COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia v. Bolster,***
2007 BCCA 65

Date: 20070202
Docket: CA033531

Between:

Her Majesty the Queen in Right of the Province of British Columbia

Appellant
(Petitioner)

And

William Bolster and The British Columbia Human Rights Tribunal

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Mr. Justice Chiasson

L. Greathead	Counsel for the Appellant
F. Kelly and J. Hadley	Counsel for William Bolster
D. Paluck	Counsel for The British Columbia Human Rights Tribunal
Place and Date of Hearing:	Vancouver, British Columbia October 16 and 17, 2006
Place and Date of Judgment:	Vancouver, British Columbia February 2, 2007

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] This appeal raises the question of whether the Crown, represented by the Province of British Columbia, may be ordered to pay compensation to a person who has been found to have been discriminated against by a government employee exercising statutory authority.

[2] The British Columbia Human Rights Tribunal found (2004 BCHRT 32) that the Superintendent of Motor Vehicles had discriminated against the respondent, William Bolster, by failing to provide him an individual functional driving assessment, so that Mr. Bolster could demonstrate his fitness to hold a commercial driver's licence despite a visual disability which prevented him from meeting the vision standards applied by the Superintendent to all applicants for driver's licences. The Tribunal ordered the Province to pay compensation, under s. 37(2)(d)(ii) of the ***Human Rights Code***, R.S.B.C. 1996, c. 210, as amended by S.B.C. 2002, c. 62, of $141,939.38 for the loss during the period from October 1998 to January 2003, when Mr. Bolster was unable to earn a living driving a truck because his commercial driver's licence had been cancelled when his visual disability became known to the Superintendent.

[3] The Tribunal's decision was upheld on judicial review: (2005) 49 B.C.L.R. (4th) 374, 2005 BCSC 1491.

[4] The Province challenges the Tribunal's jurisdiction to order that it pay compensation under s. 37(2)(d)(ii) of the ***Code***, and if the Tribunal has that jurisdiction, challenges the order calculating the compensation from 1998, when Mr. Bolster's commercial driver's licence was cancelled. The appeal also raises issues concerning the application of s. 59 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45, and the proper standard of review on judicial review of the Tribunal's decision.

[5] For the reasons that follow, I would dismiss the appeal.

Facts

[6] Mr. Bolster suffers from congenital optic atrophy, a visual disability involving diminished capacity of the optic nerves. His visual acuity is not fully correctable with glasses or contact lenses.

[7] As a result of his condition, Mr. Bolster's visual acuity does not meet the standards for drivers recommended in the "Guide for Physicians in Determining Fitness to Drive a Motor Vehicle" or the "National Safety ***Code*** - Medical Standards for Drivers". These standards are used by the Office of the Superintendent of Motor Vehicles (the "Superintendent") in assessing fitness to drive.

[8] Despite his disability, in 1982 Mr. Bolster obtained a class 5 driver's licence, which authorized him to drive passenger vehicles and small trucks, motor homes, and buses and vans seating up to ten people.

[9] In 1985, Mr. Bolster sought to upgrade his driver's licence to a commercial licence. He obtained a class 3 licence, which authorized him to drive dump trucks, large tow trucks, and larger commercial trucks, and subsequently a class 1 licence, which authorized him to drive semi-trailer trucks. He was restricted from driving buses, taxis, limousines, and ambulances, which are authorized by a class 2 or 4 licence.

[10] Each time Mr. Bolster applied for an upgraded licence, he was required to submit a report from his ophthalmologist (known as an "Examination of Visual Function") prior to being allowed to proceed with the licensing process.

[11] Mr. Bolster worked as a commercial truck driver for the next 13 years (1985 - 1998), operating a wide variety of commercial vehicles, in all weather conditions, often driving in excess of 10,000 kilometres a month. He and his former wife operated their own trucking business, which was dissolved when they divorced in May 1998.

[12] In April 1998, Mr. Bolster's class 1 licence was reissued with the same restrictions.

[13] In May 1998, Mr. Bolster began to work as an independent contractor with Westcan Bulk Transport Ltd. Westcan required him to successfully complete a comprehensive road test and undergo a complete medical examination, including a visual function test. He advised the examining doctor, Dr. Playfair, of his visual disability, and Dr. Playfair requested that Mr. Bolster provide a report from an ophthalmologist.

[14] Dr. Anderson reported to Dr. Playfair:

> He has been driving tandem trucks all his life and has not had problems. He is legally below the visual limit to drive either cars or trucks. I have explained this to him, both in 1994 and again today. There is no evidence of any progressive visual decline and there is no evidence of any other neurological disease, so this is an isolated congenital mild optic atrophy.

[15] In August 1998, Dr. Playfair reported to the Superintendent, attaching Dr. Anderson's report. Dr. Playfair wrote:

> This gentleman works as a trucker. He saw me for an employment medical and turned out to have 20/70 vision with both eyes. This is a congenital atrophy of visual acuity, he has plainly made very good central compensation and functions very well. I do not consider him a danger BUT think it my duty to inform you. Perhaps a road test would do him justice?

[16] The Superintendent referred the case to Dr. Hosgood, a retired medical doctor, with no specialty in ophthalmology or optometry. Dr. Hosgood concluded that Mr. Bolster should not have been driving and that his licence should be cancelled.

[17] On October 26, 1998, the Superintendent cancelled Mr. Bolster's licence without notice. Mr. Bolster lost his contract with Westcan.

[18] Mr. Bolster contacted the Superintendent and advised them that his vision had remained unchanged for many years, and was the same when he was issued a class 1 licence. The Superintendent's office could not find the records of Mr. Bolster's previous licences, and questioned whether anyone with Mr. Bolster's visual disability would have been issued a licence.

[19] Mr. Bolster submitted further letters from Drs. Playfair and Anderson, who both questioned the assumption that Mr. Bolster posed a safety concern. Dr. Playfair again suggested a driving test. Dr. Anderson pointed out that Mr. Bolster had adapted extremely well to his congenital disability.

[20] Dr. Hosgood requested the opinion of Dr. Beattie, an eye physician and surgeon. Dr. Beattie was provided with the letters from Drs. Playfair and Anderson, as well as information concerning Mr. Bolster's driving record. Dr. Beattie incorrectly assumed that Mr. Bolster also suffered from other "visual function abnormalities", and concluded that he was incapable of operating a motor vehicle safely.

[21] On January 15, 1999, the Superintendent wrote to Mr. Bolster confirming the cancellation of his licence.

[22] Mr. Bolster, now represented by counsel, sought a reconsideration through the formal review procedure in April 1999. The process involved an independent medical review board made up of two ophthalmologists. Both of them concluded that Mr. Bolster should not have a class 1 licence, but opined that he should be allowed a class 5 licence.

[23] Dr. Hosgood recommended that Mr. Bolster be given a class 5 licence, restricted to daylight hours, which was issued June 24, 1999. The Superintendent advised Mr. Bolster that he would be required to complete a driver's medical examination in two years time.

[24] Mr. Bolster's counsel appealed this decision. He sought the reinstatement of Mr. Bolster's commercial licence, and the removal of the daylight restriction.

[25] Dr. Hopp, an ophthalmologist, wrote to the Superintendent requesting that they consider lifting the daylight restriction. In his letter, Dr. Hopp stated that "certainly there appears no reason why he should have night blindness as no peripheral retinal degeneration is present".

[26] Nonetheless, on July 30, 1999, the Superintendent confirmed the restricted class 5 licence.

[27] From July 1999 through the fall of 2002, Mr. Bolster received three notices from the Superintendent about the requirement for a medical examination.

[28] In August 2000, he responded to the Superintendent’s notice with a telephone call, questioning the need for a medical examination before the required two years. He was told the notice was sent in error. During that telephone call, Mr. Bolster also raised the restrictions on his class 5 licence and his cancelled class 1 licence, and was told he did not meet the visual standard.

[29] On June 19, 2001, the Superintendent sent another notice to Mr. Bolster to undergo a medical examination. Mr. Bolster attended an optometrist, Dr. Clark. Dr. Clark concluded that by use of a combination of high plus spectacles and contact lenses Mr. Bolster’s corrected night vision was better than his daylight vision.

[30] Mr. Bolster contacted the Superintendent shortly after obtaining Dr. Clark’s report to have the daylight restriction removed on his class 5 licence, and to ask

about an upgrade to a class 3 licence. At the time he called, he was told that the Superintendent had not scanned Dr. Clark's report into the information system, but that someone would get back to him once this had been done. Mr. Bolster stated that no one got back to him, and by this time he had become demoralized, and so did not pursue the issue at that time.

[31] The following year, Mr. Bolster received another notice from the Superintendent requiring a medical examination. Mr. Bolster clarified that he was only required to have an eye examination, which Dr. Clark completed on September 24, 2002. On the basis of this report, the daylight restriction was removed from Mr. Bolster's licence on November 28, 2002. Mr. Bolster again inquired about his commercial licence, and was again told he did not meet the visual standards.

[32] After this, Mr. Bolster redoubled his efforts to have his commercial licence reinstated. These efforts included a steady flow of telephone calls and letters to the Superintendent, and contact from Mr. Bolster's MLA on his behalf.

[33] At around the same time, Mr. Bolster made plans to move to Alberta. He applied for an Alberta class 1 driver's licence on December 9, 2002. He provided all of the medical and other information concerning his driving history and the loss of his class 1 licence in British Columbia. In February 2003, Mr. Bolster passed a class 1 road test and was approved for an Alberta class 1 licence.

[34] Mr. Bolster filed his complaint with the British Columbia Human Rights Commission in January 2003. The Commission contacted the Superintendent, and after that, the Superintendent moved to deal with Mr. Bolster's case.

[35] The Superintendent outlined the information they required in a letter to Mr. Bolster dated January 29, 2003, and on March 4, 2003, advised Mr. Bolster that he was approved for an individual functional assessment, at his expense. Mr. Bolster could not afford the cost of the assessment, and after further communication, in September 2003, the Superintendent agreed to pay the cost. As Mr. Bolster had been injured in a work-related accident in June 2003, he did not undergo the assessment until early 2004.

[36] The Superintendent accepted the assessment and on February 12, 2004, issued Mr. Bolster a class 1 driver's licence with the same restrictions that had been in place before his class 1 licence was cancelled in October 1998.

The Tribunal's Decision

[37] The Tribunal found, in its reasons for decision released April 22, 2004, that Mr. Bolster had established a *prima facie* case of discrimination on the basis of physical disability and that the Province had not established a *bona fide* and reasonable justification. The Superintendent discriminated against Mr. Bolster by cancelling his class 1 licence in October 1998 and by continuing to refuse to reinstate it. They did not accommodate Mr. Bolster, as required by the test established in ***British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)***, [1999] 3 S.C.R. 3 ("***Meoirin***"), when they failed to offer Mr. Bolster an individual functional driving assessment. The Tribunal awarded Mr. Bolster compensation under s. 37(2)(d)(ii) of the ***Code*** for wages lost, calculated at

$141,939.38, $5,000 for injury to dignity, feelings, and self-respect, and an amount to offset any additional income tax liability Mr. Bolster may incur as the result of receiving compensation for lost salary in a lump sum.

Judicial Review – Chambers Judge's Reasons for Judgment

[38] The Province filed a petition for judicial review of the decision of the Tribunal, seeking an order in the nature of *certiorari* quashing the entire decision, or quashing those parts of the decision requiring the Province to compensate Mr. Bolster for lost wages, hurt feelings, and the income tax amount.

[39] Mr. Justice Parrett dismissed the petition.

[40] The chambers judge rejected the Province's claim that principles of Crown immunity precluded the Tribunal from awarding monetary compensation to Mr. Bolster under s. 37(2)(d)(ii) and (iii) of the ***Code***, stating (at para. 102):

> There is, in my view, no principle of law emerging from the authorities relied upon by the petitioner which limit the Tribunal's statutory jurisdiction to make such an award in the circumstances of this case.

[41] The chambers judge also rejected the Province's challenge to the Tribunal's decision to award compensation for discrimination from the date Mr. Bolster's licence was cancelled in October 1998. Having determined that s. 59 of the ***Administrative Tribunals Act*** did not apply (at para. 68), and the standard of review of the Tribunal's decision at common law was reasonableness *simpliciter* (at

para. 116), he concluded (at para. 127) that "the Tribunal's finding of discrimination and liability for that discrimination was reasonable and meets the requisite standard".

Issues on Appeal

[42] The Province's grounds of appeal raise the same substantive and standard of review questions considered by the chambers judge on judicial review of the Tribunal's decision.

[43] The substantive grounds of appeal address the Tribunal's jurisdiction to award compensation to Mr. Bolster for discrimination by the Superintendent, and whether compensation is payable from 1998, when Mr. Bolster's licence was cancelled.

[44] The Province says that the Tribunal does not have jurisdiction to order it to pay compensation for discrimination by the Superintendent, because under common law and constitutional principles the Crown is immune from damage-type awards with respect to legislative or quasi-judicial decisions made by statutory decision-makers.

[45] The Province says further that if the Tribunal has the jurisdiction to order that it pay compensation, it failed to apply the proper legal principles in awarding compensation from 1998, when Mr. Bolster's class 1 licence was cancelled, because at that time the Superintendent was entitled to rely on the decision of this Court in ***British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*** (1997), 44 B.C.L.R. (3d) 301 (C.A.) ("***Grismer BCCA***"), released December 18, 1997. According to the Crown, ***Grismer BCCA*** approved

the use of standards to the exclusion of individual functional assessments to determine fitness for driving.

[46] The standard of review questions concern the application and interpretation of s. 59 of the ***Administrative Tribunals Act***.

[47] The parties agree that the question of the jurisdiction of the Tribunal to award compensation as against the Crown is a question of law, and the standard of review is correctness under both the common law pragmatic and functional approach, and the ***Act***. There is no dispute concerning the standard of review as applied by the chambers judge.

[48] The question of standard of review arises only with respect to the second substantive issue on appeal: the determination of the amount of compensation. The Province takes issue with the chambers judge's conclusions that the ***Act*** did not apply, and the standard of review was reasonableness *simpliciter*. It argues that the ***Act*** applies, and in any event, whether the Tribunal applied the proper legal principles in awarding compensation from 1998 is a question of law for which the standard of review is correctness under both common law and the ***Act***. The Tribunal, whose submissions on this question were adopted by Mr. Bolster, takes the position that the ***Act*** does not apply, and that the standard of review at common law is reasonableness *simpliciter* (agreeing with the chambers judge). The Tribunal submits further that if the ***Act*** applies, the standard is still reasonableness.

Summary of Reasons and Conclusions

[49] I would not accede to the Province's substantive arguments.

[50] The Crown, as represented by the Province, is not entitled to claim immunity from an award of compensation by the Tribunal to Mr. Bolster for the discriminatory acts of the Superintendent. The chambers judge's decision was correct.

[51] The Province is liable to Mr. Bolster for compensation, as awarded by the Tribunal, for the period from 1998 to 2003 during which the Superintendent discriminated against him by cancelling his driver's licence and not offering him an individual functional driving assessment, with the result that Mr. Bolster could not obtain a commercial driver's licence.

[52] The chambers judge erred in concluding that s. 59 of the ***Administrative Tribunals Act*** did not apply to judicial review proceedings conducted after it came into force, and the standard of review of the Tribunal's decision determining the amount of compensation payable to Mr. Bolster was reasonableness *simpliciter*. Applying the correctness standard, in accordance with the ***Act***, the outcome is the same.

[53] I would dismiss the appeal.

Crown Immunity

[54] The Province claims that, under common law principles of Crown immunity, the Tribunal cannot award compensation against it. The issue is whether the

common law principles of Crown immunity from damages, where legislative and regulatory actions are found to be invalid for constitutional or other reasons, apply to the licensing decisions of the Superintendent. Can those principles override the Legislature's express intention, stated in the ***Code*** and the ***Interpretation Act***, that the Crown is bound by the ***Code***? My short answer is the same as the chambers judge — the ***Code*** is binding on the Province, and no principle of Crown immunity provides an exemption from liability for compensation for discrimination.

[55] The principles of Crown immunity relied on by the Province derive from ***Welbridge Holdings Ltd. v. Winnipeg (Greater)***, [1971] S.C.R. 957. In that case, the Supreme Court of Canada found that a municipality could not be held liable in damages where a by-law was declared invalid. The general principle as stated in that case is that a government owes no duty of care and cannot be held liable in negligence for legislative or quasi-judicial decisions made by statutory decision-makers.

*The **City of Montreal** case*

[56] The principle of Crown immunity from damages was applied by the Supreme Court of Canada to bar an award of compensation by a human rights tribunal in ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal***, [2004] 1 S.C.R. 789, 2004 SCC 30 ("***City of Montreal***"). The Supreme Court held that the Quebec Tribunal des droits de la personne did not have the jurisdiction to order the Communauté urbaine de Montréal

to pay compensation for discrimination against a hearing-impaired applicant for a position as a police officer, based on the ***Welbridge*** principles of immunity.

[57] The Province's position on this appeal relies on the decision of the Supreme Court in ***City of Montreal***. It is apparent from the reasoning of Lebel J. for the Supreme Court, however, that that case focuses on the "legislative function" of government (not in issue here), in the context of the application of Quebec civil law and the Quebec ***Charter of Human Rights and Freedoms,*** R.S.Q., c. C-12. The chambers judge distinguished the case on that basis (at para. 103), and a review of Lebel J.'s reasons for judgment make it clear that he was correct in doing so.

[58] In ***City of Montreal***, the hearing standards for hiring police officers were contained in a regulation enacted by the municipality under its enabling statute. The Quebec Commission des droits de la personne et des droits de la jeunesse found that the Communauté urbaine de Montréal had discriminated against an applicant for hiring on the basis of a hearing disability, in violation of ss. 10 and 16 of the ***Quebec Charter***. The Commission proposed a measure of redress in favour of the applicant. The proposal was not acted on, so the Commission filed an application to institute proceedings with the Tribunal des droits de la personne, under s. 80 of the ***Quebec Charter***, which provides for an application by the Commission to the Tribunal to obtain an appropriate measure of redress.

[59] The Tribunal found the regulatory standard inoperable in relation to the applicant, and directed the Communauté urbaine de Montréal to reconsider the applicant's application. It concluded, however, that it could not award damages

resulting from the application of the Communauté's legislative and regulatory powers. The Quebec Court of Appeal agreed with the Tribunal that, "as a general rule, in cases where a legislative or regulatory provision is found to be inoperable or invalid, the Tribunal cannot award damages as a remedy pursuant to s. 49 of the *Quebec Charter*" (***City of Montreal***, para. 4). Section 49 of the ***Quebec Charter*** entitles victims to obtain the cessation of interference with their rights and to "compensation for the moral or material prejudice resulting therefrom" (referred to by Lebel J. (at para. 14) as "damages").

[60] The Supreme Court agreed with the Tribunal and the Court of Appeal that damages were not available where the violation of the ***Charter*** had its source in a regulatory or legislative act of government. It explained (at para. 15):

> Section 52 unquestionably gives the *Quebec Charter* a preeminent, quasi-constitutional stature in relation to other Quebec legislation. We should nevertheless bear in mind that the appropriate remedy for a violation cannot be chosen without taking into account the constitutional framework and principles governing the organization and practices of Canada's public institutions so that the relationships between the various components of the legal hierarchy applicable to the situation under Quebec law are articulated appropriately. In this regard, a review of a number of this Court's observations concerning the relationship between fundamental rights and the overall makeup of Canada's constitutional framework is in order. These observations are particularly relevant to the discharge of the legislative function, even when that function is delegated, as in the case at bar.
>
> [Underlining added.]

[61] In its further explication of the application of these principles, the Supreme Court made it clear that it was dealing in that case with "the exercise of an independent legislative power" (at para. 16). It noted (at para. 17):

> The nature of Canada's constitutional regime must be taken into consideration when establishing the hierarchy of rules governing the actions of legislatures and public entities, such as municipalities, to which legislative powers have been validly delegated.
>
> [Underlining added.]

[62] The Court emphasized (at para. 18) that the dispute in that case:

> … arose out of the adoption and application of a regulatory standard authorized by provincial legislation. It stems from the regulatory activities of the CUM authorized under s. 178.1 of its enabling Act.
>
> [Underlining added.]

[63] The Supreme Court further explained (at para. 19) that "well established principles of public law rule out the possibility of awarding damages when legislation is declared unconstitutional", quoting the comments of Gonthier J. in ***Mackin v. New Brunswick (Minister of Finance)***, [2002] 1 S.C.R. 405, 2002 SCC 13, at paras. 78-79:

> According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional *(Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42)...:
>
> > In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]

> ... The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a Charter context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

[64] The Supreme Court continued its analysis in ***City of Montreal*** (at para. 22), where it discussed the relationship between the conflicting principles of "immunities attached to legislative and regulatory action" and that the application of a legislative or regulatory standard may constitute a "fault" and "engage the liability of a public entity or its officials". The Court concluded (at para. 23) that:

> Recourse to the civil liability regime to punish violations of the *Quebec Charter* does not oust those fundamental rules which serve to safeguard free and effective discharge of the legislative function,...
>
> [Underlining added.]

[65] This case does not engage the legislative or regulatory function of government. The Province argues, however, that in ***Welbridge***, the Supreme Court said that the principles of Crown immunity also apply to the exercise by statutory

decision-makers of quasi-judicial functions, and that the Superintendent, in making licensing decisions, exercises such functions.

Crown Immunity for Quasi-Judicial Decisions

[66] In ***Welbridge***, the municipality had passed a zoning by-law which was subsequently found invalid because the municipality had failed to give proper public notice of the hearing of the application. A developer who had expended funds relying on the by-law sued the municipality in negligence. The Supreme Court held that the municipality could not be held liable for the exercise of its legislative function, nor for those which had a "quasi-judicial component". The quasi-judicial functions in that case arose from the requirements that the municipality follow proper procedures for carrying out its legislative functions. It was in that context that Laskin J. (as he then was) for the Court referred (at 967) to a decision by a "statutory tribunal with quasi-judicial functions", stating that such a tribunal "which in the good faith exercise of its powers…makes a decision which turns out to be invalid because of anterior procedural defects" owes no duty of care in tort. Mr. Justice Laskin rejected (at 969) the possibility that the quasi-judicial function of the municipality in holding a public hearing, "taken in isolation", could come under a private tort duty.

[67] Mr. Justice Laskin described the differing functions of governments in the following terms (at 968-969):

> 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 the 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.
>
> …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, the municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of the 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": See *Davis, 3 Administrative Law Treaties*, 1958, at p. 487.

[68] Thus, the Province maintains that the Superintendent cannot be held liable for damages in exercising quasi-judicial statutory functions, unless the Superintendent was not acting in good faith.

[69] The chambers judge found (at para. 89) that the Superintendent was not exercising quasi-judicial functions, but rather was exercising a "business power". He said that if he was wrong in that conclusion, it was not possible to view the decision to cancel Mr. Bolster's licence as a good faith exercise of the Superintendent's powers.

[70] I do not find it necessary to conduct an assessment of the Superintendent's licensing functions to determine if they are quasi-judicial or administrative, despite the Province's argument that the application of the principles of Crown immunity to discriminatory actions of the Superintendent requires such a determination, because the British Columbia legislature has made its intentions clear with respect to the liability of the Crown to pay compensation under the ***Code***.

[71] On this point, however, I agree with the Province that there was no basis in the evidence for the chambers judge to conclude that the Superintendent was not acting in good faith.

The Human Rights Context

[72] The human rights laws of British Columbia preclude the Province from claiming Crown immunity from the remedy of compensation in respect of the discriminatory acts of the Superintendent.

[73] The remedies under the ***Code*** are exclusive: see ***Seneca College v. Bhadauria***, [1981] 2 S.C.R. 181 at 195, where Laskin, C.J.C. said:

> …not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

[74] Thus, the principles that provide Crown immunity from tort claims are not directly applicable to claims under human rights laws.

[75] It is worth noting that in Quebec, the remedies for human rights violations under the ***Quebec Charter*** are not exclusive and do not preclude suing in the ordinary courts: see ***Béliveau St.-Jacques v. Fédération des employées et employés de services publics Inc.***, [1996] 2 S.C.R. 345 at para. 124, where Gonthier J. for the majority distinguished ***Bhadauria*** as applying only in the common law provinces and characterized the liability for compensation for a violation of the ***Charter*** under s. 49 as a "civil liability". In ***City of Montreal***, the Supreme Court

considered this characterization in its examination of the relationship between the law of civil liability and public law (at para. 22). This difference in the nature of the remedy under human rights legislation further distinguishes ***City of Montreal*** from this case.

[76] The Legislature has expressly bound the Province to the provisions of the ***Code***. Before 1984, s. 25 of the ***Code***, R.S.B.C. 1979, c. 186 provided: "This Act applies to and binds the Crown in right of the Province". Section 25 of the ***Code*** was repealed by the ***Human Rights Act***, S.B.C. 1984, c. 22, s. 26. What is now s. 14(1) of the ***Interpretation Act***, R.S.B.C. 1996, c. 238, however, has been included in that ***Act*** since 1974. Section 14(1) of the ***Interpretation Act*** provides: "Unless it specifically provides otherwise, an enactment is binding on the government."

[77] As noted by the chambers judge (at para. 105), the Province has, over the years, amended the ***Code*** several times, including significant changes to the administrative structure in 2002 (***Human Rights Code Amendment Act***, 2002, S.B.C. 2002, c. 62), and considered its application in the ***Administrative Tribunals Act***. In none of these legislative reviews has the Province seen fit to exempt itself from the remedy of compensation, although the compensation remedy has been included in the ***Code*** since its inception.

[78] Human rights legislation is recognized as having a special character. It is to be interpreted so as to give it full force and effect, and is not to be limited except by express legislative language. The Supreme Court of Canada expressed those

principles in ***Re Winnipeg School Division No. 1 and Craton et al.***, [1985] 2 S.C.R. 150 at 156:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

[79] It is apparent from the Province's submissions that the ***City of Montreal*** case suggested a line of reasoning that would exempt the Province from liability for compensation under the ***Code*** without an express legislative act. However, neither the ***City of Montreal*** case nor the underlying principles on which that decision was based has that effect on the facts of this case. The chambers judge correctly decided that the Province is subject to all of the remedies of the ***Code***, including the requirement to pay compensation where ordered to do so by the Tribunal.

Calculation of Compensation – Grismer and the De Facto Doctrine

[80] The Province argues that if the Tribunal had jurisdiction to award Mr. Bolster compensation for the Superintendent's discriminatory acts, it erred in calculating the compensation from 1998, when Mr. Bolster's class 1 driver's licence was cancelled, to 2003, when the discrimination ceased.

[81] The gravamen of the Tribunal's decision was that the Superintendent discriminated against Mr. Bolster by failing to offer him an individual functional driving assessment. That was also the issue in ***British Columbia (Superintendent***

of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868 ["***Grismer SCC***"].

[82] The history of Mr. Grismer's litigation is central to the Province's argument. Like Mr. Bolster, Mr. Grismer had a visual disability. On medical advice that Mr. Grismer's particular condition was "incompatible with driving a motor vehicle of any class", the Superintendent cancelled his licence. Mr. Grismer brought a human rights complaint. On December 7, 1994, the B.C. Council of Human Rights found that the Superintendent had discriminated against Mr. Grismer by applying a visual standard and not providing an individual assessment of his fitness for driving (***Grismer v. British Columbia (Ministry of Attorney General, Motor Vehicle Branch)***, [1994] B.C.C.H.R.D. No. 38). The Council's decision was upheld by the Supreme Court of British Columbia on judicial review on June 3, 1996 (***British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)***, [1996] B.C.J. No. 1219). On December 18, 1997, this Court allowed the Superintendent's appeal and reversed the Council's decision (***Grismer BCCA***).

[83] In ***Grismer SCC***, McLachlin J. (as she then was) summarized the grounds on which this Court found that the Tribunal Member had erred (at para. 11). The Province relies on the following ground:

> The Court of Appeal, per Donald J.A., unanimously allowed the appeal on the ground that the Member had erred by:
>
> . . .
>
> - concluding that individual testing should be considered absent evidence that such assessment was a practical alternative, and considering whether individual testing was possible, as opposed

> to practical. There was no evidence of a "safe or reliable form of testing that can measure the ability to deal with unexpected or exceptional traffic situations" (p. 321).

[84] An application for leave to appeal to the Supreme Court of Canada was filed on February 26, 1998, and leave was granted October 8, 1998 ([1998] S.C.C.A. No. 69).

[85] On December 16, 1999, the Supreme Court of Canada allowed Mr. Grismer's appeal (by then, his estate was the appellant, as Mr. Grismer died shortly after the Council's decision). The Supreme Court held that the Superintendent had failed to accommodate Mr. Grismer by offering him an individual assessment. As McLachlin J. said (at para. 44):

> The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety.

[86] Mr. Bolster's complaint of discrimination spanned the time between the decisions in ***Grismer BCCA*** and ***Grismer SCC***. Mr. Bolster's licence was cancelled on October 28, 1998, after the decision in ***Grismer BCCA*** (and after leave to appeal to the Supreme Court of Canada had been granted).

[87] The Province claims that after ***Grismer BCCA***, the Superintendent was entitled to apply the then existing law. The Province says that ***Grismer BCCA*** established that the Superintendent was not discriminating against applicants for a driver's licence with visual disabilities by failing to offer them individual functional driving assessments to determine their fitness for driving, and it was only when the

Supreme Court of Canada released its decision in ***Grismer SCC*** that the Superintendent could be found to be discriminating against Mr. Bolster by failing to offer him an individual functional assessment. The Province says that the Tribunal should not have awarded compensation to Mr. Bolster for discrimination between October 26, 1998, when his licence was cancelled, and December 16, 1999, the date of release of ***Grismer SCC***.

[88] The Province argues further that Mr. Bolster should not be compensated for the period between July 1999, when his internal appeal to the Superintendent was denied, and the fall of 2002, when Mr. Bolster again pursued the reinstatement of his commercial licence. The Province does not dispute the Tribunal's findings of fact that Mr. Bolster telephoned the Superintendent's office in August 2000 and June 2001 and inquired about reinstatement of his commercial licence and the removal of restrictions on his class 5 licence. The Province claims that these telephone calls are insufficient, in law, to support an award of compensation during the period between July 1999 and the fall of 2002.

[89] The Province characterizes its argument with respect to the calculation of compensation as a question of law. It submits that for the purposes of determining the proper remedy in this case, the "*de facto* doctrine" operates to, in effect, validate the Superintendent's actions before the release of ***Grismer SCC***. In general terms, the *de facto* doctrine is a legal principle according to which acts done and rights acquired in good-faith reliance upon laws generally thought to be valid at the time will not be nullified by subsequent discovery that the laws in question were

unconstitutional: see Dale Gibson and Kristin Lercher, "Reliance on Unconstitutional Laws: The Saving Doctrines and Other Protections" (1986) 15 Man. L.J. 305.

[90] The chambers judge did not deal with the *de facto* doctrine in his reasons for judgment, and I assume it was not argued before him. He reviewed the Tribunal's decision on the question of the applicability of ***Grismer BCCA*** as a question of mixed fact and law – whether the facts as found by the Tribunal reasonably led to the finding of discrimination from 1998. He found that the Tribunal's conclusion was reasonable in the context of the facts found by the Tribunal, which focused not only on the requirement to provide an individual functional driving assessment, but also on other aspects of the Superintendent's actions, including cancelling Mr. Bolster's licence without notice, and not taking any steps toward conducting an individual assessment until January 2003, more than three years after ***Grismer SCC***.

[91] The Province's approach on the appeal to the question of the calculation of compensation raises the question of the standard of review and the application of s. 59 of the ***Administrative Tribunals Act***. I will deal with that question and return to the analysis of the application of the *de facto* doctrine.

Application of the de facto Doctrine – Standard of Review

[92] Section 59 of the ***Act*** came into force with respect to judicial review of decisions of the Tribunal on October 15, 2004. Sections 59(1) and (2) are relevant to this case:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all

> questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

[93] The parties differ on whether s. 59 of the ***Act*** applies to determine the standard of review, and the proper standard of review on this issue.

[94] The Province argues that the ***Act*** applies to this case, and in any event, at both common law and under s. 59(1), the standard of review on the issue of whether the *de facto* doctrine applies based on ***Grismer BCCA***, is a question of law for which the standard of review is correctness.

[95] The Tribunal and Mr. Bolster agree with the chambers judge that the ***Act*** does not apply, and in any event, the question of whether the Superintendent discriminated against Mr. Bolster before ***Grismer BCCA*** was overturned is a question of mixed fact and law, for which, under both the common law and s. 59 of the ***Act***, the standard of review is reasonableness *simpliciter*.

[96] The question of whether s. 59 of the ***Act*** applies raises issues of the temporal application of statutory changes, the characterization of the enactment of a statutory standard of review as substantive or procedural, and whether a common law standard of review is a "vested right".

Application of the ***Administrative Tribunals Act***

[97] The crux of the question of the application of s. 59 of the ***Act*** is whether a statutory change of the standard of review to be applied by a court to a judicial review proceeding interferes with a vested right.

[98] Much has been written by many learned judges and other legal writers about the temporal application of statutory changes. I find helpful in this case the analysis of the legal principles by Professor Ruth Sullivan, in ***Sullivan and Dreidger on the Construction of Statutes***, Fourth Edition, (Markham and Vancouver: Butterworths Canada Ltd., 2002) at 546-585.

[99] Professor Sullivan uses the terms "retroactive", "retrospective", "prospective", "immediate", and "future" to describe the alternative times for the application of legislation (at 546). She summarizes three "well-established" common law rules that govern the temporal application of statutes, two of which are relevant here: there is a strong common law presumption against the "retroactive" application of legislation, as that involves changing the "past legal effect of a past situation", and there is a "weaker and in some contexts…easily rebutted" presumption that the legislature does not intend to "interfere with vested rights."

[100] The question that arises in this case is whether the legislature intended that s. 59 of the ***Act*** be applied to an application for judicial review that was commenced by filing a petition in Supreme Court before s. 59 came into force, or whether the application of s. 59 in these circumstances is precluded by the operation of

presumptions against a statute changing past or on-going situations in a way that interferes with a vested right.

[101] The application of s. 59 in these circumstances would not have "retroactive" effect, as defined by Professor Sullivan. Section 59 would, however, have "retrospective" effect if it changed the "future legal effect of a past situation"; or "immediate" effect if it changed the "future legal effect of an on-going situation". The difference between the two would be how the "situation" was characterized: as the filing of the petition or the on-going judicial review proceeding. As noted by Professor Sullivan (at 547), for these purposes there is no difference in result:

> At common law, there is no presumption against the retrospective or immediate application of legislation as those terms are defined here. However, many instances of retrospective and immediate application are covered by the presumption against interference with vested rights or by the general transitional rules found in all Canadian Interpretation Acts.

[102] The presumptions applicable to procedural legislation are also relevant here. Professor Sullivan states (at 582):

> There is a common law presumption that procedural legislation applies immediately and generally to both pending and future facts. This presumption is formulated in a variety of ways: (1) persons do not have a vested right in procedure; (2) the effect of a procedural change is deemed to be beneficial for all; (3) procedural provisions are an exception to the presumption against retrospectivity; (4) procedural provisions are ordinarily intended to have an immediate effect. Perhaps the clearest formulation of the rule is that of Baron Wilde in *Wright v. Hale* [(1860), 6 H. & N. 227, at 332, 148 E.R. 94]:
>
> > …where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.

> Procedural legislation is about the conduct of actions. It indicates how actions will be prosecuted, proof will be made and rights will be enforced in the context of a legal proceeding. Such legislation is presumed to apply *prospectively* for it applies only to stages in proceedings or procedural events that occur after its coming into force. However, as the quote from Baron Wilde indicates, it is presumed to apply *immediately* to ongoing proceedings, including those commenced but not completed before its coming into force. In some cases, this could also entail giving it a retrospective application.

[103] Professor Sullivan goes on to note (at 583-84):

> … To be considered procedural in the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any substantive rights or liabilities of the parties or produce other unjust results. This point is emphasized repeatedly in the cases.

[104] The Province says that s. 59 of the ***Act*** is purely procedural — it spells out the process to be used by courts in determining the standard of review, replacing the common law process or procedure, the pragmatic and functional approach. The Province claims that as a matter of pure procedure, s. 59 applies immediately; that is, to all applications for judicial review heard by the court after October 15, 2004. It says that there is no vested right in procedural matters.

[105] That was the conclusion of Paris J. in ***St. James Community Service Society v. Johnston***, 2004 BCSC 1807, followed by Cullen J. in ***British Columbia v. Hutchinson*** (2005), 49 B.C.L.R. (4th) 331, 2005 BCSC 1421. The chambers judge did not follow those decisions (see paras. 62-64, 69-70). He found that where s. 59 alters the standard of review, it effects substantive change (at para. 68).

[106] The Tribunal and Mr. Bolster say that the determination of the proper standard of review on a judicial review application is not purely procedural. The Tribunal notes in its factum:

> [Standards of review] have a jurisdictional aspect in that they delineate the scope of a court's supervisory authority, by defining the extent to which a court may interfere with a decision that the Legislature has chosen to delegate to a specialized tribunal in the first instance, rather than to the courts.

[107] The Tribunal maintains that when a statute changes the standard of review that would apply at common law, applying the statute to an on-going judicial review proceeding is a retrospective application that interferes with a substantive, vested right. That was the conclusion of the chambers judge.

[108] The Province is correct that s. 59 spells out a process for determining the standard of review in a judicial review proceeding, but I agree with the Tribunal that that determination is not purely procedural. As McLachlin C.J.C. explained in ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 2003 SCC 19 at para. 21, it has a substantive and constitutional aspect:

> …Bastarache J. [in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982] affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statue creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from the grant of powers" (*Bibeault*, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

[109] It follows that I disagree with the Province that s. 59 of the ***Act*** applies immediately because it is purely procedural. I conclude, however, that s. 59 applies immediately, because it does not interfere with any vested right.

[110] Professor Sullivan discusses the "central problem" of determining what is a vested (or accrued) right (at 570):

> The Court must decide whether the particular interest or expectation for which protection is being sought is sufficiently important to be recognized as a right and sufficiently defined and in the control of the claimant to be recognized as vested or accrued.
>
> Some vested rights are easily recognized. Property rights, contractual rights, and rights to damages or other common law remedies are well established categories. So are defences and immunities from suit [footnote omitted]. For the most part, these are "private law" rights with a respectable common law pedigree; their importance is taken for granted. Moreover, it usually is possible to identify a specific point at which these rights arise and can be said to "belong" to a claimant….
>
> Outside of these traditional categories it is difficult to predict when a given interest or expectation will be recognized as a vested or accrued right….
>
> [Underlining added.]

[111] Clearly the standard of review to be applied on a judicial review proceeding does not fall into any of the traditional categories. Nor does the analysis of Bastarache J., writing for the majority in ***Dikranian v. Quebec (Attorney General)***, [2005] 3 S.C.R. 530, 2005 SCC 73 at paras. 37-40 assist very much. He adopted the analytical framework for recognizing vested rights suggested by Professor Pierre-André Côté in ***Interpretation of Legislation in Canada***, 3rd ed. (Scarborough: Carswell, 2000) (at para. 37):

> Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61).

These criteria are more suitable to rights that fall into the traditional "private law" categories, described by Professor Sullivan.

[112] In my opinion, the standard of review a court adopts on a judicial review proceeding is not a "right" that "belongs to" or is "in the control of" any party to the proceeding. As McLachlin C.J.C. pointed out in ***Dr. Q***, it is the process a superior court follows to carry out its constitutional responsibility for the rule of law in reviewing the decisions of statutory tribunals. The standard of review in a particular case is determined by the court as part of the judicial review proceeding, at common law by employing a principled application of the pragmatic and functional approach, and under the ***Act*** by interpreting and applying s. 59. Previous determinations of the standard of review in similar cases, especially at common law, may or may not apply, as "[t]he pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors. This approach applies whenever a court reviews the decision of an administrative body" (***Dr. Q*** at para. 25). Thus, no party can claim a "right" in a particular standard of review.

[113] Assuming that the standard of review of the Tribunal's finding that the Superintendent discriminated against Mr. Bolster during the entire period from October 1998 to 2003 would be, at common law, reasonableness *simpliciter*, and

under s. 59 of the ***Act***, correctness, Mr. Bolster cannot be said to have a "vested right" in the reasonableness *simpliciter* standard of review.

[114] For these reasons, and noting that there is nothing in the words or context of s. 59 of the ***Act*** that suggests that the legislature intended otherwise, I conclude that s. 59 applies "immediately"; that is, to all on-going judicial review proceedings at the date s. 59 came into force. The chambers judge erred in concluding that s. 59 of the ***Act*** did not apply in this case.

*The Standard of Review Under s. 59 of the **Act***

[115] The Province maintains that the question for determination on the issue of the calculation of compensation is whether a principle of law, the *de facto* doctrine, applies to the facts found by the Tribunal. It says that is a question of law, and under s. 59(1) of the ***Act***, the standard of review is correctness.

[116] The Tribunal says that the application of a legal principle to a set of facts is a question of mixed fact and law. It points out that this Court has previously decided that at common law, applying the pragmatic and functional approach, the determination of whether facts found by the Tribunal give rise to discrimination is a question of mixed fact and law, and the standard of review is reasonableness *simpliciter*: see ***Oak Bay Marina v. B.C. Human Rights Commission*** (2002), 5 B.C.L.R. (4th) 115, 2002 BCCA 495 at para. 20, ***School District No. 44 (North Vancouver) v. Jubran*** (2005), 39 B.C.L.R. (4th) 153, 2005 BCCA 201 at para. 58. That was the conclusion of the chambers judge (at para. 116).

[117] In my opinion, whether the *de facto* doctrine applies to the facts as found by the Tribunal to determine whether the Superintendent discriminated against Mr. Bolster during the period before ***Grismer BCCA*** was overturned is a question of mixed fact and law, albeit a "law-intensive" question of mixed fact and law: see ***Housen v. Nickolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33, at paras. 33-36, ***Dr. Q*** at para. 34.

[118] The Tribunal argues that questions of mixed fact and law fall within the phrase "findings of fact" in s. 59(1), and are excepted from the standard of correctness. It argues that in the context of the ***Code*** and the ***Act***, the second standard in s. 59(2), that the finding "in light of all the evidence…is otherwise unreasonable", applies to determinations of the Tribunal that involve finding facts and applying a legal test. Otherwise, the Tribunal argues, the courts have been put in the position, on judicial review of the Tribunal's decisions, of substituting their view of whether discrimination has been established, when that decision is at the heart of the Tribunal's mandate.

[119] I am sympathetic to the Tribunal's arguments that the courts are not as well-suited as the Tribunal to make decisions about whether discrimination has been established, and that some deference has traditionally been found to be appropriate, despite the absence of a privative clause. The Tribunal was presumably established to make such decisions. Nonetheless, I cannot find in the words or the context of the ***Act*** any indication that the Legislature intended that questions of mixed fact and law be treated as "findings of fact" or excluded from the general rule of s. 59(1).

[120] If I did accept that questions of mixed fact and law may, in some cases, be "findings of fact" for the purposes of s. 59(1), I would not characterize the issue of mixed fact and law in this case in that way. The question of the application of the *de facto* doctrine to the facts of this case involves primarily the articulation and application of a legal principle other than the legal definition of discrimination under the ***Code***. The Tribunal has no particular expertise in the application of the *de facto* doctrine, and the traditional deference to the Tribunal's decision on the question of discrimination is not warranted.

[121] In introducing the ***Act*** in the Legislature, then Attorney General G. Plant discussed what he described as an uncertain, time-consuming and expensive search by courts for legislative intent in determining the standard of review on a case-by-case basis, and the intent of the government to bring certainty and finality to that matter. He stated (***Debates of the Legislative Assembly (Hansard)***, Volume 25, Number 15, May 18, 2004, at 11193):

> In the bill before us today, the government is for the first time taking up the challenge of defining legislative intent by simplifying and codifying the standards of review that we want courts to apply in their review of tribunal decisions. For tribunals with specialized expertise…this bill generally provides that a court must defer to a tribunal's decision unless the decision is patently unreasonable or the tribunal has acted unfairly. For other tribunals…the bill provides that with limited exceptions, a court must adopt a standard of correctness in reviewing the tribunal's decisions.
>
> …I believe these provisions offer the promise of greater certainty and finality to those British Columbians who want tribunals to help them on the matters that concern their health, their jobs and their futures.

[122] The Tribunal is one of those tribunals to which the standard of correctness applies, with limited exceptions, under s. 59 of the ***Act***.

[123] Interpreting the words "findings of fact" in s. 59(1) of the ***Act*** as urged by the Tribunal would introduce fine analytical distinctions between fact-intensive and law-intensive questions of mixed fact and law. This would be inconsistent with the government's stated goals of certainty and finality in determining standards of review. While the statements of the Attorney General would not preclude that interpretation if it was justified by an analysis of the words and context of s. 59(1), the statement of the government's intent reflects the absence of anything in s. 59(1) that would support such an interpretation.

[124] I conclude that under s. 59 of the ***Act*** the standard of review on a question of mixed fact and law is reviewable on the standard of correctness. In the context of this case, the correctness standard applies in determining whether the *de facto* doctrine is relevant to the calculation of the amount of compensation payable to Mr. Bolster.

Application of the De Facto Doctrine

[125] The Province relies on the *de facto* doctrine to, in effect, shield it from the consequences of the finding that, in the period before ***Grismer BCCA*** was overturned by ***Grismer SCC***, the Superintendent's refusal to offer Mr. Bolster an individual functional driving assessment was discriminatory. The Province's reasoning, as I understand it, is that although ***Grismer BCCA*** was found in ***Grismer SCC*** not to be the law, the Superintendent should not be held liable for

compensation to Mr. Bolster for acting in accordance with ***Grismer BCCA*** before it was overturned — from October 1998 until December 1999.

[126] Analyzing the Province's argument requires an explanation of the *de facto* doctrine, and an examination of ***Grismer BCCA*** in the context of the facts of this case.

[127] In ***Ref. re Language Rights under Manitoba Act, 1870***, [1985] 1 S.C.R. 721 (the "***Manitoba Language Reference***") at paras. 75-81, the Supreme Court applied the *de facto* doctrine to deem the statutes of Manitoba enacted since 1870 to be temporarily valid after they were found to be *ultra vires* because they were not published in both official languages. In ***Air Canada v. British Columbia*** (1989), 59 D.L.R. (4th) 161 at 188, La Forest J., for three of the six judges who decided the case, referred to the ***Manitoba Language Reference*** with respect to "the distinction between declaring an Act unconstitutional and determining the practical and legal effects that flow from that determination." Both the ***Manitoba Language Reference*** and ***Air Canada*** were referred to by Esson C.J.S.C. (as he then was) in ***Galiano Conservancy Assn. v. British Columbia (Ministry of Transportation and Highways)*** (1996), 17 B.C.L.R. (3d) 392 (S.C.), appeal dismissed for other reasons (1997), 40 B.C.L.R. (3d) 171 (C.A.).

[128] In ***Galiano***, Esson C.J.S.C. considered whether the acts of an approving officer in regard to subdivisions of land were valid. The approving officer had acted in accordance with an order of the British Columbia Supreme Court declaring zoning by-laws to be void for illegality. The by-laws were later determined by this Court to

be valid. The petitioners applied to have the approvals set aside on the ground that the approving officer erred in law in treating the by-laws as void. They argued that as a result of the order of the Court of Appeal, the by-laws must be accepted as always having been valid.

[129] Chief Justice Esson noted (at para. 18) the distinction drawn in ***Air Canada*** between a declaration of invalidity and determining the "practical and legal effects flowing from that determination". Counsel for the approving officer suggested that the acts of the approving officer could be validated by the *de facto* doctrine, relying on the following portions of the explanation of the *de facto* doctrine in the ***Manitoba Language Reference*** at paras. 76 and 80 (at para. 19):

> The *de facto* doctrine is defined by Judge Albert Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4 as follows:
>
> > The *de facto* doctrine is a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, which recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and, thirdly, which imparts validity to the official acts of persons who, under color of right or authority, hold office under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage.
>
> * * *
>
> The application of the *de facto* doctrine is, however, limited to validating acts which are taken under invalid authority: it does not validate the authority under which the acts took place. In other words,

> the doctrine does not give effect to unconstitutional laws. It recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.
>
> [Underlining added.]

[130] Chief Justice Esson did not apply the *de facto* doctrine, although he noted (at para. 20) that there was a "close similarity in the underlying considerations" in ***Galiano***, ***Air Canada***, and the ***Manitoba Language Reference***. He noted that in ***Galiano***, however, the decision that the by-laws were of no force and effect was later reversed, a circumstance not present in the other cases.

[131] Chief Justice Esson considered the theory that the by-laws were always in force and effect, holding (at para. 23) that "the approving officer had no choice but to accept the law as declared by this court" (that is, that the by-laws were void). He said (at para. 21): "It is a fundamental principle that an order of the court is never a nullity and that it is valid until it is set aside on appeal", citing the statement of Sidney Smith J.A. in ***Canadian Transport (U.K.) Limited v. Alsbury et al.*** (1952), 7 W.W.R. 49 at 71 (B.C.C.A.), aff'd [1953] 1 S.C.R. 516:

> The order of a superior court is never a nullity; but, however, wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal.

[132] The Province says that ***Grismer BCCA*** similarly had full force until it was reversed on appeal; the Superintendent was entitled to follow it in making licensing decisions involving all visually impaired applicants for driver's licences; and the *de facto* doctrine protects the Province from liability for compensation for actions taken by the Superintendent in reliance on the law as articulated in ***Grismer BCCA***, which under the law as later articulated in ***Grismer SCC***, were found to be discriminatory.

[133] The Province does not quarrel with the finding that the Superintendent discriminated against Mr. Bolster for the period between October 1998 and January 2003. The Province argues that it should not be ordered to compensate Mr. Bolster for the period between October 1998 and December 1999, when ***Grismer BCCA*** must be considered to be binding. As I understand the distinction, the Province accepts that the effect of ***Grismer SCC*** overturning ***Grismer BCCA*** is that the Superintendent's acts must be considered to have been discriminatory (the equivalent, for these purposes of this analysis, as invalid) throughout the material time period, but that in determining the appropriate remedy — the "practical and legal effect flowing from that determination" — the *de facto* doctrine should be applied to protect the Superintendent from the consequences of the later-determined liability.

[134] I would not accede to this argument for a number of reasons.

[135] First, as the Supreme Court of Canada said in ***Garland v. Consumers' Gas Co.***, [2004] 1 S.C.R. 629, 2004 SCC 25 at para. 80: "The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These

interests are not at stake in this litigation." That is clear from the reasons the Court gave for applying the *de facto* doctrine in the ***Manitoba Language Rights*** case (at para. 83):

> The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.

[136] It need hardly be said that the Province of British Columbia would not be faced with chaos and anarchy if the Province is ordered to pay compensation to Mr. Bolster for the discriminatory conduct of the Superintendent.

[137] More recently, in ***Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)***, 2007 SCC 1, the Supreme Court of Canada rejected the "immunity rule" articulated by La Forest J. in ***Air Canada***. In that case, the immunity rule was used as justification for deciding that the British Columbia government was not required to repay taxes collected under a statute subsequently found to be unconstitutional. In ***Kingstreet***, Mr. Justice Bastarache, for the Court, wrote (at para. 25):

> Another policy reason given by La Forest J. for the immunity rule was a concern for fiscal inefficiency and fiscal chaos (p. 1207). My view is that concerns regarding potential fiscal chaos are best left to Parliament and the legislatures to address, should they choose to do so. Where the state leads evidence before the court establishing a real concern about fiscal chaos, it is open to the court to suspend the declaration of invalidity to enable government to address the issue.
>
> [Underlining added.]

[138] The application of the *de facto* doctrine in the circumstances of this case is unwarranted.

[139] Second, it is a trite legal principle that a decision in a particular case is binding in that case. In ***Grismer BCCA***, this Court approved the use of a "visual field standard", to the exclusion of individual testing, in assessing the fitness of a person suffering from homonymous hemianopsia, loss of left side peripheral vision in both eyes. This Court determined that there was no evidence that individual testing was a possible alternative in his case. Mr. Bolster had a different visual disability, congenital optic atrophy. The evidence in this case is that individual functional testing was, in fact, effective to demonstrate Mr. Bolster's fitness to hold a commercial licence.

[140] Before ***Grismer BCCA***, the Superintendent had been ordered several times, by the human rights tribunal and the courts, to consider each individual application for a licence on its merits: see ***Lewis v. British Columbia (Superintendent of Motor Vehicles)*** (1980), 18 B.C.L.R. 305 (S.C.) (visual disability); ***Hutchison v. British Columbia (Ministry of Solicitor General)***, [1990] B.C.C.H.R.D. No. 15 at para. 22 (insulin-dependent diabetics); ***Grismer v. British Columbia (Ministry of Attorney General, Motor Vehicle Branch)***, [1994] B.C.C.H.R.D. No. 38 at para. 115. Similar comments were made in ***Hussey v. British Columbia (Ministry of Transportation and Highways)***, [1999] B.C.H.R.T.D. No. 63 at para. 81 (hearing disability), decided after ***Grismer BCCA***. While none of these decisions was binding on this Court, it is not reasonable to read ***Grismer BCCA*** as reversing all of this previous law. Moreover, the ***Motor Vehicle Act*** and the practices and procedures of

the Superintendent always provided for the assessment of fitness for driving by the application of more than a single standard.

[141] It seems that McLachlin J. in ***Grismer SCC*** anticipated the argument made by the Province in this case, when she said (at para. 45):

> Nor should this decision be taken as predetermining the result in other cases. This appeal is essentially a judicial review of a decision of a human rights tribunal in a particular case. The result flows from the evidence called before and accepted by the Member in this case. The Member found that the Superintendent had not met the burden of proving that a blanket refusal without the possibility of individual accommodation was reasonably necessary under the Act. In another case, on other evidence, that burden might be met.

[142] Third, in relying on ***Grismer BCCA*** to justify the Superintendent's actions in this case, the Province argues that ***Grismer BCCA*** had to be given effect until it was reversed on appeal. As Esson C.J.S.C. pointed out in ***Galiano*** (at para. 22), there is a distinction between the effect of an order on the parties, and reliance on it by a third party. It is binding on the parties before it is reversed, because otherwise it would be treated as a nullity. It is not binding, however, on third parties, and where it is found to be wrong in law, the principle that it is "never a nullity" does not necessarily apply.

[143] Finally, the Superintendent's intention is irrelevant to the determination of discrimination: see ***School District No. 44 (North Vancouver) v. Jubran*** at paras. 48-50. Section 2 of the ***Code*** provides: "Discrimination in contravention of this Code does not require an intention to contravene this Code." Whether the Superintendent knew he was or was not discriminating against Mr. Bolster before ***Grismer BCCA***

was reversed is not relevant. It would be contrary to the principles applied in interpreting the ***Code*** to import intention into the calculation of compensation under s. 37.

[144] For all of these reasons, I would not accede to the Province's argument that the *de facto* doctrine applies to validate the acts of the Superintendent in the period before ***Grismer BCCA*** was reversed in ***Grismer SCC***. Neither the Tribunal nor the chambers judge erred in law in failing to apply the *de facto* doctrine to excuse the Province from paying compensation to Mr. Bolster for lost wages between October 1998 and December 1999.

Calculation of Compensation – July 1999 to Fall 2002

[145] The Province claims that it is not liable to pay compensation for the period between July 1999 and the Fall of 2002, when Mr. Bolster did not actively pursue reinstatement of his commercial driver's licence, other than by making two telephone calls to the Superintendent's office. It says that the two telephone calls are insufficient, in law, to support an award of compensation.

[146] The chambers judge commented, in the context of reviewing the reasonableness of the Tribunal's decision (at para. 126):

> The petitioner's submission that Mr. Bolster did not actively pursue the matter between December 1999 and November 2002 must be given the weight it deserves in the context of the evidence as a whole….The Tribunal made a specific finding that he did pursue the matter of his Class 1 licence and, on the evidence that conclusion was reasonable.

[147] The Province provided no authorities or legal principles in support of its claim. I know of no basis on which to determine that the findings and conclusions of the Tribunal and the chambers judge on this issue are wrong in law.

[148] Indeed, the comments in ***Grismer SCC*** (at paras. 42-43) on the obligation of the Superintendent to show that he considered and rejected all viable forms of accommodation undercuts the Province's position. It might place too high a burden on the Superintendent to expect that they will take proactive steps to accommodate every applicant for a licence who has been refused or issued a restricted licence, if an applicant does not pursue his or her case. The evidence in this case is, however, not only that Mr. Bolster pursued his case by the two telephone calls, but the Superintendent's office kept track of his restricted licence by alerting him three times, in August 2000 (in error), June 2001, and in the fall of 2002, that he was required to undergo a medical examination.

[149] I would not accede to this argument.

Continuing Discrimination

[150] The Province claims that the Tribunal erred in law in finding there was a "continuing contravention" or "on-going discrimination" from October 1998, and awarding compensation on that basis.

[151] The Province raised this argument before the Tribunal, where it was rejected because the Province had not raised any objection to the scope of the complaint at the time it was filed, and did not apply under the ***Code*** to have any portion of the

complaint dismissed as being outside of the time limits (Tribunal reasons for decision at para. 117). This matter was not addressed by the chambers judge in his reasons for judgment.

[152] The Province's argument in this Court appears to be that if the event of discrimination was the cancellation of Mr. Bolster's licence in 1998, that was a discrete event, and by the time Mr. Bolster made his complaint in January 2003, the limitation period in the ***Code*** had expired. (The limitation period was "within one year of the alleged contravention": s. 22 of the ***Code***, applicable to Mr. Bolster's complaint by s. 28(1) of the ***Human Rights Code (Amendment) Act***, S.B.C. 2002, c. 62; see Tribunal reasons for decision, para. 114.)

[153] The Tribunal noted (at para. 114) that Mr. Bolster's complaint as filed with the Human Rights Commission (which was disbanded on March 31, 2003) alleged that the dates of the discrimination were November 1998 and ongoing. The Tribunal considered the complaint on that basis, and found that the discrimination consisted of the cancellation of Mr. Bolster's licence in October 1998, and the continued refusal to reinstate his licence (at paras. 79, 90, 98). The Province's argument that the discrimination was the cancellation of Mr. Bolster's licence in 1998 seems misplaced.

[154] The authorities cited by the Province in support of this argument discuss the meaning of "continuing contravention" for the purposes of the ***Code***. In ***Lynch v. British Columbia (Human Rights Commission)***, 2000 BCSC 1419, R.M.J. Hutchinson J. adopted the definition expressed by Philp J.A. for the Manitoba Court

of Appeal in ***Re The Queen in Right of Manitoba and Manitoba Human Rights Commission et al.*** (1984), 2 D.L.R. (4th) 759 at 764:

> What emerges from all of the decisions is that a continuing violation (or a continuing grievance, discrimination, offence or cause of action) is one that arises from a succession (or repetition) of separate violations (or separate acts, omissions, discriminations, offences or actions) of the same character (or of the same kind). That reasoning, in my view, should apply to the notion of the "continuing contravention" under the Act. To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.

[155] That test was approved by this Court in ***O'Hara v. British Columbia (Human Rights Commission)***, 2003 BCCA 139 at para. 25.

[156] Applying that test to this case, the on-going failure of the Superintendent to offer Mr. Bolster an individual functional driving assessment, after repeated appeals and requests, was "a succession or repetition of separate acts of discrimination of the same character". Those acts continued, as found by the Tribunal, until the Superintendent began to take steps, in January 2003, to offer and arrange an individual functional driving assessment for Mr. Bolster.

[157] I would not accede to this ground of appeal.

Interpretation of Remedial Provisions in the Code

[158] In its reply factum, the Province raised for the first time an argument that s. 37 of the ***Code*** does not authorize the Tribunal to order compensation for "lost opportunity".

[159] Section 37(2)(d)(ii) grants the Tribunal the power to make an order to "compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention". The Superintendent contravened s. 8 of the ***Code*** by discriminating against Mr. Bolster regarding "a service…customarily available to the public".

[160] The Province argues that the "service" and the "contravention" relate to the provision of an individual functional driving assessment, not a driver's licence, and therefore the remedy must be limited to providing that assessment, not compensation for the loss of the driver's licence and the lost opportunity flowing from that. It claims that "the principles of Crown immunity, similar remedies granted under the ***Charter***, and the Superintendent's obligation to act in the interest of public safety" support this interpretation of the remedies than can flow from a contravention of the ***Code***. It provided no further authorities or analysis of this argument.

[161] In ***Grismer SCC***, McLachlin J. made a similar point (at para. 44):

> This case deals with no more than the right to be accommodated. It does not decide that Mr. Grismer had the right to a driver's licence. It merely establishes that he had a right to be assessed. That was all the Member found and all that we assert. The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate

> that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety.

[162] The Tribunal recognized this limitation (at para. 127):

> I would not, in any event, have ordered that the OSMV issue Mr. Bolster a class 1 driver's licence. This case was not about whether Mr. Bolster must be allowed to drive. The OSMV is responsible for ensuring that drivers are physically, cognitively and medically fit and able to drive, in the interests of public safety. It is not for the Tribunal to usurp that role, or to substitute its judgment for that of the OSMV. Rather, the issue is whether, on the evidence before me, Mr. Bolster should have been given a chance to prove through an individual assessment that he could drive with a high degree of safety. I found that he should have been given that opportunity. The OSMV has now provided him with that.

[163] By the end of the Tribunal hearing, Mr. Bolster had undergone an individual functional driving assessment, and on February 12, 2004, he was reissued a class 1 driver's licence with no more restrictions than he had before his licence was cancelled in October 1998 (Tribunal reasons for decision at para. 126). The Tribunal took that into account in calculating the compensation award (at paras. 140-141):

> I have found that the OSMV discriminated against Mr. Bolster in cancelling his licence without conducting an individual assessment, and in failing to agree to conduct an individual assessment until March 2003. As noted above, the result of this determination is not necessarily that Mr. Bolster should have had his licence for the past five years, but that he should have been individually assessed for that licence. There is the possibility that, had the OSMV individually assessed Mr. Bolster, it still would have confirmed their decision to cancel his licence, or to not grant him a class 1 licence. Thus, in any determination of wage loss, I must consider the negative contingency that Mr. Bolster would not have had his licence reinstated.
>
> However, this negative contingency is significantly reduced by the fact that, once the OSMV determined that Mr. Bolster could undergo an individual assessment, and Mr. Bolster in fact underwent

> that assessment, it resulted in a decision to reinstate his licence with no more restrictions than he had on October 28, 1998.

[164] Neither Mr. Bolster nor the Tribunal had an opportunity to respond to this argument.

[165] I fail to see what practical difference it would make, on the facts of this case, if this argument were to succeed. As the Tribunal carefully noted, Mr. Bolster had the individual functional driving assessment, passed it, and his commercial licence was reinstated. An order that the Superintendent offer the individual functional driving assessment would be no remedy for Mr. Bolster's loss, which began when his licence was cancelled and continued until the Superintendent moved towards its reinstatement by offering an individual functional driving assessment.

[166] I doubt that this argument was proper reply, and in any event, would not accede to it on its merits.

Summary and Conclusion

[167] I would not accede to the Province's substantive arguments. There is no Crown immunity from an award of compensation for the contravention of the ***Code*** by the Superintendent; the *de facto* doctrine does not apply to limit the calculation of compensation for the period before ***Grismer SCC*** was released; and neither the Tribunal nor the chambers judge erred in law in finding that the discrimination continued between July 1999 and the fall of 2002, and in finding that there was "continuing discrimination" from October 1998 to January 2003.

[168] Section 59 of the ***Administrative Tribunals Act*** applies to all judicial review proceedings of decisions of the Tribunal heard by the court after October 15, 2004. The standard of review for questions of mixed fact and law is correctness, under s. 59(1) of the ***Act***.

[169] I would dismiss the appeal.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Chiasson"