

# Administrative Delicts: A Case Study in Unlawful Municipal Administration

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Article abstract

Municipalities are prone to abuses of power by elected officials. The law books overflow with examples of municipal illegality. This threatens the rule of law. Courts require sufficient remedial authority to maintain the rule of law. An adequate remedy would simultaneously correct the illegal situation, deter repetition, compensate those injured, channel public outrage and, in certain cases, allow supervision of corrupt governmental processes or officials.

To satisfy these requirements, a new head of liability is needed. Liability in damages should be imposed for intentional jurisdictional excess.

The developing doctrine of administrative delict would provide for damages for deliberate and malicious abuse of power. Damages for an intentional or negligent failure of an individual or administrative body to operate within jurisdiction should be available either against the individual in his personal capacity or against the administrative body.

Because many of the wrongs suffered as a result of the illegal use of power are intangible, exemplary damages should be readily available in an action for administrative delict. This remedy would also enable the courts to consider deterrence and breach of public trust in assessing the award.

It is the responsibility of administrative law to maintain a sense of orderliness in public administration. The theory of administrative delict needs doctrinal nourishment in order to restrain the abuses of authorities imbued with statutory power.

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# Administrative Delicts: A Case Study in Unlawful Municipal Administration

JOSEPH ELIOT MAGNET

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## ABSTRACT

*Municipalities are prone to abuses of power by elected officials. The law books overflow with examples of municipal illegality. This threatens the rule of law.*

*Courts require sufficient remedial authority to maintain the rule of law. An adequate remedy would simultaneously correct the illegal situation, deter repetition, compensate those injured, channel public outrage and, in certain cases, allow supervision of corrupt governmental processes or officials.*

*To satisfy these requirements, a new head of liability is needed. Liability in damages should be imposed for intentional jurisdictional excess.*

*The developing doctrine of administrative delict would provide for damages for deliberate and malicious abuse of power. Damages for an intentional or negligent failure of an individual or administrative body to operate within jurisdiction should be available either against the individual in his personal capacity or against the administrative body.*

## RÉSUMÉ

*Les municipalités sont exposées aux abus de pouvoir des représentants élus. Les livres de droit regorgent d'exemples d'illégalités municipales qui, de plus en plus, mettent en péril la règle de droit.*

*Pour préserver la règle de droit, les tribunaux ont besoin d'un pouvoir de réparation suffisant. Un moyen de réparation adéquat serait de leur permettre à la fois de corriger la situation délictuelle, de prévenir la récidive, de dédommager les victimes d'injustice, de juguler l'outrage public et, dans certains cas, d'exercer un contrôle sur les pratiques frauduleuses du gouvernement ou des fonctionnaires.*

*Pour réaliser ces objectifs, un nouveau chef de responsabilité délictuelle est nécessaire. La responsabilité en dommages-intérêts devrait être imposée pour excès de compétence intentionnel.*

*La doctrine du délit administratif qui s'élabore peu à peu prévoira des dommages-intérêts pour abus de pouvoir délibérés et*

*Because many of the wrongs suffered as a result of the illegal use of power are intangible, exemplary damages should be readily available in an action for administrative delict. This remedy would also enable the courts to consider deterrence and breach of public trust in assessing the award.*

*It is the responsibility of administrative law to maintain a sense of orderliness in public administration. The theory of administrative delict needs doctrinal nourishment in order to restrain the abuses of authorities imbued with statutory power.*

*malveillants. Lorsqu'une personne ou un service administratif omet volontairement ou par négligence d'agir dans les limites de sa compétence, l'adjudication de dommages-intérêts devrait être prévue à l'encontre soit de cette personne en sa capacité personnelle, soit du service administratif.*

*Comme les préjudices causés par les abus de pouvoir sont intangibles dans bon nombre de cas, des dommages symboliques devraient être prévus dans une action pour délit administratif. Ce recours permettrait également aux tribunaux de prendre en considération l'aspect préventif et l'abus de la confiance publique dans l'adjudication des dommages-intérêts.*

*Maintenir le sens de l'ordre dans l'administration publique est la responsabilité du droit administratif. Il faut donner à la théorie du délit administratif le support doctrinal qui permette de restreindre les abus des autorités imbues de leur pouvoir statutaire.*

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### I. HISTORICAL BACKGROUND

In 1971, the Province of Manitoba amalgamated St. Boniface, St. Vital, Winnipeg and other area municipalities to create the present City of Winnipeg. St. Boniface and St. Vital have large Francophone populations. To safeguard Francophone communities, the provincial government included limited protection for the French language in the *City of Winnipeg Act*.<sup>1</sup> Part III of the Act, entitled “Official Languages of Canada”, provides:

1. That there be bilingual personnel at the city’s central offices and in the St. Boniface - St. Vital community offices so that residents may receive municipal services in French or English;
2. That all major information signs in the city’s central offices be bilingual;
3. That all notices in connection with any municipal service sent to residents of St. Boniface and St. Vital be bilingual;
4. That all city street and traffic signs in St. Boniface and St. Vital be bilingual.

The language provisions in the *City of Winnipeg Act* effected a political compromise between the province’s need for efficient municipal organization and the desire of autonomous French communities to preserve their distinctive identity. This compromise has been unsuccessful. Its failure points to a major crack in the municipal law/public law system. Since creation of the new city council in 1971, Council’s anglophone majority has consistently failed to respect the bilingualism provisions in the *City of Winnipeg Act*.

Travel to Winnipeg. You will see that virtually no signs in the city’s central offices are bilingual. Nor are bilingual personnel available in those offices to provide services in French to francophones. Services from municipal departments tend towards unilingualism. The police department, for example, is to all intents and purposes unilingual English. Francophones who seek information or advice in French are greeted with deri-

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1. S.M. 1971, chap. 105, s. 78-81.

sion. Even in St-Boniface - St. Vital, the heart of French Canada in the west, the Winnipeg City Council fails to respect the 1971 compromise. Notwithstanding the commands in the *City of Winnipeg Act*, English prevails in St-Boniface street and traffic signs.

Where the City complies with the bilingualism requirements, it is only as the consequence of a desperate, painful lobbying campaign by the francophone community. Even then the City seems to go out of its way to offer the grudging minimum. After years of pressuring the City, Francophones were promised bilingual services in Provencher Park. The City ultimately provided a few students for the summer months able to respond to questions in French.

City Council's non-compliance with the bilingualism provisions in the *City of Winnipeg Act* is deliberate. In the face of years of vigorous protests, how else could one explain a complete absence of bilingual signs, services and facilities in the municipal building where Council sits? In 1978, City Council debated the issue of bilingual signs at City Hall. One counsellor stated: "Only over my dead body shall there be bilingual signs in this building!" He was warmly applauded by his colleagues.

The Council's attitude is consistent with the general conduct of Manitoba's elected officials with regard to the rights of the province's Francophones. For ninety-five years, Manitoba disregarded section 23 of the *Manitoba Act*, which provides for the use of French in legislative records, journals and acts. Four times the courts ruled *ultra vires* the Manitoba legislation abolishing French as an official language. Four times the province disregarded the ruling in open defiance of the courts.

The events of 1983-84 indicate that a large proportion of Manitobans, and, in particular, Winnipeggers are not prepared to accord any linguistic rights to Francophones, legal or otherwise. In the autumn and winter of 1983-84, the N.D.P. provincial government attempted a political compromise by which, in exchange for a ten year delay to restore French in legislative acts, it would provide a limited right to bilingual services at the provincial level. This produced sufficient hysteria in the province to paralyse the legislature.

It is impossible for someone who did not live through the Manitoba language crisis of 1983-84 to appreciate what occurred. The Winnipeg offices of the *Société franco-manitobaine* were burned to the ground by an arsonist. *S.F.M.* files were destroyed. The leadership of the *S.F.M.* received constant death threats. The fear and violence grew to the point that the family of the *S.F.M.* leader had to be sent out of the province for its protection. Even I had to invest a small amount of my meagre academic salary in security.

Winnipeg City Council played a leading role in these attacks on the *franco-manitobaine* community. When it appeared that the provincial legislature would pass a resolution granting limited rights to the francophone community, Council voted to hold a city-wide referendum on

the issue. The wording and timing of the question leave no doubt that the vote was a deliberate attempt by Council to block the long overdue recognition of French linguistic rights in the province. The plebiscite only served to fuel the racial hatred of Winnipeg's rabble.

## II. THE RULE OF LAW

The contempt of Winnipeg's City Council for language rights guaranteed in the *City of Winnipeg Act* is but an exaggerated example of a situation occurring every day to the thousands of people who have to deal with municipal authorities. I have other examples taken from today's newspapers. The law books overflow with examples of municipalities which abuse their staggering powers for ulterior motives.<sup>2</sup> There is a certain inevitability about this. With the possible exceptions of Toronto and Montréal, municipalities are small governmental units. Elected officials are close to the scene. Frequently they are involved in the action. They know the players and personalities. They deal with concerns that affect people directly. A council decision with respect to a school, the re-zoning of a neighbourhood, or a road affect those things about which people care most passionately: their children, their homes and routines. Municipal councillors, because of proximity, are more susceptible than other elected officials to the hopes and fears of their communities. It is therefore easier to persuade them to bend or ignore the rules to reward their friends or clobber their enemies. Many municipalities have no permanent legal staff. Proceedings are "informal", by which I mean "unprofessional".

The Canadian legal system is premised on the Rule of Law, the fundamental principle that in discharging public duties, public officials have only that power which the law specifically assigns them. Irrelevant purposes, arbitrary actions, personal vendettas by public officials are the antithesis of our system. The Rule of Law requires that all government officials faithfully discharge every obligation imposed upon them by statute. In the *Patriation Reference*, the Supreme Court of Canada explained:

The "rule of law" is a highly textured expression [. . .] conveying for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.<sup>3</sup>

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2. For recent examples, see *R. v. Vanguard Hutterian Brethrens Inc.*, [1979] 6 W.W.R. 335, 5 Sask. R. 376 (Dist. Ct.); *Hauff v. Vancouver*, (1980) 12 M.P.L.R. 125; affirmed (1981) 28 B.C.L.R. 276, 24 L.C.R. 109 (C.A.); *Thurlestone Co-op v. Scarborough*, (1981) 15 M.P.L.R. 240 (Ont. Div. Ct.); *Re Doman Indust. Ltd. and North Cowichan*, (1980) 116 D.L.R. (3d) 358 (B.C.S.C.).

3. *Reference re Proposed Resolution Respecting the Constitution of Canada*, [1981] 1 S.C.R. 753, 805-6.

If elected officers were permitted with impunity to refuse to carry out their legal obligations and to act according to their own arbitrary priorities, the Rule of Law would be at an end. It is crucial for our democratic system that a court asked to intercede to compel adherence to the law has sufficient remedial authority to protect the precept of orderly accountability which underlies our public law system.

What would be the dimensions of a remedy adequate to redress the attack on the Francophone community perpetuated by Winnipeg City Council and the countless other victims of municipal lawlessness elsewhere? A sufficient remedy ought to respond to the following five requirements:

1. swift correction of the illegal situation;
2. deterrent power capable of checking irresolute officials;
3. compensation to those injured by illegal excesses of power;
4. a channel to express the community's outrage against the abuse of its trust;
5. in certain cases, continuing supervision over recently corrupted municipal institutions, processes or offices.

It may be desirable to establish an independent tribunal mandated to audit compliance with statutory requirements by municipal councils. It is always onerous to ask a private citizen to enforce orderly civic administration through slow, expensive, frustrating court proceedings. In municipal cases, additionally, the litigant is often attacking his neighbours, associates or friends. An independent body would better fill the lacunae left by private litigants who withdraw in the face of these formidable obstacles.

### III. REMEDIES

I have listed the components of an adequate remedial arsenal in ascending order of difficulty for our public law system to achieve. Through our overriding concepts of jurisdiction and illegality, public law, generally speaking, can channel municipal excesses and omissions into the proper statutory path, at least prospectively. It is more difficult for our public law system to achieve a proper compensatory mechanism through a comprehensive theory of administrative tort. The liability of public authorities had to develop out of immunities which were only recently relaxed.<sup>4</sup> For these reasons, administrative law places relatively little emphasis on deterrence and less on compensation.

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4. For a thorough examination of Crown immunities, see HOGG, *Liability of the Crown in Australia, New Zealand and the United Kingdom*. The issue was the subject of two recent Supreme Court decisions, *R. v. Eldorado Nuclear Ltd. and Uranium Canada Ltd.*, (1984) 50 N.R. 120 (S.C.C.); *Northern Pipeline Agency v. Pehinec*, [1984] 2 W.W.R. 385, 4 D.L.R. (4d) 1 (S.C.C.).

Conceptually, therefore, it would be better to think in terms of a special law of administrative torts, distinct from proceedings against the Crown. I am suggesting nothing less than a wholly new head of liability, particular to public law, based on jurisdictional excess. We can already see this development occurring in the theory of constitutional remedies under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*.<sup>5</sup>

The primary purpose of an action for administrative delict is to encourage orderly administration. It is not to facilitate the efficient allocation of losses caused by governmental entities. Losses caused by government entities are better dealt with through the ordinary law of civil responsibility. Crown liability has special features for historical reasons only. The reasons which underlie Crown immunity have disappeared. It would be wise to amend statutes governing liability of the Crown in order to harmonize them with the general law of civil responsibility.

All public law remedies are supplementary. A public law cause of action is no substitute for concentrating our major efforts on refining public institutions, the better to encourage them to utilize their powers for the purposes intended. Administrative lawyers ought not to wander lost in the law reports, forgetting that the primary element of public law is intelligent institutional design, especially in these times of constitutional and administrative law reform.

This understood, it is worth noting that our public law system can supplement efforts to perfect institutional design by a remedy for public law damages. Public law damages for intentional jurisdictional excess would aid the law of judicial review in its purpose to control statutory entities.

It is very difficult for courts to accept the need for continuing supervision over corrupt municipal affairs. Notwithstanding that municipalities are statutory creatures, they remain highly political legislative animals. Courts, therefore, hesitate to assume their functions, or to engage in any wide-ranging remedial mechanism that implies any form of trusteeship.

#### A. MANDAMUS

The theory of jurisdiction which underlies Canadian administrative law ought to be sufficient to correct Winnipeg's statutory evasion for the future. The City of Winnipeg's non-compliance with its Part III bilingualism duties is a clear breach of a statutory obligation by a public

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5. See *Crossman v. R.* (Fed. T.D.), April 13, 1984 (not yet reported); *Collin v. Lussier*, (1983) 3 C.R.D. 300-02 (Fed. Ct.). See also the American cases *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Carlson v. Green*, 446 U.S. 14 (1980).



authority. In such cases, the prerogative writ of mandamus is relatively easy to obtain<sup>6</sup> to require the Council to discharge the duty in question. Council's continued refusal to comply with a writ of mandamus will lead to a contempt citation, and the liability of the City's officers to imprisonment.

This course of action could perhaps provide a temporary solution to the problems in Winnipeg. However, it would not deter Winnipeg or any other authority from acting similarly in future, or from resuming its attack on the Francophone community. An appropriate remedy must retroact as well as prescribe.

#### B. DAMAGES FOR A BREACH OF ADMINISTRATIVE DUTY

Where a statutory entity or other public authority exceeds its jurisdiction, the common law is developing a new theory of administrative liability by which an injured party can recover damages. I will call this new theory the doctrine of administrative delict. The doctrine is speculative, but is capable of being developed from existing legal materials.

In the law of administrative delict, the mental element is key. To attract liability, excesses of jurisdiction must be deliberate, malicious or negligent. *Bona fide*, non-negligent extra-jurisdictional actions do not give rise to an action for damages under the umbrella of administrative delict.<sup>7</sup>

Since *Ashby v. White*,<sup>8</sup> the courts have consistently held that damages could be awarded to the victim of an abuse of power. The most famous modern example of this principle is the case of *Roncarelli v. Duplessis*<sup>9</sup> where the Québec Premier was ordered to pay over \$ 100,000 in damages to the plaintiff in compensatory (and exemplary) damages for the harm caused by malicious executive acts. The theory of this case is of interest in that Duplessis was held liable in his personal capacity. Excess of jurisdiction took him beyond the protective immunity of office and left him exposed as any private individual for damages caused by a wrongful act to another. Nevertheless, the point to notice is that the case withstands an interpretation which fastens on jurisdictional excess as the essential wrong. This distinguishes the case sharply from private law actions.

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6. *Re Hooton and Northumberland & Durham*, [1935] O.W.N. 382; *Re Waterloo Local Bd. of Health; Campbell's Case*, (1918) 44 O.L.R. 338; *Noble v. Esquesing*, (1917) 41 O.L.R. 400. For a recent discussion of the availability of mandamus, see *Government of the Republic of Italy v. Piperno*, [1982] 1 S.C.R. 320.

7. *R. v. Saskatchewan Wheat Pool*, [1983] 3 W.W.R. 97, 143 D.L.R. (3d) 9 (S.C.C.).

8. (1703) 2 Ld. Raym. 938.

9. [1959] S.C.R. 121; 16 D.L.R. (2d) 689.

*Roncarelli v. Duplessis* should be contrasted with *Gershman v. Manitoba Vegetable Producer's Board*<sup>10</sup> where the plaintiff was awarded \$ 35,000 as a result of the injuries he suffered due to the illegal harassment of the defendant board. Damages were paid by the board as an administrative entity, not by its individual members in their personal capacities, as in *Roncarelli v. Duplessis*.

I wish to underline the special element which inheres in the law of administrative delict. That is jurisdictional excess. Jurisdictional excess is utterly unknown to the private law. This impacts on the constituent components of an action for damages — causation, foreseeability of harm, and remoteness — which require reformulation in the law of administrative delict. It is not my present purpose to outline the new dimensions of these elements of an administrative tort here; only to draw attention to the inapplicability of private law concepts without substantial modification.

The recent Supreme Court decision in *R. v. Saskatchewan Wheat Pool*<sup>11</sup> is an important development in the law of administrative delict. In this case, Chief Justice Dickson rejected the existence in Canada of the nominate tort of statutory breach giving use to a right to recovery merely on proof of a statutory contravention and of damages. To protect innocent officials who unwittingly breach statutory duties, the court ruled that the plaintiff must prove "an intentional or negligent failure to comply with a statutory duty".<sup>12</sup> The decision is noteworthy for public law because it is likely that administrative entities exceed their jurisdiction by failure to comply with statutory duties on the emergent theory that substantial observance of the law is a condition precedent to the valid exercise of jurisdiction.<sup>13</sup> The case is equally noteworthy for its delineation of the mental element necessary to constitute an administrative delict, an intention to exceed jurisdiction. I freely confess that *R. v. Saskatchewan Wheat Pool* requires extensive interpretation to be seen in this way. The relevant point is that the case appears fully consistent with this interpretation.

These principles are obviously relevant to Winnipeg City Council's deliberate failure to respect Part III of the *City of Winnipeg Act*. City Council's serious statutory breach is jurisdictional; it is intentional; it is malicious. The conditions for an administrative tort are therefore fulfilled. Compensatory damages would lie.

It would be difficult to quantify the damages suffered by Winnipeg's francophone community as a result of City Council's illegal actions. Francophones have certainly lost the enjoyment of living in a community which reflects their culture. The linguistic atmosphere guaranteed to them

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10. [1976] 4 W.W.R. 406; 69 D.L.R. (3d) 177 (C.A.).

11. *Supra*, footnote 7.

12. *Id.*, 143 D.L.R. (3d) 9, at 25.

13. *Pearlman v. Harrow School*, [1978] 3 W.L.R. 736; *Re Hughes Boatworks*, (1980) 26 O.R. (2d) 420; *Re Racal Communications Ltd.*, [1983] W.L.R. 181 (H.L.).

as part of the 1971 compromise was never delivered. The community has had to mobilize politically just to tread water. The rate of assimilation is alarming.<sup>14</sup>

However, the cool logic of the common law regards these passionate complaints as intangibles. It would appear, therefore, that the law of administrative delict requires refinement and distinction from its common law cousin as regards quantifiability of damages for jurisdictional excesses. Many of the wrongs suffered as a result of the illegal use of power will have a similar aura of intangibility.

### *Exemplary Damages*

Exemplary damages have been awarded by common law courts since the mid 18th century.<sup>15</sup> The modern formulation of the elements of this head of damages was stated by the House of Lords in *Rookes v. Barnard*.<sup>16</sup> There, Lord Devlin sought to limit the categories of cases where exemplary damages could be awarded to two. He described the first of these categories as those cases where there has been "oppressive, arbitrary or unconstitutional action by the servants of the government".<sup>17</sup>

Canadian courts reject the limitations prescribed by Lord Devlin. The Alberta Court of Appeal made this clear in *McKinnon v. F.W. Woolworth*.<sup>18</sup> It reaffirmed this decision in the later case of *Paragon Properties Ltd. v. Magna Ltd.*<sup>19</sup> where Clement, J.A., concurring on this point, explained:

The basis of such an award [exemplary damages] is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct of the community in such a marked degree that censure by way of damages is, in the opinion of the Court, warranted. The object has been variously described to include deterrence to other wrongdoers [. . .] It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong.<sup>20</sup>

It is likely that some variant of the exemplary damages principle will be found more suitable to the law of administrative delict than compensation. This is suggested by the twin phenomena of intangibility

14. There has been a 40% drop in the enrolment in French language schools between 1971 and 1984. These figures are taken from the 1983 Annual Report of the Official Language Commissioner.

15. *Wilkes v. Wood*, [1763] Lofft 1; *Huckle v. Money*, (1763) 2 Wils. 205.

16. [1964] A.C. 1129.

17. *Id.*, p. 1226.

18. (1968) 70 D.L.R. (2d) 286; 66 W.W.R. 205 (Alta. C.A.).

19. [1972] 3 W.W.R. 106; 24 D.L.R. (3d) 156 (Alta. C.A.).

20. *Id.*, 24 D.L.R. (3d) 156, at 167.

of harm suffered, and community outrage at the abuse of its trust. It is worthy of notice that exemplary damages developed in situations, like *Rookes v. Barnard*, of intentional jurisdictional excess, which are the paradigm instance of administrative delict.

Apply the *Rookes v. Barnard* principle to Winnipeg City Council. City Council, in its arrogant disregard for the rule of the law, merits severe reprimand to censure its reprehensible conduct and to deter other public authorities from similar acts. Municipal councils, because of their close proximity to the community, have an endemic propensity towards bending the rules. For this reason, exemplary damages should probably be the first recourse in an action against a municipal authority, not a last afterthought.

For exemplary damages to succeed in its aim of deterring others, the damages awarded must be substantial.<sup>21</sup> In the case of large, powerful municipal corporations, such as Winnipeg, an appropriate award for such flagrant attacks on the Rule of Law would be in the millions, an award large enough to be built specially into the tax base.

It is noteworthy that in Canada, as well as in the United States, exemplary damages can be awarded even if general damages have not been proven, or even claimed.<sup>22</sup> This would be an important principle to incorporate into the law of administrative delict. It would allow exemplary damages to typify the law of administrative delict, rather than constitute a curious exception.

An action against the mayor of Winnipeg personally under the *Roncarelli v. Duplessis* theory would be in order. In the *City of Winnipeg Act*, the mayor is defined as "the head of the council and the chief officer of the city".<sup>23</sup> Most provincial municipal acts stipulate the duties of a mayor, head of council or chief officer of the municipality. The Manitoba *Municipal Act*, for example, states:

The head of every municipality shall be vigilant and active at all times

a) in causing the law for the government of the municipality to be duly executed and put in force [ . . . ]<sup>24</sup>

Municipal law texts are unanimous that the general duties of the mayor include the obligation to ensure that the laws of the municipality

21. See *Pretu v. Donald Tidey Co. Ltd.*, [1966] O.R. 191; affirmed 53 D.L.R. (2d) 509 (C.A.); *Fleming v. Spracklin*, (1921) 50 O.L.R. 289, at 297 (C.A.).

22. See *S. v. Mundy*, [1970] 1 O.R. 764, 9 D.L.R. (3d) 446; *Nappe v. Anshelewitz*, (1984) 53 L.W. 2057 (N.J. Sup. Ct.).

23. S.M. 1971, chap. 105, s. 9(1).

24. S.M. 1971, chap. 100, s. 138. Similar provisions are found in the statutes of Ontario (R.S.O. 1980, chap. 302, s. 72), Alberta (R.S.A. 1980, chap. C-26, s. 51(1)), British Columbia (R.S.B.C. 1978, chap. 290, s. 239).

are being enforced and obeyed.<sup>25</sup> A problem lies in the fact that a mayor derives his powers and duties from statute<sup>26</sup> and that the *City of Winnipeg Act*, unlike most other provincial municipal acts, does not delineate the role of the mayor, the head of council or the chief official of the city. It would, therefore, be necessary to develop municipal law so as to create implied duties for executive officers of statutory municipal corporations to oversee the enforcement of the laws governing the city. A breach of these implied duties would strip an executive officer of his shield of office, exposing him in his personal capacity to an action for administrative delict.

#### C. HUMAN RIGHTS VIOLATION

I might mention briefly that human rights statutes and the *Canadian Charter of Rights and Freedoms* are frequently relevant to intentional jurisdictional excess, as they are in this case. City Council's actions contravene the Manitoba *Human Rights Act*.<sup>27</sup> Paragraph 3(1)(b) of the Act prohibits discrimination against any person or class of persons with respect to any service, facility, right, licence or privilege unless there is reasonable cause for discrimination. Subsection 3(2) states that ethnic or national origin<sup>28</sup> of a person does not constitute reasonable ground for discrimination. Subsection 3(3) explicitly includes the services, facilities, rights, etc. of municipal corporations within the ambit of the Act. Paragraph 28(2)(c) of the Manitoba *Human Rights Act* allows the commission to grant exemplary damages.

#### D. VIOLATION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In April of 1985, section 15 of the *Canadian Charter of Rights and Freedoms* will come into force. The Charter applies to municipalities and many other statutory entities.<sup>29</sup> Section 15 prohibits discrimination on

25. See ROGERS, *The Law of Canadian Municipal Corporations*, Toronto, Carswell, s. 53.2, p. 280.12.

26. *Id.*, p. 280.11-280.12.

27. S.M. 1974, chap. 65.

28. There is some dispute as to whether Francophones constitute an ethnic group. The Canadian Human Rights Commission has recently ruled that it does not. (See "Complaint over French hiring is dismissed by commission", *Globe and Mail*, March 4, 1983; "PS discrimination charges dismissed by rights board", *The Citizen*, June 24, 1983). The Ontario Human Rights Board took the opposite view in *Cousens v. Canadian Nursing Association*, (1981) 2 C.H.R.R. D/365. In 1981, the Manitoba Commission was willing to hear a grievance of alleged discrimination, in part, on the basis of national origin. The grievor was a Francophone. On the facts, the commission found no discrimination. The fact that the commission accepted to hear the complaint indicates that in 1981, it was prepared to accept a person's mother tongue as equivalent to ethnic origin (See *1981 Annual Report of the Manitoba Human Rights Commission*, Sample Cases, p. 22).

29. *R. v. McCutcheon and City of Toronto*, (1983) 147 D.L.R. (3d) 193 (Ont. H.C.), established that the Charter applies to municipalities.

the basis of ethnic origin. Assuming that a person's mother tongue is equivalent to ethnic origin,<sup>30</sup> the City of Winnipeg would be in breach of section 15 of the Charter. Subsection 24(1) of the Charter confers power on the courts to award any remedy which the court considers just and appropriate. In the case of Winnipeg's deliberate disregard of linguistic rights, exemplary damages would be in order. Canadian courts have on two occasions awarded monetary damages for deliberate violation of Charter protected freedoms. This development runs in the same channel cut by American law fifteen years ago.<sup>31</sup>

### CONCLUSION

As the public institutions of our society grow increasingly complex and powerful, our legal system must expand to check the new forms of abuses of power which inevitably inhere in concentration of authority. Administrative law is responsible to maintain a sense of orderliness in public administration, so essential to a society premised on the Rule of Law. This requires curial power to check public authorities who are frequently tempted to use their might without regard for the rights of the weaker elements of our society.

The power of municipal councils has expanded tremendously as Canada has transformed into a more concentrated urban society. Our public law system has not yet developed sufficiently to restrain the all too frequent abuses of municipal power which experience teaches us to expect.

Prerogative writs are useful and in many instances may be sufficient. In many situations, however, the remedy they offer is incomplete. A new cause of action is needed to guarantee the compliance of municipalities with the law. The action for administrative delict, which I have proposed, with its compensatory and exemplary remedies would usefully secure this purpose. The foundation for the action exists in the decided cases, although hitherto the unifying principles await judicial and academic development.

I urge the legal profession, practicing and academic, to refine the law of administrative delict to give teeth to this budding course of action. Otherwise, I would suggest our public law system will be inadequate to deal with the large concentrations of power which ever more characterize the modern administrative state.

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30. *Supra*, footnote 28.

31. *Supra*, footnote 5.