
CANADA / JUDGMENT

Finney v. Barreau du Québec

2004 SCC 36

COURT

Supreme Court of Canada

DECIDED

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Finney v. Barreau du Québec

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Report

[2004] 2 SCR 17

Case number

29344

Judges

McLachlin, Beverley; Iacobucci, Frank; Major, John C.; Bastarache, Michel; Binnie, William Ian
Corneil; Arbour, Louise; LeBel, Louis

On appeal from

Quebec

Subjects

Professional law

Torts

Notes

SCC Case Information: 29344

Decision Content

Finney v. Barreau du Québec, [2004] 2 S.C.R. 17, 2004 SCC 36

Barreau du Québec Appellant

v.

Christina McCulloch-Finney Respondent

and

Attorney General of Canada and

Federation of Law Societies of Canada Interveners

Indexed as: Finney v. Barreau du Québec

Neutral citation: 2004 SCC 36.

File No.: 29344.

2004: February 12; 2004: June 10.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for quebec

Civil liability — Barreau — Immunity of professional orders — Nature and extent of Barreau's civil liability — Action in damages against Barreau for breach of obligation to protect public in handling of complaints against an advocate — Whether Barreau can claim immunity set out in Professional Code — Concept of good faith — Professional Code, R.S.Q., c. C-26, ss. 23, 193 — Civil Code of Québec, S.Q. 1991, c. 64, art. 1376.

Law of professions — Professional orders — Civil liability — Immunity — Barreau — Scope of immunity granted to professional orders — Professional Code, R.S.Q., c. C-26, s. 193.

B was entered on the Roll of the Order of Advocates in 1978. Between 1981 and 1987, the Barreau's Committee on Discipline and the Professions Tribunal found him guilty on at least three occasions of disciplinary offences. In 1990, after a lengthy investigation, the Professional Inspection Committee submitted a report to the Executive Committee concluding that B was incompetent. Two years later, the Executive Committee required that B complete a refresher training period and ordered that he practise his profession only under the supervision of a tutor. The respondent's difficulties with B began in 1990. Between 1991 and 1993, she filed several complaints against B and even contacted the Office des professions to complain about the Barreau's inaction. It was not until 1994 that the syndic served B with a request to have him provisionally struck off the Roll, which was granted by the Barreau's Committee on Discipline in May 1994. In 1998, B was found guilty on 17 counts and struck off the Roll of the Order for five years. In 1996, the respondent launched an action in damages against the Barreau for breach of its obligation to protect the public in the handling of the complaints made against B. The Superior

Court dismissed the action. The Court of Appeal allowed the respondent's appeal in part and ordered the Barreau to pay her \$25,000 for the moral injury she had suffered.

Held: The appeal should be dismissed.

It is the Professional Code that sets out the basic rules governing the organization and activities of professional orders in Quebec, including the Barreau. Section 23 of the Code expressly provides that professional orders are created primarily to protect the public. To this end, the Code establishes two mechanisms for monitoring the professional competence of the members of a professional order and ensuring compliance with the rules of ethics, namely professional inspection and disciplinary action. On the other hand, because of the difficulties and risks to which the professional orders are exposed in performing their various functions, s. 193 of the Code prohibits prosecutions of professional orders and their officers and staff for acts engaged in "in good faith in the performance of their duties" or functions. This immunity provision gives professional orders the scope to act and the latitude and discretion that they need in order to perform their duties. This case raises the question of civil liability for acts or omissions of the Barreau in relation to the performance of its duties and functions in respect of supervision of the profession of law, that is, the manner in which the complaints made by the respondent were handled. The respondent alleged a number of consecutive faults which continued to be committed up to 1994. Since the legal situation of the parties was still in the course of being created on January 1, 1994, the rules governing liability in the Civil Code of Québec apply by virtue of the principle that the new legislation had immediate effect, set out in the Act respecting the implementation of the reform of the Civil Code.

The Barreau du Québec is a public body and, because of the specific nature of governments and the diversity and complexity of the duties assigned to them, art. 1376 C.C.Q. recognizes that the general rules of liability set out in art. 1457 C.C.Q. apply only "subject to any other rules of law which may be applicable to them". In this case, the changes to the general rules reflect the nature of the faults that are required to be shown in order to establish liability that is limited by the partial immunity granted by s. 193 of the Professional Code. Since good faith is the key concept in this provision, the respondent must show that the Barreau acted in bad faith. However, in the case of duties relating to the management of disciplinary cases, it would be contrary to the fundamental objective of protecting the public set out in s. 23 of the Professional Code if this immunity provision were interpreted as requiring evidence of malice or intent to harm in order to rebut the presumption of good faith. The concept of bad faith must be given a broader meaning that encompasses serious carelessness or recklessness.

The conduct of the Barreau, when considered in its entirety, constitutes a fault for which it cannot claim the immunity set out in s. 193. Exceptional though the case may have been, the conduct of the Barreau was not up to the standards imposed by its fundamental mandate, which is to protect the public. The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence. Neither the need to adhere to the statutory and procedural discipline framework and to act with care and caution nor the complexity inherent in any administrative process can explain the slowness seen in this case.

The nature of the complaints and B's professional record in fact made it plain that this was an urgent case that had to be dealt with very diligently to ensure that the Barreau carried out its mission of protecting the public in general and a clearly identified victim in particular. Despite the urgency of the situation the Barreau took over a year to request provisional striking off. The very serious carelessness the Barreau displayed amounts to bad faith, and the Barreau is civilly liable. As to the existence of a causal connexion and the assessment of the injury suffered by the respondent, the Barreau has not shown any error in the Court of Appeal's judgment.

Finally, this is an exceptional case in which the circumstances justify awarding the respondent costs on a solicitor and client basis since she represented herself until the case came before this Court and her appeal raises issues of general importance concerning the application of the legislation governing the professions in Quebec, the implications of which go beyond her particular case.

Cases Cited

Referred to: Fortin v. Chrétien, [2001] 2 S.C.R. 500, 2001 SCC 45; Doré v. Verdun (City), [1997] 2 S.C.R. 862; Prud'homme v. Prud'homme, [2002] 4 S.C.R. 663, 2002 SCC 85; 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; Morier v. Rivard, [1985] 2 S.C.R. 716; Québec (Procureur général) v. Deniso Lebel Inc., [1996] R.J.Q. 1821, leave to appeal refused, [1997] 1 S.C.R. vi; Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 S.C.R. 211; Augustus v. Gosset, [1996] 3 S.C.R. 268; Gauthier v. Beaumont, [1998] 2 S.C.R. 3; Roncarelli v. Duplessis, [1959] S.C.R. 121; Chaput v. Romain, [1955] S.C.R. 834; Corporation de St-Joseph de Beauce v. Lessard, [1954] B.R. 475; Directeur de la protection de la Jeunesse v. Quenneville, [1998] R.J.Q. 44, leave to appeal refused, [1998] 1 S.C.R. xiii; Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, 2001 SCC 80; Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79; Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13; Roberge v. Bolduc, [1991] 1 S.C.R. 374.

Statutes and Regulations Cited

Act respecting the Barreau du Québec, R.S.Q., c. B-1, ss. 81 et seq. [rep. 1994, c. 40, s. 261], 128.

Act respecting the implementation of the reform of the Civil Code, S.Q. 1992, c. 57, ss. 3, 85.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 49.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 300, 1376, 1457, 1474, 2805.

Professional Code, R.S.Q., c. C-26, art. 23, 48, 109, 112, 113, 116, 121 et seq., 126 et seq., 130, 162, 164, 193 [am. 1988, c. 29, s. 59], 194, 195, 196.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 47 .

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Giroux, Pierre, et Stéphane Rochette. “La mauvaise foi et la responsabilité de l’État”, dans *Développements récents en droit administratif et constitutionnel*, vol. 119. Cowansville, Qué.: Yvon Blais, 1999, 117.

APPEAL from a judgment of the Quebec Court of Appeal, [2002] R.J.Q. 1639, [2002] R.R.A. 706, [2002] Q.J. No. 1522 (QL), setting aside a judgment of the Superior Court, [1999] R.R.A. 83, [1998] Q.J. No. 3690 (QL). Appeal dismissed.

J. Vincent O’Donnell, Q.C., Raymond Doray and Jean St-Onge, for the appellant.

Guy J. Pratte, Susie N. Paquette and Georges Thibaut, for the respondent.

Michel F. Denis and Michèle Ducharme, for the intervener the Attorney General of Canada.

William J. Atkinson, for the intervener the Federation of Law Societies of Canada.

English version of the judgment of the Court delivered by

LeBel J. —

I. Introduction

1 An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers’ own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession, which are then responsible for ensuring the competence and honesty of their members in their dealings with the public (see *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 CSC 45, at paras. 11-18 and 52, per Gonthier J.). Subject to the limits defined by the applicable legal rules and principles, a law society will be liable for a breach of this supervisory duty. Such cases are indeed rare, but one has arisen in this instance. For the reasons that follow, which differ in part from the reasons of the Quebec Court of Appeal ([2002] R.J.Q. 1639), I would dismiss the appeal by the Barreau du Québec (“Barreau”) and accordingly affirm the decision appealed from, which found the Barreau liable to the respondent, Christina McCulloch-Finney, and ordered it to pay her \$25,000 in moral damages. The appeal thus raises the issues of the nature and extent of the Barreau’s liability and the scope of the immunities it enjoys in the exercise of the duties and functions assigned to it by the legislation governing the organization of the profession and the practice of the profession of law in Quebec, on which it relies here.

II. Origin of the Case

2 Following an order I made on October 22, 2003, the appellant filed a certificate stating that parts of the record were still covered by a sealing order and publication ban. Since some of the facts covered by the publication ban will be mentioned, the ban will be lifted with respect to the information disclosed in these reasons.

3 The Barreau's difficulties and the problems experienced by McCulloch-Finney, and the ten-year dispute between the parties, can be traced to a lawyer named Éric Belhassen and his misconduct. Mr. Belhassen was entered on the Roll of the Order of Advocates in 1978. In short order, he committed several breaches of professional ethics. Between 1980 and 1985, the Syndic of the Barreau lodged four disciplinary complaints against him for a variety of offences. The Committee on Discipline and the Professions Tribunal found him guilty on at least three occasions between 1981 and 1987. The Barreau was also concerned about his professional competence. The Professional Inspection Committee, the body with jurisdiction in this respect, initiated the first investigation in 1985. In 1990, after a number of delays caused for the most part by investigators departing and new investigators being appointed, the Professional Inspection Committee submitted a report to the Executive Committee concluding that Belhassen was incompetent. It recommended that his right to practise be completely suspended and that he be required to repeat his professional training in its entirety at the École du Barreau. The Court of Appeal characterized the Committee's recommendation as [translation] "polite, but alarming" (para. 11). The Professional Inspection Committee seemed to be persuaded that Belhassen was incompetent and unfit to practise the profession. At the same time, it recommended that the Executive Committee order, under ss. 81 et seq. of the Act respecting the Barreau du Québec, R.S.Q., c. B-1 (repealed on October 15, 1994; see now s. 48 of the Professional Code, R.S.Q., c. C-26), that Belhassen submit to a medical examination to determine his physical and mental fitness to practise the profession. The examination was performed. The Court of Appeal judgment is silent as to its results.

4 The Executive Committee then convened to consider the report of the Professional Inspection Committee. Belhassen was given notice to attend and was heard. Ultimately, on June 1, 1992, the Executive Committee did not suspend Belhassen's right to practise law. Instead, it decided to require that he complete a refresher training period, which consisted of participating in the activities offered by the Continuing Education Department of the Barreau in family law. Belhassen was also restricted to practising his profession under the supervision of a tutor, an eminent Montréal lawyer. The tutor was to submit quarterly reports to the Executive Committee. The tutor agreed to the appointment and undertook work under that mandate, which ended a year later in the circumstances described below.

5 In the interim, between 1990 and 1992, McCulloch-Finney's conflict with Belhassen was brewing. The respondent had the misfortune of crossing paths with this member of the Barreau in 1990. At the time, her husband, Samir Badr, was being represented by Belhassen in some commercial litigation. The respondent's son, Jasson, had also retained his services for a number of matters. McCulloch-Finney gave Belhassen a \$2,000 advance on her son's behalf. By a few

months later, there was general dissatisfaction. Jasson and his mother sought an accounting. Belhassen sued McCulloch-Finney to collect a debt that she claimed had been trumped up. In 1994, the action was dismissed. Jasson's lawyer then sent the Syndic of the Barreau a strongly worded complaint against Belhassen. The conflict between the respondent and the Barreau can be traced to this initial volley.

6 The respondent charged that the Barreau took no action on that complaint before it was repeated in 1996. The Barreau replied that an assistant syndic met with Belhassen to get his version of the events and then asked for comments from Jasson, who did not contact him again until 1996. After the initial complaint, there was one mishap after another. The lawyer representing McCulloch-Finney filed a fresh complaint in January 1991 regarding his colleague's conduct toward him and contacted the Barreau again in March 1991 in connection with the same difficulties.

7 The next complaint was filed by the respondent herself on January 22, 1993. It arose out of a confrontation with Belhassen that took place after the breakdown of the respondent's relationship with her spouse, Samir Badr. Following a complex series of legal disputes involving numerous proceedings, the respondent obtained a judgment against Badr and attempted to have it executed. Belhassen at times represented Badr in those cases, or was involved in various ways. Once judgment had been given, he himself brought a whole range of proceedings, or had them brought by third persons, to prevent execution of the judgment and recovery of the money owing. The complaint filed in January 1993 alleged breaches of the rules of ethics in the course of those proceedings. For instance, it was alleged that Belhassen had appeared both for the plaintiff and for the defendant in a proceeding thought up in an attempt to create a debt that could be set off against the respondent. Further complaints were sent to the syndic over the weeks that followed. McCulloch-Finney's lawyer alerted the Office of the Syndic to the fact the Belhassen was threatening him with bankruptcy proceedings. Belhassen later withdrew the petition in bankruptcy, however, after being given notice to appear by the Syndic in early March 1993. At that time, apart from files being opened and investigations initiated, nothing had yet been done. The respondent therefore decided to contact the Office des professions to complain about the Barreau's inaction. She brought the first action in damages against both the Barreau and Belhassen. At the end of April, however, she withdrew the action as against the appellant.

8 In the interim, the guerilla war that Belhassen had started in the courts reached its peak. The Superior Court was concerned about the deluge of proceedings, and the unusual nature of those proceedings. The Hon. Pierre A. Michaud, Associate Chief Justice of the Superior Court, had all of the proceedings joined and brought before him, and summoned all of the parties involved. The Office of the Syndic was given notice by the Superior Court and attended the hearing, the outcome of which was that any proceeding brought by Belhassen was to be subject to a special review. All this time, the tutor noticed nothing. At the end of April 1993, he complained to the Syndic that he was no longer able to contact Belhassen. He then learned about the Superior Court's intervention in respect of a series of proceedings, none of which he knew anything about. A few days later, he resigned from his position as tutor and reported to the Executive Committee.

As a result of the respondent's complaints, further communications from the Office des professions, the Superior Court hearing and the breakdown of the refresher training, the seriousness of the situation created by Belhassen's behaviour prompted the Chief Syndic to recommend to the Executive Committee that a syndic ad hoc be appointed. The appointment was made in October, and the new syndic took over the files in November.

9 In the interim, as the Court of Appeal observed, [translation] "Belhassen's guerrilla war against the [respondent] in the courts was in full gear" (para. 34). On October 28, 1993, the lawyer who was then advising the respondent contacted the Office des professions to stress the seriousness of the case. The Office asked the Barreau for an explanation on November 3. A few days later, in response to threats from Belhassen, the lawyer withdrew from the case. On January 12, 1994, the Office again contacted the Barreau and asked it to come to the respondent's assistance. On January 14, the syndic ad hoc sent Belhassen a formal notice and gave him 15 days to explain his actions. On March 29, 1994, the syndic ad hoc served Belhassen with a complaint containing 23 counts, and attached a request to have him provisionally struck off the Roll. Belhassen was provisionally struck off by the Committee on Discipline of the Barreau on May 19, 1994, effective May 24, 1994. On April 22, 1998, the Committee on Discipline found Belhassen guilty on 17 counts. On August 12, 1998, he was struck off the Roll of the Order for five years, but retroactively to 1994.

III. Judicial History

10 Before the disciplinary proceedings against Belhassen concluded, the respondent launched an action against the Barreau in damages, on January 8, 1996. In the action as amended on July 31, 1998, the respondent claimed \$975,000 in compensatory, material, moral and exemplary damages. The respondent was initially seeking damages against the Barreau and certain of its senior officials for breach of their obligation to protect the public in their handling of the complaints made against Belhassen. The Barreau vigorously denied any wrongdoing but, on the other hand, cited the immunities granted by the legislation that governs the professions in Quebec.

A. Quebec Superior Court, [1999] R.R.A. 83

11 The respondent failed completely in the Superior Court. In its judgment, the court analyzed the Belhassen case, the relationship between Belhassen and the respondent and the dispute between the respondent and the Barreau carefully and at length. Because of the three-year prescription in the Civil Code of Québec, S.Q. 1991, c. 64, the trial judge held that since the action had been served in early 1996, only the facts that had transpired since the beginning of 1993 should be taken into account in determining whether the Barreau had committed any wrongful acts for which it could be held liable. In the judge's opinion, because of the immunity granted to the Barreau and its functionaries and officers by s. 193 of the Professional Code for acts engaged in the performance of their duties or functions, the respondent had to prove intentional wrongdoing. While he recognized that there had been considerable delays in the consideration of

the complaints made by McCulloch-Finney and in the course taken by the disciplinary proceedings against Belhassen, Normand J. concluded that the Barreau had exercised its powers properly and had committed no wrongful act in this case, the difficulty of which he acknowledged. He therefore dismissed the action. His judgment was appealed to the Quebec Court of Appeal.

B. Quebec Court of Appeal, [2002] R.J.Q. 1639 (Deschamps, Robert and Pelletier JJ.A.)

12 The Quebec Court of Appeal allowed the respondent's appeal in part. The court held, first, that the trial judge had erred in failing to have regard to the events prior to January 1993 in assessing the Barreau's liability. Even though an action in liability based on those specific facts was prescribed, they should have been taken into account in assessing the conduct of the Barreau in this case. The Court of Appeal examined those facts and the facts set out by Normand J., and strongly criticized the Barreau's conduct. In short, Belhassen posed a grave and imminent danger to the public and the Barreau was aware of this danger. The court found the time that elapsed between the complaints made by the respondent in early 1993 and the request for provisional striking off to be unacceptable and inexcusable. In the court's opinion, the Barreau had, by its conduct, failed to exercise the administrative discretion and perform the duties delegated to it by the Professional Code to achieve the objective set out in s. 23: the protection of the public. The court found that the Barreau had thus failed to exercise its jurisdiction and accordingly no longer enjoyed the immunity set out in s. 193 of the Professional Code. Consequently, the delays and negligence on its part all constituted civil faults for which it was liable. The Court of Appeal concluded by ruling that McCulloch-Finney had suffered a moral injury which it assessed in the amount of \$25,000, and which it imputed to the wrongful acts committed by the appellant. The appeal decision therefore ordered the Barreau to pay that amount but denied any relief against individual members of the Barreau's staff. The appeal for which leave was granted by this Court seeks to have that judgment set aside and the action dismissed in its entirety.

IV. Relevant Legislation

13 The relevant statutory provisions, as they read at the time of the dispute, are as follows:

Professional Code, R.S.Q., c. C-26

23. The principal function of each corporation shall be to ensure the protection of the public.

For this purpose it must in particular supervise the practice of the profession by its members.

193. The syndics, assistant syndics, corresponding syndics, the investigators and experts of a professional inspection committee, the members of the Office, of a Bureau, of a committee on discipline, of a professional inspection committee or of a committee of inquiry established by a Bureau, and the members of a tribunal hearing an appeal from a decision by a committee on discipline or by a Bureau, shall not be prosecuted for acts done in good faith in the performance of their duties.

Civil Code of Québec, S.Q. 1991, c. 64

1376. The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

V. Analysis**A. The Nature of the Issues**

14 The issue in this appeal is the nature of the civil liability rules that apply to the activities of the Barreau, a public body with administrative, regulatory and disciplinary powers delegated by the Quebec National Assembly. The positions taken by the parties on that liability lead to different conclusions. The respondent argued that the rules were similar to the common law rules of liability. The appellant argued for rules under which it would be liable only in exceptional cases, because of the statutory immunities and the limitation of liability principles that it contends derive from the public law that applies in Quebec.

15 Given these divergent positions, we must first examine the civil law rules that apply to the liability of professional orders. It will then be necessary to determine whether that liability is limited by the immunities or public law principles, and if so, to what extent. To complete this analysis, we will determine whether the conduct of the Barreau constitutes a fault for which it would have delictual civil liability. To carry out this analysis, we must first review the legal framework governing the activities of the Barreau in Quebec and the functions delegated to professional orders by Quebec legislation and, more specifically, by the Professional Code. In the course of this analysis, we will also review the mechanisms created for supervising the competence and discipline of lawyers and the obligations that the applicable legislation governing professions imposes on the Barreau in this respect.

B. The Professional Organization of the Barreau in Quebec

16 In Quebec law, it is the Professional Code that sets out the basic rules governing the organization and activities of the more than 40 professional orders, which include the Barreau. In addition, the Act respecting the Barreau du Québec contains special provisions that do not, however, alter the principles governing its organization and activities that are set out in the Professional Code. The Professional Code states the essential purpose for which independent

orders, such as the Barreau du Québec, are created. The primary objective of those orders is not to provide services to their members or represent their collective interests. They are created to protect the public, as s. 23 of the Professional Code makes clear:

23. The principal function of each corporation shall be to ensure the protection of the public.

For this purpose it must in particular supervise the practice of the profession by its members.

(See also *Fortin v. Chrétien*, *supra*, at para. 11, per Gonthier J.)

17 This legislation gives the members of the Barreau a monopoly over the performance of a number of professional acts, such as giving consultations, drawing up pleadings and representing parties before the courts (Act respecting the Barreau du Québec, s. 128). Since that monopoly was not created for private purposes, but rather to recognize the social importance of the role of the lawyer in a democratic society founded on the rule of law, it imposes significant obligations on the professional order to monitor the competence and supervise the conduct of its members once they have been entered on the Roll of the Order (*Fortin v. Chrétien*, at paras. 12-18).

18 The Professional Code establishes two mechanisms for monitoring the professional competence of the members of a professional order and ensuring compliance with the rules of ethics: professional inspection by the Syndic and the committees on discipline, and the discipline that they may impose. There are other means available to the Barreau to enable it to meet its objective of preserving the competence, honesty and diligence of its members, such as professional training, refresher training, information services and trust account audits. The only mechanisms of concern for the purposes of this appeal are professional inspection and discipline. Although the two share the ultimate goal of maintaining and improving professional standards, professional inspection is more specifically concerned with lawyers' competence, while discipline focusses on their conduct. The role of professional inspection is preventive, while the role of discipline is punitive. As we shall see, however, a single problem may raise both professional inspection and discipline issues. This was certainly true in the *Belhassen* case.

19 Like all other professional orders, the Barreau was required to establish a Professional Inspection Committee, in accordance with s. 109 of the Professional Code. The Committee performs a general function of supervising the manner in which professionals keep their records and offices. In addition, at the request of its Bureau or of its own initiative, the Committee may inquire into the fitness of members to practise their profession, or their professional competence (s. 112). The Committee may recommend a range of measures, including training courses or limitations on the right to practise law (s. 113). It is then up to the decision-making bodies of the Barreau to take the action they consider appropriate. It should also be noted that the lawyer in question has to be heard, is entitled to defend himself or herself and has a right to appeal to the Professions Tribunal in certain cases.

20 The other mechanism for protecting the public is discipline. Under the Professional Code, an independent functionary, the Syndic, is responsible for investigating disciplinary complaints and deciding whether a complaint should be lodged with the Committee on Discipline. If the situation so warrants, the Syndic brings the matter to that Committee (ss. 121 et seq.). The procedure is adversarial. The Syndic must inform the lawyer and obtain his or her version of the facts. The Committee on Discipline is an administrative tribunal that is required to apply the rules of the adversarial process and the principles of procedural fairness (ss. 116 and 126 et seq.). No finding of guilt is made, or penalty imposed, until that process has been completed, and those decisions may be appealed to the Professions Tribunal (ss. 162 and 164). As an exception to that rule, the Syndic may, before a decision is made on a complaint, request the provisional striking off of a lawyer, *inter alia* if the protection of the public could be compromised (s. 130). This complex mechanism reflects the values that underlie the Canadian justice system, but neither simplifies nor facilitates the work of the Barreau's staff or of the members of the Professional Inspection Committee and the Committee on Discipline, whose responsibility it is to take action. The action that they take is necessarily governed by a binding legal framework. We must bear the existence and scope of that framework in mind, in analyzing the appellant's situation and assessing its liability.

21 On the other hand, because of the difficulties and risks to which the professional orders are exposed in performing their various functions, the legislature has granted them immunity for acts engaged in in good faith in the performance of their duties or functions, within the meaning of and subject to the limits set out in s. 193 of the Professional Code. In addition, ss. 194, 195 and 196 limit the availability of judicial review of the decisions of professional orders and the Professions Tribunal.

C. The Applicable Rules of Civil Liability

22 The Barreau du Québec is a public body and, as such, performs a variety of functions delegated to it by the legislature. The acts or omissions it is accused of by the respondent, which form the basis of her action for damages, occurred in the course of its performance of its functions in supervising the conduct and competence of one of its members. Here again, then, the question of the relationship between the civil law and public law of Quebec must be addressed in order to determine what rules of civil liability apply to McCulloch-Finney's action in damages.

23 To answer that question, we must first briefly review the transitional law problem raised by the coming into force of the Civil Code of Québec on January 1, 1994, in relation to facts that found an action and that took place before and after that date, approximately between early 1993 and the spring of 1994. Depending on the solution that is reached, the Civil Code of Québec may or may not apply, and the answer has a direct impact on the substance of the rules governing the delictual civil liability of a public body. To solve this problem, we must refer to the transitional rules of law set out in the Act respecting the implementation of the reform of the Civil Code, S.Q. 1992, c. 57 ("Transitional Law Act").

24 Section 85 of the Transitional Law Act provides that the law in force at the time of the fault or act out of which liability arose:

85. The conditions of civil liability are governed by the legislation in force at the time of the fault or act which causes the injury.

25 That provision is problematic in this case, because the facts out of which liability arose do not boil down to a single isolated event at a particular point in time. Rather, as noted earlier, the respondent alleges a number of consecutive faults which continued to be committed up to 1994. The legal situation of the parties was still in the course of being created on January 1, 1994. The Civil Code of Québec therefore applies by virtue of the principle that the new legislation had immediate effect, set out in s. 3 of the Transitional Law Act:

3. The new legislation is applicable to legal situations which exist when it comes into force.

Any hitherto unfulfilled conditions for the creation or extinction of situations in the course of being created or extinguished are therefore governed by the new legislation; it also governs the future effects of existing legal situations.

26 The coming into force of the Civil Code of Québec had a significant impact on the rules governing the civil liability of governments and public bodies in Quebec. This change was the result of the new position assigned to the Civil Code in the hierarchy of the sources of law in matters within the legislative jurisdiction of the Quebec National Assembly. As this Court has had occasion to note in the past, the effect of the preliminary provision of the Civil Code is that it became the *jus commune* of Quebec. In addition, under art. 1376 C.C.Q. the law that applies as a general rule to the contractual undertakings and delictual liability of governments is the law set out in the Civil Code, subject to the rules of public law; the relevance of those rules to the conduct of the business of public bodies is recognized by art. 300 C.C.Q. (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at paras. 15-17 and 20-21, per Gonthier J.; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85, at paras. 28-31; *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, at para. 20).

27 As a rule, an examination of the liability of governments begins with the application of the rules of liability established by the Civil Code of Québec. However, art. 1376 C.C.Q. states that the Civil Code applies only “subject to any other rules of law which may be applicable to them”. This reserve on the part of the legislature reflects the specific nature of governments, and the diversity and complexity of the duties assigned to them. Very often, the assessment of a public body’s conduct and decisions that a court might make based on the simple, straightforward application of the rules of the *jus commune* would not provide it with the freedom it needs in order to perform its functions. That is why this Court recognizes that general principles or specific rules of public law may either prevent the general rules of civil liability from applying altogether or substantially alter the rules by which they operate (*Prud'homme v. Prud'homme*, *supra*, at para. 31; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, *supra*, at para. 22).

28 As I noted earlier, the professional orders governed by the Professional Code perform significant, diverse and often difficult social functions. To achieve their fundamental objective of supervising the practice of their profession, professional orders exercise regulatory powers, manage complex administrative systems and, on occasion, through the actions of committees, perform adjudicative functions.

29 The difficulties inherent in the exercise of the powers of professional inspection and discipline, in particular, for a body such as the Barreau, are undeniable. Although the objectives of professional inspection actions are training and prevention, they may call for a thorough examination of a lawyer's methods of practice, and the lawyer's right to practise the profession may be at stake as a result. Confrontation is an unavoidable result of disciplinary proceedings. When disciplinary investigation is initiated, the aggrieved or dissatisfied client or third party, the lawyer in question and the Syndic are brought into contact. In this often emotion-filled and very tense situation, in which the lawyer nonetheless has the right to defend himself or herself, the Syndic must verify the material in the file, gather information from the parties, and assess that information. The Syndic must then decide whether a complaint should be lodged with the Committee on Discipline. Such a process requires time, care and tact to do this job. It will sometimes displease some people, whatever the outcome of the case. In this situation, it is very easy to understand why the rules of public law are applied in order to determine the extent of a professional order's liability.

30 While reference is sometimes made to general principles that derive from the case law, the law itself frequently provides the necessary rules. In fact, it is important to examine the wording of those rules carefully before proceeding too hastily to apply the general principles. This is true in the case of the Professional Code. That Act contains an immunity provision, s. 193, which prohibits prosecutions of professional orders and their officers and staff for acts engaged in "in good faith in the performance of their duties" or functions. The existence of such a provision requires that courts hearing an action against the Barreau examine the scope of that provision to determine the circumstances in which a body of that nature may be liable.

31 Although the result of this method is also recognition of the Barreau's liability, it is preferable to take an approach different from the one taken by the Quebec Court of Appeal. That court declined to apply s. 193, because in its opinion the appellant had failed to exercise its powers for the purposes set out in the Act, that is, the protection of the public. That method has the disadvantage of confusing review of the legality of a public body's decisions with the rules that determine that body's civil liability. Undoubtedly those questions will overlap on occasion, and acts that are illegal and that may be set aside under the rules that govern review for legality may found an action in civil liability. However, this does not often happen, and illegality is not necessarily synonymous with civil fault, or a source of delictual liability (*Morier v. Rivard*, [1985] 2 S.C.R. 716, at p. 745, per Chouinard J.; *Québec (Procureur général) v. Deniso Lebel Inc.*, [1996] R.J.Q. 1821, at pp. 1836-37, leave to appeal refused, [1997] 1 S.C.R. vi; *R. Dussault and L. Borgeat*, *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 190).

32 In this case, the issue is clearly the question of civil liability for the acts or omissions of the Barreau in relation to the performance of its duties and functions in respect of supervision of the profession of law, that is, the manner in which the complaints made by McCulloch-Finney and the cases involving Belhassen were handled. This is not an issue of jurisdiction. The answer to the question depends on how s. 193 of the Professional Code is interpreted and applied, and on the scope of the immunity that s. 193 confers with respect to actions in delictual civil liability. The parties acknowledge that s. 193 gives the Barreau only partial immunity with respect to its actions. After that, their positions differ strongly when they attempt to delineate the rules of civil liability that apply to the legal situation in issue in this case.

D. The Scope of the Barreau's Immunity

33 In the submission of the Barreau, the key concept in analyzing s. 193 is good faith. Article 2805 C.C.Q. establishes a presumption of good faith. Moreover, in the appellant's submission, s. 193, which applies in this case, shields it from all liability unless its bad faith is established. In other words, according to the appellant's arguments on appeal, only an action based on proof of intentional fault, which would essentially amount to malice, would fall outside the purview of s. 193. In the appellant's submission, even if it concedes that it was slow to deal with these complaints and cases, there is nothing from which it could be concluded that an intentional fault was committed. The respondent, relying on the reasoning of the Court of Appeal, tried to rule out any application of immunity, but argued that the fault in the conduct of the Barreau was so serious that no protection was available to it under s. 193 on a correct interpretation of that provision. What must therefore be done is to determine what kind of gross negligence, if any, would fall outside the purview of an immunity provision like the one in issue here.

34 As long as there have been systems of civil liability, legal scholars have tried to classify faults according to their seriousness and to define each of them. That effort is plainly ongoing, and it has generated a considerable body of case law and never-ending debates in the legal literature. Some of these distinctions have been incorporated into the Civil Code of Québec, where they appear in art. 1474, which prohibits the exclusion of liability for intentional or gross fault:

1474. A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

He may not in any way exclude or limit his liability for bodily or moral injury caused to another.

35 It remains easier to describe than to define those categories of fault, as illustrated by a passage from a frequently cited Quebec treatise on the law of civil liability. The authors of that work point out that the positive law recognizes a classification, but the description of the categories demonstrates the fluidity of their content:

[translation]

165 . . . However, the courts and now the legislature (see art. 1474 C.C.Q.) have retained the concept of gross fault from this classification, a concept that refers, in both contractual and extracontractual contexts, to conduct that shows recklessness, gross carelessness or total disregard for the interests of others, and assign specific legal consequences to it. The courts have also equated gross fault with intentional, wilful and fraudulent fault and sometimes, in specific circumstances, “serious” fault.

(J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (6th ed. 2003), at pp. 123-24)

36 In this case, there is no need to revisit this issue in its entirety. The nature of the analysis that is required in order to resolve this matter may be determined by referring to the concept of good faith in s. 193 of the Professional Code. That concept lies at the heart of the interpretation and application of this provision. On this point, I accept the appellant’s argument that the respondent’s action must be dismissed if she is unable to rebut the presumption of good faith under art. 2805 C.C.Q. and show absence of good faith in the conduct of the Barreau.

37 What, then, constitutes bad faith? Does it always correspond to intentional fault? The courts do not appear to equate the state or acts of bad faith squarely with a demonstrated intent to harm another or, consequently, to require evidence of intentional fault. That direct linkage is made only in the case law relating to punitive damages under s. 49 of the Charter of Human Rights and Freedoms, R.S.Q., c. C-12. For example, in *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, this Court adopted a narrow definition of intentional fault, based on the nature and function of that type of action. The actual consequences of the wrongful conduct must have been intended (para. 117). Proof of recklessness is not sufficient (paras. 114 and 121). This approach has been followed in subsequent decisions of this Court (see *Augustus v. Gosset*, [1996] 3 S.C.R. 268, at paras. 77-78; *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3, at para. 105).

38 Outside the context of claims for punitive damages, the law of civil liability in Quebec does not, however, appear to take such a narrow view of the content of the concept of bad faith. It appears, rather, to accept evidence of conduct described as “l’insouciance ou l’incurie grave ou déréglée” (recklessness or serious or extreme carelessness), expressions that reflect an attempt to translate into French the legal concept of “recklessness” that is familiar to legal English. The application of that concept to the civil liability of governments has been debated. It has been observed that the interpretations applied to that concept have been varied and sometimes irreconcilable. In some cases, overly broad interpretations threatened to unduly extend the scope of public liability and deny administrative decision-makers the latitude and discretion they need in order to discharge their duties. In others, the interpretation was so narrow that bad faith was of very little practical use as a source of liability (P. Giroux and S. Rochette, “La mauvaise foi et la responsabilité de l’État”, in *Développements récents en droit administratif et constitutionnel* (1999), vol. 119, 117, at pp. 127-33).

39 These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised (Dussault and Borgeat, *supra*, vol. 4, at p. 343). This Court seems to have adopted a similar view in *Chaput v. Romain*, [1955] S.C.R. 834. In that case, provincial police officers were held liable for breaking up a meeting of Jehovah's Witnesses. Although the police had been granted immunity by a provincial statute for acts carried out in good faith in the performance of their duties, Taschereau J. concluded that the police officers could not have acted in good faith, as there was no other explanation for their negligence (p. 844). (See also, but in the context of an action to quash a municipal by-law, the comments by Pratte J. in *Corporation de St-Joseph de Beauce v. Lessard*, [1954] B.R. 475, at p. 479.) Moreover, the fact that actions have been dismissed for want of evidence of bad faith and the importance attached to this factor in specific cases do not necessarily mean that bad faith on the part of a decision-maker can be found only where there is an intentional fault, based on the decision-maker's subjective intent (see, for cases dealing with intentional fault: *Deniso Lebel Inc.*, *supra*; *Directeur de la protection de la Jeunesse v. Quenneville*, [1998] R.J.Q. 44 (C.A.), leave to appeal refused, [1998] 1 S.C.R. xiii).

40 An immunity provision such as the one set out in s. 193 of the Professional Code is intended to give professional orders the scope to act and the latitude and discretion that they need in order to perform their duties. In the case of duties relating to the management of disciplinary cases, it would be contrary to the fundamental objective of protecting the public set out in s. 23 of the Professional Code if this immunity were interpreted as requiring evidence of malice or intent to harm in order to rebut the presumption of good faith. Gross or serious carelessness is incompatible with good faith. It may therefore be concluded that, in the case of the exercise of these case management powers, the requirement that the performance or failure to perform an act have been committed in bad faith is not a bar to an action in damages against a professional order that is subject to the Professional Code. In accordance with art. 1376 C.C.Q., the rules of civil liability that are applicable to the actions of the Barreau are the general rules set out in art. 1457 C.C.Q., with the changes that reflect the nature of the faults that are required in order to establish liability that is limited by the partial or qualified immunity granted by s. 193 of the Professional Code. I would point out, however, that we need not make a finding as to the legal principles that would apply to the exercise of adjudicative functions by bodies such as the committees on discipline and the Professions Tribunal. Accordingly, we must now apply the rules that govern liability that were defined above and determine whether the conduct of the Barreau was such as to justify the award made against it by the Quebec Court of Appeal.

E. Application of the Rules of Liability

41 First, the problem of how the rules of civil liability defined above are to apply does not raise a question of fact or of the assessment of evidence. On this point, the appellant is wrong to suggest that the Court of Appeal improperly revised the trial judge's findings of fact. Rather, we must resolve a question of law, having regard to facts that have been clearly established; the question is whether the conduct of the Barreau, when considered in its entirety, constitutes a fault for which the Order cannot claim the immunity set out in s. 193 of the Professional Code. In any event, as the Court of Appeal pointed out, the Superior Court made an obvious and serious error in assessing the facts. The trial judge failed to have regard to events prior to 1993 in assessing the conduct of the Barreau. Even though civil liability based on the events that occurred before that time is precluded by prescription, those events were still relevant in assessing the conduct of the Barreau after fresh complaints were made by McCulloch-Finney. They were also useful for putting together a profile of Belhassen's professional career since he was entered on the Roll of the Order and were needed in order to make a better assessment of the duty of diligence that rested on the Barreau after it received these complaints.

42 In the face of all of these facts, the Court of Appeal passed harsh judgment on the conduct of the Barreau, particularly in respect of its lack of diligence and its slowness to act, not to say its lack of action, in its handling of McCulloch-Finney's complaints. In my view, that judgment was justified. The attitude exhibited by the Barreau, in a clearly urgent situation in which a practising lawyer represented a real danger to the public, was one of such negligence and indifference that it cannot claim the immunity conferred by s. 193. The very serious carelessness it displayed amounts to bad faith, and it is liable for the results. This is apparent on a quick review of all the facts.

43 At the point when fresh complaints were made by the respondent, the Barreau had to have been aware of Belhassen's problematic professional history. In the language of criminal law, he had a record. He had committed disciplinary offences and had been found guilty of them. Furthermore, the Professional Inspection Committee had conducted a lengthy investigation into his professional practices and competence, and had stated its concerns in that respect in the clearest terms possible. In any event, the Executive Committee had decided that it was necessary, at the very least, to subject Belhassen to a supervision period, which was still in effect when McCulloch-Finney again went to the Barreau in early 1993. The Barreau and its Syndic had to have been aware of this situation and must have taken it into account in considering the complaint and making a decision on it. In spite of the necessary administrative separation between discipline and professional inspection, the Barreau had knowledge of everything that Belhassen had done and of his record of professional misconduct.

44 The Barreau must exercise judgment and care in performing its disciplinary functions. The Syndic must take care in conducting investigations, and must respect the rights guaranteed to lawyers by the legislation governing the profession and by the principles of procedural fairness. The Syndic may not disbar lawyers of his or her own accord. A complex, binding procedure must be followed, and it provides that provisional striking off is an exceptional measure to be taken by

decision of the Committee on Discipline or the Professions Tribunal. Neither the need to adhere to the statutory and procedural discipline framework and act with care and caution nor the complexity inherent in any administrative process can explain the slowness and lack of diligence seen in this case. The nature of the complaints and the lawyer's professional record in fact made it plain that this was an urgent case that had to be dealt with very diligently to ensure that the Barreau carried out its mission of protecting the public in general and a clearly identified victim in particular.

45 Despite the urgency of the situation the Barreau took over a year to request provisional disbarment, which was in fact quickly granted by the Committee on Discipline. In the interim, McCullock-Finney had repeated her complaints. The Office had more than once asked the Barreau for an explanation. Even the Superior Court had had to get involved in the matter. Troubled by the rising tide of proceedings brought by Belhassen in court cases involving McCullock-Finney, the Hon. Pierre A. Michaud, Associate Chief Justice of the Superior Court, had summoned all the parties to a special hearing to stem the procedural flood. The Superior Court had informed the Syndic of the situation and notified him of the hearing, which he in fact attended. Several days later, when Belhassen's tutor was informed of the hearing that had been held, he terminated his mandate. Thereafter, despite the nature of the acts of which Belhassen had been accused, a syndic ad hoc was not appointed until the fall of 1993. The complaints that were needed were not lodged until the end of March 1994. The provisional striking off, which put an end to the harassment of McCullock-Finney, was granted in May 1994. Exceptional though the case may have been, the conduct of the Barreau in this matter was not up to the standards imposed by its fundamental mandate, which is to protect the public. The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence. The Barreau is liable, as held by the Court of Appeal.

46 One other comment seems timely here, regarding an aspect of the arguments made by the Barreau regarding the analysis of its civil liability. In the appellant's submission, the common law principles that apply to public bodies preclude liability in its case. As the respondent pointed out, in common law, the Barreau would have been no less liable in the circumstances of this case if the analysis adopted by this Court in *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 CSC 80, and *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 CSC 79, had been applied. The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.

F. Damages and Causation

47 I now turn to the issues of damages and causal connection. The Court of Appeal concluded that the inaction on the part of the Barreau had allowed Belhassen to pursue his campaign of harassment in the courts. That conclusion is the necessary inference from the facts in the record. The Court of Appeal did not err in this regard. It also recognized that McCullock-Finney had suffered moral injury, which it assessed at \$25,000. Here again, no error has been shown with

respect to the existence of the injury. There was no demonstrable error in the assessment of that injury. Although the award was probably generous, it is not vitiated by any error in principle that would warrant intervention by this Court to revise it. I would find the appeal to be without merit in all respects.

G. Costs

48 Given the circumstances of this case, I would award the respondent her costs in this Court on a solicitor and client basis. Costs are awarded on this basis only in exceptional cases, under s. 47 of the Supreme Court Act, R.S.C. 1985, c. S-26 (see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at paras. 86-87; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 445-46). In this case, the respondent represented herself until the case came before this Court, where a lawyer agreed to represent her. The appellant's appeal raised issues of general importance concerning the application of the legislation governing the professions in Quebec, the implications of which go beyond her particular case. Given the situation, this Court is justified in awarding the respondent costs on a solicitor and client basis.

VI. Conclusion

49 For these reasons, I would dismiss the appeal. I would award the respondent her costs in this Court on a solicitor and client basis.

Appeal dismissed.

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Solicitors for the respondent: Borden Ladner Gervais, Ottawa.

Solicitor for the intervener the Attorney General of Canada: Attorney General's Prosecutor, Montréal.

Solicitors for the intervener the Federation of Law Societies of Canada: McCarthy Tétrault, Montréal.

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