EB-2011-0361
EB-2011-0376

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other order.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

BOARD STAFF BOOK OF AUTHORITIES

December 15, 2011

Stockwoods LLP Barristers
Royal Trust Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1

M. Philip Tunley LSUC #26402J
Tel: 416-593-3495
Fax: 416-593-9345
Email: philt@stockwoods.ca

Counsel for the Ontario Energy Board Staff

ONTARIO ENERGY BOARD
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Martine M.N. Band
Tel: 416-440-8117
Email: martine.band@ontarioenergyboard.ca

TO: **ONTARIO ENERGY BOARD**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Kirsten Walli, Board Secretary
Tel: 888-632-6273
Fax: 416-440-7656
E Mail: *boardsec@ontarioenergyboard.ca*

AND TO: **DAVID LEES**
2 St. Clair Avenue West, Suite 700
Toronto, ON M4V 1L5

Tel: 416-682-7159
Fax: 416-863-3997
Email: david.lees@millsandmills.ca

Counsel for the Applicant, Langley Utilities Contracting Ltd.

AND TO: **ELECTRICITY DISTRIBUTORS ASSOCIATION**
3700 Steeles Avenue West, Suite 1100
Vaughan, ON L4L 8K8

Teresa Sarkesian, Policy Director
Tel: 905-265-5313
Fax: 905-265-5301
Email: tsarkesian@eda-on.ca

Intervenor

AND TO: **GOODMANS LLP**
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Peter Ruby
Tel: 416-597-4184
Fax: 416-979-1234
Email: pruby@goodmans.ca

Michael Koch
Tel: 416-597-5158
Fax: 416-979-1234
Email: mkoch@goodmans.ca

Counsel for the Intervenor, Electricity Distributors Association

AND TO: **ENERSOURCE HYDRO MISSISSAUGA SERVICES INC.**
3240 Mavis Road
Mississauga, ON L5C 3K1

Andrew Bloomfield, Director of Operations, Street Lighting
Tel: 905-283-4058
Fax: Not Provided
Email: abloomfield@enersource.com

Gia DeJulio, Director, Regulatory Affairs
Tel: 905-283-4098
Fax: 905-566-2737
Email: gdejulio@enersource.com

Intervenor

AND TO: **NORTON ROSE OR LLP**
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
P.O. Box 84
Toronto, ON M5J 2Z4

Jennifer Teskey
Tel: 416-216-2303
Fax: 416-216-3930
Email: jennifer.teskey@nortonrose.com

Alan Mark
Tel: 416-216-4805
Fax: 416-216-3930
Email: Alan.Mark@nortonrose.com

Counsel for the Intervenor, Enersource Hydro Mississauga Services Inc.

AND TO: **JAMES T. HUNT LAW OFFICE**
279 Spring Street
Coburg, ON K9A 3K3

James Hunt
Tel: 905-372-4500
Fax: 905-372-0091
Email: sherwoodhunt@bellnet.ca

Counsel for the Intervenor, Powerline Plus Ltd.

AND TO: **MATTHEW REA**
2 Wellington Street West
Brampton, ON L6Y 4R2

Tel: 905-874-2626
Fax: 905-874-2699
Email: matthew.rea@brampton.ca

Counsel for the Intervenor, The Corporation of the City of Brampton

AND TO: **GOLDCORP – RED LAKE GOLD MINES**
15 Mine Road, Bag 2000
Balmertown, ON P0V 1C0

Curtis Pedwell
Tel: 807-735-2077
Fax: Not Provided
Email: curtis.pedwell@goldcorp.com

Applicant

AND TO: **GARDINER ROBERTS LLP**
Suite 3100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y2

Ian Blue
Tel: 416-865-2962
Fax: 416-865-6636
Email: iblue@gardiner-roberts.com

Counsel for the Applicant, Goldcorp – Red Lake Gold Mines

AND TO: **CASSELS BROCK & BLACKWELL LLP**
40 King Street West, Suite 2100
Toronto, ON M5H 3Y2

Brian Dominique
Tel: 416-869-5435
Fax: 416-360-8877
Email: bdominique@casselsbrock.com

Counsel for the Applicant, Goldcorp – Red Lake Gold Mines

AND TO: **ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO**
372 Bay Street, Suite 1702
Toronto, ON M5H 2W9

Adam White, President
Tel: 416-260-0225
Fax: 416-260-0442
Email: awhite@ampco.org

Intervenor

AND TO: **DAVIS LLP**
1 First Canadian Place, Suite 6000
P.O. Box 367
100 King Street West
Toronto, ON M5X 1E2

David Crocker
Tel: 416-941-5415
Fax: 416-777-7431
Email: dcrocker@davis.ca

Counsel for the Intervenor, Association of Major Power Consumers in Ontario

AND TO: **ECONALYSIS CONSULTING SERVICES**
34 King Street East, Suite 1702
Toronto, ON M5C 2X8

Shelley Grice, Consultant
Tel: 416-260-0225
Fax: 416-260-0442
Email: shelley.grice@rogers.com

Consultant for the Intervenor, Association of Major Power Consumers in Ontario

AND TO: **CONSUMERS COUNCIL OF CANADA**
62 Hillsdale Avenue East
Toronto, ON M4S 1T5

Julie Girvan, Consultant
Tel: 416-322-7936
Fax: 416-322-9703
Email: jgirvan@ca.inter.net

Consultant for the Intervenor, Consumers Council of Canada

AND TO: **WEIRFOULDS LLP**
The Exchange Tower
Suite 1600, P.O. Box 480
130 King Street West
Toronto, ON M5X 1J5

Robert B. Warren
Tel: 416-947-5075
Fax: 416-365-1876
Email: rwarren@weirfoulds.com

Counsel for the Intervenor, Consumers Council of Canada

AND TO: **ELECTRICITY DISTRIBUTORS ASSOCIATION**
3700 Steeles Avenue West, Suite 1100
Vaughan, ON L4L 8K8

Teresa Sarkesian, Policy Director
Tel: 905-265-5313
Fax: 905-265-5301
Email: tsarkesian@eda-on.ca

Intervenor

AND TO: **HYDRO ONE NETWORKS INC.**
483 Bay Street
8th Floor, South Tower
Toronto, ON M5G 2P5

Pasquale Catalano, Regulatory Coordinator
Tel: 416-345-5405
Fax: 416-345-5866
Email: regulatory@HydroOne.com

Intervenor

AND TO: **LAC SEUL FIRST NATION (LSFN)**
No. 28 General Delivery
Lac Seul, ON P0V 2A0

Chris Angeconeb, Lands & Resources Manager
Tel: Not Provided
Fax: Not Provided
Email: cangeconeb@lsfn.ca

Chief Clifford Bull
Tel: 807-582-3503
Fax: 807-582-3493
Email: Not Provided

Intervenor

AND TO: **KESHEN & MAJOR**
120 Second Street South, Suite 200
Kenora, ON P9N 1E9

William Major
Tel: 807-469-3073
Fax: 807-468-4893
Email: wjmajor@mac.com

Counsel for the Intervenor, Lac Seul First Nation

AND TO: **ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION**
439 University Avenue, 18th Floor
Toronto, ON M5G 1Y8

Wayne McNally, SEC Coordinator
Tel: 416-340-2540
Fax: 416-340-7571
Email: wmcnally@opsba.org

Intervenor, School Energy Coalition

AND TO: **JAY SHEPHERD PROFESSIONAL CORPORATION**
2300 Yonge Street, Suite 806
Toronto, ON M4P 1E4

Jay Shepherd
Tel: 416-483-3300
Fax: 416-483-3305
Email: jay.shepherd@canadianenergylawyers.com

Mark Rubenstein
Tel: 416-483-3300
Fax: 416-483-3305
Email: mark.rubenstein@canadianenergylawyers.com

Counsel for the Intervenor, School Energy Coalition

AND TO: **FIVE NATIONS ENERGY INC.**
P.O. Box 370
Moose Factory, ON P0L 1W0

Lucie Edwards - CEO
Tel: 705-268-0056
Fax: 705-268-0071
Email: lucie.edwards@fivenations.ca

Intervenor

AND TO: **NORTON ROSE OR LLP**
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
P.O. Box 84
Toronto, ON M5J 2Z4

John Beauchamp
Tel: 416-216-1927
Fax: 416-216-3930
Email: john.beauchamp@nortonrose.com

Counsel for the Intervenor, Five Nations Energy Inc.

INDEX

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TAB 1

Borowski *v.* Canada (Attorney General), [1989] 1 S.C.R. 342

Joseph Borowski *Appellant*

v.

The Attorney General of Canada *Respondent*

and

Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada and Women's Legal Education and Action Fund (LEAF) *Interveners*

indexed as: borowski *v.* canada (attorney general)

File No.: 20411.

1988: October 3, 4; 1989: March 9.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

on appeal from the court of appeal for saskatchewan

Appeal -- Mootness -- Abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case -- Criminal Code, R.S.C. 1970, c. C-34, s. 251 -- Canadian Charter of Rights and Freedoms, ss. 7, 15.

Criminal law -- Abortion -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Constitutional law -- Charter of Rights -- Right to life, liberty and security of the person -- Right to equality before and under the law -- Whether or not Charter rights extending to foetus -- Charter issues ancillary to question of validity of abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Civil procedure -- Standing -- Standing originally found because action seeking declaration as to legislation's validity -- Provisions under challenge already found invalid -- Whether or not standing as originally determined -- Whether or not s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 able to support claim for standing.

Appellant attacked the validity of s. 251(4), (5) and (6) of the *Criminal Code* relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Appellant's standing had been found on the basis that he was seeking a declaration that legislation is invalid, that there was a serious issue as to its invalidity, that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue could be brought before the Court.

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the *Charter* as a foetus was not protected by either s. 7 or s. 15 of the *Charter* and also held that the s. 1 of *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of

legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the *Charter* applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the *Charter*; (2) if so, whether s. 251(4), (5) and (6) of the *Criminal Code* violated the principles of fundamental justice contrary to s. 7 of the *Charter*; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the *Charter*; (4) if so, whether s. 251(4), (5) and (6) of the *Criminal Code* violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the *Criminal Code* were justified by s. 1 of the *Charter*. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in *R. v. Morgentaler (No. 2)*.

A serious issue existed at the commencement of the appeal as to whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal so that the whole appeal could be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues.

Held: The appeal should be dismissed.

The appeal is moot and the Court should not exercise its discretion to hear it. Moreover, appellant no longer has standing to pursue the appeal as the circumstances upon which his standing was originally premised have disappeared.

The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

This appeal is moot as there is no longer a concrete legal dispute. The live controversy underlying this appeal -- the challenge to the constitutionality of s. 251(4), (5) and (6) of the *Criminal Code* -- disappeared when s. 251 was struck down in *R. v. Morgentaler (No. 2)*. None of the relief sought in the statement of claim was relevant. Three of the five constitutional questions that were set explicitly concerned s. 251 and were no longer applicable. The remaining two questions addressed the scope of ss. 7 and 15 of the *Charter* and were not severable from the context of the original challenge to s. 251.

A constitutional question cannot bind this Court and may not be used to transform an appeal into a reference. Constitutional questions are stated to define with precision the constitutional points at issue, not to introduce new issues, and accordingly, cannot be used as an independent basis for supporting an otherwise moot appeal.

The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of their discretion by considering the underlying rationale of the mootness doctrine.

The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The Court should decline to exercise its discretion to decide this appeal on its merits because of concerns for judicial economy and for the Court's role in the law-making process. The absence of an adversarial relationship was of little concern: the appeal was argued as fully as if it were not moot.

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost

certainly be brought before the Court within a specific legislative context or possibly in review of specific governmental action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the *Charter* protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not the question raised in the original action. Indeed, what was sought -- a *Charter* interpretation in the absence of legislation or other governmental action bringing it into play -- would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

The appellant also lacked standing to pursue this appeal given the fact that the original basis for his standing no longer existed. Two significant changes in the nature of this action occurred since standing was granted by this Court in 1981. Firstly, the claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the *Charter*. Secondly, the legislative context of original claim disappeared when s. 251 of the *Criminal Code* was struck down. Standing could not be based on s. 24(1) of the *Charter* for an infringement or denial of a person's own *Charter*-based right was required. Here, the rights allegedly violated were those of a foetus. Standing could not be based on s. 52(1) of the *Constitution Act, 1982* as

this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

Cases Cited

Referred to: *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Morgentaler v. The Queen (No. 1)*, [1976] 1 S.C.R. 616; *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii; *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69; *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385; *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111; *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481; *R. v. Mercure*, [1988] 1 S.C.R. 234; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Re Maltby and Attorney-General of Saskatchewan* (1984), 10 D.L.R. (4th) 745; *Hall v. Beals*, 396 U.S. 45 (1969); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Sibron v. New York*, 392 U.S. 40 (1968); *Vadeboncœur v. Landry*, [1977] 2 S.C.R. 179; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911); *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713; *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756; *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470; *Re Opposition by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265.

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Constitution of the United States of America, Art. III, s. 2(1).

Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).

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Authors Cited

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Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1987), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, dismissing an appeal from a judgment of Matheson J. (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984] 1 W.W.R. 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

Morris C. Shumiatcher, Q.C., and *R. Bradley Hunter*, for the appellant.

Claude R. Thomson, Q.C., and *Robert W. Staley*, for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children.

Angela M. Costigan and *Karla Gower*, for the intervener R.E.A.L. Women of Canada.

Edward Sojonky, Q.C., for the respondent.

Mary Eberts and *Helena Orton*, for the intervener Women's Legal Education and Action Fund (LEAF).

//Sopinka J.//

The judgment of the Court was delivered by

SOPINKA J. -- This appeal by leave of this Court is from the Saskatchewan Court of Appeal, [1987] 4 W.W.R. 385, which affirmed the judgment at trial of Matheson J. of the Saskatchewan Court of Queen's Bench, [1984] 1 W.W.R. 15, dismissing the action of the plaintiff (appellant in this Court). In the courts below, the plaintiff attacked the validity of subss. (4), (5) and (6) of s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, relating to abortion on the ground that they contravened protected rights of the foetus. Subsequent to the decision of the Saskatchewan Court of Appeal but by the time the appeal reached this Court, s. 251, including the subsections under attack in this action, had been struck down in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (hereinafter *R. v. Morgentaler (No. 2)*).

From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable

whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

In view of the conclusion that I have reached, it is necessary to deal with the issues of mootness and standing only. Since it is a change in the nature of these proceedings which gives rise to these issues, a review of the history of the action is necessary.

History of the Action

Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim on September 5, 1978, which asked for the following relief:

(a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the *Criminal Code* invalid and inoperative;

(b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is *ultra vires* and unlawful;

(c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;

(d) The costs of this action; and

(e) Such further and other relief as to this Honourable Court seems just and expedient.

Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, was that Mr. Borowski had standing to attack the provisions of the *Code* referred to in his statement of claim. Martland J., speaking for the majority, stated, at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

Laskin C.J., with whom Lamer J. concurred, would have denied standing on the basis that Mr. Borowski was not a person affected by the legislation and that there were others, such as doctors and hospitals, who might be so affected. The Chief Justice concluded, therefore, that Mr. Borowski did not have any judicially cognizable interest in the matter and that the Court ought to exercise its discretion to deny standing.

An amended statement of claim was filed on April 18, 1983, in which the original claims based on an alleged violation of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, were repeated. Allegations based upon the *Canadian Charter of Rights and Freedoms*, which had been proclaimed on April 17, 1982, were added. The prayer for relief claimed:

(a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of Section 251 of the *Criminal Code* to be *ultra vires*, unconstitutional, invalid, inoperative and of no force or effect;

(b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of Section 251 of the *Criminal Code* are *ultra vires*, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful:

(c) The costs of this action; and

(d) Such further and other relief as to this Honourable Court seems just.

The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the *Canadian Bill of Rights*. Matheson J. held that both *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (hereinafter *Morgentaler v. The Queen (No. 1)*) and *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.) (leave to appeal to S.C.C. refused [1981] 1 S.C.R. viii) concluded that the *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of legislation.

Matheson J. noted that Mr. Borowski's principal argument under the *Charter* was that the foetus is a person and therefore should be afforded the protection of s. 7 of the *Charter*. It was held, however, that s. 251(4), (5), and (6) did not violate the *Charter* as a foetus is not included in "everyone" so as to trigger the application of any s. 7 rights.

On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the Court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and

concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

Leave to appeal to this Court was granted on September 3, 1987. The grounds for appeal alleged by the appellant in his notice of motion for leave to appeal refer primarily to ss. 7 and 15 of the *Charter*. On October 7, 1987, McIntyre J., pursuant to Rule 32 of the *Rules of the Supreme Court of Canada*, SOR/83-74, stated the following constitutional questions:

1. Does a child *en ventre sa mère* have the right to life as guaranteed by Section 7 of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question 1 is "yes", do subsections (4), (5) and (6) of Section 251 of the *Criminal Code* violate or deny the principles of fundamental justice, contrary to Section 7 of the *Canadian Charter of Rights and Freedoms*?

3. Does a child *en ventre sa mère* have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability that are guaranteed by Section 15 of the *Canadian Charter of Rights and Freedoms*?

4. If the answer to question 3 is "yes", do subsections (4), (5) and (6) of Section 251 of the *Criminal Code* violate or deny the rights guaranteed by Section 15?

5. If the answer to question 2 is "yes" or if the answer to question 4 is "yes", are the provisions of subsections (4), (5) and (6) of Section 251 of the *Criminal Code* justified by Section 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

On January 28, 1988, after leave to appeal was granted, this Court decided *R. v. Morgentaler (No. 2)*, *supra*, in which all of s. 251 was found to violate s. 7 of the *Charter*. Accordingly, s. 251 in its entirety was struck down.

In July of 1988 in light of this Court's judgment in *R. v. Morgentaler (No. 2)*, *supra*, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the *Criminal Code* had been nullified

and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child *en ventre sa mère* is entitled to the protection of ss. 7 and 15 of the *Charter* respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

I am of the opinion that the appeal should be dismissed on the grounds that: (1) Mr. Borowski's case has been rendered moot and (2) he has lost his standing. When section 251 was struck down, the basis of the action disappeared. The initial prayer for relief was no longer applicable. The foundation for standing upon which the previous decision of this Court was based also disappeared.

Mootness

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart

from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

When is an Appeal Moot? -- The Authorities

The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

In *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-

> settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

A challenged municipal by-law was repealed prior to a hearing in *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: *Attorney-General for Alberta v. Attorney- General for Canada*, [1939] A.C. 117 (P.C.)

Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385, and *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111. In *Coca-Cola v. Mathews*, Rinfret C.J. held the result of the undertaking was to eliminate any further *lis* between the parties such that the Court would have been forced to decide an abstract proposition of law.

As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628, in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (*Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481 (C.A.)) and a speeding ticket (*R. v. Mercure*, [1988] 1 S.C.R. 234) ended any concrete controversy between the parties.

As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: *Re Maltby v. Attorney-General of Saskatchewan* (1984), 10 D.L.R. (4th) 745 (Sask. C.A.)

The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of Article III of the American Constitution, that there exist a "case or controversy":

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Supreme Court" (1974), 88 *Harvard L.R. 373*, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in *Hall v. Beals*, 396 U.S. 45 (1969), a

challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in *Sibron v. New York*, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute (see: Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 *Calif. L.R.* 1385). A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

Is this Appeal Moot?

In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the *Criminal Code* having been struck down in *R. v. Morgentaler (No. 2)*, *supra*, the *raison d'être* of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 *Charter* rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the *Criminal Code*.

They were a mere step in the process of measuring the impugned provision against the *Charter*.

In any event, this Court is not bound by the wording of any constitutional question which is stated. Nor may the question be used to transform an appeal into a reference: *Vadebonc{oe}ur v. Landry*, [1977] 2 S.C.R. 179, at pp. 187-88, and *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71. The procedural requirements of Rule 32 of the *Rules of the Supreme Court of Canada* are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record. Rule 32 provides:

> **32.** (1) When a party to an appeal
>
> (a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,
>
> (b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.
>
> such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

The questions cannot, therefore, be employed as an independent basis for supporting an appeal that is otherwise moot.

By reason of the foregoing, I conclude that this appeal is moot. It is necessary, therefore, to move to the second stage of the analysis by examining the basis upon which this Court should exercise its discretion either to hear or to decline to hear this appeal.

The Exercise of Discretion: Relevant Criteria

Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. This same problem in the United States led commentators there to remark that "the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed." (Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, at p. 1387). I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in *Vic Restaurant Inc. v. City of Montreal*, *supra*. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was

the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle that collateral consequences of an already completed cause of action warrant appellate review was most clearly stated in *Sibron v. New York, supra*. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

> . . . most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."

In Canada, the cases of *Law Society of Upper Canada v. Skapinker*, *supra*, and *R. v. Mercure*, *supra*, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) It is an unfortunate reality that there is a need to ration

scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in *Vic Restaurant Inc. v. City of Montreal, supra.*

Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra.* The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable

to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, and Kates and Barker, *supra*, at pp. 1429-1431. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, *supra*, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

This was the basis for the exercise of this Court's discretion in the *Re Opposition by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793. The question of the constitutionality of the patriation of the Constitution had, in effect, been rendered moot by the occurrence of the event. The Court stated at p. 806:

> While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court.
>
> In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed

heavily in the decision of the majority of this Court in *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90.

The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, and Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 67.)

In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 *Sup. Ct. L. Rev.* 369, at p. 373:

> The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

Exercise of Discretion: Application of Criteria

Applying these criteria to this appeal, I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot.

The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the

mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

None of the other factors that I have canvassed which justify the application of judicial resources is applicable. This is not a case where a decision will have practical side effects on the rights of the parties. Nor is it a case that is capable of repetition, yet evasive of review. It will almost certainly be possible to bring the case before the Court within a specific legislative context or possibly in review of specific governmental action. In addition, an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the courts will be asked to examine specific legislation or governmental action in any event. Therefore, while I express no opinion as to foetal rights, it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation.

Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See *R. v. Morgentaler (No. 2)*, *supra*, *per* Dickson C.J., at p. 75; *per* Beetz J. at pp. 122-23; *per* Wilson J. at pp. 181-82. A pronouncement in favour of the appellant's position that a foetus is protected by s. 7 from the date of conception would decide the issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night

to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed, I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third. One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action. That question related to the validity of s. 251 of the *Criminal Code*. He now wishes to ask a question that relates to the *Canadian Charter of Rights and Freedoms* alone. This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

Having decided that this appeal is moot, I would decline to exercise the Court's discretion to decide it on the merits.

Standing

Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the *Criminal Code* violated the s. 1 right to life of the *Canadian Bill of Rights*: *Minister of Justice of Canada v. Borowski*, *supra*. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

Standing was granted premised upon Mr. Borowski's desire to challenge specific legislation. Martland J. considered the earlier standing decisions of the Supreme Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, and *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and concluded that the appellant had standing by reason of his "genuine interest as a citizen in the validity of the legislation" under attack (at p. 598):

The Court relied heavily upon the decision in *Thorson*, *supra*, where Laskin J. (as he then was), speaking for the majority, stated at p. 161:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised . . . . [Emphasis added.]

I believe these decisions were clear in allowing an expanded basis for standing where specific legislation is challenged on constitutional grounds.

There have been two significant changes in the nature of this action since this Court granted Mr. Borowski standing in 1981. The claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Secondly, by holding s. 251 to be of no force and effect in *R. v. Morgentaler (No. 2)*, *supra*, the legislative context of this claim has disappeared.

By virtue of s. 24(1) of the *Charter* and 52(1) of the *Constitution Act, 1982*, there are two possible means of gaining standing under the *Charter*. Section 24(1) provides:

> **24.** (1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In my opinion s. 24(1) cannot be relied upon here as a basis for standing. Section 24(1) clearly requires an infringement or denial of a *Charter*-based right. The appellant's claim does not meet this requirement as he alleges that the rights of a foetus, not his own rights, have been violated.

Nor can s. 52(1) of the *Constitution Act, 1982* be invoked to extend standing to Mr. Borowski. Section 52(1) reads:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section offers an alternative means of securing standing based on the *Thorson*, *McNeil*, *Borowski* trilogy expansion of the doctrine.

Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the *Constitution Act, 1982* is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the *Charter*. What the appellant now seeks is a naked interpretation of two provisions of the *Charter*. This would require the Court to answer a purely

abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court. In the circumstance, it is appropriate that the respondent pay to the appellant the costs of the appeal incurred subsequent to the disposition of the motion to adjourn which was made on July 19, 1988.

Appeal dismissed.

Solicitors for the appellant: Shumiatcher - Fox, Regina.

Solicitors for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.

Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.

Solicitor for the respondent: Frank Iacobucci, Ottawa.

Solicitors for the intervener Women's Legal Education and Action Fund (LEAF): Tory, Tory, DesLauriers & Binnington, Toronto.

TAB 2

Garland *v.* Consumers' Gas Co., [1998] 3 S.C.R. 112

Gordon Garland *Appellant*

v.

The Consumers' Gas Company Limited *Respondent*

Indexed as: Garland *v.* Consumers' Gas Co.

File No.: 25644.

1998: March 23; 1998: October 30.

Present: L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for ontario

Criminal law -- Criminal interest rate -- Late payment penalty -- Gas utility charging late payment penalty of five percent on accounts not paid by due date -- Whether late payment penalty constitutes "interest at a criminal rate" -- Criminal Code, R.S.C., 1985, c. C-46, s. 347.

Costs -- Class actions -- Class proceedings fund -- Costs of procedural motion awarded against class representative in his personal capacity -- Whether costs award should be set aside -- Law Society Act, R.S.O. 1990, c. L.8, s. 59.4 -- Class Proceedings Act, 1992, S.O. 1992, c. 6.

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board, bills its customers on a monthly basis, and each bill includes a "due date" for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty which does not compound or increase over time. It was implemented in 1975 following a series of rate hearings conducted by the Board. In granting the respondent's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to the respondent of carrying accounts receivable. The Board recognized that if a bill is paid very soon after the due date, the penalty can be shown to represent a very high rate of interest, but it noted that customers could avoid such a charge by paying their bills on time. The appellant commenced an action on behalf of a large number of the respondent's customers alleging that the LPP violates s. 347 of the *Criminal Code* because -- for a significant number of customers each month -- it constitutes interest at a rate exceeding 60 percent per year. He submitted actuarial evidence showing that under the normal billing plan, the LPP gives rise to an interest rate exceeding 60 percent per annum for customers who pay within 37 days after the due date. Under the equal billing plan, the point at which the interest rate falls below 60 percent is between 24 and 90 days after the due date, depending on the month. The appellant also submitted statistical evidence indicating that while many of the respondent's customers pay late, most pay only a few days late. In support of this action, the appellant applied for and received financial assistance from the Ontario Class Proceedings Committee. He also moved for certification of a class proceeding on behalf of all customers who paid LPP charges after April 1, 1981, when s. 347 of the *Code* came into force. Prior to the disposition of that motion both the appellant and the respondent moved for summary judgment on various grounds. A judge of the Ontario

Court (General Division) granted summary judgment in favour of the respondent and dismissed the action. The respondent moved for an order amending the judge's formal judgment. The appellant refused to consent to the motion. The motion was granted and the judge assessed costs to be payable by the appellant personally. The Court of Appeal dismissed the appellant's appeal of the dismissal of his action.

Held (Bastarache J. dissenting): The appeal should be allowed and the matter remitted to the Ontario Court (General Division).

Per L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Major and Binnie JJ.: Section 347 of the *Code* applies to the LPP imposed by the respondent. For the purposes of s. 347, "interest" is an extremely comprehensive term which expressly includes charges or expenses "in the form of a . . . penalty". However, not every charge or expense will be subject to the criminal interest rate provision. In order to constitute "interest" under s. 347, a charge -- whatever its form -- must be "paid or payable for the advancing of credit under an agreement or arrangement". Under s. 347(2), "credit advanced" encompasses not only "the money" advanced under an agreement or arrangement, but also "the monetary value of any goods, services or benefits" which may be so advanced. The most plausible interpretation of s. 347(2) is that an "advance" of "the monetary value of any goods, services or benefits" means a deferral of payment for such items. The respondent provides goods and services to its customers, for which a specified amount of money is payable each month on a certain date. The deferral of that payment past the due date constitutes "credit advanced" within the meaning of s. 347(2), assuming that such deferral is permitted under the payment relationship which exists between the parties. Moreover, the credit is advanced by the respondent to its customers "under an agreement or arrangement". The arrangement between the parties creates two payment options: a short-term option, which costs nothing, and a longer-term option,

which involves an additional charge. While it is clear that the respondent neither encourages late payments nor seeks to profit from them, under the terms prevailing between the parties customers are permitted to defer their payment, albeit for a price. That is an arrangement for the advancing of credit under the broad language adopted in s. 347. On the facts of this case, a penalty incurred, pursuant to the terms of a standing arrangement between the parties, for the deferral of payment of a specified amount of money owing for goods, services or benefits is an "interest" charge within the meaning of s. 347 and is subject to that law's prohibitions against requiring or receiving interest at a criminal rate.

Section 347 creates two separate offences. Section 347(1)(*a*) makes it illegal to enter into an agreement or arrangement to receive interest at a criminal rate, while s. 347(1)(*b*) makes it illegal to receive a payment or partial payment of interest at a criminal rate. Section 347(1)(*a*) should be narrowly construed. Whether an agreement or arrangement for credit violates the provision is determined as of the time the transaction is entered into. If the agreement or arrangement permits the payment of interest at a criminal rate but does not require it, there is no violation of s. 347(1)(*a*), although s. 347(1)(*b*) might be engaged. It is clear that there is no violation of s. 347(1)(*a*) in this case. The arrangement between the respondent and its customers does not, on its face, require the payment of interest at a criminal rate. Section 347(1)(*b*) should be broadly construed. Whether an interest payment violates the provision is determined as of the time the payment is received. For the purposes of s. 347(1)(*b*), the effective annual rate of interest arising from a payment is calculated over the period during which credit is actually outstanding. Pursuant to the decision in *Nelson*, there is no violation of s. 347(1)(*b*) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the

agreement. The actuarial evidence submitted in this case shows that if a regular billing customer waits 38 days or longer to pay, the annual interest rate represented by the five percent charge drops below the criminal threshold of 60 percent per annum. It cannot be said, however, that payment of the LPP within 38 days is a "voluntary" act within the meaning of *Nelson*. While strictly speaking, it is true that customers may delay their payment of the LPP beyond 38 days, there is clearly no invitation to do so, and it would be disingenuous to conclude that customers actually perceive themselves to be at liberty to wait that long. Statistical evidence submitted by the appellant strongly supports the opposite conclusion.

The motions judge erred in awarding costs against the appellant in his personal capacity. The purpose of s. 59.4 of the *Law Society Act* is to protect class representatives from personal exposure to costs in actions where financial support has been granted by the Class Proceedings Fund. Since the appellant has successfully applied for support from the Class Proceedings Fund, he should not be exposed to personal liability for any costs arising in this action, including costs incurred in the context of procedural motions.

Per Bastarache J. (dissenting): While the definition of "interest" includes the notion of "penalty", the application of s. 347 is also predicated upon the existence of an "agreement or arrangement" for the advancement of credit. On the facts of this case, the respondent has not entered into an agreement or arrangement to give credit to the appellant or to any other customers who have paid the LPP. Far from being a consensual extension of credit, the respondent's LPP represents an effort to prevent or deter customers from unilaterally taking credit. The decisions of the Ontario Energy Board approving the LPP confirm that the penalty is not "paid or payable for the advancing of credit", but is an incentive for timely payment. Further indicia supporting

this view are the fact that the penalty is not compounded, the fact that it is a one-time payment which does not increase over time, the fact that there is no sanction for the non-payment of the penalty, and the fact that the penalty triggers contemporaneously with the account becoming overdue. Since s. 347 of the *Code* is not applicable, the action should be dismissed. A contract for the extension of credit should not be implied in every case where there is late payment pursuant to a sale of goods. This case involves a regulated industry and a rate approval scheme has been established with the specific purpose of protecting consumer interests. To limit the choice of means of the regulator by resorting to the criminal law power is inappropriate and unwarranted.

Cases Cited

By Major J.

Distinguished: *Nelson v. C.T.C. Mortgage Corp.* (1984), 16 D.L.R. (4th) 139, aff'd [1986] 1 S.C.R. 749; **referred to:** *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974; *Immeubles Fournier Inc. v. Construction St-Hilaire Ltée*, [1975] 2 S.C.R. 2; *Attorney-General for Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570; *Delta v. Active Chemicals Ltd.* (1984), 57 B.C.L.R. 213; *Mira Design Co. v. Seascape Holdings Ltd.* (1981), 34 B.C.L.R. 55; *Aectra Refining & Marketing Inc. v. Lincoln Capital Funding Corp.* (1991), 6 O.R. (3d) 146; *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90.

By Bastarache J. (dissenting)

Coffelt v. Arkansas Power & Light Co., 451 S.W.2d 881 (1970); *State ex rel. Utilities Commission v. North Carolina Consumers Council, Inc.*, 198 S.E.2d 98 (1973).

Statutes and Regulations Cited

Class Proceedings Act, 1992, S.O. 1992, c. 6.

Commercial Concentration Tax Act, R.S.O. 1990, c. C.16, s. 15(10).

Criminal Code, R.S.C. 1970, c. C-34, s. 305.1.

Criminal Code, R.S.C., 1985, c. C-46, s. 347(1), (2).

Excise Tax Act, R.S.C., 1985, c. E-15, s. 7(1).

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 163.1, 227(9).

Interest Act, R.S.C., 1985, c. I-15 [formerly R.S.C. 1970, c. I-18].

Law Society Act, R.S.O. 1990, c. L.8, ss. 59.2 [ad. 1992, c. 7, s. 3], 59.4 [*idem*].

Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3.

Municipal Franchises Act, R.S.O. 1990, c. M.55.

Ontario Energy Board Act, R.S.O. 1990, c. O.13.

Small Loans Act, R.S.C. 1970, c. S-11, ss. 2 "cost", 3.

Authors Cited

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Ziegel, Jacob S. "Section 347 of the Criminal Code" (1994), 23 *C.B.L.J.* 321.

Ziegel, Jacob S. "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1986), 11 *C.B.L.J.* 233.

APPEAL from a judgment of the Ontario Court of Appeal (1996), 30 O.R. (3d) 414, 93 O.A.C. 155, 28 B.L.R. (2d) 278, [1996] O.J. No. 3162 (QL), affirming a decision of the Ontario Court (General Division) (1995), 22 O.R. (3d) 451, 122 D.L.R. (4th) 377, 17 B.L.R. (2d) 239, [1995] O.J. No. 302 (QL), dismissing the appellant's action. Appeal allowed, Bastarache J. dissenting.

Barbara L. Grossman, Michael L. McGowan, Christopher D. Woodbury and *Dorothy Fong*, for the appellant.

Fred D. Cass, *John J. Longo*, *Daniel Boivin* and *Janet Clark*, for the respondent.

The judgment of L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Major and Binnie JJ. was delivered by

1 MAJOR J. -- This appeal concerns the interpretation and application of s. 347 of the *Criminal Code*, R.S.C., 1985, c. C-46 -- the "Criminal Interest Rate" provision. Section 347 makes it an offence to enter into an agreement for, or to receive, interest at a rate exceeding 60 percent per year. The respondent sells natural gas to Ontario

TAB 3

DATE: 200620524
DOCKET: C44127

COURT OF APPEAL FOR ONTARIO

FELDMAN, MACPHERSON and LANG JJ.A.

B E T W E E N :	)	
	)	
GRAYWOOD INVESTMENTS LIMITED	)	**Frank J. C. Newbould, Q.C. and Benjamin T. Glustein for the appellant**
Applicant (Respondent)	)	
	)	**Robert J. Howe and David S. Cherepacha for the respondents**
- and -	)	
TORONTO HYDRO-ELECTRIC SYSTEM LIMITED and ONTARIO ENERGY BOARD	)	**M. Philip Tunley for the Ontario Energy Board**
Respondent (Appellant)	)	
	)	**Heard: May 1, 2006**

On appeal from the judgment of the Divisional Court (Justice G. Dennis Lane and Justice Anne M. Molloy, Justice Romain W. M. Pitt dissenting) dated February 3, 2005.

MACPHERSON J.A.:

A. INTRODUCTION

[1] In 2000, a dispute arose between Graywood Investments Limited ("Graywood") and Toronto Hydro-Electric System Limited ("Toronto Hydro") concerning whether the parties had agreed that Toronto Hydro would install an electricity distribution system in a Graywood building project and, if so, at what price. Graywood made a complaint to the Ontario Energy Board (the "OEB"), which rendered a decision in favour of Toronto Hydro.

[2] Graywood made an application for judicial review to the Divisional Court. The three judges who heard the application agreed that the standard of review for the OEB decision was reasonableness. However, the panel divided in its assessment of whether the OEB decision was reasonable. Molloy J., with Lane J. concurring, held that the

decision was unreasonable; Pitt J., dissenting, concluded that it was "eminently reasonable".

[3] The sole issue on this appeal is whether the Divisional Court erred in quashing the OEB decision.

B. FACTS

(1) The parties and the events

[4] In 1999, Graywood commenced development of a residential subdivision in Scarborough (the "Scarborough project"). At that time, Toronto Hydro was the monopoly provider of electricity distribution systems in Toronto. In November 1999, Graywood engaged Toronto Hydro to design the distribution system. Graywood paid a "design deposit fee" of $63,140 in advance. On June 27, 2000, Toronto Hydro sent its completed design to Graywood. At that time, both parties would have expected Toronto Hydro, as the monopoly provider, to install the system as well.

[5] However, in mid-2000 the statutory regime governing electricity distribution changed to open the market to competition. On July 14, 2000, the OEB issued a new *Distribution System Code* (the "*Code*") which provided for a transition from monopoly to competition-based distribution. The *Code* stipulated new and lower rates for the installation of distribution systems.

[6] As a result of an OEB decision on September 29, 2000, the OEB amended the *Code* by adding a transitional provision respecting its coming into force:

> 1.7 Coming into Force
>
> This Code comes into force on the day subsection 26(1) of the *Electricity Act* comes into force with the following exception.
>
> All of Chapter 3, *Connections and Expansions* and Subsection 6.2.3. of Section 6.2, *Responsibilities to Generators* come into force on September 29, 2000. These provisions do not apply to projects that are the subject of an agreement entered into before November 1, 2000.

[7] In early November 2000, Graywood contacted Toronto Hydro about the connection of electricity for the Scarborough project. Toronto Hydro insisted on a formal written connection agreement, which was drafted and executed in December 2000, but was back-dated to November 8. Taking the position that s. 1.7 of the *Code* applied to the

project, Toronto Hydro charged Graywood at the higher rates applicable under the old monopoly regime and refused to allow Graywood to seek a competitive bid under the new regime. Graywood protested but paid the higher fee and allowed Toronto Hydro to install the distribution system, while reserving its right to pursue a legal remedy.

[8] Graywood complained about the position taken by Toronto Hydro by letter to the OEB and requested a hearing on the issue of whether it had an agreement with Toronto Hydro before November 1, 2000 for electricity connection in its subdivision. The OEB declined to hold a hearing but decided to conduct an investigation. Graywood provided the OEB with a good deal of information about its relationship with Toronto Hydro relating to the Scarborough project.

[9] The OEB issued its decision in a letter dated July 25, 2001. It dismissed Graywood's complaint and found that an implied agreement had been entered into prior to November 1, 2000, thus making the project subject to the higher rates in the former statutory regime. The essence of the OEB decision is contained in these paragraphs:

> Based on the information provided, the Board finds that an implied agreement had been entered into prior to November 1, 2000.
>
> The Board finds that in past industry practice, there was often no formal offer to connect and associated written connection agreement between parties on a specific project. The evidence demonstrates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The evidence further demonstrates that Toronto Hydro had been included in the Project for approximately a year prior to November 1, 2000 and that Graywood was committed to the Project proceeding as municipal servicing had commenced prior to October of 2000.
>
> Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed based on past industry practice.
>
> The Board finds that Toronto Hydro is not required to comply with the requirements of Chapter 3 of the Code for this Project. Therefore the Board finds that Toronto Hydro is not in breach of its licence and the Board will not issue a notice of its intention to issue a compliance order under subsection 75(2) of the Act.

(2) The judicial review proceedings

[10] Graywood sought judicial review of the OEB decision. The Divisional Court was unanimous in its view that the question determined by the OEB — namely, whether the agreement between Graywood and Toronto Hydro was entered into before or after November 1, 2000 in the context of s. 1.7 of the *Code* — was a question of mixed fact and law. The three judges also agreed, after applying the factors in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, that the standard of review to be applied to the OEB decision was reasonableness.

[11] The judges of the Divisional Court parted company in their application of the reasonableness standard to the OEB decision. Molloy J., with Lane J. concurring, held that the decision was unreasonable; Pitt J., dissenting, characterized the decision as "eminently reasonable".

[12] In the result, the Divisional Court quashed the OEB decision and remitted the matter to the OEB for further consideration on the basis that the new *Code* provisions applied to the parties' relationship.

[13] Toronto Hydro obtained leave to appeal the Divisional Court's decision to this court.

C. ISSUE

[14] The sole issue on the appeal is whether the majority of the Divisional Court erred in holding that it was unreasonable for the OEB to conclude that Toronto Hydro and Graywood had an agreement for electricity connection prior to November 1, 2000, and that the former statutory regime therefore applied to the Toronto Hydro–Graywood relationship.

D. ANALYSIS

(1) The reasonableness standard and its implications for a reviewing court

[15] The three judges of the Divisional Court held, correctly, that the OEB decision in this case was subject to judicial review on a reasonableness standard. In my view, it is crucial that a reviewing court clearly appreciate both the content and the implications of the reasonableness standard of review.

[16] The content of the reasonableness standard is clearly set out in two important Supreme Court of Canada decisions: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226. In both cases, the court elaborated on the application of the

reasonableness standard to decisions of administrative tribunals. In both cases, the court overturned the decision of the reviewing court and restored the decision of the tribunal.

[17] Crucially, in *Ryan* the court provided an analysis covering both the context within which judicial review on a reasonableness standard takes place and the precise legal question a reviewing court must ask.

[18] The context within which judicial review on a reasonableness standard takes place can be summarized in a single word – deference. As expressed by Iacobucci J. in *Ryan* at paras. 46 and 51:

> Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did....
>
> . . .
>
> [C]ourts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

[19] The precise legal question a reviewing court must ask when applying the reasonableness standard was formulated by Iacobucci J. at para. 47:

> The content of a standard of review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness basically involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time...reasonableness [is] the standard.

[20] Iacobucci J. continued, at para. 55, by setting out, in relatively stark language, the implications for a reviewing court of trying to answer this question:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere....

See also: *Donnini v. Ontario (Securities Commission)* (2005), 76 O.R. (3d) 43 (C.A.).

(2) Application

[21] In her majority reasons, Molloy J. stated that "[t]he central and dispositive finding made by the OEB was that an 'implied agreement had been entered into prior to November 1, 2000.'" She was of the view that this finding was inconsistent with the formal contract the parties entered into after November 1, 2000. Molloy J. reasoned:

> The parties here chose to date their contract November 8, 2000. This was not inadvertent. Toronto Hydro drafted the contract in December 2000. It was deliberately back-dated to November 8, 2000 to reflect the point at which Toronto Hydro was first contacted by Graywood with respect to the installation of the distribution system. In the face of that evidence, it is simply not reasonable to find that the agreement arose by implication earlier than November 1, 2000.

[22] Pitt J. did not accept this analysis. He reviewed the history of the relationship between the parties, including the executed design agreement, the extensive discussions about installation of the system and the parties' expectations, and concluded that the OEB's finding that there was an implied agreement between the parties prior to the "cut-off date" of November 1, 2000 was reasonable.

[23] With respect, I think that Pitt J.'s analysis and conclusion are more faithful to the analytical framework set out in *Ryan*, *Dr. Q.* and *Donnini*. I say this for four reasons.

[24] First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its decisions are, therefore, entitled to substantial deference. Interestingly, on this point Molloy J.'s analysis is clear and compelling:

> While the expertise brought to bear by the OEB in the case at bar is somewhat different from the situation before the Court in the *Consumer's Gas* case, it is no less complex or specialized. The Board was required to balance the interests of the consumer with those of electricity distributors, suppliers and contractors, all within the context of a market that was moving from a monopolistic structure to one with some aspects of competition, but still with supervision and controls. The OEB's expertise includes not just the provision of electricity but many other aspects of construction, engineering and subdivision planning and control. The specialized nature of the OEB's expertise demands a relatively high degree of deference to its decisions.

[25] Second, the legislation in issue in this case, including the transitional provision found in s. 1.7 of the *Code*, is legislation that the OEB itself drafted. In other words, this is not even a case where a tribunal is called upon to interpret a statute enacted by a legislature; rather, the tribunal is required to interpret statutory language that it drafted. Thus, the law-intensive component of the analysis on a question of mixed fact and law is one particularly well-suited to the tribunal. In my view, this raises the deference bar even higher.

[26] Third, the question of mixed fact and law at the centre of the case shades substantially onto the fact side of the spectrum. On this point, I agree with Pitt J.'s description:

> [T]he question whether the project was subject to an agreement entered into before November 1, 2000 within the meaning of s. 1.7 of the *Code* is more appropriately viewed as a question of mixed fact and law....The "law" component of that issue is the interpretation of the provisions of the *Code*, as they relate to the proper management of a major transition from monopoly to competition under the *OEB Act*, rather than general contractual principles. The determination is "fact-intensive", and involves an assessment of specialized facts and relationships, which are at the core of the OEB's exclusive jurisdiction. See *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 41; *Dr. Q. v. College of*

Physicians and Surgeons of B.C., [2003] 1 S.C.R. 226 at p. 240.

[27] Fourth, on the record in this case, including the OEB's written reasons for decision, I think it is impossible to conclude, *per* the instruction in *Ryan*, that there is "no line of analysis" to support the decision. The OEB identified several factors in support of its conclusion that "an implied agreement had been entered into prior to November 1, 2000." It reviewed industry practice, which was not always grounded in formal contracts or agreements. The OEB also considered the relationship between the parties concerning the Scarborough project. Toronto Hydro was retained to perform the design work on the project and successfully completed it. Moreover, Toronto Hydro's role in the project had continued for about one year before the November 1, 2000 cut-off date. In addition, the OEB specifically considered Graywood's position. It noted that Graywood was committed to the project before the cut-off date and had costed the project on the basis of installation prices under the old statutory regime; this led the OEB to declare that its proposed decision would not be unfair to Graywood.

[28] Combining these points, I think it is clear that the OEB was of the view that the history of the parties' relationship on this project, including the completed design assignment, industry practice generally, and fairness considerations, resulted in an implied agreement that the installation component of the project would be performed by Toronto Hydro under the pre-November 1, 2000 statutory regime. This was not the only interpretation and result open to the OEB. However, within the parameters of *Ryan*, *Dr. Q.* and *Donnini*, the OEB's interpretation and disposition were, as Pitt J. concluded, "eminently reasonable".

E. DISPOSITION

[29] I would allow the appeal, set aside the order of the Divisional Court, and reinstate the decision of the OEB.

[30] Toronto Hydro is entitled to its costs of the appeal and the motion for leave to appeal which I would fix at $20,000 inclusive of disbursements and GST. The OEB does not seek an order for costs.

RELEASED: May 24, 2006 ("KNF")

"J. C. MacPherson J.A."
"I agree K. Feldman J.A."
"I agree S. E. Lang J.A."

TAB 4

SUPREME COURT OF CANADA

CITATION: Northrop Grumman Overseas Services Corp. *v.* Canada (Attorney General), 2009 SCC 50, [2009] 3 S.C.R. 309

DATE: 20091105
DOCKET: 32752

BETWEEN:

Northrop Grumman Overseas Services Corporation
Appellant
and
Attorney General of Canada and Lockheed Martin Corporation
Respondents

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 48)

Rothstein J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ. concurring)

Northrop Grumman Overseas Services Corp. *v.* Canada (Attorney General), 2009 SCC 50, [2009] 3 S.C.R. 309

Northrop Grumman Overseas Services Corporation *Appellant*

v.

Attorney General of Canada and Lockheed Martin Corporation *Respondents*

Indexed as: Northrop Grumman Overseas Services Corp. *v.* Canada (Attorney General)

Neutral citation: 2009 SCC 50.

File No.: 32752.

2009: May 19; 2009: November 5.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Commercial law — Trade agreements — Agreement on Internal Trade — Scope — Non-Canadian supplier — Government procurement — Whether non-Canadian suppliers have standing to initiate procurement complaints before Canadian International Trade Tribunal under Agreement on Internal Trade — Meaning of expression "procurement within Canada" in Article 502 of Agreement.

Administrative law — Boards and tribunals — Canadian International Trade Tribunal — Jurisdiction — Agreement on Internal Trade — Government procurement — Non-Canadian supplier bringing complaint before Canadian International Trade Tribunal with respect to award of procurement concerning military goods — Whether Tribunal has jurisdiction to hear complaint initiated by non-Canadian supplier under Agreement on Internal Trade — Agreement on Internal Trade, Article 502.

Public Works and Government Services Canada ("PW") launched a request for proposals for the procurement of military goods. Northrop Overseas, a Delaware corporation wholly owned by another Delaware corporation, submitted a bid. When another bidder was awarded the contract, Northrop Overseas filed a complaint with the Canadian International Trade Tribunal ("CITT") alleging that PW had failed to evaluate the bids properly, violating Article 506(6) of the *Agreement on Internal Trade* ("AIT"). When the CITT agreed to hear the complaint, PW challenged Northrop Overseas' standing to file the complaint on the grounds that Northrop Overseas was not a "Canadian supplier". The CITT ruled that Northrop Overseas had standing to bring the complaint. On judicial review, the Federal Court of Appeal quashed the ruling, holding that the CITT's jurisdiction under the AIT was limited to complaints brought by Canadian suppliers.

Held: The appeal should be dismissed.

Non-Canadian suppliers do not have standing before the CITT to bring a complaint under the AIT. While the CITT may be an efficient dispute resolution vehicle, it is a statutory tribunal and access to it must be found in the relevant statutory instrument. The statutory provisions

provide that access to the CITT is pursuant to specific trade agreements negotiated by governments. If the government of a supplier did not negotiate access to the CITT for its suppliers, there is no access for them. In this case, standing before the CITT is determined by the AIT. As a U.S. company with no office in Canada, Northrop Overseas is not a Canadian supplier and is within the jurisdiction of a government that did not negotiate access to the CITT for this type of contract. Its recourse is judicial review in the Federal Court. [1] [30] [44] [47]

The procurement provisions in Chapter Five of the AIT are incorporated in their entirety into the CITT's statutory scheme. Under the *Canadian International Trade Tribunal Act*, a "potential supplier" may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a "designated contract". In order to qualify as a "potential supplier", the bidder must be a bidder or prospective bidder on a designated contract. Section 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* further provides that a "designated contract" is one described in certain trade agreements, including the AIT. However, under the AIT, in order for a contract to be a "designated contract", the supplier must also be a "Canadian supplier". Otherwise the AIT is inapplicable to that contract. [11] [13] [16-17] [32]

The AIT is essentially a domestic free trade agreement. Article 101(1), which defines the scope of the AIT, provides that it applies to "trade within Canada" and Article 501 indicates that Chapter Five of the AIT, which relates to procurement, establishes a framework that will ensure equal access to procurement for all Canadian suppliers. According to Article 518, only suppliers with an office in Canada qualify as Canadian suppliers. When read in context, "procurement within Canada" in Article 502 is a subset of the category of "trade within Canada" whereby the government

acquires supplies. Under Article 502, the nationality of the "supplier" is necessary to determine whether the procurement at issue is "within Canada" and therefore covered by the AIT. This interpretation is consistent with the rest of Article 502 and with the French text of the AIT. Since the notion of "potential supplier" and the nationality of the supplier enter into consideration at different stages of the analysis for different purposes, it also avoids circularity. [11] [22] [24-26] [28-29] [34]

Granting non-Canadian suppliers standing to bring complaints based on the AIT to the CITT would lead to problematic results. In this case, Northrop Overseas would gain rights under the AIT despite its government not being a party to the AIT. This poses difficulties. The goods that were the subject of this procurement were specifically excluded from trade agreements signed with its country's government and allowing the complaint would undercut that exclusion and others like it in other international trade agreements. There would also be no reason for the CITT Regulations to refer to each specific trade agreement if anyone contracting with a government institution had standing before the CITT solely on the basis of Article 502(1) of the AIT. [41] [43]

Cases Cited

Referred to: *Eurodata Support Services Inc. (Re)*, [2001] C.I.T.T. No. 59 (QL); *Winchester Division—Olin Corp. (Re)*, [2004] C.I.T.T. No. 44 (QL); *EFJohnson (Re)*, PR-2006-006, April 26, 2006; *Computer Label Worldwide Co. (Re)*, PR-2006-023, August 22, 2006; *Europe Displays, Inc. (Re)*, [2007] C.I.T.T. No. 2 (QL); *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 F.C. 514; *E.H. Industries Ltd. v. Canada (Minister of Public Works and Government*

Services), 2001 FCA 48, 267 N.R. 173; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241, [2002] 1 F.C. 292; *Defence Construction (1951) Ltd. v. Zenix Engineering Ltd.*, 2008 FCA 109, 377 N.R. 47; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *UL Canada Inc. v. Québec (Procureur général)*, [1999] R.J.Q. 1720.

Statutes and Regulations Cited

Canadian International Trade Tribunal Act, R.S.C. 1985, c. 47 (4th Supp.), ss. 30.1 "complaint", "designated contract", "government institution", "interested party", "potential supplier", 30.11(1), 30.13(1).

Canadian International Trade Tribunal Procurement Inquiry Regulations, SOR/93-602, ss. 3(1), 7(1), 11.

Trade Agreements

Agreement on Government Procurement, 1915 U.N.T.S. 103 (being Annex 4(b) of the *Marrakesh Agreement establishing the World Trade Organization*, 1867 U.N.T.S. 3), Ann. 1.

Agreement on Internal Trade, (1995) 129 Can. Gaz. I, 1323, Preamble, Chapter One, arts. 100, 101, Chapter Five, arts. 501, 502, 504, 506, 513, 514, 518, Ann. 502.1A.

Canada-Chile Free Trade Agreement, art. K*bis*-13, Ann. K*bis*-01.1-3, Schedule of Canada, Section A, para. 2.

Canada-Colombia Free Trade Agreement, art. 1412, Ann. 1401-3, Schedule of Canada, Section A, para. 2.

Canada-Peru Free Trade Agreement, art. 1412, Ann. 1401.1-3, Schedule of Canada, Section A, para. 2.

North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can. T.S. 1994 No. 2, Ann. 1001.1b-1.

Authors Cited

Bankes, Nigel. "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991), 29 *Alta. L. Rev.* 792.

Swinton, Katherine. "Law, Politics, and the Enforcement of the Agreement on Internal Trade", in Michael J. Trebilcock and Daniel Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade*. Toronto: C.D. Howe Institute, 1995, 196.

APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and Ryer JJ.A.), 2008 FCA 187, [2009] 1 F.C.R. 688, 293 D.L.R. (4th) 335, 379 N.R. 1, [2008] F.C.J. No. 798 (QL), 2008 CarswellNat 1619, setting aside a decision of the Canadian International Trade Tribunal and remitting the matter back to it, [2007] C.I.T.T. No. 100 (QL), 2007 CarswellNat 3717. Appeal dismissed.

Barbara A. McIsaac, Q.C., and *Patrick Veilleux*, for the appellant.

Anne M. Turley, *Christine Mohr* and *Alexander Gay*, for the respondent the Attorney General of Canada.

Richard A. Wagner and *G. Ian Clarke*, for the respondent the Lockheed Martin Corporation.

The judgment of the Court was delivered by

ROTHSTEIN J. —

1. Introduction

[1] The issue in this case is whether a potential supplier for a government procurement that is not a Canadian supplier has standing before the Canadian International Trade Tribunal ("CITT") to bring a complaint alleging an unfair bidding process based on the *Agreement on Internal Trade* ("AIT"), (1995) 129 Can. Gaz. I, 1323. In my opinion, it does not.

2. Facts

[2] Public Works and Government Services Canada ("PW") launched a request for proposals for the procurement of 36 advanced multi-role infrared sensor ("AMIRS") targeting pods for the Department of National Defence's CF-18 aircraft and 13 years of in-service support for the pods. AMIRS pods are devices mounted on military aircraft in order to provide high-resolution imagery for identifying targets. The appellant, Northrop Grumman Overseas Services Corporation ("Northrop Overseas"), submitted a bid along with Lockheed Martin Corporation ("Lockheed") and Raytheon Company. Lockheed's bid was chosen, resulting in it being awarded a contract for US$89,487,521 for the AMIRS targeting pods and US$50,357,649 for the in-service support.

[3] Subsequent to the award of the procurement to Lockheed, Northrop Overseas filed a

complaint with the CITT. It alleged that PW failed to evaluate bids submitted in response to the request for proposals in accordance with the Evaluation Plan, which set out the procedures and methodology for evaluating the bids, including the score to be awarded for different aspects of each bid. Northrop Overseas alleged that it was not awarded points to which it was entitled and that Lockheed was awarded points to which it was not entitled under the Evaluation Plan. In so doing, Northrop Overseas argued that PW violated Article 506(6) of the AIT, which requires procurements covered by the AIT to clearly identify the criteria used to evaluate bids. The CITT agreed to hear the complaint.

[4] Northrop Overseas is incorporated in the state of Delaware and is wholly owned by Northrop Grumman Corporation ("Northrop Grumman"), another Delaware corporation. Northrop Grumman also owns a Canadian subsidiary, Northrop Grumman Canada (2004) Inc. ("Northrop Canada"). The bid, in this case, was made by Northrop Overseas.

[5] Before a hearing on the merits took place, PW challenged Northrop Overseas' standing to file a complaint with the CITT based on a breach of the AIT. It alleged that Northrop Overseas was a U.S. company and not a "Canadian supplier". PW argued that access to the CITT through the AIT is restricted to Canadian suppliers (letter of May 2, 2007).

[6] The CITT ruled that Northrop Overseas did have standing to bring a complaint based on the AIT ([2007] C.I.T.T. No. 100 (QL)). In coming to this ruling, the CITT broke with its previous decisions in which it held that only Canadian suppliers could bring complaints based on the AIT: see *Eurodata Support Services Inc. (Re)*, [2001] C.I.T.T. No. 59 (QL); *Winchester*

Division—Olin Corp. (Re), [2004] C.I.T.T. No. 44 (QL); *EFJohnson (Re)*, PR-2006-006, April 26, 2006; *Computer Label Worldwide Co. (Re)*, PR-2006-023, August 22, 2006; *Europe Displays, Inc. (Re)*, [2007] C.I.T.T. No. 2 (QL).

[7] On judicial review, the majority of the Federal Court of Appeal quashed this ruling, determining that the CITT only had jurisdiction to hear complaints under the AIT brought by Canadian suppliers (2008 FCA 187, [2009] 1 F.C.R. 688). It remitted the matter to the CITT for determination as to whether Northrop Overseas was a Canadian supplier.

[8] Northrop Overseas appeals to this Court to have the CITT's original ruling granting it standing before the CITT restored. Both PW and Lockheed defend the judgment of the majority of the Federal Court of Appeal.

3. Issue

[9] I take the appellant as identifying two main issues. First, did the CITT err in holding that non-Canadian suppliers have standing to initiate procurement complaints before the CITT under the AIT? If standing is not limited to Canadian suppliers, the second issue is whether the CITT erred in holding that Northrop Overseas' complaint discloses a reasonable indication of a violation of Chapter Five of the AIT as required by s. 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 ("CITT Regulations"). Since I determine that standing is limited to Canadian suppliers under the AIT, I do not examine the second issue.

4. Analysis

A. *Standard of Review*

[10] As the Federal Court of Appeal and the parties noted, the case law has established that a CITT decision on whether something falls within its jurisdiction will be reviewed on a correctness standard: see *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 F.C. 514 (C.A.), at para. 45; *E.H. Industries Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 48, 267 N.R. 173, at para. 5; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241, [2002] 1 F.C. 292, at para. 15; and *Defence Construction (1951) Ltd. v. Zenix Engineering Ltd.*, 2008 FCA 109, 377 N.R. 47, at para. 19. These are relatively recent cases which have determined the standard of review and all parties accept that they remain authoritative in relation to the standard of review applicable to the question to be answered in this appeal. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, recognized that an exhaustive standard of review analysis is not required in every case if the relevant standard of review jurisprudence has already determined *in a satisfactory manner* the degree of deference to be accorded with regard to a particular category of question: see paras. 54, 57 and 62. The approach to standard of review in *Dunsmuir* is intended to be practical. In this case, it is not necessary to go beyond the initial step in the *Dunsmuir* analysis. The issue on this appeal is jurisdictional in that it goes to whether the CITT can hear a complaint initiated by a non-Canadian supplier under the AIT. Accordingly, the standard of review is correctness.

B. *Standing*

(i) Interpretation

[11] The AIT is an inter-governmental agreement entered into by the executive of the federal, provincial and territorial (except Nunavut) governments. It is not a piece of legislation. The executive cannot displace existing laws by entering into agreements, though the agreements may bind it: see *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 433; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 551. Of course, the legislature can choose to adopt an agreement, in whole or in part, and give it the force of law: see *UL Canada Inc. v. Québec (Procureur général)*, [1999] R.J.Q. 1720 (Sup. Ct.), at p. 1741, citing Nigel Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991), 29 *Alta. L. Rev.* 792, at p. 832. Indeed, parts of the AIT have been adopted by reference in legislation. Aside from the provisions discussed in this appeal, Chapter Five of the AIT, which relates to procurement, is incorporated in its entirety into the CITT's statutory scheme by s. 11 of the CITT Regulations.

[12] However, the fact that part of the AIT has been adopted in legislation should not obscure the fact that it was not drafted as legislation. As Katherine Swinton, now Justice Swinton of the Ontario Superior Court, has noted, the AIT is a political document. Many of its provisions express general principles or goals that are not directly enforceable. While, as Katherine Swinton notes, the AIT may be "written in legal language", PW rightly points out that it does not necessarily follow the conventions of legislative drafting: see "Law, Politics, and the Enforcement of the Agreement on Internal Trade", in M. J. Trebilcock and D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (1995), 196, at p. 201.

(ii) Standing Under the *Canadian International Trade Tribunal Act*

[13] Standing before the CITT for procurement complaints is governed by s. 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) ("CITT Act"), which provides that "a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint".

[14] Northrop Overseas says that pursuant to s. 30.11(1) of the CITT Act, the only requirement for standing is to be a "potential supplier" under a "designated contract". It submits that it was a potential supplier. It says that contrary to the decision of the Federal Court of Appeal, there is no requirement to be a "Canadian supplier" in order that the contract in question be a "designated contract" in order to ground standing before the CITT.

[15] Indeed, that is the main issue in this appeal. Resolving it is a matter of statutory interpretation and interpretation of the AIT. The relevant provisions of the applicable legislation and the AIT are contained in the Appendix.

[16] Under s. 30.1 of the CITT Act, "potential supplier" is defined as "a bidder or prospective bidder on a designated contract". A "designated contract" is defined as "a contract for the supply of goods or services" to a government institution and "that is designated or of a class of contracts designated by the regulations". Section 30.1 also provides that a "government institution" is "any

department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations".

[17] Section 3(1) of the CITT Regulations further provides that a "designated contract" is one described in the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 ("NAFTA"), the World Trade Organization *Agreement on Government Procurement*, 1915 U.N.T.S. 103 ("WTO-AGP"), or the AIT, and now, the *Canada-Chile Free Trade Agreement* ("CCFTA"). As Ryer J.A. put it at para. 85, those trade agreements

> may be regarded as "doors" into the jurisdiction of the CITT. A potential complainant in respect of a procurement may pass through a "door" and thereby gain access to the CITT complaint procedure, by demonstrating that the subject-matter of the procurement is within the scope of one of the trade agreements and that the activity contemplated by that potential complainant is covered by, or within the scope of, that agreement.

[18] The agreements through which complainants can gain access to the CITT were each negotiated between different parties and confer different rights. It is not argued that either the NAFTA or the WTO-AGP is relevant. This is because Canada has negotiated the exclusion of the military procurement at issue in this case from the NAFTA and the WTO-AGP. In both the NAFTA and the WTO-AGP, military procurement is treated differently from many other categories of procurement. Whereas all procurements by certain federal government departments are covered by the rules in these agreements, for the Department of National Defence ("DND"), the only procurements covered by the NAFTA are those for the goods listed at its Annex 1001.1b-1. And the only procurements covered by the WTO-AGP are those listed in its Annex 1. In this case, the goods at issue, "Fire Control Systems", are not listed in either Annex 1001.1b-1 or Annex 1 and,

therefore, neither the NAFTA nor the WTO-AGP applies to the procurement in this case. By contrast, the AIT applies to all procurements by PW or DND and so the goods at issue are not excluded from the AIT: see Annex 502.1A of the AIT.

(iii) The Scope of the AIT

[19] Northrop Overseas argues that the contract with PW for the supply of targeting pods for the CF-18 aircraft plus in-service support for 13 years is a contract described in Article 502 of the AIT. It says it is entitled to rely on the AIT.

[20] Article 502 of the AIT sets monetary thresholds for the application of the AIT. There is no doubt that the contract in this case far exceeds those thresholds.

[21] Article 502(1) makes it clear that it applies to procurements by the federal, provincial or territorial (except Nunavut) governments. However, it does not specify expressly who may be a supplier in the case of procurements covered by the AIT. Article 502 uses the expression "procurement within Canada" by listed entities ("*marchés publics . . . passés au Canada par une [des] entités énumérées*" in French), but it does not define "procurement within Canada". To understand what makes a procurement "within Canada", it is necessary to consider other provisions of the AIT that provide the context in which to understand Article 502.

[22] Article 501 sets forth the purposes of Chapter Five of the AIT: ". . . to establish a framework that will ensure equal access to procurement for all Canadian suppliers . . . ." A

"Canadian supplier" is defined in Article 518 as a supplier having "a place of business in Canada".

[23] Further guidance is provided in the Preamble and in Articles 100 and 101 of the AIT. The AIT's Preamble states that the parties to the agreement have resolved to promote an "open, efficient and stable domestic market" and "equal economic opportunity for Canadians", as well as to reduce barriers to the free movement of "persons, goods, services and investments within Canada" (emphasis added). Article 100 provides that it is the obligation of the parties to eliminate barriers to free trade of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. Article 101(1) provides that the AIT applies to trade within Canada. Article 101(3) provides further elaboration to this end. Article 101(3)(a) says that the parties will not establish new barriers to *internal trade*. Article 101(3)(b) says that the parties will treat all persons, goods, services and investments equally *irrespective of where they originate in Canada.* Paragraphs (c) and (d) require the parties to reconcile relevant standards, regulatory measures and administrative policies to provide for free movement of *trade within Canada.*

[24] It is abundantly clear having regard to these provisions of the AIT that the agreement pertains to domestic trade within Canada. Essentially, it is a domestic free trade agreement.

[25] These provisions assist in providing context within which to interpret the meaning of Article 502(1) of the AIT. As I understand Ryer J.A.'s reasons, he takes "procurement within Canada" to be a subset of the category of "trade within Canada", which defines the scope of the AIT at Article 101(1); "procurement within Canada" is that sub-category of "trade within Canada" whereby the government acquires supplies: see majority reasons at paras. 36-40 and 58. I think he

is correct.

[26] This interpretation is consistent with the rest of Article 502. Article 502(3) allows certain entities to deviate from the AIT in their commercial procurement provided that they do not discriminate against suppliers of goods or services of any other *party*.

[27] The procurements within Canada referred to in Article 502(1) are procurements between a government entity of a party to the AIT and a supplier of another party. That is, when an entity of the federal government or a provincial or territorial government (except Nunavut) enters into a procurement contract with a supplier within the jurisdiction of the federal government or a provincial or territorial government (except Nunavut) who are the parties to the AIT, the procuring party is to govern itself in accordance with the requirements of the AIT.

[28] According to Article 518, only suppliers with an office in Canada qualify as Canadian suppliers. This makes sense in light of the AIT being concerned with internal trade. As Ryer J.A. noted, a procurement contract with a foreign supplier would entail trading with a supplier not located in Canada — "the resulting transaction would more properly constitute 'international' trade, and not 'internal' Canadian trade or trade inside Canada" (para. 55).

[29] I do not think the interpretation that suppliers to procurement under the AIT have to be suppliers in Canada is inconsistent with the French text of the AIT. In his dissent, Létourneau J.A. expressed concern that the French version of Article 502(1) indicated that the AIT's procurement provisions applied "to a public deal or contract done in Canada which involves the Canadian

government in this case" (para. 97). In French, Article 502(1) refers to "*marchés publics . . . passés au Canada*". While, acontextually, the phrase "*marchés publics . . . passés au Canada*" might be interpreted as procurement merely made or reached in Canada, the phrase must be read in light of the title, the Preamble and Chapter One's stipulation that the agreement applies to "internal trade" and "trade within Canada". In the context of the AIT's scope and purpose, I think it is fair to say that in order for a procurement contract to be "*pass[é] au Canada*", the supplier must be Canadian, as defined in Article 518.

(iv) The Relationship Between Suppliers and the Parties to a Trade Agreement in the Scheme of the CITT Regulations

[30] This appeal proceeds on the basis that Northrop Overseas does not have a place of business in Canada. On this basis, Northrop Overseas is not a Canadian supplier because it does not have a place of business within the jurisdiction of a government that is a party to the AIT and it is not entitled to invoke the provisions of the AIT in order to have standing before the CITT.

[31] In other words, a designated contract, under the scheme of s. 3(1) of the CITT Regulations, is one for procurement by a government or government entity under either the NAFTA, the AIT, the WTO-AGP, or, now, the CCFTA. The placement of the AIT alongside other trade agreements in s. 3(1) is instructive. These agreements operate on the basis of a mutual lowering of trade barriers for the parties to each agreement. Canada negotiated access for its citizens to markets in other countries in exchange for lowering Canadian barriers to commerce from these same countries. The agreements confer rights on the parties to them and to suppliers of those parties.

[32] In the case of the AIT, in order for the contract to be a designated contract, the supplier must be a Canadian supplier in a procurement contract by a Canadian government or government entity. Otherwise the AIT is inapplicable to that contract.

(v) Circularity

[33] Létourneau J.A. was of the view that PW's argument is circular, stating that

> a potential supplier, according to section 30.1 of the CITT Act, is "a bidder or prospective bidder on a designated contract." And a designated contract is one that takes into account particular circumstances or characteristics of the potential supplier. In other words, a potential supplier is defined by the designated contract and a designated contract is defined by the potential supplier. [para. 102]

I am unable to agree with this characterization because, in my view, it conflates the notion of "potential supplier" in ss. 30.1 and 30.11 of the CITT Act with the notion of "supplier" in Article 502 of the AIT. These are, in my respectful view, two different concepts that are used in two different ways.

[34] Under Article 502 of the AIT, the nationality of the "supplier" is necessary to determine whether the procurement at issue is "within Canada" and therefore covered by the AIT. By contrast, the notion of "potential supplier" defined at s. 30.1 of the CITT Act is used, at s. 30.11, to determine whether the complainant has standing before the CITT under a relevant listed trade agreement. The term "potential supplier" in the CITT Act is general and intended to apply to all the trade agreements

listed in s. 3(1) of the CITT Regulations. While these determinations may overlap to some extent, the notion of "potential supplier" and the nationality of the supplier enter into consideration at different stages of the analysis for different purposes. There is therefore no circularity.

(vi) Other Provisions of the AIT

[35] Northrop Overseas points to a number of other provisions of Chapter Five of the AIT as supporting its argument that the AIT confers rights to it. These arguments are made with respect to the second issue, namely, whether Northrop Overseas' complaint discloses a reasonable indication of a violation of the AIT in accordance with s. 7(1) of the CITT Regulations. I do not address this issue because I have found that non-Canadian suppliers do not have standing before the CITT. Nevertheless, I think it is useful to address some of Northrop Overseas' arguments in that they might be thought to have a bearing on the interpretation of Article 502 of the AIT.

[36] Northrop Overseas says that Article 514 provides for federal bid protest procedures (i.e. the CITT) that are available to all suppliers on a procurement by a designated entity. It points to the distinction between "suppliers" and "Canadian suppliers" in the definitions at Article 518 of the AIT to argue that where the AIT refers only to "suppliers", as in Article 514, it includes non-Canadian suppliers. That interpretation would mean that, in this case, Northrop Overseas, a non-Canadian supplier, would be entitled to file a complaint before the CITT. I do not think this interpretation can stand. The AIT does not distinguish between "Canadian suppliers" and "suppliers" in the way Northrop Overseas suggests. Although Articles 513(2-6) refer only to "suppliers", Articles 513(4-6) assume that the supplier will be located in a province. For example, Article 513(4) provides that "a

supplier . . . may make a written request to the contact point in the Province where the supplier is located to seek resolution of the complaint".

[37] The fact that the AIT does not specify that the provincial bid protest procedures set out in Article 513 are limited to Canadian suppliers, while clearly assuming it, suggests that references to "suppliers" in Article 514, which sets out the federal bid protest procedures, are also meant to apply only to Canadian suppliers.

[38] Article 504(6) (and perhaps Article 504(5)) do use "supplier" so as to include non-Canadian suppliers. Other provisions of Article 504 use "supplier" (and not "Canadian supplier") to refer to suppliers from Canada: Article 504(1) refers to "suppliers . . . of any other Party", Articles 504(2) and (4) refer to "suppliers . . . of a particular Province or region", and Article 504(3) assumes suppliers will have a "place of business in Canada". However, Article 504(6) provides:

> Except as otherwise required to comply with international obligations, a Party may limit its tendering to Canadian goods, Canadian services or Canadian suppliers, subject to the following conditions:
>
> (a) the procuring Party must be satisfied that there is sufficient competition among Canadian suppliers;
>
> (b) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine Canadian content; and
>
> (c) the requirement for Canadian content must be no greater than necessary to qualify the procured good or service as a Canadian good or service. [Emphasis added.]

A number of interpretations of this provision have been advanced. Northrop Overseas argues that

it must be intended to benefit non-Canadian suppliers. Otherwise it creates "a right for which there is no beneficiary" (Factum, at para. 93).

[39] I do not think this is the correct way to read Article 504(6). The opening words of the provision recognize that the AIT will not trump international obligations pertaining to the nationality of goods, services or suppliers of a procurement process. It does not recognize any obligations to foreign suppliers, unless those obligations are required by international agreements or law. Otherwise, the obligations recognized in the AIT are to other government parties and the suppliers of those parties. The conditions under which a procurement may be limited to Canadian goods, services or suppliers in Article 504(6) ensure that the taxpayers funding the procurement are receiving the benefits of a substantively competitive process. It does not bring foreign suppliers under the AIT.

[40] Northrop Overseas also argues that Article 506, on which it based its complaint, confers rights to all suppliers rather than just Canadian suppliers. However, as Ryer J.A. notes, Article 506(1) stipulates that procedures set out in Article 506 apply to the "procurements that are covered by Chapter 5" (para. 45). That, in turn, is determined by Article 502. I do not think that Article 506 is therefore helpful in interpreting Article 502 or the scope of the AIT. As I have stated, Chapter Five applies only to procurements between listed entities and Canadian suppliers.

(vii) Problems With the AIT Applying to Non-Canadian Suppliers

[41] Northrop Overseas' argument that non-Canadian suppliers have standing to bring

complaints based on the AIT to the CITT leads to problematic results. If the argument of Northrop Overseas were correct, it would gain rights under the AIT despite its government (here, the U.S.) not being a party to the AIT. This poses difficulties. First, the goods that were the subject of this procurement were excluded from the NAFTA and the WTO-AGP. Allowing non-Canadian suppliers to gain rights under the AIT where those rights were specifically excluded from agreements signed with their country's government would undercut the exclusion. Canada has negotiated similar exclusions for the military goods at issue in this case in trade agreements with Chile, Colombia and Peru: see CCFTA, Annex K*bis*-01.1-3, Schedule of Canada, Section A, para. 2; *Canada-Colombia Free Trade Agreement*, Annex 1401-3, Schedule of Canada, Section A, para. 2; *Canada-Peru Free Trade Agreement*, Annex 1401.1-3, Schedule of Canada, Section A, para. 2.

[42] Second, Northrop Overseas' interpretation undermines the Canadian government's approach to negotiating trade agreements. Access to an accelerated alternative dispute resolution body for procurement disputes, such as the CITT, is a concession that Canada can offer other countries in negotiating trade agreements with the intent of obtaining reciprocal concessions in the other country. If access to the CITT were freely available to suppliers of all countries, access to it would have no value as a concession and Canada would have greater difficulty securing the equivalent access for its own suppliers in foreign countries. Canada's trade agreements with Chile, Peru and Colombia also provide for timely dispute resolution of the sort provided by the CITT and, as noted above, the CCFTA has been added to s. 3(1) of the CITT Regulations: see CCFTA, Article K*bis*-13; *Canada-Peru Free Trade Agreement*, Article 1412; and *Canada-Colombia Free Trade Agreement*, Article 1412.

[43] There would be no reason for the CITT Regulations to refer to each specific trade agreement if anyone contracting with a government institution had standing before the CITT solely on the basis of Article 502(1) of the AIT.

(viii) The Jurisdictions of the CITT and the Federal Court

[44] It is suggested that the CITT provides an efficient dispute resolution mechanism to which there should be ready access. While the CITT may be an efficient dispute resolution vehicle, it is a statutory tribunal and access to it must be found in the relevant statutory instrument. The statutory provisions provide that access to the CITT is pursuant to specific trade agreements negotiated by governments. If the government of a supplier did not negotiate access to the CITT for its suppliers, there is no access for them.

[45] Northrop Overseas says that such an interpretation produces anomalous results. A Canadian supplier would have standing to challenge a contract awarded to a non-Canadian supplier but the reverse would not be true. Again, this is the result of the agreements negotiated by the governments who are parties to the various agreements under which the terms of access to the CITT are determined.

[46] It should be noted that a non-Canadian supplier of goods is not without recourse. Decisions of governments and government entities are subject to judicial review. In the case of the Government of Canada and its entities and, in particular, PW, there is recourse to the Federal Court by way of judicial review. It is argued that such recourse is limited and duplicative by comparison

to that available through the CITT. While that may be so, again, access to the CITT is the product of the trade agreements entered into between the governments who are parties to such agreements and the legislation adopted to implement those agreements. The rights of suppliers are subject to the rights negotiated for them by their governments.

[47] Northrop Canada apparently has a place of business in Canada and if it, instead of Northrop Overseas, had bid on the procurement in this case, then, as the potential supplier in this case, it may well have had standing to complain about the award to Lockheed before the CITT. The majority of the Federal Court of Appeal suggested that income tax considerations may have been the reason Northrop Overseas was the potential supplier (para. 64). Whatever the reason, standing before the CITT is determined by the agreements entered into by the governments of suppliers. As Northrop Overseas is within the jurisdiction of a government that did not negotiate access to the CITT for this type of military procurement by the Government of Canada, its recourse is judicial review in the Federal Court.

5. Disposition

[48] I would dismiss the appeal with costs.

APPENDIX

Canadian International Trade Tribunal Act, R.S.C. 1985, c. 47 (4th Supp.)

30.1 [Definitions] In this section and in sections 30.11 to 30.19,

"complaint" means a complaint filed with the Tribunal under subsection 30.11(1);
"designated contract" means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations;

"government institution" means any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations;

"interested party" means a potential supplier or any person who has a material and direct interest in any matter that is the subject of a complaint;

"potential supplier" means, subject to any regulations made under paragraph 40(*f.1*), a bidder or prospective bidder on a designated contract.

30.11 (1) [Filing of complaint] Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

. . .

30.13 (1) [Decision to conduct inquiry] Subject to the regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2), it shall decide whether to conduct an inquiry into the complaint, which inquiry may include a hearing.

Canadian International Trade Tribunal Procurement Inquiry Regulations, SOR/93-602

Designations

3. (1) For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade, in Article I of the Agreement on Government Procurement or in Article K*bis*-01 of Chapter K*bis* of the CCFTA, by a government institution, is a designated contract.

. . .

Conditions for Inquiry

7. (1) The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the

complaint:

(*a*) the complainant is a potential supplier;

(*b*) the complaint is in respect of a designated contract; and

(*c*) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade, the Agreement on Government Procurement or Chapter *Kbis* of the CCFTA applies.

Agreement on Internal Trade, (1995) 129 Can. Gaz. I, 1323

PREAMBLE

The Governments of Canada, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories and Yukon,

RESOLVED to:

PROMOTE an open, efficient and stable domestic market for long-term job creation, economic growth and stability;

REDUCE AND ELIMINATE, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada;

PROMOTE equal economic opportunity for Canadians;

ENHANCE the competitiveness of Canadian business;

PROMOTE sustainable and environmentally sound development;

CONSULT on matters related to internal trade;

RECOGNIZE the diverse social, cultural and economic characteristics of the provinces; and

RESPECT the legislative authorities of Parliament and the provincial legislatures under the Constitution of Canada;

HEREBY AGREE as follows:

PART I

GENERAL

Chapter One

Operating Principles

Article 100: Objective

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

Article 101: Mutually Agreed Principles

1. This Agreement applies to trade within Canada in accordance with the chapters of this Agreement.

. . .

3. In the application of this Agreement, the Parties shall be guided by the following principles:

(a) Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada;

(b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;

(c) Parties will reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and investments within Canada; and

(d) Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada.

4. In applying the principles set out in paragraph 3, the Parties recognize:

(a) the need for full disclosure of information, legislation, regulations, policies and practices that have the potential to impede an open, efficient and stable domestic market;

(b) the need for exceptions and transition periods;

(c) the need for exceptions required to meet regional development objectives in Canada;

(d) the need for supporting administrative, dispute settlement and compliance mechanisms that are accessible, timely, credible and effective; and

(e) the need to take into account the importance of environmental objectives, consumer protection and labour standards.

. . .

Article 501: Purpose

Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

Article 502: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A, where the procurement value is:

(a) $25,000 or greater, in cases where the largest portion of the procurement is for goods;

. . .

3. The entities listed in Annex 502.2B shall be free to pursue commercial procurement practices that may otherwise not comply with this Chapter. Nevertheless, the Parties shall not direct those entities to discriminate against the goods, services or suppliers of goods or services of any Party, including those related to construction.

. . .

Article 504: Reciprocal Non-Discrimination

1. Subject to Article 404 (Legitimate Objectives), with respect to measures covered by this Chapter, each Party shall accord to:

(a) the goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best

treatment it accords to its own such goods and services; and

(b) the suppliers of goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own suppliers of such goods and services.

2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:

(a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or

(b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.

3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:

(a) the imposition of conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a supplier's place of business in Canada, the place in Canada where the goods are produced or the services are provided, or other like criteria;

. . .

4. No Party shall impose or consider, in the evaluation of bids or the award of contracts, local content or other economic benefits criteria that are designed to favour:

(a) the goods and services of a particular Province or region, including those goods and services included in construction contracts; or

(b) the suppliers of a particular Province or region of such goods or services.

5. Except as otherwise required to comply with international obligations, a Party may accord a preference for Canadian value-added, subject to the following conditions:

(a) the preference for Canadian value-added must be no greater than 10 per cent;

(b) the Party shall specify in the call for tenders the level of preference to be used in the evaluation of the bid; and

(c) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine the Canadian value-added.

6. Except as otherwise required to comply with international obligations, a Party may limit its tendering to Canadian goods, Canadian services or Canadian suppliers, subject to the following conditions:

(a) the procuring Party must be satisfied that there is sufficient competition among Canadian suppliers;

(b) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine Canadian content; and

(c) the requirement for Canadian content must be no greater than necessary to qualify the procured good or service as a Canadian good or service.

. . .

Article 506: Procedures for Procurement

. . .

6. In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

. . .

Article 513: Bid Protest Procedures — Provinces

1. This Article applies to complaints regarding procurement by Provinces.

2. Where, in respect of a specific procurement, a supplier has had recourse to the dispute settlement procedures under another procurement agreement, it may not utilize the bid protest procedures of this Chapter for that specific procurement.

3. The supplier shall communicate its concerns or complaints in writing to the procuring Party with a view to resolving them.

4. Where a supplier has exhausted all reasonable means of recourse with respect to a complaint with the procuring Party, it may make a written request to the contact point in the Province where the supplier is located to seek resolution of the complaint.

5. Where the contact point determines that the complaint is reasonable, it shall, on behalf of the supplier, within 20 days after the date of delivery of the request, approach

the contact point of the procuring Party and make representations on the supplier's behalf. Where the contact point determines that the complaint is unreasonable, it shall provide a written notice to the supplier within 20 days after the date of delivery of the request setting out reasons for the decision. Failure to provide such notice is deemed to be notice for the purposes of Article 1711(2)(a) (Initiation of Proceedings by Persons).

6. Where the matter has not been resolved under paragraph 5 within 20 days after the date of delivery of the supplier's request, the Party in whose territory the supplier is located may make a written request for consideration of the complaint by a review panel. The request shall be delivered to the procuring Party and to the Secretariat. Where the Party in whose territory the supplier is located determines the complaint to be unreasonable, it shall provide written notice to the person within 20 days after the date of delivery of the supplier's request. Failure to provide such notice is deemed to be notice for the purposes of Article 1711(2)(b) (Initiation of Proceedings by Persons).

. . .

Article 514: Bid Protest Procedures — Federal Government

1. This Article applies to complaints regarding procurement by the Federal Government.

2. In order to promote fair, open and impartial procurement procedures, the Federal Government shall adopt and maintain bid protest procedures for procurement covered by this Chapter that:

(a) allow suppliers to submit bid protests concerning any aspect of the procurement process, which for the purposes of this Article begins after an entity has decided on its procurement requirement and continues through to the awarding of the contract;

(b) encourage suppliers to seek a resolution of any complaint with the entity concerned prior to initiating a bid protest;

(c) ensure that its entities accord fair and timely consideration to any complaint regarding procurement covered by this Chapter;

(d) limit the period within which a supplier may initiate a bid protest, provided that the period is at least 10 business days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;

(e) permit a supplier that does not achieve a successful resolution of its complaint to bring the matter to the attention of an authority, with no substantial interest in the outcome, to receive and consider the complaint and make appropriate findings and recommendations with respect to the complaint;

(f) require the reviewing authority to provide its findings and recommendations in writing and in a timely manner and make them available to the Parties; and

(g) require the reviewing authority to specify its bid protest procedures in writing and make them generally available.

. . .

Article 518: Definitions

In this Chapter:

. . .

Canadian supplier means a supplier that has a place of business in Canada;

. . .

place of business means an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during normal working hours;

. . .

supplier means a person who, based on an assessment of that person's financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction procurement;

tender means a response to a call for tenders;

Appeal dismissed with costs.

Solicitors for the appellant: Borden Ladner Gervais, Ottawa.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the respondent the Lockheed Martin Corporation: Ogilvy Renault, Ottawa.

TAB 5

Operation Dismantle *v.* The Queen, [1985] 1 S.C.R. 441

Operation Dismantle Inc., Canadian Union of Public Employees, Canadian Union of Postal Workers, National Union of Provincial Government Employees, Ontario Federation of Labour, Arts for Peace, Canadian Peace Research and Education Association, World Federalists of Canada, Alberni Valley Coalition for Nuclear Disarmament, Comox Valley Nuclear Responsibility Society, Cranbrook Citizens for Nuclear Disarmament, Peace Education Network, Windsor Coalition for Disarmament, Union of Spiritual Communities of Christ Committee for World Disarmament and Peace, Against Cruise Testing Coalition, B.C. Voice of Women, National Action Committee on the Status of Women, Carman Nuclear Disarmament Committee, Project Survival, Denman Island Peace Group, Thunder Bay Coalition for Peace and Nuclear Disarmament, Muskoka Peace Group, Global Citizens' Association, Physicians for Social Responsibility (Montreal Branch) *Appellants*;

and

Her Majesty The Queen, The Right Honourable Prime Minister, the Attorney General of Canada, the Secretary of State for External Affairs, the Minister of Defence *Respondents.*

File No.: 18154.

1984: February 14, 15; 1985: May 9.

Present: Ritchie* Dickson, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.
*Ritchie J. took no part in the judgment.

on appeal from the federal court of appeal

Constitutional law -- Canadian Charter of Rights and Freedoms -- Right to life, liberty and security of person -- U.S. cruise missile testing in Canada -- Testing alleged to increase risk of nuclear war in violation of that right -- Motion to strike out -- Whether or not facts as alleged in violation of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 24(1), 32(1)(a) -- Constitution Act, 1982, s. 52(1).

Jurisdiction -- Judicial review -- Cabinet decision relating to national defence and external affairs -- Whether or not decision reviewable by courts.

Practice -- Motion to strike -- U.S. cruise missile tests alleged to increase risk of nuclear war in violation of s. 7 of Charter -- Whether or not statement of claim should be struck out -- Whether or not statement of claim can be amended before statement of defence filed -- Federal Court Rules, Rules 419(1), 421, 1104, 1723.

This appeal is from a judgment of the Federal Court of Appeal which allowed respondents' appeal from a judgment dismissing their motion to strike out the appellants' statement of claim.

Appellants alleged that a decision made by the Government of Canada to allow the United States to test cruise missiles in Canada violated s. 7 of the *Charter.*

The development of the cruise missile, it was argued, heightened the risk of nuclear war and the increased American military presence and interest in Canada as a result of the testing allegedly made Canada more likely to be a target for nuclear attack. Declaratory relief, an injunction and damages were sought.

Held: The appeal should be dismissed.

Per Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: The appellants' statement of claim should be struck out and their cause of action dismissed. The statement of claim does not disclose facts which, if taken as true, would prove that the Canadian government's decision to permit the testing of the cruise missile in Canada could cause a violation or a threat of violation of their rights under s. 7 of the *Charter*.

The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict and thereby violates the right to life, liberty and security of the person. This alleged violation of s. 7 turns upon an actual increase in the risk of nuclear war resulting from the federal cabinet's decision to permit the testing. This allegation is premised upon assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of uncertainty and change, will react to the Canadian government's decision to permit the testing of the cruise. Since the foreign policy decisions of independent nations are not capable of prediction on the basis of evidence to any degree of certainty approaching probability, the nature of the reaction to the federal cabinet's decision to permit the testing can only be a matter of speculation. The appellants could never prove the

causal link between the decision to permit the testing and the increase in the threat of nuclear conflict.

Cabinet decisions are reviewable by the courts under s. 32(1)(*a*) of the *Charter* and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the *Charter*. The decision to permit the testing of the cruise missile cannot be considered contrary to the duties of the executive since the possible effects of this government action are matters of mere speculation. Section 7 could only give rise to a duty on the part of the executive to refrain from permitting the testing if it could be said that a deprivation of life or security of the person could be proven to result from the impugned government act.

Per Wilson J.: The government's decision to allow the testing of the U.S. cruise missile in Canada, even although an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(*a*) of the *Charter*. It was not insulated from review because it was a "political question" since the Court had a constitutional obligation under s. 24 of the *Charter* to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.

On a motion to strike out a statement of claim as disclosing no reasonable cause of action, the court must take the allegations of fact therein as proved. If such allegations raise a justiciable issue the court cannot abdicate its responsibility for review on the basis of anticipated problems of proof.

This statement of claim was struck, notwithstanding the general hesitancy of the courts to strike, because the facts disclosed no reasonable cause of action (1)

under s. 24(1) of the *Charter*, (2) under s. 52(1) of the *Constitution Act, 1982* or (3) under the common law power to grant declaratory relief. To succeed in their claim for relief under s. 24 of the *Charter* the plaintiffs would have to establish a violation or threat of violation of their right under s. 7 of the *Charter*. To obtain a declaration of unconstitutionality under s. 52(1) of the *Constitution Act, 1982*, the plaintiffs would have to show that the government's decision to test the cruise missile in Canada was inconsistent with their right under s. 7. To obtain declaratory relief at common law, they would have to establish a violation or threatened violation of their right under s. 7.

The government's decision to test the cruise missile in Canada does not give rise to a violation or threatened violation of the plaintiffs' right under s. 7. Even an independent, substantive right to life, liberty and security of the person cannot be absolute. It must take account of the corresponding rights of others and of the right of the state to protect the collectivity as well as the individual against external threats. The central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. It does not extend to incidental effects of governmental action in the field of inter-state relations.

There is at the very least a strong presumption that governmental action concerning the relation of the state with other states, and not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may incidentally increase the risk of death or injury that individuals generally have to face.

Section 1 of the *Charter* was not called into operation here given the finding that the facts as alleged could not constitute a violation of s. 7.

Since the application to amend the statement of claim was filed after the Crown instituted its appeal, the application was made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal applied. Appellants' right under Rule 421 had therefore expired and their only recourse was to proceed under Rule 1104.

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v. British Medical Association, [1970] 1 All E.R. 1094; *Dowson v. Government of Canada* (1981), 37 N.R. 127; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225; *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221; *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652, referred to.

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Constitution Act, 1982, s. 52.

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APPEAL from a judgment of the Federal Court of Appeal, [1983] 1 F.C. 745, 49 N.R. 363, allowing an appeal from a judgment of Cattanach J., [1983] 1 F.C. 429, dismissing a motion to strike out. Appeal dismissed.

Gordon F. Henderson, Q.C., *Lawrence Greenspon* and *Emilio Binavince*, for the appellants.

W. I. C. Binnie, Q.C., and *Graham R. Garton*, for the respondents.

The judgment of Dickson, Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

1. DICKSON J.--This case arises out of the appellants' challenge under s. 7 of the *Canadian Charter of Rights and Freedoms* to the decision of the federal cabinet to permit the testing of the cruise missile by the United States of America in Canadian territory. The issue that must be addressed is whether the appellants' statement of claim should be struck out, before trial, as disclosing no reasonable cause of action. In their statement of claim, the appellants seek: (i) a declaration that the decision to permit the testing of the cruise missile is unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages. Cattanach J. of the Federal Court, Trial Division, refused the respondents' motion to strike. The Federal Court of Appeal unanimously allowed the respondents' appeal, struck out the statement of claim and dismissed the appellants' action.

2. The facts and procedural history of this case are fully set out and discussed in the reasons for judgment of Madame Justice Wilson. I agree with Madame Justice Wilson that the appellants' statement of claim should be struck out and this appeal dismissed. I have reached this conclusion, however, on the basis of reasons which differ somewhat from those of Madame Justice Wilson.

3. In my opinion, if the appellants are to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights under s. 7 of the *Charter*. I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the *Charter* is simply too uncertain, speculative and hypothetical to sustain a cause of action. Thus, although decisions of the federal cabinet are reviewable by the courts under the *Charter*, and the government bears a general duty to act in accordance with the *Charter's* dictates, no duty is imposed on the Canadian government by s. 7 of the *Charter* to refrain from permitting the testing of the cruise missile.

I

The Appellants' Statement of Claim

4. The relevant portion of the appellants' statement of claim is found in paragraph 7 thereof. The deprivation of s. 7 *Charter* rights alleged by the appellants and the facts they advance to support this deprivation are described as follows:

> 7. The plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their

members and all Canadians, specifically their right to security of the person and life in that:

(a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;

(b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;

(c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;

(d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;

(e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

Section 7 of the *Charter* provides in English:

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.

and in French:

> **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

5. Before turning to an examination of the appellants' allegations concerning the results of the decision to permit testing and its consequences on their rights under s. 7, I think it would be useful to examine the principles governing the striking out of a statement of claim and dismissal of a cause of action.

(a) Striking Out a Statement of Claim

6. The respondents, by a motion pursuant to Rule 419(1)(*a*) of the *Federal Court Rules*, moved for an order to strike out the appellants' statement of claim as disclosing no reasonable cause of action. Rule 419(1)(*a*) reads as follows:

> *Rule 419.* (1) The Court may at any stage of an action order any pleading to be struck out, with or without leave to amend, on the ground that
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be,...

7. The most recent and authoritative statement of the principle applicable to determine when a statement of claim may be struck out is that of Estey J. in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (App. Div.)

8. Madame Justice Wilson in her reasons in the present case [at p. 486] summarized the relevant principles as follows:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed".

9. I agree with Madame Justice Wilson that, regardless of the basis upon which the appellants advance their claim for declaratory relief--whether it be s. 24(1) of the *Charter*, s. 52 of the *Constitution Act, 1982*, or the common law--they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the *Charter*.

10. In short then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian government has caused a violation or a threat of violation of their rights under the *Charter*.

(b) <u>The Allegations of the Statement of Claim</u>

11. The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict, and thus violates the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter*.

12. As a preliminary matter, it should be noted that the exact nature of the deprivation of life and security of the person that the appellants rely upon as the legal foundation for the violation of s. 7 they allege is not clear. There seem to be two possibilities. The violation could be the result of actual deprivation of life and security of the person that would occur in the event of a nuclear attack on Canada, or it could be the result of general insecurity experienced by all people in Canada as a result of living under the increased threat of nuclear war.

13. The first possibility is apparent on a literal reading of the statement of claim. The second possibility, however, appears to be more consistent with the appellants' submission at p. 31 of their factum, that:

> ...at the minimum, the above allegations show [in paragraph 7 of the statement of claim] that there is a "threat" to the life and security of the Appellants which "threat", depending upon the construction of the concept "infringe" or "deny" in Section 7 [*sic*], could arguably constitute an infringement or denial of their right to life and security of the person. The amendment to the Statement of Claim, rejected by the Court of Appeal, would have made infringement or denial more explicit when it states: "The very testing of the cruise missile *per se* in Canada endangers the *Charter of Rights and Freedoms* Section 7: (sic) Rights".

14. I believe that we are obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.

15. Thus, I am prepared to accept that the appellants intended both of these possible deprivations as a basis for the violation of s. 7. It is apparent, however, that the violation of s. 7 alleged turns upon an actual increase in the risk of nuclear war, resulting from the federal cabinet's decision to permit the testing of the cruise missile.

Thus, to succeed at trial, the appellants would have to demonstrate, *inter alia*, that the testing of the cruise missile would cause an increase in the risk of nuclear war. It is precisely this link between the cabinet decision to permit the testing of the cruise and the increased risk of nuclear war which, in my opinion, they cannot establish. It will not be necessary therefore to address the issue of whether the deprivations of life and security of the person advanced by the appellants could constitute violations of s. 7.

16. As I have noted, both interpretations of the nature of the infringement of the appellants' rights are founded on the premise that <u>if</u> the Canadian government allows the United States government to test the cruise missile system in Canada, <u>then</u> there will be an increased risk of nuclear war. Such a claim can only be based on the assumption that the net result of all of the various foreign powers' reactions to the testing of the cruise missile in Canada will be an increased risk of nuclear war.

17. The statement of claim speaks of weapons control agreements being "practically unenforceable", Canada being "more likely to be the target of a nuclear attack", "increasing the likelihood of either a pre-emptive strike or an accidental firing, or both", and "escalation of the nuclear arms race". All of these eventualities, culminating in the increased risk of nuclear war, are alleged to flow from the Canadian government's single act of allowing the United States to test the cruise missile in Canada.

18. Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to

permit the testing of the cruise and the results that the appellants allege could never be proven.

19. An analysis of the specific allegations of the statement of claim reveals that they are all contingent upon the possible reactions of the nuclear powers to the testing of the cruise missile in Canada. The gist of paragraphs (a) and (b) of the statement of claim is that verification of the cruise missile system is impossible because the missile cannot be detected by surveillance satellites, and that, therefore, arms control agreements will be unenforceable. This is based on two major assumptions as to how foreign powers will react to the development of the cruise missile: first, that they will not develop new types of surveillance satellites or new methods of verification, and second, that foreign powers will not establish new modes of co-operation for dealing with the problem of enforcement. With respect to the latter of these points, it is just as plausible that lack of verification would have the effect of enhancing enforceability than of undermining it, since an inability on the part of nuclear powers to verify systems like the cruise could precipitate a system of enforcement based on co-operation rather than surveillance.

20. As for paragraph (c), even if it were the case that the testing of the air-launched cruise missile would result in an increased American military presence and interest in Canada, to say that this would make Canada more likely to be the target of a nuclear attack is to assume certain reactions of hostile foreign powers to such an increased American presence. It also makes an assumption about the degree to which Canada is already a possible target of nuclear attack. Given the impossibility of determining how an independent sovereign nation might react, it can only be a matter

of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other.

21. Paragraph (d) assumes that foreign states will not develop their technology in such a way as to meet the requirements of effective detection of the cruise and that there will therefore be an increased likelihood of pre-emptive strike or an accidental firing, or both. Again, this assumption concerns how foreign powers are likely to act in response to the development of the cruise. It would be just as plausible to argue that foreign states would improve their technology with respect to detection of missiles, thereby decreasing the likelihood of accidental firing or pre-emptive strike.

22. Finally, paragraph (e) asserts that the development of the cruise will lead to an escalation of the nuclear arms race. This again involves speculation based on assumptions as to how foreign powers will react. One could equally argue that the cruise would be the precipitating factor in compelling the nuclear powers to negotiate agreements that would lead to a de-escalation of the nuclear arms race.

23. One final assumption, common to all the paragraphs except (c), is that the result of testing of the cruise missile in Canada will be its development by the United States. In all of these paragraphs, the alleged harm flows from the production and eventual deployment of the cruise missile. The effect that the testing will have on the development and deployment of the cruise can only be a matter of speculation. It is possible that as a result of the tests, the Americans would decide <u>not</u> to develop and deploy the cruise since the very reason for the testing is to establish whether the missile is a viable weapons system. Similarly, it is possible that the Americans would develop the cruise missile even if testing were not permitted by the Canadians.

24. In the final analysis, exactly what the Americans will decide to do about development and deployment of the cruise missile, whether tested in Canada or not, is a decision that they, as an independent and sovereign nation, will make for themselves. Even with the assistance of qualified experts, a court could only speculate on how the American government may make this decision, and how important a factor the results of the testing of the cruise in Canada will be in that decision.

25. What can be concluded from this analysis of the statement of claim is that all of its allegations, including the ultimate assertion of an increased likelihood of nuclear war, are premised on assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of radical uncertainty, and continually changing circumstances, will react to the Canadian government's decision to permit the testing of the cruise missile.

26. The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact. In brief, it is simply not possible for a court, even with the best available evidence, to do more than speculate upon the likelihood of the federal cabinet's decision to test the cruise missile resulting in an increased threat of nuclear war.

(c) The Rule that Facts in a Statement of Claim Must be Taken as Proven

27. We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, *supra*, to take as true the appellants' allegations concerning the possible

consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

II

The Cabinet's Decision to Permit the Testing of the Cruise Missile and the Application of the *Charter of Rights and Freedoms*

(a) Application of the *Charter* to Cabinet Decisions

28. I agree with Madame Justice Wilson that cabinet decisions fall under s. 32(1)(*a*) of the *Charter* and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*. Specifically, the cabinet has a duty to act in a manner consistent with 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.

(b) The Absence of a Duty on the Government to Refrain from Allowing Testing

29. I do not believe the action impugned in the present case can be characterized as contrary to the duties of the executive under the *Charter*. Section 7 of the *Charter* cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act.

30. The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.

31. The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:

> 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
>
> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts": (*The Law of Declaratory Judgments* (1978), at p. 179).

32. None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,

> ...no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty....

33. Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In *Solosky*, *supra*, one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present

challenge to this order. This Court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The Court made it clear, however, at p. 832:

> ... that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise.

(Emphasis added.)

34. A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, *Injunctions and Specific Performance* (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective at pp. 30-31:

> All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered ....
>
> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet*--because he fears--and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

35. The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": Sharpe, *supra*, at p. 31. In *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652, at p. 665, *per* Lord Upjohn, the House of Lords laid down four general propositions concerning the

circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:

> 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

36. It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

37. In the present case, the speculative nature of the allegation that the decision to test the cruise missile will lead to an increased threat of nuclear war makes it manifest that no duty is imposed on the Canadian government to refrain from permitting the testing. The government's action simply could not be proven to cause the alleged violation of s. 7 of the *Charter* and, thus, no duty can arise.

III

Justiciability

38. The approach which I have taken is not based on the concept of justiciability. I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of

disputes. I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts. My concerns in the present case focus on the impossibility of the Court finding, on the basis of evidence, the connection, alleged by the appellants, between the duty of the government to act in accordance with the *Charter of Rights and Freedoms* and the violation of their rights under s. 7. As stated above, I do not believe the alleged violation--namely, the increased threat of nuclear war--could ever be sufficiently linked as a factual matter to the acknowledged duty of the government to respect s. 7 of the *Charter*.

IV

Section 52 of the *Constitution Act, 1982* and Section 1 of the *Charter*

39. I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the *Charter* is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52. Equally, it is not necessary for the resolution of this case to express any opinion on the application of s. 1 of the *Charter* or the appropriate principles for its interpretation.

V

Conclusion

40. I would accordingly dismiss the appeal with costs.

The following are the reasons delivered by

41. WILSON J.--This litigation was sparked by the decision of the Canadian government to permit the United States to test the cruise missile in Canada. It raises issues of great difficulty and considerable importance to all of us.

1. The Facts

42. The appellants are a group of organizations and unions claiming to have a collective membership of more than 1.5 million Canadians. They allege that a decision made by the Canadian government on July 15, 1983 to allow the United States to test cruise missiles within Canada violates their constitutional rights as guaranteed by the *Canadian Charter of Rights and Freedoms*. More specifically, quoting from their statement of claim:

> 7. The Plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:
>
> (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
>
> (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
>
> (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which

would result in making Canada more likely to be the target of a nuclear attack;

(d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;

(e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

43. The plaintiffs, in addition to declaratory relief, seek consequential relief in the nature of an injunction and damages. The defendants, by a motion pursuant to Rule 419(1) of the *Federal Court Rules*, moved to strike out the plaintiffs' statement of claim and to dismiss it as disclosing no reasonable cause of action. Cattanach J. dismissed the defendants' motion to strike on the grounds that the *Charter* applied to the Government of Canada, including executive acts of the cabinet, and that the statement of claim contained "the germ of a cause of action" and raised a "justiciable issue". The Federal Court of Appeal unanimously allowed the defendants' appeal.

2. The Judgment Appealed From

44. Each of the five judges who sat on the appeal to the Federal Court of Appeal delivered separate reasons for allowing the appeal. Four of the five (Pratte, Le Dain, Marceau and Hugessen JJ.) held that a breach of s. 7 of the *Charter* must involve a failure to comply with the principles of fundamental justice and the appellants had not alleged any such failure.

45. Three of the justices (Pratte, Marceau and Hugessen JJ.) were of the opinion that the facts as alleged did not constitute a violation of the right to life, liberty and security of the person as guaranteed by s. 7. Pratte and Hugessen JJ. thought that any breach of s. 7 would only occur as the result of actions by foreign powers who were not bound by the *Charter*. Pratte J. went further and stated that the only "liberty and security of the person" that was protected by s. 7 was security against arbitrary arrest or detention. Marceau J. felt that s. 7 could never have "any higher mission than that of protecting the life and the freedom of movement of the citizens against arbitrary action and despotism by people in power".

46. Two of the justices (Ryan and Le Dain JJ.) would have allowed the appeal on the fundamental ground that the issue was inherently non-justiciable and therefore incapable of adjudication by a court. Ryan J. thought that the question whether national security was impaired, and hence whether the plaintiffs' own personal security had been affected, was not triable because it was not susceptible of proof. Le Dain J. took the central issue to be the effect of testing cruise missiles on the risk of nuclear conflict, a matter which he asserted to be non-justiciable as involving factors either inaccessible to a court or incapable of being evaluated by it. The other three judges did not directly address this point.

47. Marceau J. would have allowed the appeal on the additional ground that the *Charter* did not give the courts a power to interfere with an exercise of the royal prerogative, especially when issues of defence and national security were involved. However, a majority of the Court (Pratte, Le Dain and Ryan JJ.) was of the opinion that the *Charter* did apply to decisions taken in the exercise of the royal prerogative. Hugessen J. did not deal with this question.

48. None of the five judges was prepared to say that the cabinet's decision to test the cruise missile was unreviewable because it involved a "political question". Pratte and Marceau JJ. expressly rejected this argument, Le Dain and Hugessen JJ. did not consider it necessary to deal with it, and Ryan J. did not mention it.

3. The Issues

49. The issues to be addressed on the appeal to this Court may be conveniently summarized as follows:

> (1) Is a decision made by the Government of Canada in relation to a matter of national defence and foreign affairs unreviewable on any of the following grounds:
>
> (a) it is an exercise of the royal prerogative;
>
> (b) it is, because of the nature of the factual questions involved, inherently non-justiciable;
>
> (c) it involves a "political question" of a kind that a court should not decide?
>
> (2) Under what circumstances can a Statement of Claim seeking declaratory relief concerning the constitutionality of a law or governmental decision be struck out as disclosing no cause of action?
>
> (3) Do the facts as alleged in the Statement of Claim, which must be taken as proven, constitute a violation of s. 7 of the *Canadian Charter of Rights and Freedoms*? and

(4) Do the plaintiffs have a right to amend the Statement of Claim before the filing of a Statement of Defence?

(1) Is the Government's Decision Reviewable?

(a) The Royal Prerogative

50. The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the *Constitution Act, 1867* the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(*a*) the *Charter* applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", the *Charter's* application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercice of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued, the limiting phrase "within the authority of Parliament" would be deprived of any effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words "within the authority of the legislature of each province" in s. 32(1)(*b*), are merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. They describe the subject-matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action. As Le Dain J. points out, the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal

prerogative, and since the former clearly fall within the ambit of the *Charter*, I conclude that the latter do so also.

(b) Non-Justiciability

51. Le Dain and Ryan JJ. in the Federal Court of Appeal were of the opinion that the issues involved in this case are inherently non-justiciable, either because the question whether testing the cruise missile increases the risk of nuclear war is not susceptible of proof and hence is not triable (*per* Ryan J.) or because answering that question involves factors which are either inaccessible to a court or are of a nature which a court is incapable of evaluating (*per* Le Dain J.) To the extent that this objection to the appellants' case rests on the inherent evidentiary difficulties which would obviously confront any attempt to prove the appellants' allegations of fact, I do not think it can be sustained. It might well be that, if the issue were allowed to go to trial, the appellants would lose simply by reason of their not having been able to establish the factual basis of their claim but that does not seem to me to be a reason for striking the case out at this preliminary stage. It is trite law that on a motion to strike out a statement of claim the plaintiff's allegations of fact are to be taken as having been proved. Accordingly, it is arguable that by dealing with the case as they have done Le Dain and Ryan JJ. have, in effect, made a presumption against the appellants which they are not entitled, on a preliminary motion of this kind, to make.

52. I am not convinced, however, that Le Dain and Ryan JJ. were restricting the concept of non-justiciability to difficulties of evidence and proof. Both rely on Lord Radcliffe's judgment in *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 (H.L.), and especially on the following passage at p. 151:

> The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interests. I may add that I can think of few issues which present themselves in less triable form. It would be ingenuous to suppose that the kind of evidence that the appellants wanted to call could make more than a small contribution to its final solution. The facts which they wished to establish might well be admitted: even so, throughout history men have had to run great risk for themselves and others in the hope of attaining objectives which they prize for all. The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends on an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.

(Emphasis added.)

In my opinion, this passage makes clear that in Lord Radcliffe's view these kinds of issues are to be treated as non-justiciable not simply because of evidentiary difficulties but because they involve moral and political considerations which it is not within the province of the courts to assess. Le Dain J. maintains that the difficulty is one of judicial competence rather than anything resembling the American "political questions" doctrine. However, in response to that contention it can be pointed out that, however unsuited courts may be for the task, they are called upon all the time to decide questions of principle and policy. As Melville Weston points out in "Political Questions," 38 *Harv. L. Rev.* 296 (1925), at p. 299:

> The word "justiciable" ... is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to a tribunal having an established procedure, with an orderly presentation of such evidence as is available, for the purpose of an adjudication from which practical consequences in human conduct are to follow. For example, when nations decline to submit to arbitration or to the compulsory jurisdiction of a proposed international tribunal those questions of honor or interest which they call

> "non-justiciable", they are really avoiding that broad sense of the word, but what they mean is a little less clear. Probably they mean only that they will not, or deem they ought not, endure the presentation of evidence on such questions, nor bind their conduct to conform to the proposed adjudications. So far as "non-justiciable" is for them more than an epithet, it expresses a sense of a lack of fitness, and not of any inherent impossibility, of submitting these questions to judicial or *quasi*-judicial determination.

53. In the 1950's and early 1960's there was considerable debate in Britain over the question whether restrictive trade practices legislation gave rise to questions which were subject to judicial determination: see Marshall, "Justiciability," in *Oxford Essays in Jurisprudence* (1961), ed. A.G. Guest; Summers, "Justiciability" (1963), 26 *M.L.R.* 530; Stevens, "Justiciability: The Restrictive Practices Court Re-Examined," [1964] *Public Law* 221. I think it is fairly clear that the British restrictive trade practices legislation did not involve the courts in the resolution of issues more imponderable than those facing American courts administering the *Sherman Act*. Indeed, there is significantly less "policy" content in the decisions of the courts in those cases than there is in the decisions of administrative tribunals such as the Canadian Transport Commission or the CRTC. The real issue there, and perhaps also in the case at bar, is not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness of the use of judicial techniques for such purposes.

54. I cannot accept the proposition that difficulties of evidence or proof absolve the Court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must rather than on whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us. I will return to this question later.

(c) The Political Questions Doctrine

55. It is a well established principle of American constitutional law that there are certain kinds of "political questions" that a court ought to refuse to decide. In *Baker v. Carr*, 369 U.S. 186 (1962), at pp. 210-11, Brennan J. discussed the nature of the doctrine in the following terms:

> We have said that "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman* v. *Miller*, 307 U.S. 433, 454-455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

At page 217 he said:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

While one or two of the categories of political question referred to by Brennan J. raise the issue of judicial or institutional competence already referred to, the underlying

theme is the separation of powers in the sense of the proper role of the courts *vis-à-vis* the other branches of government. In this regard it is perhaps noteworthy that a distinction is drawn in the American case law between matters internal to the United States on the one hand and foreign affairs on the other. In the area of foreign affairs the courts are especially deferential to the executive branch of government: see *e.g. Atlee v. Laird*, 347 F.Supp. 689 (1972) (U.S. Dist. Ct.), at pp. 701 *ff.*

56. While Brennan J.'s statement, in my view, accurately sums up the reasoning American courts have used in deciding that specific cases did not present questions which were judicially cognizable, I do not think it is particularly helpful in determining when American courts will find that those factors come into play. In cases from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to *United States v. Nixon*, 418 U.S. 683 (1974), the Court has not allowed the "respect due coordinate branches of government" to prevent it from rendering decisions highly embarrassing to those holding executive or legislative office. In *Baker v. Carr* itself, *supra*, Frankfurter J., in dissent, expressed concern that the judiciary could not find manageable standards for the problems presented by the reapportionment of political districts. Indeed, some would say that the enforcement of the desegregation decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), gave rise to similar problems of judicial unmanageability. Yet American courts have ventured into these areas undeterred.

57. Academic commentators have expended considerable effort trying to identify when the political questions doctrine should apply. Although there are many theories (perhaps best summarized by Professor Scharpf in his article "Judicial Review and the Political Question: A Functional Analysis," 75 *Yale L.J.* 517 (1966)), I think it is fair to say that they break down along two broad lines. The first, championed by

scholars such as Weston, "Political Questions," *supra*, and Wechsler, *Principles, Politics, and Fundamental Law* (1961); Wechsler, Book Review, 75 *Yale L.J.* 672 (1966), define political questions principally in terms of the separation of powers as set out in the Constitution and turn to the Constitution itself for the answer to the question when the Courts should stay their hand. The second school, represented by Finkelstein, "Judicial Self-Limitation," 37 *Harv. L.Rev.* 338 (1924), and Bickel *The Least Dangerous Branch* (1962), especially chapter 4, "The Passive Virtues," roots the political questions doctrine in what seems to me to be a rather vague concept of judicial "prudence" whereby the courts enter into a calculation concerning the political wisdom of intervention in sensitive areas. More recently, commentators such as Tigar, "Judicial Power, the 'Political Question Doctrine,' and Foreign Relations," 17 *U.C.L.A. L.R.* 1135 (1970), and Henkin, "Is There a `Political Question' Doctrine?" 85 *Yale L.J.* 597 (1976), have doubted the need for a political questions doctrine at all, arguing that all the cases which were correctly decided can be accounted for in terms of orthodox separation of powers doctrine.

58. Professor Tigar in his article suggests that the political questions doctrine is not really a doctrine at all but simply "a group of quite different legal rules and principles, each resting in part upon deference to the political branches of government" (p. 1163). He sees Justice Brennan's formulation of the doctrine in *Baker v. Carr*, *supra*, as an "unsatisfactory effort to rationalize a collection of disparate precedent" (p. 1163).

59. In the House of Lords in *Chandler*, *supra*, Lord Devlin expressed a similar reluctance to retreat from traditional techniques in the interpretation of the phrase "purpose prejudicial to the safety or interests of the state..." in the *Official Secrets Act,*

1911. His colleagues, in particular Lord Radcliffe and Lord Reid, seem to have been of the view that in matters of defence the Crown's opinion as to what was prejudicial to the safety or interests of the State was conclusive upon the courts. Lord Devlin agreed with the result reached by his colleagues on the facts before him, and with the observation of Lord Parker on the Court of Criminal Appeal ([1962] 2 All E.R. 314, at pp. 319-20) that "the manner of the exercise of... [the Crown's] prerogative powers [over the disposition and armament of the military] cannot be inquired into by the courts, whether in a civil or a criminal case...." ([1962] 3 All E.R. 142, at p. 157) but went on to make three observations in clarification of his position.

60. Lord Devlin's first observation was that the principle that the substance of discretionary decisions is not reviewable in the courts is one basic to administrative law and is not confined to matters of defence or the exercise of the prerogative. The second point was that even though review on the merits of a discretionary decision was excluded, that did not mean that judicial review was excluded entirely. The third comment was that the nature and effect of the principle of judicial review is "[to limit] the issue which the court has to determine...." ([1962] 3 All E.R. 142, at p. 158).

61. Lord Devlin then proceeded to apply these propositions to the case before him and asked what it was that the jury was required to determine. In his view "the fact to be proved is the existence of a purpose prejudicial to the state--not a purpose which `appears to the Crown' to be prejudicial to the state" ([1962] 3 All E.R. 142, at p. 158). He accordingly went on to conclude at p. 159:

> Consequently, the Crown's opinion as to what is or is not prejudicial in this case is just as inadmissible as the appellants'. The Crown's evidence about what its interests are is an entirely different matter. They can be proved by an officer of the Crown wherever it may be necessary to do so.

> In a case like the present, it may be presumed that it is contrary to the interests of the Crown to have one of its airfields immobilised just as it may be presumed that it is contrary to the interests of an industrialist to have his factory immobilised. The thing speaks for itself, as the Attorney-General submitted. But the presumption is not irrebuttable. Men can exaggerate the extent of their interests and so can the Crown. The servants of the Crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative. But in the present case there is nothing at all to suggest that the Crown's interest in the proper operation of its airfields is not what it may naturally be presumed to be or that it was exaggerating the perils of interference with their effectiveness.

(Emphasis added.)

62. It seems to me that the point being made by Lord Devlin, as well as by Tigar and Henkin in their writings, is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.

63. It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the *Constitution Act, 1867* and that the federal executive has the powers conferred upon it in ss. 9-15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case,

the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the *Charter*, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question": see Martin H. Redish, "Abstention, Separation of Powers, and the Limits of the Judicial Function," 94 *Yale L.J.* 71 (1984).

64. I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.

65. One or two hypothetical situations will, I believe, illustrate the point. Let us take the case of a person who is being conscripted for service during wartime and

has been ordered into battle overseas, all of this pursuant to appropriate legislative and executive authorization. He wishes to challenge his being conscripted and sent overseas as an infringement of his rights under s. 7. It is apparent that his liberty has been constrained and, if he is sent into battle, his security of the person and, indeed, his life are put in jeopardy. It seems to me that it would afford the conscriptee a somewhat illusory protection if the validity of his challenge is to be determined by the executive. On the other hand, it does not follow from these facts that the individual's rights under the *Charter* have been violated. Even if an individual's rights to life and liberty under s. 7 are interpreted at their broadest, it is clear from s. 1 that they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If the Court were of the opinion that conscription during wartime was a "reasonable limit" within the meaning of s. 1, a conscriptee's challenge on the facts as presented would necessarily fail.

66. By way of contrast, one can envisage a situation in which the government decided to force a particular group to participate in experimental testing of a deadly nerve gas. Although the government might argue that such experiments were an important part of our defence effort, I find it hard to believe that they would survive judicial review under the *Charter*. Equally we could imagine a situation during wartime in which the army began to seize people for military service without appropriate enabling legislation having been passed by Parliament. Such "press gang" tactics would, one might expect, be subject to judicial review even if the executive thought they were justified for the prosecution of the war.

67. Returning then to the present case, it seems to me that the legislature has assigned to the courts as a constitutional responsibility the task of determining whether

or not a decision to permit the testing of cruise missiles violates the appellants' rights under the *Charter*. The preceding illustrations indicate why the legislature has done so. It is therefore, in my view, not only appropriate that we decide the matter; it is our constitutional obligation to do so.

(2) In What Circumstances May a Statement of Claim Seeking Declaratory Relief Be Struck Out?

68. In order to put this issue in context it is necessary to review the procedural history of the case.

69. On July 20, 1983 the appellants filed a statement of claim seeking a declaration that their constitutional rights had been violated and consequential relief in the form of an injunction, damages and costs. The respondents moved on August 11, 1983 under Rule 419(1) of the *Federal Court Rules* to strike out the statement of claim primarily on the ground that it disclosed no reasonable cause of action. The statement was also alleged to be frivolous and vexatious and an abuse of the process of the Court. Cattanach J. denied the motion on September 15, 1983. He noted the requirement under Rule 408 that a statement of claim contain a precise statement of the material facts upon which the plaintiff relies and must stand or fall on the allegations of fact. He said that a statement of claim would not be struck out if the facts alleged were capable of constituting "the scintilla of a cause of action". He noted that by virtue of s. 32(1)(*a*) the *Charter* applies to the Parliament and government of Canada and by virtue of s. 24(1) the Court has jurisdiction to administer and provide appropriate remedies. He concluded that the statement of claim contained sufficient allegations to raise a justiciable issue and analogized the alleged liability of the

respondents to liability for extra-hazardous activities contemplated by the rule in *Rylands v. Fletcher*, [1861-73] All E.R. 1 (H.L.) He concluded that there was a "germ of a cause of action" disclosed in the statement of claim.

70. On September 19, 1983 the respondents appealed to the Federal Court of Appeal. On October 7, 1983 the appellants sought leave from the Court of Appeal to amend their statement of claim under Rule 1104 to include an allegation that the testing of the cruise missile in Canada *per se* violated the appellants' rights under s. 7 of the *Charter*. Pratte J. dimissed the application without reasons on October 11, 1983. The Federal Court of Appeal heard the case on November 28, 1983 and allowed the respondents' appeal for the reasons outlined earlier.

71. The appeal to this Court was heard on February 14 and 15, 1984. On March 6, 1984 the appellants applied to Muldoon J. for an injunction under Rule 469 of the *Federal Court Rules* to prevent testing until the case was decided. Muldoon J. concluded that until this Court decreed differently the law applicable to the matter was that the appellants' claim was non-justiciable. He held that in order to get an interlocutory injunction "cogent" evidence of a violation of a right had to be presented. The evidence presented was speculative only and could not establish a "real and proximate jeopardy" to the appellants' rights. There was nothing therefore to support the issue of an injunction.

72. The procedural issue before the Court then is: did the appellants' statement of claim disclose a reasonable cause of action within the meaning of Rule 419 of the *Federal Court Rules*?

(a) The Applicable Principle

73. Estey J. stated the applicable principle in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (App. Div.)

74. In *Shawn v. Robertson* (1964), 46 D.L.R. (2d) 363, a declaration was sought against a ministerial exercise of discretion. An application for striking out on the basis of no reasonable cause of action was made under the Ontario Rules. Grant J. stated, at p. 365:

> The principles to be applied by the Court in determining whether to exercise jurisdiction conferred by Rule 126 or not are set out in the following cases; in *Ross v. Scottish Union & National Insurance Co.* (1920), 53 D.L.R. 415 at pp. 421-2, 47 O.L.R. 308 at p. 316, Magee, J.A., states:
>
> That inherent jurisdiction is partly embodied in our Rule 124 (now R. 126) ... The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.
>
> And at p. 423 D.L.R., p. 317 O.L.R.: "To justify the use of Rule 124 ... it is not sufficient that the plaintiff is not likely to succeed at the trial."
>
> In *Gilbert Surgical Supply Co. and Gilbert v. Frank W. Horner Ltd.*, 34 C.P.R. 17, [1960] O.W.N. 289, 19 Fox Pat. C. 209, Aylesworth, J.A.,

> speaking for himself, Porter C.J.O., and LeBel, J.A., states as follows at p. 289 O.W.N.:
>
> He said that the action was novel and he could not agree that the defendant had shown the case to be one within the Rule. At this stage of litigation the Court could not conclude that the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown.

75. A case analogous to the present case, not in the nature of the issues involved but in the novelty of the alleged cause of action and the absence of precedent, is *McKay v. Essex Area Health Authority*, [1982] 2 All E.R. 771. In that case a pregnant mother contracted German measles in the early months of her pregnancy. Her doctor took blood samples from her which were tested by the defendant Health Authority but the infection was not diagnosed and the child was born severely disabled. The mother and child sued the doctor and the Health Authority for negligence, the child claiming damages for her "entry into a life in which her injuries are highly debilitating". The Master struck out the child's claim on the basis it disclosed no reasonable cause of action. His order was set aside on appeal, the judge holding that the defendants owed a duty of care to the child and her real claim was not that she had suffered damage by reason of "wrongful entry into life" but by reason of having been born deformed. This gave rise to a reasonable cause of action. An appeal to the Court of Appeal was allowed and the order of the Master striking out the claim restored.

76. Stephenson L.J. had to struggle with the question whether a child had a right not to be born deformed which in the case of a child deformed or disabled before birth by disease meant a right to be aborted. Counsel for the child submitted that this could not be viewed as a plain and obvious case susceptible of only one result, nor

could it be viewed as frivolous or vexatious; although it might be novel, it raised issues of real substance which ought to go to trial. His Lordship disagreed. He said at p. 778:

> Here the court is considering not `ancient law' but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at a trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendants' application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding.

(Emphasis added.)

77. It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs.

78. It has been suggested, however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The

question of the probable cause of a certain result is a good illustration and germane to the issues at hand. An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence: see *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.) Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. For example, in *Fleming v. Hislop* (1886), 11 A.C. 686, it was necessary to determine whether or not the finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' land would cause material discomfort and annoyance to the pursuers," was a finding of fact or a finding of law. It was argued that it could not be a finding of fact because it related to something that was "prospective, future, not actually in existence". The Earl of Selborne agreed that, since the thing had not actually happened, a finding of fact as a thing past was impossible. But it was nevertheless a finding of fact and "there is a fallacy in saying that, because the word `would' is a word of futurity, the words `would cause' do not mean something which is properly a fact" (p. 690). See also on causation as an issue of fact *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, *per* Lord Salmon, at pp. 489-90.

> The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

79. In my view, several of the allegations contained in the statement of claim are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts

or by expert testimony or "through the application of common sense principles": see *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350, at p. 363, *per* Lord Dunedin. We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage to prejudge that question. I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

(b) Declaratory Relief

80. This may be an appropriate point at which to consider the appellants' submission that in order to establish a reasonable cause of action in relation to their claim for declaratory relief as opposed to their claim for an injunction and damages, they do not have to allege in their statement of claim the violation of a right or the threat of a violation of a right. It is sufficient, they submit, that the plaintiff have standing, that a "serious constitutional issue" is raised, and that the declaration sought serves a useful purpose. In support of this contention the appellants rely on *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, and *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138. *Thorson* involved an alleged excess of legislative power by the Parliament of Canada as did the later case of *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265. Given the nature of such questions it is undoubtly true that no violation of a right need necessarily be involved.

81. Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

> ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant....

Borchard then goes to expand upon the concept of a "legal interest" at pp. 48-49:

> It is an essential condition of the right to invoke judicial relief that the plaintiff have a protectible interest. The fact that under declaratory procedure so many types of legal issues are presentable for determination which are incapable of any other form of relief, has imposed upon the courts at the outset the function of determining whether the facts justify the grant of judicial relief, and more particularly, whether the plaintiff has a "legal interest" in the relief he seeks. In the more familiar executory action, the legal interest is sought in the "cause of action," but, as already observed, the narrow scope often given to this ambiguous term has served to conceal from view the many occasions and situations in which a plaintiff not yet physically injured or one seeking escape from dilemma and uncertainty by a clarification of his legal position has need for judicial relief not of the traditional kind. The wider opportunity and necessity for judicial usefulness disclosed by the declaratory judgment make necessary either a more flexible and comprehensive connotation of the term "cause of action" or the employment of a less chameleonic term to indicate when the petitioner may be accorded judicial protection. Without losing sight of the necessity for jurisdictional facts, it is suggested that the term "legal interest" meets the need.

82. Where, however, the unconstitutionality of a law or an act is founded upon its conflict with a right, then the right must be alleged to have been violated. Such was the case in *Borowski* where a declaration was being sought to the effect that the abortion provisions in the *Criminal Code* contravened the right to life guaranteed by s. 1(*a*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. It was alleged in *Borowski* that rights were being violated even although they were the rights of human foetuses and not rights of the plaintiff. It seems to me that whenever a litigant raises a "serious constitutional issue" involving a violation of the *Charter* or the *Canadian*

Bill of Rights then, since what is being complained of is an alleged violation of a right, it follows almost by definition that the nature of the alleged violation must be asserted. Moreover, as the respondents point out, s. 24(1) of the *Charter* makes the infringement or denial of a right a pre-condition to obtaining relief in the courts under that section. That being so, it seems to follow that the infringement or denial complained of must be specifically pleaded.

83. The appellants submit, however, that while their consequential relief in the form of an injunction and damages is made pursuant to s. 24(1) of the *Charter*, their claim for declaratory relief is at large. It is not sought pursuant to that section in paragraph 9(c) of their statement of claim which merely seeks a declaration of unconstitutionality. It is, they submit, a separate cause of action at common law and also under s. 52 of the *Constitution Act, 1982* and can stand alone even if they fail in their claim for consequential relief under s. 24(1). They cite Rule 1723 of the *Federal Court Rules* which provides:

> *Rule 1723.* No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

84. The appellants acknowledge that a declaration of unconstitutionality is a discretionary remedy (*Solosky v. The Queen*, [1980] 1 S.C.R. 821) but say that the discretion lies with the trial court and is exercisable only after a trial on the merits. Accordingly, their claim for this relief should not have been struck out at the preliminary stage regardless of the fate of their other claims. However, as the respondents point out, declaratory relief is only discretionary in the sense that a court may refuse it even if the case for it has been made out: see Zamir, *The Declaratory*

Judgment (1962), at p. 193. The Court, therefore, on a motion to strike on the basis that no reasonable cause of action has been disclosed in the statement of claim is not in any sense usurping the discretionary power of the trial court.

(i) Inconsistency with the *Constitution Act, 1982*, s. 52(1)

85. Section 52(1) of the *Constitution Act, 1982*, provides:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

86. Section 52 would appear to have the same role in terms of imposing a constitutional limitation on law-making power in Canada as its predecessors, s. 2 of the *Colonial Laws Validity Act, 1865*, 28 & 29 Vict., c. 63 and s. 7 of the *Statute of Westminster, 1931*, 22 Geo. 5, c. 4 (R.S.C. 1970, App. II, No. 26): see La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 *Can. Bar Rev.* 19, at p. 28. Section 2 of the *Colonial Laws Validity Act 1865* provides:

> **2.** Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Section 7 of the *Statute of Westminster, 1931* provides:

> 7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
>
> (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.
>
> (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

Accordingly, Dickson J., as he then was, is unquestionably correct when he states in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 313:

> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme.

Dickson J. then goes on to note that where a declaration is sought under s. 52 to the effect that legislation is unconstitutional the standing requirements for constitutional litigation must of course be met.

87. If the appellants are relying on s. 52(1) of the *Constitution Act, 1982* as the source of their right to a declaration of unconstitutionality, which it would appear from their factum that they are, it is noted that that provision is directed to "laws" which are inconsistent with the provisions of the Constitution.

88. Counsel for the appellants submitted in oral argument that they should not be prejudiced in the relief sought by the absence of any law authorizing, ratifying or

implementing the agreement between Canada and the United States since legislation, they submitted, should have been passed. The government should not therefore be allowed to immunize itself against judicial review under s. 52 of the *Constitution Act, 1982* by its own omission to do that which it ought to have done.

89. This argument assumes, of course, that legislation was required and this does not appear to be so. The law in relation to treaty-making power was definitively established for Canada and the rest of the Commonwealth in *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions)*, [1937] A.C. 326, where Lord Atkin stated at pp. 347-48:

> It will be essential to keep in mind the distinction between (I.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.

(Emphasis added.)

90. A treaty, therefore, may be in full force and effect internationally without any legislative implementation and, absent such legislative implementation, it does not form part of the domestic law of Canada. Legislation is only required if some alteration in the domestic law is needed for its implementation: see R. St. J. Macdonald: "The Relationship between International Law and Domestic Law in Canada," in *Canadian Perspectives on International Law and Organization* (1974), eds. Macdonald, Morris and Johnston, p. 88.

91. The agreement in this case took the form of an "exchange of notes" between Allan Gotlieb, Canadian Ambassador to the United States and Kenneth W. Dam, Acting Secretary of State, The United States State Department. As Mr. Gotlieb points out in an article entitled "Canadian Treaty-Making: Informal Agreements and Interdepartmental Arrangements," in *Canadian Perspectives on International Law and Organization, supra*, at p. 230, Canadian treaty-making practice has been characterized by a movement away from formal, full-fledged governmental "treaties" and towards informal "exchange of notes" arrangements. There is nothing unusual, therefore, in the procedure adopted in relation to the cruise testing agreement.

92. Although little, if any, argument has been addressed in this case to the question whether the government's decision to permit testing of the cruise missile in Canada falls within the meaning of the word "law" as used in s. 52 of the *Constitution Act, 1982*, I am prepared to assume, without deciding, that it does. I am also prepared to assume that the appellants could establish their standing to bring an action under s. 52. The question remains, however, whether the appellants' claim raises a serious question of constitutional inconsistency. This in turn depends on the answer to the

question whether the government's decision violates the appellants' rights under s. 7. If it does not, there is no inconsistency with the provisions of the Constitution.

(ii) At common law

93. If the appellants' claim for declaratory relief is a claim at common law of the type upheld in *Dyson v. Attorney-General*, [1911] 1 K.B. 410, no issue arises as to whether or not there is a "law" implementing the cruise testing agreement. The common law action affords a means of attack on the acts of public officials who have allegedly exceeded their powers. However, in order to have standing to bring such an action a plaintiff must, as noted from Borchard, *supra*, be able to show that he or she will suffer injury to a right or legally protected interest from the conduct of such officials. The same point is made in de Smith, *Constitutional and Administrative Law* (4th ed.), at p. 604:

> The declaratory judgment is basically a twentieth-century judicial remedy and has come to be used for a great variety of purposes in public and private law. Declarations can be awarded in almost every situation where an injunction will lie--the most important exception is that interim relief cannot be granted by way of a declaration--and they extend to a number of situations where an injunction would be inappropriate (for example, because there is nothing to prohibit) or could not be obtained for other reasons (for example, because the prospective defendant was the Crown). The rules governing *locus standi* are in a state of confusion. In *Gouriet* v. *Union of Post Office Workers* [[1977] 3 All E.R. 70 (H.L.)] Mr. Gouriet eventually amended his claim to an application for a declaration that the Union of Post Office Workers was acting unlawfully in blocking mail from this country to South Africa. He was refused such a declaration. Lord Wilberforce said: '... there is no support for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and defendant concerning their legal respective rights and liabilities, either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him, or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff.'

(Emphasis added.)

I believe, therefore, that the appellants, even on the common law action for a declaration, must establish at least a threat of violation, if not an actual violation, of their rights under s. 7 of the *Charter* in order to bring a viable claim for declaratory relief against governmental action.

94. The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?" Is it plain and obvious that the plaintiffs' claim for declaratory or consequential relief cannot succeed?

(3) Could the Facts as Alleged Constitute a Violation of Section 7 of the *Charter*?

95. Section 7 of the *Canadian Charter of Rights and Freedoms* provides as follows:

> **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.

96. Whether or not the facts that are alleged in the appellants' statement of claim could constitute a violation of s. 7 is, of course, the question that lies at the heart

of this case. If they could not, then the appellants' statement of claim discloses no reasonable cause of action and the appeal must be dismissed. The appellants submit that on its proper construction s. 7 gives rise to two separate and presumably independent rights, namely the right to life, liberty and security of the person, and the right not to be deprived of such life, liberty and security of the person except in accordance with the principles of fundamental justice. In their submission, therefore, a violation of the principles of fundamental justice would only have to be alleged in relation to a claim based on a violation of the second right. As Marceau J. points out in his reasons, the French text of s. 7 does not seem to admit of this two-rights interpretation since only one right is specifically mentioned. Moreover, as the respondents point out, the appellants' suggestion does not accord with the interpretation that the courts have placed on the similarly structured provision in s. 1(*a*) of the *Canadian Bill of Rights*: see *e.g., Miller v. The Queen*, [1977] 2 S.C.R. 680, *per* Ritchie J., at pp. 703-04.

97. The appellants' submission, however, touches upon a number of important issues regarding the proper interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of interpretation arising under the *Charter* but I do not think it is necessary to deal with them in this case. It can, in my opinion, be disposed of without reaching these issues.

98. In my view, even an independent, substantive right to life, liberty and security of the person cannot be absolute. For example, the right to liberty, which I take to be the right to pursue one's goals free of governmental constraint, must accommodate the corresponding rights of others. The concept of "right" as used in the *Charter* postulates the inter-relation of individuals in society all of whom have the same right. The aphorism that "A hermit has no need of rights" makes the point. The concept of "right" also premises the existence of someone or some group against whom the right may be asserted. As Mortimer J. Adler expressed it in *Six Great Ideas* (1981), at p. 144:

> Living in organized societies under effective government and enforceable laws, as they must in order to survive and prosper, human beings neither have autonomy nor are they entitled to unlimited liberty of action. Autonomy is incompatible with organized society. Unlimited liberty is destructive of it.

99. The concept of "right" as used in the *Charter* must also, I believe, recognize and take account of the political reality of the modern state. Action by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens. It may be argued, for example, that the failure of government to limit significantly the speed of traffic on the highways threatens our right to life and security in that it increases the risk of highway accidents. Such conduct, however, would not, in my view, fall within the scope of the right protected by s. 7 of the *Charter*.

100. In the same way, the concept of "right" as used in the *Charter* must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both

its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state's citizens. Such steps, it seems to me, cannot have been contemplated by the draftsman of the *Charter* as giving rise to violations of s. 7. As John Rawls states in *A Theory of Justice* (1971), at p. 213:

> The government's right to maintain public order and security is ... a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them.

101. The rights under the *Charter* not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s. 1. As was pointed out by the Ontario Court of Appeal in *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225, at p. 244:

> ... the Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws....

There is no liberty without law and there is no law without some restriction of liberty: see Dworkin, *Taking Rights Seriously* (1977), p. 267. This paradox caused Roscoe Pound to conclude:

> There is no more ambiguous word in legal and juristic literature than the word right. In its most general sense it means a reasonable expectation involved in civilized life. [See *Jurisprudence*, vol. 4, (1959), p. 56.]

102. It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.

103. I agree with Le Dain J. that the essence of the appellants' case is the claim that permitting the cruise missile to be tested in Canada will increase the risk of nuclear war. But even accepting this allegation of fact as true, which as I have already said I think we must do on a motion to strike, it is my opinion for the reasons given above that this state of affairs could not constitute a breach of s. 7. Moreover, I do not see how one can distinguish in a principled way between this particular risk and any other danger to which the government's action *vis-à-vis* other states might incidentally subject its citizens. A declaration of war, for example, almost certainly increases the risk to most citizens of death or injury. Acceptance of the appellants' submissions, it seems to me, would mean that any such declaration would also have to be regarded as a violation of s. 7. I cannot think that that could be a proper interpretation of the *Charter*.

104. This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s. 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the

populace--as, for example, if it were being tested with live warheads--I think that might well raise different considerations. A court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under s. 1 of the *Charter*. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.

(4) Can the Statement of Claim be Amended?

105. The appellants were denied leave by Pratte J. to amend their statement of claim by adding the following:

> The very testing of the cruise missiles *per se* in Canada endangers the Charter of Rights and Freedoms Section 7: Rights.

106. Since this is a conclusion of law, not fact, it cannot in my view affect the factual allegations which the Court must accept as proved in order to decide whether the statement of claim should be struck out. We do not know the basis on which Pratte J. refused the amendment. He gave no reasons, nor was he obliged to. The matter was

purely discretionary under Rule 1104. Certainly conclusions of law may be pleaded: see *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221, *per* Gale J. at pp. 221-22, but they do not form part of the factual allegations which must be taken as proved for purposes of a motion to strike. No appeal was taken from the order of Pratte J.

107. Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421 and that they should not be prejudiced with respect to this right because they invoked the discretion of the Court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.

108. The point, however, may be academic. The proposed amendment amounts to no more than an assertion of the conclusion which the appellants submit the Court ought to come to on the main issue in the case. Since the Court must address that issue in any event, the addition of the suggested amendment could, it seems to me, make no difference one way or the other to the appellants' case.

Conclusions

109. In summary, it seems to me that the issues raised on the appeal are to be disposed of as follows:

(1) The government's decision to permit testing of the cruise missile in Canada cannot escape judicial review on any of the grounds advanced;

(2) The statement of claim may be struck out if the facts as alleged do not disclose a reasonable cause of action which in this case could be either

(a) a cause of action under s. 24(1) of the *Charter*; or

(b) a cause of action for declaratory relief at common law on the principle of *Dyson v. Attorney-General*, *supra*; or

(c) a cause of action under s. 52(1) of the *Constitution Act, 1982* for a declaration of unconstitutionality.

(3) Taking the facts alleged as proven, they could not constitute a violation of s. 7 of the *Charter* so as to give rise to a cause of action under s. 24(1);

(4) The appellants could not establish their status to sue at common law for declaratory relief for the same reason that they could not establish a cause of action under s. 24(1); and

(5) The appellants could not establish a cause of action for declaratory relief under s. 52(1) since the facts as alleged could not constitute a violation of s. 7 and therefore no inconsistency with the provisions of the Constitution could be established.

110. I would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Karam, Tannis, Greenspon, Vanier.

Solicitor for the respondents: R. Tassé, Ottawa.

TAB 6

DATE: 1998079
DOCKET: C11823

COURT OF APPEAL FOR ONTARIO

ABELLA, AUSTIN and CHARRON JJ.A.

B E T W E E N:	)	
	)	**Ian J. Roland,**
THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION	)	**Martin J. Doane and Pamela Shime,**
	)	**for the appellant**
Appellant (Applicant)	)	
	)	
and	)	**Donald MacIntosh and David Sgayias,**
THE ATTORNEY GENERAL OF CANADA	)	**for the respondent**
	)	
Respondent	)	
	)	**Heard: November 4 and 5, 1997**
	)	

CHARRON J.A.:

[1] The appellant, the Corporation of the Canadian Civil Liberties Association, was granted standing to bring an application challenging the constitutional validity of certain investigative powers contained in the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (the "Act"), and seeking injunctive relief. The issue of standing was determined prior to the hearing as a preliminary matter. The decision is reported at (1990), 74 O.R. (2d) 609 (H.C.J.) [References are to this decision unless otherwise stated.]. Following a hearing, the application was dismissed: (1992), 8 O.R. (3d) 289 (Gen. Div.).

[2] The appellant appeals from the dismissal of the application. The respondent, the Attorney General of Canada, cross-appeals on the issue of standing.

[3] I have come to the conclusion that the issue of standing is determinative in this case. The main issues argued by counsel in relation to the appeal on the substantive

merits of the application are more properly directed to the question of standing. In my view, the motions judge erred in granting the appellant standing to bring its application. In the result, I would allow the cross-appeal and dismiss the appellant's application on the ground of no standing. Consequently, I would also dismiss the appeal on the same ground.

A. The Applicant

[4] The appellant is a non-profit corporation, established pursuant to the laws of Canada, the objects of which are identical to those of the Canadian Civil Liberties Association (the "Association"). In its material, the appellant states that its governance is closely linked to that of the Association. The appellant essentially relies on the status of the Association in support of its application for standing in this case.

[5] The appellant describes the Association in its factum as follows:

> The Association is a national organization with more than sixty-five hundred (6,500) individual members. The Association's major objectives include the promotion of legal protection of the freedom and dignity of the individual against unreasonable invasion of public authority and the advancement of fair procedures for the determination of individual rights and obligations. The Association has long had a serious concern with the powers accorded the police and national security agencies in Canada. It has publicly addressed how far the powers of a national security agency may impinge on basic civil liberties such as those of speech, freedom of association and reasonable expectation of privacy.

[6] The motions judge recognized the Association's "long history of involvement in the public debate over the constitutional validity of the CSIS legislation" (at p. 617) and the contributions to the debate of its General Counsel, Alan Borovoy. It would appear from the reasons of the motions judge that the appellant and the Association were treated as one and the same for the purpose of the application for standing. The parties on appeal have chosen to confine their argument to their respective facta on the issue of standing and no issue is raised on this question in either factum. In these circumstances, I am prepared to adopt the same approach as the motions judge and consider the appellant's interest to be the same as that of the Association.

B. Nature and Scope of the Application

[7] The appellant seeks a declaration that ss.12 and 21 to 26 inclusive of the Act are unconstitutional and of no force and effect to the extent that they authorize the use of intrusive surveillance techniques of lawful activities of Canadian citizens and permanent residents. It is contended that the impugned legislative provisions violate the freedoms of speech, assembly and association and the right to be secure against unreasonable searches or seizures as guaranteed under ss. 2(b), (c), (d) and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The appellant has abandoned its claim that the Act violated s. 7 *Charter* rights. The appellant also relies on s. 52(1) of the *Constitution Act.* The relevant constitutional provisions read as follows:

> 2. Everyone has the following fundamental freedoms:
>
> . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[8] The appellant is also seeking injunctive relief restraining the Canadian Security Intelligence Service ("CSIS") from acting under the impugned provisions of the Act. Specifically, the appellant seeks the following relief:

> (a) A declaration that s. 12 of the Act is unconstitutional and of no force and effect to the extent that it

authorizes CSIS to use the intrusive surveillance techniques of electronic bugging, surreptitious search, mail opening, invasion of confidential records, and the deployment of covert informants, against Canadian citizens and permanent residents, in the course of investigating "activities" that are not unlawful but are defined as "threats to the security of Canada" in s. 2 of the Act.;

(b) A declaration that ss. 21 to 26 of the Act are unconstitutional and of no force and effect, to the extent that they provide for the issuance of warrants that may authorize the use of the foregoing intrusive surveillance techniques against Canadian citizens and permanent residents, in the course of investigating "activities" that are not unlawful but are defined as "threats to the security of Canada" in s. 2 of the Act;

(c) A permanent injunction restraining CSIS or any of its employees or agents from using the foregoing intrusive surveillance techniques against Canadian citizens or permanent residents in the course of investigating "activities" that are not unlawful but are defined as "threats to the security of Canada" in s. 2 of the Act.

[9] CSIS is mandated, pursuant to ss.12 and 21 to 26 of the Act, to collect information respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, to report to and advise the Government of Canada. "Threats to the security of Canada" are defined in s. 2 of the Act:

"Threats to the security of Canada" means

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada

> and are clandestine or deceptive or involve a threat to any person,
>
> (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state, and
>
> (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,
>
> but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d). [Emphasis added.]

[10] The appellant argues that certain key components of that definition, when combined with some of the enabling provisions found in ss.12 and 21 to 26 of the Act, in effect permit techniques of intrusive surveillance for use against Canadian citizens and permanent residents which exceed any clearly demonstrated need. The appellant therefore relies on the overbreadth of the legislative provisions as a basis for establishing a violation of *Charter* rights and freedoms. The impugned provisions of the Act are appended to this decision for ease of reference.

[11] The appellant concedes that there is a need for the creation of a government intelligence service. However, it is the appellant's position that the powers of surveillance available to CSIS against Canadian citizens and permanent residents in regard to their *lawful* activities are "excessive and needlessly broad." The appellant *does not* take issue with CSIS surveillance in relation to *unlawful* activities of Canadian citizens and permanent residents, or in relation to *activities*, lawful or unlawful, *of foreign visitors*.

[12] The appellant further restricts its application to the use of *intrusive* techniques of surveillance authorized under the Act. It takes issue with the express authority under the Act for the use by CSIS, pursuant to judicial warrant, of powers such as electronic surveillance, mail opening, surreptitious searches and the invasion of confidential records. The appellant also takes issue with the deployment of covert informants, a

surveillance technique CSIS can use without judicial authorization. The appellant *does not* take issue with the use of *overt* surveillance techniques.

[13] In short, the appellant contends that the very existence of intrusive surveillance techniques under the Act inhibit and deter individuals from expressing themselves freely and participating in legitimate activities. The appellant expresses concern that, due to the surreptitious nature of the impugned CSIS surveillance techniques, its members and other Canadian citizens and permanent residents will not be able to gather satisfactory proof that their constitutional rights have been threatened or violated by CSIS and will therefore be unable to seek judicial protection of their rights and freedoms. Hence, it argues that it is in the best position to bring these issues before the court. The appellant states that it brings this application in order to secure and promote the constitutionally guaranteed rights of freedom of speech, freedom of assembly, freedom of association and the right to be secure against unreasonable searches or seizures.

[14] In support of its application, the appellant relies on the alleged overbreadth of the impugned provisions themselves and on evidence which purports to show the adverse effects of the legislation. This evidence consists of four affidavits and a number of excerpts of reports prepared by the Security Intelligence Review Committee ("SIRC"). SIRC is an independent body established under the Act for the purpose of reviewing the performance of CSIS; ensuring that its activities are carried out in accordance with the Act and that the activities do not involve any unreasonable or unnecessary exercise by CSIS of its powers; and conducting investigations into complaints and other matters with respect to CSIS.

[15] I will review this evidence in further detail later in this judgment; however, for the purpose of this overview, I will reproduce the motions judge's summary of the appellant's evidence (at p. 619):

> The applicant has put before the court affidavit evidence and copies of the SIRC Annual Reports for 1986-87 to 1988-89 inclusive, which purport to show that the use of intrusive surveillance techniques and other such powers have a "chilling effect" on the willingness of citizens to exercise their right to engage in lawful advocacy, protest or dissent. The applicant submits that since individuals proposing to do no more than engage in advocacy and dissent do not always know whether their lawful activities will be monitored, the cautious among them may, and do, choose to refrain from

> engaging in legitimate political activities for fear of becoming objects of CSIS surveillance. This assertion is supported somewhat by the affidavit evidence of three members of three different lawful advocacy groups who feel that they, their organizations and their membership have been the subject of CSIS surveillance. The fear of intrusion into their lives by CSIS, through the use of covert surveillance or actual interference in their affairs, is alleged by the applicant to be an infringement of the *Charter* rights of freedom of expression, assembly, association, the right to privacy and the right to be free from unreasonable search and seizure.

C. Principles Governing the Discretionary Grant of Public Interest Standing

[16] The appellant does not contend that the impugned provisions of the Act affect its own rights or that it is affected differently from others so as to bring itself within the traditional rules governing standing. Rather, the applicant submits that, in the circumstances of this case, the court ought to exercise its discretion in recognizing its right to assert public interest standing.

[17] It is well established that the granting of public interest standing is a discretionary matter. Further, it is trite law that a court must exercise its discretion judicially and in accordance with established principles. The Supreme Court of Canada, in a pre-*Charter* trilogy of decisions, established the requirements for a discretionary grant of public interest standing to challenge the validity of legislation: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575.

[18] These cases have established that, before a court will exercise its discretion in favour of an applicant seeking public interest standing, three criteria must be met:

> (a) there must be a serious issue as to the validity of the Act;
>
> (b) the applicant must be directly affected by the Act or have a genuine interest in its validity; and

(c) there must be no other reasonable and effective way to bring the Act's validity before the court.

These criteria have been reviewed by the Supreme Court in a number of post-*Charter* cases. As will become apparent from the brief review that follows, the criteria should not be considered as mere technical requirements to be applied in a mechanistic fashion. They have been extracted from various judicial responses to concerns arising out of any proposed extension of the scope of public interest standing. In order to understand and to apply these criteria properly these underlying concerns should be kept in mind.

[19] In *Finlay v. Canada*, [1986] 2 S.C.R. 607, the court extended the scope of the trilogy to non-constitutional challenges of administrative authority. Le Dain J., in writing for the court, identified the judicial concerns underlying the test for public interest standing and endeavoured to link its various requirements to these concerns (at p. 631-33):

> The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government.
>
> ...
>
> The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability, which Laskin J. held in *Thorson* to be central to the exercise of the judicial discretion whether or not to recognize public interest standing.
>
> ...
>
> The judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody is

> addressed by the requirements affirmed in *Borowski* that there be a serious issue raised and that a citizen have a genuine interest in the issue.
>
> ...
>
> The judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue - a consideration that was particularly emphasized by Laskin C.J. in *Borowski* - is addressed by the requirement affirmed in *Borowski* that there be no other reasonable and effective manner in which the issue may be brought before a court. [Emphasis added.]

[20] While Le Dain J. identifies justiciability as a separate requirement, this factor appears to be subsumed in later cases in the consideration of the "serious issue" criterion.

[21] In *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236, the court reviewed the approaches to standing taken in the United Kingdom, Australia and the United States and concluded that each of these jurisdictions has taken a more restrictive approach than have the courts in Canada. The court then reviewed the criteria established by the earlier quartet of cases and posed the question whether the current test for public interest standing should be extended. While the court maintained the criteria set out in the earlier cases, it clearly opted for a restrictive approach in their application. Cory J., in writing for the court, stated as follows (at pp. 252-53):

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982.* However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the

> unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
>
> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner. [Emphasis added.]

[22] The Canadian Council of Churches (the "Council"), a federal corporation which represents the interests of a broad group of member churches including the protection and resettlement of refugees, was denied standing to challenge the constitutional validity of a number of provisions contained in the amended *Immigration Act, 1976*. Although the court was satisfied that the Council had raised a serious issue of invalidity and had demonstrated a genuine interest, it failed on the third criterion. The court concluded as follows (at pp. 255_56):

> From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging

> the legislation. Thus the very rationale for the public interest litigation party disappears. [Emphasis added.]

[23] In the subsequent case of *Hy and Zel's Inc. v. Ontario*, [1993] 3 S.C.R. 675, public interest standing was again denied, by majority decision, on the basis that other reasonable and effective ways to bring the issue before the court existed. In arriving at this conclusion, Major J., in writing for the majority, examined the lack of a proper evidentiary basis. He noted that the applicants relied upon the evidence filed in other applications and "presented almost no original evidence in support of their claim" (at p. 692). The court stated as follows (at pp. 693-94):

> As this Court stated in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp.361-62:
>
> > *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.
>
> More recently in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p.1093, this Court cautioned that "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". This mirrors the Court's vigilance in ensuring that it hears the arguments of the parties most directly affected by a matter. In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised.

[24] The majority decision does not provide any further analysis as to how the sufficiency of evidence relates to the issue of standing. L'Heureux-Dubé J. (McLachlin J. concurring) in her dissenting judgment in *Hy and Zel's* disagreed on this point. A consideration of her opinion may be useful in bringing the relationship between sufficiency of evidence and standing into better focus.

[25] L'Heureux-Dubé J. was of the view that the appellants had standing under the traditional test and that they should also succeed under the test for discretionary grant of public interest standing. In considering the latter as an alternative basis for standing, she indicated her disagreement with the majority opinion on the relevance of the evidentiary basis to the issue of standing (at p. 720):

> This Court's decisions *MacKay* and *Danson*, which dealt with the need to avoid deciding *Charter* issues in a factual vacuum, are not at all relevant to the question of standing. If anything, they lend support to the notion that standing is an issue separate and apart from the question of the sufficiency of the evidence and, furthermore, that an appellant's standing can be unassailable even when there is not a shred of evidence to support a *Charter* claim.

In support of this statement, she notes that in *MacKay*, the court indicated that there was not one particle of evidence before the court, yet there was no suggestion that the appellants lacked standing. Similarly, with respect to *Danson*, she noted that there was a complete absence of adjudicative facts, yet the court expressly stated that standing of the appellant was not an issue.

[26] With respect, I have some difficulty with this reasoning since public interest standing was not in issue in either *MacKay* or *Danson.* In *MacKay*, the appellants were claiming that their own rights were violated, hence the traditional rules of standing would apply. However, the issue was never raised. In *Danson*, the facts could have given rise to a question of public interest standing but the only issue before the court was a narrow one, that is whether it was appropriate to seek constitutional declarations by way of application without alleging facts in support of the relief claimed. In answering this question in the negative, the court indeed expressly noted that standing of the appellant was not an issue before the court. I interpret this reference as a caution that the court's decision should not be taken as confirmation of Danson's standing.

[27] In any event, L'Heureux Dubé J. was of the view that there was an evidentiary basis in *Hy and Zel's* and her comments on *MacKay* and *Danson* were not essential to her dissenting opinion. I mention her opinion on this point for sake of completeness because I wish to refer to another reference in her judgment which I find of assistance in establishing the link between the sufficiency of the evidence and standing. Earlier in her reasons, L'Heureux-Dubé J. provides a useful review of the various rationales which have been invoked for imposing restrictions on standing. She states (at pp. 702-3):

> Three major concerns are typically identified: the proper allocation of judicial resources; the prevention of vexatious suits brought at the behest of mere "busybodies"; and the particular requirements of the adversary system. The first category includes such concerns as fears about a multiplicity of suits, otherwise known as the "floodgates" argument. Within the second category, courts have employed standing restrictions to ensure that issues are fully canvassed by promoting the use of the judicial process to decide live disputes between parties as opposed to hypothetical ones. Under the latter category are subsumed such matters as the "justiciability" of the issue before the courts, whether the full dimensions of the issue can be expected to be aired before the court and limits on the exercise of judicial power.

[28] I would agree with L'Heureux-Dubé J. that the issue of sufficiency of the evidence is entirely separate from the question of standing for those litigants who have a cause of action under the traditional rules, a situation which she was of the view existed in *Hy and Zel's*. These litigants have standing as of right. They do not depend on a discretionary grant of standing to pursue their claim. Any screening of unmeritorious claims which may be made under the rules of procedure on the ground of a lack of a proper evidentiary basis will not likely be related to any issue of standing.

[29] However, where a litigant does not have a cause of action under the traditional rules and requires a discretionary grant of public interest standing to pursue its claim, the concerns identified above have to be addressed and these concerns, as held by the majority in *Hy and Zel's*, include a consideration of the sufficiency of the evidence. More will be said later on what constitutes a sufficient evidentiary basis for this purpose.

[30] If one considers the rationales for imposing restrictions on standing which were identified by L'Heureux-Dubé J., it would seem to me quite clear that the lack of a proper

evidentiary basis could have a bearing on considerations such as "the proper allocation of judicial resources", "ensuring that issues are fully canvassed", "promoting the use of the judicial process to decide live disputes between parties as opposed to hypothetical ones" and determining "whether the full dimensions of the issue can be expected to be aired before the court".

D. The Decision Under Appeal and the Issues Raised on the Cross-Appeal

[31] The motions judge correctly instructed himself as to the three criteria which must be met before public interest standing will be granted. He did not, however, have the benefit of the subsequent decisions of the Supreme Court in *Canadian Council of Churches* and *Hy and Zel's* which assist in further defining these criteria. His decision with respect to each of the criteria is as follows:

1. Serious issue of invalidity

[32] The motions judge addressed the question whether the seriousness of an issue relates to its general public importance or to its substantive merits. He reviewed some of the relevant jurisprudence and concluded that this requirement could not be equated to "a reasonable cause of action" and, hence, that this criterion related to the general importance of the issue. He stated as follows (at p. 618):

> In the case before me, the parties have agreed to have the issue of standing determined as a preliminary issue. While the nature of the applicant's interest in the substantive issues raised by the application is set out by the allegations and contentions in the application record and in the factums and authorities brief filed by the parties, I do not think it prudent to rule on the substantive merits of the application. Rather, the appropriate inquiry at this stage of the proceedings is to ask whether or not the application raises issues of general public importance which deserve the consideration of this court.
>
> In applying this standard as to whether or not the applicant has raised a "serious issue" as to the validity of the legislation, I do not wish to be seen as injecting another verbal formula into the process of determining the applicant's standing. Rather, interpreting the "serious issue" criterion to

> mean that the issue be one of general public importance is to indicate that by granting standing, the court is prepared to place a certain societal value on an interest and protect it by allowing it to be the subject of litigation, thus recognizing that the individual or group seeking to litigate is not disputing something of merely idiosyncratic interest.

The motions judge then reviewed the issues raised by the appellant in its application and concluded as follows (at p. 619):

> Without ruling on the adequacy of the applicant's evidence, or on the substantive merits of the issues of law presented, the applicant has raised issues of general public importance that ought to be the subject of a full and complete judicial examination. There may well be a nexus between the impugned provisions of the *CSIS Act* and the legitimate imposition of a "chill" on a citizen's ability to express a thought, belief or opinion. It is in the public interest for a court to address the merits of this application.

[33] The respondent, in its cross-appeal, submits that the motions judge erred in relating the seriousness of the issues raised by the application to their general importance rather than to the substantive merits of the application. It is the respondent's position that the application has no substantive merit because it is unsupported by any evidentiary basis. Rather, it is based on hypothetical consequences which, it is argued, cannot form the basis for granting declaratory and injunctive relief. Consequently, the respondent submits that standing ought to have been denied for failure to raise a serious issue of invalidity.

[34] It is clear from the above-noted review of the jurisprudence that the motions judge erred in refusing to consider the merits of the application. In particular, *Canadian Council of Churches* and *Hy and Zel's* establish beyond controversy that the merits of the application are a relevant consideration, and indeed can become determinative, on the issue of standing. This court is in as good a position as the motions judge to assess this factor and I will address it later in these reasons.

2. Appellant's genuine interest in the validity of the Act

[35] No issue is raised on appeal on this criterion. The respondent concedes that the appellant has demonstrated a genuine interest in the validity of the Act.

[36] In my view, this concession is properly made with respect to the Association. As stated earlier, the parties appear to have been content throughout to have the appellant's interest considered as being the same as that of the Association.

3. Another reasonable and effective way to bring the issues before the court

[37] The motions judge's decision on this issue summarizes well the position of the parties and it is useful to set out the full text of his reasons on this point (at pp. 619-21):

> The respondent's last objection to the granting of standing to the applicant is that the applicant has not shown that there is no other effective manner in which this issue may be brought before the court. The respondent cites Le Dain J.'s concern in *Finlay*, at p. 633 S.C.R., that the "court should have the benefit of the contending views of the persons most directly affected by the issue". It is submitted that the applicant is not among those "most directly affected" by the legislation. Thus, the respondent argues, the court will not have the contending views of those most directly affected by the legislation. Given the scarcity of judicial resources, the court should deal with these issues when they are raised by persons whose rights have actually been infringed or are actually threatened.
>
> The applicant, on the other hand, argues that it is particularly well suited to bring an application under the circumstances of this case. It argues that unless it is allowed to challenge the constitutional validity of CSIS's intrusive surveillance powers, these powers will likely remain unchallenged. Because many of the activities of CSIS are surreptitious and are undertaken essentially to gather and analyze certain kinds of information, but not to collect evidence for prosecution in court, it is unlikely that the individuals whose rights are most seriously and directly violated will have sufficient proof that they are the subjects of

> unconstitutional investigation, nor would they have a real opportunity to challenge the activities in court. The applicant further submits that, even where a group or individual may be aware of an investigation, the chilling effect of the Act and CSIS's activities will certainly serve to discourage directly affected parties from initiating litigation. Lastly, the applicant submits that its expertise in matters relating to security intelligence activities and the advocacy of civil liberties issues in Canada strongly suggested that a grant of standing in this case is not only practical but will also put before the court the most informed and competent arguments in relation to the issues before the court.
>
> I tend to agree with the position taken by the applicant. I place little weight on the respondent's concern that, if the applicant is granted standing, the court will not have the contending views of the persons most directly affected by the issues raised. The CCLA and the federal Department of Justice have undoubted knowledge and expertise with respect to the issues at hand, and both sides have the resources to ensure that every relevant factual and legal argument is put before the court. While it is preferable for constitutional issues to be brought before the courts by those whose rights are most directly infringed (as it is also with other issues raised under private law), under the circumstances of this case, where the "group" most directly affected could be said to be the public at large (in that, if we accept the arguments of the applicant, the very processes of our political democracy could conceivably be threatened by a chill on s. 2 *Charter* rights), the most reasonable and effective manner in which the issues can be brought before the court is to grant the applicant standing.

[38] The respondent submits that the motions judge erred in this conclusion. Persons whose activities are actually targeted by the legislation and who can claim that CSIS has actually violated their rights can, and do, challenge the constitutionality of the legislation. By way of example, the respondent notes the case of *R. v. Atwal* (1987), 36 C.C.C. (3d) 161 (F.C.A.) where, by majority decision, the Federal Court of Appeal held that s. 21 of the Act met the constitutional requirements set out in s. 8 of the *Charter*. The respondent

argues that those persons directly affected by the Act are the ones who can bring the issues before the court in the most reasonable and effective manner. It is submitted that, because the court did not have before it those persons who are most directly affected by the legislation, the application proceeded without a proper factual foundation.

[39] As seen in *Hy and Zel's*, the sufficiency of the evidence can have some bearing on the application of this criterion. I will therefore return to it after my review and assessment of the evidence and the merits of the application.

E. The merits of the application

[40] As stated earlier, the respondent contends that the application is without merit because it is without any evidentiary basis. I will review the evidence in some detail in order to assess this factor.

1. The evidence

[41] In reviewing and assessing the evidence, it may be useful to recall the nature and scope of the application. What is brought in issue is the deleterious effect of the *intrusive* techniques of CSIS surveillance, (this is electronic surveillance, mail opening, surreptitious searches, the invasion of confidential records and the deployment of covert informants), as they relate to the lawful activities of Canadians and permanent residents. No issue is taken with the constitutional scope of *overt* surveillance techniques.

[42] It is also important to review the distinction between adjudicative facts and legislative facts. Sopinka J. in *Danson* refers to this distinction (at p. 1099):

> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p.353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how, and with what motive or intent...". Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and

> cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *per* Laskin C.J., at p.391; *Re Residential Tenancies Act 1979,* [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p.318.

[43] As noted earlier, the applicant filed four affidavits and various excerpts of reports from SIRC. The contents of this material can be summarized as follows:

a) affidavit by A. Alan Borovoy

[44] Mr. Borovoy identifies himself as General Counsel of the Canadian Civil Liberties Association and states that, as such, he has authority to speak on behalf of the appellant. He states that the corporate objects of the appellant are identical to those of the Association. He then describes the Association, its objects and its extensive involvement in the litigation of civil liberties issues over the years.

[45] This part of the affidavit, which consists of approximately one half of it, is of relevance to show that the Association (and presumably, the appellant) has a genuine interest in the validity of the Act. It is of no relevance to the substantive merits of the application.

[46] In the second half of the affidavit, Mr. Borovoy describes some of the contents of the SIRC reports and refers to the other affidavits filed in support of the application. He then expresses the following belief with respect to the activities of CSIS:

> ... it is very difficult to conduct such pervasive intelligence operations without casting a chill over political liberty and personal privacy. At the very least, many people are likely to feel that they are under surveillance. This will particularly apply to those who have unconventional beliefs and ideologies. If such people think their organizations are infested with spies, they will not speak freely at their meetings. If they think they are being followed, they will not attend certain functions. If they think that their telephones are tapped, they will not speak freely on the telephone.

Mr. Borovoy then describes some "evidence" discovered as a result of the Association's investigations into the American experience. None of this "evidence" is filed. The remaining few paragraphs make further reference to SIRC reports. Finally, Mr. Borovoy states that unless an organization such as the appellant initiates legal proceedings to challenge the intrusive surveillance powers contained in the Act, such challenge is not likely to be made for a long period of time. He concludes as follows:

> Since so many activities of a civilian intelligence agency are surreptitious and are undertaken essentially to gather and analyze information, and not to collect evidence for prosecution in court, it is unlikely that the individuals whose rights are most seriously violated would have satisfactory proof that they were targets, nor would they have a ready opportunity to challenge that targeting in court.

[47] Quite clearly, this second half of the affidavit consists of personal opinion and argument. Apart from its questionable admissibility either as adjudicative fact or legislative fact, it is of no evidentiary value on the merits of the application.

b) affidavit of Margaret Third-Tsushima

[48] The affiant identifies herself as the Executive Director of the St. Barnabas Refugee Society. She states that the St. Barnabas Society was instrumental in the formation of the Edmonton branch of the Coalition for a Just Refugee and Immigration Policy ("the Coalition") and remains a member of this Coalition. She describes the objectives of the Coalition as "includ[ing] lobbying for the enactment of legislation to ensure a fairer and more efficient processing of refugee claims in Canada, the easing of the restrictions in immigration law on family reunification, and the defeat of Bills C-55 (regarding a new refugee determination process,) and C-84 (providing for the interdiction of ships and detention of refugee claimants)".

[49] Ms. Third-Tsushima states that the Alberta Federation of Labour ("AFL") has been an active member of the Coalition, and its representative on the Coalition, Mr. Don Aitken, has on occasion been spokesperson for the Coalition. She states that she also has, on occasion, been spokesperson for the Coalition.

[50] The affiant then relates the incident which caused her some concern. In the spring of 1987, shortly after Mr. Aitken appeared at a press conference as spokesperson for the Coalition, she received a call from a person (whose name she cannot recall) who

identified himself as an agent for CSIS and who asked her to meet him to discuss the Coalition. She agreed to meet him. She described the encounter as follows:

> In the spring of 1987, shortly after Mr. Aitken appeared at a press conference as spokesperson for the Coalition, I received a telephone call from an agent of the Canadian Security Intelligence Service (CSIS) asking that I meet with him at the Westin Hotel in Edmonton in order to discuss the Coalition.
>
> I met with the CSIS official in the lounge of the Westin Hotel. The CSIS officer, whose name I do not recall, asked me several questions about the Coalition. For example, he asked me to identify the members of the Coalition. I cooperated fully by answering all of his questions but suggested that he attend a Coalition meeting which is open to the public and which would likely answer most of his questions. The CSIS official also offered, more than once during the course of the conversation, to buy me a drink.
>
> After I answered a number of his questions, the CSIS official then expressed concern about the participation of one of the members in the Coalition. He advised me that the Coalition should be particularly careful as such groups can be influenced and taken over by foreign powers. He commented that one group was involving itself as a member of the Coalition when it had never been involved in immigration and refugee matters before.
>
> Near the end of the conversation, the CSIS official intimated that he was concerned that the AFL was a member of the Coalition. However, he did not expressly say that this was the group that was being directed by, or could be influencing or taking over the Coalition on behalf of, a foreign power. However he mentioned the names of no other members of the Coalition during the whole of our meeting.

[51] Ms. Third-Tsushima then describes the effect this encounter had on her. First, it caused her to contact Mr. Aitken to advise him about the meeting with the CSIS official.

She states that Mr. Aitken volunteered, on behalf of the AFL, to drop out of the Coalition or to "take a back seat in the affairs of the Coalition". She states that, on behalf of the Coalition, she refused his offer and insisted that the AFL continue on as a full member as before. Secondly, she describes her subjective concerns as follows:

> I am concerned that CSIS was attempting to cause dissension between members by questioning the motives of certain members and/or to cause certain members to be excluded or limited in participation, thus limiting the effectiveness of the Coalition. I am also concerned that, if CSIS has shown an interest in the internal affairs of the Coalition, it might have used, or might be willing to use, techniques of intrusive surveillance against me or other members of the Coalition, such as wiretapping and the use of covert informants. I am particularly concerned about a wiretap at the offices of the St. Barnabas Refugee Society as it speaks with refugees who may be escaping persecution by foreign governments. Some of those conversations deal with information which, if passed on by CSIS to such a foreign government, could go so far as to endanger the lives of potential refugee claimants.

[52] It is difficult to see how this evidence can assist the appellant in establishing an infringement of *Charter* rights and freedoms as alleged. Quite clearly the incident described by the affiant is an *overt* act of surveillance, a technique which the appellant concedes is constitutionally permissible. Any effect the described CSIS intervention may have had on Mr. Aitken (assuming this evidence can be admitted through this affiant) can hardly be said to constitute evidence of the adverse effects of the *impugned* provisions, that is those provisions which permit *intrusive* techniques. In any event, it is not clear what adverse effect this constitutionally permissible intervention has had on anyone's *Charter* rights or freedoms. The suggestion appears to be that this overt act of surveillance almost caused Mr. Aitken to curtail his freedom to associate with the Coalition. But, in the end result, it would appear that he carried on as before.

[53] At best, this affidavit can be said to show that, once this affiant was armed with the knowledge that an organisation which whom she is associated was a source of interest to CSIS, she developed a subjective fear that the organisation may have been or may become the target of intrusive surveillance techniques and hence, presumably a possible victim of s. 8 violations. In my view, this evidence adds nothing more to the simple

reliance on the overbreadth of a legislative provision on its face to establish a *Charter* infringement. Whether this argument raises a serious issue of invalidity is a matter I will address later.

[54] In any event, this evidence is so weak that it is difficult to see how it has any probative value at all. A few questions which come to mind are the following:

> Is the subjective fear at all linked to the impugned provisions of the Act? Does Ms. Third-Tsushima even have knowledge of the existence of the Act or of the tenor of any of its provisions? Would she have the same fear if the Act didn't exist or if some of its provisions were struck down?
>
> Is her fear reasonable? Is it perhaps based on an ignorance of the fact that, except for the deployment of covert informants, all forms of intrusive surveillance are subject to judicial control under the Act? Or is it based rather on a general distrust of the judicial system's efficiency in protecting her *Charter* rights?
>
> How does this evidence connect the subjective fear (presumably related to the impugned provisions) to the alleged *Charter* violations? In other words, as the result of this fear, has any of the freedoms of speech, assembly and association or the right to be secure against unreasonable searches and seizures been curtailed for anyone?

c) affidavit of William Zander

[55] Mr. Zander states that he is, and has been since 1975, President of the British Columbia Provincial Council of Carpenters. He describes the Council as a province-wide federation of carpenter unions chartered by the United Brotherhood of Carpenters and Joiners of America and as the certified bargaining agent for 25 local unions in the province of British Columbia.

[56] Mr. Zander states that in the summer of 1985, it was brought to his attention that there had been "outside interference" in the affairs of one of the local unions. He does not describe the nature of this interference, which presumably would have occurred prior to or during the summer of 1985. He then states that two rival slates were vying for the

election of officers to the executive of this local union and that in the fall of 1985, he was advised that a member of the Royal Canadian Mounted Police (RCMP) had attended a strategy session of one the groups, the "opposition slate" seeking to displace the incumbent officers. He was informed by a letter from one of the members of the "opposition slate" that this RCMP officer, whose name could not be recalled, had been *invited* to attend the meeting. The letter, annexed to the affidavit, does not say who invited the RCMP officer.

[57] This information about the attendance of the RCMP officer at the meeting prompted Mr. Zander to write to the Honourable Perrin Beatty, Solicitor General of Canada at the time, "registering [his] objection" to RCMP interference in local union affairs and requesting that a thorough investigation be made. Mr. Beatty responded, indicating that the RCMP were not involved in the alleged affair and informing Mr. Zander that his letter had been forwarded to CSIS.

[58] A few months later, it was confirmed that the officer had been a member of CSIS. Mr. Beatty wrote to Mr. Zander and informed him that the Director of CSIS "is fully satisfied that there has been no impropriety by a member of the Service in relation to the affairs of the British Columbia Provincial Council of Carpenters". Mr. Zander communicated his dissatisfaction to Mr. Beatty with this response. In yet further correspondence, Mr. Beatty assured Mr. Zander that the contact between the union members and the member of CSIS was voluntary and that there had been no improprieties. The affidavit describes further exchanges between Mr. Beatty and Mr. Zander to the same effect.

[59] The affiant also states that the matter was raised by Mr. Svend Robinson as Member of Parliament during question period in the House of Commons, demanding an explanation for "CSIS involvement in the internal affairs of the union". In answer to the question, the Solicitor General of Canada at the time referred to the exchange of correspondence mentioned above.

[60] Mr. Zander then expresses his concerns as follows:

> As a result of CSIS involvement in the internal democratic process of Local 452, the reputation of the British Columbia Provincial Council of Carpenters has been harmed. Concerns about CSIS involvement have been expressed directly to me by union members. They have asked me what it is that the union is doing that could trigger CSIS

> involvement. If our union is so open, they asked, why should CSIS be interested in local union affairs. Similar concerns have been intimated to me by other union members. It is my belief that some of the union members are concerned that if they become involved in union politics they could become targets of CSIS surveillance. As a result, they may be less likely to get involved in union affairs by running for election for union office.
>
> As a result of the CSIS involvement in the internal democratic process of Local 452, I am now concerned that CSIS may be using some of its other techniques of intrusive surveillance that are available to it, such as wiretapping and the use of covert informants, against the union.

[61] This affidavit also describes the effect of *overt* techniques of CSIS surveillance, an activity which falls outside the scope of the appellant's application. It is essentially of the same tenor as Ms. Third-Tsushima's affidavit and it is fraught with the same difficulties noted above.

d) affidavit of Wendy Wright

[62] Ms. Wright states that she is a member and a spokesperson of the Toronto Disarmament Network (TDN). She describes the TDN as an umbrella organization of approximately 80 Toronto groups which support various peace initiatives described in a document entitled "Basis of Unity". These initiatives include the opposition to war, the support of general disarmament, the opposition to policies which increase the level of conventional and nuclear armaments, the reduction and elimination of nuclear weapons on a world scale, the opposition to the militarization of space, the dissolution of military blocks and the opposition to the export of nuclear technology and radioactive fuels which may be used for the production of nuclear weapons.

[63] Ms. Wright describes a number of public activities carried out by the TDN in furtherance of its objectives and expresses her belief that these activities are recorded by police agencies. She states that unidentified photographers are always present at any public demonstrations conducted by TDN. These photographers "generally" refuse to identify themselves.

[64] Ms. Wright expresses the belief that fear of CSIS surveillance has undermined TDN's efforts to carry out its programs and objective. She states that this fear has been evidenced by "restricted participation in demonstrations, fear of signing petitions, fear of loss of reputation and decreased morale among supporters". She has been told by a number of individuals who would otherwise join in public demonstrations that they do not do so because of the taking of photographs. People have told her that they do not sign petitions for fear of being placed on a "police list".

[65] Ms. Wright also expressed the belief that TDN has been the object of surreptitious surveillance by CSIS because of an "illegal break and enter" which occurred on August 6, 1988. Ms. Wright describes how the state of the office after the intrusion was discovered led her to believe that the intruders were looking for information on TDN's sources of funding and its connection with the Soviet Union and how this inference, in turn, led her to believe that the intrusion was the result of CSIS surveillance. She relies on the following facts in support of her belief:

- Shortly before the intrusion, a Co-ordinator of the TDN had travelled to the Soviet Union on invitation by the government of the Soviet Union to view the destruction of a nuclear missile and this trip received media attention.

- Some cash boxes had not been touched by the intruders.

- The financial records were neatly stacked on a different shelf while material unrelated to the internal affairs of TDN was strewn across the floor.

- The minute books were not found on the floor and "appeared to have been scrutinized".

Ms. Wright does not indicate whether anything was taken at the time of the break and enter. She states that police investigated the occurrence and, to her knowledge, the intruders were never found.

[66] She states that "[t]he intensity and regularity of CSIS surveillance detracts from the reputation of the peace movement as a legitimate social force". She gives no other specifics with respect to this intense and regular CSIS surveillance. Presumably, she is referring to the unidentified photographers and the break and enter.

[67] She states that, following the break-in on August 6, 1988, "office morale suffered". She states that she believes that members feared that further intrusive searches of the premises or "other reprisals might follow future travels abroad". "Further,

members were required to choose whether they were more frightened by the threat of nuclear war or the threat of government retaliation." She expresses the opinion that "this kind of fear inhibits and chills legitimate efforts in the organization and communication of ideas and the achievement of the programs and objectives of TDN." She does not provide any specifics as to how and to what extent TDN activities have been curtailed.

[68] Finally she expressed the view that this fear of surveillance interferes with "our freedom of expression and freedom of conscience by curtailing participation in demonstrations, petitions and other activities through which we lawfully express our social and political beliefs".

[69] This evidence is relied upon by the appellant to show the adverse effects of the impugned provisions on the s. 2 freedoms of speech, assembly and association. It is also relied upon to establish a s. 8 infringement of the right to be secure against unreasonable searches or seizures.

[70] In so far as s. 2 freedoms are concerned, the evidence is subject to much the same difficulties described above. Many of the effects described flow from the presence of the unidentified photographers. Even assuming CSIS involvement in that activity, it remains an *overt* technique which is conceded to be constitutionally permissible. It does not assist the appellant in establishing the adverse effects of the impugned legislative provisions.

[71] In so far as the August 6 intrusion may have had an effect on s. 2 freedoms, again assuming CSIS involvement, the evidence goes no further than expressing a subjective fear and making a bare allegation of interference with the programs and objectives of TDN. No evidence is provided of any curtailment of the freedom of speech, assembly or association. In my view this affidavit does not add anything of substance to the appellant's bare reliance on the overbreadth of a legislative provision on its face to establish a s. 2 *Charter* infringement.

[72] At best, this affidavit provides some evidence towards proving a s. 8 breach. I will comment further on the sufficiency of this evidence when I return to the test for standing.

e) excerpts of SIRC reports

[73] As indicated earlier, the Security Intelligence Review Committee ("SIRC") is an independent body established under the Act for the purpose of reviewing the performance of CSIS; ensuring that its activities are carried out in accordance with the Act and that the activities do not involve any unreasonable or unnecessary exercise by CSIS of its powers; and conducting investigations into complaints and other matters with respect to CSIS. SIRC has extensive powers under the Act to enable it to fulfil its mandate. The material reveals that SIRC has access to all information in CSIS's hands. Apart from investigating any complaints, it carries an ongoing extensive review of all CSIS activities. Annual reports are prepared.

[74] Some of SIRC's reports are relied upon by the appellant as legislative facts in support of its application. The excerpts relied upon by the appellant include the following:

- recommendations on CSIS policies and practices
- comments on some perceived by-products of overt CSIS surveillance activities: on the one hand, deterrence of terrorists, on the other hand, inhibition in the exercise of legitimate and lawful dissent
- expressions of concern over the scope and wording of the s. 2 definition of "threats to the security of Canada" and recommendations for amendments to bring more precision and clarity to the legislation
- criticism with respect to many of the activities of the counter-subversion branch of CSIS (since disbanded)
- identification of situations where CSIS has overstepped its mandate
- suggestions for management of targeting
- compilation of statistics on warrants sought and obtained to authorize intrusive forms of surveillance.

[75] In summary, the evidentiary basis in support of the application is as follows: (1) with respect to the s. 2(b), (c), and (d) alleged infringements,

(a) the overbreadth of the impugned provisions and its consequential adverse effect on the freedoms of speech, assembly and association; and

(b) some legislative facts;

(2) with respect to the s. 8 alleged infringement,

(a) the overbreadth of the impugned provisions and its consequential adverse effect on the right to be secure against unreasonable searches or seizures;

(b) the August 6, 1988 incident at TDN headquarters; and

(c) some legislative facts.

F. Application of the Test for Public Interest Standing to the Appellant's Application

[76] As I have indicated at the outset, it is my view that the motions judge erred in granting standing in this case. As it turns out, his reasons for dismissing the application on the merits lend support to the conclusion that this is not a proper case to grant public interest standing.

[77] First, the motions judge's ultimate conclusion on the s. 2 alleged infringements was in essence a finding that the appellant had not raised an issue recognized in Canadian constitutional jurisprudence. In these circumstances, it could hardly be said that a serious issue of invalidity had been raised and standing ought to have been refused on that basis. In fact, the appellant argued that the motions judge's decision on s. 2 of the *Charter* was inconsistent with his decision to grant standing.

[78] Second, on the s. 8 alleged infringement, the issue was ultimately resolved on the basis of *stare decisis*. The motions judge held that the decision of the Federal Court of Appeal in *R. v. Atwal* was authoritative on the constitutional question before him. As seen earlier, when the impugned legislative provision is or will be subject to attack by a private litigant, the purpose for granting public interest standing disappears. Standing ought to have been refused on the basis that there was another reasonable and effective way to bring the issue before the court.

[79] It therefore becomes quite apparent that the motions judge's fundamental error was in refusing to consider the merits of the application on the issue of standing. Had he considered the merits on the preliminary motion, he would likely have refused standing. I will review the issues raised on standing in light of the merits of the application.

1. Serious issue of invalidity

[80] What will constitute a serious issue of invalidity is not easy to ascertain with any precision from the case law. It would be unwise to attempt to answer this question in any exhaustive manner in this case because the full scope of this question was not argued. I will limit my consideration of the question to the issues raised by the parties.

[81] One question raised is whether it is sufficient for the appellant to raise issues of "general public importance" in the abstract without regard to the substantive merits of the application. This question has already been answered in the negative. It is now beyond controversy that the substantive merits of the application are relevant to a consideration of this criterion.

[82] Of course, the consideration of the merits for the purpose of determining standing is not a determination of the ultimate merits of the case. It is more akin to the question whether there is a reasonable cause of action. Depending on the facts of the particular case, the issues of standing and reasonable cause of action tend to merge: see *Finlay*, at p. 636, *Canadian Council of Churches*, at p. 253, *Energy Probe v. Canada* (1989), 68 O.R. (2d) 449 (C.A.) at 465. In this case as well, the two issues tend to merge.

a) Alleged infringement of s. 2(b), (c) and (d) of the *Charter*

[83] A consideration of the merits of the application leads to the conclusion that the appellant cannot succeed in its challenge to the constitutionality of the impugned provisions on the basis of the alleged infringements of s.2 (b), (c), and (d) because of the lack of an evidentiary basis. As set out above, the appellant presents no relevant adjudicative facts. The application is based entirely on the argument that the legislation is overbroad and, consequently, creates a "chill" or an adverse effect on the freedoms of speech, assembly and association.

[84] In support of this argument, the appellant cited a number of American cases for their persuasive value. The motions judge, in his decision on the merits of the application, rejected the appellant's argument. With respect to each of the alleged s. 2(b), (c) and (d)

infringement, the motions judge held that no breach had been established on the following basis (8 O.R. (3d) at 319):

> In conclusion, as previously determined with respect to s. 2(b) [and s. 2(c)] of the *Charter*, current Canadian law has not adopted the chilling effect doctrine in determining the sphere of conduct to be protected under s. 2 of the *Charter*, nor will this court adopt the American chilling effect doctrine in determining the scope of the s. 2(d) freedom. Therefore the applicant has not established that the purpose or the effect of the Act restricts the freedom of association.

[85] The argument was put to this court, not in terms of the American "chilling effect doctrine" but in terms of "overbreadth" as a basis for establishing an infringement. I do not find it necessary to review any of the American authorities cited to us. Following the hearing in this matter, the case of *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 was decided and, in my view, it is determinative on this point. The following passage fully answers the appellant's argument (at p. 628):

> Overbreadth in American law is tied to the First Amendment. It is grounds to obtain what is termed "facial invalidation" of a statute, as opposed to a declaration that the statute is unconstitutional in the case of the particular plaintiff, which is the usual remedy. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), indicates how overbreadth interacts with vagueness in First Amendment cases. The court wrote at pp. 494-95:
>
> > In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Overbreadth ties in to the taxonomy of protected and unprotected conduct and expression developed by American courts under the First Amendment. Some conduct or expression receives First Amendment protection and some does not, and to the extent that a statute substantially touches upon protected conduct and cannot be severed or read down, it will be declared void (see L. H. Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 1022).

This distinction between protected and unprotected conduct or expression is typical of American law, since the American Constitution does not contain a general balancing clause similar to s. 1 of the *Charter*. Balancing must be done within the First Amendment itself. In this respect, it can be seen that the doctrine of overbreadth in American law involves an element of balancing, since the aims and scope of the statute must be compared with the range of protection of the First Amendment. C. Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness", in R. J. Sharpe, ed., *Charter Litigation* (1987), at pp. 261-62, traces this element of balancing to *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

This Court has repeatedly emphasized the numerous differences which exist between the *Charter* and the American Constitution. In particular, in the interpretation of s. 2 of the *Charter*, this Court has taken a route completely different from that of U.S. courts. In cases starting with *Irwin Toy* up to *Butler*, including the *Prostitution Reference* and *Keegstra*, this Court has given a wide ambit to the freedoms guaranteed by s. 2 of the *Charter*, on the basis that balancing between the objectives of the State and the violation of a right or freedom should occur at the s. 1 stage. Other sections of the *Charter*, such as ss. 7 and 8, do however incorporate some element of balancing, as a limitation within the definition of the protected right, with respect to other notions such as principles of fundamental justice or reasonableness.

> A notion tied to balancing such as overbreadth finds its proper place in sections of the *Charter* which involve a balancing process. Consequently, I cannot but agree with the opinion expressed by L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada* that overbreadth is subsumed under the "minimal impairment branch" of the *Oakes* test, under s. 1 of the *Charter*. This is also in accordance with the trend evidenced in *Osborne* and *Butler*. Furthermore, in determining whether s. 12 of the *Charter* has been infringed, for instance, a court, if it finds the punishment not grossly disproportionate for the accused, will typically examine reasonable hypotheses and assess whether the punishment is grossly disproportionate in these situations (*R. v. Smith*, [1987] 1 S.C.R. 1045, and *R. v. Goltz*, [1991] 3 S.C.R. 485). This inquiry also resembles the sort of balancing process associated with the notion of overbreadth.
>
> In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument. [Emphasis added.]

[86] In my view, it is clear from the above that the appellant cannot simply rely on "overbreadth" as proof of an infringement of s. 2 freedoms. I also find the cases in *MacKay* and *Danson,* which emphasize the importance of a factual basis in *Charter* litigation, apposite to this case. Both cases are referred to above in the passage quoted from *Canadian Council of Churches.* I would further note the following passage from *Danson* at pp.1099-1101:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against

the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack.

...

In the present case, the appellant contends that he ought to be entitled to proceed with his application under Rule 14.05(3)(h) in the complete absence of adjudicative facts, and, moreover, that it is sufficient that he present in argument (but not prove by affidavit or otherwise) legislative "facts", in the form of textbooks and academic material about the prevailing understanding of the concept of the independence of the bar, and material concerning the legislative history of the impugned rules. In the view I take of this matter, the appellant is not entitled to proceed with the application as presently constituted.

In the time between the granting of leave to appeal in this matter and the hearing of the appeal, this Court heard and decided *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, a case concerning an action for a declaration that certain provisions of *The Elections Finances Act*, S.M. 1982-83-84, c. 45, violated the guarantee of freedom of expression contained in s. 2(*b*) of the *Charter*. Cory J., speaking for a unanimous Court, stated, at pp. 361-62:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.... *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

Later [in the *MacKay v. Manitoba* case], Cory J. stated, at p. 366:

> A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellant's position.

This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof). As Beetz J. pointed out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter*, and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional. [Emphasis is Cory J.'s.]

The unconstitutional purpose of Beetz J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out. It is obvious that this is not one of those exceptional cases. In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been

> abhorred. As Morgan put it, op. cit., at p. 162: "... the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology."

This case is not one of these exceptional cases where the law, on its face, violates one of the fundamental freedoms.

[87] It therefore becomes clear upon considering the merits of the application that the appellant has failed to present a serious issue of invalidity in so far as it is based on s. 2 of the *Charter*.

b) Alleged infringement of s. 8 of the *Charter*

[88] In my view, the adjudicative facts presented in support of the s. 8 claim are so weak that the same result should probably follow. However, I do not find it necessary to determine whether the appellant has succeeded in raising a serious issue of invalidity with respect to that aspect of the application since I am of the view that the appellant fails on the next criterion.

2. Another reasonable and effective way to bring the issue before the court

[89] As discussed above, standing should be granted in those situations where it is necessary to ensure that the legislation is not immune from constitutional challenge. To repeat the words of Cory J. in *Canadian Council of Churches,* "The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (at p. 252).

[90] In this case, a challenge to the impugned provisions was made on the basis of s. 8 of the *Charter* in *R. v. Atwal*. By majority decision, the Federal Court of Appeal upheld the constitutional validity of the legislation. In fact, the appellant on appeal urged this court to adopt the reasoning of the dissenting judge in *Atwal* and the respondent urged this court to follow the majority. It would appear from the motions judge's reasons that the argument followed essentially the same course in first instance. He ultimately ruled as follows (8 O.R. (3d) at 327-28):

> It is the respondent's position that *Atwal v. Canada, supra*, is binding on all designated judges and therefore there is no need for this court to entertain a similar challenge to this Act.

> In summation, the object of this Act is not law enforcement, and therefore the standard set out in *Hunter v. Southam Inc., supra*, with respect to statute-authorized searches does not necessarily apply; yet, upon reviewing ss. 21 through 26, the statute meets the four minimum criteria set out in *Hunter v. Southam Inc., supra.* Moreover, the Federal Court of Appeal in *Atwal v.Canada* has held that the Act meets the criteria set out in *Hunter v. Southam Inc., supra.* It is to be concluded that a statute-authorized search under the Act would be reasonable. Therefore, the Act does not infringe the right to be free from unreasonable search and seizure. [Emphasis added.]

To grant standing in this case is to create a duplication which can hardly be said to be a wise allocation of limited judicial resources.

[91] Further, the scant evidentiary basis in this case raises other concerns referred to by L'Heureux-Dubé J. in *Hy and Zel's*. A comparison of the factual basis in *Atwal* with the scant adjudicative facts alleged in this case confirms that better use can usually be made of the judicial process to decide live issues between parties as opposed to hypothetical ones. In *Atwal*, CSIS involvement was clearly established. An actual warrant had been obtained and executed pursuant to the Act. Clearly, the impugned provisions of the Act were engaged. In this case, a mere suspicion was raised that CSIS was involved. Many facts would have to be presumed before an intelligible debate on the constitutionality of the section could be engaged in. The scant evidentiary basis does not allow the issues to be fully canvassed.

[92] Hence, again here, a consideration of the merits of the application makes it clear that, in so far as the application alleged a s. 8 violation, the motions judge erred in finding that the "most reasonable and effective manner in which the issues can be brought before the court is to grant the applicant standing". He ought to have refused standing for failure to meet this criterion.

G. Conclusion

[93] In the result, I would allow the cross-appeal and set aside the motions judge's judgment dated March 25, 1992. I would dismiss the application on the ground of no standing. I would also dismiss the appeal on the ground of no standing.

ABELLA J.A. (Dissenting in part):

[94] I have had the benefit of reading the reasons of Charron J.A. While I agree with her disposition of the appeal on the merits, I am unable to agree with her conclusion that standing ought not to have been granted. In my view, Potts J. was correct in exercising his discretion to grant standing to the Corporation of the Canadian Civil Liberties Association (C.C.L.A.). There was, in this case, a serious issue as to the constitutionality of portions of the legislation and C.C.L.A. was in the best position to bring the issue effectively to the court's attention.

[95] There is no dispute that the applicable authorities are *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236; and *Hy and Zel's Inc. v. Ontario*, [1993] 3 S.C.R. 675.

[96] As Charron J.A. points out, the two latest cases were decided after the 1990 decision on standing in this case. In my view, while these two cases do not expand the law of standing, neither do they fundamentally restrict the scope or principles applied by Potts J. and set out in the "standing quartet" of *Thorson*, *McNeil*, *Borowski*, and *Finlay*. The most recent cases continue to promulgate the triplicate requirements for the granting of standing: that there be a serious issue of legislative validity; that the applicant have a genuine as opposed to a theoretical interest in the issue; and that no other reasonable and effective way exists for bringing the issue before the court.

[97] The discussions in *Canadian Council of Churches* and *Hy and Zel's* emphasize the significance of an adequate factual context. They reinforce the judicial interest in having the most effective presentation possible of important public issues and in avoiding gratuitous, frivolous or hypothetical litigation. But they do not, in my view, go so far as to suggest that the merits of a case be given pre-eminent consideration when considering the threshold issue of standing.

[98] It would be a significant diminution of access to public interest standing to so merge the question of standing and the merits, that a preliminary conclusion about the merits determines whether the case should be heard at all. There must certainly be enough evidence to justify the conclusion that the issue is an arguable one and serious enough to warrant judicial scrutiny (*Energy Probe v. Canada (Attorney General)* (1989),

68 O.R. (2d) 449 (C.A.)). But I would resist an approach that appears to require that there should be enough evidence to demonstrate the likelihood of success.

[99] Focusing too emphatically on the merits at this stage means that a pre-trial assessment could immunize issues from judicial review in cases where it would be in the public's interest to have the matter openly reviewed.

[100] It bears noting that in *Canadian Council of Churches*, Cory J. bracketed his comments on the need to prevent the overburdening of courts through the "unnecessary proliferation of marginal or redundant suits", with a restatement of the significance of public interest standing and the corresponding need to keep the door open:

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982*.
>
> ...
>
> ... [W]hen exercising the discretion the applicable principles should be interpreted in a liberal and generous manner. [emphasis added] (pp. 252-53)

[101] Standing is essentially a preliminary issue about access to the judicial system. Although it is undoubtedly tied to the substantive issues it seeks to expose, it is at heart a decision about whether an applicant is entitled to have the courts consider the merits of an arguable legal claim. To determine those merits at the outset could defeat the purpose of public interest standing principles. Those principles were designed to keep out needless claims and claimants, not just unsuccessful ones. A claimant entitled to standing may not ultimately be entitled to succeed on the claim itself, but that, it seems to me, is not a determinative argument against granting standing.

[102] The 1989 Ontario Law Reform Commission's Report on Standing pointed out (at p. 92):

> ... courts are essentially engaged in a process of acknowledging and granting access to the courts to a variety

> of interests. This process reflects certain value judgments respecting what kinds of interest "deserve" recognition.

In determining how to exercise the discretion to grant standing, the evidence must, of course, be examined to ensure that the claim is not frivolous or unworthy of public attention. But it should not be used to exclude from judicial, and therefore public examination, issues worthy of serious consideration, whether or not the challenge proves ultimately to be successful.

[103] The information contained in C.C.L.A.'s supporting affidavits raises serious questions about whether the constitutionally protected rights of citizens to engage in lawful expression, association, or assembly may be compromised or threatened under the authority of the *C.S.I.S. Act*. These were legal organizations engaged in legal activity. When members of labour unions, refugee organizations, or peace movements find themselves monitored by a branch of government, the Canadian public is entitled to be assured that the legislative framework under which the Canadian Security Intelligence Service (C.S.I.S.) operates does not equate lawful dissent with threats to national security. There is no question that the perception of C.S.I.S. intervention was, to say the least, unsettling to the people involved and potentially inhibiting (see Jonathan R. Siegel, "*Chilling Injuries as a Basis for Standing*" (1989), Yale Law Journal 906).

[104] It goes to the heart of an open democracy that members of the public are, and perceive that they are, free from unwarranted government surveillance when they are engaging in lawful, even if provocative, activity. Yet under s. 2 of the *C.S.I.S. Act*, lawful activities *can* be investigated if done in conjunction with activities defined as threats to national security. This is an exceptional legislative tool. It was in the public's interest that the statutory scheme be judicially reviewed to ensure that it met constitutional standards.

[105] Moreover, in my view, C.C.L.A. is the most effective litigant to raise the issues in an informed and comprehensive way. C.C.L.A. and its General Counsel, A. Alan Borovoy, have devoted years of institutional and professional energy to ensuring that under the rubric of "threats to national security", covert surveillance is not a ruse for intelligence-gathering into lawful, constitutionally protected activities. No person or organization has greater expertise in the area or is better able to elucidate the relevant issues for the court.

[106] One of the major tenets in the Ontario Law Reform Commission's Report on Standing was that, given the nature of public interest standing, the requirement that no other way exists for bringing the matter before the court, should be liberally construed:

> ... no proceeding [should] be dismissed and no pleading struck out only on the ground that the person bringing the proceeding has no personal, proprietary, or pecuniary interest in the proceeding or that the person has suffered or may suffer injury or harm of the same kind or to the same degree as other persons. (at p. 79)

The fact that a private litigant once raised a related issue (*R. v. Atwal* (1987), 36 C.C.C. (3d) 161 (F.C.A.)) should not therefore foreclose the granting of standing to C.C.L.A.

[107] The question of who is most directly affected by the legislation and is therefore in the best position to raise the issues, is more easily applied in less opaque legal environments. By its nature, C.S.I.S. operates covertly and usually without prior or subsequent disclosure. Individuals may not know they are being targeted or what happens to the information gathered about them. The harm may not therefore be easily discernable, but there is nonetheless a profound public interest in ensuring that whatever is done, is done within constitutional limits.

[108] By applying for standing, C.C.L.A. offered to bring the issue of the constitutionality of C.S.I.S.'s governing legislation before the courts on the public's behalf. The application raised serious issues which have profound implications, and was brought to the judicial forum by the best possible applicant.

[109] The inability of C.C.L.A. to provide an evidentiary basis demonstrating the likelihood of success, or to prove that the legislative provisions are unconstitutional, in no way diminishes the importance of the issue being argued, or the benefit to the public of judicial consideration.

[110] I would therefore dismiss the cross-appeal of Pott's J.'s decision to grant standing, but dismiss the appeal from his decision on the merits of the application.

Released:

APPENDIX "A"

Sections 12 and 21 to 26 of the *Canadian Security Intelligence Service Act*:

12. The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

21. (1) Where the director or any employee designated by the Minister for the purpose believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16 [s. 16 is of no relevance to this appeal.], the Director or employee may, after having obtained the approval of the Minister, make an application in accordance with subsection (2) to a judge for a warrant this section.

(2) An application to a judge under subsection (1) shall be made in writing and be accompanied by an affidavit of the applicant deposing to the following matters, namely,

(a) the facts relied on to justify the belief, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16;

(b) that other investigative procedures have been tried and have failed or why it appears that they are unlikely to succeed, that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures or that without a warrant under this section it is likely that

information of importance with respect to the threat to the security of Canada or the performance of the duties and functions under section 16 referred to in paragraph (a) would not be obtained;

(c) the type of communication proposed to be intercepted, the type of information, records, documents or things proposed to be obtained and the powers referred to in paragraphs (3)(a) to (c) proposed to be exercised for that purpose;

(d) the identity of the person, if known, whose communication is proposed to be intercepted or who has possession of the information, record, document or thing proposed to be obtained;

(e) the persons or classes of persons to whom the warrant is proposed to be directed;

(f) a general description of the place where the warrant is proposed to be executed, if a general description of that place can be given;

(g) the period, not exceeding sixty days or one year, as the case may be, for which the warrant is requested to be in force that is applicable by virtue of subsection (5); and

(h) any previous application made in relation to a person identified in the affidavit pursuant to paragraph (d), the date on which the application was made, the name of the judge to whom each application was made and the decision of the judge thereon.

(3) Notwithstanding any other law but subject to the *Statistics Act*, where the judge to whom an application under subsection (1) is made is satisfied of the matters referred to in paragraphs (2)(*a*) and (*b*) set out in the affidavit accompanying the application, the judge may issue a warrant authorizing the persons to whom it is directed to intercept any

communication or obtain any information, record, document or thing and, for that purpose,

(a) to enter any place or open or obtain access to any thing;

(b) to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or thing; or

(c) to install, maintain or remove any thing.

(4) There shall be specified in a warrant issued under subsection (3)

(a) the type of communication authorized to be intercepted, the type of information, records, documents or things authorized to be obtained and the powers referred to in paragraphs (3)(*a*) to (*c*) authorized to be exercised for that purpose;

(b) the identity of the person, if known, whose communication is to be intercepted or who has possession of the information, record, document or thing to be obtained;

(c) the persons or classes of persons to whom the warrant is directed;

(d) a general description of the place where the warrant may be executed, if a general description of that place can be given;

(e) the period for which the warrant is in force; and

(f) such terms and conditions as the judge considers advisable in the public interest.

(5) A warrant shall not be issued under subsection (3) for a period exceeding

(a) sixty days where the warrant is issued to enable the Service to investigate a threat to the security of Canada within the meaning of paragraph (d) of the definition of that expression in section 2; or

(b) one year in any other case.

22. On application in writing to a judge for the renewal of a warrant issued under subsection 21(3) made by a person entitled to apply for such a warrant after having obtained the approval of the Minister, the judge may, from time to time, renew the warrant for a period not exceeding the period for which the warrant may be issued pursuant to subsection 21(5) if satisfied by evidence on oath that

(a) the warrant continues to be required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16; and

(b) any of the matters referred to in paragraph 21(2)(b) are applicable in the circumstances.

23. (1) On application in writing by the Director or any employee designated by the Minister for the purpose, a judge may, if the judge thinks fit, issue a warrant authorizing the persons to whom the warrant is directed to remove from any place any thing installed pursuant to a warrant issued under subsection 21(3) and, for that purpose, to enter any place or open or obtain access to any thing.

(2) There shall be specified in a warrant issued under subsection (1) the matters referred to in paragraphs 21(4)(c) to (f).

24. Notwithstanding any other law, a warrant issued under section 21 or 23

(*a*) authorizes every person or person included in a class of persons to whom the warrant is directed,

(i) in the case of a warrant issued under section 21, to exercise the powers specified in the warrant for the purpose of intercepting communications of the type specified therein or obtaining information, records, documents or things of the type specified therein, or

(ii) in the case of a warrant issued under section 23, to execute the warrant; and

(b) authorizes any other person to assist a person who that other person believes on reasonable grounds is acting in accordance with such a warrant.

25. No action lies under section 18 of the *Crown Liability Act* in respect of

(a) the use or disclosure pursuant to this Act of any communication intercepted under the authority of a warrant issued under section 21; or

(b) the disclosure pursuant to this Act of the existence of any such communication.

26. Part VI of the *Criminal Code* does not apply in relation to any interception of a communication under the authority of a warrant issued under section 21 or in relation to any communication so intercepted.

TAB 7

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by

ROBERT W. MACAULAY, Q.C.

and

JAMES L.H. SPRAGUE, B.A., LL.B.

Contributors

Judy Algar
Peter Budd
Irène Dicaire
Marvin J. Huberman
David P. Jacobs
Charles Mathis
Sharon Silberstein

Patricia Auron
Laura Boujoff
Daria Farr
Irving Kleiner
Steve B. McCann
Judith A. Snider

Gay A. Brown
Douglas Colbourne
Roger R. Elliott
Leslie MacIntosh
Paul Pudge
David Wood

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9.7(a) Public Interest Standing

Public interest standing deals with the ability of a person to challenge a decision who would not ordinarily be considered to be sufficiently directly affected by the issue at hand to do so.[32.110] There are instances where such persons

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2010 BCCA 343 (B.C.C.A) that "where a litigant does have a direct interest in the dispute, before the matter is considered the court should address whether the litigant has standing to participate in the litigation."

32.110 In *Morgentaler v. New Brunswick*, 2009 CarswellNB 200, 2009 NBCA 26 (N.B. C.A.) the New Brunswick Court of Appeal held that a superior court may exercise its inherent jurisdiction to grant public interest standing at any time – whether before the commencement of a proceeding or anytime during the proceeding. And it is, in fact, good for the issue to be resolved early in the process.

> Just as significantly, the court may grant public interest standing in the exercise of its inherent jurisdiction, whenever it is just to do so, whether before the commencement of the proceeding or at any time during its pendency.
>
> . . .
>
> Ideally, applications for public interest standing should be made before the commencement of proceedings. If the application is denied, time, effort and money otherwise wasted will become available for some other worthy public interest cause or to assist a like-minded claimant with standing as of right. If the application is allowed, the claimant will have original rights including the right to initiate the litigation, "develop its factual underpinning" and control its unfolding within the applicable procedural framework (see Sharon Levine, *Advocating Values: Public Interest Intervention in Charter Litigation* (1993), 2 N.J.C.L. 1-410, p. 37). Moreover, and just as importantly, the parties' energies will be channeled, sooner rather than later, in the direction of an "expeditious determination of [the] proceeding on its merits" (see Rule 1.03(2)).

Once public interest standing is granted a person to challenge the constitutionality of a provision, the person has full participation rights.

There is some case law which refers to a "residual" power in the courts to grant standing beyond the traditional concepts of as of right standing, public interest standing and intervenor status. See, for example, *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2008 CarswellNat 3930, 2008 FC 1102 (Fed. Ct.), affirmed but with no discussion of the standing issue, 2009 CarswellNat 920, 2009 FCA 116 (Fed. C.A.). Without making any definitive finding on the issue, the New Brunswick Court of Appeal, in *Morgentaler v. New Brunswick*, 2009 CarswellNB 200, 2009 BNCA 26 (N.B. C.A.), expressed some doubts about there being any general residual authority in superior courts of this nature.

The common law recognizes at least two categories of standing in civil proceedings: (1) private standing or standing as of right (it bears noting that a civil defendant entitled to the benefit of the *Big M Drug Mart* exception—so named because it arises from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17 (S.C.C.)—has standing as of right: *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, [1998] S.C.J. No. 78 (S.C.C.), para. 47); and (2) public interest standing. A third category, standing to sue under a "residuary" judicial discretion, is mentioned in some of the cases referenced by the motion judge and in Canadian Egg Marketing Agency v. Richardson, at para. 35. However, it is unclear whether the observations on point in the last-mentioned case are general in application or whether they speak only to the special intervention rules applicable in the Supreme Court of Canada. In my view, it is at least questionable whether there is any need for a basket category of standing and debatable whether it is warranted by principle, having regard to the

can be allowed to bring those applications in the public interest. Such applications are said to be brought in the public interest and the person bringing them is said to have public interest standing. However, unlike the superior courts which have the inherent authority to grant such standing, statutory agencies must be given that authority by legislation and, thus, must exercise caution in identifying such authority when considering requests for public interest standing. Agencies cannot grant public interest standing to result in their hearing matters which their legislation did not contemplate their hearing. This may be seen most easily where their enabling statute clearly limits who can bring applications.[33] Before an agency can grant public interest standing it must ensure that the legislation grants the agency discretion to do so. Allowing the bringing of an application by a person who does not meet that statutory criteria would be tantamount to the agency extending its own jurisdiction.

In the Supreme Court of Canada decision in *Finlay v. Canada (Minister of Finance)*[33.1] the Court was confronted with the issue as to whether a recipient of provincial social assistance under the Manitoba Social Allowances Act,[34] had standing to challenge the manner in which this Act was being administered. The plaintiff claimed that the wrongful administration of this Act contravened certain undertakings which Manitoba gave to the Federal Government as part of a cost-sharing plan, and, accordingly, he sought a declaration that these federal payments were invalid as a result. The court held that it had the discretion to grant a form of "public interest" standing in this situation and. in turn, concluded that the plaintiff met all the criteria for the positive exercise of this discretion. In arriving at this conclusion, Mr. Justice LeDain, for a unanimous court, relied upon the

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Supreme Court of Canada's exhortation to interpret liberally and generously the principles that inform the three-part test for public interest standing (see Canadian Council of Churches, para. 36). That said, Dr. Morgentaler did not ask the court to grant him standing under any "residuary" judicial discretion and I prefer to leave to another day any in-depth discussion of its existence and application in this Province.

33 *C.U.P.E., Local 30, v. WMI Waste Management of Canada Inc.*, 1996 CarswellAlta 40, 34 Admin L.R. (2d) 172 (Alta. C.A.) (Person "directly affected" can appeal matter to agency. Court of Appeal approves agency refusing "public interest" standing to allow persons to appeal matter to agency where that would have effect of extending meaning of "directly affected". Court of Appeal noted that "No authorities have been cited to suggest that the expansion of the principle of public interest standing has been applied to administrative agencies.") Similarly, see *Canadian Civil Liberties Assn. v. Ontario Civilian Commission on Police Services*, 2006 CarswellOnt 7414, 275 D.L.R. (4th) 744, 56 Admin. L.R. (4th) 249 (Ont. C.A.), leave to appeal refused (2007), 2007 CarswellOnt 2860, 2007 CarswellOnt 2859 (S.C.C.) where the Ontario Court of Appeal noted that a statutory definition of "directly affected" was intended to limit the persons who could bring applications. The Court of Appeal did not discuss "public interest standing" but the point respecting the intention of the legislature is applicable to that issue as agencies cannot extend their jurisdiction beyond that granted to them by the legislature.

33.1 *Finlay v. Canada (Minister of Finance)*, 1986 CarswellNat 104, *(sub nom) (Minister of Finance v. Finlay)*, 33 D.L.R. (4th) 321, [1986] 2 S.C.R. 607, 23 Admin. L.R. 197 (S.C.C.).

34 R.S.M. 1970, c. S160.

TAB 8

THE LAW OF

DECLARATORY JUDGMENTS

Third
Edition

LAZAR SARNA, B.A., B.C.L., LL.M., D.C.L.

MEMBER OF THE QUEBEC BAR

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STANDING AND DISCRETION

1. USE OF DISCRETION

The declaratory jurisdiction is discretionary in virtue of the very wording of the statute which creates or confirms that jurisdiction. The remedy is discretionary in the sense that a court may refuse to grant it even if the case for it has been made out. The exercise of this discretion has been judicially categorized as "delicate" and, as Lord Dunedin suggested,[1] often subject to little guidance:

> But then it is said that the granting of a mere declaration is a matter of discretion, and that that discretion ought to be shown in granting such declaration "sparingly," "with great care and jealousy" and "with extreme caution." My Lords, I confess that to my mind such expressions give little guidance. It may be that I am swayed by my experience of another system law, but a rule which can be expressed in the form of a principle may well be proper to any legal system. Your Lordships are aware that the action of declarator has existed for hundreds of years in Scotland . . . The rules that have been elucidated by a long course of decisions in the Scottish Courts may be summarized thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing has a true interest to oppose the declaration sought.

The history of the use of discretion in declaratory proceedings is, in effect, the subject of the entire present volume. At least one simple "rule" has received wide and basic acceptance: the discretion of the court is almost unlimited and should not be continually used to deny

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[1] *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 (U.K. H.L.) at 447-48. See also *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 482.

declaratory relief.[2] Of course this rule is no rule at all, but an attitude, an ideal. It does not reveal the confluence of circumstances, the capacity of the parties or the nature of the legal issue necessary to persuade the court that a declaration should be granted.

What it does reveal is that the court is subject to few restraints in deciding whether or not to issue relief, the main and possibly only restraint being that judicial discretion cannot be used to assume jurisdiction where none exists. For example, the court cannot grant a declaration upon proceedings which have been presented by way of motion instead of action as required by statute. It is as well a question of law and not discretion that no declaration issue where the fundamental elements of a proceeding are absent or irregular, such as service upon the parties and jurisdiction to deal with the subject matter, and where a statutory private clause or the private agreement of the parties prohibits judicial remedy. The power to issue declarations without consequential relief does not enable the court to create its own powers; but within the apparent scope of the declaratory jurisdiction judicial discretion is the sole determinant of the life of the recourse, even in the face of strong

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[2] *Lockyer Estate, Re* (1933), [1934] O.R. 22 (Ont. C.A.) at 27, *per* Middleton J.A., citing *Owen v. Owen* (sub nom. *Staples, Re*) [1916] 1 Ch. 322 (Eng. Ch. Div.); *Austen v. Collins* (1886), 54 L.T. 903 at 905; *Faber v. Gosworth Urban Dist Council* (1903), 88 L.T. 549 at 550; *Markwald v. Attorney General*, [1920] 1 Ch. 348 (Eng. Ch. Div.) at 357; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd., supra,* note 1, at pp. 445, 448; *Henning v. Calgary (City)* (1974), 51 D.L.R. (3d) 762 (Alta. C.A.) at 764. In *Kent Coal Co. v. Northwestern Utilities Ltd.*, [1936] 2 W.W.R. 393 (Alta. C.A.) at 412, McGillivray J.A. reviewing the jurisdiction of the court to grant a declaratory judgment quoted the remark of Lord Sterndale M.R. in *Hanson v. Radcliffe (Urban District Council)*, [1922] 2 Ch. 490 (Eng. C.A.):

> "In my opinion, under order XXV, r. 5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide."

In *Barnard v. National Dock Labour Board*, [1953] 2 Q.B. 18 (Eng. C.A.) at 41, Denning L.J. said: 'I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself' See also *Mutrie v. Alexander* (1911), 23 O.L.R. 396 (Ont. H.C.) at 401; *Roy v. Kloepfer Wholesale Hardware & Automotive Co.*, [1952] 2 S.C.R. 465 at 466.

indication that the applicant has or has not standing or legal interest to sue.[3]

2. DECLARATION AS EQUITABLE RELIEF

There has been some disagreement as to whether the declaratory judgment is an equitable[4] or common law[5] remedy, or *sui generis.*[6]

On the basis of its origin the declaratory judgment might be said to belong to equity. The enactment of the *Chancery Act* of 1850 and the *Chancery Procedure Amendment Act* of 1852 certainly confirmed the existence of the declaratory action in the court of equity prior to the adoption of O. 25, R. 5, in 1883.[7] This is not to say that declaratory relief was an inherent equitable power of Chancery available prior to 1850 in matters involving private parties,[8] or that its introduction by legislation established the remedy as being no more than a neutral law of procedure subject only to the rules of its own statute.

If the relief is equitable in nature, what have been the consequences? The development of Canadian case law has seen little if no reference to the equitable nature of the remedy; and the rules, here outlined, on the exercise of the discretion are not in essence equitable. A recent

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[3] Relief, according to principle, will issue insofar as it would not be unlawful, unconstitutional or inequitable: *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 616 (Eng. C.A.) at 626-27; but see *Electrical Development Co. v. Queen Victoria Niagara Falls Park (Commissioners)* (1917), 40 O.L.R. 480 (Ont. H.C.), permitting a statement of claim which disclosed no grounds for the declaration sought, subject to amendment; also, *Jamieson v. British Columbia (Attorney General)* (1971), 21 D.L.R. (3d) 313 (B.C. S.C.) at 323.

[4] *B. v. Canada (Department of Manpower & Immigration)*, [1975] F.C. 602 (Fed. T.D.); *Barnard v. National Dock Labour Board*, [1953] 2 Q.B. 18 (Eng. CA.), *per* Lord Denning L.J.; *Steinberg v. Cohen* (1929), 64 O.L.R. 545 (Ont. C.A.); S.A. de Smith, *Judicial Review of Administrative Action* (1973), pp. 460-61.

[5] To date there has been little suggestion that the declaratory judgment is a common law remedy.

[6] *Chapman v. Michaelson*, [1908] 2 Ch. 612 (Eng. Ch. Div.), affirmed (1908), [1909] 1 Ch. 238 (Eng. CA.); E. Borchard, "The Next Step Beyond Equity - The Declaratory Action" (1945), 13 U, of Chicago L.R. 145; I. Zamir, *The Declaratory Judgment* (1962), pp. 187-91.

[7] See in Chapter 2, "English Experience".

[8] *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536 (Eng. K.B.).

dictum of the House of Lords can be said to adequately summarize the Canadian view:

> It must be admitted that, now that all courts endeavour to give effect to the rules of both systems with predominance for equity in the case of conflict, a distinction which is based entirely on the nature or history of the remedy sought does not seem a very satisfactory basis for a material difference in the resulting positions [of the parties].[9]

There has yet to appear a serious proposal that the exercise of discretion on declaratory proceedings be confined to the general principles governing equity.[10]

Although declaratory recourse has been categorized as merely procedural rather than substantive, the remedy is undeniably equitable in origin, and is therefore subject to the consequences of its equitable origins.[11]

The remedy is at the discretion of the court; and attracts equitable defences including laches and acquiescence. A public law assertion of rights through a declaratory remedy would therefore be subject to the private law equitable defences. For example, there is no escape from those defences in the assertion of aboriginal rights: to call those rights *sui generis* above law and equity, does not recognize the role of the court in administering both legal and equitable remedies which are sought to enforce those very rights.[12]

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[9] *Kasumu v. Baba-Egbe,* [1956] A.C. 539 (West Africa P.C.) at 550, followed in *Barclay v. Prospect Mortgages Ltd.*, [1974] 2 All E.R. 672 (Eng. Ch. Div.).

[10] But see *Morris v. Morris* (1973), 42 D.L.R. (3d) 550 (Man. C.A.), leave to appeal allowed [1974] 3 W.W.R. 479 (Man. C.A.) at 567 [D.L.R.]; *MacDonald v. Law Society (Manitoba)* (1975), 54 D.L.R. (3d) 372 (Man. Q.B.).

[11] *Behr v. College of Pharmacists (British Columbia)*, 2005 BCSC 879 (B.C. S.C.).

[12] *Michel First Nation v. Canada (Minister of Indian Affairs & Northern Development)*, (*sub nom. Callihoo v. Canada (Minister of Indian Affairs & Northern Development)*) 2006 ABQB 1 (Alta. Q.B.), reversed 2007 ABCA 59 (Alta. C.A.); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, [2001] 1 C.N.L.R. 56, 139 O.A.C. 201 (Ont. C.A.), additional reasons at (2001), 204 D.L.R. (4th) 744 (Ont. C.A.), leave to appeal refused (2001), 2001 CarswellOnt 3952 (S.C.C.), reconsideration refused (2002), 2002 CarswellOnt 1903 (S.C.C.) at para 289 [Ont. C.A.]: *To hold that aboriginal rights are immune from the principles of equity would be inconsistent with the repudiation of the traditional dichotomy between law*

3. LOCUS STANDI

Locus standi refers to the right of a party to appear or plead before the court on a question which is deemed to be of interest to that party. Standing or interest confers upon an applicant the right to be heard as distinct from the right to succeed in an action or proceeding for relief. The various provincial Judicature Acts and rules of court, while taking few pains to fully define the question of standing, do presume as a basic tenet that no relief will issue unless the applicant has sufficient interest. Although the categories of "plaintiff" and "petitioner" are often statutorily applied to parties who have instituted proceedings, whether or not they have a right to do so, it is apparent that no court is obliged to provide a remedy for a claim in which the applicant has a remote, hypothetical, or no interest.

In selected circumstances, statutes and rules of court do make an *a priori* determination of which party has standing to sue. The Attorneys General are often automatically entitled as of right to be heard on

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and equity by this Court, the Supreme Court of Canada and by the House of Lords, particularly in relation to remedial issues. As Grange J.A. stated in LeMesurier v. Andrus (1986), 54 O.R. 1 at 9 with reference to the legislative direction that the courts "shall administer concurrently all rules of equity and the common law" (now found in the Courts of Justice Act, s. 96(1)), "the fusion of law and equity is now real and total". In Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534 at 582 La Forest J. adopted Lord Diplock's assertion in United Scientific Holdings Ltd. v. Burnley Borough Council (1977), (sub nom. Cheapside Land Development Co. v. Messels Service Co.) [1978] A.C. 904 (U.K. H.L.) at 924-5 that the merger of law and equity is complete and that "the waters of the confluent streams of law and equity have surely mingled now."

See also at para. 298 and 299: The doctrine of laches has been applied to bar the claims of an Indian band asserting aboriginal land rights: *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (Ont. H.C.) at 447 (affirmed on other grounds (1989), 68 O.R. (2d) 394 (Ont. C.A.), affirmed [1991] 2 S.C.R. 570, reconsideration refused (1995), 46 R.P.R. (2d) 91 (note) (S.C.C.)); *Roberts v. R.*, (1955), (sub nom. *Wewayakum Indian Band v. Canada*) 99 F.T.R. 1 (Fed. T.D.), reversed (1999), 1999 CarswellNat 2064 (Fed. C.A.), affirmed [2002] 4 S.C.R. 245 at 77 and 79 [F.T.R.]. There are also dicta in two decisions of the Supreme Court of Canada considering, without rejecting, arguments that laches may bar claims to aboriginal title: *R. v. Smith*, [1983] 1 S.C.R. 554 at 570; Guerin, *supra* at 390. . .The facts relevant to the defences of laches and acquiescence have already been discussed with respect to the consideration of delay in relation to public law remedies and it is unnecessary to repeat them here.

constitutional issues raised during the course of suits to which they may not be parties. A similar right is extended to legal heirs in contestations of wills, to persons sought to be restrained by application for injunction, and various other parties whose rights, capacities or titles are challenged. Where it is not automatically conferred, standing is usually determined by reference to such requirements as prejudice to private rights, exigibility of the claim and legal capacity.

In seeking guidance from the case law for principles governing the use of discretion to grant a declaration, one is met with a double world of discretionary power which unfortunately blurs analysis. The court has sufficient leeway, perhaps tantamount to outright discretion, to decide whether or not an applicant for relief has legal interest to sue; at the same time, the court in its absolute discretion may decide whether or not declaratory relief is suitable and should be granted. Although standing, or the right to request relief, is a matter entirely different from, but not independent of, the right to relief, the decision to deny legal standing has usually been made not in the name of discretion to determine standing, but in the name of the declaratory discretion, as if the reasons for denial are unique to and characteristic of the declaratory remedy.[13] In other instances, it has been assumed that the *locus standi* of an applicant must be determined in light of the special relief sought, and that accordingly declaratory discretion and discretion on standing must unavoidably suffer a degree of fusion.[14]

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[13] For example, *Chow v. Patterson* (1973), 38 D.L.R. (3d) 721 (B.C. S.C.)

[14] See, for example, the test of "justiciability" in *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138, and the judgment of Laskin J. at p. 145:

"I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder . . . The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; . . . The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie,* it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."

J.F. Garner, "Locus Standi in Actions for a Declaration" (1968), 31 M.L.R. 512; D.C.M. Yardley, "Prohibition and Mandamus and the Problem of Locus Standi" (1957), 73 L.Q.R. 534 at 539, retreating from a previous conclusion that determination of *locus standi* is a matter of discretion, in 71 L.Q.R. 388; G.J. Bowie, "The Advantages of the

It is safe to say that the exercise of discretion to grant declaratory relief is bounded by a principle which continually recurs in modified form: while the applicant does not have to demonstrate an interest or cause of action sufficient to support a claim for consequential relief, he must quell judicial fears that the demand for a declaration will not result in a judgment useless or detrimental in its scope and substance. Whether denial of relief is described in terms of lack of *locus standi* or inappropriateness, the use of discretion in the name of either principle is fully sanctioned by the declaratory power as provided by statute.

As a minimum basis for a claim to *locus standi*, the plaintiff must establish at least a threat of violation of rights, although no actual violation need necessarily be involved.[15] Looking at the issue in another way, the plaintiff must have a protectible interest. The concretization of these notions, however, is more difficult where the courts introduce the question of justiciability,[16] a question which frustrates those who are eager to establish some norms for the declaratory remedy. A justiciable question, in the broad sense, is one which must be susceptible of, or appropriate for, resolution by a court: consideration is given to difficulties of proof, relief sought, and jurisdiction. In that respect the

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Declaratory Judgment in Administrative Law" (1955), 18 M.L.R. 138. T.A. Cromwell, *Locus Standi* (1986), states at p. 146:

> ". . . the test for standing to seek declarations appear to be that the plaintiff must have 'an interest' in the issue sought to be litigated. The term 'interest' has been given a variety of meanings, but the most recent cases have given it a broad interpretation. Notions of privity between the parties and private law concepts of pecuniary and proprietary interest have given way to a more pragmatic, if not well articulated approach. The tendency has been to abandon formalistic analysis and to examine the real significance of the issue to the plaintiff. On occasion, the concept of interest has been extended to include matters of the plaintiff's principles and beliefs or causes, quite apart from any economic or regulatory impact the subject matter of the suit may have. The analysis of interest depends, in many cases upon the factual and regulatory context and the plaintiff's relationship to it."

[15] *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 480, 486; *Finlay v. Canada (Minister of Finance)* (1986), 23 Admin. L.R. 197 (S.C.C.).

[16] It is said that constitutional issues are always justiciable: *Waddell v. British Columbia (Governor in Council)* (1981), (sub nom. *Waddell v. Schreyer*) 126 D.L.R. (3d) 431 (B.C. S.C.), affirmed (1982), 142 D.L.R. (3d) 177 (B.C. C.A.), leave to appeal refused (1982), 142 D.L.R. (3d) 177n (S.C.C.); and generally, *Mueller v. St. Vital School Division 6*, [1985] 6 W.W.R. 657 (Man. Q.B.).

question of justiciability makes no true juridical sense where we are dealing with a court of general jurisdiction; the court has the power to entertain (and reject) a poor action as it does one which may be well-founded. To clutter the field of declaratory power with yet another synonym for discretion does not advance our study. As Wilson J. aptly noted:

> The real issue there, and perhaps also in the case at bar, is not the *ability* of judicial tribunals to make a decision on the questions presented, but the *appropriateness* of the use of judicial techniques for such purposes.
>
> I cannot accept the proposition that difficulties of evidence or proof absolve the Court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts *should* or *must* rather than on whether they *can* deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us.[17]

Public interest groups, unless they possess an interest distinct from their members whose rights are affected, generally do not have standing.[18]

4. AUTOMATIC STANDING

There have been many casualties in the attempts to demonstrate to the court the existence of a justiciable issue and the standing to sue. In practice, the only litigant who may be said to have an "automatic" standing to obtain a declaration is the Attorney General. It may be argued that even the automatic right to a declaration granted to the Attorney General depends upon his jurisdiction and the jurisdiction of the law or issue in question; but it is readily apparent that the private citizen cannot command the same presence in suit as the Attorney General.

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[17] *Operation Dismantle Inc. v. R., supra*, note 6, at pp. 466-67.

[18] See the authorities noted in *Sea Shepherd Conservation Society v. British Columbia* (1984), 11 Admin. L.R. 190 (B.C. S.C.).

Is there any need for or value in making statutory provision for the automatic right of private individuals to a declaration? For instance, should taxpayers, ratepayers and members of organizations be allowed relief simply in virtue of their status? Perhaps one of the reasons for giving to the representative of the Crown a largely unfettered right is that he can be trusted not to flood the court with a series of frivolous and hypothetical demands — this carries the presumption that the Attorney General will only risk obtaining a binding decision when the absolute need arises. On the other hand, the development of enforceable corporate shareholder rights has recently taken great strides due to specific legislation giving to aggrieved individual shareholders the right to obtain court intervention.

However, little is to be obtained by infusing special rules of standing into the declaratory power as it exists. Except for legislation providing for an opinion on a reference case, no court is willing to engage its time in a futile discussion of abstract law even if the applicant for a declaration is the Attorney General. Statutes which do permit member, shareholder or class petitions still require proof of serious grievance, even though the status of the applicant has been summarily demonstrated. To give to an individual the right to a declaration purely on the ground of his status is to invite a greater degree of judicial interference and delay in ordinary business and government activity; and the real consequence can only be a more severe use of court discretion to eliminate candidates for relief through a body of rules yet to be developed.

5. NECESSITY OF A DISPUTE

While the court has an extremely wide jurisdiction, it will not entertain an action or a motion seeking relief where there is no dispute between the parties, or where the dispute does not reveal any difficulty with respect to the rights vested in one of the parties. Proof of a dispute is in effect proof that judicial intervention is not only helpful but indeed necessary for resolution of the issue.

Once the dispute has been resolved by an order, the court should not issue a declaration of rights. The declaration risks falling into the realm of mootness, unless it is designed to prevent future conflict

between the parties. For example, if the court quashes a subpoena based on relevance, it should not proceed further to declare that the body issuing the subpoena had no jurisdiction to do so.[19]

If a party is no longer at risk of being charged under a criminal offence, nor is continuing the allegedly illegal conduct, there is no practical purpose to seeking a declaration regarding the facts underlying the charge.[20]

As the Supreme Court of Canada has noted, declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.[21]

The court is nevertheless justified in hearing a claim even where the cause of action has ceased to exist,[22] or where the disputed right

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[19] *Nova Scotia (Attorney General) v. Nova Scotia Police Review Board*, 1999 NSCA 151 (N.S. C.A.) at para. 22: *why have the declaration at all, if it accomplishes nothing more than the order to quash accomplished? That is precisely, why the additional declaratory relief is not necessary in this case.*

[20] *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 237 D.L.R. (4th) 385, 43 B.L.R. (3d) 163, 186 O.A.C. 128 at para. 89.

[21] *Solosky v. Canada*, [1980] 1. S.C.R. 821, 105 D.L.R. (3d) 745.

[22] An application to strike out an appeal will therefore not lie even where a municipal taxing by-law has been quashed for illegality, and the municipality has passed a new by-law. In *Henning v. Calgary (City), supra,* note 2, the Appellate Division of the Alberta Supreme Court held that the implied repeal of the by-law following its quashing but pending appeal did not automatically categorize the appeal as hypothetical, theoretical or academic, especially in view of the argument of the municipal corporation that its true intention was to re-enact the by-law under attack in the event that the appeal was granted. Although the decision did not involve a question of declaratory relief, the court referred to the wide declaratory jurisdiction under the *Judicature Act*, R.S.A. 1970, c. 193. It may be argued that the court unnecessarily concerned itself with the scope of its declaratory discretion, especially where the issues at hand did not seek the remedy. See, generally, *Reference re Alberta Legislation*, [1939] A.C. 117 (Alberta P.C.); *Oatway v. Canada (Wheat Board)*, [1945] S.C.R. 204; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd., supra*, note 1; *Kent Coal Co. v. Northwestern Utilities Ltd., supra,* note 2, at p. 412; *Foster Wheeler Ltd. v. J.D. Irving Ltd.* (1978), 20 N.B.R. (2d) 634 (N.B. Q.B.).

goes beyond the strict legal relationship of the parties,[23] so long as it concerns a real question of substance, and the applicant and respondent demonstrate some necessity for judgment. Unless the judgment will be of some use, the court will not issue an order determining defunct rights under a statute which has been repealed,[24] enter into an investigation and decision concerning stale contracts, or discuss the merits of a spent judgment.[25] Neither will it entertain a prayer for relief on summary motion if the material facts are disputed or where evidence must be weighed in order to determine the matters in issue. The proceeding must allege facts underpinning the claim; to allege a conflict of laws, bereft of facts, is insufficient.[26]

6. HYPOTHETICAL QUESTIONS

A proper case for a declaratory judgment generally requires some privity in law between parties concerned, an existent right and an interference or dispute concerning the right. A petitioner who has no right in the nature of a claim capable of being enforced or redressed in a civil action cannot seek a judicial declaration for the evident reason that he cannot take advantage of or suffer the consequences of such an order: the lack of standing to sue robs the court of its declaratory jurisdiction.

Questions which are purely academic, hypothetical, obscure, or of no relevance to the parties, cannot form a suitable basis for an appli-

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[23] Such larger meaning must evidently entail some economic consequence: *Canadian Pacific Railway v. Building Material, Construction & Fuel Truck Drivers' Union*, [1975] 5 W.W.R. 329 (B.C. C.A.) at 363, *per* Bull J.A. citing Zamir, *The Declaratory Judgment*, p. 249:

> "There is no need that the relationship between the parties should be one within the framework of recognized categories: contract, tort, trust, etc. It is sufficient that the act of the defendant has affected or may affect the plaintiff in his private rights." But see W *C.B., Man, v. Hagebock* (1985), 22 D.L.R. (4th) 473 (Man. C.A.).

[24] *Gruen Watch Co. of Canada v. Canada (Attorney General)*, [1950] 4 D.L.R. 156 (Ont. H.C), reversed in part [1951] 3 D.L.R. 18 (Ont. C.A.) at 177 [4 D.L.R.].

[25] *CTV Television Network Ltd. v. Kostenuk*, [1972] 3 O.R. 338 (Ont. C.A.).

[26] *Berman v. Karleton Co.* (1982), 37 O.R. (2d) 176 (Ont. H.C.); *Burlington v. Clairton* (1979), 24 O.R. (2d) 586 (Ont. C.A.); *Danson v. Ontario (Attorney General)* (1987), 22 O.A.C. 38 (Ont. C.A.), affirmed [1990] 2 S.C.R. 1086.

cation for relief.[27] Judicial avoidance of these questions is attributable

[27] *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 at 830-31, per Dickson J. (at that time):

> "Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

"The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 (U.K. H.L.), in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

"'The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.'"

"In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government,* [1958] 1 Q.B. 554, (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):

> "' . . . if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.'

"The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in *Pharmaceutical Society of Great Britain v. Dickson,* [1970] A.C. 403 (H.L.), a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be *ultra vires* its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

> "'A person whose freedom is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.'"

Followed in *Major, Re*, [1984] 6 W.W.R. 435 (B.C. S.C.). See the reference to the "usefulness" test in *Terrasses Zarolega Inc. c. Quebec (Olympic Installations Board)*, [1981] S.C.R. 94 at 107:

> "As the Court pointed out to counsel for the appellants at the hearing, the declaratory judgment they are seeking in the case at bar could only be of very limited usefulness in the circumstances. Question 11 is so formulated that the finding could only be that the word 'include' in s. 27 of the *Act respecting the Olympic Village* does not have a limiting effect. This would leave the issue unresolved respecting each of the items individually which appellants might wish to submit to the arbitration committee, so that the declaratory proceeding might have to be begun again for each of these."

See also *Federal Business Development Bank v. Group Plus One Ltd.* (1985), 160 A.P.R. 267 (P.E.I. C.A.)

in some measure to the wording of statute, which demands that a judgment must contain a declaration of rights. A judicial statement to the effect that a given act, contract or demand is legal, enforceable or non-existent may in certain circumstances not be considered an actual determination of rights, even though the rights of the parties are incidentally decided.[28]

The courts have on occasion assumed jurisdiction to make a declaration which is devoid of legal effect, but likely to have some practical effect. Judgments have issued confirming that a labour dismissal or demotion was wrongfully effected even though there was no possibility of reinstatement, and that an administrative decision was rendered without regard to principles of natural justice even though the cancellation of the decision would not restore the *status quo ante*. While the applicant may have no real economic or patrimonial stake in obtaining the judgment, judicial sympathy has been forthcoming: especially where relief might effectively remove a slur upon the applicant's character, provide corrective or practical guidance to administrative officials,[29] lead to a

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[28] *Charleston v. MacGregor* (1957), 23 W.W.R. 353 (Alta. T.D.) at 359; *Freemont Canning Co. v. Wall*, [1941] O.R. 379 (Ont. H.C.), affirmed [1941] O.R. 379 at 398 (Ont. C.A.); *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324 at 342; *McCutcheon v. Wardrop* (1918), [1919] 1 W.W.R. 925 (Man. K.B.); *Motor Car Supply Co. of Canada v. Alberta (Attorney General)*, [1938] 3 W.W.R. 374 (Alta. T.D.).

[29] *McCarthy v. Canada (Attorney General)* (1979), [1980] 1 F.C. 22 (Fed. T.D.), reversed (1980), [1981] 1 F.C. 309 (Fed. C.A.); *Landreville v. R.*, [1973] F.C. 1223 (Fed. T.D.), supported mainly by *Merricks v. Nott-Bower*, [1964] 1 All E.R. 717 (Eng. C.A.) at 721, *per* Lord Denning M.R.:

> "Then it is said: Accepting that view, what is the relief claimed? All that is claimed is a series of declarations, all of them to the effect that the transfer was made without regard to the regulations and without regard to the principles of natural justice. It is asked: What use can such declarations be at this stage, when the transfer took place six and a half years ago? What good does it do now? There can be no question of re-opening the transfers . . . On this point we have been referred to a number of cases which show how greatly the power to grant a declaration has been widened in recent years. If a real question is involved, which is not merely theoretical, and on which the court's decision gives practical guidance, then the court in its discretion can grant a declaration. A good instance is the recent case on the football transfer system decided by Wilberforce, J., *Eastham v. Newcastle United Football Club Ltd.*, [1964] Ch. 413, [1963] 3 All E.R. 139. Counsel for the plaintiffs said that, in this particular case, the declaration might be of some use in removing a slur which was cast against the plaintiffs by the

possible practical result, or simply declare a breach of law for the intrinsic social good.[30]

Where a deportation order has been issued but is stayed by the operation of law until applicant's application for humanitarian treatment is decided, a declaration that it would be a violation of the principles of fundamental justice to deport the applicant back to his homeland, if granted, would have no practical effect: the applicant might be deported if his other application were unsuccessful and he could not be deported until the decision was made to grant or not grant permanent resident status.[31]

In rare circumstances, the courts will be chided for under-using its declaratory jurisdiction, especially where the declaratory relief in itself falls short of having any practical effect. In one decision, the court added an order to the declaration issued by the lower court, saying that the restoration of fundamental rights must not be reduced to a choice between applying the general civil liability regime or rendering declaratory judgment that recognizes the right but gives it no practical effect. It noted this approach was perhaps indicative of an undue focus upon a single, albeit important, question in the analysis of the issue of remedies under the *Quebec Charter*, namely, the issue of the question of the relationship between the law of civil liability in the *jus commune* and the fundamental freedoms guaranteed under the *Quebec Charter*.[32]

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transfer. He also put it on the wider ground of the public interest that the power to transfer can only be used in the interests of administrative efficiency and not as a form of punishment. He said that it would be valuable for the court so to declare. Again on this point, but without determining the matter, it seems to me that there is an arguable case that a declaration might serve some useful purpose. We cannot at this stage say that the claim should be rejected out of hand."

30 Even if no possible practical result is foreseen: *Kelso v. Canada*, [1981] 1 S.C.R. 199; *Jasper Park Chamber of Commerce v. Canada (Governor-General in Council)* (1982), 141 D.L.R. (3d) 54 (Fed. C.A.); *Canadian Pacific Ltd. v. Telesat Canada* (1982), 36 O.R. (2d) 229 (Ont. C.A.), leave to appeal refused (1982), 133 D.L.R. (3d) 321n (S.C.C.) at 255 [O.R.].

31 *Brown (Litigation Guardian of) v. Canada (Minister of Citizenship & Immigration)*, 2003 FCT 269 (Fed. T.D.).

32 *Quebec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine)*, [2004] 1 S.C.R. 789, 239 D.L.R. (4th) 253, 122 C.R.R. (2d) 1, 18 Admin. L.R. (4th) 90, 36 C.C.E.L. (3d) 1, 49 C.H.R.R. D/129

Notwithstanding these considerations, the courts have displayed reluctance to grant relief where it cannot even *prima facie* be shown that an impugned act has caused or may result in a violation or prejudice to any rights.

In *Operation Dismantle*,[33] the appellants sought (1) a declaration that a federal cabinet decision to permit the testing of the cruise missile was unconstitutional, (2) an injunction to prohibit testing. The Supreme Court of Canada struck out the appellants' statement of claim and dismissed the action on the basis that no facts were disclosed in the statement which, if taken as true, would show the action of the federal government could cause an infringement of their rights under s. 7 of the *Canadian Charter of Rights and Freedoms*.[34] Dickson J. concurred with Wilson J. that regardless of the basis upon which appellants' advanced their claim for declaratory relief, be it s. 24(1) of the *Charter*, s. 52 of the *Constitution Act, 1982*, or the common law, the appellants were bound and failed to, demonstrate their ability to establish a threat of, or actual violation of their rights under the *Charter*. The Court clearly indicated that federal Cabinet decisions are reviewable in the courts on the basis of s. 32(1)(*a*) of the *Charter* where the harm is actual, or probable, but not merely speculative. Dickson J. noted:

> The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:
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> "3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
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> "4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief."

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[33] *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441.

[34] Being Pt. I of the *Constitution Act, 1982* [en. by the *Canada Act, 1982* (U.K.), c. 11, s. 1].

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts": *(The Law of Declaratory Judgments* (1978), at p. 179).

None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,

> " . . . no 'injury' or 'wrong' need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty. . . ."

Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In *Solosky, supra,* one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This Court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The Court made it clear, however, at p. 832:

> " . . . that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise." (Emphasis added.)

...

It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.[35]

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[35] *Supra*, note 19, pp. 456-58.

To postulate a test, the greater the distance between a claimant's expectation of and the existence of his right, between the potential of harm and its realization, between the realization of harm and a consequent violation of rights, and between a claim and its dispute, the less likely judicial discretion will be exercised in favour of granting declaratory relief. This is not to say that declaratory and injunctive relief should be perfectly aligned insofar as prerequisites to relief are concerned. It would endanger the vitality of the declaratory remedy to subject it to the same cautious scrutiny as that applied to injunctions - for example, in questioning whether the declaration will alter the *status quo,* or whether it will cause an inconvenience, or will require security.

7. FUTURE RIGHTS

It has generally been asserted that relief will not lie for the declaration of future rights unless aspects of an existent right depend upon the judgment. It has also been said that the court has the discretion to grant a declaration as to the future where the order serves a definite purpose and does not embarrass the interests of any of the parties concerned.[36]

A distinction should be made between future rights and the future effects of a declaratory judgment. A judicial determination of present rights is binding on the parties as *res judicata* and will settle in the future all matters coming within the purview of the declaration.[37] On the other hand, future rights are those not yet born out of the judicial relationship between the parties and do not by definition ascertain all relevant parties, or the enforceability, relevance and scope of the obligation. For good reason, the issue of future rights has been assimilated to the treatment of hypothetical or academic rights in determining standing to sue. What interest can a party profess in seeking judicial determination of rights which may never accrue, or exclude him when they do, or be devoid of value for reasons of death, insolvency or change of

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[36] *Lockyer Estate, Re* (1933), [1934] O.R. 22 (Ont. C.A.); *Bunnell v. Gordon* (1890), 20 O.R. 281 (Ont. Ch.); *Thomson v. Cushing* (1899), 30 O.R. 123 (Ont. C.P.), affirmed (1899), 30 O.R. 388 (Ont. C.A.); *Fries v. Fries*, [1950] O.W.N. 661 (Ont. H.C.).

[37] *Canadian Warehousing Assn. v. R.* (1968), [1969] S.C.R. 176.

circumstances? Unless there is actual prejudice to present rights, an applicant must wait for his claim to ripen with the happening of the event. Even the consent of all parties who may reasonably be expected to be affected by future rights may be insufficient to confer upon the applicant adequate interest to sue.

From the point of view of practice, it is evident that the court finds it fairly difficult to give an appropriate interpretation to a clause of a deed or a right to title without specific documentation which may be largely unformed at the date of the proceedings. There is however no absolute rule against reviewing conditions in wills, settlements or commercial deeds which become actual with the mere passage of time, or even with the rendering of a judicial order. The main concern of the court is to avoid an unprofitable trip into the nebulous.

Parties often seek a declaration as a preliminary step to future action for other relief. The court is hesitant to issue a declaration within the framework of the same action in which consequential relief has been rejected, if it is evident that the dispute between the parties will continue following litigation. The rule applied is that declaratory relief is not to be used merely as the "foundation for substantive relief which fails."[38]

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[38] *Hugh W Simmons Ltd v. Foster, supra,* note 16, at p. 343:

> "In *Dysart v. Hammerton*, [1914] 1 ch. 822, where the action was for a declaration that the plaintiffs were entitled to an ancient ferry and an injunction to restrain the defendants from disturbing them in the enjoyment thereof, the Court of Appeal held that where such an action was dismissed on the ground that there had been no disturbance of the ferry a declaration of the plaintiffs' title under Order XXV, r. 5, should not be made. Cozens-Hardy M.R. said that the rule enabling the Court to make a declaratory decree ought not to be applied where a declaration is merely asked as a foundation for substantive relief which fails. While the decision of the Court of Appeal was reversed in the House of Lords *(Hammerton v. Dysart*, [1916] 1 A.C. 57), Viscount Haldane agreed with the opinion of the Court of Appeal on this point saying (p. 64): -
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> "'As the learned judge had found that the plaintiffs could have no relief against the defendants, the Court of Appeal thought that it was not proper, having regard to the character of the case, to make a declaration which might prejudge other cases.'
>
> "Lord Sumner said (p. 95) that whatever the jurisdiction might be to grant declarations of right where no other relief is given, this was not a case in which the power should have been exercised. There was no dissent from these views by the

For similar reasons, some courts will refuse to grant relief if they are requested to issue a negative declaration, or a judgment in denial of rights. The reason for refusal has been attributed to the judicial practice shortly following the enactment of the *Chancery Procedure Amendment Act* of 1852 of limiting declaratory relief to instances where the plaintiff had a right to consequential relief.[39] It is perhaps more true to make the attribution to judicial hesitancy to double the number of applicants for relief by extending the right to sue to both positive and negative claims. The court understandably cannot properly make a declaration of rights if the applicant claims that no right does or should exist. Although there does exist some incongruity, the court is prepared to determine the validity of a right of the plaintiff even though such a decree denies or necessarily declares non-existent the right of the defendant.

8. PENDING PROCEEDINGS

While an applicant may have sufficient standing to make application for a declaratory judgment, the court will refuse to grant relief where it has been asked to deal with the same points of law being posed in pending court proceedings. The objection of *lis pendens* in matters of declaratory relief is well taken though the pending action seeks an alternate remedy. For the sake of uniformity of judgments, especially as they affect the same or similar parties, an applicant cannot for the purpose of providing persuasive authority on the point of law ask another court to deal with the strictly legal issues involved — for example, in an action in damages.[40] However, the applicant is entitled

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other members of the House who delivered judgment."

See also *Medalta Potteries Ltd. v. Medicine Hat (City)* (1930), [1931] 1 W.W.R. 217 (Alta. T.D.).

[39] P. Martin, "The Declaratory Judgment" (1931), 9 Can. Bar Rev. 540 at 544; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536 (Eng. K.B.); compare *Shewfelt v. Kincardine (Township)* (1915), 35 O.L.R. 39 (Ont. H.C.), affirmed (1916), 35 O.L.R. 344 (Ont. C.A.). Negative declarations are now a common occurrence.

[40] *MacDonald v. Law Society (Manitoba)* (1975), 54 D.L.R. (3d) 372 (Man. Q.B.) at 375: "This application is asking for an extraordinary equitable remedy and it would be undesirable to entertain it at a time when there is another action pending before this same Court . . . I, therefore, dismiss this application, but reserve to the applicant the right to re-apply when the other action has been disposed of."

after a resolution of the action claiming consequential relief to represent his demand for a declaration if the need for that remedy still exists.[41]

9. AVAILABILITY OF ALTERNATE PROCEEDINGS

There exists a general premise that the power of a court to grant declaratory relief is necessarily ousted where the governing statute provides a special procedure in another forum; further, that the mere fact that a statute contains provision governing the procedure for enforcement of an act does not oust the jurisdiction of a superior court to grant relief.[42] This means that even where jurisdiction has not been ousted the availability of an alternate recourse is sufficient reason to decline the exercise of discretion in favour of permitting declaratory relief. One reason for this conservative attitude has been attributed to the historical function of the remedy, as an alternative recourse prior to the amendment of the *Supreme Court Rules* of 1883.[43] Other reasons may easily be reduced to the desire of the court to direct the flow of litigation away from the bench to the less formal and more efficient tribunals specially established to convenience the parties. There is little doubt that where another forum for relief has been engaged the court is wise in refusing to intervene. However, duplicity of proceedings has never been a vital argument against entertainment of proceedings where no other action is pending; nor has it prevented a superior court from using its supervisory jurisdiction to issue declarations where statute has ousted its original jurisdiction.

The real question is whether or not declaratory relief should, on the basis of discretionary rule, be refused where the only other available recourse lies before the same court, and provides substantially the same remedy. A preliminary answer of course is that no declaratory proceeding should be entertained if it results in an abuse of process, an unwarranted side-stepping of delays and costs attached to other recourses, or a procedural or evidentiary prejudice against the other parties to the

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41 *Hugh W Simmons Ltd. v. Foster, supra,* note 16.

42 *Canada (Radio-Television & Telecommunications Commission) v. Teleprompter Cable Communications Corp.*, [1972] F.C. 1265 (Fed. C.A.), citing *Ealing London Borough Council v. Race Relations Board*, [1972] A.C. 342 (U.K. H.L.).

43 S.A. de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), p. 457.

action.[44] Such elements as burden of proof, determination of urgency and limitation of actions may differ substantially in favour of the litigant who chooses the declaration over other routes to relief. Aside from these preliminary dangers, there has yet to be proposed a more simple argument that: to permit the issuance of a declaration where another suitable remedy exists is to effectively erode the divisions between recourses and subsume all relevant writs and motions under the umbrella of the declaratory proceeding. While all judgments are declaratory in that they explicitly or implicitly recognize rights, there has been no statutory impetus to denude all recourses of their intrinsic characteristics by endowing them with the attributes of the declaratory proceeding. It will be recalled that the wording of the rules of court and legislation confirming the existence of the pure declaratory remedy is itself purely declaratory (in the sense of confirmatory), and cannot be said to do more than permit the declaratory remedy to find a roost among its peers. To determine that a litigant should have the right to choose a declaratory route over all other equally suitable routes is in some manner to permit the use of a general tool for a specialized function and ultimately to permit the abandonment of the special tools available.

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[44] *Jernberg v. Phoenix Assurance Co.* (1943), 51 Man. R. 258 at 259 (Man. K.B.), reversed in part (1943), 51 Man. R. at 266 (Man. C.A.): defendant would lose right to plead extinction of plaintiff's right to claim under insurance policy; *Toronto General Trusts Corp. v. McConkey* (1971), 41 O.L.R. 314 (Ont. H.C.): arbitration a less formal, more summary mode of proceedings; *Ottawa Young Men's Christian Assn. v. Ottawa (City)* (1913), 29 O.L.R. 574 (Ont. C.A.): statutory tribunal for tax assessment would provide speedier judgment; *Hollinger Bus Lines Ltd v. Ontario (Labour Relations Board)*, [1951] O.R. 562 (Ont. H.C.) affirmed [1952] O.R. 366 (Ont. C.A.): *certiorari* would prove less theoretical than a declaration in the air, *I.L.A., Local 1571 v. I.L.A., Local 1764* (1950), [1951] 3 D.L.R. 50 (N.B. Q.B.); *Jurak v. Cunningham* (1959), 29 W.W.R. 561 (B.C. S.C.); *Kuzych v. White (No. 3)*, [1951] A.C. 585 (British Columbia P.C.): ripeness of proceeding by way of declaration; *R. v. Shore Disposal Ltd.* (1976), 16 N.S.R. (2d) 538 (N.S. C.A.): a declaration cannot be used as a private prosecution of an alleged offence; *Bingo Enterprises Ltd v. Manitoba (Lotteries & Gaming Licensing Board)*, [1983] 5 W.W.R. 710 (Man. C.A.); *Parkinson v. Health Sciences Centre*, [1982] 2 W.W.R. 102 (Man. C.A.), leave to appeal refused (1982), 42 N.R. 174 (S.C.C.); *Campbell River (District) v. Driemel* (1979), 10 B.C.L.R. 209 (B.C. S.C.); *Johnson v. Manitoba Provincial Police Commission* (1978), 91 D.L.R. (3d) 535 (Man. C.A.); *Investment Property Owners' Assn. of Nova Scotia Ltd. v. Nova Scotia (Rent Review Commission)* (1984), 141 A.P.R. 133 (N.S. T.D.), affirmed on other grounds (1984), 147 A.P.R. 319 (N.S. C.A.)

There is no advantage to invoking inherent jurisdiction. The inherent jurisdiction of a superior court is said not to be limitless: if the legislative body has not left a functional gap or vacuum, inherent jurisdiction should not be brought into play to permit the issuance of a declaration.

In *Scion Capital v. Gold Fields Ltd.*, the applicants sought a declaration that the Respondents contravened the insider trading rules under section 76 and Part XX of the Ontario *Securities Act*, R.S.O. 1990, c. S.5. The applicants argued that the court had discretion to grant the declaration, both under its inherent jurisdiction and under section 97 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that this court "may make binding declarations of right, whether or not any consequential relief is or could be claimed." The court found it was not appropriate in the instance to invoke the inherent jurisdiction of the court since the securities legislation established a procedure for civil actions as a remedy for insider trading: there is no functional gap or vacuum. In effect, the applicants were not in a position to show that they had suffered damages, and therefore sought a declaration as a base to launch further relief.[45]

10. PUBLIC IMPORTANCE

In theory, the court cannot issue a declaration to a party who lacks standing; the fact that the legal issue under discussion is not simply of private concern cannot serve to accord standing where none exists.[46] It

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[45] *Scion Capital, LLC v. Gold Fields Ltd.* (2006), 2006 CarswellOnt 699 (Ont. S.C.J.) citing *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.)

[46] B.L. Strayer, *Judicial Review of Legislation in Canada* (1st ed., 1968), p. 100, referring to *Smith v. Ontario (Attorney General)*, [1924] 3 D.L.R. 189 (S.C.C.).

"Curiously, three of the judges, after coming to the conclusion that Smith had no standing to raise the issue as to the validity of the Canada Temperance Act in Ontario, proceeded to decide against him on the substantive issue as well. Duff J. (Maclean J. concurring) had indicated that to decide such an issue at the suit of such a party would lead to 'grave inconvenience.' Having established this principle he indicated that the judges were 'loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure . . .' He then analyzed the means by which the Act had been applied to Ontario and held them to be adequate. Mignault J. similarly found the procedural objection sufficient to dispose of the matter but in addition held the Act to

has been suggested that declarations should nevertheless issue in the absence of legal standing if the question posed by the proceeding is one of overwhelming public importance. In practice, it is argued, the definition of legal standing is subject to such liberal constraints that mere sleight of hand may easily mask its absence.

Take, for example, the seemingly simple case of a request for a declaration obligating prison officials to force-feed prisoners. The court will analyze the governing statutes and common law duties to determine the jurisdiction and obligations of officials in the circumstances. A positive declaration confirming a duty to force-feed may have implications going far beyond the circumstances of the case: it may cause massive budgetary and staff reallocations and introduce a new cause of action in damages. A negative declaration may reinforce or cause an undesirable administrative attitude toward a new generation of clients. Due to the serious implications of a pronouncement on an issue of public importance, it is understandable, although not always laudable,

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be validly in force. One cannot fail to note the contrast here with the practice of United States federal courts. It is most improbable that one of those courts would find that a plaintiff had no standing to bring the action in question and then proceed to decide a constitutional or quasi-constitutional issue such as this. The difference in treatment must reflect to some extent the comparative lack of constitutional restraint imposed on Canadian courts. As they are not strictly limited to the exercise of 'judicial' functions alone, Canadian courts are free to render a decision with respect to an issue raised by a person not properly a party before the court. In this case it seems to have been a matter of discretion for the Supreme Court of Canada whether they dealt with the substantive issue. Though all the judges had decided that to entertain actions of this type would, as a general rule, lead to 'inconvenience,' three of them could not bring themselves to dismiss this particular action. They were 'loath' to do so on a 'disputable point of procedure.' Apparently they considered that the power was in their hands to deal with the substantive question of validity if they chose to do so."

Henning v. Calgary (City) (1974), 51 D.L.R. (3d) 762 (Alta. C.A.) at 767:

> "The city has a real interest in raising the question. We are advised that many municipalities are interested in this question and, although this is not a sufficient reason in itself to justify a declaratory judgment, it is an element that may be taken into consideration."

See also *Landreville v. R.*, [1973] F.C. 1223 (Fed. T.D.); *Jamieson v. British Columbia (Attorney General)* (1971), 21 D.L.R. (3d) 313 (B.C. S.C.) at 323; *Hardayal v. Canada (Minister of Manpower & Immigration)*, [1978] 1 S.C.R. 470; *Bedford Service Commission v. Nova Scotia (Attorney General)* (1976), 18 N.S.R. (2d) 132 (N.S. C.A.), reversed [1977] 2 S.C.R. 269.

that the court may refuse to issue an order in the absence of clear authority and limited issue.[47]

We have already discussed the early, strained divorce of the declaratory remedy from consequential relief. It will also be recalled that while declaratory relief was not made subject to the same prerequisite as substantive relief, namely, the necessity of a cause of action, the declaratory power did not mean that relief could be granted to anyone "off the street". Whether or not it had the innate power to issue declarations, the judiciary did not use the power to give its opinions on public matters simply because it was asked. In order to prevent the devaluation of its opinions, especially where there was no possibility of enforcement, the judiciary paid serious attention to its only form of legitimate expression — the judgment. The function of the courts has always been to resolve conflict according to the jurisdictional remedies available. To endow the courts with the power to issue judgments without the necessity of determining legal standing is effectively equivalent to abolishing the notion of jurisdiction, and, on a broader scale, revising the political role of the judiciary. There is no doubt that historically judges have vented their opinions on matters of which they were not legally seized, either by private speech or by way of interlocutory remarks made during the course of a hearing. The respect for the integrity of a judgment, however, absolutely requires the limitation of judicial opinion not only to a demonstrable set of facts, but also to a forum duly constituted for the purpose. It is unfair to expect the assumption of a radically revised mandate by the courts without constitutional impetus from the legislator;[48] the statutory or regulatory provisions confirming declaratory relief simply did not do away with the basic bar to judicial consideration, the absence of legal standing.

As to a workable definition of "public importance", issues of public concern and matters going beyond limited private rights in a unique

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[47] *British Columbia (Attorney General) v. Astaforoff* (1983), [1984] 4 W.W.R. 385 (B.C. C.A.)

[48] The use of judges to chair royal commissions of inquiry can be seen as a disguised attempt to exact the declaratory powers of the court from their natural habitat for transplantation into the political arena.

circumstance readily qualify, although a true test is yet to be formulated.[49]

11. STANDING AND DISCRETION IN QUEBEC

(a) The notion of interest

The *Code of Civil Procedure* contains a recurring reference to the notion of interest, without providing a specific definition of the term. This is surprising, since the *Code* is after all a procedural passport for those who have an enforceable claim or other request which properly belongs before the court.

The juridical notion of interest is defined as an "avantage d'ordre pécuniaire ou moral".[50] To have an interest means that the action brought by the petitioner is capable of modifying or ameliorating his current juridical position. The modification or amelioration cannot refer to rights which are not tangible in the sense of rights which are purely academic, hypothetical or without apparent enforceability. Legal interest, therefore, becomes the procedural aspect of the exercise of a pecuniary or moral right.[51]

The law furthermore contains various distinctions and degrees of interest necessary for suit; these may be divided into six general categories. A person has sufficient interest in a proceeding if:

1. He is named in a pending suit, whether or not the suit is validly instituted:

2. He has a common basis of action with others who have been recognized to have the right to appear before the court;

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[49] Take, for example, the matter of "public importance" in *Major, Re*, [1984] 6 W.W.R. 435 (B.C. S.C.), namely the right of claimants to a declaration of entitlement to the insurance proceeds of the bankrupt's professional liability coverage

[50] Cited by Solus and Perrot. *Droit judiciaire privé* (1961), t. 1, No. 226, pp. 200 *et seq.*

[51] A judicial interest must relate to the person instituting an action or reside in that person byway of lawful transmission through mandate, cession, succession, or otherwise: Pigeau, *Procédure civile de Chatelet de Paris* (1787), t. 1, p. 160.

TAB 9

Sullivan on the Construction of Statutes

Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

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> domestic offences, it would have been much easier to do so directly, and I cannot imagine why it would have done so in the General Part of the *Code*.[26]

Although LaForest J. was dissenting, his analysis here is exemplary. In reaching its conclusion, the majority in *Finta* did not address this point.

THE PRESUMPTION AGAINST TAUTOLOGY

Governing principle. It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.[27] Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd.*, Viscount Simons wrote:

> [Al]though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.[28]

In *R. v. Proulx*, Lamer C.J. wrote:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.[29]

As these passages indicate, every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.[30]

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26 *Supra* note 24, at para. 35.

27 *Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] S.C.J. No. 37, [1985] 1 S.C.R. 831, at 608 (S.C.C.).

28 [1949] A.C. 530, at 546 (H.L.).

29 [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61, at para. 28 (S.C.C.).

30 See *Winters v. Legal Services Society*, [1999] S.C.J. No. 49, [1999] 3 S.C.R. 160, at para. 48 (S.C.C): "The appellant's position would render [certain] words superfluous. This cannot have been the intention of the legislature ... *Rizzo Shoes* ... makes it clear that all words in a statute must be given meaning." *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] S.C.J. No. 84, [1983] 2 S.C.R. 493, at 504 (S.C.C.): "Some meaning must be attributed to the word ... as otherwise it is mere surplusage, and courts in the application of the principles of statutory construction endeavour, where possible, to attribute meaning to each word employed by the Legislature in the statute." *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] S.C.J. No. 89, [1991] 3 S.C.R. 388, [1992] 1 W.W.R. 193, at 209 (S.C.C.): "It is a principle of statutory interpretation that every word of a statute must be given meaning". See also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] S.C.J. No. 20, [2006] 1 S.C.R. 715, at paras. 45-46 (S.C.C.); *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, 74

The presumption against tautology is invoked by the courts frequently and for a variety of purposes: to reveal ambiguity[31] or resolve it,[32] to infer the purpose of provisions,[33] to determine the scope of general terms, powers or conditions,[34] and to clarify the relation between the provisions of one or more Acts.[35] It applies both to individual words and phrases and to larger units of legislation such as paragraphs and sections[36] and to parts of the legislative scheme.[37] It applies to the Charter and other constitutional instruments as well as to ordinary legislation.[38]

In *R. v. Kelly*[39] the Supreme Court of Canada relied on the presumption against tautology to help determine the elements of the offence created by s. 426(1) of the *Criminal Code*. That subsection provided that a person is guilty of an offence if, while acting as an agent, he or she "corruptly ... agrees to accept

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C.R. (3d) 1, at 19 (S.C.C.); *Swan v. Canada (Minister of Transport)*, [1990] F.C.J. No. 114, [1990] 2 F.C. 409, at 431 (T.D.); *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, *supra* note 27, at 608; *Goulbourn (Township) v. Ottawa-Carleton (Regional Municipality)*, [1979] S.C.J. No. 118, [1990] 1 S.C.R. 496, at 7, 13 (S.C.C.).

31 See, for example, *R. v. B. (G.) (No. 1)*, [1990] S.C.J. No. 59, [1990] 2 S.C.R. 3, at 27-29 (S.C.C.).

32 See, for example, *R. v. Clark*, [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6, at para. 51 (S.C.C.); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539, at paras. 31, 39 (S.C.C.); *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 62 (S.C.C.); *Re Therrien*, [2001] S.C.J. No. 36, [2001] 2 S.C.R. 3, at para. 120 (S.C.C.); *R. v. Z. (D.A.)*, [1992] S.C.J. No. 80, [1992] 2 S.C.R. 1025, at 1044-48 (S.C.C.); *Davidson v. Canada (Board of Referees, Unemployment Insurance)*, [1987] F.C.J. No. 536, 80 N.R. 268, at 269 (F.C.A.); *Extendicare Health Services Inc. v. Canada (Minister of National Health & Welfare)*, [1987] F.C.J. No. 819, 15 F.T.R. 187, at 190-91 (T.D.); revd [1989] F.C.J. No. 538, [1989] 3 F.C. 593 (F.C.A.); *Swan v. Canada (Minister of Transport)*, *supra* note 30, at 431 (T.D.).

33 See, for example, *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at para. 20 (S.C.C.); *Reference re Criminal Code (Canada), Sections 193 & 195(1)(c)*, [1990] S.C.J. No. 52, [1990] 4 W.W.R. 481, at 553 (S.C.C.).

34 See, for example, *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] S.C.J. No. 58, [2006] 2 S.C.R. 846, at paras. 36, 57, 81 (S.C.C.); *Winters v. Legal Services Society*, [1999] S.C.J. No. 49, [1999] 3 S.C.R. 160, at para. 61 (S.C.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 33-42 (S.C.C.); *Grini v. Grini*, [1969] M.J. No. 53, 5 D.L.R. (3d) 640, at 644-45 (Man. Q.B.); *R. v. Green*, [1992] S.C.J. No. 18, [1992] 1 S.C.R. 614, at 615 (S.C.C.).

35 See, for example, *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 52 (S.C.C.); *R. v. Proulx*, *supra* note 29; *Morguard Properties Ltd. v. City of Winnipeg*, *supra* note 30, at 504-05; *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, at 76 (S.C.C.); *Menzies v. Manitoba Public Insurance Corp.*, [2005] M.J. No. 313 (Man. C.A.), at paras. 45, 48-49 (Man. C.A.).

36 See, for example, *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] S.C.J. No. 75, [1998] 3 S.C.R. 90, at para. 26 (S.C.C.); *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] S.C.J. No. 35, [1994] 2 S.C.R. 41 (S.C.C.); *R. v. C. (C.)*, [1990] O.J. No. 1818, 75 O.R. (2d) 187, at 190 (Ont. C.A.); *R. v. Shubley*, *supra* note 30, at 19.

37 See *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] S.C.J. No. 127, [1989] 2 S.C.R. 1297, at 489 (S.C.C.).

38 See, for example, *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, 46 C.R.R. 193, at 215 (S.C.C.).

39 [1992] S.C.J. No. 53, [1992] 2 S.C.R. 170 (S.C.C.).