CASE COMMENT

The Supreme Court of Canada in *Brown* and *Swinamer*: *Just* to Clarify the "Built-In Barriers" Against Government Liability in Tort

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I. INTRODUCTION

IN ITS FIRST OPPORTUNITY to clarify the application of the principles in *Just* v. *British Columbia*,[1] the Supreme Court of Canada showed surprising restraint in its role of broadening government liability in tort. Whether this signals the end of a trend is unclear.[2] More certainly, it demonstrates a different judicial emphasis in the application of the *Just* principles to determine government tortious liability, namely on the safeguards or barriers to such liability.

This restraint would mark a change in the recent jurisprudence. The principles enunciated in *Just* extensively broadened the liability exposure of public authorities. A liberal interpretation of duty of care

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[1] [1989] 2 S.C.R. 1228 [hereinafter *Just*].

[2] The trend actually began with *Barratt* v. *North Vancouver District*, [1980] 2 S.C.R. 418; continued with *City of Kamloops* v. *Nielsen*, [1984] 2 S.C.R. 2 [hereinafter *Nielsen*]; and perhaps climaxed with the principles in *Just*, *supra* note 1. Cory J., writing for the majority in the case, applied the principles as an extension of *Anns* v. *Merton London Borough Council*, [1977] 2 All E.R. 492 (H.L.) [hereinafter *Anns*]. The *Anns* test is a twofold one to determine negligent liability: First, it considers whether there exists a *prima facie* duty of care based on the proximity of the parties; and secondly, if a duty is held to exist, whether the scope of the duty is limited, reduced or negated under the circumstances. In *Just*, it was found that in the circumstances a *prima facie* duty arose, subject to any statutory or common law exemptions. While there was no relevant statutory exemption, such an exemption may have existed at common law if the action or decision in question fell within the scope of "pure policy." As a result, Cory J. had to distinguish between the policy and operational spheres of public authority decision-making. The former were held to be decisions dictated by financial, economic, social or political factors; while the latter involved the practical execution or carrying out of policy decisions. These were the main principles enunciated in *Just*.

and "operational" decisions combined with a narrow view of statutory exemption or immunity defences and "pure policy" decisions facilitated this exposure to tort law scrutiny. The decision was quickly criticized. For some it represented "deep pocket justice"[3] and undue judicial intervention.[4] Others viewed the "policy/operational" dichotomy with some scepticism as an unworkable test to specify which government activities are operational and, therefore, subject to tortious liability.[5] More fundamental for public authorities was the concern that the floodgates of negligence claims could open. While "pure policy" decisions were immune from judicial scrutiny this non-actionable sphere seemed limited to "threshold" or formulaic decisions made by those at high levels of authority. And while statutory exemption or immunity provisions protected government from tortious liability, the specificity or precision of the wording to achieve this immunity was still uncertain. Wilson J. rejected the floodgates argument in an earlier decision holding that the principles enunciated contained their "own built-in barriers against the flood."[6] Given the Court's liberal approach toward government civil liability in subsequent decisions, and its failure to address the above concerns, these barriers or safeguards were not at all apparent, or even obvious.

In *Brown* v. *British Columbia*[7] and *Swinamer* v. *Nova Scotia*,[8] the Supreme Court was provided with an opportunity to address these concerns and specifically elaborate upon an aspect of *Just* not yet given much judicial consideration, namely the safeguards or "built-in barriers" to government liability in tort.

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[3] D. Wilson, "Deep Pocket Justice — Recent Cases on Tort Liability of Public Authorities" (1992) 4 C.J.A.L.P. 311.

[4] L. Klar, "The Supreme Court of Canada: Extending the Tort Liability of Public Authorities" (1990) 28 Alta. L. Rev. 648.

[5] Sopinka J., dissenting to the majority's approach in *Just*, is the only member of the Supreme Court to hold this view. In *Brown*, *infra* note 7 at 423 he cites with approval the following articles critical of the "policy/operational" test as a touchstone of liability: Klar, *ibid.*; S.H. Bailey & M.J. Bowman, "The Policy/Operational Dichotomy — A Cuckoo in the Nest" (1986) 45 Cambridge L.J. 430; P.M. Perell, "Negligence Claims against Public Authorities" (1994) 16 Advocates' Q. 48; and D. Cohen & J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can. Bar Rev. 1.

[6] *Nielsen*, *supra* note 2 at 25.

[7] [1994] 1 S.C.R. 420 [hereinafter *Brown*].

[8] [1994] 1 S.C.R. 445 [hereinafter *Swinamer*].

This commentary has four parts. The first part provides the jurisprudential setting, by way of introduction; the second reviews the relevant facts, issues and reasons in *Brown* and *Swinamer*; the third reconsiders the principles in after these decisions; and the fourth provides some concluding remarks. The cases were heard and decided at the same time. Both parties suffered personal injury while travelling provincial highways, one as a result of black-ice that formed on the road and the other as a result of a fallen elm tree. There were provincial safety measures in force: (i) a summer road maintenance schedule in British Columbia, and (ii) a survey to identify dead and hazardous trees in Nova Scotia. The plaintiffs sought damages from the respective highways departments on grounds of negligence in relation to these measures. The Supreme Court of Canada applied the principles in *Just* to hold in favour of the provincial governments.

II. FACTS, ISSUES AND REASONS

THE PLAINTIFFS IN BOTH *Brown* and *Swinamer* suffered personal injury while driving on provincial highways. In *Brown*, a patch of black-ice on the road forced the plaintiff's vehicle off the highway and rendered him temporarily unconscious. In *Swinamer*, an elm tree with a severe fungus infection collapsed on the plaintiff's vehicle and rendered him paraplegic.

The highways departments in both provinces provided for specific safety and precautionary measures. In *Brown*, the British Columbia Highways Department established two working schedules to maintain the roads in question; a summer schedule and a winter schedule. The winter schedule provided for better road maintenance by employing more workers and operating the entire day and week. The summer schedule was restricted in personnel. It operated only one shift for four days and maintained an emergency call out system for the remainder of the week. At the time of the accident, the summer schedule was in operation. The dates and conditions of the schedules were negotiated between the Department and the union and incorporated in the collective bargaining agreement. The terms of the agreement reflected budgetary and personnel considerations.

In *Swinamer*, the regional engineer, responsible for maintaining highways on behalf of the Nova Scotia Department of Transportation, authorized a survey to identify trees in the region that posed a hazard to the travelling public. He instructed a survey technician and a foreman with some knowledge of forests to complete the survey. It covered a geographic area of 800 kilometres and identified 200 trees

for removal. The survey was completed just prior to the accident, covered the location of the accident and failed to identify for removal the elm tree which caused the damages. Of the 200 trees identified for removal, however, funding was provided for the removal of only 66 trees. The remaining trees were removed in subsequent years with further funding.

Both parties sought damages against the respective provincial highways departments for negligence. In *Brown*, the plaintiff advanced two arguments to establish the province's negligence: (i) the failure to respond in a timely manner to icy condition reports, and (ii) the failure to remedy or eliminate ice formation in the maintenance of the particular road. The trial judge rejected the arguments and dismissed the action. The judgment was affirmed by the Court of Appeal.[9]

At trial in *Swinamer*, the Department was found liable.[10] The trial judge held that the survey was conducted in a negligent manner. According to the judge, had the Department consulted with experts and trained the foreman to recognize a severe fungus infection, the elm tree would have been identified and removed. The Court of Appeal disagreed and allowed the province's appeal.[11]

On appeal to the Supreme Court of Canada, the claims in *Brown* and *Swinamer* were dismissed. Both matters were heard and decided at the same time and resolved in favour of the provinces by an application of the principles set out in *Just*.[12]

The issues involved were the following:

(a) the duty of care owed to the plaintiffs (Did the provinces owe a duty of care to those persons using its highways such as the plaintiffs?);
(b) the scope of the duty to maintain highways (Was there a specific duty to maintain highways and did it include reasonable maintenance of the highways to prevent accidents caused by black-ice and hazardous trees?);
(c) possible statutory exemptions from the duty (What constituted a statutory exemption from the duty of care and was it incor-

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[9] (1992), 65 B.C.L.R.(2d) 232.

[10] (1991), 101 N.S.R.(2d) 333.

[11] (1992), 108 N.S.R.(2d) 254.

[12] *Supra* note 1. There is no suggestion in either case that the decisions were not *bona fide* or were so irrational as to constitute an improper exercise of governmental discretion. That is, the government decisions were attacked under tort, not administrative law.

porated in the provinces *Highway Act*, *Crown Proceedings Act* or *Occupier's Liability Act*?);

(d) the "policy/operational" dichotomy (What differentiated "operational" and "pure policy decisions?" Were the Departments' decisions to maintain a summer schedule in British Columbia and to inspect and identify hazardous trees in Nova Scotia operational or policy-based?);

(e) and negligence in the operational aspect of a policy decision (Were the "operational" components of the Departments' decisions conducted negligently? More specifically, were the services provided under the summer schedule in British Columbia or under the survey in Nova Scotia carried out negligently?).

The Court considered the aforementioned concerns in its reasons.

A. Duty of Care to Plaintiffs

Writing for the majority, Mr. Justice Cory held that the provinces owed a duty of care to those persons using its highways such as the plaintiffs.[13] This finding was based on the proximity or neighbourhood test in *Anns* v. *Merton London Borough Council*.[14] Applying the test to the facts, Cory J. had little difficulty finding that a sufficient relationship of proximity existed between the Highway Departments and users of the highways in question, so as to establish a *prima facie* duty of care.

Having found a *prima facie* duty to exist, the Court went on to discuss the scope of this duty. That is, the Court considered the second part of the *Anns* test, namely, whether there were considerations to "negative or limit" the scope of the duty.[15]

B. Scope of the Duty to Maintain Highways

The Court interpreted the construction and maintenance of highways provisions of relevant highway legislation as setting the scope of the duty. According to the Court, the duty to maintain highways includes the reasonable maintenance of those roads and the reasonable prevention of injury to travellers from black-ice or hazardous trees.[16]

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[13] *Supra* note 7 at 439; note 8 at 458–459.

[14] *Supra* note 2.

[15] *Supra* note 7 at 439–440; note 8 at 459–462.

[16] *Supra* note 7 at 439; note 8 at 459.

Two factors, however, could limit or eliminate the imposition of this duty on the provinces, namely statutory exemptions and "pure policy" decisions.

C. Statutory Exemption from Duty

No exemption from duty was held to be provided by the applicable legislation. The Court adopted a high threshold test for a provision to constitute a statutory exemption.[17] Its wording would have to be "explicit," "clear" and "precise." The provisions cited by the British Columbia and Nova Scotia governments as statutory exemptions failed to meet this test.

In *Brown*, the British Columbia Highways Department cited specific provisions under the *Highway Act*,[18] the *Occupier's Liability Act*[19] and *Crown Proceeding Act*,[20] as statutory exemptions. The Court rejected this characterization of the provisions.[21] They failed to specifically exempt the Crown from liability for negligently maintaining its roads. Also, the *Occupier's Liability Act* was held to be irrelevant to the Department's obligation to maintain its roads.[22]

The Nova Scotia Department of Transportation, in *Swinamer*, had a stronger legislative basis for the existence of a statutory exemption. Section 5 of the *Public Highways Act* provided this basis.[23] Indeed, the Nova Scotia Court of Appeal interpreted the provision as constituting a statutory exemption.[24] Specifically, the following wording was held to exempt the Department from liability: "...but nothing in this Act compels or obliges the Minister to construct or maintain any highway or to expend money on any highway."[25] There was no similar provision in the British Columbia *Highway Act*. Regardless, the Supreme Court of Canada held that the section was not explicit

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[17] *Supra* note 8 at 459–460.

[18] R.S.B.C. 1979, c. 167.

[19] R.S.B.C. 1979, c. 303, s. 8.

[20] R.S.B.C. 1979, c. 86, s. 3(2)(f).

[21] *Supra* note 7 at 439–440.

[22] The Court also rejected the non-feasance/mis-feasance argument advanced by the Province. The Court held that if a duty is found to exist then the distinction between non-feasance and mis-feasance is irrelevant.

[23] R.S.N.S. 1989, c. 371, s. 5.

[24] *Supra* note 11 at 263.

[25] *Supra* note 23.

enough to constitute a statutory exemption from liability in tort.[26] To achieve this, the section would have to express the exemption in "clear and precise" terms. This is not an absolute rule, however, as Cory, J. points out: "I would agree that the presence of a discretion such as that provided in section 5 might in some circumstances support an argument that there is no statutory duty to maintain."[27] The Court does not elaborate upon what circumstances.

Instead, it proceeds by rejecting the argument that the *Proceedings Against the Crown Act* provides any statutory exemptions,[28] for the same reasons above, lack of "clear and precise" worded exemptions.[29]

The Court does offer some sound legal, and perhaps political, advice for governments contemplating reliance on statutory exemptions or considering future legislation to that effect. It states that "if the Crown wishes to exempt itself from tortious liability in the construction and maintenance of highways, it is a simple matter to legislate to that effect, and to leave the propriety of that legislative action for the voters consideration."[30] Even with the absence of a clear statutory exemption, such an exemption may have existed at common law if the action or decision in question fell within the realm of "pure policy." As a result, Cory J. was faced with the difficult task of deciding whether the activities of the defendants were properly characterized as matters of policy or operations.

D. Policy/Operational Dichotomy

The Court first distinguished between policy and operational decisions based on the principles in *Just*.[31] The former do not give rise to liability and include "balancing" decisions usually dictated by financial, economic, social and political factors or constraints. The latter give rise to liability and are concerned with the practical implementation, performance or carrying out of policy.

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[26] *Supra* note 8 at 459.

[27] *Supra* note 8 at 459.

[28] R.S.N.S. 1989, c. 360, s. 5(1)(a).

[29] *Supra* note 8 at 460. The Court also rejected the argument advanced by the Province that it lacked the authority to enter upon lands which abut highways for inspection or survey purposes. Both the *Public Highways Act* and *Expropriation Act* were held to provide such authorization.

[30] *Supra* note 8 at 461.

[31] *Supra* note 1.

Applying these principles, the Court held as policy the departmental decisions in question. Both the summer road schedule in British Columbia and the survey to identify hazardous trees in Nova Scotia were accordingly viewed as policy matters. The former involved negotiations between government and unions to determine the commencement date of summer and winter schedules and according to the Court, "involving classic policy considerations of financial resources, personnel, and ...social, political and economic factors."[32] As to the survey, its purpose was to identify dead and hazardous trees so that funding could be obtained to remove them and according to the Court represented "a preliminary step in what will eventually become a policy decision involving the expenditure and allocation of funds."[33] Department considerations including its past practice, budget, cost, personnel for the inspection team and possible closing of the road before conducting the survey, were all held to be matters of expenditure and fund allocation and clear indicators of a policy decision.

The Court makes two significant clarifications in the application of the *Just* principles. First, policy decisions are not limited to "threshold" decisions or broad initial decisions as to whether something will or will not be done. The Court broadens the "true policy" sphere as follows:

> Policy decisions can be made by persons at all levels of authority. In determining whether an impugned decision is one of policy, it is the nature of the decision itself that must be scrutinized, rather than the position of the person who makes it.[34]

Secondly, policy decisions arising from budgetary considerations are not affected by the cost in question. Whether the budgetary consideration concerns a small or large sum of money has no bearing on the judicial determination of a policy decision, according to the Court.[35]

The Court then tests the reasonableness of the operational aspects of carrying out the summer schedule and survey.

E. Negligence in Operational Aspects

The Court declined to find either department negligent in its operations. With regard to the summer schedule operations in *Brown*,

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[32] *Supra* note 7 at 441–442.

[33] *Supra* note 8 at 464–465.

[34] *Supra* note 7 at 442.

[35] *Supra* note 8 at 465.

there was some delay in the sanding operations and some inability in reaching the call out employees. Since this had no bearing on the accident, the Court held the British Columbia Highways Department not liable.[36] In *Swinamer*, the Court was impressed with the prudence and foresight of the Nova Scotia Department of Transportation in conducting the survey of dead and hazardous trees.[37] The survey covered 800 kilometres and it was not expected that every elm tree be searched, particularly visibly healthy ones such as the one in question. Also, according to the Court, there was no need to retain an expert or provide special training to the survey foreman. While this may have been a course of perfection, the Court dismissed the requirement of such action given the perceived risks, budgetary constraints and the need to complete the survey quickly so as to present a request for funds. Accordingly, no negligence was found on the Department's part in carrying out the operational aspects of its policy decisions.

III. COMMENTS — *JUST* TO CLARIFY THE SAFEGUARDS

THE SUPREME COURT DECISIONS in *Brown* and *Swinamer* are more concerned with limiting the application of the principles in *Just* than expanding them. This represents a noticeable shift from the recent judicial trend of expanding government liability in tort. While applying the principles in *Just,* the Court attempts to clarify some of the safeguards or "built-in barriers" to government civil liability. In so doing it may be signalling a greater degree of judicial deference to government decision-making than demonstrated in the recent past. This is apparent in four key areas.

First, the Court provides some guidance to governments as to what will constitute a statutory exemption from liability in tort. It must be drafted in "clear and precise" terms and is a simple matter of legislating to that effect. The only repercussions for government, according to the Court, will be political ones. In most instances, a general exemption provision, particularly one found in an unrelated act, to the main action will not constitute a statutory exemption. This is not an absolute rule. Despite this qualification, the inference to be drawn from the Court's reasoning is that the exemption should be explicitly drafted and incorporated in the legislation giving rise to the alleged liability.

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[36] *Supra* note 7 at 444.

[37] *Supra* note 8 at 466.

Secondly, the Court broadened the scope of the non-actionable "policy" sphere and narrowed the "operational" sphere which is actionable. Policy decisions are not limited to "threshold" or broad, formulaic decisions, generally made by those at high levels of authority. It is the nature of the decision that is important, not the decision-maker or level of authority. The result is a significant expansion of the scope of "true policy decisions," with a corresponding shrinking of the area called "operations." The former can be made by any authorized person at all levels of government and includes "balancing" decisions based on financial, economic, social and political constraints. The decision to conduct a survey for tree removal funding in *Swinamer* provides a good example. It was a lower level decision made by the regional director. Furthermore, it was made after weighing or "balancing" several factors or interests, including public safety, budgetary constraints and survey costs. Hence, the true policy test is more a "balancing" test than a threshold one and significantly expands the range of government activities immune from negligent liability. The rejection of the "threshold" test is the clearest signal by the Court that there are limits or safeguards to the principles in *Just*.

Thirdly, the amount of money or cost involved in a budgetary consideration is irrelevant in the determination of a pure policy decision. The trial judge in *Swinamer* had held that the amount or costs involved with the survey were so small that the budgetary considerations in relation to the survey were outside the scope of policy. The Supreme Court of Canada rejected this view again signalling a broader test. True policy decisions are not restricted to "threshold," high level decisions involving large sums of money or costs; they also include lower level, "balancing" decisions, involving small sums of money or costs.

Finally, the Court does not adopt a high standard of reasonable care when reviewing the operational aspects of carrying out a government policy decision. In *Swinamer*, the lack of expert or trained specialist conducting the survey did not render the operation unreasonable. The Court accounted for the perceived risks, budgetary constraints and timely completion of the survey to make its decision. In *Brown*, the delay in sanding operations and the lack of home telephone numbers to reach employees of the summer schedule in case of emergency were held not to be grounds for liability.

This seemingly lower standard of reasonableness, when reviewing the operational aspects of government decisions, combined with the broader policy test and the guidance provided for statutory exemptions

define the judicial limits set on the application of the principles in *Just*.

IV. CONCLUSION

THE SUPREME COURT OF Canada does more than simply apply the principles in *Just* to *Brown* and *Swinamer*; it actually limits them by clarifying the "built-in barriers" or safeguards to government liability in tort. For example, it rejects the threshold test and broadens true policy decisions; it provides legislative guidance for the implementation of statutory exemptions against tortious liability; and it adopts a lower (or, at least, refuses to adopt a higher) standard of reasonableness when reviewing the operational aspects of government decisions. The principles remain intact, however, despite these limits. No member of the Court, with the exception of Sopinka J., was willing to acknowledge that the "policy/operational" test was ineffective, unreliable, problematic as a touchstone of liability and a potential mechanism to broaden government liability in tort.[38] It would be misleading, therefore, to suggest that the principles in *Just* have been materially changed; rather, they were limited to the extent mentioned in this comment. After all, the decisions in *Brown* and *Swinamer* represent an application of the *Just* principles, not their rejection. While the barriers have been fortified to prevent the flood, the gates remain open.

[38] *Supra* note 6.