droits et libertés?", *id.*, p. 35; D. GIBSON, "What did Dolphin Deliver? Comments", *id.*, p. 75; R. DUSSEAULT, "Qu'est-ce que le gouvernement et quelle est l'étendue de sa sphère? — Commentaires", *id.*, p. 91; Y.M. MORISSETTE, "Certains problèmes d'applicabilité des Chartes des droits et libertés en droit québécois", in *Application des chartes des droits et libertés en matière civile*, Formation permanente du Barreau du Québec, Montréal, Les Éditions Yvon Blais, 1988, p. 1; Y. DE MONTIGNY, "Le domaine des relations privées: un 'no man's land' constitutionnel", (1988) 22 *R.J.T.* 243; A.J. PETTER and P.J. MONAHAN, "Developments in Constitutional Law: The 1986-87 Term", (1988), 10 *Supreme Court L.R.* 61.

5. *Supra*, note 3, p. 597.
6. *Id.*, p. 598-599.
7. *Id.*, p. 598-600.
8. *Id.*, p. 600.
9. *Id.*
10. See G. OTIS, "The Charter, Private Action and the Supreme Court", (1987) 19 *Ottawa L. Rev.* 71, p. 87-88.
11. *Id.*

Delivery, as it was decided and later interpreted by the Supreme Court [12], does not support a theory of judicial immunity from primary review. It is argued in the first part of this article that, even after *Dolphin Delivery*, a considerable sphere of judicial activity remains directly subject to the prescriptions of the Charter. Within that sphere, judges are reached as primary actors and not simply as lofty constitutional adjudicators.

The second part of this article deals with the delicate problem of devising the appropriate method for redressing judicial constitutional violations. The discussion will centre on the need to harmonize the efficacious vindication of Charter rights and the necessity of fostering judicial independence.

1. The Application of the Charter to the Judiciary

1.1. *Dolphin Delivery* and the Notion of Judicial Immunity

Dolphin Delivery has been understood by some judges and writers as precluding the imputation of an infringement of Charter guarantees to the courts and judges. Thus, in *Royer et al. v. Migneault* [13] a monetary suit was brought against a Quebec Superior Court judge in relation to remarks he made *in banco* questioning in unequivocal terms the competence of lawyers acting for the defence in a criminal trial. The plaintiffs, two members of the Bar of Quebec, based their case against the judge partly on the submission that his attack on their professional abilities amounted to a breach of their rights under section 7 of the Charter. *Dolphin Delivery* had been decided when the case reached the Quebec Court of Appeal. Addressing the issue whether the provisions of the Charter could buttress the claim against the judge, Mr. Justice Rothman, speaking on behalf of the court on this point, relied on the construction of section 32(1) proposed by Mr. Justice McIntyre to conclude that:

> ... s. 32(1) of the *Charter*, which defines the actors to whom the *Charter* is applicable, cannot be interpreted to include the judiciary as a branch of "government" or to include courts or judges as agents of "governmental action". [14]

The cause of action could not be sustained since in uttering the allegedly injurious words, the defendant could not violate a constitutional right or freedom. This was a clear finding of the court even though Mr. Justice Rothman would still have rejected the claim had the judge's conduct been

12. See the cases cited *infra*.
13. (1988), 32 C.R.R. 1.
14. *Id.*, p. 15.

covered by section 32(1) [15]. A similar solution was arrived at in at least one other case where a judge was sued for breach of Charter rights [16]. It is obvious that by virtue of this understanding of *Dolphin Delivery*, courts and judges might never be characterized as constitutional wrongdoers under the Charter. Such an approach seems to be part of a strategy aimed at safeguarding the traditional personal immunity from suit enjoyed by judges in the name of judicial independence. But a restriction of liability can probably be achieved through the fashioning of appropriate remedial techniques rather than by means of a complete bar on direct Charter review of judicial action. The question of what constitutes an "appropriate and just" remedy for judicial constitutional wrongdoing should be kept distinct from the issue of review.

A number of commentators have also ascribed to *Dolphin Delivery* the effect of exempting the courts from the application of the Charter. While being sometimes harshly critical of Mr. Justice McIntyre's analysis of section 32(1), they apparently view judicial immunity as an inevitable corollary of the Supreme Court's refusal to regard the judicial branch as part of government. The reaction of these academic writers is fairly summed up in the assertion that "[o]n this interpretation section 32(1) and in turn the whole Charter are interpreted so as to exclude their application to the third — the judicial — branch of our government" [17]. It is apparent that this view is founded on the assumption that the Supreme Court's exclusion of the judiciary from section 32(1) is conclusive as regards the subjection of courts and judges to the dictates of the Charter. It is submitted that this assumption is incorrect.

1.2. Charter Review of Judicial Action with Regard to Public Law

Arguments to the effect that the approach taken to section 32(1) in *Dolphin Delivery* amounts to "... excusing the judiciary from constitutional review..." [18] cannot be reconciled with the Supreme Court's willingness to expose at least a portion of the common law to possible invalidation for offending the Charter. Mr. Justice McIntyre acknowledged that the common law is reviewable but not when it regulates private conduct or is invoked in a

15. *Id.*, p. 15-17.
16. See *Charters v. Harper* (1987), 79 N.B.R. (2d) 28, p. 39-44 (N.B.Q.B.).
17. See Beatty, *supra*, note 4, p. 188. See also Hogg, *supra*, note 4, (1987) 51 *Sask. L.R.* 273, p. 274; Petter and Monahan, *supra*, note 4, p. 123; Manwaring, *supra*, note 4, p. 438; H.P. Glenn, "L'article 24(1) de la Charte canadienne des droits et libertés: la réparation juste et convenable" in *Application des chartes des droits et libertés en matière civile*, *supra*, note 4, 75, p. 89.
18. See Beatty, *id.*, p. 190.

purely private dispute [19]. His Lordship affirmed that the Charter could reach the common law whenever it was relied upon by a governmental actor to justify conduct encroaching on constitutional guarantees [20]. The door was therefore not closed completely to Charter control of at least some legal rules and orders of judicial origin, despite the refusal to classify the judiciary among the actors referred to in section 32(1). Even when judge-made law is attacked primarily as the basis of governmental action, it is ultimately the constitutionality of a rule which is the product of judicial action that is at issue [21].

In construing section 32(1) the way he did, Mr. Justice McIntyre was not concerned with providing a complete and definite answer to the question whether judicial action can ever be vulnerable to a Charter claim. Instead, he was intent on consolidating his finding that the private sector was not directly affected. He noted that if the judicial branch were to be fitted within the term "government", any court order would be susceptible to review [22]. This, in his opinion, would render futile the restriction of Charter duties to the public sector since virtually all private dealings could be brought within the purview of the Charter through review of judicial enforcement of private arrangements [23].

Scrutiny of judge-made rules of a public law nature, that is, not regulating purely private relationships, does not frustrate the insulation of private action from constitutional attack. Nor does scrutiny of judicial enforcement of the public law in general. In fact, review of the public law process only conforms with the Supreme Court's own characterization of the *Constitution Act, 1982* as a "... yardstick of reconciliation between the individual and the community and their respective rights..." [24]. Justice McIntyre's

19. *Supra*, note 3, p. 599 and 602-604. It is interesting to note that the Quebec Court of Appeal recently decided that the Charter does not apply when a private party alleges defamation by another private party in breach of section 1053 of the Civil Code. See *Larose v. Malenfant*, [1988] R.J.Q. 2643.
20. *Id.*, p. 599.
21. It is therefore not possible to subscribe to Professor Hogg's suggestion that the common law may not really be said to be subject to the Charter when it is the basis of governmental action. The learned author thinks that: "It is questionable whether one ought to describe the *Charter* as applicable to the common law in even these situations, where it is the presence of the governmental actor, not the source of the actor's power, that makes the *Charter* applicable", see *supra*, note 4, (1987) 51 *Sask. L. Rev.* 274, p. 278. See also DE MONTIGNY, *supra*, note 4, p. 247.
22. *Supra*, note 3, p. 600.
23. *Id.*, p. 600-601. This understanding of the effect of subjecting court orders to the Charter, however, is questionable, see OTIS, *supra*, note 10, p. 87-89 and BELOBABA, *supra*, note 4, p. 42-45.
24. *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, p. 366.

interpretation of section 32(1) was intended to confirm rather than to weaken the role of the Charter as a public law instrument. The fact that he did nor rule out the reviewability of the common law in the public sphere may be construed as an indication that the question whether courts are governmental actors is not conclusive in ascertaining the effect of Charter obligations on the judiciary. A justification for review may be inherent in the Charter's public law character even if the judiciary does not rank among governmental actors as such for the purpose of section 32(1). This crucial aspect of *Dolphin Delivery* has generally been neglected in the chorus of criticism it has sparked off.

Another judgment has been handed down by the Supreme Court which confirms that *Dolphin Delivery* has not decreed the impossibility of judicial constitutional infringements. The Supreme Court found in *B.C.G.E.U. v. British Columbia*[25] that a court order designed to enforce a judicially developed prohibition of criminal contempt of court must comply with the Charter. In that case, the appellant union was contesting an injunction restraining its members from picketing British Columbia law courts in the course of a legal strike. The impugned order had been issued by the Chief Justice of British Columbia, on his own motion and *ex parte*, on the grounds that the picketing interfered with the administration of justice and thus constituted the offence of contempt in the face of the court. The union questioned the constitutionality of the order arguing *inter alia* that it offended rights and freedoms set out in sections 2, 7 and 11 of the Charter.

The Supreme Court agreed with the courts below that the union's actions amounted to criminal contempt as defined by established principles of common law, and that the judge's handling of the picketing was therefore fully justified in view of the superordinate importance of ensuring the unimpeded functioning of the law courts[26]. Before examining the specific Charter claims put forward by the appellant, the Supreme Court had to determine whether the document could be invoked at all against the injunction. Chief Justice Dickson, speaking for the court on this point, decided on the basis of *Dolphin Delivery* that the Charter was indeed applicable:

> *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, holds that the *Charter* does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of the criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion

25. [1988] 2 S.C.R. 214.
26. See also, *Newfoundland (Attorney General) v. N.A.P.E.*, [1988] 2 S.C.R. 204.

> and not at the instance of a private party. The motivation of the court's actions is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.[27]

In *Dolphin Delivery* a court order enjoining picketing was deemed unaffected by the Charter's provisions because the common law rule it served to effectuate related to private dealings and was applied in private litigation. In *B.C.G.E.U.*, on the other hand, a judicially imposed restraint on picketing was reviewed since it gave rise to a "public" dispute. A remarkable feature of the passage just quoted is that it contains no mention of section 32(1), and no query as to whether judicial conduct constitutes governmental action. In fact, it is not suggested once in the judgment that an element of governmental action is present so as to activate the Charter. At the same time, their Lordships clearly focused the Charter debate on a judge-made rule of criminal law and the manner in which a judge took the initiative of issuing an order under the authority of such rule.

Thus, the discussion of the Charter issues was dominated by considerations bearing upon the conduct of the judge in issuing the impugned order. Chief Justice Dickson stated that, assuming there had been a deprivation of liberty under section 7, an *ex parte* injunction was in the circumstances consistent with fundamental justice[28]. The appellant's contention based on section 11 also failed because no one was charged with an offence[29]. But the Chief Justice considered that a prima facie breach of the picketers' freedom of expression under section 2(b) did result from the injunction[30]. The ensuing section 1 enquiry centred on the reasonableness of the judge's handling of the picketing given the pressing public interest in unhampered access to justice. It was ruled that his decision to take immediate and unilateral action to secure public access to the courts served an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom"[31]. The order was also deemed proportionate within the meaning of the tripartite *Oakes* formula[32].

In view of such a sustained and close Charter scrutiny of judicial action, it may be tempting to suggest that *B.C.G.E.U.* signals the implicit abandonment

27. *Supra*, note 25, p. 243-244.
28. *Id.*, p. 245-246.
29. *Id.*, p. 246-247.
30. *Id.*, p. 244-245.
31. *Id.*, p. 248 quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 352.
32. *Id.*, p. 248-249. See *R. v. Oakes*, [1986] 1 S.C.R. 103, p. 135-140.

by the Supreme Court of its much-maligned refusal to treat the judiciary as part of government. But it must be pointed out that the court reaffirmed the non-application of the Charter to private disputes and to judge-made rules of law governing private relationships. This indicates that Chief Justice Dickson did not want to equate any judicial action and order to governmental conduct. It is submitted that the better view is that by not even averting to section 32(1) in resolving an important problem of Charter application, the Supreme Court has merely made it clear once again that this provision is not invariably conclusive with respect to constitutional review of judicial action pursuant to the Charter.

The *B.C.G.E.U.* case concerned the alleged infringement of constitutional rights flowing from the judicial development and enforcement of rules that brought to bear against individuals the full power of constraint of the criminal law in order to foster collective interests. The court apparently felt that the tension between individual liberty and collective interests that was inherent in the impugned rule of criminal law and its judicial implementation rendered the dispute "public", and thus triggered the application of the Charter. Such an attitude is consonant with the Supreme Court's understanding of the Charter as an instrument of protection of individual and minority interests from the excesses of majoritarian rule[33]. Independently of the meaning of "government" in section 32(1), scrutiny of the court order was founded upon the grand design of the Charter to balance collective and individual or minority rights.

Another judge-made rule of criminal law was attacked on the basis of the Charter in a case decided recently by the Supreme Court. In *R. v. Bernard*[34], the accused raised a defence of drunkenness against a charge of sexual assault causing bodily harm contrary to section 246.2(c) of the *Criminal Code*. He invoked sections 7 and 11(d) of the Charter to question the constitutionality of the judge-made rule whereby self-induced intoxication cannot prevent criminal liability in a general intent offence[35]. A majority of the court

33. In *R. v. Holmes*, [1988] 1 S.C.R. 914, Chief Justice Dickson noted p. 931: "[t]he overarching principle of judicial review under the *Charter* is that the judiciary is entrusted with the duty of ensuring that legislatures do not infringe unjustifiably upon certain fundamental individual and collective interests in the name of the broader common good". This aspect of the Supreme Court's Charter jurisprudence has been particularly apparent with respect to the application and interpretation of the limitation clause. For a recent review of the Supreme Court's approach in this area, see R.M. ELLIOT, "The Supreme Court of Canada and Section 1 — The Erosion of the Common Front", (1988), 12 *Queens L.J.* 277.

34. [1988] 2 S.C.R. 833.

35. See *Leary v. The Queen*, [1978] 1 S.C.R. 29.

apparently took for granted the direct application of the Charter to the contested common law rule and dealt with the constitutional aspect of the case accordingly.

Mr. Justice La Forest, however, canvassed whether the criminal law of judicial origin could be invalidated for offending Charter rights. He stated that it would be "... anomalous if the courts could infringe such a fundamental right [...] while any attempt by Parliament to do so would be subjected to searching scrutiny under s. 1 as established by this court"[36]. He consequently found that "... when a common law rule is found to infringe upon a right or freedom guaranted by the *Charter*, it must be justified in the same way as legislative rules"[37]. In his separate reasons, the Chief Justice approached the problem of Charter application somewhat differently. He thought the impugned rule had to be "overruled" on the basis of the passage in *Dolphin Delivery* where Mr. Justice McIntyre points out that the judiciary "ought" to develop the common law so as to uphold Charter values[38]. Mr. Justice McIntyre was referring to the desirability in the private law sphere of taking into account the policies embodied in the constitutional document[39].

It is difficult to understand why the Chief Justice felt obliged to resort to this rather indirect basis for a Charter assessment of a rule very similar in nature to that which was under attack in *B.C.G.E.U.*, namely, a judge-made rule of criminal law which did not impact on purely private dealings. Why did his Lordship not find, as he did in *B.C.G.E.U.*, that the case was one of "public" litigation? The approach of the court in *B.C.G.E.U.* is certainly preferable because it dispels all doubts as to whether the judiciary simply "ought", as a matter of public policy to take Charter values into account or has a constitutional duty to obey the Charter in criminal law matters. It also ensures the availability of a remedy under section 24(1) of the Charter in case of judicial breach. Mr. Justice Dickson was the only one in *Bernard* to have departed clearly from the *B.C.G.E.U.* analysis. Such a departure was not warranted and it is hoped that it will not become a feature of Charter jurisprudence.

The foregoing analysis of *Dolphin Delivery* and *B.C.G.E.U.* indicates that, despite the views expressed to the contrary, constitutional violations of judicial origin are possible. The Charter applies for two reasons ; first, there is no direct control of purely private action and litigation ; secondly, scrutiny of

36. *Supra*, note 34, p. 891.
37. *Id.*, p. 891-892.
38. *Supra*, note 34, p. 851.
39. See *supra*, note 3, p. 603.

the courts can be justified under the Charter itself irrespective of the meaning attached to "government" in section 32(1). It is argued in the next section that a similar rationale can be articulated to explain review in another important category of cases.

1.3. Review of Judicial Action under Specific Provisions of the Charter

In a number of decisions rendered before and after *Dolphin Delivery*, the courts have acknowledged that members of the judiciary can be obligated by the Charter as primary actors. They have also, in some instances, awarded remedies under section 24(1) of the Charter to redress serious judicial violations of constitutional guarantees. A brief overview of some of these decisions will reveal that they are reconciliable with *Dolphin Delivery* and *B.C.G.E.U.* because they did not involve scrutiny of purely private action, and the application of the Charter to judicial conduct could be justified independently of the governmental action test of section 32(1).

Some Charter provisions directly reach into the judicial sphere of activity in that they textually, or by necessary implication, treat a defective judicial process as an integral part of the mischief to be checked by a constitutional guarantee. An example of such a provision is section 11(b) which gives everyone charged with an offence the right to be tried within a reasonable time. It is apparent that the constitutional duty to avoid undue delay encompasses various stages in the administration of justice, including the conduct of the trial by the court itself. In *Mills v. R.* [40], a majority of the Supreme Court acknowledged the special responsibility of the judiciary in avoiding unconstitutional delays [41]. The subsequent case of *R. v Rahey* [42] presented their Lordships with a concrete case of infringement by a judge of section 11(b). All the justices agreed that a trial judge had caused an unreasonable delay by initiating 19 adjournments over a period of 11 months before ruling on a motion for a directed verdict. *Rahey* is not the only case where responsibility for a violation of section 11(b) has been clearly laid at the door of a judge [43].

In *Rahey*, the Supreme Court did not touch on the issue whether the courts were bound by the Charter under section 32(1). The application of

40. [1986] 1 S.C.R. 863.
41. *Id.*, p. 940-941 (*per* Lamer J.).
42. [1987] 1 S.C.R. 588.
43. See also *McGann and Charters* (1987), 72 N.B.R. (2nd) 108 (N.B.Q.B.); *R. v. Mireau*, Sask. Q.B., N° 848-016 summarized in *The Lawyers Weekly*, April 28 1989, p. 18.

section 11(b) to a judge-generated delay was founded solely upon an interpretation of that provision. The Supreme Court thus showed its willingness to give full effect to guarantees whose very definition entails control of the judicial process. It is clear that had their Lordships relied on the exclusion of the courts from section 32(1) to rule out the prospect of a judicial breach of section 11(b), they would have very seriously impaired the effectiveness of this constitutional guarantee. By implicitly recognizing the autonomy of section 11(b), the court avoided applying one provision of the Charter — section 32(1) — in a way which would have gravely jeopardized the vigour of other Charter provisions. Hence, internal cohesion is fostered in accordance with the rule that the Charter ought to be approached as much as possible as a coherent system where "every component contributes to the meaning of the whole, and the whole gives meaning to its parts"[44].

Some writers have seen a contradiction between the court's interpretation of section 32(1) in *Dolphin Delivery* and the finding of a judicial infringement of the Charter in *Rahey*[45]. The contradiction, however, is more apparent than real. The fact that the Supreme Court in *Rahey* did not explicitly attempt to reconcile its decision with that in *Dolphin Delivery* does not render the two cases incompatible. As was argued above, Mr. Justice McIntyre's judgment in *Dolphin Delivery* suggests that in cases not involving private litigation, judicial action may be regulated when a basis for review can be found in the Charter, despite the judiciary not being governmental actors. *Rahey* did not concern private litigation and their Lordships identified section 11(b) as an independent basis for review.

The decision in *Rahey* is only one of several instances where Charter provisions imposing specific constitutional duties on the judiciary were found to have been violated without reference to any governmental action test. The guarantee under section 11(d) that everyone charged with an offence shall be tried by an "independent and impartial tribunal" can hardly be construed as creating no obligation for the judicial branch. In *Valente v. The Queen*[46], the Supreme Court has determined that section 11(d) embodies a requirement of individual judicial impartiality as well as institutional independence[47]. Individual judges have no latitude to ignore this provision which, according to the court

44. *Dubois v. R.*, [1985] 2 S.C.R. 350, p. 365. The *Dubois* case itself arguably provides an example of the application of section 13 to the actions of a court. The Supreme Court held that the admission by a criminal court of incriminatory evidence given at an earlier trial breached section 13, see HOGG, in BEAUDOIN, *supra*, note 4, p. 19.

45. See P. HOGG, in BEAUDOIN, *supra*, note 4, p. 20; E.P. BELOBABA, *supra*, note 4, p. 41; A.J. PETTER and P.J. MONAHAN, *supra*, note 4, p. 127.

46. [1985] 2 S.C.R. 673.

47. *Id.*, p. 685-691.

in *Valente*, pertains to "... a state of mind or attitude in the actual exercise of judicial functions..."[48].

This point is illustrated by the case of *Re Jenset and the Queen*[49]. In that case, a judge presiding a preliminary hearing was shown to have conducted the hearing in an inquisitorial fashion, forcing the accused to answer incriminating questions from the bench, and failing to allow him to make submissions in his defence. The reviewing court described the proceedings as a "flagrant example of the judge assuming the role of the prosecutor"[50]. In the face of such a mockery of justice, the court ruled that sections 11(c) and (d) had been violated. The committal for trial was quashed as the appropriate and just remedy under section 24(1).

The vitality of all Charter rights that are textually defined as applicable to certain "proceedings" depends on the courts being obliged to respect them in their capacity as primary actors in the adjudicative process. It is submitted, however, that the whole group of "legal rights" contained in sections 7 to 14 may give rise to Charter claims against judicial action, even if some of these provisions contain no clear textual indication to that effect. The Supreme Court has repeatedly stated that sections 8 to 14 are to be treated as specific manifestations of the generic guarantee laid down in section 7[51]. The latter provision, in turn, clearly regulates the courts by subjecting any deprivation of life, liberty and security of the person to the "principles of fundamental justice". In *Reference re Section 94(2) of the Motor Vehicle Act*[52], Mr. Justice Lamer, speaking for the majority of the Supreme Court, asserted that the phrase "principles of fundamental justice" corresponded to the "essential elements of a system for the administration of justice"[53]. He did not doubt that the requirements of fundamental justice pertained primarily to the functioning of the courts:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle *within the judicial process* [...] and in our legal system...[54].

48. *Id.*, p. 685 and 691.
49. (1986), 20 C.R.R. 211 (Ont. H.C.J.).
50. *Id.*, p. 218.
51. See *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, p. 502; *Oakes, supra*, note 32, p. 119; *Mills, supra*, note 40, p. 917-918 (*per* Lamer J.); *R. v. Morgentaler*, [1988] 1 S.C.R. 30, p. 175 (*per* Wilson J.).
52. *Id.*
53. *Id.*, p. 503.
54. *Id.*, p. 513 (emphasis added).

To shelter the activities of the judiciary from the full normative impact of a constitutional provision centred on fundamental justice would indeed have robbed such provision of much of its substance. Further support for the view that section 7 applies to courts and judges can be derived from a strong obiter dictum of the majority of the Supreme Court in *Société des acadiens du Nouveau Brunswick v. Association of Parents for Fairness in Education*[55]. Mr. Justice Beetz observed that the right to be heard and understood by a court is part and parcel of the right to a fair hearing recognized by principles of natural justice. This right, in turn, is constitutionally protected because "[i]t belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*[56]". It is partly on the basis of this entitlement to a fair hearing that the court decided in favour of the right for a party pleading before a New Brunswick court to be heard by a court "... the member or members of which are capable by any reasonable means of understanding the proceedings..."[57]. Although the case was not specifically decided on the basis of section 7, it is submitted that the Supreme Court in *Société des acadiens* accepted that this provision, subject to the restrictions contained therein, can be used to impose on judges the constitutional duty to take reasonable means to understand any language used in their courts. There is therefore little doubt that the Supreme Court is prepared to regard section 7 as a source of direct constitutional constrains on the judiciary.

The early case of *Germain v. The Queen*[58] provides a good illustration of how a judge can violate section 7 in the course of judicial proceedings. The case concerned an application under section 24(1) of the Charter by an accused person who had been placed in custody for contempt of court by the trial judge. It was alleged that the judge had abused the power of summary conviction for contempt in a way that violated the constitutional legal rights of the accused. Justice Macdonald agreed that the evidence showed an arbitrary behaviour on the part of the judge in convicting the accused. This conduct amounted to a breach of section 7 because:

> ... the accused was deprived of his liberty by a procedure that was not in accordance with the principles of fundamental justice, which require that the specific nature of the complain against him be distinctly stated and that he be given an opportunity of answering it.[59]

55. [1986] 1 S.C.R. 549.
56. *Id.*, p. 577. See also *Macdonald v. City of Montreal*, [1986] 1 S.C.R. 460, p. 499-500.
57. *Id.*, p. 581.
58. (1984), 10 C.R.R. 232 (Alta. Q.B.).
59. *Id.*, p. 241.

There are other cases where section 7 has been employed to assess the constitutionality of judicial action[60]. It is not surprising, in view of the substantive unity discerned by the Supreme Court between section 7 and sections 8 to 14, that legal rights provisions containing no textual reference to the judicial process have nevertheless been resorted to in order to control judicial misconduct. In *Jenset*[61] the presiding judge was found to have denied the accused the right enshrined in section 10(b) of the Charter when he refused without reason to grant an adjournment to allow the accused to obtain counsel. A similar instance of judicial disregard for the constitutional rights of an accused person was revealed in *R. v. M(S)*[62]. A 15 year old youth was cited for contempt for laughing in court and, without being advised of his right to counsel, sentenced to 90 days in jail. The Nova Scotia Court of Appeal held that "the trial judge was required to advise the appellant of his right to counsel under the Charter"[63]. The sentence and conviction were set aside in order to vindicate section 10(b) of the Charter.

The potential sphere of judicial activity caught by the legal rights sections is vast. But Charter scrutiny of the third branch of the state goes beyond these sections. It is almost certain that courts and judges can be the targets of Charter claims by virtue of the equality rights provisions of section 15(1). It has been cogently argued that the right to equality "*before* the law" at least represents an entitlement to equality of treatment in the administration and enforcement of the law[64]. This is how equality before the law in the *Canadian Bill of Rights*[65] was interpreted[66], and the Supreme Court in *Andrews v. Law Society of British Columbia*[67] impliedly gave a similar content to the corresponding words of section 15 of the Charter. Mr. Justice McIntyre, expressing the views of the court on the matter, stated that in guaranteeing three basic equality rights in addition to equality before the law, the Charter was intended to provide a broader protection than the *Canadian Bill of Rights*. He noted :

60. See for example *R. v. Baumet* (1987), 50 Sask. R. 210 (Sask. C.A.).
61. *Supra*, note 49.
62. (1988), 40 C.C.C. (3d) 242.
63. *Id.*, p. 244.
64. See J.W.S. TARNOPOLSKY and W.F. PENTNEY, *Discrimination and the Law*, De Boo, 1985, p. 16-10 and 16-11 ; A.F. BAYEFSKY, "Defining Equality Rights", in A.F. BAYEFSKY and EBERTS M. (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms*, Carswell, 1985, 1, p. 4-12 ; A.F. BAYEFSKY, "Defining Equality Rights Under the Charter", in K.E. MAHONEY and S.L. MARTIN (eds.), *Equality and Judicial Neutrality*, Carswell, 1987, 106, p. 107-108.
65. R.S.C. 1970, App. III, 1(b).
66. See *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349.
67. [1989] 1 S.C.R. 143.

> Section 15 spells out four basic rights: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law. The inclusion of these last three additional rights in s. 15 of the *Charter* was an attempt to remedy some of the shortcomings of the right to equality in the *Canadian Bill of Rights*.[68]

According to Tarnopolsky, when the right to equality before the law is combined with the other equality clauses provided for in section 15(1), "it does appear that it was intended that section 15 should govern every application and implementation of the law"[69]. The judicial process of enforcement and implementation of the law should therefore be easily caught by section 15. The foregoing reasoning, on the other hand, cannot be extended to the judicial enforcement of the private common law until the Supreme Court reverses its refusal to apply the Charter directly to such law.

Unequal enforcement of the law could also be impugned through section 7 when a court order occasions a deprivation of life, liberty and security of the person. It is submitted that such judicial conduct would offend the principles of fundamental justice. The various provisions of the Charter do not operate as watertight compartments and the basic ideal of equality before the law cannot be neatly disentangled from the values of justice enshrined in section 7[70]. The Supreme Court has declined in *R. v. Cornell*[70.1] to rest the constitutional safeguard of the principle of equality before the law on section 7 with respect to a cause of action arising prior to the coming into force of section 15. It would have been contrary to the intent of the framers, in the court's view, to resolve a Charter case on the basis of equality principles while the central equality provision was not yet effective[70.2]. Mr. Justice Le Dain, however, explicitly refrained from holding that section 15 dealt exhaustively with the issue of equality[70.3].

In the light of this overview of judicial decisions and Charter provisions, it is easy to concur with Professor Hogg when he writes that "some provisions of the Charter can work only on the basis that the courts are bound by the

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68. *Id.*, p. 14 of his reasons for judgment.
69. *Id.*, p. 16-11.
70. For a judicial pronouncement on the interdependence of various Charter provisions, see *R. v. Lyons*, [1987] 2 S.C.R. 309, p. 326 (*per* La Forest J.).
70.1 [1988] 1 S.C.R. 461.
70.2 *Id.*, p. 478.
70.3 *Id.* His Lordship emphasized that he reached his conclusion in view of "the clear intention of the framers of the *Charter* as to when the constitutional protection of the right to equality before the law was to take effect, not on the basis of the maxim *expressio unius est exclusio alterius*..." He added that "... there may be some overlap between section 7 and other provisions of the *Charter*."

Charter[71]". The author also maintains that, in spite of *Dolphin Delivery*, these provisions require that the meaning of "government" in section 32(1) be extended to the courts[72]. He seems to assume that following *Dolphin Delivery* section 32(1) is necessarily conclusive on the question of Charter review of judicial conduct. This assumption seems incorrect since, as was shown above, there is another way of harmonizing decisions like *Rahey* and *Dolphin Delivery*.

There is nonetheless an imperative need for the Supreme Court to coordinate its various rulings and clarify its position with respect to the impact of the Charter on the judiciary. The court's failure in *Rahey* even to allude to *Dolphin Delivery* suggests a regrettable tendency to substitute *ad hoc* reasoning for a clear and coherent exposition of Charter jurisprudence. The same can be said of the failure to explain in *B.C.G.E.U.* why section 32(1) and its governmental action test were not required for the resolution of the case. Improvisation thwarts the sound development of constitutional doctrine. For instance, a combination of the approaches in *Dolphin Delivery* and *Rahey* could have afforded the court in *B.C.G.E.U.* a double-barrelled justification for assessing the consistency of the injunction with sections 7 and 11 of the Charter. First, the case involved public law, and secondly, the judicial process is regulated by sections 7 and 11 by virtue of the very definition of the guarantees enshrined therein. The problem of the application of the Charter to the judiciary highlights the necessity for Canada's highest court to return to the commendable commitment to systematic analysis it evinced in the early days of the Charter.

2. The Problem of Redress for Judicial Breaches of the Charter

Once a judicial breach of the Charter has been declared, the reviewing court is faced with the responsibility, pursuant to section 24(1), of ensuring that the wrong shall not remain unremedied. The courts have so far properly discharged this mission in the context of criminal proceedings by granting a range of remedies of a criminal nature. The effective enforcement of the Charter may, however, prove more problematical when a monetary claim is brought in a civil court against a judge in connection with a Charter violation. This section examines the specific difficulties arising when a monetary suit is instituted on the basis of section 24(1) of the Charter.

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71. *Supra*, note 4, (1987) *Sask. L. Rev.* 273, p. 275. See also BAUDOIN, *supra*, note 4, p. 29; TASSÉ, *supra*, note 4, p. 62.
72. *Id.*

2.1. Section 24(1) and Non-Constitutional Principles of Immunity

It is now widely accepted that monetary redress is part of the panoply of remedies obtainable under section 24(1) [73]. The first problem to be resolved in ascertaining the position of members of the judiciary with respect to constitutional pecuniary suits pertains to whether restrictions of liability that may exist at common law or under statute are directly applicable to such suits. Section 24(1) confers on a court of competent jurisdiction the broad constitutional authority to determine the proper remedial response to a breach of constitutional rights. As one author put it, "the Canadian Charter of Rights and Freedoms entrenches both the right to apply to a court for a remedy and the courts' discretion to fashion the appropriate remedy" [74]. The constitutional supremacy of section 24(1) should accordingly secure the full operation of judicial remedial discretion without constraint from legislation, the Civil Code or the common law as to what is appropriate and just in a given case. The entrenched remedial authority generated by section 24(1) means that the decision as to who should be liable, and on what basis, lies solely in the hands of the judiciary.

Since the *raison d'être* of section 24(1) is the vindication of the constitution of which it is an integral part [75], the remedial power it recognizes must be exercised only in accordance with the constitution as the sole binding law on the question of liability. It follows that section 24(1) should be interpreted as representing a distinct source of liability and embodying a novel remedy [76]. The constitutional cause of action has a life of its own within the structure of the Charter, being informed by its own textual and contextual environment, and fulfilling a unique function of constitutional implementation. The issue

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73. The main studies on monetary redress under the Charter are : M.L. PILKINGTON, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms", (1984) 62 *Can. Bar. Rev.* 517; M.L. PILKINGTON, "Monetary Redress for Charter Infringement" in R.J. SHARPE (ed.), *Charter Litigation*, Toronto, Butterworths, 1987, 307; K. COOPER-STEPHENSON, "Tort Theory for the Charter Damages Remedy", (1988) 52 *Sask. L. Rev.* 1.
74. See PILKINGTON, *id.*, p. 531.
75. In *Mills, supra*, note 40, Mr. Justice Lamer stated p. 881 that the purpose of section 24(1) is to ensure "that the *Charter* will be a vibrant and vigourous instrument for the protection of the rights and freedoms of Canadians [...] Section 24(1) establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights". See also *B.C.G.E.U.*, *supra*, note 25, p. 229.
76. This seems to be the way the courts have generally treated the cause of action under section 24(1), see *Collin v. Lussier* (1983), 6 C.R.R. 89 (F.C.T.D.) reversed on other grounds (1986), 20 C.R.R. 29 (F.C.A.); *Bertram S. Miller Ltd. v. The Queen* (1985), 15 C.R.R. 298 (F.C.T.D.) reversed on other grounds (1986), 31 D.L.R. (4th) 210 (F.C.A.); *Lord v. Allison* (1986), 3 B.C.L.R. (2d) 300 (B.C.S.C.); *R. v. B.B.* (1986), 69 A.R. 203 (Alta. Prov. C.).

of judicial liability or immunity under the Charter is consequently not governed by the common law, the Civil Code or statute law. It is strictly a matter of constitutional law, although the courts might want, when appropriate and just, to draw useful analogies with traditional non-constitutional principles.

There is a line of cases, however, which hold that non-constitutional rules may be determinative of judicial liability for breach of the Charter if they impose a reasonable limit, within the meaning of section 1, on the court's power under section 24(1) to determine the avenue of redress it considers appropriate and just. The validity of this position obviously depends on whether the limitation clause of the Charter extends to section 24(1). The courts have assumed wrongly, it is submitted, that the ambit of section 1 is not confined to the substantive provisions of the Charter. Thus, in *Charters v. Harper*[77], monetary redress was sought under section 24(1) from a Provincial Court judge for the infringement of the plaintiff's right under 11(b) to be tried within a reasonable time. The defendant contented that he was immune from the suit by virtue of the *Protection of Persons Acting Statute Act*[78]. He claimed, in other words, that the statute could be applied to restrict the power of the court to decide whether the plaintiff's pecuniary claim against him personally was appropriate and just in the circumstances. The plaintiff, on the other hand, maintained that an ordinary statute could not affect his constitutional position under section 24(1). The court ruled in favour of the defendant on this particular issue. The judge said :

> The plaintiff submits that the provincial statute is superseded by the provisions of the *Canadian Charter of Rights and Freedoms*, but for my purposes, I do not accept that submission as s. 1 of the Charter guarantees the rights and freedoms therein set forth "subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It would be my opinion that the necessity for a protective statute such as c. P-20 could easily be justified to protect honest *bona fide* acting persons from harassing actions. Courts or judges must not be subject to litigation for acts performed conscientiously in the course of their duties, even if in error[79].

The court therefore found it possible to invoke section 1 to justify a statutory limitation imposed upon the victim's constitutional right to seek, and the constitutional power of the court to grant, monetary redress. It is unfortunate that the judge did not even query whether judicial liability would have been appropriate and just under section 24(1) in the first place. The

77. (1986), 31 D.L.R. (4th) 469 (N.B.Q.B.).
78. R.S.N.B. 1973, c. P-20, ss 1, 2, 3.
79. *Supra*, note 77, p. 470.

decision in *Charters* was followed in *Somerville v. Lynch*[80]. This was another case from New Brunswick where a Provincial Court judge was sued personally under section 24(1) for the alleged infringement of various Charter rights. The court quoted the above passage from the previous judgment and found that the statute prevailed accordingly[81]. The court went further, however, in ruling that the judicial immunity recognized by the common law also prevailed[82]. Similarly, Mr. Justice Rothman said in an *obiter dictum* in *Royer*[83] that even if the Charter were applicable to judicial acts, the common law rule of immunity "would be justified as a reasonable limit on the rights of action of citizens in a free and democratic society and, as such, it could come within the saving provision of s. 1 of the Charter"[84].

It is submitted that, on the contrary, the limitation clause only applies to substantive rights and freedoms. This view is supported by both the text and context of sections 1 and 24(1). The first textual point is that the qualified guarantee stated in section 1 refers only to "rights and freedoms" and not to "remedies", so that Madame Justice Wilson accurately observed in *Rahey*[85] that "... it is rights that are guaranteed under the Charter not remedies"[86]. This view of the scope of section 1 appears reinforced by the wording of section 24(1). The phrase "as guaranteed by this Charter" used in that provision refers clearly to the guarantee stipulated in section 1. It is equally clear that the balancing process of section 1 is treated in section 24(1) as something external to the remedial stage since the phrase quoted above qualifies the terms "rights or freedoms" as opposed to the other portions of section 24(1) that give access to a court of competent jurisdiction and entrust such court with the authority to fashion an appropriate and just remedy. It is therefore reasonable to infer from the way section 24(1) has been framed that the limited guarantee proclaimed by section 1 applies to the provisions where the rights and freedoms are actually set forth.

It is important to note that the limitation clause and the remedial provision play different roles within the scheme of the Charter. Section 1 states and limits the guarantee of constitutional rights and freedoms whereas section 24(1) affords a means of giving practical effect to these rights and freedoms when they are breached. This delimitation of the respective sphere

80. (1987), 74 N.B.R. (2d) 438 (N.B.Q.B.).
81. *Id.*, p. 443.
82. *Id.*, p. 447.
83. *Supra*, note 13.
84. *Id.*, p. 17.
85. *Supra*, note 42.
86. *Id.*, p. 621.

of rights and remedies is at least implicit in the following description, proposed by the Supreme Court, of the structure of the Charter:

> Earlier sections of the Charter assure, in clear and specific terms, certain fundamental freedoms, democratic rights, mobility rights, legal rights, and equality rights of utmost importance to each and every Canadian. And what happens if those rights and freedoms are infringed or denied? Section 24(1) provides the answer — anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The rights and freedoms are guaranteed by the Charter and the courts are directed to provide a remedy in the event of infringement. [87]

Beyond a textual and structural analysis of the Charter, the central importance of the vindication of rights through an effective remedial provision militates strongly in favour of section 24(1) being immune from a "reasonable limit" on its application. The Canadian courts have traditionally been hostile to measures whereby government seeks to insulate itself from its constitutional duties through the enactment or imposition of limitations on the availability of remedial measures with regard to breaches of the constitution. Attempts to introduce the equivalent of constitutional privative clauses designed to prevent judicial review of the constitutionality of laws have been consistently rejected by the courts [88]. Similarly, the courts have dismissed claims of statutory or common law immunity from monetary suits in relation to taxes levied unconstitutionally [89].

In *Mills* [90] a majority of the Supreme Court have expressed opinions which suggest that legislative interference with the judicial power under section 24(1) cannot be contemplated. Mr. Justice Lamer referred to the "unique character of a constitutional remedy" [91] to support his position that "a constitutional remedy and its accessibility should not in principle be open to statutory limitation" [92]. Mr. Justice La Forest agreed on this point with the three justices for whom Mr. Justice Lamer was speaking [93]. Hostility to any attempt to tamper with the courts' remedial mission pursuant to section 24(1) can also be detected in the following observations made by Canada's Chief Justice in *B.C.G.E.U.*:

87. See *B.C.G.E.U., supra*, note 25, p. 229.
88. See *Air Canada v. Attorney General of British Columbia*, [1986] 2 S.C.R. 539, p. 543; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, p. 151.
89. See *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Air Canada, id.*
90. *Supra*, note 40.
91. *Id.*, p. 893.
92. *Id.*
93. *Id.*, p. 971-972.

> ... it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the Charter and should not first protect that which alones makes it in fact possible to benefit from such guarantees, that is, access to a court [...] Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied? The Charter protections would become merely illusory, the entire Charter undermined [94].

It is true that the extension of the reasonable limit test to section 24(1) would probably not completely deprive a victim of the right to seek *some* remedy. A law purporting to effect a total denial of redress would likely not be found reasonable under section 1. But the traditional sensitivity of Canadian constitutional doctrine for the effective enforcement of the supreme law at least suggests that any ambiguity as to the scope of section 1 should be resolved in a way that ensures the unrestricted operation of section 24(1). It must be remembered that "any doubt about the effect of a provision of the Constitution must be resolved in favor of the citizen" [95]. To allow the justification of limitations on the remedial authority of the courts could further restrict an already qualified protection of rights and freedoms.

It is accordingly submitted that no effect can be given to any statute or rule of common law purporting to determine what remedy is or is not appropriate and just under section 24(1). Any such rule of law is precluded by section 52(1) of the *Constitution Act, 1982* from governing the constitutional law of monetary redress.

2.2. Judicial Immunity from Personal Liability: A Constitutional Imperative

When faced with a Charter violation of a judicial nature, a court should first enquire whether monetary redress is required either to compensate the victim for actual injury, or to deter future egregious disregard for constitutional rights [96]. If the answer is affirmative, the court's duty to vindicate the victim's paramount constitutional position should take precedence over governmental

94. *Supra*, note 25, p. 229.
95. *Alliance des professeurs de Montréal v. Attorney General for Quebec* (1986), 21 D.L.R. (4th) 354, p. 374 (Que. C.A.).
96. Deterrence constitutes one of the means of vindicating Charter rights, see *Collin, supra*, note 76; *Lord, supra*, note 76 and *Crossman v. The Queen* (1984), 12 C.C.C. (3d) 547 (F.C.T.D.).

interests, unless immunity can be said to be prescribed as a countervailing constitutional imperative.

If the function of section 24(1) is to uphold constitutional values, it should follow that the remedial role of the courts ought not to be performed in a manner which undermines constitutionally enshrined principles. Their power should, to the greatest possible extent, be integrated harmoniously into the overall structure of the constitution. The need for cohesion within the constitution has been emphasized by the Supreme Court in its interpretation of the Charter. In *Dubois v. R.* [97], for example, Mr. Justice Lamer stated that no provision of the Charter should be construed in a way that implies the breach of another provision [98]. Mr. Justice La Forest also said in *Lyons v. The Queen* [99] that "the Charter is a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada" [100].

An illustration of the use of the internal cohesion analysis may be found in *R. v. Morgentaler* [101] where in her concurring opinion Madame Justice Wilson wrote that section 251 of the *Criminal Code* not only deprived a pregnant woman of her liberty and security of the person, but also offended the freedom of conscience guaranteed in section 2(a) of the Charter. Madame Justice Wilson used this link between Charter rights and freedoms to conclude that a "... deprivation of the section 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice" [102].

Another ruling by the Supreme Court shows how even other parts of the constitution can influence the scope of the provisions of the Charter. In *Reference re An Act to Amend the Education Act (Ontario)* [103], certain rights and privileges had been accorded specifically to Roman Catholic denominational schools by the Ontario Legislature in conformity with section 93(3) of the *Constitution Act, 1867*. The court was asked to decide whether the Ontario legislation infringed religious freedom (s. 2(a)) and the equality rights (15(1)) enshrined in the Charter. It was found that no Charter constraint could affect the operation of section 93(3). Madame Justice Wilson thought that "[i]t was

97. *Supra*, note 44.
98. *Id.*, p. 366.
99. *Supra*, note 70.
100. *Id.*, p. 326.
101. *Supra*, note 51.
102. *Id.*, p. 175. She recently applied the same approach to section 8 in *R. v. Simmons*, [1988] 2 S.C.R. 495, p. 545; *R. v. Jacoy*, [1988] 2 S.C.R. 548, p. 561-563; *R. v. Strachan*, [1988] 2 S.C.R. 980, p. 1012.
103. [1987] 1 S.C.R. 1149.

never intended [...] that the *Charter* could be used to invalidate other provisions of the Constitution..." [104]. As for Mr. Justice Estey he stated :

> Although the Charter is intended to constrain the exercise of legislative power conferred under the *Constitution Act, 1867* where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*. [105]

In designing constitutional remedies, the courts should therefore be responsive to the interaction and tension between constitutional principles and provisions. This point is illustrated dramatically by the case of *Reference re Language Rights under the Manitoba Act, 1870* [106] where the supremacy of the constitution decreed by section 52(1) of the *Constitution Act, 1982* collided with the doctrine of the rule of law. The Supreme Court ruled that, despite a persistent violation by Manitoba of section 23 the *Manitoba Act, 1870*, an unqualified declaration of invalidity of all offending laws would have thrown the province into a legal void, thereby causing a transgression of the rule of law [107]. Since "the constitutional status of the rule of law is beyond question" [108], an adequate remedial response, in the opinion of the court, could not exclusively vindicate the linguistic rights of French-speaking Manitobans. The court felt its remedial responsibility was to accommodate both the constitutional imperative of enforcing these rights and the competing constitutional necessity of maintaining the rule of law in Manitoba [109]. Hence the order of temporary application of the laws declared unconstitutional.

There is little doubt that the courts' duty to preserve the integrity of the constitution can impose limitations on judicial discretion under section 24(1) of the Charter. It is in this context that the issue of judicial immunity from monetary liability should be addressed. An exemption from the full impact of section 24(1) in favour of the judiciary should certainly not be easily conceded. As guardians of the constitution [110], judges should be the first to obey its

104. *Id.*, p. 1197.
105. *Id.*, p. 1207.
106. [1985] 1 S.C.R. 721.
107. *Id.*, p. 747-748.
108. *Id.*, p. 750.
109. *Id.*, p. 753 where the Chief Justice states that "[t]he task the court faces is to recognize the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the 'supreme law' of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law".
110. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J. said at p. 169 that the courts are "the guardians of the Constitution". Similarly in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, he described p. 70 the judicial branch as the "protector of the constitution and the fundamental values embodied in it...".

dictates. But judicial liability has been restricted or denied at common law and under statute in order to safeguard the independence of the judiciary [111]. One commentator even said that "at the core of the principle of judicial independence lies the immunity of judges from civil actions" [112]. The significance of this rationale in the context of the Charter will depend first on whether or not judicial independence represents a constitutionally enshrined doctrine, and secondly, on whether personal liability does in fact conflict with judicial independence as it is defined for constitutional purposes.

The Supreme Court examined the foundations of judicial independence in Canada in *The Queen v. Beauregard* [113]. Their Lordships made it clear that judicial independence is entrenched in the Canadian constitution. The court had to rule on the constitutionality of a federal statute affecting the financial status of some federally appointed judges. The validity of the statute was impugned on the ground that it interferred, or could be perceived as interferring, with the independence of certain judges. Speaking for the court on this point, Chief Justice Dickson characterized judicial independence as "the lifeblood of constitutionalism in democratic societies" [114].

The Chief Justice found in Canada's written constitution three distinct sources of the principle of judicial independence. First, the distribution of power between federal and provincial governments provided for in the *Constitution Act, 1867* requires an impartial judicial umpire to resolve disputes between governments and individuals who rely on the federal distribution of power. Secondly, the advent of the Charter also renders judicial independence essential for the effective defence of human rights against state intrusions. Thirdly, the Chief Justice discerned a direct textual recognition of the need for an independent judiciary in the preamble of the *Constitution Act, 1867*, which states that Canada is to have a constitution similar "in principle to that of the United Kingdom". He also referred to the provisions of the same Act dealing with the judiciary [115]. It should be added that judicial independence is explicitly required in proceedings regulated by section 11(d) of the Charter. In addition, it can no doubt be counted among the principles of fundamental justice that must be observed according to

111. See *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716, p. 737-745, R.J. SADLER, "Judicial and Quasi-Judicial Immunities : A Remedy Denied", (1981-82) 13 *M.U.L.R.* 508, p. 524-52 ; H.P. GLENN, "La responsabilité des juges", (1982-83) 28 *McGill L.J.* 228, p. 261 ; G. PÉPIN, "L'immunité absolue des juges des cours supérieures et des commissaires-enquêteurs, en matière de responsabilité civile", (1986) 46 *R. du B.* 149, p. 151.

112. M. BRAZIER, "Judicial Immunity and the Independence of the Judiciary", [1976] *P.L.* 397.

113. *Supra*, note 110.

114. *Id.*, p. 70.

115. *Id.*, p. 70-73.

section 7 when there is a deprivation of life, liberty and security of the person [116].

Even if the constitutional stature of judicial independence is beyond doubt, the content of the principle must be circumscribed in order to ascertain whether it requires insulating judges from monetary liability under the Charter. Chief Justice Dickson wrote in *Beauregard*:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge, should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. [117]

Judicial independence is also a matter of perception. The Supreme Court in *Valente* stated that the judiciary must be perceived to be free from any outside interference [118]. The appearance of independence has proved a key factor in the recognition of judicial immunity at common law. In *Nakhla v. McCarthy* [119], Mr. Justice Woodhouse of the New Zealand Court of Appeal justified the common law rule by pointing out that "[i]t lies in the right of men and women to *feel* that when discharging his judicial responsibilities a judge will have no more reason to be affected by fear than he will allow himself to be subjected to influences of favour..." [120].

It seems fair to suggest that the possibility of a judge being made personally answerable in civil proceedings, instigated by any of the parties appearing before him or her, would create a reasonable perception that he or she is not totally free from outside individual interference in relation to the discharge of his or her judicial function. Moreover, as was emphasized by Chief Justice Dickson, judicial independence demands that judges be secure not only from actual interference but also from any attempt to interfere. It is

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116. See for example, *Re Sethi and Minister of Employment and Immigration et al.* (1988), 50 D.L.R. (4th) 669 (F.C.T.D.) where Reed J. ruled that the basic principles of natural justice and fundamental justice prescribed by s. 7 of the Charter require that a person's rights be adjudicated upon by an independent decision-maker. The Appeal Division reversed Reed J.'s decision on the question whether there was indeed a risk of impartiality in the case. But the requirement of impartiality on the basis of section 7 was not questioned. See F.C.A.-493-88 (20-6-88). On the constitutional foundations of judicial independence in Canada see generally, K. BENYEKHLEF, *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada*, Cowansville, Y. Blais, 1988.
117. *Supra*, note 110, p. 69.
118. *Supra*, note 46, p. 689.
119. [1978] 1 N.Z.L.R. 291 (C.A.).
120. *Id.*, p. 294, emphasis added.

therefore submitted that shielding judges from personal constitutional liability would represent an appropriate and just way of upholding this high degree of independence. It must be borne in mind that such a denial of a cause of action against a judge personally is not simply designed to advance the utilitarian values of governmental thrift and efficiency. It is aimed at ensuring the integrity of the constitution itself. Exempting judges from personal suits does not contravene the rule of law. In fact, the rules protecting the independence of the judiciary are intended :

> ... to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the rule of law. [121]

In the United States, the Supreme Court has held that judges are immune from suit in relation to constitutional wrongdoing [122]. But the idea of protecting judges completely from personal liability has by no means earned the support of all commentators in Canada. Some, like Professor Pilkington, maintain that the personal accountability of judges to the victim of a constitutional breach is desirable in order to check wrongdoing by members of the judiciary [123]. This view, however, is too insensitive to the constitutional imperative of bolstering judicial independence as it was defined in *Beauregard*. Perhaps the most common and effective criticism of absolute immunity is that it denies redress to the victim [124]. In *Maharaj v. Attorney General of Trinidad and Tobago* (N° 2) [125], the Judicial Committee of the Privy Council applied a solution which simultaneously provides the constitutionally required protection of judges from personal suits and avoids the injustice of leaving the wrong unredressed. In that case, a lawyer was remanded in custody for contempt of court and it was found that his rights under the constitution of Trinidad and Tobago had been violated [126]. A subsequent monetary claim against the judge based on the general remedial provision contained in the constitution reached the Privy Council. The judgment of the majority was written by Lord Diplock who held the state of Trinidad and Tobago directly liable under the constitution for a breach of constitutional rights in the performance "of the judicial power of the state" [127]. Their Lordships did not impose any primary liability on the judge personally.

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121. J. RAZ, "The Rule of Law and its Virtue", (1977) 93 *L.Q.R.* 195, p. 201.
122. *Pierson v. Ray*, 386 U.S. 547 (1967), p. 554-555.
123. *Supra*, note 73, p. 560-561.
124. SADLER, *supra*, note 111, p. 530; BRAZIER, *supra*, note 112, p. 400; PILKINGTON, *supra*, note 73, p. 560.
125. [1978] 2 All E.R. 670.
126. [1975] 1 All E.R. 411 (P.C.).
127. *Supra*, note 125, p. 679.

A number of pronouncements by Canadian courts indicate that this approach may well be imported into Charter jurisprudence. [128] It is submitted that this would be the correct way of dealing with the question of constitutional liability with regard to violations of judicial origin. Exclusive direct institutional liability reconciles the objective of vindicating the guarantees contained in the Charter with the goal of preserving a countervailing principle that is entrenched in the supreme law of Canada. State liability may also allow some indirect judicial accountability. The public airing in open court of judicial wrongdoing, and the imposition of monetary liability on the state in connection with proven judicial abuse of power, might remind judges that as the custodians of the constitution they ought not to behave as if they stand above it.

Conclusion

The judiciary could without great difficulty have been considered as part of "government" within the terms of section 32(1). The Supreme Court's failure to do so has understandably caused confusion if not bewilderment among observers. One writer even raised the prospect of a constitutional amendment as a means of defeating a possible exemption of the courts from Charter control [129]. Such a development will not prove necessary as the Supreme Court is now gradually making clear that the governmental action test does not afford an exhaustive answer to the question of Charter application to the judicial branch. Canada's highest jurisdiction has not hesitated, even after its ruling in *Dolphin Delivery*, to find judicial breaches of constitutional rights. Such breaches have been found when there was no risk of extending the Charter to purely private conduct and when a basis for constraining the judiciary could be detected somewhere in the Charter.

Only a clear acknowledgment that the courts are among the actors falling within the purview of section 32(1) would be totally satisfactory. But the Supreme Court's apparent willingness to minimize judicial immunity from Charter review is welcome. This trend might eventually culminate in a reinterpretation of section 32(1).

Just as the constitution requires compliance by the courts with constitutional rights, it demands a cautious handling of judicial infringements at the remedial stage. Judicial independence, as a constitutionally protected principle, should be reconciled as much as possible with the imperative of giving practical effect to constitutional guarantees. Remedial duties related to

128. See *Germain, supra*, note 58, p. 244 and *Royer, supra*, note 13, p. 16.
129. See GIBSON, *supra*, note 4, p. 83.

Charter violations of judicial origin should therefore be directed at the state and not at judges *qua* individuals. This remedial approach is not only consonant with the need to encourage a judicial attitude of impartiality, it also adequately reflects the state's being the primary target of Charter dictates.