Discretionary Coherence: Excluding the Private Law Liability of Public Authorities in Paradis Honey v Canada

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I. Introduction

'[F]EW HAVE BEEN brave enough to articulate a unified theory of government liability.'[1] In Canada, public authorities occupy a unique space when it comes to legal liability. Public authorities are subject to the public law (for example, by way of judicial review of a governmental decision). The public law exists for the sole purpose of addressing the relationship between the government and other parties. Public authorities are also subject to private law, which generally governs the relationship between non-governmental parties (for example, a public authority may be liable in negligence).[2] The private law in Canada has adapted to deal with the government actor's unique characteristics. Where a plaintiff seeks damages, he

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1 Geoff McLay, 'What are we to do with the public law of torts?' (2009) 7 NZJPIL 373. See e.g. Tom Cornford, *Toward a Public Law of Tort* (Ashgate 2008); David Cohen and JC Smith, 'Entitlement and the Body Politic: Rethinking Negligence in Public law' (1986) Can Bar Rev 1.

2 See generally Robert M Solomon et al, *Cases and Materials on the Law of Torts* (9th edn, Carswell 2015). In private law, a public authority may be liable for performing a variety of governmental functions. This paper is only concerned with government liability for administrative functions. More particularly, government liability in tort (as opposed to breach of contract). Public authorities may only exercise an administrative function if they are empowered to exercise administrative acts. Administrative functions involve establishing and applying policies that affect the public. For example when a licensing board prohibits a certain act it is exercising an administrative function.

or she must generally proceed in private law.[3] In contrast, monetary remedies in public law are limited,[4] while other non-monetary remedies are available.[5] In this way, public authorities straddle public and private law.[6]

Before his appointment to the Federal Court of Appeal, Stratas JA observed that public authority liability in Canada was 'fraught with uncertainty, conflicting principles, and unresolved questions.'[7] Until recently, only private law actions typically resulted in a damage award for a successful plaintiff. In *Paradis Honey v Canada*.[8], Stratas JA, writing for the majority of the Federal Court of Appeal, proposed a new framework to grant monetary relief in public law Although Stratas JA did not propose completely removing private law liability of public authorities, his suggestion that a monetary award may be necessary as grounded in public law implied that private law liability of public authorities is currently inadequate. Moreover, Stratas JA suggested that 'the current law of liability – the provenance

3 Freya Kristjansen and Stephen Moreau, 'Regulatory Negligence and Administrative Law' (2012) 25 CJALP 103 at 104; *Ashby v White* (1703), 2 Ld Raym 938, 92 ER 126 (QB), rev'd Ld Raym 320, 92 ER 710 (HL) ('If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for a want of right and want of remedy are reciprocal' at 953). The maxim is not, *ubi damnum, ibi remedium*: 'wherever there is a right, there is a remedy'; Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages* (Irwin Law 2014) ('From a pragmatic point of view, the issue of remedies is of utmost importance in civil litigation since a right has practical value only to the extent that it is vindicated by an adequate remedy' at 1).

4 Under Part I of the Constitution Act 1982, Canadian Charter of Rights and Freedoms, s 24(1) (the "Charter"): a claimant may obtain damages for a breach of their *Charter* rights.

5 JM Browns and M Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing 1998) ('The defining characteristic of the remedies of *certiorari*, prohibition, and *mandamus*, is that they are available only in respect of a breach of a duty imposed by public law' at para 1.1200).

6 McLay (n 2) 374.

7 David Stratas, 'Damages as a Remedy Against Administrative Authorities: An Area Needing Clarification' (Paper delivered at the CIAJ Annual Conference 2009) [unpublished] [Stratas 2009] (Stratas argues for a 'unified coherence' of public authority liability: 'It would be more coherent if there were a single standard of misconduct by administrative authorities that invites liability, and a single set of defences; then there would be one vision of the 'justice-governance' policy tension. At present though, the analysis above shows that we have much uncertainty and many questions surrounding a patchwork array of causes of action and defences' at 370); see also David Stratas, 'Public Law Remedies: The Next Five Years' (Paper delivered at Annual Educational Seminar at Court of Appeal for Ontario, 2004) [unpublished]. Stratas JA is not alone in this view. See *Syl Apps Secure Treatment Centre v BD* (2007) SCC 38; *Fullowka v Pinkerton's of Canada Ltd* (2010) SCC 5; see also Kristjansen (n 4) (many cases are 'contradictory' and 'in a state of lamentable confusion' at 127); *Just v British Columbia*, [1989] 2 SCR 1228; Paul Daly, 'The Policy/Operational Distinction – A View from Administrative Law', in Matthew Harrington (ed) *Compensation and the Common Law* (LexisNexis 2015); Bruce Feldthusen, 'Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified' (2014) 92 Can Bar Rev 211, 214, 216–217.

8 [2015] FCA 89 (Justice Nadon concurring).

and essence of which is private law … should now end.'[9] I argue that the courts should not adopt the *Paradis Honey* framework to the exclusion of private law for three reasons.[10] First, the premise under which Stratas JA operates, namely that there exists, or should exist, a rigid distinction between public and private law, is flawed. Stratas JA places too much importance on keeping the public and private separate. I assert that, to the contrary, public and private law are not so divergent. Nor should they be. There is much overlap between these two bodies of law. This overlap should not be considered problematic. Even assuming a rigid public-private divide, Stratas JA nonetheless imports private law principles into his public law claim. Ultimately, the public-private divide is impedes meaningful public authority liability and unnecessarily complicates this area of the law.

Second, the new public law claim does not remove uncertainty or confusion in the law. It creates another sphere of uncertainty under the umbrella of judicial discretion. Moreover, the new claim imports the very essence of the problematic nature of private law liability: the policy-operational distinction.

Third, the new claim potentially limits the liability of government authorities. Factual scenarios not amenable to public law may be left outside the scope of liability, thereby rendering public authorities immune from certain administrative actions. The discretionary nature of the new claim may also mean that damage awards are less frequent. This would subdue government accountability.[11] I assert that favouring discretion over the patchwork of actions in both private and public law creates a 'discretionary coherence', which does not adequately address the alleged confusion of private law liability. A public law claim is insufficient, on its own, to adequately compensate victims of administrative abuse. Private law liability of public authorities should remain.

This paper will proceed by examining the liability of public authorities before *Paradis Honey*. It will then explore critiques of the existing private law framework, followed by Stratas JA's potential solution: the novel public law framework. Finally, the paper will argue that private law liability for public authorities should remain intact for the three reasons asserted above.

[9] *Paradis Honey* (n 9) [129]–[130].

[10] Canadian courts have already relied on Stratas JA's *obiter dictum* as authority *McNally v Canada (Minister of National Revenue)* [2015] FCA 248; *R v Michaud* [2015] ONCA 585; *Carhoun & Sons Enterprises Ltd v Canada (Attorney General)* [2015] BCCA 163.

[11] On application for leave, the Crown argued that the *obiter dictum* 'significantly lowers the threshold for claimants to plead a viable claim against the Crown, contrary to existing authority. The proposed analytical framework could expose government to expanded liability in damages… unrestrained by traditional tort elements and defences' (Appellant Memorandum on Leave (n 30) at para 31). I take the opposite stance.

II. Public Authority Liability in Canada

The Crown is liable in tort in the same way as a private citizen. Historically, the Crown was immune from all tort claims at common law.[12] The Crown Liability and Proceedings Act has removed this immunity and the federal Crown is now liable in tort to the same 'as if it were a person.'[13] Consequently, the scope of the Crown's tort liability is left to be decided on common law principles.[14] Although there is no special 'public' law of torts in Canada,[15] public law principles infect the private law in this context. For example, when faced with tortious liability, the public authority can rely on the defence of legal authority. If a governmental act is authorized by statute or prerogative, then it is not tortious.[16] This principle is a fundamental component of constitutional and administrative law.[17]

Public authorities in Canada are also subject to other forms of liability like declarations and injunctions. Declarations and injunctions originated as private law remedies but may be used to challenge administrative action in public law.[18] Public authorities may also have damages awarded against it for a breach of the Canadian Charter of Rights and Freedoms.[19] The availability of a monetary remedy for a breach of the *Charter* widens the scope of the traditionally purely

[12] *National Harbours Board v Langelier* (1968), 2 DLR 81.

[13] Crown Liability and Proceedings Act, ss 2.1 and 3. Similar provisions exist in all jurisdictions in Canada, Australia, New Zealand, and the United Kingdom: Hogg (n 114) 32.

[14] Michael F Donovan, 'When Public and Private Law Collide: The Relationship Between Judicial Review and Tort Remedies in Claims Against the Federal Government' (2007) 22 Advoc Q 355.

[15] ibid, 195. See also David Phillip Jones and Anne de Villars, *Principles of Administrative Law* (5th edn, Carswell 2015) ch 13.

[16] Hogg (n 114) 188.

[17] *Entick v Carrington* [1765] 19 St Tr 1029 (KB) 189.

[18] Browns (n 6) at para 1.1200.

[19] Charter (n 5); *Guimond c Québec (Procureur général)*, [1996] 3 SCR 347; *Mackin v New Brunswick (Minister of Justice)* (2002) 209 DLR 564. As a rule, an action for damages cannot be combined with an action for a declaration of invalidity based on s 52 of the Charter; but see *Boyce v Toronto Police Services Board* (2011) CarswellOnt 2958, where the plaintiff did not have a right under s 24(1) of the Charter to bring action for damages for personal injury; ML Pinkington, 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 Can Bar Rev 517; K Cooper-Stephenson 'Tort Theory for the Charter Damages Remedy' (1988) 52 Sask L Rev 1; *Charter Damages Claims* (1990) (Cooper-Stephenson); Hogg (n 114) s 6.5(d); GS Gilden 'Allocating Damages Caused by Violation of the Charter: The Relevance of American Constitutional Remedies Jurisprudence' (2009) 24 Nat J Con Law 121; K Roach, 'A Promising Late Spring for Charter Damages: Ward v Vancouver' (2011) 29 Nat J Con Law 135; see also *Crown Trust Co v Ontario* (1986) 26 DLR 41 (Ont DivCt); *Dix v Canada (Attorney General)* [2003] 1 WWR 436 (remedies for breaches of Charter rights subsumed in remedy for damages for malicious prosecution).

private right to seek damages.[20] Monetary relief for a *Charter* breach has regularly been called the 'constitutional tort.'[21] *Charter* damages may serve an important gap-filling function where a *Charter* breach does not give rise to a potential tort claim.[22]

Damages for a *Charter* breach, though, are not automatically awarded. In *Ward v Vancouver*,[23] McLachlin CJ wrote for the Court that damages are an appropriate and just remedy when they serve a 'useful' function. The function is threefold: (1) to compensate the plaintiff for his loss; (2) to vindicate the *Charter* right; and (3) to deter future *Charter* breaches.[24] Since vindication and deterrence are societal goals, *Charter* damages would not necessarily be the same as common law damages.[25] Nonetheless, the availability of damages in public law, albeit somewhat limited and obscure,[26] is evidence of public law's import of private law principles.

The availability of *Charter* damages still does not explain why private law claims should be abolished for abusive administrative action.[27] A section 24(1) damage award is constrained by the availability of alternative remedies, like private actions in tort, and concern for effective performance.[28] This is evidence of the value of private law principles. Even where damages might serve compensation, vindication, or deterrence, there may be cases where countervailing considerations render a damage award unjust.[29] *Charter* damages fulfill a specific gap-filling purpose when private law is inadequate to address the wrong.

The above discussion highlights the complex patchwork of liability a public authority may face in Canada. In some circumstances, litigants prefer a monetary remedy to any other judicial review remedy in public law, which puts pressure on judicial review doctrine.[30] Stratas JA states that the essentially private law doctrine

[20] Roach, ibid.

[21] Van Harten (n 80) 1175.

[22] See *Québec Commission des driots de la personne et des droits de la jeunesse v Communauté urbaine de Montréal* [2004] 1 SCR 789; *Ferri v Ontario (Attorney General)* (2007) 279 DLR 643 (Ont CA), leave to appeal refused: [2007] SCCA 175.

[23] [2010] 2 SCR 28.

[24] ibid, [25].

[25] Hogg (n 114) 40–39 (since they are purely compensatory). Hogg notes that McLachlin CJ did not talk about the possibility of punitive damages: see *Whiten v Pilot*, [2002] SCC 18.

[26] See Raj Anand, 'Damages for Unconstitutional Actions: A Rule in Search of a Rationale' 27 NJCL 159. Damages are often nominal: *Ayangma v Prince Edward Island* (2000) 194 Nfld and PEIR; *Delude v Canada* (2000) 264 NR1 (FCA); contra *Proulx v Attorney General* (2001) 3 SCR 9.

[27] ibid Anand. See also *Mackin* (n 20): '[t]hus it is only in the event of conduct that is clearly wrong, in bad faith, or abuse of power that damages may be awarded' at [79].

[28] Kent Roach, 'Enforcement of the Charter' (2013) 62 SLCR 473. Since private law actions are a consideration under section 24(1), it is not clear how Stratas JA's proposal will impact the application of this remedy.

[29] See *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3; but see *Henry v British Columbia (Attorney General)*, (2015) SCC 24.

[30] Feldthusen (n 8).

governing liability of public authorities 'remains chaotic and uncertain with no end in sight.'[31] Stratas JA cites one commentator, who argues that 'more recently, that trend may have been attenuated somewhat, although, over-all, the law remains mired in a lamentable state of obscurity and confusion.'[32] By removing the availability of damages in private law and transferring them to public law, it is thought that coherence will be achieved. However, public law is not that clear either. For example, the Supreme Court in *Dunsmuir* recognised that '[d]espite its clear, stable, constitutional foundations, judicial review has proven to be difficult to implement.'

In light of the potentially complex nature of public authority liability, commentators have attempted to streamline it. First, Richard Evans[33] and Tom Cornford[34] propose a regime of strict liability: anyone who suffers loss by relying on an invalid governmental decision should be entitled to damages.[35] Second, Michael Fordham and others[36] propose that courts use their discretion to award damages in judicial review.[37] Third, Cornford also proposes that tort liability should be extended to encompass a public authority's failure to conduct itself reasonably in relation to the victim.[38] A general remedy for maladministration has been refuted.[39]

[31] *Paradis Honey* (n 9) [119], [124].

[32] Kristjansen (n 4).

[33] RC Evans, 'Damages for Unlawful Administrative Action' (1982) 31 Int & Comp LQ 640, 660.

[34] Cornford (n 2) 57–58.

[35] Hogg (n 114).

[36] A variation of this proposal is to award damages directly in judicial review. In keeping with Law Commission of Wales, damages would be available for invalid decisions in judicial review proceedings if (a) the underlying statutory or common law regime conferred a benefit on the claimant; (b) there was serious fault on the part of the public authority; (c) and the claimant suffered loss as a result. The Law Commission's Proposals were heavily criticized and was abandoned (Final Report 2010). This remedy would play an ancillary role. Where the facts were not truly 'public', tort law governs. An act or omission is truly public if: (a) the body exercised, or failed to exercise, a special statutory power; or (b) the body breached a special statutory duty; or (c) the body exercised or failed to exercise a prerogative power: Law Commission (England and Wales), *Administrative Redress* (Consultation Paper 2008). See also *Monetary Remedies in Public Law* (Discussion Paper 2004) and *Remedies Against Public Bodies* (Scoping Report 2006).

[37] Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2008) 8 Judicial Review 104 and Michael Fordham, 'Monetary Awards in Judicial Review' (2009) Public Law 1. See also M Amos, 'Extending the Liability of the State in Damages' (2001) 21 Legal Studies 1.

[38] Hogg (n 114) 208–211. Cornford argues that recovery should be allowed via Principle I: reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule: Council of Europe Committee of Ministers Recommendation No R (84) 15 of the Committee of Ministers to Member States Relating to Public Liability (18 September 1984).

[39] Stephen Bailey, 'Public Authority Liability in Negligence: the Continued Search for Coherence'

In Canada, an invalid exercise of statutory duty is not actionable without proof of fault.[40] Hogg, Monahan, and Wright argue that the current patchwork approach is preferable to the above reforms because (1) current approach is familiar; (2) the law already catches cases most deserving of compensation; (3) the existing torts are flexible enough to fill in any inappropriate gaps in liability.[41] Stratas JA's public law tort, which will be discussed below, can be considered an additional reform in this area.

III. The *Paradis Honey* Framework: Public Law Claim for Private Law Remedy

In *Paradis Honey*, a group of commercial beekeepers brought a class action in negligence and bad faith against the Crown.[42] The plaintiffs relied on importing honeybee 'packages' to replace colonies lost in the winter. The plaintiffs argued that the Crown was negligent in adopting a blanket prohibition on the import of bee 'packages' from the continental United States after December 31, 2006.[43] Since the legislation previously banning importing these packages expired at the end of 2006, [44] the plaintiffs argued that the public authority had no legal basis to prohibit them from importing honeybee packages once the legislation expired.

The Crown brought a motion to strike the pleading for failure to disclose a reasonable cause of action.[45] The Court of Appeal overturned the Federal Court's decision[46] to strike out a claim. While Stratas JA held that it was not 'plain and obvious' that the negligence claim would fail, examining whether monetary relief[47] could be awarded based on public law principles would be '[f]or the benefit of future cases.'[48]

Both Justice Pelletier, dissenting, and Stratas JA recognised that the facts

(2006) 26 LS 155.

40 Paul Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) 1015–1016. Breach of statutory duty is not a tort alone, and is subsumed in negligence law: *The Queen v Sask Wheat Pool* [1983] 1 SCR 205.

41 Hogg (n 114) 213.

42 ibid, 4. Her Majesty the Queen, Minister of Agriculture and Agri-Food, and the Canadian Food Inspection Agency, collectively 'the Crown'.

43 *Paradis Honey* (n 9) [2].

44 ibid.

45 *Paradis Honey* (n 9) [114].

46 *Paradis Honey Ltd v Canada (Attorney General)* (2014) FC 215.

47 Interestingly, he never uses the word 'damages' in his portion of the judgment addressing the public law claim, only in the area addressing negligence.

48 *Paradis Honey* (n 9) [112]. In *Ishaq v Canada (Minister of Citizenship and Immigration)* (2015) FC 156, Stratas JA cited his *obiter dictum* as an example of when the common law can take a slow step forward.

could facilitate an award of administrative law remedies, or more generally public law remedies.[49] The facts appeared to be sufficiently 'public' in nature to prompt judicial review proceedings. Damages, however, are not available through judicial review.[50] To seek monetary relief, a litigant must initiate a separate civil action for damages alongside, or in lieu of, a judicial review application.[51] Reading the allegations by the plaintiff 'generously,' Stratas JA concluded that '[i]n substance, the beekeepers allege they are victims of abusive administrative action warranting monetary relief. Getting past the legal label and the technical form of the pleading, the real issue before us is the viability of a claim for monetary relief in public law.'[52]

According to Stratas JA, monetary relief against public authorities should be based on public, rather than private, law principles. Public law principles come from administrative law; in particular, judicial review.[53] In administrative law, if a public authority acts unacceptably or indefensibly the courts have discretion to grant relief.[54] According to Stratas JA, these two public law factors should govern whether monetary relief may be had by way of private action.[55] Stratas JA effectively would allow damages in public law if: (1) the public authority acts unacceptably or indefensibly in the administrative law sense; and (2) as a matter of discretion, a monetary remedy should be awarded.

Stratas JA's finding that the facts as pleaded supported a claim for monetary relief in public law, albeit in *obiter dictum*,[56] may be seen as a direct response to the private law's 'confusion' when applied to public authorities. As Stratas JA commented:

> In cases involving public authorities, we have been using an analytical framework built for private parties, not public authorities. We have been using private law tools to solve public law problems. So to speak, we have been using a screwdriver to turn a bolt.[57]

In *R v Imperial Tobacco*,[58] the Supreme Court of Canada appeared to favour the admission of novel causes of action and cautioned courts on constraining the

[49] ibid, [85].
[50] ibid, [120]–[121].
[51] ibid, [121].
[52] ibid, [115].
[53] ibid, [132].
[54] ibid.
[55] ibid, [132] and [139].
[56] The *obiter dictum*, though, was of such importance to the federal government in this case that it formed the substance of their factum to the Supreme Court of Canada. Leave to appeal was ultimately denied: [2015] SCCA No 227.
[57] *Paradis Honey* (n 9) [127].
[58] [2011] 3 SCR 45.

development of the law at an early stage:

The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognised the particular claim. The court must rather as whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed at trial.[59]

Perhaps, then, the framework is reaction to the fact that when a public authority acts in a public manner, rather than in a private manner,[60] public law damages should nonetheless be available. This may especially be the case when the victim has suffered some form of financial loss, as was the case in *Paradis Honey*. Given the apparent public nature of the alleged wrongful public conduct in this case, Stratas JA may have been dissatisfied with the lack of monetary relief in public law. He may also have foreseen that the facts, although being robust enough to pass the 'not plain and obvious test', may have precluded a successful negligence claim at trial. These are all good reasons to move forward with the novel public law tort. However, as will be discussed below, the courts should consider this tort in tandem with existing private law remedies.

IV. Private Law Liability for Public Authorities Should Remain Intact

A. The Public And Private Law Are Not, And Should Not Be, Distinct

Public authority liability is not so straight-forward as to warrant an all-or-nothing approach. A public authority may wear more than one hat. In *Paradis Honey*, Stratas JA asserts the public and private law are distinct bodies of law with distinct rules: 'private matters are governed by private law and are addressed by private law remedies; public matters are governed by public law and addressed by public law remedies. This has become a fundamental organizing principle.'[61] This proposition is supported by *Dunsmuir v New Brunswick*,[62] *Air Canada v Toronto Port Authority*,[63] and *Canada (Attorney General) v Mavi*.[64] In these cases, the distinction between private and public law was drawn to determine the applicability of

[59] ibid, [21].

[60] For example, see *Dunsmuir* (n 63) where the public authority was bound by contract law. In this particular instance, the public authority was acting in a private manner.

[61] *Paradis Honey* (n 9) [129].

[62] [2008] SCC 9.

[63] [2011] FCA 347.

[64] [2011] 2 SCR 504.

judicial review. If the relationship between the public authority and the claimant is essentially private in character, private, not public, law applies to the claim.[65] For example, in *Dunsmuir*, a government dismissed one of its employees. The Supreme Court of Canada (SCC) considered the extent to which public law (judicial review) and private law (contract) applied to an employee/employer relationship when the employer was a public authority. Since contract law governed this relationship, the Court ultimately held that it was unnecessary to consider any public law duty and the employee successfully claimed contractual remedies for his dismissal.[66] While this case provides narrow support for Stratas JA's distinction between public and private law, it also suggests that these bodies of law must be considered together (in that their principles may or may not apply depending on the nature of the situation).

Although *Dunsmuir* concerns the application of judicial review, the public-private distinction drawn in *Dunsmuir* is useful for examining *Paradis Honey*. The ultimate issue the court must determine before applying judicial review is 'what is public and what is private?'[67] This determination suggests that, on a broader level, public and private law are distinct. For example, *Black's Law Dictionary* defines public law as '[t]he laws that cover administration, constitution, and criminal acts. It controls the actions [between] the citizens of the state and the state itself. It deals with the government's operation and structure.'[68] By contrast, private law 'means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals.'[69] A plain reading of this suggests that public authority liability should be confined to public law, in tandem with Stratas JA's holding.

In order to make a place in the law for the public law framework, Stratas JA concludes that 'nothing in law obstructs the ability of whether monetary relief in public law may be had by way of action.'[70] As an example, he states that the

[65] ibid.

[66] *Dunsmuir* (n 63) [117].

[67] Interestingly, it is not clear whether the new framework proposed by Stratas JA would eliminate the effect of contract law on public authorities. Such research would be a worthy endeavor, as removing contract liability from governments seems absurd.

[68] Bryan A Garner, *Blacks Law Dictionary*, (10th edn, West Group 2014).

[69] ibid.

[70] *Paradis Honey* (n 9) [139]–[140]. In support of this change to public authority liability, Stratas JA relies on two authorities English law: (Maurice Sunkin, 'Remedies Available in Judicial Review Proceedings' in D. Feldman (ed), *English Public Law* (OUP 2004); United Kingdom Law Commission, *Consultation Paper No. 187, Administrative Redress: Public Bodies and the Citizen* (The Law Commission 2010). In the United Kingdom, 'non-judicial review remedies' may be claimed in association with judicial review proceedings. Specifically, those seeking judicial review may claim damages but may not seek damages alone: UK Supreme Court Act 1981 s 31(4)). If a

traditional rules of Crown immunity and the Crown Liability and Proceedings Act (and its predecessors) did not prevent the damages award in 'public law cases' like *Roncarelli v Duplessis*[71] and *McGillivray v Kimber*.[72]

The Supreme Court of Canada awarded damages in both *Roncarelli* and *McGillivray* for the wrongful cancellation of licenses. In *Roncarelli*, the plaintiff restaurant owner's injury engaged public law principles in establishing the public authority's fault under the Article 1053 of the Civil Code of Lower Canada.[73] Under Article 88 of the *Code of Civil Procedure*, public authorities are granted a defence where they act within the 'exercise of their functions.'[74] In determining whether the public authority acted within this function, the court held that 'he acted well beyond the scope' of any function given to him. Indeed, it was 'so far so that it was done exclusively in a private capacity.'[75]

While both 'public law cases' (in that they engaged public law principles), in *Roncarelli* and *McGillivray*, the court awarded damages where the authorities were acting without jurisdiction. In other words, they lacked the authority and were thus likened to acting in private capacity.[76] This casts doubt on Stratas JA's reasoning in *Paradis Honey*, where the public authorities were also acting as private parties, not as public authorities, and thus damages flowed from their actions in the private capacity.

While distinct, the delineation between public and private law is not as rigid as Stratas JA's judgment or *Black's Law Dictionary* seems to suggest. Nor does it need to be. Stratas JA recognised this in *Air Canada* where he stated that when determining what is public and what is private, 'perhaps there [is] no comprehensive answer.'[77] He went on to state that in law, 'certain concepts cannot

claim for damages is made in judicial review proceedings, the court may award damages if it is satisfied that damages would have been awarded in ordinary private law proceedings. Damages are not available to compensate those who have suffered as a consequence of actions or decisions that are unlawful in the public law sense barring certain circumstances: Michael Fordham and Gemma White, 'Monetary Claims Against Public Authorities' (2001) Judicial Review 44. However, Stratas JA did not address the fact that these provisions reflect the absence in English public law of any general right to indemnity for financial loss suffered as a consequence of invalid action on the part of public bodies: *R v Secretary of State* [1991] 1 AC 603; *X Minors v Befordshire*, [1995] 2 AC 633.

71 [1959] SCR 121.

72 *Paradis Honey* (n 9) [140]; [1915] 52 SCR 146.

73 Succeeded by Article 1457 *Civil Code of Québec*, CQLR Chapter C-1991. See also David Mullan, '*Roncarelli v Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does it Stand in 2009?' (2010) 55 McGill LJ 587.

74 CQLR Chapter C-25.

75 *Roncarelli* (n 72) 145.

76 For a discussion of the public-private divide in *Roncarelli*, see Derek McKee 'The Public-Private Distinction in *Roncarelli v Duplessis*' (2010) 55 McGill LJ 461.

77 *Air Canada* (n 64) [56]–[57] (again, in the context of judicial review).

be reduced to clear definition given their elusive nature.'[78] Similarly, administrative law has been described as 'pervasive' because of the extensive and fundamental role of government in modern society.[79] As evidenced by the above discussion, the common law has not distinguished between public law and private law in a systematic way.[80] Absent a complete codification of public authority liability, the common law must remain flexible. As mentioned by Hogg, Monahan, and Wright, tort law provides this flexibility. Flexibility is important given the complex nature of modern governments and the variety of ways in which they can act. To exclude liability from private law would thus not allow the law to keep up with the nature of modern government.

Moreover, even if Stratas JA is correct in his rigid delineation between public and private,[81] it is not clear why damages should be awarded in public law and not private law. A strict interpretation of private and public law may contradict Stratas JA's conclusion: private law damages would belong only in private law and public law remedies would belong only in public law. Nonetheless, Stratas JA imports damages into public law. Then he holds that public authorities, being public bodies and thus governed by public law, should be confined to public law remedies and actions. This latter conclusion apparently justifies his import of damages into public law. In other words, the nature of the defendant dictates what sphere the action should live in. It is not clear, though, why this is a good reason for preferring public law instead of private law.

In order to maintain flexibility it is preferable to follow the current system, which looks at the nature of the impugned act carried out by the public authority. Even where a public authority makes a 'public' law wrong, there is no reason to exclude a parallel private law cause of action. Once the precondition of finding that government acted outside legal powers is met, ordinary private law governs the government's liability to pay damages.[82] Therefore, it should not matter, at least

[78] *Dunsmuir* (n 63) [57].

[79] Gus Van Harten, Gerald Heckman, David Mullan and Janna Promislow, *Administrative Law: Cases, Text, and Materials* (7th edn, Emond Publishing 2015), 4.

[80] Browns (n 6) para 1.1200. See Mayo Moran, 'The Mutually Constitutive Nature of Public and Private Law' in Andrew Robertson and Tang Hang Wu (eds) *The Goals of Private Law* (Oxford 2009) (public and private law are mutually constitutive).

[81] On application for leave to the SCC, the Crown argued that Stratas JA blended public and private law concepts where damages would be awarded for nothing more than 'a breach of statutory duty'. The plaintiff argued, as respondent, that the Crown mischaracterized Stratas JA's judgment. It is also important to note that, in corporate law, there is no special law of corporations that refuses to cooperate with traditional private law principles. Corporations are considered 'natural persons' in Canada under the Canadian Business Corporations Act 1985, Chapter C-44 s 15.

[82] Judicial review used to be mandatory before private law action: *Canada v Grenier* [2006] 2 FCR 287. But this has been overruled: *Canada (Attorney General) v TeleZone Inc* (2010) SCC 62.

for the sake of preventing a completely categorical approach, that the defendant is a public authority. Indeed, the Crown is subject to liability only to the extent that it voluntarily submits itself to judicial authority though legislation.[83] Courts are guardians of the rule of law, but they still need to operate within their sphere of authority.[84] This means respecting the fact that, through enabling statutes, legislatures do not grant authority over certain things to the courts themselves.[85] This would invariably include the assumption that the courts would not completely usurp the legislature. Choosing public law to the exclusion of private law is therefore unnecessary and potentially damaging. It would be equally unnecessary to provide redress for abusive administrative action in solely private law. As law professor Stephen Bailey has recognised, 'the default position is that they should be treated in the same way as other defendants … there needs to be a good reason either for restricting or expanding liability simply because the defendant is a public authority.'[86] Public and private law actions serve different objectives and are governed by different substantive and procedural rules.[87] Where facts may give rise to a tort action and judicial review, it should be left to the claimant to decide their course of action.

B. Circumventing Private Law Liability Does Not Resolve Doctrinal Confusion

Since *Donoghue v Stevenson*,[88] the law of negligence has applied to both private parties and public authorities. In Stratas JA's view, negligence law does not take into account the difference between private parties and public authorities. These differences, he says, render private law an unsatisfactory tool for assessing liability. Public authorities may be '"giant", "complex," and "serve millions."'[89] Stratas

[83] Robert M Solomon et al, *Cases and Materials on the Law of Torts* (9th edn, Carswell 2014), 802. Public authorities can act for 'public' purposes or in 'private' ways, as in the law of contract. The important point is that the law recognises the distinction, but does not recognise the exclusivity of one over the other when it comes to public authorities. It comes down to the facts and the capacity in which the public authority was acting.

[84] Colleen M Flood and Lorne Sossin, *Administrative Law in Context* (Emond Montgomery Publications 2013) at 107.

[85] ibid.

[86] Bailey (n 40) 164.

[87] ibid 165.

[88] [1932] UKHL 100.

[89] *Paradis Honey* (n 9) [119]. Given the size and reach of modern government, Stratas JA does not think it makes sense to apply the neighbour principle These characteristics aptly describe corporations as well, who do not enjoy immunity from private law suits. It is also possible that the public authority in question is one individual, such as a Minister. It is not clear how this factored into his analysis.

JA also holds that the standard of care is inadequate because it is difficult to determine a standard of care for a body with a wide variety of mandates and purposes.[90] He cites further differences, including the fact that public authorities carry out mandatory statutory obligations, which 'invariably' advantages some and disadvantages others.[91] Lastly, certain defences for private parties do not apply realistically to public authorities and there are less drastic tools to address public authorities' misbehaviour.[92] Stratas JA holds that the standard of care is inadequate because it is difficult to determine a standard of care for a body with a wide variety of mandates and purposes.[93] He cites further differences, including the fact that public authorities carry out mandatory statutory obligations, which 'invariably' advantages some and disadvantages others.[94] Lastly, certain defences for private parties do not apply realistically to public authorities and there are less drastic tools to address public authorities' misbehaviour.[95]

But it is characteristic of government that they must consider competing interests and it is uncontroversial that its conduct will affect many. This reason, alone, may not be a good one for limiting tort liability. Moreover, public authorities are not liable in negligence unless their conduct is operational and broader policy implications do not negate the duty of care. This is arguably an adequate safeguard against rampant public authority liability.[96] The negligence framework also takes into account the unique nature of public authorities. Indeed, Stratas JA recognises this: '[t]o make this analytical framework suitable … courts have tried gamely to adapt it.'[97] In essence, it is not the fact that negligence law differentiates between public authorities and private parties that is the source of Stratas JA's need for reform, but the fact that this differentiation is inadequate. As mentioned above, Stratas JA concedes elsewhere in the judgment that his new framework shares similarities to the application of negligence to public authorities.

Dicey famously asserted that no person is above the law and officials are just as liable as ordinary citizens for harmful acts done without justification.[98] But

[90] ibid, [128].
[91] ibid, [125].
[92] ibid, [128].
[93] ibid.
[94] ibid, [125].
[95] ibid, [128].
[96] See Feldthusen, 'Tilting the Balance of Power between the Courts and Government through the Common Law of Negligence' (2015) Working Paper Series University of Ottawa, Working Paper 2015-31. See also Norman Siebrasse, 'Liability of Public Authorities and Duties of Affirmative Action' (2007) 57 UNBLJ 84.
[97] *Paradis Honey* (n 9) [120].
[98] AV Dicey, *The Law of the Constitution* (10th edn, Macmillan 1967) 193–194; contra Van Harten (n 80) 1110. As noted by administrative law scholar Gus Van Harten, determining whether

this assertion has been questioned.[99] Australian legal scholar Peter Cane, cited by Stratas JA in *Paradis Honey*, states that the equality principle is imperfect in its application and courts and legislatures must attempt to arrive at the correct balance.[100] The law that applies to public authorities should take into account the way that governments differ from private parties.[101] Cane takes this notion of substantive equality[102] for governments further and argues that there should be no special head of damages available only against governments. This would certainly bring into question the tort of misfeasance in a public office,[103] which is only available against public officers.

Removing private law liability of public authorities is inconsistent with Dicey's idea of equality. In order to reconcile his new action with the Crown Liability and Proceedings Act, Stratas JA concludes that the defendant public authority must be regarded as having committed a 'tort' within sections 3(a)(i) and 3(b)(i).[104] In an interesting exercise of statutory interpretation, Stratas JA concludes that the word 'tort' 'must extend to any legally-recognized fault… otherwise… the rest of Canada would have a different liability rule. Preventing different liability rules within Canada was the point of the amendments made to these provisions…'[105]

While Cane's critique is attractive, it has been rendered moot by the legislature. Private law liability of public authorities does not arise from thin air. Recall the Crown subjects itself to tort liability. Therefore, even if good theoretical or practical arguments exist to refute the private law liability of public authorities, absent usurping the legislature's role, the statutory connection to private law should stand. Ultimately, Dicey's idea of equality provides the basis for a rational, workable, and acceptable theory of governmental liability.[106] Applying private law to government activities conforms to a widely held political ideal, circumvents

monetary relief should be available against public authorities in the same way as private parties starts traditionally with a discussion of A. V. Dicey's idea of equality: Van Harten (n 80) 1110.

99 ibid Van Harten, 111. For a functionalist critique of Dicey see John Willis, 'The McRuer Report: Lawyers' Values and Civil Servants' Values' (1968) 18 UTLJ 351; John Willis, 'Three Approaches to Administrative Law: The Juridical, the Conceptual and the Functional' (1935) 1 UTLJ 53.

100 Peter Cane, 'Remedies Available in Judicial Review Proceedings' in D Feldman (ed) *English Public Law* (OUP 2004) 915, 949.

101 ibid.

102 For a discussion of various theoretical perspectives on substantive equality, see C Edwin Baker, 'Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection' (1983) 131 University of Pennsylvania Law Review 933.

103 See generally Erika Chamberlain, *Misfeasance in a Public Office* (Carswell 2016).

104 *Paradis Honey* (n 9) [140].

105 ibid.

106 Hogg (n 114) 3–4.

practical problems,[107] and provides a satisfactory resolution of conflicts between government and citizen.[108]

C. Narrowing The Scope Of Governmental Accountability

Stratas JA's framework has provided an opportunity for litigants seeking to challenge wrongful policy decision that do not fit within existing private or public law frameworks. In *Tk'emlups Te Secwèpemc Indian Band v Canada*,[109] a group of First Nations proposed a class action against the federal Crown for injuries resulting from Residential Schools. The government argued that there was no reasonable cause of action in an attempt to strike the claim. The court held that the allegation, which was that Canada had a policy to eliminate Indians by the systematic erosion of their language and culture, was allowed to proceed. Relying on Stratas JA's *obiter dictum*, the court recognised that 'a viable argument can be made that indefensible applications of public policy may be actionable.'[110] The new action may thus serve factual scenarios that do not appear to fit within any other action: either in public or private law.

At the same time, however, the *Paradis Honey* framework arguably narrows the scope of public authority liability in situations that were traditionally brought in private law. At first glance, Stratas JA provides litigants harmed by administrative action the opportunity to obtain monetary relief in public law. It is not an application for judicial review, but rather its own freestanding action. Stratas JA's new claim, although not a judicial review application, relies largely on judicial review principles. On closer examination, the action has striking similarities to judicial review, yet overrides the requirement that damages may not be awarded on a judicial review application.

This is important because, if his action is similar to judicial review, it will inform the types of cases that will come within its ambit and therefore the scope of public authority monetary liability. Damages, traditionally awarded in private law, hold governments accountable[111] for abusive administrative decisions and

[107] M Olson, 'Dictatorship, Democracy, and Development' 1993 87 Am Poli Sci Rev 567 (it also has economic advantages).

[108] Hogg (n 114).

[109] [2015] FC 706.

[110] ibid at [39], citing Stratas JA in *Paradis Honey* (n 9). This may be consistent with the Crown's fear that liability will be widening, not becoming smaller. However, while the action may allow more claims to come forward, I still assert that the discretionary nature of the action will bar claims.

[111] Tort law is an avenue where public decision-makers may be held accountable as a more general proposition: Aloke Chatterjee, Neil Craik and Carissima Mathen, 'Public Wrongs and Private Duties: Rethinking Public Authority Liability in Canada' (2007) 57 UNCLJ 1.

compensate the victim for losses suffered.[112] Moreover, the removal of private law liability does not solve any confusion in the doctrine; it merely ignores it. The potential damaging effects of ignoring the confusion of the private law are exacerbated by the discretionary nature of awarding remedies in public law. Stratas JA's framework imports the broad discretion afforded to judges to refuse a public law remedy even where one may be warranted.[113] This is also a far removal from the nature of private law, where an appropriate remedy promptly follows a finding of liability.[114] The public law claim may very well provide some level of certainty[115] or coherence to public authority liability. However, keeping private law liability of public authorities is important given that different torts in private law address different factual matrixes. Therefore, the novel action should not be adopted by Canadian courts to the extent that adopting it would require the complete exclusion of private law liability for governmental action.

In Canada, a damage award pursuant to judicial review proceedings is not possible.[116] Indeed, a damage award is not one of the remedies that can be obtained

[112] Jefferson T Hunter, 'Constitutional Wrongs and Common Law Principles: The Case of Recognition of State Constitutional Actions against State Governments' (1997) Vand L Rev 1525. See also AM Linden, 'Tort Law as Ombudsman' (1973) 51 Can Bar Rev 155.

[113] Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell 2011), 64.

[114] ibid. A claimant may also have issues enforcing judgment in public law. For an excellent article discussing the difficulty of suing a public authority see Lewis Klar, 'Tort Liability of the Crown: Back to *Canada v Saskatchewan Wheat Pool*' (2006) 32 Advoc Q 293. See also *Elipolous v Ontario* (2006) 82 OR 321; Brown and Brochu, 'Once More Unto the Breach: *James v BC* and Problems with the Duty of Care in Can Tort Law' (2008) 45 Alta L Rev.

[115] See e.g. Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823 ('Since the law should strive to balance certainty and reliability against flexibility, it is, on the whole, wise legal policy to use rules as much as possible for regulating human behavior as they are more certain than principles and lend themselves more easily to uniform and predictable application', 841–42). See also Richard Craswell and John E Calfee, 'Deterrence and Uncertain Legal Standards' (1986) 2 JL Econ & Org 279, 298–99; Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175, 1178–83 (arguing that courts should decide cases in such a way that provides guidance to lower courts, future legislators, and citizens); Cass R Sunstein, 'Problems with Rules' (1995) 83 Cal L Rev 953, 957 (describing the conventional view that a target of law is clarity). See especially Anthony D'Amato, 'Legal Uncertainty' (1983) 71 California L Rev 1 (D'Amato argues that legal certainty actually decreases over time because 'legal systems favour disentangling legal rules and principles.' D'Amato defines legal uncertainty as determining the outcome of a particular case. However, his argument, in my view, can be expanded to account for certainty in a body of law. 'A related but operationally different definition of legal uncertainty has recently been used by a number of writers concerned with a specialized problem in jurisprudence. They mean by 'uncertainty' the situation that obtains in a legal system when that system contains at least one case that in principle cannot be decided in an identifiably and uniquely correct way').

[116] Chief Justice John D Richard, 'Judicial Review in Canada' (2007) 45 Duq L Rev 483, 514; Felix Hoehn, 'Privatization and the boundaries of judicial review' (2011) 54 Canadian Public Admin

in an application for judicial review under section 18 of the Federal Courts Act.[117] Moreover, the Federal Court, like most provincial courts, has no jurisdiction to award damages on an application for judicial review.[118] The reason for this seems to be that damages and any duty to mitigate usually requires evidence that is better received at trial than through summary procedure for judicial review.[119] Moreover, public law grievances will not give rise to a cause of action unless the invalid decision also involves a tort.[120] Interestingly, section 18.4(2) of the Federal Courts Act gives the Court discretion to convert judicial review into an action. This provision showcases the importance of keeping private law actions against public authorities and the non-urgency of creating a unified public law liability framework.

Generally, judicial review addresses the following jurisdictional failings: '(1) substantive *ultra vires*, such as building a highway when the legislature has authorized building a park;[121] (2) exercising a discretion for an improper purpose,[122] with malice,[123] in bad faith,[124] or by reference to irrelevant considerations;[125] (3) ignoring relevant matters; (4) making serious procedural errors;[126] and (5) making an error of law[127] in certain circumstances…'[128] The ambit of judicial review would likely be very similar to the ambit of the public law claim. While the above five scenarios may capture facts that would allow a successful misfeasance in public office claim, it is not clear that negligence cases would survive. Acting unreasonably

73 ('unlike private law, damages are not a typical remedy in administrative law', 76). This is not strictly accurate. Money can be awarded through judicial review if *mandamus* is used and a public official breaches a legal duty to remit a specific sum of money from an already allocated budget: *R ex rel Lee WCB*, [1942] 2 DLR 665 (BCCA).

117 Federal Courts Act 1985, Chapter F-7. The Federal Courts Act is a complete statutory code governing *all* aspects of the judicial review of federal administrative action, including grounds of review, available remedies, and the procedure for applying for relief: Browns (n 6) para 2.1000 [emphasis added].

118 See *Liddar v Canada* [2007] 371 NR 65 (FCA) (Federal Court lacked authority to order minister to repay interest and penalties); *Radhil Bros Fishing Co v Canada* (2000) 29 Admin LR 159 FCTD, aff'd on this point FCA 2001. ibid Browns, 5.45.

119 ibid Browns, 5.46.

120 *Sask v Eacom Timber* (2012) SKQB 226 at [134]–[137]. Where both damages and admin law remedies are sought, the application for judicial review and the action are both permitted: see *Meggeson v Canada* [2012] FCA 175, [40].

121 *Ritiche v Edmonton (City)* (1980) 108 DLR 694 (Alta QB).

122 ibid.

123 *Roncarelli* (n 72).

124 *Campeau Corp v Calgary (city)* (1978) 7 Alta LR 294 (Alta CA).

125 *Padfield v Min of Agriculture, Fisheries and Food* [1968] UKHL 1; [1968] 2 WLR 924.

126 *Quebec v Alliance* [1953] 2 SCR 140).

127 *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1951] EWCA Civ 1.

128 De Villars (n 16) 7–8.

in the private law sense does not seem to be caught within the ambit of judicial review doctrine. This is problematic in light of the recognition that the courts must delicately balance the discharge of public obligations with the rights and interests of individuals.[129] If public authorities were immune from negligence, the rights and interests of individuals to be free from negligent administrative action would be completely without redress (save for cases that managed to come within public law).[130]

If negligence is left outside the ambit of the new claim, it appears Stratas JA has scarified justice for coherence. Moreover, tort law is both consistent with and capable of taking into account public and private law principles as discussed above. This issue was recognised by the Supreme Court of Canada in *Kamloops (City of) v Nielson*, where it was held that 'the activities of a public authority and its powers and duties are a matter of public law; but alongside its public law duties, a public authority may have private law duties to avoid causing damage to others…'[131] If a public authority can act as private parties do, such as through contract, and be liable in contract,[132] it is not clear why negligence should be removed. If a public authority is negligent, they should be liable in negligence.[133] To hold otherwise, is to leave a gap in the law where none existed before.

Stratas JA does not remove himself entirely from the incoherence of private law. Following his two-step framework, it becomes apparent that there are two discretionary hurdles that a claimant must pass in order to get damages. First, the margin of appreciation afforded to the public authority 'depends on the circumstances.'[134] The margin of appreciation is narrow where the public authority's decision is 'clear-cut' or constrained by law. In these cases, the court is 'more likely to reach the remedial stage.'[135] On the other hand, absent bad faith, the remedial stage would rarely be reached where the public authority had wide discretionary authority. [136] This distinction is eerily similar to the policy-operational distinction in negligence. Stratas JA also explicitly recognises this as characteristic of negligence

[129] Kristjansen (n 4).

[130] *Association des crabiers acadeiens Inc v Canada (Attorney General)* (2009) FCA 357, [32].

[131] *Kamloops (City of) v Nielsen* [1984] 2 SCR 2.

[132] *Dunsmuir* (n 63) [13].

[133] For example, in *TeleZone* (n 83), public and private law present distinct and separate justiciable issues at [28]–[30].

[134] ibid.

[135] *Canada (Attorney General) v Abraham* (2012) FCA 266, 440 NR 201; *Canada (Attorney General) v Almon Equipment Limited* (2010) FCA 193, [2011] 4 FC 203; *Canada (Public Safety and Emergency Preparedness) v Huang* (2014) FCA 228.

[136] *Rotherham Metropolitan Borough Council v Secretary of State for Business Innovation and Skills* [2015] UKSC 6.

(therefore not avoiding problem with private law).[137] But he seems to conclude that even so, it is better to understand using public, not private, law.

Second, awarding damages based on public law principles is potentially problematic. If the remedial stage is reached, the court will use their discretion to determine if damages would be appropriate.[138] In contrast to private law damage awards, monetary relief in public law has a discretionary character. Judicial review is fundamentally discretionary, in the way that appeals are not, because the court has the discretion to refuse a remedy.[139] Stratas JA's new framework has the same discretionary character. Public authorities are afforded a margin of appreciation regarding their decision.[140] If the decision is outside of the margin, the court may consider a remedy. If the decision is within a range of acceptability or defensibility, then a remedy is precluded.[141] By importing judicial review principles, remedial discretion in his new claim is informed 'by an examination of the acceptability and defensibility of the decision, the circumstances surrounding it, its effects, and the public law values that would be furthered by the remedy in the particular practical circumstances of the case.'[142] Public law values are principles inherent in administrative law and are repeatedly asserted in case law, particularly when courts explain their exercises of discretion.[143] These values include the rule of law, the principles of good administration (including proper, fair, pragmatic, efficient, and effective regulation and decision making), the democratic principle (including Parliamentary supremacy), and the separation of powers.[144] The above considerations, in my view, do not render the discretion any less confusing than determining whether a public authority was negligent.

Hogg, Monahan, and Wright have doubted the usefulness of judicial discretion in some cases, as it simply postpones difficult decisions, leaving it to the courts to develop the principles that ought to apply in determining whether to award compensation for invalid decisions beyond the situations in which damages

[137] *Paradis Honey* (n 9) [137].

[138] ibid, [138].

[139] Sossin (n 85) 107–108; Browns (n 6) 2–44ff; *Immeubles Port Ltee v Lafontaines (village)* (1991) 1 SCR 326.

[140] ibid.

[141] ibid.

[142] *D'Errico v Canada (Attorney General)* (2014) FCA 95.

[143] See generally Peter Cane, 'Damages in Public Law' (1999) 9 Otego L Rev 489; Peter Cane, 'Theory and Values in Public Law,' in Paul Craig and Richard Rawlings (eds) *Law and Administration in Europe: Essays for Carol Harlow* (OUP 2003).

[144] *D'Errico* (n 143) [15]–[21]; *Wilson v Atomic Energy of Canada Limited* (2015) FCA 17 [30], citing Paul Daly, 'Administrative Law: A Values-Based Approach' in Mark Elliott and Jason Varuhas (eds) *Process and Substance in Public Law Adjudication* (Oxford 2015); *Community Panel of the Adams Lake Indian Band v Adams Lake Band*, 419 NR 385(FCA) at [33]–[37]; *Stemijon Investments Ltd v Canada (Attorney General)*, 341 DLR 710, [52].

in tort are already available.[145] Indeed, a court has subsequently applied Stratas JA's new framework with a confusing result. In *Patrong v Banks*,[146] the plaintiff was shot by a well-known criminal and suffered debilitating injuries. The plaintiff brought an action in negligence, misfeasance in a public office, and a *Charter* challenge. The plaintiff argued that Toronto Police Service was negligent in not arresting the criminal during a surveillance sting. The criminal proceeded to shoot the plaintiff. On a motion to strike, the court considered *Paradis Honey* in the context of the negligence analysis.

The court stopped to consider the difficulties of the proximity analysis in this case. The court recognised that, although the negligence pleading was ultimately successful, the negligence analysis had little bearing on the real issue: 'should the police compensate the plaintiffs …?'[147] In the court's view, the question of proximity turns on broader considerations in public authority liability cases since the government serves the public at large under public law duties.[148] The court recognised that Stratas JA's *obiter dictum* takes the point even further: by ending the 'fiction' of private law liability for governments. The court in *Patrong* understood Stratas JA's framework as 'an application for judicial review involving remedial discretion and a remedial monetary mandate.'[149] The court held that Stratas JA was 'absolutely correct' in pointing out the unsuitability of making decisions based on narrow private law factors. The fact that the defendant is the government broadened the scope of the inquiry.[150] While allowing the negligence claim, the court held that a better view would be to consider a range of factors in determining '*whether it is fair and reasonable that the police ought to compensate the plaintiffs for the losses alleged*.'[151] Balancing all the relevant factors, it was 'fair, just, and reasonable' that the defendants ought to compensate. Stratas JA's claim thus provides ammunition for a further dilution of recognised legal principles.

The new public law action may be even more problematic if the law were to reach a stage where private law damages are not available. However, Stratas JA does provide some guidance for the courts with respect to the new action. First, he emphasizes that compensation is the goal of monetary relief in public law. In exercising this discretion, the courts must keep the compensatory goal of damages in the foreground.[152] Put another way, monetary relief will neither be necessary nor

[145] Hogg (n 114) 208.
[146] (2015) ONSC 3078. Leave to appeal allowed: (2015) ONSC 6167.
[147] ibid, [75].
[148] ibid.
[149] ibid.
[150] ibid, [77].
[151] ibid, [78] [emphasis in original].
[152] *Paradis Honey* (n 9) [143]. Interestingly, he never actually uses the word 'damages'. I expect this is

appropriate in some cases, and in others it may be the only way to accomplish the compensatory objective.[153]

Second, he suggests that the intention or nature of the administrative conduct is relevant. The 'quality' of the public authorities conduct must be considered because monetary relief in this context is a mandatory order against a public authority.[154] In public law, mandatory orders against public authorities can only be made to fulfill a clear duty, redress significant maladministration, or vindicate public law values.[155] The effect of this is that his new action appears to cover only the factual claims falling on the 'public' side. Similarly, judicial review will not move forward if the facts appear 'private'.

Lastly, Stratas JA emphasizes the importance of the governments' role. He holds that concerns about indeterminate liability,[156] and leaving public authorities free to exercise their legislative mandates must also form part of the remedial discretion.[157] But this is also recognised in tort via the policy-operational distinction. On examination of these three features, it is not clear how the problems with private law, particularly negligence, are avoided, especially since his framework is similar to negligence liability for public authorities. It is also far from clear how this claim would apply in practice.

V. Conclusion

Private law liability of public authorities should be maintained absent a clear and convincing reason to discard it. There may even be good reasons to embrace uncertainty in the law,[158] especially where a potential solution does not do much to alleviate such uncertainty. Moreover, the public-private distinction is elusive. It is not the type of divide that either is, or warrants, a categorical approach. I echo Hogg Monahan and Wrights' conclusion that, before adopting a reform in this area of the law, it must be clear that it is better than the approach that precedes it.

Courts should proceed with caution when considering adopting Stratas JA's proposal in its entirety. Providing another avenue for litigants to seek monetary relief from public authorities through a public action may be positive step for government accountability and access to justice. This step, however, is positive only

because it sounds too much like private law.

153 ibid, [144].

154 ibid. This 'intention' is similar to the bad faith requirement in s 24(1) for Charter damages.

155 ibid.

156 This is addressed in negligence in the duty of care analysis. See *Cooper v Hobart* (2001) SCC 79.

157 *Paradis Honey* (n 9) [146].

158 See Alon Harel and Uzi Segal, 'Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime' (1999) 1 Am L & Econ Rev 276, 277.

if it works in conjunction with private law. I recommend keeping his new public law tort alive and using it in tandem with the current framework. It would make an interesting addition to the current patchwork of actions available to claimants. That being said, the public law tort should not be available at the expense of the already-existing private law framework. To warrant a complete renovation of public authority liability, coherence must be more than discretionary.