Godbout *v.* Longueuil (City), [1997] 3 S.C.R. 844

City of Longueuil *Appellant/Respondent on cross-appeal*

v.

Michèle Godbout *Respondent/Appellant on cross-appeal*

and

Attorney General of Quebec *Mis en cause*

Indexed as: Godbout *v.* Longueuil (City)

File No.: 24990.

1997: May 28; 1997: October 31.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for quebec

Civil rights -- Right to privacy -- Residence requirement -- Municipality adopting resolution requiring all new permanent employees to reside within its territorial limits -- Whether right to choose where to establish one's home falls within scope of right to privacy -- Whether residence requirement infringes employee's right

to privacy -- If so, whether infringement justifiable -- Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 5, 9.1.

Municipal law -- Resolution -- Residence requirement -- Municipality adopting resolution requiring all new permanent employees to reside within its territorial limits -- Whether municipal resolution valid -- Whether residence requirement infringing "right to privacy" in Quebec Charter and "right to liberty" in Canadian Charter -- Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 5, 9.1 -- Canadian Charter of Rights and Freedoms, s. 7.

Judgments and orders -- Rectificatory judgment -- Damages -- Court of Appeal ordering employee reinstated and awarding her damages from time of her dismissal until time of trial -- Court of Appeal's reasons indicating that no damages were awarded for period between trial and appeal because they had not been properly quantified -- No holding to that effect in formal judgment -- Whether Court of Appeal erred in issuing rectificatory judgment.

Civil procedure -- Appeal -- Court of Appeal ordering employee reinstated and awarding her damages from time of her dismissal until time of trial -- No damages awarded for period between trial and appeal because they had not been properly quantified -- Whether Court of Appeal erred in not permitting employee to introduce evidence at appeal hearing in respect of damages between trial and appeal -- Whether Court of Appeal erred in not requesting parties to submit additional argument on that issue -- Whether Court of Appeal erred in not remanding issue of damages to Superior Court -- Code of Civil Procedure, R.S.Q., c. C-25, art. 523.

The appellant city adopted a resolution requiring all new permanent employees to reside within its boundaries. As a condition of obtaining permanent employment as a radio operator for the city police force, the respondent signed a declaration promising that she would establish her principal residence in the city and that she would continue to live there for as long as she remained in the city's employ. The declaration also provided that if she moved out of the city for any reason, she could be terminated without notice. The respondent's position became permanent and, approximately one year later, she moved into a new house she had purchased in a neighbouring municipality. When she refused to move back within the city's limits, her employment was terminated. The Superior Court dismissed the respondent's action for damages and reinstatement, holding that the city's residence requirement did not contravene the Quebec *Charter of Human Rights and Freedoms* and that the *Canadian Charter of Rights and Freedoms* did not apply in this case. The Court of Appeal allowed the respondent's appeal, concluding that the residence requirement was invalid mainly because it was contrary to public order. It granted the respondent's request for reinstatement and awarded damages for the financial losses she suffered from the time of her dismissal until the time of trial. The court noted that the damages in respect of the income lost by the respondent during the period between the trial and the appeal ("interim damages") had not been properly quantified and should not be awarded, but no specific holding to this effect was included in the formal judgment. The respondent brought a motion for rectification, asking that the court amend its formal judgment and award the "interim damages". The Court of Appeal granted the motion and amended the formal judgment, but did not accede to the respondent's request to recover the "interim damages". The city appealed on the substantive issues, and the respondent cross-appealed on the damages issue.

Held: The appeal and cross-appeal should be dismissed. The city's residence requirement unjustifiably infringes s. 5 of the Quebec *Charter*.

(1) *Appeal*

Per La Forest, L'Heureux-Dubé and McLachlin JJ.: The ambit of s. 32 of the Canadian *Charter* is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. As well, under s. 32, particular entities will be subject to *Charter* scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be described as "governmental" *per se*. Since municipalities cannot but be described as "governmental entities", they are subject to the Canadian *Charter*. First, municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent. Second, municipalities possess a general taxing power that, for the purposes of determining whether they can rightfully be described as "government", is indistinguishable from the taxing powers of the Parliament or the provinces. Third, and importantly, municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction. Finally, and most significantly, municipalities derive their existence and law-making authority from the provinces. As the Canadian *Charter* clearly applies to the provincial legislatures and governments, it must also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could simply avoid the application of the *Charter* by devolving powers on municipal bodies. Further, since a municipality is governmental in nature, all its activities are subject to *Charter* review. The Canadian *Charter* is therefore applicable to the residence requirement at

issue in this case. The particular modality a municipality chooses to adopt in advancing its policies cannot shield its activities from *Charter* scrutiny. All the municipality's powers are derived from statute and all are of a governmental character. An act performed by an entity that is governmental in nature is thus necessarily "governmental" and cannot properly be viewed as "private".

The right to choose where to establish one's home falls within the scope of the liberty interest guaranteed by s. 7 of the Canadian *Charter*. The right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. The autonomy protected by the s. 7 right to liberty, however, encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. Choosing where to establish one's home is a quintessentially private decision going to the very heart of personal or individual autonomy and the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so. Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the *International Covenant*[*] *on Civil and Political Rights* to which Canada is a party. The respondent's *Charter* claim did not implicate any notion of a constitutional "right to employment" or any other "economic right".

The respondent did not waive her right to choose where to establish her home by signing the residence declaration or by failing to move back within the city's

[*] See Erratum [1998] 1 S.C.R. iv

limits. The respondent had no opportunity to negotiate the mandatory residence stipulation and, consequently, cannot be taken to have freely given up her right to choose where to live. Similarly, the respondent's attempt to assert her right to choose where to live by refusing to conform with the terms of the residence requirement cannot amount to a renunciation of that right.

Under s. 7, a deprivation by the state of an individual's right to life, liberty or security of the person will not violate the Canadian *Charter* unless it contravenes the "principles of fundamental justice". Deciding whether the infringement of a s. 7 right is fundamentally just may, in certain cases, require that the right at issue be weighed against the interests pursued by the state in causing that infringement. This balancing is both eminently sensible and perfectly consistent with the aim and import of s. 7, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. As well, this balancing process will necessarily be contextual, insofar as the particular right asserted, the extent of its infringement, and the state interests implicated in each particular case will depend largely on the facts. Here, the residence requirement infringes the respondent's right to liberty in a manner that does not conform to the principles of fundamental justice. As justifications for the requirement, the city relied upon three "public interests": (1) the maintenance of a high standard of municipal services, (2) the stimulation of local business and municipal taxation revenue, and (3) the need to ensure that workers performing essential public services are physically proximate to their place of work. The first two cannot provide a sufficiently compelling basis upon which to override the respondent's right to decide where she wishes to live. As for the third one, while in certain circumstances a municipality might well be justified in imposing a residence requirement on employees occupying certain essential positions, the residence

requirement at issue is too broad to be upheld on that ground since it applies not only to employees whose functions require that they be proximate to their place of work, but also to all permanent employees of the city hired after the municipal resolution was adopted. Moreover, even if the residence requirement were restricted to emergency workers, the respondent would not fall within that class of employees.

There is no need to examine the violation of s. 7 under s. 1 of the Canadian *Charter*, given that all the considerations pertinent to such an inquiry have already been canvassed in the discussion dealing with fundamental justice. Furthermore, a violation of s. 7 will normally only be justified under s. 1 in the most exceptional of circumstances, if at all. Such circumstances do not exist here.

The residence requirement also infringed s. 5 of the Quebec *Charter* by depriving the respondent of the ability to choose where to establish her home. Section 5 protects, among other things, the right to take fundamentally personal decisions free from unjustified external interference. The scope of decisions falling within the sphere of autonomy protected by s. 5 is limited to those choices that are of a fundamentally private or inherently personal nature. The right to be free from unjustified interference in making the decision as to where to establish and maintain one's home falls squarely within the scope of the Quebec *Charter*'s guarantee of "respect for [one's] private life". Since the residence requirement imposed by the city essentially precluded the respondent from making that choice freely, it violates s. 5. Further, for the reasons given in relation to waiver under the Canadian *Charter*, the respondent did not waive her right to privacy under s. 5 of the Quebec *Charter*.

Section 9.1 of the Quebec *Charter*, assuming that it properly applies here, is to be interpreted and applied in the same manner as s. 1 of the Canadian *Charter*.

Thus, the party seeking to justify a limitation on a plaintiff's Quebec *Charter* rights under s. 9.1 must bear the burden of proving both that such a limitation is imposed in furtherance of a legitimate and substantial objective and that the limitation is proportional to the end sought, inasmuch as (a) it is rationally connected to that end, and (b) the right is impaired as little as possible. Essentially for the reasons given in the discussion of fundamental justice in the context of s. 7 of the Canadian *Charter*, the first two objectives suggested by the city as the basis for imposing the residence requirement at issue are not so significant or pressing as to justify overriding the respondent's s. 5 right. As regards the third objective, it cannot be concluded that the very broad residence requirement at issue is either rationally connected to the end sought to be achieved, or that it is proportional to it. Moreover, the specific evidence advanced by the city in respect of the justifications it offered was scant and is incapable of permitting the city to discharge its burden of proof. The infringement of the respondent's s. 5 right is thus not justified under s. 9.1.

Per Gonthier, Cory and Iacobucci JJ.: For the reasons given by La Forest J., the city's resolution requiring its employees to reside within its boundaries was invalid because it unjustifiably violated s. 5 of the Quebec *Charter*. The infringement of s. 5 provides a good and sufficient basis for dismissing this appeal and there is thus no need to consider the application of s. 7 of the Canadian *Charter*. The application of s. 7 may have a significant effect upon municipalities and, before reaching a conclusion on an issue that need not be considered in determining the appeal, it would be preferable to hear further argument with regard to it, including the submissions of interested parties and intervening Attorneys General.

Per Lamer C.J. and Sopinka and Major JJ.: The city's residence requirement infringes the respondent's right to privacy under s. 5 of the Quebec *Charter* and is not

justified under s. 9.1. This is sufficient to dispose of the appeal. It is unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the Canadian *Charter* in the absence of submissions from interested parties.

Section 5 of the Quebec *Charter* protects an employee's decision where to live as an aspect of his or her right to privacy. A municipality that seeks to uphold a residence requirement that infringes that section under s. 9.1 of the Quebec *Charter* must demonstrate that the requirement is imposed to advance a legitimate and substantial objective, and that the requirement is proportional to this objective, in that it is both rationally connected to the objective and constitutes a minimal impairment of the right protected by s. 5. These criteria must be applied flexibly and in a manner that is sensitive to the particular context and factual circumstances of each case. The objectives of improving the quality of services by fostering loyalty, of supporting the local economy, and of ensuring that certain essential employees be readily available are often invoked by municipalities to support a residence requirement. Under s. 9.1, these objectives may, depending on the circumstances of a case, be sufficiently compelling to justify an infringement of the employee's right to privacy. In the particular circumstances of this case, however, none of these objectives were sufficiently compelling to justify such an infringement.

(2) *Cross-appeal*

The issuance of the rectificatory judgment did not amount to re-examining a matter that was already *res judicata*. The reasons of the rectificatory judgment constituted nothing more than an attempt by the Court of Appeal to formalize with precision the conclusion it had reached in its previous judgment. Moreover, the issuance of the rectificatory judgment did not have any detrimental effect on the city's legal

position. The phrase "without prejudice to any of the [respondent's] rights or remedies arising from this judgment" did not confer upon her a right to pursue further recourses to recover the "interim damages", but confirmed that in formalizing its refusal to award the "interim damages", the Court of Appeal did not want to be taken as having altered any findings it had made in its previous judgment.

The Court of Appeal's refusal to permit the respondent to introduce evidence with respect to the quantum of the "interim damages" during the oral hearing itself did not constitute reversible error. To allow this evidence to be introduced at that stage would not have given the city ample opportunity to verify the figures the respondent claimed represented her losses. Moreover, under art. 199 *C.C.P.*, the respondent could have presented evidence in respect of the "interim damages" claim not only as part of the appeal itself but also at any time before judgment. No attempt to quantify the "interim damages" in accordance with the appropriate procedure was made. The Court of Appeal's refusal to grant the "interim damages" was thus not based on some procedural error on its part. Rather, it was based on the fact that no evidence as to quantum had ever been properly placed before it.

Finally, the Court of Appeal did not err in failing to request that the parties submit additional argument in respect of the "interim damages" claim, or to remand the matter to the Superior Court. Article 523 *C.C.P.* confers a discretion on the Court of Appeal to act in the interests of justice and to make whatever orders it deems necessary in order to safeguard the rights of the parties. Here, the Court of Appeal simply chose not to exercise that discretion. Given the clear opportunities the respondent had to present evidence in respect of her "interim damages", this Court should not interfere with that decision.

Cases Cited

By La Forest J.

Applied: *Brasserie Labatt ltée v. Villa*, [1995] R.J.Q. 73; **not followed:** *Ector v. City of Torrance*, 514 P.2d 433 (1973); *Kennedy v. City of Newark*, 148 A.2d 473 (1959); *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976); **referred to:** *McDermott v. Nackawic (Town)* (1988), 53 D.L.R. (4th) 150; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Re Klein and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Re McCutcheon and City of Toronto* (1983), 41 O.R. (2d) 652; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Kruse v. Johnson*, [1898] 2 Q.B. 91; *Halifax (City of) v. Read*, [1928] S.C.R. 605; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Beare*, [1988] 2 S.C.R. 387; *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Richard*, [1996] 3 S.C.R. 525; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519;

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; *R. v. Jones*, [1986] 2 S.C.R. 284; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter*, 360 N.E.2d 708 (1975), *certiorari* denied, 424 U.S. 977 (1976); *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97 (1971), appeal dismissed for want of substantial federal question, 405 U.S. 950 (1972); *Hanson v. Unified School Dist. No. 500, Wyandotte County, Kan.*, 364 F. Supp. 330 (1973); *Andre v. Board of Trustees of the Village of Maywood*, 561 F.2d 48 (1977); *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265 (1994); *Donnelly v. City of Manchester*, 274 A.2d 789 (1971); *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647; *Reid v. Belzile*, [1980] C.S. 717; *Centre local de services communautaires de l'Érable v. Lambert*, [1981] C.S. 1077; *Cohen v. Queenswear International Ltd.*, [1989] R.R.A. 570; *The Gazette (Division Southam Inc.) v. Valiquette*, [1997] R.J.Q. 30; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, [1997] 2 S.C.R. 299.

By Cory J.

Applied: *Brasserie Labatt ltée v. Villa*, [1995] R.J.Q. 73; **referred to:** *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

By Major J.

Referred to: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

Statutes and Regulations Cited

Act to amend the charter of the city of Longueuil, S.Q. 1982, c. 81, art. 3 [amending the *Cities and Towns Act* for the city of Longueuil by replacing s. 52 and adding ss. 52.1 to 52.14].

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 32(1).

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 1 [am. 1982, c. 61, s. 1], 3, 5, 6, 9.1 [ad. *idem*, s. 2], 10 [am. *idem*, s. 3].

Cities and Towns Act, R.S.Q., c. C-19.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 1379, 1437.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 199, 523 [am. 1985, c. 29, s. 11].

International Covenant[**] *on Civil and Political Rights*, Can. T.S. 1976 No. 47, Art. 12(1).

Police Act, R.S.Q., c. P-13, s. 65(*d*).

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Lefebvre, Brigitte. "Quelques considérations sur la notion d'ordre public à la lumière du Code civil du Québec". Dans *Développements récents en droit civil (1994)*. Cowansville, Qué.: Yvon Blais, 1994, 149.

[**] See Erratum [1998] 1 S.C.R. iv

Molinari, Patrick A., et Pierre Trudel. “Le droit au respect de l’honneur, de la réputation et de la vie privée: aspects généraux et applications”. Dans Formation permanente du Barreau du Québec, *Application des Chartes des droits et libertés en matière civile*. Cowansville, Qué.: Yvon Blais, 1988, 197.

Myers, Ross S. “The Constitutionality of Continuing Residency Requirements for Local Government Employees: A Second Look” (1986), 23 *Cal. W. L. Rev.* 24.

Note. “Municipal Employee Residency Requirements and Equal Protection” (1974-1975), 84 *Yale L.J.* 1684.

Singleton, Thomas J. “The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter” (1995), 74 *Can. Bar Rev.* 446.

APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal, [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130, [1995] Q.J. Nos. 686 and 874 (QL), setting aside a judgment of the Superior Court, [1989] R.J.Q. 1511, 48 M.P.L.R. 307, 12 C.H.R.R. D/141. Appeal and cross-appeal dismissed.

Jean-Jacques Rainville and *Réjean Rioux*, for the appellant/respondent on cross-appeal.

France Saint-Laurent and *Richard Bertrand*, for the respondent/appellant on cross-appeal.

Isabelle Harnois, for the *mis en cause*.

The reasons of Lamer C.J. and Sopinka and Major JJ. were delivered by

1 MAJOR J. -- I have read the reasons of my colleagues Justice La Forest and Justice Cory and I agree with Cory J. that the appeal should be dismissed on the basis that the residence requirement imposed by the appellant infringes the respondent’s right to privacy under s. 5 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. , c.

C-12, and is not justified under s. 9.1. This is sufficient to dispose of the appeal. With respect to those of my colleagues who hold the contrary view, I agree with Cory J. that it is unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the *Canadian Charter of Rights and Freedoms* in the absence of submissions from interested parties and I too express no opinion on this issue.

2 Like Cory J., I agree with La Forest J. that s. 5 of the Quebec *Charter* protects the respondent's decision where to live as an aspect of her right to privacy, and that the residence requirement in this appeal is not justified under s. 9.1. I do not agree that the scope for justification of conditions of employment by municipalities should be as limited as that outlined by my colleagues.

3 This Court held in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 770, that s. 9.1 of the Quebec *Charter* is a justificatory provision corresponding to s. 1 of the Canadian *Charter* and that it is to be interpreted and applied in the same manner. Therefore, a municipality that seeks to uphold a residence requirement that infringes s. 5 under s. 9.1 must demonstrate that the requirement is imposed to advance a legitimate and substantial objective, and that the requirement is proportional to this objective, in that it is both rationally connected to the objective and constitutes a minimal impairment of the right protected by s. 5.

4 These criteria must be applied flexibly and in a manner that is sensitive to the particular context and factual circumstances of each case. An objective which is sufficiently compelling in one case may not meet the standard in a different context. A particular residence requirement may be proportional to a stated objective in one context but not in another. In particular, whether an objective is sufficiently compelling and

whether a residence requirement is proportional to this objective will depend on a number of factors, including the nature of the objective, the duties of the affected employee, the scope and duration of the residence requirement, and the size, population and characteristics of the municipality.

5 Broadly speaking, there appear to be three objectives which municipalities seek to advance by requiring municipal employees to reside within their boundaries. It may be useful to provide a brief outline of the circumstances in which an objective may be sufficiently compelling and a residence requirement may be sufficiently proportional to this objective to meet the standard imposed by s. 9.1.

6 The first objective invoked is improving the job performance of municipal employees and therefore the quality of the services they provide to residents. It is stated that the performance of municipal employees will be enhanced by requiring them to reside within the municipality for several reasons. One, as residents they will be better acquainted with the community's problems and needs. Also, as residents they will have a greater personal stake in the welfare of the community, and thereby a greater incentive to perform. Similarly, requiring municipal employees to reside within the community will instil in them a greater sense of pride, commitment and loyalty. Finally, requiring municipal employees to be residents promotes their identity within the community, which in turn bolsters the confidence of residents in their local government.

7 La Forest J. concludes that the objective of improving the quality of services by fostering greater loyalty will never be sufficiently compelling to justify a residence requirement under s. 9.1. With respect, I disagree.

8 In my opinion there can be cases in which this objective will be sufficient. It will depend on the circumstances. In this regard, several factors are relevant. An important consideration is the nature of the affected employee's duties. Fostering a sense of loyalty is more important for high level officials charged with making policy decisions, such as the mayor or municipal councillors, than for support staff or routine labour. It seems reasonable to require those who make policy decisions affecting a community to reside within that community. Other factors to consider include the size, population and characteristics of the community. This objective is more compelling in a small town or a rural area where municipal employees are more easily identifiable by other residents than in the anonymity of a large city.

9 La Forest J. concludes that, even if the objective of improving the quality of services were sufficiently compelling, it is unclear whether requiring employees to reside within the municipality would achieve this goal. In short, he doubts whether there is a rational connection between improving the quality of services and a residence requirement. He also concludes that a residence requirement will never be the least intrusive means of achieving this objective. With respect, I do not think that necessarily follows and doubt that such a proposition can be conclusively stated. The facts surrounding the residency requirement will determine the result. The vagaries of life and particularly those of municipalities preclude such a generalization.

10 The objective of improving services and fostering loyalty by residential requirements suffers in this case from a lack of compelling evidence. The respondent was employed as a radio operator for the Longueuil police force. Given her duties, it is unlikely that requiring her to live within the City of Longueuil would improve the quality of her work or instil a greater pride among its residents. Furthermore, the City of Longueuil is an urban municipality with a sizeable population within the metropolitan

region of Montreal. The boundaries of urban municipalities such as the City of Longueuil are not clearly identifiable, as one municipality overlaps the other. It is highly unlikely that a municipal employee in the respondent's position would be identifiable to members of the local community.

11 The second objective often invoked to justify a requirement that municipal employees live within the municipality is that of supporting the local economy. Municipal employees who reside within the municipality will contribute to the local economy as consumers and to the local municipal tax base either directly as taxpayers, or indirectly as tenants. In some measure, the taxpayers of the municipality will witness some of their taxes being returned to the benefit of the community. La Forest J. concludes that this will never be a sufficiently compelling objective to justify an infringement of s. 5 under s. 9.1. I disagree. The sensitivity of the community to this conclusion will also be a question of fact. There may be cases where this objective, on the facts, will be sufficiently important to justify an infringement of s. 5. Economic concerns and employee recognition may be of greater importance in a small town or rural community than in a large city. This objective was not supported by any evidence to give it a compelling quality in this case.

12 The third and final objective which is invoked to justify the imposition of a residence requirement is that of ensuring that certain employees who provide essential services are readily available. Again, whether this objective is sufficiently compelling will depend on the particular circumstances of the case. An important factor to consider is the nature of the duties of the affected employee. This objective will be sufficiently compelling for emergency personnel, such as police officers, firefighters and ambulance personnel, given the obvious importance of ensuring that they are able to respond promptly in times of urgent need. It also seems clear that requiring these employees to

live within the municipality is rationally connected to the objective of ensuring they are readily available. It is impossible to speculate with accuracy, as even this requirement may not be the least intrusive means of achieving this objective as it may be obtained by simply requiring employees to live within a certain distance. This illustrates the need to support the objective with persuasive evidence.

13 I agree with La Forest J. that the evidence was insufficient to justify the residence requirement that was imposed on the respondent in this case on the basis of this third objective. As he points out, the residence requirement was imposed on all of the appellant's permanent employees. In view of the respondent's employment as a radio operator for the police force, and the absence of a justification for the residency requirement, the requirement in these circumstances is unreasonable.

14 In the particular circumstances of this case, none of the objectives referred to are sufficiently compelling to justify the infringement of the respondent's right to privacy under s. 5 of the Quebec *Charter*, and I would dismiss the appeal.

The reasons of La Forest, L'Heureux-Dubé and McLachlin JJ. were delivered by

15 LA FOREST J. -- In modern times, the ability of individuals to make decisions free from unwelcome external interference is increasingly under pressure. Whether that pressure finds its roots in changing patterns of social organization, in technological advancements, in governmental action, or in some other source, its net effect has largely been to whittle down the scope of personal freedom. While the exigencies of community life clearly preclude the possibility that individuals could ever be guaranteed an untrammelled right to do as they please, the basic ability to make fundamentally private

choices unfettered by undesired restrictions demands protection under law, such that it can only be overridden where other pressing concerns so dictate. The central issue raised in this appeal is whether the choice of where to establish one's home falls within that narrow sphere of personal decision-making deserving of the law's protection and whether, even if it does, other important considerations might nevertheless take precedence over it. More specifically, the appeal raises the question whether, on pain of termination, the appellant municipality can legitimately require all its permanent employees -- including the respondent -- to live within the territorial limits of the city and to maintain their homes there for the duration of their employment. The main appeal also raises a threshold issue concerning the applicability of the *Canadian Charter of Rights and Freedoms* to municipalities. The cross-appeal concerns whether, for procedural reasons, the respondent is precluded from recovering a portion of the damages she suffered after being dismissed by the appellant for failing to abide by the terms of the residence requirement.

I. Facts

16 The respondent, Michèle Godbout, was hired by the appellant municipality, the City of Longueuil, as a short-term employee on June 7, 1985. She initially held a position as an archivist, but later assumed a post as a radio operator for the Longueuil police force. As a condition of obtaining permanent employment, Ms. Godbout was required on February 17, 1986 to sign a declaration promising that she would establish her principal residence in Longueuil and that she would continue to live there for as long as she remained in the appellant's employ. The declaration also provided that if she moved out of Longueuil for any reason, she could be dismissed without notice. The document signed by Ms. Godbout read as follows:

[TRANSLATION]

DECLARATION OF PLACE OF ORDINARY RESIDENCE

I hereby undertake to establish my ordinary residence on the territory and within the limits of the City of Longueuil within a maximum of sixteen (16) months from the date on which I am hired.

I further undertake to maintain my ordinary residence on the territory and within the limits of the City of Longueuil for as long as I am employed by the City of Longueuil.

I understand and agree that failure to fulfill the above conditions will justify my dismissal, without further notice.

The residence requirement imposed by the declaration was based on Resolution CE 84-1491, which was passed by the Executive Committee of the appellant municipality on October 23, 1984. The relevant portions of that resolution provided as follows:

[TRANSLATION]

WHEREAS the Executive Committee has read the personnel adviser's report dated October 15, 1984;

IN VIEW OF the recommendations made by the director of personnel and the director general on October 15 and 18, 1984;

IT IS UNANIMOUSLY RESOLVED:

TO APPROVE the "Declaration of place of ordinary residence" form, which the Personnel Branch must have signed by every new employee hired to fill a regular position with a view to becoming permanent.

Resolution CE 84-1491 was later adopted by the Municipal Council through Resolution CM 84-1286, dated November 7, 1984.

17 On May 21, 1986, the respondent's position became permanent. Approximately one year later, and after she had informed her superiors of her intention to do so, the respondent purchased a house in the neighbouring municipality of Chambly

and moved there with her boyfriend. On January 19, 1988, the head of the appellant's personnel department approached the respondent with the aim of persuading her to move back to Longueuil. The respondent refused, and her employment was terminated by the appellant on February 17, 1988. The appellant admits that the only reason it dismissed the respondent was the fact that she moved out of Longueuil.

18 The respondent brought an action in the Superior Court of Quebec seeking damages and reinstatement in her position. The action was dismissed with costs on March 31, 1989: [1989] R.J.Q. 1511, 48 M.P.L.R. 307, 12 C.H.R.R. D/141. An appeal to the Court of Appeal was allowed on September 14, 1995 and damages in the amount of $10,763.47 were awarded: [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130, [1995] Q.J. No. 686 (QL). The respondent then brought a motion for rectification in respect of the Court of Appeal's formal judgment order, alleging that the court did not make a conclusive finding with respect to certain aspects of the damages claim. The Court of Appeal granted the respondent's motion and amended its reasons on November 15, 1995: [1995] Q.J. No. 874 (QL). It did not, however, accede to the respondent's request to recover the damages that had not been awarded in the September 14 decision. On October 3, 1996, this Court granted the appellant's motion for leave to appeal on the substantive issues as well as the respondent's motion for leave to cross-appeal on the damages issue: [1996] 3 S.C.R. xiv.

II. Judicial History

A. *Superior Court of Quebec*, [1989] R.J.Q. 1511

19 The respondent raised two main issues before Turmel J.: (a) whether the resolutions implementing the residence requirement were properly adopted by the

Municipal Council; and (b) whether, even if they were, the residence requirement was nevertheless void as violating either the Canadian *Charter* or the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, or both. While the appellant initially raised a number of subsidiary arguments, it later abandoned them, and the case proceeded on the basis that the only issues to be resolved were those raised by the respondent.

20 In respect of the first main issue, the respondent made two submissions. First, she alleged that under the *Charter of the City of Longueuil*, the Longueuil Municipal Council did not have the power to adopt a resolution restricting the place of residence of its employees. While Turmel J. accepted that the powers of municipalities are determined by the enabling statutes which govern them, he also found as follows, at pp. 1515-16:

> [TRANSLATION] Every municipal corporation . . . has regulatory, administrative and ministerial powers.
>
> In the absence of specific provisions, the hiring of employees is included in the exercise of administrative authority and, as such, like any administrative act, is subject to individual discretion. The conditions and requirements for applying for employment fall within that discretion.

On this basis, Turmel J. reasoned that the power to impose a residence requirement falls within the competence of the Longueuil Municipal Council and, consequently, he found that the respondent's contrary submission could not succeed.

21 Secondly, the respondent alleged that Resolution CM 84-1286 had not been adopted in conformity with the proper procedure. That resolution reads, in relevant part, as follows:

> [TRANSLATION]
>
> WHEREAS the Council has read the minutes of the Executive Committee's 107th meeting. . .;
>
> IT IS . . . UNANIMOUSLY RESOLVED:
>
> To take note of the minutes of the Executive Committee's 107th meeting on October 23, 1984, which contain its decisions. [Emphasis added.]

The procedure for adopting Municipal Council resolutions is set out in s. 52.2 of the *Charter of the City of Longueuil* (as amended by S.Q. 1982, c. 81, s. 3), which provides:

> **52.2** Every demand, by-law or report submitted by the executive committee must, unless otherwise prescribed, be approved, rejected, amended or returned by the vote of the majority of the members of the council present at the sitting.

The respondent contended that by the terms of this provision, the Municipal Council was entitled only to "approve", "reject", "amend" or "return" a resolution from the Executive Committee and that the words [TRANSLATION] "take note" in Resolution CM 84-1286 amounted to none of these dispositions. While he acknowledged that the phrase chosen by the Municipal Council was not as clear as it might have been, Turmel J. explained that according to s. 52.2, the Municipal Council "must" dispose of an Executive Committee resolution in one of the four prescribed manners. Finding that the words "take note" did not amount to a "rejection", "amendment" or "return", Turmel J. reasoned that they could constitute nothing other than an "approval" and he therefore rejected the respondent's claim.

22 Turning to the second of the respondent's main arguments, Turmel J. began by examining whether the residence requirement imposed by the appellant contravened ss. 1, 3, 5 or 6 of the Quebec *Charter*, which read as follows:

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.
>
> **3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.
>
> **5.** Every person has a right to respect for his private life.
>
> **6.** Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

Without a lengthy analysis, Turmel J. found that none of these provisions was violated on the facts. While he noted that the respondent could have advanced an argument based on s. 10 of the Quebec *Charter* (dealing with equality and discrimination on the basis of, *inter alia*, "civil status"), he found that such an argument would not, in any event, have succeeded in this case.

23 Finally, Turmel J. examined the submissions made in respect of the Canadian *Charter*, and explained that before the respondent could allege that any of her *Charter* rights was violated, she would first have to establish that the *Charter* actually applied. While the judge recognized that municipalities may be analogized to Parliament or provincial legislatures inasmuch as they can act in a "governmental" capacity, he found that the analogy held up only insofar as the municipality exercised its "public", law-making function. Since, in his view, the appellant was acting in a "private" capacity (i.e., *qua* employer) in imposing the residence requirement, however, he held that the Canadian *Charter* did not apply here.

24 Notwithstanding this conclusion, Turmel J. proceeded in *obiter* to discuss the specific arguments raised under ss. 7 and 15 of the Canadian *Charter*. With respect

to s. 7, he held that a "right to work" -- which, in his view, was the right implicated in this case -- did not fall within the scope of the rights to "life", "liberty" or "security of the person" and consequently, he found that s. 7 could not properly be relied upon by the respondent. As regards s. 15, Turmel J. followed the reasoning of Hoyt J.A. (as he then was) in *McDermott v. Nackawic (Town)* (1988), 53 D.L.R. (4th) 150 (N.B.C.A.), in holding both that the respondent did not belong to any identifiable group as required by that provision and that, even if she did, no discrimination existed on the facts. On this basis, he found that s. 15 did not apply here either. Having found no ground upon which to uphold the respondent's claims, Turmel J. dismissed the action with costs.

B. *Quebec Court of Appeal -- September 14, 1995*, [1995] R.J.Q. 2561

(1) Baudouin J.A.

25 On the appeal to the Court of Appeal, Baudouin J.A., who wrote the central judgment, began by explaining that while the two main issues on appeal were the same as those raised by the parties in the court of first instance, a further issue also required consideration; namely, whether the residence requirement imposed by the appellant was contrary to [TRANSLATION] "judicial public order". He expressed himself on this point, at p. 2566, as follows:

> [TRANSLATION] The rather unusual length of time this Court's judgment was reserved was due first of all to the fact that a major point of law, namely the application of the standard of judicial public order to this case, was not elaborated on or discussed in depth by the parties in either their factums or their argument. This Court therefore had to raise it *proprio motu*.

Baudouin J.A. also noted that the matter of quantification of damages had not been fully canvassed by the parties and that the Court of Appeal was also obliged to consider this

issue at length in disposing of the appeal. Before addressing these further issues, however, Baudouin J.A. examined the issues initially raised before Turmel J.

26 As regards the validity of the municipal resolutions, Baudouin J.A. agreed with Turmel J. that because the term [TRANSLATION] "take note" does not amount to a rejection, an amendment or a remand order, the Municipal Council must be taken to have approved the Executive Committee's resolution. Indeed, he held, at p. 2566, that

> [TRANSLATION] [i]t is clear in the case at bar that the Municipal Council's decision of November 7, 1984 can be interpreted only as an approval. The Council's approval does not have to be given in any set way, but can, on the contrary, be inferred from the context.

On this basis, Baudouin J.A. rejected the first of the respondent's main arguments.

27 Baudouin J.A. next examined whether the residence requirement violated the Canadian *Charter*. He explained, as had Turmel J., that the first question to be answered in this regard was whether the *Charter* even applied on the facts. Much like Turmel J., Baudouin J.A. found that because the municipality in this case was acting in a "private" capacity in imposing the residence requirement (i.e., as the respondent's employer), it would probably not be subject to *Charter* scrutiny. He found it unnecessary to make a specific finding on this point, however, since in his view, the respondent's submissions in respect of the Canadian *Charter* could not succeed anyway. At pp. 2567-68, he stated:

> [TRANSLATION] The [respondent] is relying on ss. 15 and 7 to support her arguments. What she is actually asserting is a right to work, which is not a right formally recognized by any provision of the Canadian Charter. The right to work is essentially economic in nature and, as such, does not come under the protection granted by s. 15 of the Charter. In addition, the courts have consistently held that this right cannot be based on s. 7 either,

> since obtaining or keeping a job does not involve the protection of life, liberty or security of the person.

Based on these considerations, Baudouin J.A. rejected the respondent's *Charter* arguments.

28 With respect to the Quebec *Charter*, Baudouin J.A. began by recognizing that no threshold issue of applicability arose because that document governs relations between private parties as well as those between the government and individuals. He then addressed each of the respondent's submissions in turn. He found first that the right to "freedom" enshrined in s. 1 does not include within its ambit a "right to work". Since he understood this kind of right to form the basis of the respondent's claim, he found that s. 1 did not apply. Similarly, he found that s. 3 was inapplicable because he could see no way in which the freedoms guaranteed by that provision were implicated on the facts.

29 Even though he ultimately found that s. 5 of the Quebec *Charter* did not apply either, he undertook a more thorough analysis on this point, noting that the precise content of what falls within one's "private life" has yet to be fully determined. Recognizing that s. 5 may include within its ambit a right to a protected sphere of personal activity, he nevertheless found, at p. 2569, that s. 5 could not avail the respondent in this case:

> [TRANSLATION] In the case at bar, I therefore have difficulty seeing how the choice of a particular place of residence could fall within the content of one's private life in the context under consideration or how the mere fact of making one's place of residence known to third parties could amount to such interference. It seems to me that the concept of "private life" is intended much more . . . to protect what is part of one's personal life, in short, what constitutes a minimum personal sphere that is safe from intrusion.

Baudouin J.A. further held that s. 6 did not apply, because the imposition of the residence requirement did not in any way interfere with the respondent's ability to enjoy or dispose freely of her property.

30 Having dealt with the issues raised by the parties, Baudouin J.A. turned next to the question of "public order" to which he alluded at the beginning of his reasons. He began his analysis by setting out two basic premises. The first was that a clause imposing a residence requirement is restrictive of basic liberties -- and hence potentially contrary to public order -- because it limits the ability of an employee to choose where he or she wishes to live. This premise, in Baudouin J.A.'s view, was simply a corollary of the proposition that, under normal circumstances (i.e., absent some pressing and overriding concern), citizens must be taken to have the right to live where they please. The second premise was that it must be permissible for an employee freely to waive his or her right to choose where to live through a contract of employment. Such "free" waiver did not inhere in the case at bar, Baudouin J.A. noted, because the declaration signed by the respondent amounted to a contract of adhesion, the terms of which were dictated entirely by the appellant.

31 Based on these two premises, Baudouin J.A. reasoned that a residence requirement will be contrary to public order unless a plausible justification for it can be advanced. In the case at bar, he found that all the interests suggested by the appellant were unpersuasive. Specifically, he rejected the argument that the respondent had to live in the municipality out of necessity or in case of emergency, on the basis that her position was not so essential as to justify such a requirement. Similarly, he could not agree with the submission that keeping employees within the municipality would improve city services by better acquainting those employees with the municipality itself since, to his mind, one employee could easily live within a municipality without taking

any interest in it, while another could live outside the territorial limits but be in better touch with the community and its needs. Finally, he found that because a person living within a municipality cannot be assumed to spend his or her money in that municipality, the residence requirement could not be justified on the basis that it stimulated the local economy. Finding no justification advanced by the appellant to be satisfactory, Baudouin J.A. concluded that the residence requirement at issue was contrary to public order.

32 In disposing of the case, Baudouin J.A. allowed the appeal, declared Resolutions CE 84-1491 and CM 84-1286 null and void, and granted the respondent's request for reinstatement. He also granted her damages in the amount of $10,763.47, representing the financial losses she suffered from the time of her dismissal until the time of trial. Baudouin J.A. noted, however, that since no evidence had been led in respect of the damages suffered during the period between the trial and the appeal, no calculation of quantum could be made in that regard. He noted further that while the applicable rules of civil procedure permitted plaintiffs to quantify their damages either at the time of an appeal or at any time before the appeal judgment is rendered, the respondent never availed herself of that possibility. He further found that no plausible justification existed either for allowing the respondent to make oral submissions on the damages issue during the appeal -- a request for which had been denied during the hearing on the grounds that it would have been unfair to the appellant -- or for remanding the damages issue to the Superior Court. In the result, Baudouin J.A. made no order in respect of damages suffered by the respondent during the period between the trial and the appeal.

(2) Gendreau J.A.

33 Gendreau J.A. agreed with Baudouin J.A.'s disposition but held instead, citing his own majority judgment in *Brasserie Labatt ltée v. Villa*, [1995] R.J.Q. 73 (C.A.), that the residence requirement infringed the right to respect for one's private life guaranteed by s. 5 of the Quebec *Charter*.

(3) Fish J.A.

34 Fish J.A. agreed substantially with the reasons of Baudouin J.A., subject only to the reservation that the arguments advanced under the Quebec *Charter* did not, in his opinion, need to be addressed at all.

C. *Quebec Court of Appeal -- November 15, 1995*

35 Following the release of the reasons of September 14, 1995, the respondent brought a motion for rectification of the formal judgment. Specifically, she claimed that the judgment itself made no specific order in respect of the damages she suffered between the time of the trial and the release of the appeal judgment -- an amount to which, for convenience, I shall refer as the "interim damages" -- and she sought an order granting those damages to her.

36 After considering the motion, the Court of Appeal found the respondent to be correct, *stricto sensu*, in contending that no formal order had been made in respect of the interim damages claim. It therefore granted the motion and ordered that its reasons of September 14 be amended to add the following conclusion:

[TRANSLATION]

> DISMISSES, on the ground that it is unenforceable, the conclusion in the notice of appeal that reads as follows:
>
> ORDER the defendant . . . to compensate the plaintiff . . . for all wages and other amounts lost from that date until the date on which she is reinstated, less any amounts she earned elsewhere. . . .

As the wording of this addendum makes clear, the court refused to grant the respondent the interim damages she sought.

37 In its brief reasons, the Court of Appeal simply reiterated three findings made by Baudouin J.A. in the main appeal. First, it restated Baudouin J.A.'s observation that, while the respondent could easily have quantified her interim damages at any time before the release of the appeal judgment, she had failed to do so, and it explained that she should not, at such a late stage, be permitted to rectify the situation. Secondly, it repeated Baudouin J.A.'s finding that while the respondent had offered to make submissions in the appeal hearing itself (or through an affidavit) with respect to the quantification issue, such submissions could not properly have been permitted, since the appellant had received the documents relevant to those submissions only two days earlier and hence would have been unprepared to challenge the respondent's claims. Finally, the court reiterated its rejection of the respondent's request to have the damages matter remanded to the Superior Court, on the basis that the remand power is exercised in only very limited circumstances. In the Court of Appeal's view, all these findings were evident in the appeal reasons themselves, and their repetition served only to confirm its decision not to award the respondent the interim damages.

III. Issues

38 The parties put forth a number of different arguments in this Court with respect to the validity of the appellant's residence requirement. To my mind, the main issues raised by those arguments -- and the ones I propose to discuss in detail in these reasons -- may be stated as follows:

(1)(a) Does the Canadian *Charter* apply in this case?

(b) If so, does the residence requirement imposed by the appellant infringe the respondent's right to liberty under s. 7 of the Canadian *Charter*?

(c) If so, is the infringement in accordance with the principles of fundamental justice?

(2)(a) Does the residence requirement imposed by the appellant municipality violate the respondent's right to privacy under s. 5 of the Quebec *Charter*?

(b) If so, can the violation be justified under s. 9.1 of the Quebec *Charter*?

39 The appellant also raised an issue in the main appeal with respect to whether the Court of Appeal erred in issuing its rectificatory judgment. For simplicity's sake, however, I have chosen to address this issue in the context of the cross-appeal. The issues I will examine in discussing the cross-appeal can thus be stated as follows:

(1) Did the Quebec Court of Appeal err in issuing its rectificatory judgment of November 15, 1995?

(2) Did the Quebec Court of Appeal err:

(a) in refusing to allow the respondent to adduce evidence during the appeal hearing with respect to the interim damages;

(b) in failing to request of the parties that they submit further argument in respect of the interim damages claim; or

(c) in failing to remand the matter of the interim damages to the Quebec Superior Court?

IV. Analysis

A. *The Appeal*

(1) Preliminary Matters

40 Before examining the issues I have set out above, I find it necessary to outline briefly two other issues raised by the parties, both of which were discussed at some length in the courts below. The first concerns whether or not the imposition of a residence requirement of the kind at issue here is within the competence of the appellant. The respondent contended that Resolutions CE 84-1491 and CM 84-1286 are *ultra vires* -- and hence void -- on the ground that no power to adopt a general residence requirement is conferred on the appellant either under the terms of its governing statute, the *Charter of the City of Longueuil* or under the *Cities and Towns Act*, R.S.Q., c. C-19. To buttress its submission, the respondent pointed out that a specific power to impose a residence requirement on officers of local police forces is conferred on municipalities by s. 65(*d*) of the *Police Act*, R.S.Q., c. P-13, and she argued that in light of this specific power, no analogous general power to impose a residence requirement on all municipal employees existed. In response, the appellant relied on s. 52.13 of the *Charter of the City of Longueuil* (as amended by S.Q. 1982, c. 81, s. 3), which reads as follows:

> **52.13** The clerk, the treasurer and the heads of departments and their assistants, except the manager, shall be appointed by the council on report of the committee. Such report may be altered or rejected by the majority of all the members of the council. On report of the executive committee, the council may, by the majority vote of all its members, suspend such officers, reduce their salary or dismiss them.
>
> The council shall also appoint, upon report of the committee, the other officers or permanent employees.

> Temporary employees shall be appointed by the executive committee. [Emphasis added.]

Pointing to the fact that the municipal council has the power to hire permanent employees, the appellant argued that it must, by necessary implication, have the power to set the terms and conditions of permanent employment. In the appellant's submission, the residence requirement is simply a condition of the respondent's permanent employment and, consequently, its imposition falls within the municipality's sphere of competence.

41 The second preliminary issue concerns the notion of public order, first discussed by Baudouin J.A. in the Court of Appeal. The appellant argued that Baudouin J.A. erred in his treatment of public order inasmuch as he discussed the issue without any consideration of arts. 1379 and 1437 of the *Civil Code of Québec*, S.Q. 1991, c. 64, dealing respectively with adhesion contracts and abusive clauses. In the appellant's view, these provisions circumscribe the ambit of public order in the realm of contractual relations and, consequently, the notion of public order cannot be invoked apart from them. Moreover, the appellant argued that even if public order can properly be analysed apart from arts. 1379 and 1437 *C.C.Q.*, the matter at issue was one of "protective" (as opposed to "directive") public order and that, as a result, the respondent was free to renounce the protection afforded to her as she saw fit; see B. Lefebvre, "Quelques considérations sur la notion d'ordre public à la lumière du Code civil du Québec", in *Développements récents en droit civil (1994)*, 149, at pp. 149-60. The respondent, by contrast, contended (a) that the notion of public order is not limited to the terms of arts. 1379 and 1437 *C.C.Q.*; and (b) that even if it were, the residence requirement at issue would nonetheless constitute an abusive clause within the meaning of art. 1437 *C.C.Q.*

On this basis, the respondent argued, Baudouin J.A. was correct in finding that the residence requirement was contrary to public order and, therefore, void.

42 In their written submissions, the parties gave considerable attention to both these arguments. This is understandable given the reasons for judgment of the majority of the Court of Appeal. In light of my conclusions in respect of both the Canadian *Charter* and the Quebec *Charter*, however, I do not consider it necessary to address either the *ultra vires* issue or the public order issue on their merits, and I decline to express any opinion about them. Instead, I propose to turn directly to an examination of the issues earlier set out.

(2) Issue 1: Whether the Residence Requirement Violates Section 7 of the Canadian *Charter*

(a) *Applicability of the Canadian Charter*

43 In cases where a party seeks to invoke the protection of the Canadian *Charter*, it is, of course, important to ensure that the *Charter* actually applies on the facts. The scope of *Charter*'s application is delineated by s. 32(1), which provides as follows:

> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Referring to this provision and to the jurisprudence decided under it, the appellant restated in this Court the application argument it had made in the Superior Court and in the Court of Appeal. Essentially, it contended that while municipalities may be subject to *Charter* scrutiny in respect of the "public" or "governmental acts" they undertake -- such as adopting by-laws -- they will nevertheless not be subject to the *Charter* in respect of the "private acts" they perform -- such as setting the terms and conditions of employment for their employees. Positing that the imposition of the residence requirement in this case amounted to setting a term of employment -- and hence to a "private act" -- the appellant contended that the Canadian *Charter* finds no application here at all. Despite the success this argument has enjoyed in the courts below, I am of the opinion that it is misguided. My reasons for taking this view can best be explained through a brief review of the pertinent jurisprudence of this Court dealing with the scope of application of the Canadian *Charter*.

44 Perhaps the fullest discussion of the issue of *Charter* application is found in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, and in its companion cases, *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483. There, this Court was asked to decide, *inter alia*, whether mandatory retirement policies adopted by certain universities and colleges (in *McKinney*, *Harrison* and *Douglas*) and by a hospital (in *Stoffman*) could be subjected to *Charter* review. In reiterating and elaborating upon the view taken by McIntyre J. in the seminal case of *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (viz., that the Canadian *Charter* applies to Parliament, to the provincial legislatures, and to entities that carry out executive (or "administrative") functions of government, but not to private parties), the majority in *McKinney*, *Harrison* and *Stoffman* found that the *Charter* did not apply on the facts, since the institutions whose policies were impugned were not

themselves governmental in nature; nor were they putting into place a government programme or acting in a governmental capacity in adopting those policies.

45 In *Douglas*, by contrast, the same majority found that the Canadian *Charter* did apply to the mandatory retirement policy at issue, on the ground that Douglas College was, in light of its constituent statute, simply an emanation of government. I described the differences between *McKinney* and *Harrison*, on the one hand, and *Douglas*, on the other, at pp. 584-85 of the latter case:

> As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact. In carrying out its functions, therefore, the college is performing acts of government, and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. Its status is wholly different from the universities in the companion cases of *McKinney* . . . and *Harrison* . . . which, though extensively regulated and funded by government, are essentially autonomous bodies. Accordingly, the actions of the college in the negotiation and administration of the collective agreement between the college and the association are those of the government for the purposes of s. 32 of the *Charter*. The *Charter*, therefore, applies to these activities.

46 Similar considerations to those underpinning the application analysis in *Douglas* arose in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211. There, the principal issue was whether a provision of a collective agreement compelling the appellant to pay union dues despite his non-membership in the respondent union violated the *Charter* guarantees of freedom of expression and association, insofar as the dues were being used to pay for specific political purposes chosen by the union. In addressing whether the collective agreement provision at issue was subject to *Charter* scrutiny at all, I found for the majority that the appellant's

employer, the Ontario Council of Regents for Colleges of Applied Arts and Technology, was, by virtue of the terms of its empowering Act, essentially governmental in nature. Drawing a parallel with *Douglas*, I stated, at pp. 311-12:

> [*Douglas*], like the present appeal, involved a collective agreement between the college and the Association (a union under the applicable legislation). There the Minister of Education by statute exercised a degree of control over the college that closely matched that exercised by the Ministry over the Council in the present case. It is true that in *Douglas* the college's constituent Act expressly described it as an agent of the Crown, whereas here the Act simply gives the Minister power to conduct and govern the colleges and in this endeavour the Minister is to be "assisted" by the Council. But the reality is the same. The government, through the Minister, has the same power of "routine or regular control", to use the expression of the majority of this Court, in *Harrison* . . . and *Stoffman* . . . , companion cases to *Douglas*.

On this basis, the majority found that the Council of Regents was subject to the *Charter*.

47 Comparing *McKinney*, *Harrison* and *Stoffman* on the one hand to *Douglas* and *Lavigne* on the other makes clear what I take to be an important idea governing the application of the Canadian *Charter* to entities other than Parliament, the provincial legislatures or the federal or provincial governments; namely, that where such entities are, in reality, "governmental" in nature -- as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform -- they cannot escape *Charter* scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. This is not to say, of course, that the *Charter* applies only to those entities (other than Parliament, the provincial legislatures and the federal and provincial governments) that are, by their nature, governmental. Indeed, it may be that particular entities will be subject to *Charter* scrutiny in respect of certain governmental

activities they perform, even if the entities themselves cannot accurately be described as "governmental" *per se*; see, e.g., *Re Klein and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Div. Ct.), at p. 157, where Callaghan J. held for the majority that even though the Law Society of Upper Canada is not itself governmental in nature, it may nevertheless be subject to the *Charter* in performing what amount to governmental functions. Rather, it is simply to say that where an entity can accurately be described as "governmental in nature", it will be subject in its activities to *Charter* review. Thus, the *Charter* applied to Douglas College (in *Douglas*) and to the Council of Regents (in *Lavigne*) because those bodies were wholly controlled by government and were, in essence, emanations of the provincial legislatures that created them. Since the same could not be said of the institutions under examination in *McKinney*, *Harrison* and *Stoffman* (and since none of those institutions was implementing a specific government policy or programme in adopting its mandatory retirement regulations), the *Charter* did not apply in those cases.

48 The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters within the authority" of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are -- as a simple matter of fact -- governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other

words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.

49 I pause here to reiterate an important observation made in the cases discussed earlier concerning how the notion of "government" is to be understood. The mere fact that an entity performs what may loosely be termed a "public function" will not by itself mean that the body under examination is "governmental" in nature. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

> It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*. . . . In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

In order for the Canadian *Charter* to apply to institutions other than Parliament, the provincial legislatures and the federal and provincial governments, then, an entity must truly be acting in what can accurately be described as a "governmental" -- as opposed to a merely "public" -- capacity. The factors that might serve to ground a finding that

an institution is performing "governmental functions" do not readily admit of any *a priori* elucidation. Nevertheless, and as I stated further on in *McKinney* (at p. 269), "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32".

50 Having set out what I take to be the guiding principles, I turn now to examine directly the *Charter* application issues in this appeal. The main issue concerns whether the Canadian *Charter* applies to municipalities -- like the appellant -- at all. To my mind, the analysis I have undertaken thus far leads inexorably to the conclusion that it does. While this Court has never before expressly endorsed that proposition, we have done so inferentially, inasmuch as we have already applied the *Charter* to municipal by-laws without specifically engaging in an analysis of the application issue; see *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084. Moreover, the view that municipalities are subject to the *Charter* is not only sound, but also wholly consistent with the case law I have been discussing. Indeed, municipalities -- though institutionally distinct from the provincial governments that create them -- cannot but be described as "governmental entities". I base this finding on a number of considerations.

51 First, municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent. To my mind, this itself is a highly significant (although perhaps not a decisive) indicium of "government" in the requisite sense. Secondly, municipalities possess a general taxing power that, for the purposes of determining whether they can rightfully be described as "government", is indistinguishable from the taxing powers of Parliament or the provinces. Thirdly, and importantly, municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction. Thus, while I expressed no specific opinion in *McKinney* as to whether

municipalities are, in fact, subject to the *Charter*, I nevertheless had this to say, at p. 270 of that case:

> . . . I agree with the Court of Appeal that, if the *Charter* covers municipalities, it is because municipalities perform a quintessentially governmental function. They enact coercive laws binding on the public generally, for which offenders may be punished. . . . [Emphasis added.]

Finally, and most significantly, municipalities derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves. Since the Canadian *Charter* clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could (in the manner outlined earlier) simply avoid the application of the *Charter* by devolving powers on municipal bodies.

52 This last point was discussed in some detail in *Re McCutcheon and City of Toronto* (1983), 41 O.R. (2d) 652 (H.C.), where, in considering the very question of whether municipalities are subject to the *Charter*, Linden J. (as he then was) stated, at p. 662:

> Counsel for the respondents point out that there is no express mention of municipal governments and their by-laws in s. 32 which provides that the Charter applies to the Parliament and Government of Canada and the Legislature and government of each province. Absent a specific reference to municipal governments in s. 32(1), it is contended, that [*sic*] the Charter does not apply to them . . . .
>
> This cannot be the case, for it would permit circumvention of the Charter through delegation to any body that is not classified as part of the Government of Canada or of a province. This is contrary to the tenor of s. 32(1), which provides that subordinates (the Governments of Canada and of each province) cannot do that which their principals (Parliament and the

> Legislatures) cannot do. It must be that more junior subordinates, like municipalities, are to be similarly bound by the Charter.

Further on, at p. 663, Linden J. continued:

> Municipalities, though a distinct level of government for some purposes, have no constitutional status; they are merely "creatures of the legislature", with no existence independent of the Legislature or government of the province. Hence, just as the provincial Legislatures and governments are bound by the Charter, so too are municipalities, whose by-laws and other actions must be considered, for the purposes of s. 32(1), as actions of the provincial government which gave them birth.

While I have some reservations with respect to characterizing the provinces as the "principals" of municipalities (inasmuch as municipalities have distinct political mandates and hence are not truly "agents" of the province) I am in general agreement with the thrust of Linden J.'s comments.

53 I would add one further thought at this point. This approach appears entirely consistent with the traditional legal status of municipalities as governmental bodies. Before the Canadian *Charter*, the courts had interpreted the powers conferred on municipalities by the provinces as being restricted to making by-laws that were "reasonable", the general effect of which was to limit municipalities from encroaching on individual rights; see *City of Montréal v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650; and *R. v. Greenbaum*, [1993] 1 S.C.R. 674, where the by-laws at issue were declared *ultra vires* (in whole or in part) because they unreasonably discriminated between classes of persons. See also *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.), at pp. 99-100, *per* Lord Russell of Killowen C.J., and *City of Halifax v. Read*, [1928] S.C.R. 605, at pp. 612-13, *per* Newcombe J. While the by-laws at issue in the latter cases were upheld, the idea that the reasonableness doctrine

serves to protect individual rights is apparent from the passages cited. In the *Charter* age, it seems wholly fitting that "reasonableness" should be read in light of what the *Charter* has to say about the rights of the individual. And an attempt by the legislature to so express a municipal statute as to permit a municipality to breach *Charter* rights would, it seems to me, itself be contrary to the *Charter* mandate.

54 The approach I have taken to the relation of municipalities to the provinces finds further support, I think, in the reasoning underlying this Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. There, we had to decide, *inter alia*, whether the Canadian *Charter* applied to the discretionary orders of a statutorily appointed arbitrator. Speaking for the Court on this issue, Lamer J. (as he then was) stated, at pp. 1077-78:

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. . . . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*. . . . [Emphasis added.]

While the application issues in *Slaight* and those in the present case are by no means identical, they can profitably be understood to share at least one salient feature; viz., both labour arbitrators (such as the one in *Slaight* itself) and municipalities (such as the appellant) exercise governmental powers conferred upon them by the approriate legislative body. To be sure, the nature and scope of those powers is different. As regards the arbitrator in *Slaight*, the delegated power consisted in the discretion to make

orders in the settlement of particular labour disputes. As regards municipalities, it consists in the much broader discretion to adopt and enforce coercive laws binding on a defined territory. In both cases, however, the ultimate source of authority is government *per se* and, consequently, the entity under scrutiny will be kept in check through the application of the *Charter*, just as government itself would be were it performing the functions conferred.

55 For all these reasons, then, I am firmly of the opinion that the Canadian *Charter* applies to municipalities. But what of the appellant's submission that the *Charter* should not apply because the activity in question -- i.e., the imposition of the residence requirement -- is a "private" as opposed to a "governmental" act? As I have already suggested, I cannot accept this distinction. The particular modality a municipality chooses to adopt in advancing its policies cannot shield its activities from *Charter* scrutiny. All the municipality's powers are derived from statute and all are of a governmental character; see the cited passage from *Slaight*, *supra*. An act performed by an entity that is governmental in nature is, to my mind, necessarily "governmental" and cannot properly be viewed as "private" at all. I set out my reasons for taking this view in *Lavigne*, *supra*, where (as I noted earlier) I found for the majority that a provision of a collective agreement -- i.e., a contractual term -- was subject to *Charter* scrutiny on the basis that the body responsible for negotiating the agreement (the Council of Regents) was, itself, essentially governmental in nature. At p. 314 of the judgment, I stated:

> It was also argued that the *Charter* does not apply to government when it engages in activities that are . . . "private, commercial, contractual or non-public (in) nature". In my view, this argument must be rejected. In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and

> preserve the community's economic and social welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.

This rationale is as pertinent to municipalities like the appellant as to the Council of Regents in *Lavigne*. I therefore find that the Canadian *Charter* applies to the residence requirement at issue in this case.

56 One final point should be added. As I explained earlier, refusing to subject entities acting in a governmental capacity to *Charter* scrutiny would permit governments to avoid the *Charter* by conferring governmental powers on non-governmental bodies. It seems clear to me that the same situation could arise if entities that are governmental in nature (or, for that matter, governments themselves) were not subjected to *Charter* scrutiny in respect of <u>all</u> their activities, including those that could -- if they had been performed by a non-governmental entity -- plausibly be described as "private". Stated simply, a government or an entity acting in a governmental capacity could circumvent the *Charter* not simply by granting certain of its powers to other entities, but also by itself pursuing governmental initiatives through means other than the traditional mechanism of government action -- i.e., the formal enactment of coercive laws. I discussed this issue in my reasons in *Douglas*, at p. 585:

> The fact that the collective agreement was agreed to by the appellant association does not alter the fact that the agreement was entered into by government pursuant to statutory power and so constituted government action. To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be

> tolerated. The transparency of the device can be seen if one contemplates a government contract discriminating on the ground of race rather than age.

The same reasoning applies in the context of the present case. Were the *Charter* not to apply to all activities of governmental entities, the municipal resolutions pursuant to which the residence requirement was imposed on the appellant's permanent employees would not be subject to the *Charter*, while precisely the same requirement implemented through the formal mechanism of a by-law would be. The difficulties to which such an approach could give rise are sufficiently obvious as to require no further explanation.

57 The foregoing analysis, in my view, adequately disposes of the application question in this case. For the reasons I have given, the residence requirement imposed by the appellant -- a requirement which might, if it had been implemented by a non-governmental body, properly be considered a "private" condition of employment -- is susceptible to *Charter* scrutiny, inasmuch as the appellant municipality is governmental in nature and, as such, is subject in all its activities to *Charter* review. As I noted earlier, the substance of the respondent's *Charter* claim is that the residence requirement infringes her right to liberty under s. 7 in a manner that fails to accord with the principles of fundamental justice. I turn now to an examination of the issues raised by that claim.

(b) *The Liberty Interest Under Section 7*

58 Before it is even possible to decide whether the respondent's s. 7 rights were infringed in a manner that contravenes fundamental justice, it is necessary to establish that the interest in respect of which she asserted her claim falls within the ambit of s. 7's protection. For convenience, I set out s. 7 here:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The respondent took the position that the right to "liberty" enshrined in s. 7 includes within it a right to make fundamentally personal choices free from state interference and that choosing where to establish one's home falls within the scope of that right. The appellant, whose submissions were echoed by the *mis en cause* Attorney General of Quebec, tried to impugn this position in two ways. First, it contended that the right actually asserted by the respondent was not a right to choose where to establish her home at all, but rather an economic right in the nature of a "right to work", and that such a right did not fall within the ambit of s. 7 liberty guarantee. Alternatively, the appellant submitted that even if the right asserted by the respondent was a right to choose freely where to make her home, that right would similarly not be protected under s. 7. To my mind, neither of the appellant's arguments can succeed.

59 The appellant's first argument can, I think, be addressed relatively quickly. As should be clear, the success of the claim rests on the premise that the respondent has mischaracterized the nature of the right in respect of which she seeks the *Charter*'s protection, an issue that is quite separate from the further question of whether economic rights are protected by the s. 7 liberty guarantee. Thus, if the appellant is to prevail on the s. 7 issue based on the contention that economic rights are not included within the ambit of the right to liberty, it must first establish that the right at issue is, as it claims, an economic right in the nature of a "right to work" and not, as the respondent asserts, a right to make an unfettered decision as to where to establish her home.

60 Admittedly, a certain degree of support for this line of argument can be garnered from some American case law dealing specifically with challenges to municipal

residence requirements. In *Ector v. City of Torrance*, 514 P.2d 433 (1973), for example, Mosk J. of the Supreme Court of California considered the constitutionality of a residence requirement imposed by the respondent city on the appellant, a municipally employed librarian. Affirming the decision of the Superior Court in which the appellant's petition was denied, he cited *Kennedy v. City of Newark*, 148 A.2d 473 (N.J. 1959), and stated as follows, at pp. 437-38:

> [A]ppellant asks us in effect to declare a fundamental right to be "let alone" in the choice of his place of residence. We are not unsympathetic to that Thoreauvian goal, although we fear that in this day of land-use planning, zoning, and environmental controls, it may be increasingly difficult to achieve. Nevertheless, as Chief Justice Weintraub of New Jersey explained, in this type of case "The question is not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by government." . . . No such "fundamental right" is expressed or implied in the Constitution, and it is not the province of the courts to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. [Emphasis added; citation omitted.]

A similar view appears to have been taken by the United States Supreme Court in *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). There, that court had to decide whether a Philadelphia municipal regulation was unconstitutional as a violation of the plaintiff's right to interstate travel. In describing the plaintiff's position but rejecting his claim, the court found, at pp. 646-47, that he was trying to assert "a constitutional right to be employed by the city of Philadelphia *while* he is living elsewhere". (Underlining added; italics in original.)

61 In light of these comments, the argument advanced by the appellant might, at first, seem tenable. A closer analysis, however, reveals that the appellant's position -- and, with respect, the position apparently taken in the American case law just cited -- is flawed. In seeking to impugn the residence restriction imposed upon her, the respondent

is not, as the appellant alleges, surreptitiously trying to assert a constitutionally protected "right to employment" with the City of Longueuil. She is, instead, claiming that her ability to take an unfettered decision as to where she wishes to live -- an ability which, she argues, enjoys the status of a constitutionally protected right -- ought not to be denied her simply because she has chosen to earn her living by working for the appellant municipality. This is clear, I think, inasmuch as the respondent does not challenge the very fact of her termination as being contrary to her s. 7 liberty interest; rather, she seeks to impugn the basis upon which that termination was purportedly justified; viz., the residence restriction itself. Put another way, the respondent's real complaint is not simply that she was dismissed from the appellant's employ, but rather that she was dismissed because she exercised (what she claims is) a constitutionally protected right to choose her place of residence as she sees fit. In light of these considerations, I am satisfied that the respondent's *Charter* claim does not implicate any notion of a constitutional "right to employment" or any other "economic right", and I would reject the appellant's submission to the contrary.

62 Having accepted the respondent's view that the right she seeks to invoke is, in fact, a right to choose where to establish her home, I must still address the appellant's second contention; namely, that even a right of this nature -- quite apart from any notion of economic rights -- does not fall within the ambit of the liberty guarantee enshrined in s. 7. Once again, I am unable to agree with this submission. Indeed, in my view, a proper understanding of the scope of the s. 7 right to liberty militates strongly toward the opposite conclusion. Let me explain.

63 In the recent case of *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, this Court was called upon to decide, *inter alia*, whether the s. 7 right to liberty included within its scope a right of parents to take decisions

respecting the medical care of their children. More specifically, and in addition to a claim raised under s. 2(*a*) of the Canadian *Charter*, we were asked to decide whether the appellant parents (who were Jehovah's Witnesses) could properly invoke a constitutional right to make definitive choices in respect of their daughter's medical treatment, in order to preclude health care officials from ordering -- pursuant to powers granted to them by the *Child Welfare Act*, R.S.O. 1980, c. 66 -- that the daughter undergo a blood transfusion. Writing for a plurality consisting of myself and L'Heureux-Dubé, Gonthier and McLachlin JJ., I undertook a detailed discussion of the various principles I think should guide the interpretation of s. 7, noting particularly that s. 7 must (as was first enunciated in *R. v. Lyons*, [1987] 2 S.C.R. 309, and repeatedly followed by this Court) be read in light of the values reflected in the *Charter* as a whole, and not just those embodied by the other provisions described as "legal rights". I then referred specifically to the decisions of Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103, and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, in which the meaning of the term "freedom" in ss. 1 and 2(*a*) was discussed, and found as follows, at p. 368:

> The above-cited cases give us an important indication of the meaning of the concept of liberty. On the one hand, liberty does not mean unconstrained freedom. . . . Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. [Emphasis added; citations omitted.]

On the facts of *B. (R.)* itself, I found that the right asserted by the appellant parents fell within this protected sphere of individual autonomy but that, in the circumstances, the deprivation of the right was in accordance with the principles of fundamental justice. As a consequence, I held that no violation of s. 7 occurred.

64 I note parenthetically that the joint reasons of Iacobucci and Major JJ. in *B. (R.)* (in which Cory J. concurred) do not, as I see it, appear to take issue with my view of the ambit of the s. 7 liberty guarantee. While, on the facts of *B. (R.)*, my colleagues disagreed with the finding that the appellant parents possessed a constitutional right to decide what constitutes appropriate medical care for their child (since, in their view, the purview of such a right must be delineated with specific reference to the competing rights of the child to life and security of the person), they did not explicitly question the idea that the right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein the state is, in normal circumstances, precluded from entering. Indeed, at p. 431, they stated:

> We note that La Forest J. holds that "liberty" encompasses the right of parents to have input into the education of their child. *In fact, "liberty" may very well permit parents to choose among equally effective types of medical treatment for their children*, but we do not find it necessary to determine this question in the instant case. We say this because, *assuming without deciding that "liberty" has such a reach*, it certainly does not extend to protect the appellants in the case at bar. There is simply no room within s. 7 for parents to override the child's right to life and security of the person. [Underlining in original; italics added.]

Sopinka J., too, did not explicitly disagree with my understanding of the scope of the liberty interest protected by s. 7. Rather, he took the position that the matter did not need to be addressed in *B. (R.)* since, on the facts, there was no violation of the principles of fundamental justice.

65 I should point out that the view I have expounded regarding the scope of the right to liberty draws considerable support from the reasons of Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In that case, my former colleague succinctly expressed her opinion that the s. 7 liberty interest is concerned not only with physical liberty, but

also with fundamental concepts of human dignity, individual autonomy, and privacy. Indeed, at p. 166, she stated:

> [A]n aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in [*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177], is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

Speaking for the plurality, I explicitly endorsed this passage in *B. (R.)*, at pp. 368-69, pointing out that I have long supported the views expressed in it. Indeed, shortly after *Morgentaler* was decided, I stated in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 412, that I had "considerable sympathy" for the proposition that s. 7 includes within it a right to privacy. Moreover, the view that the right to liberty encompasses more than just physical freedom is, as I explained in *B. (R.)*, supported by the vast preponderance of American case law dealing with the subject; see, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

66 The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do

whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

67 The soundness of this position can be appreciated most readily, I think, by reflecting upon some of the intensely personal considerations that often inform an individual's decision as to where to live. Some people choose to establish their home in a particular area because of its nearness to their place of work, while others might prefer a different neighbourhood because it is closer to the countryside, to the commercial district, to a particular religious institution with which they are affiliated, or to a medical centre whose services they require. Similarly, some people may, for reasons dearly important to them, value the historical significance or cultural make-up of a given locale, others again may want to ensure that they are physically proximate to family or to close friends, while others still might decide to reside in a particular place in order to minimize their cost of living, to care for an ailing relative or, as in the case at bar, to maintain a personal relationship. In my opinion, factors such as these vividly reflect the idea that choosing where to live is a fundamentally personal endeavour, implicating the very essence of what each individual values in ordering his or her private affairs; that is, the kinds of considerations I have mentioned here serve to highlight the inherently

private character of deciding where to maintain one's home. In my view, the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so.

68 Moreover, not only is the choice of residence often informed by intimately personal considerations, but that choice may also have a determinative effect on the very quality of one's private life. The respondent put this point succinctly in her factum:

> [TRANSLATION] Residence determines the human and social environment in which an individual and his or her family evolve: the type of neighbourhood, the school the children attend, the living environment, services, etc. In this sense, therefore, residence affects the individual's entire life and development.

To my mind, the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy I have been discussing. To put the point plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly, by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.

69 Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the *International Covenant*[***] *on*

[***] See erratum [1991] 1 S.C.R. iv

Civil and Political Rights, Can. T.S. 1976 No. 47, to which Canada became a party in 1976. As the respondent informed us, Article 12(1) of that convention reads as follows:

> ARTICLE 12
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

While subsection (3) of that provision provides that the right at issue can be limited by states for certain stipulated reasons, the fact remains that the right to choose where to reside is itself enshrined as one of the Covenant's fundamental guarantees. Given this Court's previous recognition of the persuasive value of international covenants in defining the scope of the rights guaranteed by the *Charter* (see, e.g., *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 348, *per* Dickson C.J. (dissenting), cited with approval in *Slaight, supra*, at pp. 1056-57), I regard Article 12 as strengthening my conclusion that the right to decide where to establish one's home forms part of the irreducible sphere of personal autonomy protected by the liberty guarantee in s. 7.

70 Having made clear why I find the right asserted by the respondent is indeed comprised within the right to liberty, all that remains to be considered as regards s. 7 of the Canadian *Charter* is whether the deprivation of the respondent's right to choose where to live -- through the imposition of the residence requirement -- conforms to the principles of fundamental justice. I will examine this issue in detail in the next section of these reasons. Before doing so, however, I should state that I do regard the imposition of the residence requirement as a "deprivation", in the sense required by s. 7, despite an argument to the contrary raised by the appellant. While it did not frame its submission in precisely this manner, the appellant essentially contended that even if a right to choose

where to establish one's home existed under s. 7, there could be no "deprivation" on the facts of this case because the respondent waived that right when she signed the residence declaration. Put another way, the imposition of the residence requirement did not, in the appellant's view, "deprive" the respondent of her right to decide where to live because she chose to sign the residence declaration and, thereby, renounced any right of that nature that she might otherwise have enjoyed.

71 If it could be sustained on the facts, the appellant's argument would raise the issue of whether it is even possible to waive a constitutional right to choose where to live, as an aspect of the right to liberty. Waiver of certain constitutional rights has, of course been recognized by this Court in other contexts; see, e.g., *Mills v. The Queen*, [1986] 1 S.C.R. 863, and *R. v. Rahey*, [1987] 1 S.C.R. 588, both dealing with s. 11(*b*); and *R. v. Richard*, [1996] 3 S.C.R. 525, dealing with s. 11(*d*). I do not consider it necessary to deal with that issue here, however, since even assuming that one can legitimately waive the right to choose where to live, I am of the view that a waiver argument cannot be upheld on the facts of this case.

72 Indeed, I find the appellant's contentions in respect of waiver to be entirely unpersuasive, inasmuch as they fail to recognize that the respondent had no alternative but to accept the residence requirement if she wanted to assume permanent employment with the municipality. By its very nature, waiver or renunciation of any right must be freely expressed if it is to be effective. Here, however, the appellant simply presented the respondent with two possible options -- she could either relinquish her post entirely (or continue only in a temporary capacity), or she could assume a permanent position as long as she undertook to maintain her home in Longueuil for the duration of her employment. The difficulty presented by this situation was eloquently expressed by T. A. Hampton in his article entitled "An Intermediate Standard for Equal Protection

Review of Municipal Residence Requirements" (1982), 43 *Ohio St. L.J.* 195, at pp. 210-11:

> What most likely lies at the heart of an employee's complaint is the imposition of an unfair choice: a municipal employee must decide whether he values more highly his job or his home. If he chooses to protect his job, he loses the right to continue residing not only in a particular house, but in a preferred neighborhood as well -- often among friends and family, and close to a church, schools, and associations in whose affairs he is involved. If he chooses instead to protect his choice of community, he must forego an opportunity to seek or maintain preferred employment.

While these comments were made in the context of a discussion dealing with rights protected under the United States Constitution, I am of the view that they are equally apposite here. Stated simply, the respondent in this case had no opportunity to negotiate the mandatory residence stipulation and, consequently, she cannot in any meaningful sense be taken to have freely given up her right to choose where to live. In civilian parlance, her acquiescence in signing the residence declaration was (as Baudouin J.A. found in the course of his public order analysis) tantamount to accepting a contract of adhesion and, as such, it cannot properly be understood to constitute waiver.

73 As a subsidiary argument, the appellant contended that even if the respondent did not waive her right by signing the residence declaration in the first place, she waived it later on by failing to move back to Longueuil when given the option of doing so by a representative of the appellant. This argument, like the one just discussed, cannot succeed. Indeed, to accept it would be to find that the respondent's explicit attempt to assert her right to choose where to live by refusing to conform with the terms of the residence requirement amounted somehow to a renunciation of that right. It would, in other words, be to turn the facts of this case on their head. Having set out my

reasons for rejecting the appellant's waiver arguments, then, I turn now to an examination of the final issue raised by the respondent's s. 7 claim.

(c) *The Principles of Fundamental Justice*

74 The text of s. 7 provides that a deprivation by the state of an individual's right to life, liberty or security of the person will not violate the Canadian *Charter* unless it contravenes the "principles of fundamental justice". Over the years since the *Charter*'s inception, this Court has repeatedly been called upon to interpret that phrase, so as to determine in particular cases whether a *Charter* violation has, in fact, occurred. In the early days of *Charter* adjudication, questions arose as to whether the principles of fundamental justice included within their ambit a substantive element, in addition to the guarantees of natural justice or procedural fairness. That issue was conclusively settled by this Court in the *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, where all members of the panel seized of the case agreed that the principles of fundamental justice are not limited merely to rules of procedure but include as well a substantive component. This has meant that if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be "fundamentally just" not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally; see *Re B.C. Motor Vehicle Act*, at p. 512; *Beare*, *supra*; and *Lyons*, *supra*.

75 The cases since *Re B.C. Motor Vehicle Act* have made clear that, particularly in light of the possibility of substantive review, the meaning of fundamental justice must depend in a given case on both the nature of the s. 7 right asserted and the character of

the alleged violation; see *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 884. In taking this contextual approach, this Court has often considered it appropriate to elucidate a specific principle or set of principles governing the particular matter before it. Thus, in *Lyons*, *supra*, the accused challenged certain provisions authorizing the imposition of an indeterminate sentence on individuals designated as dangerous offenders, on the basis that they infringed the liberty guarantee in s. 7. Writing for the majority, I explained (at p. 327) that determining whether the provisions at issue infringed s. 7 in a manner that contravened the principles of fundamental justice necessitated an inquiry into "the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions". Similarly, in *Beare*, *supra*, we considered whether mandatory fingerprinting of persons who have been accused of a crime, but not yet convicted, violated the s. 7 liberty interest. Writing this time on behalf of a unanimous Court, I found (at pp. 402-3) that the principles of fundamental justice pertinent to that context included "the applicable principles and policies that have animated legislative and judicial practice in the field" of crime prevention and law enforcement.

76 But just as this Court has relied on specific principles or policies to guide its analysis in particular cases, it has also acknowledged that looking to "the principles of fundamental justice" often involves the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state. In other words, deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as permitting a broader inquiry into whether the right to life, liberty or security of the person asserted by the individual can, in the circumstances, justifiably be violated given the interests or purposes sought to be advanced in doing so. To my mind,

performing this balancing test in considering the fundamental justice aspect of s. 7 is both eminently sensible and perfectly consistent with the aim and import of that provision, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. We need look no further than the *Charter* itself to be satisfied of this. Expressed in the language of s. 7, the notion of balancing individual rights against collective interests itself reflects what may rightfully be termed a "principle of fundamental justice" which, if respected, can serve as the basis for justifying the state's infringement of an otherwise sacrosanct constitutional right.

77 That the balancing test to which I refer has gained acceptance as an aspect of the s. 7 inquiry into fundamental justice is, I think, apparent from a number of decisions of this Court. In *Beare, supra*, at p. 404, for example, the Court weighed the liberty interest of the individual accused against such state interests as the need "to arm the police with adequate and reasonable powers for the investigation of crime", and determined unanimously that the practice of fingerprinting persons who had been accused but not yet convicted of an offence did not violate the principles of fundamental justice. In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, Sopinka J. (writing for the majority) had this to say, at pp. 592-93:

> I cannot subscribe to the opinion . . . that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required. [Emphasis added.]

Similarly, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, L'Heureux-Dubé J. stated, at pp. 579 and 583:

> [T]he *Charter* has not rendered obsolete society's interest in the enforcement of its laws. . . . This is especially true of s. 7, where the collective interest in law enforcement finds expression in the principles of fundamental justice, and must be balanced against the deprivation of individual rights to life, liberty and security of the person, as these rights have come to be recognized in our judicial system.
>
> . . .
>
> Fundamental justice in our Canadian legal tradition . . . is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens. [Emphasis added.]

I echoed this sentiment in my own reasons in that case, finding, at p. 539, that "the interests of the individual and those of the state, both . . . play a part in assessing whether a particular law violates the principles of fundamental justice", and, at p. 541, that "the community's interest is one of the factors that must be taken into account in defining the content of the principles of fundamental justice". While both L'Heureux-Dubé J. and I wrote only for ourselves in *Thomson Newspapers*, we each concurred in the majority's disposition, and our views on this matter were not explicitly questioned by our colleagues. Moreover, the same view of fundamental justice has implicitly -- and sometimes explicitly -- underpinned a number of other decisions of this Court; see, e.g., *R. v. Jones*, [1986] 2 S.C.R. 284; *Lyons*, *supra*; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-52; and *B. (R.)*, *supra*; see also T. J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can.*

Bar Rev. 446, which, although questioning the balancing test, provides a useful summary of the pertinent case law.

78 From the foregoing discussion, it is clear that deciding whether the infringement of a s. 7 right is fundamental just may, in certain cases, require that the right at issue be weighed against the interests pursued by the state in causing that infringement. This balancing process will necessarily be contextual, insofar as the particular right asserted, the extent of its infringement, and the state interests implicated in each particular case will depend largely on the facts. As discussed earlier, the right infringed in this case is that of the respondent to choose where to establish and maintain her home, a right which I found enures to her as an aspect of that narrow sphere of personal autonomy protected by the liberty guarantee. For its part, the appellant pointed to three "public interests" that in its view, justified the imposition of the residence requirement. I propose to deal with each of them in turn.

79 Before doing so, however, it is important to highlight two salient features of the particular residence requirement at issue here. First, the municipal resolutions adopted by the appellant provide that a declaration of the kind signed by the respondent must be signed by all permanent employees of the municipality who were hired after the date the resolution was adopted, regardless of their status or function. Secondly, the residence requirement does not stipulate simply that permanent employees must reside in Longueuil when they are hired, or for a certain period before they are hired. Rather, it provides that they must maintain their residence in Longueuil for the duration of their employment, on pain of termination. In my view, these features must be borne in mind in determining whether the particular residence requirement at issue contravenes fundamental justice.

80 I turn now to examine the "public interests" relied upon by the appellant as justifications for the residence requirement. The first focused on the idea that residents who lived within the territorial limits of the municipality would be better acquainted with the city, more in touch with the community's needs and desires and, therefore, better able to serve the community through their employment. This argument amounted essentially to the claim that, by compelling its employees to live in the municipality, the appellant could ensure to the best of its ability that the residents of Longueuil were provided with a high quality of local services. While this is doubtless a laudable goal, I cannot accept that it justifies invading the personal autonomy of individual employees by depriving them of their constitutional right to choose where they wish to have their homes; that is, I am not convinced that the appellant's interest in providing the best services possible warrants so significant an intrusion into its employees' private life. Moreover, even assuming that this aim were sufficiently compelling to warrant infringing the respondent's rights, it nevertheless suffers from two further difficulties.

81 First, it is by no means clear that requiring employees to maintain their homes within the municipality's territorial limits will necessarily have the effect of instilling in them the sense of pride and commitment to their city suggested by the appellant. It is, after all, perfectly conceivable that employees living outside the municipality might have just as strong a sense of loyalty to their employer and to the citizens they serve as those who reside within the city limits. Likewise, there is no guarantee that those residing within the municipality will take as active an interest in their surroundings as the appellant would have us believe. This seems particularly likely of those employees who, against their wishes, would be compelled by the residence requirement to live within the municipal limits in order to keep their jobs.

82 Secondly, it appears to me that the goal of providing a high standard of municipal services could easily be pursued through means less drastic than demanding that all permanent employees arrange one of the most fundamental aspects of their private lives in conformity with the municipality's wishes. In other words, the desire to provide the best possible local services does not necessitate constraining an employee's inherently personal choice as to where he or she wishes to live. I would conclude on this basis that the first "public interest" relied upon by the appellant does not justify the imposition on the respondent of the residence requirement at issue.

83 The second "public interest" invoked by the appellant concerns the various economic benefits that might enure to the municipality from having its employees live within its territory. Essentially, the appellant contended both (a) that the economy of Longueuil would be supported by a steady stream of income from resident employees; and (b) that municipal revenues themselves would be bolstered through taxation of those employees. While there was some disagreement in the oral hearing as to whether the taxation aspect of this claim was properly raised before this Court, I do not consider it necessary to pronounce on that issue. Even assuming this rationale can appropriately be considered, the appellant's position suffers from the same difficulties as those raised by the first justification it invoked. Stated simply, I cannot see how the fact that the City of Longueuil might benefit fiscally or economically from having its permanent employees live within its territory can provide a sufficiently compelling basis upon which to override the respondent's right to decide where she wishes to live -- the mere possibility of stimulating local business or of augmenting the funds in the municipal purse does not, in my view, provide an adequate reason for overriding the constitutional guarantee at issue. I find, therefore, that this second "public interest" is insufficient to vindicate the appellant's position.

84 The final "public interest" relied upon by the appellant merits a somewhat fuller discussion. Unlike the first two justifications it invoked, this one concerns not only the benefits that may enure to the municipality from imposing the residence requirement, but also the particular type of work performed by the employees upon whom it is imposed. Specifically, the appellant contended that residence requirements are justified whenever the functions performed by the employees subject to them are themselves of public importance and, as regards the case at bar, it argued that the services performed by the respondent in her capacity as a police radio operator were sufficiently important as to justify requiring her to reside in Longueuil for as long as she held that post.

85 In contrast to the views I have taken with respect to the other justifications relied on by the appellant, I have some sympathy for the general proposition underlying this one. Indeed, it seems to me that, in certain circumstances, a municipality (or, for that matter, another government actor) might well be justified in imposing a residence requirement on employees occupying certain essential positions. For example, it may be that a residence requirement imposed on emergency workers such as police officers, firefighters or ambulance personnel would conform to the principles of fundamental justice inasmuch as the public interest in ensuring that such persons are readily available in times of urgent need is plainly apparent. While considerations such as "distance from the workplace" or "time needed to get to work" may, in some cases, constitute more cogent criteria upon which to structure such a requirement than "city limits", the basic idea of imposing a residence requirement seems, at least *prima facie*, to be justifiable in such a context. Though addressing the issue under the rubric of public order, Baudouin J.A. agreed with this view. He stated, at p. 2571:

> [TRANSLATION] [B]ecause of the demands of their occupations, such persons as police officers, firefighters and ambulance workers may be required to live in the municipality that employs them, or possibly within a specific area inside or outside the municipality, so that they can be reached quickly and be immediately available in an emergency.

Analogous arguments might be possible with respect to persons engaged in other forms of municipal employment. Thus, a requirement that the municipal councillors of a given city reside within a specified area, for example, might well be justified on the ground that the very nature of their occupation demands that they be intimately acquainted with the constituencies they represent. Each case of this kind will, of course, have to be decided on its own facts; I offer the foregoing comments only as examples that might, in an appropriate case, survive constitutional scrutiny. I should also note that, in certain cases, factors other than the nature of the employee's position may also suffice to justify the imposition of a residence requirement.

86 It is worth noting that treating different occupations differently as regards the justifiability of residence requirements is supported by a certain line of American case law. While much of the reasoning in those cases is specific to the American constitutional context (insofar as it focuses on the appropriate level of "constitutional scrutiny" -- as it is known -- to be applied in a given case), it is nevertheless apposite here insofar as it lends support to the view that the main premise underlying the appellant's third "public interest" is sound. Thus, in *Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter*, 360 N.E.2d 708 (1975), *certiorari* denied, 424 U.S. 977 (1976), for example, the Ohio Court of Appeals found that a residence requirement imposed on municipal employees of the city of Youngstown was constitutionally valid as regards policemen, but invalid as regards the plaintiff, who was a maintenance worker at the local airport. Similarly, in *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97 (1971), appeal dismissed for want of substantial federal question, 405 U.S.

950 (1972), a majority of the Supreme Court of Michigan upheld a municipal residence requirement imposed on officers of the Detroit police force, finding expressly that by virtue of their position as emergency workers, police officers can be distinguished from other kinds of employees; see also *Hanson v. Unified School Dist. No. 500, Wyandotte County, Kan.*, 364 F. Supp. 330 (D. Kan. 1973), wherein a residence requirement imposed on schoolteachers was held invalid as not resting on any "reasonable basis". While it is true that a significant number of American cases have upheld residence requirements even in respect of non-emergency employees, they have largely done so not on the basis that the requirements constituted justified violations of rights, but rather on the ground that the particular right asserted by the plaintiff -- normally a "right to travel" or a "right to equal protection" -- was not violated at all; see, e.g., *Ector*, *supra*; *Andre v. Board of Trustees of the Village of Maywood*, 561 F.2d 48 (7th Cir. 1977); and *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265 (3rd Cir. 1994); see also Hampton, *supra*; R. S. Myers, "The Constitutionality of Continuing Residency Requirements for Local Government Employees: A Second Look" (1986), 23 *Cal. W. L. Rev.* 24; and Note, "Municipal Employee Residency Requirements and Equal Protection" (1974-1975), 84 *Yale L.J.* 1684.

87 Having accepted that residence requirements related to specific occupations might, in some cases, be justified, the question here becomes whether the requirement imposed on the respondent can be upheld on that ground. In my view, it cannot, and this for two reasons. The first has to do with the ambit of the requirement itself. As noted earlier, the residence requirement at issue here applies not only to employees whose functions, for one reason or another, require that they be proximate to their place of work. Rather, it applies to <u>all</u> permanent employees of the municipality hired after October 23, 1984. In my view, this renders the requirement too broad to be justified on the basis of the third "public interest" relied on by the appellant. The concerns

underlying this finding were well expressed by the New Hampshire Supreme Court in *Donnelly v. City of Manchester*, 274 A.2d 789 (1971). There, that court expressly recognized that a municipal ordinance imposed by the defendant city upon the plaintiff schoolteacher violated the latter's right to choose where to live, and had this to say, at p. 791:

> [T]he ordinance can be upheld only if the requirement that the employees live within the city serves a public interest which is important enough to justify the restriction on the private right. There is nothing in the record before us nor have any reasons been advanced which would justify the broad restrictions of this ordinance. We do not say that there are no employees whose residence near their place of duty may not be important enough to justify a restriction upon their place of residence but if such restrictions are permissible as to some this does not justify the broad and all inclusive requirement that all employees live within the city limits. Nothing has been brought to our attention . . . which would justify the application of the restriction to schoolteachers. [Emphasis added.]

88 The second reason I cannot accept the appellant's submissions is that even if the residence requirement were restricted, say, to emergency workers, the respondent would not, in my view, fall within that class of employees. Indeed, while the tasks performed by a police radio operator are undoubtedly important in the day to day administration of law enforcement, they do not seem to me to fall within the same class of essential services as, for example, the tasks performed by firefighters, ambulance workers, or police officers themselves. Consequently, I would reject the appellant's contentions in this regard.

89 Two final points should be made. First, as I mentioned briefly earlier, the residence requirement at issue stipulates not only that the respondent must be a resident of Longueuil at the time she is hired, but also that she must remain a resident for the duration of her employment. While it is not necessary to decide the matter (and I do not do so), it seems to me that a residence requirement that intruded to a lesser degree on an

employee's right to choose where to live -- say, by requiring only that she be a local resident at the time she is hired -- might stand a better chance of surviving a s. 7 review, even in respect of an employee whose job does not by its nature provide any justification for imposing a residence requirement. This is because where the violation of the right at issue is less severe, the state interests required to justify it may, generally speaking, be commensurately less pressing.

90 Secondly, I have no doubt that certain kinds of municipal activities that have the effect of impinging upon the individual's right to choose where to live will, in the normal run of cases, nevertheless be justified on the basis of compelling public interests. For example, municipal zoning by-laws that designate certain areas of a city as "commercial" and other areas as "residential" undoubtedly have the effect of constraining the ability of individuals to choose where they wish to establish their homes. It would appear to me, however, that in most -- if not all -- such cases, zoning by-laws (and other similar measures) will survive s. 7 scrutiny of the kind undertaken in these reasons on the ground that they intrude upon personal autonomy to only a very limited degree, while promoting a highly significant collective goal; namely, maintaining social and commercial order at the local level. No similar goal is advanced by the imposition of the residence requirement in this case.

91 Having found that none of the "public interests" suggested by the appellant suffices on the facts of this case to justify infringing the respondent's right to choose where to live, I conclude that the residence requirement at issue here violates the respondent's right to liberty in a manner that does not conform to the principles of fundamental justice and, therefore, that it contravenes one of the constitutional guarantees enshrined in s. 7 of the Canadian *Charter*. I should explain that I see no need to examine the issues in this appeal under the rubric of s. 1 of the *Charter*, given that all

the considerations pertinent to such an inquiry have, I think, already been canvassed in the discussion dealing with fundamental justice. Moreover, and as this Court has previously held, a violation of s. 7 will normally only be justified under s. 1 in the most exceptional of circumstances, if at all; see *Re B.C. Motor Vehicle Act*, *supra*, at p. 518, *per* Lamer J., and at pp. 523-24, *per* Wilson J. Such circumstances do not exist here.

92 My conclusion that the residence requirement at issue violates s. 7 of the Canadian *Charter* is of course sufficient, in and of itself, to dispose of the appeal in favour of the respondent. Nonetheless, I propose to undertake an analysis of the claim asserted under s. 5 of the Quebec *Charter* for, in my opinion, the residence requirement at issue here is equally violative of that provision and cannot be saved by the limitation provision found in s. 9.1. I turn to an examination of those matters.

(3) Issue 2: Whether the Residence Requirement Violates Section 5 of the Quebec *Charter* and Whether, if it Does, it Can Be Saved by Section 9.1

(a) *The Right to Privacy in Section 5*

93 Unlike the Canadian *Charter*, the scope of the Quebec *Charter* is not restricted to "government action". Consequently, no issues of application need be discussed. Furthermore, given that I have already addressed the nature of the right asserted by the respondent in my discussion of s. 7 of the Canadian *Charter* (i.e., by finding that it is a "right to choose where to live" and not a "right to work" as contended by the appellant), it is unnecessary to revisit that question here. Nor do I consider it necessary to make any further comments with respect to the issue of waiver, for while the appellant pointed out that this Court's decision in *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, establishes the possibility of waiving rights to

privacy under s. 5 of the Quebec *Charter* in some circumstances, those circumstances do not exist in this case for the reasons given earlier in relation to waiver under the Canadian *Charter*. In light of these considerations, I propose to move directly to an examination of whether the appellant's imposition of the residence requirement violated the Quebec *Charter* by depriving the respondent of the ability to choose where to establish her home.

94 I should first mention in this regard that the respondent raised arguments in this Court not only in respect of s. 5 of the Quebec *Charter*, but also in respect of s. 1. For convenience, I repeat those provisions here, in French and English:

> **1.** Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.
>
> Il possède également la personnalité juridique.
>
> **5.** Toute personne a droit au respect de sa vie privée.
>
> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.
>
> **5.** Every person has a right to respect for his private life.

As regards s. 5, the respondent contended that choosing where to live is a fundamentally personal decision, falling within the ambit of the "private life" protected by that provision. As regards s. 1, the respondent similarly alleged that the right to choose where to establish one's home falls within the scope of the right to "freedom".

95 Were there not another provision of the Quebec *Charter* aimed more directly at guaranteeing protection for individuals' private spheres of life, I would have had considerable sympathy for the respondent's s. 1 argument. It seems to me, however, that

in enacting s. 5 in addition to s. 1, the Quebec legislator expressly contemplated the importance of protecting matters of a fundamentally private or personal nature, and deemed it appropriate to provide specific protection for them. In light of this, I am of the view that matters involving personal autonomy and privacy -- such as choosing where to establish one's home -- will normally be more appropriately addressed under s. 5. This is not necessarily to say that s. 1 does not protect personal autonomy at all; rather, it is simply to say that since s. 5 is, by its very terms, aimed directly at protecting individuals' private lives, matters that implicate privacy and personal autonomy will generally be better dealt with there. Since I am of the view that the right asserted by the respondent in this case is protected by s. 5, I find it unnecessary to address the arguments made in respect of s. 1.

96 I turn, then, to the parties' submissions in respect of s. 5. The appellant, along with the *mis en cause*, argued that s. 5 found no application in the present case because it protects only (a) a very limited class of interests related directly to the individual himself or herself (such as physical image) and (b) certain kinds of confidential information (such as medical records or health status), but that it does not protect what I have described as a narrow sphere of personal autonomy. The respondent, by contrast, argued that the notion of "private life" ("*vie privée*") implicated by s. 5 has yet to be fully determined, that it should be found to include a limited sphere of personal autonomy with respect to personal decision-making, and that that sphere of autonomy should, in turn, be found to include the right to choose where to establish one's home.

97 The Quebec courts have clearly recognized that, in appropriate cases, such things as confidential or personal information will be found to enjoy the protection of s. 5 of the Quebec *Charter*; see, e.g., *Reid v. Belzile*, [1980] C.S. 717, and *Centre local de services communautaires de l'Érable v. Lambert*, [1981] C.S. 1077 (both dealing with

medical records); *Cohen v. Queenswear International Ltd.*, [1989] R.R.A. 570 (C.S.) (dealing with photographic image); and *The Gazette (Division Southam Inc.) v. Valiquette*, [1997] R.J.Q. 30 (C.A.) (protecting personal information concerning state of health from becoming public); see also P. A. Molinari and P. Trudel, "Le droit au respect de l'honneur, de la réputation et de la vie privée: aspects généraux et applications", in Formation permanente du Barreau du Québec, *Application des Chartes des droits et libertés en matière civile* (1988), 197. I have no doubt that the decisions mentioned, so far as they go, accurately express part of what is captured within the scope of a right to "respect for [one's] private life". In my view, however, the respondent is correct in claiming that the ambit of the right to privacy has not yet been fully delineated and that other aspects of "private life" may, as cases arise, be found to enjoy the protection of s. 5. In my view, one of those other aspects is that narrow sphere of personal autonomy within which inherently private choices are made.

98 This view finds confirmation, *inter alia*, in *Valiquette*, *supra*, at p. 36, where Michaud C.J.Q. (speaking for a unanimous panel of the Quebec Court of Appeal) stated:

> [TRANSLATION] The right to one's private life, which is considered one of the most fundamental of the personality rights . . . has still not been formally defined.
>
> It is possible, however, to identify the components of the right to respect for one's private life, which are fairly specific. What is involved is a right to anonymity and privacy, a right to autonomy in structuring one's personal and family life and a right to secrecy and confidentiality. [Emphasis added; citation omitted.]

I endorse the views expressed by Michaud C.J.Q. and find, accordingly, that s. 5 of the Quebec *Charter* protects, among other things, the right to take fundamentally personal decisions free from unjustified external interference. But as in the case of the Canadian *Charter*, where I found that the sphere of autonomy protected by the liberty interest in

s. 7 is narrowly circumscribed, I am of the view that the scope of decisions falling within the sphere of autonomy protected by s. 5 is similarly limited; viz., only those choices that are of a fundamentally private or inherently personal nature will be protected.

99 Having found that the right to make fundamentally personal decisions is protected by s. 5, the next question is whether choosing where to live qualifies as one of those decisions. For the reasons expressed in relation to s. 7 of the Canadian *Charter*, I am of the view that it does, and I do not propose to repeat my earlier comments here. Suffice it to say that by virtue of both the intimately personal considerations that factor into one's choice as to where to live and the very significant effects that choice inevitably has on one's personal affairs, the right to be free from unjustified interference in making a decision as to where to establish and maintain one's home seems to me to fall squarely within the scope of the Quebec *Charter*'s guarantee of "respect for [one's] private life". Since the residence requirement imposed by the appellant essentially precluded the respondent from making that choice freely, it violates s. 5.

100 This conclusion draws significant support from the majority decision of Gendreau J.A. in *Brasserie Labatt, supra*, upon which Gendreau J.A. himself relied in rendering his judgment in the present case. There, the respondent was required to move with his family from Quebec City to Montreal as a term of a promotion he was given within the management of the appellant brewery. While the respondent himself moved to Montreal, his family did not join him and, after a number of months, he was fired on the ground that he had failed to comply with the residence requirement in his contract. Gendreau J.A. held that the residence requirement was both contrary to public policy and violative of s. 5 of the Quebec *Charter*. In making his findings in respect of the latter ground, he stated, at p. 79:

> [TRANSLATION] I do not believe that the right to one's private life set out in the Charter cannot include protection of the type and degree of cohabitation chosen by spouses and their children. In other words, where an employer imposes the location of the conjugal home and requires spouses and their children to live together more or less all of the time out of a concern for image and greater efficiency, it seems to me that this interferes with the protection of private life as defined in the Charter, in relation to the employee, the employee's spouse and each of the employee's children, and is therefore prohibited.

101 Baudouin J.A. found that *Brasserie Labatt* could be distinguished from this case on the basis that, unlike the residence requirement at issue there, the residence requirement here does not apply to anyone other than the respondent. With respect, I disagree. While the residence requirement at issue in *Brasserie Labatt* did apply explicitly to the respondent's family (and, in that sense, differed from the one at issue here), the gist of the respondent's claim in that case was, nonetheless, exactly the same as that of the respondent's here; namely, that by imposing a residence requirement, the respective employers in each case have invaded a sphere of personal autonomy within which individuals must be left to make their own fundamentally private choices. Indeed, to find as Baudouin J.A. did that the respondent in *Brasserie Labatt* could benefit from s. 5 but that the respondent in this case cannot would, in my view, amount to finding that residence requirements imposed only on employees themselves do not violate the "right to choose where to live" while those imposed on the employee and his or her family do. Again, with respect, I see no basis for this distinction.

102 For all these reasons, I am of the view that the residence requirement imposed by the appellant violates the respondent's right to respect for her private life, enshrined in s. 5 of the Quebec *Charter*. I will now examine whether that violation can be justified under s. 9.1.

(b) *Section 9.1*

103 Section 9.1 of the Quebec *Charter* reads as follows in French and English:

> **9.1** Les libertés et droits fondamentaux s'exercent dans le respect des valeurs démocratiques, de l'ordre public et du bien-être général des citoyens du Québec.
>
> La loi peut, à cet égard, en fixer la portée et en aménager l'exercice.
>
> **9.1** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

As is evident from its very terms, s. 9.1 allows for the possibility that the "fundamental freedoms and rights" enshrined in the Quebec *Charter* may be subject to limits fixed by law. While it might be argued -- I do not say how successfully-- that the residence requirement at issue would not constitute a "law" for the purposes of s. 9.1, and while there appears to be some uncertainty in the academic literature as to whether the first paragraph of s. 9.1 can ever apply to limit rights even where no applicable "law" does so (see, e.g., F. Chevrette, "La disposition limitative de la Charte des droits et libertés de la personne: le dit et le non-dit", in *De la Charte québécoise des droits et libertés: origine, nature et défis* (1989), 71), I do not consider it necessary to pronounce specifically upon either of those issues. I take this view for the following reasons.

104 First, neither issue was explicitly addressed by the parties and, consequently, the Court has not had the benefit of counsel's submissions on the questions they raise. Putting that matter aside, however, and operating on the assumption that s. 9.1 properly applies here, I am of the opinion that it would not, in any event, avail the appellant in this case. As this Court unanimously held in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, s. 9.1 of the Quebec *Charter* is to be interpreted and applied in the same manner as s. 1 of the Canadian *Charter*. Thus, as the Court explained in *Ford*, the party

seeking to justify a limitation on a plaintiff's Quebec *Charter* rights under s. 9.1 must bear the burden of proving both that such a limitation is imposed in furtherance of a legitimate and substantial objective and that the limitation is proportional to the end sought, inasmuch as (a) it is rationally connected to that end, and (b) the right is impaired as little as possible; see *Oakes*, *supra*; and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Essentially for the reasons I gave in my discussion of fundamental justice in the context of s. 7 of the Canadian *Charter*, I am of the opinion that two of the objectives suggested by the appellant as the basis for imposing the residence requirement on the respondent in this case -- namely, (i) the maintenance of a high standard of municipal services and (ii) the stimulation of local business and municipal taxation revenue -- are not so significant or pressing as to justify overriding the respondent's s. 5 right to respect for her private life. As regards the third objective advanced by the appellant -- i.e., ensuring that workers performing essential public services are physically proximate to their place of work -- I am unable to conclude that the very broad residence requirement at issue is either rationally connected to the end sought to be achieved, or that it is proportional to it. Moreover, the specific evidence advanced by the appellant in respect of the justifications it offered was scant at best and, in my view, is incapable of permitting the appellant to discharge its burden of proof. I conclude, therefore, that the infringement of the respondent's right to choose where she wishes to live has not been justified under s. 9.1. Just as I found that the appeal should be dismissed on the basis that the residence requirement violates s. 7 of the Canadian *Charter*, then, I also find that it should be dismissed on the basis that that requirement unjustifiably violates the respondent's right to respect for her private life under s. 5 of the Quebec *Charter*. I turn now to consider the respondent's cross-appeal on the issue of what I have called the "interim damages".

B. *The Cross-Appeal*

105 Before setting out my findings on this aspect of the case, it will be useful to restate briefly the pertinent facts and the issues they raise. On September 14, 1995, the Court of Appeal released its reasons for judgment and found, in addition to its holdings on the substantive issues, that because they had not been properly quantified, damages in respect of the income lost by the respondent during the period between the trial and the appeal should not be awarded. No specific holding to this effect was included in the formal judgment, however, and the respondent brought a motion for rectification, asking that the court amend its formal judgment and award the "interim damages". For its part, the Court of Appeal granted the motion on November 15, 1995 but amended its reasons in the manner set out earlier. In this Court, the appellant alleges that the Court of Appeal erred in issuing the rectificatory judgment in the first place, inasmuch as that judgment amounted to pronouncing upon a matter that was already *res judicata*, while the respondent claims that the Court of Appeal erred in three ways: (a) in refusing to allow her to introduce evidence at the appeal hearing in respect of the interim damages; (b) in failing to request that the parties submit additional argument in respect of the interim damages claim; and (c) in failing to remand the matter to the Superior Court to be decided there.

106 To my mind, the issues raised in the cross-appeal can be addressed relatively quickly. I begin with the appellant's submission in respect of whether the issuance of the rectificatory judgment itself constituted an error. As I mentioned when setting out the issues, this claim is, technically speaking, a part of the main appeal but, for convenience, I have chosen to address it here. The crux of the argument was that because the reasons of September 14 made sufficiently clear that no interim damages would be awarded, the Court of Appeal ought not to have issued its November 15 judgment at all. While I agree that Baudouin J.A.'s September 14 reasons make plainly clear the Court of Appeal's refusal to award the interim damages, I do not find that the

rectificatory judgment of November 15 amounted to re-examining a matter that was already *res judicata*. As I see it, the November 15 reasons constituted nothing more than an attempt by the Court of Appeal to formalize with precision the conclusion it had reached some two months earlier. They did not reopen the matters at issue; nor did they alter in any way the substance of the judgment that had already been rendered. Consequently, I cannot conclude, as the appellant urges, that the issuance of the rectificatory judgment constituted reversible error.

107 I should note in this regard that what appeared to concern the appellant most about the November 15 reasons was the following passage from the addendum that the Court of Appeal sought to include in its September 14 judgment:

> [TRANSLATION]
>
> DISMISSES, on the ground that it is unenforceable, the conclusion in the notice of appeal. . .
>
> . . .
>
> without prejudice to any of the [respondent's] rights or remedies arising from this judgment. [Emphasis added.]

The respondent treated this passage as conferring upon her a right to pursue further recourses to recover the interim damages and, in this respect, the appellant viewed the rectificatory judgment as depriving it of a decision that had already been rendered in its favour. For my part, I do not read this passage in the manner advanced by the respondent. Indeed, to my mind, it simply serves to confirm that in formalizing its refusal to award the interim damages, the Court of Appeal did not want to be taken as having altered any findings it had made in its September 14 reasons. Read in this manner, the issuance of the rectificatory judgment did not have any detrimental effect on the legal position of the appellant.

108 As regards the respondent's submissions concerning how the Court of Appeal dealt with the interim damages issue -- which are the matters truly raised in the cross-appeal itself -- I am similarly unable to find any reversible error. In respect of the first claim (concerning the refusal of the Court of Appeal to admit the respondent's interim damages evidence during the appeal hearing itself), the Court of Appeal pointed out that the respondent could, in the course of the appeal proceedings, easily have presented evidence with respect to the quantum of the interim damages had she followed the proper procedures. Instead of doing so, however, the respondent simply attempted to introduce such evidence during the oral hearing itself, and then only after questions with respect to quantification had been raised by members of the court. As both the Court of Appeal and the appellant pointed out, allowing this evidence to be introduced at that stage would not have given the appellant ample opportunity to verify the figures the respondent claimed represented her losses. I cannot see how the Court of Appeal's refusal to permit the respondent to proceed in this manner could constitute reversible error.

109 Moreover, as the Court of Appeal itself explained in its September 14 reasons (*per* Baudouin J.A.), the respondent could have presented evidence in respect of the interim damages claim not only as part of the appeal itself but also at any time before judgment, pursuant to art. 199 of the *Code of Civil Procedure*, R.S.Q., c. C-25. Nearly a whole year elapsed between the oral hearing and the handing down of judgment -- a period during which the respondent would, of course, have been on notice that the Court of Appeal lacked sufficient evidence upon which to calculate any interim damages award -- and still no attempt to quantify the interim damages in accordance with the appropriate procedure was made. In light of these considerations, I cannot accept that the Court of Appeal's refusal to grant the interim damages was based on some

procedural error on its part. Rather, it was based simply on the fact that no evidence as to quantum had ever been properly placed before it.

110 In respect of the second and third claims (concerning whether the Court of Appeal should either have requested submissions on the interim damages issue or remanded the matter to the Superior Court), the respondent relied largely on art. 523 *C.C.P.* which reads in relevant part as follows:

> **523.** The Court of Appeal may, if the ends of justice so require, permit a party to amend his written proceedings, to implead a person whose presence is necessary, or even, in exceptional circumstances, to adduce, in such manner as it directs, indispensable new evidence.
>
> It has all the powers necessary for the exercise of its jurisdiction and may make any order necessary to safeguard the rights of the parties. . . .

The very wording of art. 523 *C.C.P.* makes clear that it confers a discretion on the Court of Appeal to act in the interests of justice and to make whatever orders it deems necessary in order to safeguard the rights of the parties; see *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, [1997] 2 S.C.R. 299. In the present case, the Court of Appeal simply chose not to exercise that discretion. Particularly given the clear opportunities the respondent had to present evidence in respect of her interim damages, I am not persuaded this Court would be justified in interfering with that decision.

V. Conclusions

111 Based on my findings that the residence requirement at issue unjustifiably violates both s. 7 of the Canadian *Charter* and s. 5 of the Quebec *Charter*, I would dismiss the appeal with costs. I would also dismiss the cross-appeal, but make no order as to costs.

The judgment of Gonthier, Cory and Iacobucci was delivered by

112 CORY J. -- In his carefully considered reasons, Justice La Forest rests his decision primarily upon his conclusion that the resolution of the City of Longueuil requiring employees of the city to reside within its boundaries unjustifiably infringes s. 7 of the *Canadian Charter of Rights and Freedoms*.

113 Although I agree with the conclusion reached by La Forest J. to dismiss the appeal, I would not base it upon an infringement of the Canadian *Charter*.

114 In the Quebec Court of Appeal, [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130, the judges were unanimous in their conclusion that the residence requirement was invalid but arrived at the result in different ways. Baudouin J.A. found that there was no infringement of a right protected by the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and that s. 7 of the Canadian *Charter* was not applicable. He concluded nevertheless that, under the general law as a matter of public order, in the absence of some pressing and overriding concern persons must have the right to live where they wish. The residence requirement was not justified and contravened public order by restricting employees in choosing their place of residence. It was on this basis that he found the residential requirement to be invalid.

115 Fish J.A. was in substantial agreement with the reasons of Baudouin J.A. but determined that the Quebec *Charter* did not need to be considered.

116 Gendreau J.A. based his decision upon s. 5 of the Quebec *Charter* which provides:

5. Every person has a right to respect for his private life.

117 Gendreau J.A., correctly in my view, relied upon his reasons given on behalf of the majority in *Brasserie Labatt ltée v. Villa*, [1995] R.J.Q. 73 (C.A.), in concluding that the residence requirement infringed s. 5 of the Quebec *Charter*. Similarly, La Forest J., in the course of his scholarly reasons, found that the resolution of the City of Longueuil was invalid because it violated s. 5 of the Quebec *Charter*. I am in complete agreement with his reasoning on this issue. For me the infringement of s. 5 of the Quebec *Charter* provides a good and sufficient basis for dismissing this appeal and I would not consider the application of s. 7 of the Canadian *Charter*.

118 Although I would not consider s. 7 of the Canadian *Charter*, I cannot adopt the conclusion of the Court of Appeal that it is simply not applicable. This Court has recognized that the *Charter* can be applicable to municipal by-laws. See for example *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084. Yet I would prefer to withhold consideration of the application of s. 7 to a situation such as that presented in this case. The case raises important questions as to the scope of s. 7. Further, its application may have a significant effect upon municipalities. Before reaching a conclusion on an issue that need not be considered in determining this appeal I would like to hear further argument with regard to it including the submissions of interested parties and intervening Attorneys General of the provinces and Territories. Those submissions might well serve to change, vary or modify the approach the Court will take on this issue. Without hearing further argument on this question I would prefer not to hazard an opinion upon it.

119 Like La Forest J. I would dismiss the cross-appeal and make no order as to costs.

Appeal dismissed with costs. Cross-appeal dismissed.

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