Bokor (*Appellant*) *v.* **The Queen** (*Respondent*)

Walsh J.—Montreal, September 23, Ottawa, November 5, 1970.

Crown—Public Service—Bill of Rights—Preference to Canadian citizens in civil service —Whether violation of Bill of Rights—No statutory requirement for examination —Selection and ranking of candidates not reviewable by court—No obligation to advise unsuccessful candidate why rejected—Rejection of temporary employee for cause—Whether candidate to be advised of reason—Civil Service Act, S. of C. 1960-61, c. 57, secs. 38(1), 40, 42—Public Service Employment Act, S. of C. 1966-68, s. 28(3)—Bill of Rights, S. of C. 1960, c. 44, secs. 1, 5(1).

Suppliant, a Rumanian who became a Canadian citizen in June 1965, sued the Crown for damages on the grounds: (1) that he was never interviewed on any of 24 applications for employment by the Civil Service Commission nor given an opportunity to present a case for himself or participate in a competition; (2) that while a probationary employee he was discriminated against because he was not a Canadian citizen and summarily dismissed three months before he would become a permanent employee without recourse and without being given the opportunity to appeal or to present his grievances.

Held, his petition of right did not disclose a cause of action.

1. Section 40 of the *Civil Service Act* which gives a priority, *inter alia,* to Canadian citizens who are candidates for employment, does not contravene s. 1 of the *Bill of Rights,* 1960, c. 44, which prohibits discrimination "by reason of race, national origin, colour, religion or sex". *The Queen v. Drybones* [1970] S.C.R. 282, distinguished.

2. Under s. 38(1) of the *Civil Service Act* the Civil Service Commission has a wide discretion whether or not to conduct an examination for candidates for employment.

3. The selection and ranking of candidates by the Civil Service Commission for an eligible list under s. 42 of the *Civil Service Act* are administrative matters which are not subject to review by the court.

4. The Civil Service Commission is not obliged to notify an unsuccessful candidate the reason why his application was not accepted. The Act was adopted in the interests of the public and not in that of candidates for employment.

5. Section 28 of the *Public Service Employment Act* does not require a deputy head to notify a temporary employee as well as the Commission of the reasons why the candidate has been rejected for cause. *Zamulinski v. The Queen* [1956-60] Ex.C.R. 175; *Hopson v. The Queen* [1966] Ex.C.R. 608, distinguished. The absence of a hearing was not a violation of any of the human rights and fundamental freedoms protected by s. 1 and s. 5(1) of the *Bill of Rights. The Queen v. Randolph* [1966] S.C.R. 260, distinguished.

PETITION of right.

R. W. A. Agard for suppliant.

R. Cousineau and *G. Smith* for respondent.

WALSH J.—This action came on before me for hearing on a question of law to be heard and disposed of before the trial of the matter, the question being as follows:

> Assuming that the allegations contained in the petition of right are true, does the suppliant have a cause of action under the *Crown Liability Act* in tort or delict, or otherwise?

A judgment was previously rendered herein by Jackett P. on April 18, 1969, dismissing an application by the Deputy Attorney General of Canada under R. 114 of the Rules of this court to strike out the petition of right herein and in rendering judgment he indicated that the question of whether the *Civil Service Act* created a cause of action against the Crown in favour of an applicant whose application has not been dealt with in accordance with the requirements of the statute, and the other possibility of a cause of action being found in tort or delict, depending on whether the place where the claim arises is Ontario or Quebec, on the ground that such tort or delict has been committed against the suppliant by servants of the Crown acting in the course of their employment so as to raise a cause of action against the Crown under the *Crown Liability Act,* had not been argued sufficiently before him for him to dispose of these issues, and that therefore a defence should be filed and that consideration could then be given to raising a question of law for decision before the matter proceeded further.

Suppliant's claim for damages is based on two principal grounds. First, that despite having made twenty-four applications for employment to the Civil Service Commission between June 1964 and July 1966, he was never interviewed nor given the opportunity to present a case for himself nor participate in a competition with other prospective applicants as he alleged was required by law and the practice in such cases. Second, that when he was accepted for the position of French professor in the Language School in Hull, where he worked from November 1, 1965 to July 31, 1967, he was discriminated against and summarily dismissed on July 31, 1967, three months before the time he would become a permanent employee, without recourse and without being given the opportunity to appeal nor to present his grievances.

Dealing with his first ground, he refers in par. 14, 15, 19 and 21 of his petition of right to applications for positions in which priority was granted to competent candidates who are Canadian citizens. He had come to Canada from Rumania on June 8, 1960, and became a Canadian citizen in June 1965 and, hence, at the relevant times he was not a Canadian citizen and he alleges that this constituted discrimination against him in contravention of the *Bill of Rights,* the *Civil Service Act,* and the *Canada Fair Employment Practices Act.* This contention can be disposed of quickly. In support of it he refers to s. 33 of the *Civil Service Act*[1] which reads as follows:

> 33. The Commission may in relation to any position or any class or grade prescribe qualifications as to age, residence or any other matters that in the opinion

[1] 1960-61 (Can.), c. 57.

> of the Commission are necessary or desirable having regard to the nature of the duties to be performed, but in so doing the Commission shall not discriminate against any person by reason of *race, national origin, colour or religion.*

These are substantially the same words used in the *Bill of Rights*[2], in which s. 1 reads, in part:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex the following human rights and fundamental freedoms, namely,...

with the exception that the word "sex" does not appear in the *Civil Service Act,* but this is not an issue in the present case.

The *Canada Fair Employment Practices Act*[3] also uses in s. 4 the words "race, national origin, colour or religion", but it applies to "employment upon or in connection with any work, undertaking or business that is within the legislative authority of the Parliament of Canada", and it would seem doubtful whether this would include employment in the Civil Service of Canada, so as to affect the rights of the Crown, since it provides for offences and penalties which clearly could not be applied against the Crown.

Section 40 of the *Civil Service Act* makes provision for granting priority to candidates in receipt of wartime pensions, veterans, widows of veterans, and thereafter to Canadian citizens in preference to persons not coming within any of these categories, and suppliant attacks this preference as being in contravention of the *Bill of Rights.* In doing so, he appears to confuse the words "national origin" with "citizenship". "Citizenship" is something quite different and is not covered by s. 33 of the *Civil Service Act* or by the *Bill of Rights.* If suppliant, after acquiring Canadian citizenship, had then been discriminated against because he had been born in Rumania rather than Canada, he might have had a cause of action under this heading, but it is in my view quite proper for the Commission, in accordance with the provisions of s. 40(1)(*c*) of the *Civil Service Act* to give Canadian citizens a preference for positions in the Civil Service. In support of his contention, suppliant's counsel refers to the judgment of Ritchie J. in the recent case of *The Queen v. Drybones*[4], quoting the judgment as follows:

> I think that the word "law" as used in s. 1(*b*) of the *Bill of Rights* is to be construed as meaning "the law of Canada" as defined in s. 5(2) (i.e. Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(*b*) means at least that no individual or group of individuals is to be treated more harshly than another under that law,
>
> * * *

He omits to quote the remainder of this sentence, however, which reads:

> ..., and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his *fellow Canadians* are free to do without having committed any offence or having been made subject to any penalty.

---

[2] 1960 (Can.), c. 44.
[3] S. of C. 1952-53, c. 19.
[4] [1970] S.C.R. 282 at p. 297.

It is clear that that judgment is dealing with discrimination before the courts against Canadians of one race as distinguished from Canadians of another race, and cannot be interpreted as having held that no distinction can ever be made in any federal statute between Canadians and non-Canadians. It is surely self-evident that Canadian citizenship carries with it certain rights and privileges not accorded to non-Canadians as, for example, the right to vote in elections[5] and that such privileges cannot be held to be in contravention of the *Bill of Rights*. It is also surely self-evident that, for certain sensitive positions in the Public Service, it is desirable to give preference to Canadian citizens or even to go further and make Canadian citizenship a necessary requirement, and that suppliant was therefore not discriminated against in having his application for the positions with such requirements rejected during the period before he acquired such citizenship.

Although it was not specifically referred to in his petition of right, his written notes state:

> It will also be shown at trial that the Civil Service Commission did allow other candidates who were non-Canadian citizens to write the Civil Service examinations from which suppliant was excluded. These non-Canadian citizens were however either of British or French origin. Therefore we have the arbitrary exclusion of certain ethnic groups from the right to write these examinations, the whole contrary to s. 33 of the Civil Service Act . . .

If this statement is made in reference to the four positions for which his application was rejected on the ground that priority was given to Canadian citizens then the Commission may have erred in permitting non-Canadian citizens of British or French origin to write the examinations for them while refusing suppliant such right, but it must be pointed out that s. 40 merely provides for a priority list in which Canadian citizens shall rank ahead of non-Canadian citizens and has no reference to whether examinations have been written or not, and I fail to see how suppliant could acquire a cause of action merely because the Commission may not have applied the provisions of s. 40 in the case of other candidates who were not Canadian citizens when it should have done so, since I find that the section was properly applied in his case.

It may well be, however, that the above quotation from suppliant's notes and authorities has reference to other paragraphs of his petition in which the refusal to permit him to submit to examinations was not based on his lack of Canadian citizenship, in which event this then relates to his argument on these other paragraphs of his petition.

Dealing with the other twenty positions for which he was not given the opportunity of writing competitive examinations, we find that with the exception of one occasion, he always received a reply to his application and on sixteen of these occasions, the reply indicated that there was a more suitable candidate, someone with more experience in line with the requirements, some-

[5] *Canada Elections Act*, 1960 (Can.), c. 39, s. 14.

one with more appropriate qualities, or that there were no positions immediately available in the general category for which he applied, or no positions available for persons with his experience. In three cases he received a somewhat unusual reply. In the instance referred to in par. 17 of his petition of right his application was turned down since "you are now receiving a higher salary than the maximum indicated it is assumed that you are not interested in being considered further". In the position referred to in par. 23, a telephone call advised him that the nomination had already been made. In par. 29 he alleges that in this case he received a reply but was turned down for "no apparent reason". In only one case, as already stated, namely, that referred to in par. 32, he received no reply to his application.

In considering applications for employment in the Civil Service, the Commission must apply s. 38 of the Act which reads as follows:

> 38. (1) The Commission shall examine and consider all applications received within the time prescribed by it for the receipt of applications and, after considering such further material and conducting such examinations, tests, interviews and investigations as it considers necessary or desirable, shall select the candidates who are qualified for the position or positions in relation to which the competition is conducted, and shall place them in order of merit.
>
> (2) An examination, test or interview under this section shall be conducted in the English or French language or both at the option of the candidate.
>
> (3) Where in the opinion of the Commission there are sufficient qualified applicants
>
> (*a*) coming within paragraphs (*a*) and (*b*) of subsection (1) of section 40, or
>
> (*b*) coming within paragraphs (*a*), (*b*) and (*c*) of subsection (1) of section 40
>
> to enable the Commission to prepare an eligible list in accordance with section 42, the Commission may confine its selection of qualified candidates under subsection (1) of this section to those applicants.

It is to be noted that s. 38(1) refers to "conducting such examinations, tests, interviews and investigations *as it considers necessary or desirable*". It appears to me that this is the governing section and that subsec. (2) merely requires that the examination, test or interview (if given) shall be conducted in English or French or both at the option of the candidate, but in no way indicates, as suppliant claims, that an examination, test or interview must be given unless the Commission considers this "necessary or desirable". The said s. 38 refers to s. 40, which I have already discussed, and s. 42 and it might be convenient to quote the relevant parts of them here:

> 40. (1) In the case of an open competition the Commission shall, after complying with section 38 and after making such further investigations as it considers necessary, prepare a list of candidates in accordance with the following principles:
>
> (*a*) those who are in receipt of a pension
>
> (i) by reason of their service in World War I, or
>
> (ii) by reason of their service only in World War II, and who at the commencement of such service were domiciled in Canada or Newfoundland,
>
> who have from causes attributable to such service lost capacity for physical exertion to an extent that makes them unfit to pursue efficiently the vocations

that they were pursuing before the war, and who have not been successfully re-established in some other vocation, shall be placed, in order of merit, ahead of other successful candidates;

(*b*) those who are veterans and who do not come within the provisions of paragraph (*a*), or who are widows of veterans, shall be placed, in order of merit, on the list immediately following the candidates, if any, mentioned in paragraph (*a*);

(*c*) Canadian citizens not coming within paragraph (*a*) or (*b*) shall be placed in order of merit after any candidates coming within either of those paragraphs; and

(*d*) persons not coming within paragraph (*a*), (*b*) or (*c*) shall be placed in order of merit after any candidates coming within any of those paragraphs.

* * *

42. From the list of qualified candidates the Commission shall prepare a list, to be known as the eligible list, which shall include the highest ranking candidates and shall, wherever possible, include a number of names sufficient in the opinion of the Commission

(*a*) in the case of a special eligible list, to provide for the filling of the position; and

(*b*) in the case of a general eligible list, to provide for the filling for a peri one year of the positions that are likely to become vacant in the grade or class in relation to which the list was established.

Section 38(3) makes it very clear that if there are sufficient candidates in the categories of s. 40(1)(*a*), (*b*) or (*c*), selection of qualified candidates may be confined to those applicants. Even if the requirements for Canadian citizenship were not included in the advertisement for the position, s. 40 would still be applied since the use of the word "shall" makes it mandatory and this would have affected all of suppliant's applications prior to June 1965 when he obtained citizenship. In any application after that date, and this seems to apply to those referred to in par. 22, and 24 to 35, he would not be adversely affected by s. 40(1)(c) but would still rank after candidates coming within par. (*a*) and (*b*) of that subsection.

Section 42, in referring to the list of qualified candidates which the Commission "shall" prepare, refers to "highest ranking candidates". While this might at first sight seem to imply a ranking resulting from an examination, s. 38(1), which gives the Commission wide discretion whether to conduct an examination or not, indicates that it shall select qualified candidates and place them in order of merit from which it can be inferred that, to the extent that a list can be prepared putting the candidates in order of merit without an examination, the Commission is entitled to do so.

There is no provision in the Act for any appeal from a decision of the Commission as to the selection or ranking of candidates for determination of the eligible list. These matters are of an administrative nature and I am of the view that it would be improper for the court, in the absence of such express provision, to attempt to review in any way a decision made

by the Commission in the exercise of its discretion, or by employees to whom the Commission has properly delegated its powers in accordance with the provisions of the Act.

Although s. 38(1) of the Act merely requires that "the Commission shall examine and consider all applications received within the time prescribed by it for the receipt of applications" and there is no requirement that the Commission shall notify each applicant of the outcome of this examination, the Commission punctiliously wrote suppliant in connection with each of his applications (with one exception, which is not too significant in view of the substantial number of times that his applications were acknowledged and the fact that the Act required no such acknowledgment), indicating that his application had been examined and considered and, again with one exception, the reason why it was not accepted. Here again, since the Act has no requirement for indicating to unsuccessful candidates why their application was not accepted, the omission to give a reason in this one case was not significant.

The primary purpose of the *Civil Service Act* is clearly to ensure employment in the Civil Service of Canada of the most competent and best qualified persons available. It is an Act which was adopted in the interests of the public as a whole and not for the benefit and protection of persons applying for employment in the Civil Service. In the case of *Cutler v. Wandsworth Stadium Ltd* [6], Lord Simonds states, at p. 407:

> . . . It is, I think, true that it is often a difficult question whether, where a statutory obligation is placed on A., B. who conceives himself to be damnified by A.'s breach of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration.

This judgment refers with approval to the words of Lord Kinnear in *Black v. Fife Coal Co.* [1912] A.C. 149 at p. 165, where he states:

> . . . We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended.

In the Supreme Court case of *Grossman et al v. The King* [7], Kerwin J. states at page 594:

> . . . It must now be taken as settled by this Court in *Anthony v. The King* ([1946] S.C.R. 569), that the Crown's officer or servant must owe a duty to the third person, the breach of which would make him liable to that third party before the Crown's responsibility could attach under the section; that is, the rule *respondent superior* applies.

---

[6] [1949] A.C. 398.
[7] [1952] S.C.R. 571.

While this judgment was rendered before the adoption of the *Crown Liability Act* in 1953, the situation remains unchanged. This judgment was followed in the case of *Gagné v. La Reine*[8] where Noël J. stated at p. 272-73:

> . . . La faute positive du préposé de l'intimée dans l'exécution de ses fonctions suffirait au besoin pour entraîner, par conséquent, la responsabilité de l'intimée pour les dommages subis par le requérant. D'ailleurs, une simple abstention de la part d'un préposé ne pourrait disculper le commettant que si ce préposé n'a des devoirs qu'à l'égard de son employeur et aucun devoir envers les tiers. Priver quelqu'un par incurie d'une aide ou assistance doit être considéré comme lui infligeant un tort plutôt que lui refusant un bienfait ou avantage et c'est d'ailleurs ce que paraît avoir décidé la Cour Suprême dans *Grossman v. The King* tel qu'exprimé par le juge Taschereau:
>
> > What this Court held in these two cases clearly indicates that the employees of the Crown failed in their duty to third parties, that their negligence, although arising only out of an omission to act, entailed *their personal liability,* and consequently the vicarious liability of the Crown. The Court was not merely confronted with cases of nonfeasance of acts which should have been done by the servant, as the result of a contract between the employer and the employee, and which would not involve the personal liability of the latter to third persons, but with the failure to perform a duty owed to the victims. (Halsbury, Vol. 22, page 255).

Although the court cannot, in the present state of the law, interfere with the exercise of discretion and the decisions reached by the Civil Service Commission and its employees in the administration of the *Civil Service Act,* it may well be that suppliant would have a legal remedy if it were shown that the provisions of that Act had not been complied with in dealing with his applications, and that they had not been considered at all, or that they had been rejected because of his race, national origin, colour or religion[9], but there is nothing in the petition of right which would justify reaching any such conclusion even on the assumption, on which we are proceeding, that the allegations contained in the petition of right are true. Suppliant would have the Court draw the inference that, because he undoubtedly possesses very high academic, linguistic, administrative and teaching qualifications, and since his applications were rejected for so many different positions after a mere preliminary examination and consideration without his being called for an interview or given the opportunity of taking an examination, he must have been discriminated against on the basis of race, national origin, colour or religion. He does allege in para. 11 of his petition of right that:

> . . . he was refused employment for discriminatory, abusive, unjustifiable and immoral reasons, the whole as hereinafter set forth, . . .

The following paragraphs, however, merely recite the various applications which he made for employment in the Civil Service and the answers received, none of which justify the conclusion that his employment was refused for "discriminatory, abusive, unjustifiable and immoral reasons".

---

[8] [1967] 1 Ex. C.R. 263.

[9] Probably that remedy would not be available by way of legal proceedings against the Crown but rather by way of appropriate legal proceedings (Prerogative Writ proceedings, for example) against the Civil Service Commission (which has apparently been set up as a statutory authority to act independently of the Crown) to compel it to do its duty in accordance with the statute or to test the validity of something it has done in breach of the statute.

I therefore conclude that no cause of action exists whether in tort or delict or otherwise with respect to the first part of suppliant's claim arising from the fact that he was never interviewed or given the opportunity of writing competitive examinations in connection with his various applications for employment in the Civil Service.

Turning now to the second issue set out in paras. 39 to 44 of the petition of right, suppliant alleges in para. 44 that:

> . . . he was dismissed barely three months before the time he became a permanent employee, the whole without recourse and without being given the opportunity to appeal or to present his grievances;

The allegations in paras. 40 to 43 respecting the low level at which his salary was originally fixed, that he was discouraged from continuing his employment and was treated unfairly, and that he was dismissed for no valid reason whatsoever and that during the period of his employment, increases of salary and promotion were determined in an inequitable and discriminatory manner, are not matters subject to review by the court but are matters to be dealt with by whatever grievance procedures are provided in the applicable Act and regulations. If the proper procedure was not followed in connection with his dismissal, however, and he was not given an opportunity to be heard in connection with it, then he might have a cause of action on this ground. The leading case on this is that of *Zamulinski v. The Queen*[10]. In that case, the statute in effect at that time[11] provided, in s. 19, that

> 19. Except where otherwise expressly provided, all appointments to the Civil Service . . . shall be during pleasure;
>
> * * *

Provision was made for regulations for carrying out the Act, and Reg. 118 provided that:

> 118. No employee shall be dismissed, suspended or demoted without having been given an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head.

The postal employee in question was given notice of dismissal which became effective without his having been given the opportunity of being heard as prescribed by Reg. 118. He petitioned for:

1. a declaration that his employment still continued and for wages;
2. a declaration that he was wrongly dismissed and for damages; and
3. damages for not being given prior to dismissal an opportunity to present his side of the case.

It was held that:

> Section 19 of the Act made statutory the long-established rule that Crown servants hold office during pleasure, and the suppliant, consequently, had no right to a declaration that his job still continued nor to a declaration that he was wrongly dismissed. However, Reg. 118, which was validly enacted, gave him a right to a hearing (which was not inconsistent with the Crown's right to dismiss

[10] (1957) 10 D.L.R. 685; [1956-60] Ex. C.R. 175.
[11] R.S.C. 1952, c. 48.

at pleasure), and a violation of this right gave him a cause of action which was cognizable in the Exchequer Court under s. 18(1)(*d*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98. He was accordingly entitled to damages which, in this case were more than nominal, because his ultimate dismissal would have been delayed if a hearing were given. Suppliant's claim under the third head would be disallowed if it were merely a claim for wrongful dismissal by reason of non-compliance with a procedural requirement or a claim of a right not to be dismissed without being given the required hearing. As framed, however, this claim does not challenge the dismissal but properly complains of a violation of a legal right. (*R. Venkata Rao v. Secretary of State for India*, [1937] A.C. 248, dist'd; *Ashby v. White*, 2 Ld. Raym. 938, 92 E.R. 126, folld.)

In rendering judgment, Thorson P. stated at p. 697-98:

. . . In that view of s. 118 of the Regulations all that it does is to give the civil servant whom it is proposed to dismiss an opportunity, prior to his dismissal, to present his side of the case to a senior officer of the Department nominated by the deputy head. When that opportunity has been given the right to dismiss at pleasure provided by s. 19 of the Act is in full force and effect. The intendment of s. 118 of the Regulations is plain, namely, that before the right of dismissal at pleasure under s. 19 of the Act is exercised the employee proposed to be dismissed should be given the opportunity prescribed by the section. To the extent that it is of importance in the matter of interpretation it may properly be said that if it is not contrary to the public policy that a civil servant may be dismissed at pleasure that before his dismissal goes into effect he should be given the opportunity prescribed by s. 118 of the Regulations.

I, therefore find that an employee of the Civil Service of Canada has the right under s. 118 of the Regulations to be given the opportunity, prior to his dismissal, of presenting his side of the case to a senior officer of the Department nominated by the deputy head. This gives him a claim under s. 118 of the Regulations and brings him within the jurisdiction of this Court under s. 18(1)(*d*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which provides:

"18(1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

"(*d*) every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council."

In my opinion, the suppliant has a claim arising under a Regulation made by the Governor in Council, namely, a claim under s. 118 of the Civil Service Regulations. He had a right under that section to be given the opportunity, prior to his dismissal, to present his side of the case to a senior officer of the Department nominated by the deputy head. I find as a fact that this right was not given to him. It is a fundamental principle that the violation of a right gives a cause of action: *vide Ashby v. White et al.* (1703), 2 Ld. Raym. 938, 92 E.R. 126. Here there was a denial of a right to which the suppliant was legally entitled and he has a right to damages therefor.

This judgment distinguished the leading British case of *R. Venkata Rao v. Secretary of State for India*[12] as appears from the statement of the learned President at pages 695-96 where he says:

I must say that if the suppliant's only claim had been for damages for wrongful dismissal by reason of failure to comply with a procedural requirement the decision of the *Venkata* case, *supra*, would have been against him. I have already dismissed his claim for wrongful dismissal. But that is not his claim in par. (*c*) of his prayer for relief. He does not in that paragraph claim damages for wrongful dismissal. His claim is for damages for not having been given the opportunity, prior to his dismissal, to present his side of the case to a senior officer of the Department nominated by the deputy head. That is a different kind

[12] [1937] A.C. 248.

of a claim from a claim for wrongful dismissal. That kind of a claim was not made in the *Venkata* case and there is nothing in the decision in that case that denies it.

This case was followed in the judgment of Thurlow J. in *Hopson v. The Queen*[13] which held that the suppliant was entitled to damages which were calculated at $400 for not having been given an opportunity to present his side of the case prior both to suspension and to his dismissal. The headnote reads, in part:

> . . . It is fundamental to the power to suspend and dismiss under s. 118 of the Regulations made pursuant to s. 5 of the *Civil Service Act* that the employee be advised of the subject matter relied on for his suspension and/or dismissal.

This portion of suppliant's claim is based on a different statute, namely, the *Public Service Employment Act*[14] which was assented to on February 23, 1967. Suppliant had secured his position as French professor in the Language School in Hull on November 1, 1965, but his summary dismissal took place on July 31, 1967. Regulations under the *Public Service Employment Act* were made by order in council 129 on March 13, 1967. It is alleged in para. 14 of the statement of defence filed herein that the suppliant was on a two year probationary period from the date of his appointment and was rejected during the same period by the deputy head for cause. It is apparently common ground that he was still a probationary employee since para. 44 of the petition of right refers to the fact that he was dismissed barely three months before the time he became a permanent employee. Section 24 of the *Public Service Employment Act* reads as follows:

> 24. The tenure of office of an employee is during the pleasure of Her Majesty, subject to the provisions of this and any other Act and the regulations thereunder and, unless some other period of employment is specified, for an indeterminate period.

This section is identical to s. 50(1) of the *Civil Service Act* but the second subsection of that Act reads as follows:

> 50. (2) Nothing in this Act shall be construed to limit or affect the right or power of the Governor in Council to remove or dismiss any employee.

This is not incorporated in the *Public Service Employment Act* and is, in any event, not the procedure adopted in the present case. Section 31 of the Act reads as follows:

> 31. (1) Where an employee, in the opinion of the deputy head, is incompetent in performing the duties of the position he occupies or is incapable of performing those duties and should
>
> (*a*) be appointed to a position at a lower maximum rate of pay, or
>
> (*b*) be released,
>
> the deputy head may recommend to the Commission that the employee be so appointed or released, as the case may be.
>
> (2) The deputy head shall give notice in writing to an employee of a recommendation that the employee be appointed to a position at a lower maximum rate of pay or be released.
>
> (3) Within such period after receiving the notice in writing mentioned in subsection (2) as the Commission prescribes, the employee may appeal against the recommendation of the deputy head to a board established by the Commission

[13] [1966] Ex.C.R. 608.
[14] S. of C. 1966-67, c. 71.

to conduct an inquiry at which the employee and the deputy head concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission shall,

(*a*) notify the deputy head concerned that his recommendation will not be acted upon, or

(*b*) appoint the employee to a position at a lower maximum rate of pay, or release the employee,

accordingly as the decision of the board requires.

(4) If no appeal is made against a recommendation of the deputy head, the Commission may take such action with regard to the recommendation as it sees fit.

(5) The Commission may release an employee pursuant to a recommendation under this section and the employee thereupon ceases to be an employee.

In the case of probationary employees, however, the manner of dismissal is governed by s. 28 of the Act which reads, in part, as follows:

28. (1) An employee shall be considered to be on probation from the date of his appointment until the end of such period as the Commission may establish for any employee or class of employees.

* * *

(3) The deputy head may, at any time during the probationary period, give notice to the employee and to the Commission that he intends to reject the employee for cause at the end of such notice period as the Commission may establish for any employee or class of employees and, unless the Commission appoints the employee to another position in the Public Service before the end of the notice period applicable in the case of the employee, he ceases to be an employee at the end of that period.

(4) Where a deputy head gives notice that he intends to reject an employee for cause pursuant to subsection (3) he shall furnish to the Commission his reasons therefor.

* * *

It is important to note that, although subsec. (3) of s. 28 requires that notice be given to the employee and to the Commission of the intention to reject the employee for cause at the end of the notice period, subsec. (4) requires that "he shall furnish *to the Commission* his reasons therefor". Apparently the Act does not require that the reasons be made known to the employee, nor is any provision made for allowing the employee to be heard before the expiration of the notice period. I would conclude, therefore, that the judgments in the *Zamulinski* and *Hopson* cases (*supra*) are inapplicable in the present case since the Act and Regulations give no right to be heard to suppliant in connection with his dismissal from probationary employment.

It might here be opportune to again return to an examination of the *Bill of Rights*. Section 2(*e*) of that statute reads as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

* * *

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

* * *

Though the context of this para. (*e*) of s. 2 seems to indicate that it has reference primarily to court proceedings and, in particular, to penal proceedings, suppliant's counsel attempted to give a wider interpretation to it and extend it to include a hearing in connection with his dismissal from probationary employment even though no such hearing is provided for in the statute. In support of this contention, he refers to the Supreme Court case of *The Queen v. Randolph et al.*[15]. This case dealt with an interim order by the Postmaster General prohibiting delivery of all mail directed to the respondent or deposited by him in a post office under the provisions of s. 7(1) of the *Post Office Act*[16], which subsection reads as follows:

> 7. (1) Whenever the Postmaster General believes on reasonable grounds that any person
>
> (*a*) is, by means of the mails,
>
> (i) committing or attempting to commit an offence, or
>
> (ii) aiding, counselling or procuring any person to commit an offence, or
>
> (*b*) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,
>
> the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

Subsection (2) of s. 7 provides that within five days of the interim order, notice must be given to the person affected, informing him of the order and giving him ten days to request that an inquiry be held. The right of appeal was therefore given in connection with the final order but not in connection with the interim order. In rendering judgment, Cartwright J. said, at pp. 265-66:

> . . . There is no doubt that Parliament has the power to abrogate or modify the application of the maxim *audi alteram partem*. In s. 7 it has not abrogated it. Rather it has provided that before any final prohibitory order is made, the party affected shall have notice and a right to an expeditious hearing and has defined the procedure to be followed. It would, in my opinion, be inconsistent with the scheme of the section to hold that before making an interim order the Postmaster General must hold a hearing. If such a duty existed it would be a duty to notify the party affected of what was alleged against him and to give him a reasonable opportunity to answer. If this were done the hearing prescribed by subs. (2) would be an unnecessary repetition. Generally speaking the maxim *audi alteram partem* has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2(*e*) of the *Canadian Bill of Rights* upon which the respondents relied.
>
> The following passage in Broom's Legal Maxims, 10th ed., at p. 117 is in point:
>
> Although cases may be found in the books of decisions under particular statutes which at first might seem to conflict with the maxim, it will be found on consideration that they are not inconsistent with it, for the rule, which is one of elementary justice, only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard.

It appears doubtful to me whether this case can be applied to the present situation. In the *Randolph* case there was a procedure for hearing before the final order and what the judgment essentially decided was that in view of

[15] [1966] S.C.R. 260.
[16] R.S.C. 1952, c. 212.

this there was no need for a hearing before the interim order was put into effect. As already quoted, Mr. Justice Cartwright, in rendering judgment, stated:

> ... Generally speaking, the maxim *audi alteram partem* has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2(*e*) of the *Canadian Bill of Rights* upon which the respondents relied.

It is true that the dismissal of suppliant from probationary employment was final in its nature and that the *Public Service Employment Act* provides for no hearing of suppliant before this dismissal takes effect, or even for the necessity of giving him reasons for his dismissal. Section 2 of the *Bill of Rights,* however, refers to "the abrogation, abridgment, or infringement of any of the rights or freedoms herein recognized and declared, ...". The rights recognized and declared are set out in s. 1, which reads as follows:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (*b*) the right of the individual to equality before the law and the protection of the law;
>
> (*c*) freedom of religion;
>
> (*d*) freedom of speech;
>
> (*e*) freedom of assembly and association; and
>
> (*f*) freedom of the press.

Even though suppliant was summarily dismissed from probationary employment without being heard and without a reason being given, it appears to me to be doubtful that he could be held to have been deprived of his "liberty, security of the person and enjoyment of property" within the meaning of para. (*a*) of s. 1 or of "equality before the law and the protection of the law" within the meaning of para. (*b*) of s. 1. It appears to me that security of tenure of employment, especially when it is known at the time that it is accepted to be of a probationary nature and subject to abrupt termination, is not a fundamental human right covered by the *Bill of Rights*, but rather something which should be covered by some other statute such as the *Canadian Fair Employment Practices Act* (*supra.*), which does not seem to provide protection against this, and in any event as I have previously indicated, is not I believe applicable to public service employees. Neither do I believe that security of tenure of employment under these circumstances is a human right or fundamental freedom within the meaning of s. 5(1) of the *Bill of Rights* which reads as follows:

> 5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

Moreover, in the *Randolph* case Mr. Justice Cartwright also stated categorically "There is no doubt that Parliament has the power to abrogate or modify the application of the maxim *audi alteram partem*". By providing no

hearing for probationary employees who have been dismissed, it has perhaps done so, but only for this particular class of employee since a hearing is provided by s. 31 of the Act before the demotion or release of a permanent employee.

I therefore conclude that suppliant has no cause of action on this second issue either.

In view of this conclusion, it is unnecessary to go into the question, although it was argued at some length by the parties, of whether the cause of action, if there had been one, would have arisen out of tort or delict.

I therefore answer the question of law in the negative and, since I have found that suppliant has no cause of action, proceedings herein will be dismissed with costs.