SYMPOSIUM – L'UNIVERSITÉ DE MONCTON

CONTRIBUTION OF THE HONOURABLE MICHEL BASTARACHE

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SPEECH BY THE HONOURABLE PIERRE BLAIS,

CHIEF JUSTICE OF THE FEDERAL COURT OF APPEAL

Introduction

Thank you for inviting me to speak today at this important occasion. As you know, we are all here today to make note of the contributions of the Honourable Michel Bastarache. It goes without saying that the Honourable Michel Bastarache was an exemplary judge who was highly respected for the quality of his judgments and the way he expressed himself in his decisions. At this point in the symposium, I am sure you have heard about the Honourable Michel Bastarache's impressive biography. Unfortunately, I was unable to join you at the sessions on Monday and Tuesday because I was speaking at another symposium with the Bar of Montreal and I arrived in Moncton late last night. I do not want to repeat too much of what has already been said about him, but I feel I should at least make note of a few important points in his career.

The Honourable Michel Bastarache studied at the Université de Moncton (B.A.), the Université de Montréal (LL.L.), the University of Ottawa (LL.B.) and the Université de Nice (graduate degree in public law). He has honorary degrees from many universities, which are too numerous to list! He is a member of the New Brunswick, Alberta and Ontario Bars.

Before his appointment to the judiciary, the Honourable Michel Bastarache was a legal translator for the government of New Brunswick, had been the Vice President and Director of Marketing at Assomption-Vie and later, President and Chief Executive Officer of Assomption-Vie and its subsidiaries. You must all be very proud of the fact that he was once a law professor at the Université de Moncton Law School, and then Dean from 1978-1983.

After that, he accepted the position of Director General of a Secretary of State of Canada program to promote the official languages, in 1983-1984. He was Associate Dean of the common law section at the University of Ottawa Faculty of Law from 1984-1987.

In addition to his experiences in the academic field, Michel Bastarache also practiced law in Ottawa with the firm Lang, Michener, Lash, Johnston, from 1987-1989, and in Moncton with Stewart, McKelvey, Stirling, Scales, from 1994-1995.

He is the author of many books and publications on language rights, bilingual interpretation and real property, among others, and has won many awards and honours. For example, he was awarded a medal marking Canada's 125th anniversary in 1993 and was appointed Officier de la Légion d'honneur de la France in 2003.

The Honourable Michel Bastarache was appointed Judge of the Court of Appeal of New Brunswick on March 1, 1995. On September 30, 1997, he was appointed to the Supreme Court of Canada. He retired on June 30, 2008, but from what I understand, he is as busy as ever with other commitments!

For the purposes of my speech today, I reviewed certain Supreme Court of Canada decisions in which the Honourable Michel Bastarache participated. I paid particular attention to the decisions in which the Federal Courts were involved, including the Federal Court of Appeal, over which I preside, and the Federal Court, over which Chief Justice Lutfy presides.

In order to make the important link with the federal Courts, I will provide a quick overview of our jurisdiction to provide a better setting for you.

Jurisdiction of the Federal Courts

In 1971, Canada's Parliament enacted the *Federal Court Act*, which created the Federal Court of Canada to complement the court systems of the provinces by adjudicating cases arising under specific areas of federal law. In the beginning, the Federal Court was composed of two sections, the Trial Division and the Appellate Division. However, in 2003, the Federal Court of Canada and its two divisions were replaced by two separate courts. The Federal Court replaced the Trial Division and the Federal Court of Appeal replaced the Appellate Division. An appeal from the Federal Court is heard before the Federal Court of appeal, which also hears appeals from the Tax

Court of Canada. Additionally, the Federal Court of Appeal hears appeals and applications for judicial review directly from certain federal administrative tribunals specified in the *Federal Courts Act.*

Appeals from decisions by the Federal Court of Appeal are heard by the Supreme Court, with leave of that Court. However, because the Supreme Court of Canada grants leave to appeal in 70 to 80 cases a year from courts of appeal across Canada, in all areas of the law, the Federal Court of Appeal is the final court of appeal for nearly all federal administrative law cases. Administrative law also comprises a larger percentage of its caseload than that of any provincial court of appeal.

The federal Courts exercise jurisdiction in a number of areas within the competence of Parliament, including intellectual property, admiralty and maritime law, actions for damages against the federal government and income tax. Most importantly,for our purposes of course, the federal Courts exercise exclusive jurisdiction over most federal administrative law matters.

The federal Courts may also decide any question of constitutional law that arises during a judicial review proceeding, whether it concerns the division of powers between the federal and provincial governments, or the *Canadian Charter of Rights and Freedoms.*

The federal Courts have exclusive judicial review jurisdiction over "federal boards," defined as any body or person "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under any order made pursuant to a prerogative of the Crown." These bodies or persons include all manner of agencies of the federal government and federal public officials (including Ministers and the Governor in Council or Cabinet), and any non-governmental organization or person on whom Parliament has conferred statutory powers or duties.[1]

I will now refer to some decisions by the Honourable Michel Bastarache while he was with the Supreme Court of Canada. I noted some decisions in particular from the Federal Court of Appeal that influenced our case law and

[1] For more information on this subject, see the document prepared for the international symposium of the International Association of Supreme Administrative Jurisdictions (IASAJ) in Australia in March 2010, by the Honourable John Evans, Federal Court of Appeal judge. The document can be found on the Federal Court of Appeal Website at: www.fca-caf.gc.ca.

one that is not from our court but had a strong impact on Administrative law in Canada.[2]

(I) Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982

First, let us consider the important decision, ***Pushpanathan* v. *Canada*** in 1998. Bastarach J. had just been appointed to the Supreme Court of Canada and you will see that even then, the Honourable Michel Bastarache left his mark as a renowned judge.

In *Pushpanathan*, the appellant was a native of Sri Lanka who arrived in Canada through Italy on March 21, 1985. He claimed Convention refugee status in accordance with the *Immigration Act* (formerly the *Immigration Act, 1976*, S.C. 1976-77, c. 52). The claim was never adjudicated as the appellant was granted permanent resident status under an administrative program in May 1987, and therefore he could stay in Canada.

The appellant was later arrested in Canada and accused of conspiracy to traffic in narcotics. At the time of his arrest, he was a member of a group that was in possession of heroin with a street value of close to $10 million. He pleaded guilty and was sentenced to eight years in prison.

After being granted parole, the appellant renewed his claim for Convention refugee status, under the UN *Convention Relating to the Status of Refugees* (the "Convention"). On June 22, 1992, a conditional deportation order was issued against him by Employment and Immigration Canada under ss. 27(1)(*d*) and 32.1(2) of the Act, which provide that a permanent resident found guilty of an offence under an Act of Parliament for which the sentence is a term of imprisonment of more than six months may be deported.

Since such a deportation is conditional upon a determination of the Convention refugee status, Mr. Pushpanathan's claim was referred to the Immigration and Refugee Board. The Board determined that the appellant was not a Convention refugee by virtue of the exclusion clause in article 1F(*c*) of the Convention, which provides that the provisions of the Convention do not apply to a person who "has been found guilty of acts contrary to the purposes and principles of the United Nations."

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[2] In terms of research of case law for this speech, I note the work of my law clerk this year, Pierre Lavoie.

Presented with an application for judicial review, the Federal Court, Trial Division and the Federal Court of Appeal refused to overturn the decision.

According to Bastarache J., the decision raised two important issues regarding the admissibility of refugees to Canada. The first was the standard of judicial review applicable to Immigration and Refugee Board decisions and the second was the meaning to give the words "guilty of acts contrary to the purposes and principles of the United Nations" as applied to persons excluded from refugee status.

However, the importance of the decision is the fact that for the first time, the Supreme Court was to rule on the appropriate standard of review for Immigration and Refugee Board decisions.

To begin, Bastarache J. confirmed the "pragmatic and functional" analysis that requires many different factors to be considered, none of which is decisive, and each of which provides an indicator on a spectrum of the degree of deference to be shown the decision in question.

The four contextual factors underlying this pragmatic and functional analysis are well known: the existence or absence of a privative clause or right to appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and the nature of the question—law, fact or mixed law and fact.

Recall that in immigration matters, as provided under subsection 83(1) of the Act, a Federal Court decision on judicial review may only be appealed before the Federal Court of Appeal if the Trial Division has certified that a serious question of general importance is involved and has stated the question.

The key element in Parliament's intention regarding the standard of review analysis is the use, at subsection 83(1) of the Act, of the words "serious question of general importance." The general importance of the question, it's applicability to numerous future cases, justifies its review by a court of law.

However, according to Bastarache J., subsection 83(1) would be inconsistent if the standard was anything other than correctness. In his opinion, the key element of Parliament's intention regarding the standard of review is the use

of the words "serious question of general importance" (Bastarache J.'s emphasis).

He also considers that the general importance of the question, or its applicability to numerous future cases, justifies the Court's scrutiny. To find otherwise would lead the Court to accept decisions by the Board that erred in law but that were not patently unreasonable.

Bastarache J. feels it is only possible to respect the scope of subs. 83(1), as specifically worded, by authorizing the Court of Appeal—and, as a result, the Federal Court, Trial Division—to substitute its own opinion for that of the Board on questions of general importance.

In this case, the principal of law could easily be separated from the uncontested facts in the case and would have undoubtedly been of great precedential value. Bastarache J. feels that the factual expertise of the Board does not assist with the interpretation of this principle of general law.

He therefore found that it was clear from a pairing of the privative clause in its current wording and subs. 83(1), that the first is void in regard to questions of "general importance."

The "pragmatic and functional" analysis allows for distinct judicial deference standards even between the provisions of a same Act and even between the types of decisions made by the tribunal in question. In this case, the wording of the privative clause coincides with the fourth factor in the pragmatic and functional analysis, namely that decisions on abstract principles of general application represent a strong argument against judicial deference.

It must be noted that even if there was a split decision on the appeal, there was agreement on Bastarache J.'s finding, that the applicable standard of review was correctness.

(II) Harvard College v. Canada (Commissioner of Patents), [2002] 4 S.C.R. 45, 2002 SCC 76

Now we will shift from immigration matters to intellectual property and you will see the diversity and scope of the Honourable Michel Bastarache's

knowledge. In ***Harvard College v. Canada***, often known as "Harvard Mouse", the case was to determine whether the context of the *Patent Act*, R.S.C. 1985, c. P-4, allowed patents for higher life forms.

The respondent, President and Fellows of Harvard College, wanted to patent a mouse that had been genetically modified to increase its predisposition to cancer, for cancer research purposes. The patent claims also covered all non-human mammals modified in the same way.

The Commissioner of Patents confirmed the decision by the patent examiner to refuse the patent. This decision was confirmed by the Federal Court Trial Division then overturned by the Federal Court of Appeal in a majority decision.

Other than the issue of the applicable standard of review for these decisions, for Bastarache J., the nature of the issue raised was a determining factor in this case. In particular, the question was whether the definition of "invention" at section 2 of the *Patent Act* covered higher life forms. In his opinion, it was a question whose answer would have great precedential value.

According to Bastarache J., the answer to this question lies in the definition of "invention" in section 2 of the *Patent Act* and whether in the context of that Act, the words "manufacture" and "composition of matter" are sufficiently broad to cover higher life forms such as the oncomouse.

In his opinion, Parliament did not intend for higher life forms to be patentable. If it had wanted any object imaginable to be patentable, it would not have adopted an exhaustive definition that limits inventions to "any...art, process, machine, manufacture or composition of matter..." Moreover, the terms "manufacture" and "composition of matter" do not correspond to our common understandings of animal and plant life.

He continues by stating that even accepting that these words have a broad interpretation, the words in the definition must be interpreted in light of the scheme of the *Patent Act* and the relevant context.

He therefore found that the *Patent Act* in its current form did not address the many unique concerns raised by the delivery of patents for higher life forms,

which, in his opinion, indicated that Parliament did not intend for the definition of "invention" to apply to this type of subject matter.

By allowing the appeal, he therefore decided that a higher life form was not patentable because it is neither a "manufacture" nor a "composition of matter" within the meaning of the word "invention" found at s. 2 of the *Patent Act*.

In addition, given the unique concerns associated with the grant of a monopoly right over higher life forms, Bastarache J. found that Parliament would not likely choose the *Patent Act* in its current form as the appropriate vehicle to protect the rights of inventors of this type of subject matter.

However, we must note the dissent of four colleagues of Bastarache J. who, per Binnie J., considered the context and scheme of the *Patent Act* supported a broader interpretation of the words "composition of matter" as required for the oncomouse to be patentable and that it was in fact patentable.

(III) Bristol-Myers Squibb Co. v. Canada (Attorney General), [2005] 1 S.C.R. 533, 2005 SCC 26

Three years after Harvard Mouse, we saw the dissidence of the Honourable Michel Bastarache in ***Bristol-Myers,*** regarding patents.

In Bristol-Myers, the Supreme Court was to decide whether the Minister was incorrect in issuing a Notice of Compliance to Biolyse based on a new drug submission (NDS) that BMS claimed was issued based on the bioequivalence of its product. This decision relied on the interpretation of the provisions of the *Patented Medicines (Notice of Compliance) Regulations* (NOC Regulations).

The facts in this case are complex and I will not go into too much detail. However, I make note if it for the significance of the dissidence of Bastarache J., who had affirmed the Federal Court of Appeal decision! Bastarache J. would have dismissed the appeal and quashed the Notice of Compliance the Minister issued to Biolyse. Bastarache J. found that the ordinary and grammatical meaning of subs. 5(1.1) of the Regulations is unambiguous and clearly indicates that Biolyse's submission for a NOC falls under the provision.

(IV) Bell Canada v. Canadian Telephone Employees Association, [2003] 1 S.C.R. 884, 2003 SCC 36

I will now consider the role the Honourable Michel Bastarache had in ***Bell Canada*** in 2003; this decision was of utmost importance in terms of judicial independence and impartiality.

This case was to be the conclusion to a long legal saga between Bell Canada and two unions, the Canadian Telephone Employees Association (CTEA) and the Communications, Energy and Paperworks Union of Canada (CEPU), and Femmes Action resulting from complaints against Bell, alleging gender discrimination in the payment of wages, in violation of s. 11 of the *Canadian Human Rights Act*.

This case did not decide the issue on merit. It was simply a decision on a motion Bell had submitted to members of the Canadian Human Rights Tribunal designated to consider the complaints against it. Bell alleged that the independence and impartiality of the Tribunal were compromised by two powers: first, the power of the Canadian Human Rights Commission to make guidelines binding on the Tribunal in "a class of cases" and second, the power of the Chairperson to extend appointments of Tribunal members in ongoing inquiries.

The Tribunal dismissed Bell's claims and ordered the hearing of the complaints. The Federal Court Trial Division allowed Bell's application for judicial review, finding that even the Commission's restricted power to make guidelines unduly limited the Tribunal and the Chairperson's discretionary power to extend the Tribunal members' appointments did not provide a sufficient guarantee of tenure. The Federal Court of Appeal overturned this judgment.

The appeal was dismissed by the Supreme Court. The Court's judgment was rendered by the Chief Justice and Bastarache J.

In their opinion, the appeal was to determine whether the required independence and impartiality of the Canadian Human Rights Tribunal (the Tribunal) were compromised because the Canadian Human Rights Commission has the power to issue guidelines that are binding on the

Tribunal in "a class of cases" and the Chairperson of the Tribunal has the power to extend Tribunal members' terms for ongoing inquiries.

They found that neither of the two powers challenged by Bell compromise the procedural fairness of the Tribunal. Neither contravenes any applicable quasi-constitutional or constitutional principle.

Additionally, the power to issue guidelines does not undermine the independence or impartiality of the Tribunal. Lastly, the power to extend the Tribunal members' terms does not undermine their independence or impartiality. A reasonable person, informed of the facts would not conclude that the members were likely to be pressured to adopt the Chairperson's views.

(V) Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada, [2008] 1 S.C.R. 383, 2008 SCC 15

Let us now look at a subject that is very familiar to the Honourable Michel Bastarache, language rights. In ***Société des Acadiens,*** the Honourable Michel Bastarache developed the constitutional obligations regarding official languages in light of the *Canadian Charter of Rights and Freedoms.*

The facts in this decision are relatively simple. Under an agreement between Canada and New Brunswick, the Royal Canadian Mounted Police (RCMP), a federal institution, acts as a provincial police force in that province.

The appeal aimed to determine whether members of the RCMP were required to fulfil the language obligations imposed on New Brunswick institutions under subs. 20(2) of the *Canadian Charter of Rights and Freedoms* when performing their duties as provincial police officers.

The Federal Court found that the duty carried out as provincial police force made the RCMP a New Brunswick institution for the purposes of subs. 20(2) and the RCMP was therefore required to provide police services in accordance with the provincial language standards.

The Federal Court of Appeal set aside that judgment.

In a relatively short judgment, Bastarache J. for the Supreme Court of Canada found that subs. 20(2) of the Charter requires the RCMP to provide

services in both official languages when it acts as a provincial police force in New Brunswick pursuant to the April 1, 1992, agreement between the Government of New Brunswick and the Government of Canada.

Although the RCMP retains its status as a federal institution when it acts under contract with a province, each member of the RCMP is granted, under subs. 2(2) of the New Brunswick *Police Act*, all the attributes of a provincial police officer; therefore, as such, he or she is authorized by that province to administer justice there and performs the role of an "institution of the legislature or government" of New Brunswick.

As a result, subs. 20(2) of the Charter applies. Under this agreement, New Brunswick retains control over the RCMP's policing activities. The provincial Minister of Justice's constitutional obligations are discharged by the RCMP members designated as New Brunswick peace officers by the provincial legislation.

Thus, as a result of this agreement, by participating in a function of the New Brunswick government, the RCMP has constitutional obligations imposed on it under subs. 20(2) of the Charter.

(VI) Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307

Lastly, ***Blencoe v. British Columbia*** is another important decision involving the Honourable Michel Bastarache that was not the result of an appeal from a Federal Court of Appeal case, but had a significant impact on administrative law in Canada.

The facts of the case follow. In March 1995, a Minister in the Government of British Columbia faced complaints of sexual harassment by one of his assistants, and then two other women for various incidents of sexual harassment that allegedly occurred between March 1993 and March 1995.

These allegations generated intense media attention. Following these events, the respondent suffered from severe depression and did not run for re-election in 1996.

In November 1997, considering himself "unemployable" in British Columbia due to the outstanding human rights complaints against him, the

respondent filed an application for judicial review to have the complaints stayed.

He claimed that the Commission had lost jurisdiction due to unreasonable delay in processing the complaints and had caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice.

His application was dismissed by the Supreme Court of British Columbia. The majority of the Court of Appeal allowed the appeal and directed that the human rights proceedings against him be stayed. The majority found that the respondent had been deprived of his right under s. 7 of the *Canadian Charter of Rights and Freedoms* to security of the person in a manner which was not in accordance with the principles of fundamental justice.

The majority judgment of the Supreme Court of Canada allowed the appeal, and was delivered by Bastarache J.

He felt that the appeal raised the question of whether the state-caused delay in the human rights process engaged s. 7 of the *Canadian Charter of Rights and Freedoms*. In the alternative, should the Court find that s. 7 was not engaged, the question would be whether the respondent was entitled to a remedy pursuant to the principles of administrative law, notwithstanding that he had not been prejudiced by his ability to respond to the complaints against him.

Bastarache J. accepted that s. 7 of the Charter is not restricted to criminal law in certain circumstances, at least where there is government action which directly involves the legal system and the administration of justice.

However, he felt that for s. 7 to apply, it must first be established that the respondent's claim falls within the ambit of s. 7. In terms of the right to liberty guaranteed by s. 7, Bastarache J. indicated that it was not restricted to freedom from physical restraint, but also included the right to make important fundamental decisions without state interference. In this case, he found that the state did not prevent the respondent from making any "fundamental personal choices."

As for the right to security of the person guaranteed by s. 7, he allowed that it protects the psychological integrity of a person but for this right to be

triggered, the harm must result from the actions of the state and must be serious. He found that the direct cause of the harm to the respondent was not the state-caused delay in the human rights process, but rather the events prior to the complaints—the allegations by the respondent's assistant—that led the respondent to be ousted from Cabinet and caucus, and the actions of non-governmental actors such as journalists. The harm to the respondent is a result of the publicity surrounding the allegations themselves, and the ensuing political fallout.

He then added that the rights guaranteed by s. 7 do not include a generalized right to dignity, or more specifically, the right to protection from the stigma associated with a human rights complaint, and the psychological harm was not a result of the state's action but essentially his own personal hardship.

Finally, on the constitutional right to be "tried" within a reasonable time, Bastarache J. indicated that this only applies in criminal matters. In terms of time limits, he indicated that administrative law offers remedies for state-caused delays in human rights proceedings. However, delay in itself does not justify a stay of proceedings as an abuse of process in common law. There must be proof of significant prejudice caused by a situation in which the respondent's ability to have a fair hearing was compromised.

He added that an unacceptable delay might also amount to an abuse of process in certain circumstances, even where the fairness of the hearing was not compromised but in this case, the delay must clearly be unacceptable and have directly caused a significant enough prejudice to bring the human rights system into disrepute, is contrary to the interest of justice or is a result of oppressive conduct.

In his opinion, the fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases.

Conclusion

To conclude on a more personal note, I would like to add something from my own experience as a judge. A judge does not, and should not, have an agenda, set idea or preconceived opinion. The public should not quote us as defenders of such and such a cause, but rather as honest people who make good decisions in light of all the facts. A judge must examine the case for its

worth, in accordance with the current legislation and case law. This is the beauty of common law and the way the law evolves in all areas, because of valid judgments are rendered. Michel Bastarache was one of these judges, and this independent spirit allowed him to render significant decisions in all fields.

As we have seen together, the Honourable Michel Bastarache had a very distinguished career as a translator, teacher, public servant, lawyer and judge. But he is not done yet...some of his friends would tell you he has just begun with the new challenges before him. I am sure that you will join me in congratulating him for all his accomplishments in the legal and educational communities and in wishing him success in all his future projects.

THANK YOU.