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By Brad Caldwell

FEDERAL COURT PRACTICE – 2003 UPDATE

CROWN LIABILITY

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I. Introduction

This paper is designed to provide an overview on a variety of topics that arise in the context of Crown litigation. Hence, the paper will not attempt to explore any topic exhaustively.

II. Liability of The Crown In Tort an Overview

A. *Introduction*

Although there are number of relatively obscure torts for which the Crown may be held liable such as interference with economic relations and malicious prosecution, this paper will be limited to a discussion of the torts of abuse of public office and negligence.

Since the jurisprudence on the distinction between policy decisions and operational decisions as set out in *Just v. British Columbia,* [1989] 2 S.C.R. 1228 has been well described elsewhere,[1] this jurisprudence shall not be discussed other than to mention that actions against the Crown in negligence are generally restricted to operational

matters involving the implementation of policy. On the other hand, actions against the Crown for abuse of public office can apply to policy decisions as well.[2]

B. Common Law

The Supreme Court of Canada in *National Harbours Board v. Langelier* (1968) 2 D.L.R. (3d) 81 summarized the liability of servants of the Crown at common law as follows at page 91:

> *First is the proposition that the Crown itself could not be sued in tort.*
>
> *Second is the proposition that Crown assets could not* [be] *reached, indirectly, by suing in tort, a Department of Government, or an official of the Crown. As to a Government Department, there was the added barrier that, not being a legal entity, it could not be sued.*
>
> *Third is the proposition that a servant of the crown cannot be made liable vicariously for a tort committed by a subordinate. The subordinate is not his servant but is, like himself, a servant of the Crown which, itself, cannot be made liable.*
>
> *Fourth is the proposition that a servant of the Crown, who commits a wrong, is personally liable to the person injured…*

To summarize, absent legislation, the Crown could not be held liable for torts of its servants. However, the servant could be sued in his or her individual capacity, but not as a servant of the Crown. Hence, the judgement could only be enforced against the individual.

Apart from tort, at common law, claims for equitable relief could be pursued against the Attorney General: *Dyson v. Attorney-General* [1911] 1 K.B. 410 (C.A.).

C. Statute

In Canada, the *Exchequer Court Act*, the predecessor to the *Federal Court Act*, granted jurisdiction to the Exchequer Court to entertain claims against the Federal Crown. The *Exchequer Court Act* as early as 1887 gave that court jurisdiction over claims against the federal Crown for the negligence of Crown servants if the negligence occurred on a "public work"; section 16(c). In 1938, the "public work" limitation in section 16(c) of the *Exchequer Court Act* was removed. See generally, the *Exchequer Court Act*, R.S.C. 1927 c. 34, s. 19(c).

In 1953, substantive reform of Federal Crown liability occurred. On May 14, 1953 the *Crown Liability Act* was proclaimed in force. That legislation was significant in that it imposed liability on the Crown in respect of all torts committed by Crown servants. Hence, for the first time the Crown could be liable for the intentional torts as well as the negligence of its officers and servants.

However, section 24(1) of the *Crown Liability Act* essentially specified that the Crown was not liable for torts committed prior to passage of that statue. The *Crown Liability Act* was subsequently renamed the *Crown Liability and Proceedings Act* S.C. 1990 c. 8. (the "*CLPA*"). Section 3 is the provision that creates the liability in tort.

The foregoing background is more than just of historical interest. For example, in the Indian residential school context, issues about pre-May 14, 1953 liability still arise. In some Indian Residential School cases actions involving events alleged to have occurred prior to May 14, 1953 are filed. The case law has generally been uniform that a plaintiff cannot pursue a claim against the Federal Crown in a provincial superior Court for intentional torts that occurred prior to May 14, 1953. However, a claim in negligence pre-1953 likely could still be pursued in Federal Court based on the provisions of the Exchequer Court Act which of course allowed claims based on the negligence of Crown servants while acting within the scope of duty or employment.

Daniels v. Canada (A.G.) 2003 SKQB 58

M.C.C. v. Canada (A.G.) 2001 O.J. No. 4163 (Q.L.)

Kaiswatum c. Canada (A.G.) 2003 SKQB 46

1. Highlights of the CLPA

Section 3 provides as follows:

> **3.** The Crown is liable for the damages for which, if it were a person, it would be liable
>
> (a) in the Province of Quebec, in respect of
>
> (i) the damage caused by the fault of a servant of the Crown, or
>
> (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and
>
> *(b) in any other province, in respect of*
>
> *(i) a tort committed by a servant of the Crown, or*
>
> *(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.*
>
> R.S., 1985, c. C-50, s. 3; 2001, c. 4, s. 36.

Section 3, imposes vicarious liability on the Crown for the acts of its servants. That conclusion is clear when section 10 is considered:

Section 10 provides:

> ***10.*** *No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.*
>
> R.S., 1985, c. C-50, s. 10; 2001, c. 4, s. 40.

Since Crown liability is vicarious, not direct, in order for the Crown to be liable, the plaintiff must establish that the servant would be personally liable, i.e. the servant owed a duty of care to the plaintiff, and breached that duty and caused the loss.

Air Canada v. Canada (Minister of Transport) [1999] 165 F.T.R. 60

It should be noted that in British Columbia, the Crown's liability is direct; *Crown Proceeding Act,* R.S.B.C. 1979, c. 86.

That said, in *Swinamer v. Nova Scotia (A.G.)* [1994] 1 S.C.R. 445 the Supreme Court of Canada in comparing the B.C. statute, to legislation in Nova Scotia which has a provision similar to s.10 of the *CLPA*, concluded that the foregoing difference is without substance since the Crown can only act through its servants and agents.

Section 23 of the *CLPA* specifies who is the proper defendant before the Superior Courts of the Province. Section 23 provides that an action must be taken against the Attorney General of Canada and not Her Majesty the Queen in Right of Canada.

Munro v. Canada (1992), 11 O.R. (3d) 1

However, in the Federal Court, the proper party is Her Majesty the Queen by virtue of s. 48(1) of the *Federal Court Act,* and the Schedule to that Act.

Section 24 of the CLPA provides the Crown with all of the defences available to a **natural person**.*[Bolding added.]* However, if the Crown relies on a defence provided by statute, it must take the burdens of the statute.

Canada Trust Co. v. The Queen [1982] 2 F.C. 722 (T.D.)

Section 25 of the *CLPA* prohibits obtaining default judgment against the Crown without leave of the Court being obtained on an application with 14 days clear notice being given to the A.G.

Section 29 of the CLPA provides no execution shall issue on a judgment against the Crown. However, execution against the Crown is unnecessary as the Crown is bound pursuant to s. 30(1) of the *CLPA* to pay any judgment against it.

D. Statutory Authority Defence

The defence of statutory authority essentially provides that absent negligence, no cause of action is available for actions that would otherwise be a nuisance, if the body so acting is acting within its statutory authority. Some noteworthy aspects of this defence include:

a) For the defence to apply the statute need not explicitly refer to liability for nuisance, rather it is sufficient that it authorizes certain activities to be carried out and the inevitable result of the carrying out those authorized activities is the damage the subject of the complaint;

b) For the defence to apply it is not necessary for the statute to require that the activities be carried out, it is sufficient if the statute authorizes the activities;

c) It is sufficient if the activities authorized are authorized by subordinate legislation such as regulations, orders in council, or licenses, permits issued under statute; and

d) The defence applies to persons other than the Crown. The key is whether the activity is statutorily authorized.

Ryan v. Victoria [1999] 1 S.C.R. 201

Tock v. St. John's Metropolitan Area Board [1989] 2 S.C.R. 1181

Sutherland et al. v. The Vancouver International Airport Authority 2002 BCCA 416

The Sutherland, case, *supra,* the airport noise case, is a recent decision where that defence was raised successfully.

E. Abuse of Public Office

The subject of the tort of abuse of public office was exhaustively covered in the paper by Professor Lewis Klar, entitled *Torts*, found in the CLE entitled "Civil Litigation Conference-2003".[3] Professor Klar at page 6.1.03 of his paper stated:

> The requirements of the tort are as follows:

1. the actor must be a public official;
2. the activity in question must relate to an exercise of a statutory authority or power; and
3. the wrongdoing must be intentional.

Rather than attempt to repeat Professor Klar's work, I commend his paper to you. However, I do want to deal with one aspect of this tort, which is currently being considered by the Supreme Court of Canada.

In the *Odhavji Estate v. Metropolitan Police Force* (2000), 194 D.LR. (4th) 577 (Ont. C.A.) an action was commenced by the estate of the deceased who was fatally shot by police following his pursuit as a suspected bank robber. The shooting engaged the Special Investigation Unit (S.I.U.) an independent body created by statute to investigate cases of death or serious injury that may result from criminal offences by police officers in Ontario. The action alleged inter alia, that the police officers who shot the deceased committed the tort of misfeasance of public office because of their failure to properly cooperate with the S.I.U. investigation, despite a legal duty under the *Police Services Act* to fully cooperate. The defendants applied to strike out that part of the claim.

The case raises the issue as to whether breach of statutory duty can ever be a basis for the tort of abuse of public office. The traditional view was that the public official must have exercised a power. In the case at bar, what was involved was a statutory duty.

The Motions Judge struck out the claim and the Ontario Court of Appeal in a 2-1 decision upheld the motions judge's decision. The Majority affirmed that a breach of statutory duty does not give rise to the tort Rather, the majority concluded that in order for the tort to arise the defendant must be in a position of exercising a power. However, the dissent concluded that the distinction between improper exercise of a power and a failure to carry out a duty was one merely of semantics.

The Supreme Court of Canada heard the appeal on February 17, 2003. It should be noted that this is the first occasion since *Roncarelli v. Duplessis*, [1959] S.C.R. 121 that the Supreme Court of Canada has considered the scope of this tort.

F. Negligence

The test set out in *Anns v. Merton London Borough Council* was revisited by the Supreme Court of Canada in 2001 in the case of *Cooper v. Hobart,* [2001] 3 S.C.R. 537. In this case the court said as follows:

> *In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.* (para. 30)

The court stated that the second step of the *Anns* test generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. This is the stage where the exclusion of liability for government policy (as opposed to operational) decisions arises (para. 38).

The court also noted that at this stage one of the factors to be considered by the court is "[d]oes the law already provide a remedy?" (para. 37). This is of particular significance to the Federal Court where the issue of whether or not the existence of an administrative law remedy bars an action in damages was left open by a divided Court of Appeal in the decision of *Comeau's Seafoods Limited v. Canada (Minister of Fisheries and Oceans), Supra,* note 1. [4] While the Supreme Court did not say the existence of an alternative remedy is determinative, it clearly said that it is one of the factors that should be considered. This is consistent with the pragmatic approach adopted by the Federal Court of appeal in *Zarzour v. Canada* (2000) 268 N.R. 235, [2000] F.C.J. 2070. In this case, Letourneau J.A., said as follows:

The trial judge said he was concerned by a serious procedural problem that the parties had not addressed. Could the respondent proceed by an action in damages as he did, citing the unlawfulness of the Board's decisions? Or should he instead have filed an application for judicial review under section 18.1 of the Federal Court Act, to attack these decisions within the allotted time? He concluded that the respondent should have proceeded by way of an application for judicial review and consequently that a large part of his action was inadmissible.

> *The question is not a new one in litigation emanating from the prison environment and has given rise judicially to some differences of opinion: see Zubi v. Canada (1994) 71 F.T.R. 168 (F.C.T.D.); Shaw v. Canada (1997) 134 F.T.R. 128 (F.C. Protho.); Creed v. Canada (Solicitor General) [1998] F.C.J. No. 199 (F.C.T.D.); and Shaw v. Canada (2000) 167 F.T.R. 233 (F.C.T.D.).*

> *It is necessary, I think, to adopt an utilitarian approach to this, and favour the proceeding that can be used to eliminate or repair the harm resulting from the decision that was rendered. For example, there is no use in requiring that an*

inmate who has already served his 15-day segregation period seek to have the decision that forced this on him set aside by way of judicial review. However, when a decision is still operative, as is the Board decision in this case imposing a prohibition on contact as a condition of release, it is not only useful but necessary to proceed by judicial review in order to have it quashed. Otherwise, both the decision and its effects will drag on, with possible aggravation of the harm during the period in which the action in damages follows its course.

It was this pragmatic approach that was rightly adopted by Prothonotary Hargrave in Shaw v. Canada (1997), 134 F.T.R. 128. At paragraph 23 of his decision, he writes:

> *[23] I do not see that a plaintiff must, in all circumstances, first bring an application for judicial review and only then, if successful, bring an action for damages. All the more so when a declaration would serve no current purpose. Further, this is not a situation in which the procedures the plaintiff employs are alternatives leading to one end: the remedies are very different. Finally, where there are several approaches or procedures a court should impose the least intrusive remedy capable of providing a cure. In summary, I can see no utility in forcing the plaintiff to try to obtain declaratory relief, concerning something that happened over a year ago, in order to then begin a second piece of litigation by which to claim damages.*

Unfortunately, there is no magic formula applicable to all situations to which there is more than one remedy. Each case is sui generis, and must be assessed on its merits in order to determine the appropriate procedure. (paragraphs 46-50)

See also *Radil Bros. Fishing Co. Ltd. v. Her Majesty the Queen et al.* (2001) 207 D.L.R. (4th) 82, 2001 FCA 317 (F.C.A) varying (2000) 197 F.T.R. 169 (T.D.) which varied (1999) 175 F.T.R. 182 and the dissenting opinion of Linden J. in *Comeau, supra* where he suggests that the failure to pursue an administrative law remedy could be relevant to the issue of mitigation.[5] A recent case that deals with this issue in some detail is the decision of Prothonotary Hargrave in the case of *Budisukma Puncak Sendirian Berhad, Maritime Consortium Management Sendirian Berhad v. Queen B.S. Warna and D.A. Hall* 2003 FC 992 at pargraphs 50-4.

III. Liability of the Crown in Contract

At common law, the Crown has the power of a **natural person***[Bolding added.]* to enter into contracts. Generally, a contract will be valid so long as it is within the power of the particular government and it was made by a servant or agent within the scope of his or her authority.[6] For examples of cases successfully imposing liability on the Crown for breach of contract see:

1. *R. v. CAE Industries Ltd.* [1986] 1 F.C. 129 (C.A.);

2. *Sumerville Belkin Indust. Ltd. v. Man* [1988] 3 W.W.R. 523 (Man C.A.);

3. *Muntuck v. Canada* [1986] 3 F.C. 249 (T.D.);

4. *Grant v. Province of New Brunswick* (1973), 6 N.B.R. (2d) 95 (C.A.);

5. *Wells v. Newfoundland,* [1999] 3 S.C.R. 199; and

6. *Puddister Trading Corporation Ltd. v. Canada* (28 May 1997), No. T-168-92 (Fed. Ct. T.D.).

However, there does exist a line of cases that say that statutory powers may not be fettered by contract.[7] In the municipal context, see also *Pacific National Investments v. Victoria (City)* 2000 SCC 64, [2000] 2 S.C.R. 919 where the majority decision of a deeply divided Supreme Court of Canada ruled that in the absence of express legislative authority, a municipality cannot contractually bind itself to fetter its future legislative

powers. It further ruled that an implied agreement to compensate in the event of breach of the agreement is also *ultra virus.*

IV. Practice Matters

A. Injunctive and Declaratory Relief

Section 22 of the *CLPA* provides as follows:

> ***22.*** *(1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.*
>
> *(2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.*
>
> R.S., 1985, c. C-50, s. 22; 1990, c. 8, s. 28; 2001, c. 4, s. 46(F).
>
> See: *Grand Council of Crees v. The Queen* [1982] 1 F.C. 599 (F.C.A.) and *Blanco v. Canada* [2003] F.C.J. No. 344 (T.D.)

Sections 18 and 18.1 of the *Federal Court Act,* authorize the Federal Court to issue injunctive relief against Federal Boards. However s. 18 does not authorize the granting of injunctions against Ministers of the Crown, except in cases where the Minister clearly acts beyond the scope of his statutory authority or is in arriving at his or her decision was motivated by irrelevant considerations or the he or she acted arbitrarily or in bad faith.

A recent case that illustrates some of the hurdles one must overcome to obtain an injunction against the Crown is *North of Smokey Fisherman's Assn. v. Canada (Attorney General),* 2003 FCT 33, [2003] F.C.J. No. 40 (T.D.). This case involved a judicial review proceeding against the Minister of Fisheries challenging his decision to open a winter cod fishery in the Sydney Bight area east of Cape Breton. While the hearing of the proceeding was pending, the applicant, an association of fishermen, brought on a motion for an interlocutory injunction enjoining the Minister from opening the fishery. The court dismissed the application for an injunction on the primary ground that S. 22 of the *Crown Liability and Proceedings* Act prohibits injunctions against the Crown when acting within the powers granted to it by law (although allowing declarations). Since the applicant was not able to show any statutory provision contravened by the Minister or any evidence that his decision was motivated by irrelevant considerations or that he acted arbitrarily or in bad faith, s. 22 applied. Alternatively, the court ruled that the applicant did not satisfy the three-part test for an injunction set out in *RJR MacDonald Inc. v. Canada (AG),* [1994] 1 S.C.R. 311. With respect to whether or not there existed a "serious issue to be tried", the court noted that when the result of the interlocutory motion will, in effect, amount to a final determination of the application, the threshold for satisfying the test is raised and the applicant must make out a prima facie case. With respect to "irreparable harm", the court noted that it was necessary to show irreparable harm to the applicant itself. With respect to "balance of convenience", the court noted that "an action taken by the Crown is prima facie deemed to be in the public interest . . ." (para. 24). When a public authority is prevented from exercising its statutory powers, "it can be said that the public interest, of which the authority is the guardian, suffers irreparable harm . . . A court should not, as a general rule, attempt to ascertain whether actual harm would result (para. 26) . . . Here, NOSFA, in effect, seeks to have the court manage or police the fishery. That is not a function of the court." (para. 27).

B. **Combining Claims for Both Damages and Judicial Review**

Given the jurisprudence that suggests that the availability of an administrative law remedy may have some impact on whether or not a court will impose a duty of care (as

discussed above), it is often more practical to pursue both judicial review and damages at the same time. Since an application for judicial review can only be made by way of originating application under sections 18 and 18.1 to 18.4 of the *Federal Court Act* this can be problematic. Although a judicial review proceeding can later be converted to an action with leave of the court under section 18.4(2), up until recently one could not add a damage claim to such an action when converting it.[8] Accordingly, in order to avoid this problem parties have in the past commenced separate actions for damages and applied to have them heard at the same time as the converted judicial review proceeding.[9] However, this may no longer be necessary as in the case of *Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans)* 2001 FCT 181[10], Hugessen J. rejected such an argument made by the Crown in a application to strike and allowed an application for judicial review and a claim for damages to stand in the same action.[11]

Since sections 18 (3) and 18.1(3b) of the *Federal Court Act* provide that declarations can only be obtained on applications for judicial review, this can similarly be problematic for litigants seeking both declarations and damages.[12] While some courts have allowed pleadings seeking declarations of right to remain in actions,[13] others have endorsed a procedure whereby the action would somehow be transformed in a judicial review proceeding and then transferred back into an action by way of order under section 18.4(2).[14] Presumably the best approach to take for a litigant seeking both damages and a declaration would be to commence an action for judicial review within the applicable time limit[15] and then apply to both convert it to an action and amend the pleadings to include a claim for damages.

C. Categorization of Claims

Since the Federal Court has exclusive jurisdiction over matters of judicial review and only concurrent jurisdiction over damage actions against the Crown, a body of jurisprudence has developed on the categorization of such claims. In most cases, this jurisprudence arises in the context of a challenge to the jurisdiction of a provincial superior court on the grounds that an action is really a matter of judicial review dressed up as a tort action.[16]

[1] Fridman, G.H.L., *Law of Torts in Canada* (2d) (Toronto: Carswell, 2002) pp. 332-6; Hogg, Peter W. and Monahan, Patrick J., *Liability of the Crown* (3d) (Toronto: Carswell 2000) pp. 163- 70; dissenting reasons for judgement of Linden J. in *Comeau's Seafoods Limited v. Canada (Minister of Fisheries and Oceans)* 1997] 1 S.C.R. 12 (S.C.C.) upholding for different reasons [1995] 2 F.C. 467 (F.C.A.) reversing [1992] 3 F.C. 54 (T.D.) (Strayer J.) paragraphs 77 – 94.

[2] In most decisions this is not specifically referred to a as the tort of abuse of public office, see for example the dissenting reasons of Linden J. at paragraph 91 of *Comeau, supra* note 1 where he says, "In the event a court decides that conduct in question involves a "policy decision and exempts the government agency from ordinary negligence principles, liability may still be imposed, but on another more complex and narrower basis. It is open to a claimant to prove that a policy decision was made in bad faith or that it was so irrational or unreasonable that it did not constitute a proper exercise of discretion." See also: Fridman, *Canadian Tort Law*, *supra* note 1 p. 335 and the cases referred to at his footnote 125. For cases specifically articulating the tort of abuse of process as a means for imposing liability for policy decisions see: *Voratich v. Law Society of Upper Canada* (1975) 20 O.R. (2d) 214 (Ont. High Ct.) at page 216 and the trial level decision of *Keeping v. Canada (A.G.)* [2002] N.J. No. 9 (Nfld. & Labrador S.C.) para. 56 as upheld on appeal at 2003 NLCA 21, [2003] N.J. NO. 116 (Nfld. & Labrador C.A.).

[3] See also: Fridman, *supra* note 1 at pp. 875-84, Hogg and Monahan, *supra* note 1 at pp. 144-6, Professor Irvine, "Misfeasance in Public Office: Reflections on some Recent Developments" (2002), 9 C.C.L.T. (3d) 26, Nancy E. Brown, "Abuse of Public Office" in *C.L.E. of B.C.,* "Suing and Defending the Government" Feb. 2002.

[4] See Vern W. DaRe, *Case Comment on Government Actions: Tort Flaw: Comeau's Sea Foods* (1997) 76 Can. Bar. Rev. 253

[5] Para. 101.

[6] Hogg, *supra* note 1 at p. 219.

[7] See Hogg, supra note 1 at 227 and the discussion of *The King v. Dominion of Canada Post Stamp Vending Company (1930)* [1930] S.C.R. 500 (cannot grant licence to sell postage stamps that was renewable in perpetuity).

[8] *Radil Bros. Fishing Co. Ltd.* 2000 F.C.J. 1885 referring to the unreported decision of Rouleau J. in the same proceeding (para. 13); *Durant v. Canada* 2002 F.C.T. 327 (para. 37); *Tench v. Canada* [1999] F.C.J. No. 1716.

[9] This was done in *Jada Fishing Co. v. Canada (Minister of Fisheries and Oceans)* 2002 FCA 103 (F.C.A.), para. 77.

[10] Upheld on appeal at 2002 FCA 255, although this particular issue was not specifically addressed by the court.

[11] He did, however, say that if the joinder turns out to be too cumbersome or otherwise inappropriate the court retains a discretionary power under Rule 107 to order separate trials.

[12] For a strict application of this rule see: *Radil Bros. Fishing Co. Ltd. v. Queen* 2000 F.C.J. 1885; *Khaper v. Canada* (1999) 178 F.T.R. 68 upheld by the F.C.A. at (2001) 268 N.R. 370.

[13] Minority concurring decision of the former Chief Justice Issac in *Ward v. Samson Cree Nation No. 444* (1999) 247 N.R. 254 (F.C.A.) (relying upon Rule 64) and the decision of MacKay J. in *Federation of Saskatchewan Indian Nations v. Canada* [2003] F.C.J. 429, 2003 FCT 306 (T.D.) following that decision.

[14] This was the remedy endorsed by the majority of the Federal Court of Appeal in *Ward v. Samson Cree, supra* note 12 based upon its power under section 52(a)(i) of the *Federal Court Act* to give the judgement that the trial division could have given. In doing so it also seemed to endorse having the action for judicial review and damages proceed in one action (see para. 49). See also *Maroney v. Canada* [2002 FCT 801 where this approach was followed by Prothonotary Hargrave (although he was a bit vague as to just how Rule 18.4(2) was to be applied).

[15] Under Rule 18.1(2) the time limit is thirty days, although there are exceptions to this rule and the court can grant extensions of time.

[16] See for example: *Oak Island International Group Ltd. v. Canda (Attorney General)* 2003 NSSC 47 (damage claim against Minister of Fisheries not judicial review); *Horseman v. Horse Lake First Nation* (2002 ABQB 765 (damage claim related to membership in Indian Band not judicial review); *Day Star First Nation v. Canada* 2003 SKQB 261 (challenge to the manner in which government funding is administered is in the nature of judicial review).