Court File No. 24668

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

THE BRANT COUNTY BOARD OF EDUCATION

Appellant

- and -

CAROL EATON AND CLAYTON EATON

Respondents

- and -

ONTARIO ASSOCIATION FOR COMMUNITY LIVING,
CANADIAN DISABILITY RIGHTS COUNCIL, and
ATTORNEY GENERAL OF ONTARIO

Intervenors

BRIEF OF AUTHORITIES OF THE MOVING PARTY

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NORCAN LIMITED .....APPELLANT;

AND

HAROLD LEBROCK .....RESPONDENT;

AND

HAROLD GOLTMAN and ALPHONSE RAYMOND JR. ..... APPLICANTS.

1969

*Mar. 17
May 16

MOTION FOR LEAVE TO INTERVENE

Practice and procedure—Intervention—Whether bondsmen entitled to intervene on appeal to Supreme Court of Canada—Rule 60.

The appellant appealed to this Court from a judgment of the Court of Appeal affirming a judgment of the Superior Court granting the respondent's petition to quash a writ of *capias* and discharging the bondsmen. The respondent has left the country, was not represented in the Court of Appeal and his solicitors will not represent him on the appeal. The bondsmen applied to a Judge in Chambers for leave to intervene under Rule 60 of the Rules of this Court. The application was opposed on the ground that the interest required to file an intervention must be an interest in the subject-matter of the litigation, not merely an interest in the result, and that the bondsmen could not be considered as having the required interest. The application was referred to the Court.

Held: The application to intervene should be granted.

Rule 60 should not be narrowly construed. Any interest is sufficient to support an application under that rule, subject always to the exercise of discretion.

Procédure—Intervention—Droit des cautions d'intervenir dans un appel devant la Cour suprême du Canada—Règle 60.

La compagnie appelante a interjeté appel à cette Cour d'un jugement de la Cour d'appel confirmant un jugement de la Cour supérieure accordant la requête de l'intimé pour faire annuler un bref de *capias* et libérant les cautions. L'intimé a quitté le pays, n'était pas représenté devant la Cour d'appel et ses avocats ne le représenteront pas sur l'appel. Les cautions ont présenté une requête à un Juge en chambre pour obtenir la permission d'intervenir selon la règle 60 des Règles de cette Cour. La requête a été contestée pour le motif que l'intérêt requis pour produire une intervention doit être un intérêt dans l'objet du litige, et non pas simplement un intérêt dans le résultat, et que les cautions ne pouvaient pas être considérées comme ayant l'intérêt requis. La requête a été déférée à la Cour.

Arrêt: La requête pour intervenir doit être accordée.

On ne doit pas interpréter la règle 60 d'une façon restreinte. Sous réserve de la discrétion judiciaire, tout intérêt est suffisant pour obtenir la

NORCAN LTD. v. LEBROCK

REQUÊTE pour obtenir la permission d'intervenir déférée à la Cour par le Juge en chambre. Requête accordée.

APPLICATION for leave to intervene referred to the Court by the Judge in Chambers. Application granted.

J. M. Schlesinger, Q.C., for the applicants.

J. Gibb Stewart, Q.C., for the appellant.

The judgment of the Court was delivered by

PIGEON J.:—In this case Norcan Ltd. appeals from a judgment of the Court of Appeal for the Province of Quebec affirming a judgment of the Superior Court granting Harold Lebrock's petition to quash a writ of *capias* and discharging the bondsmen. It appears from the reasons for judgment that Lebrock has left the country and was not represented at the hearing. The solicitors who had been acting for him have notified the Registrar that their mandate has been revoked and that they will not represent him in this Court. Under those circumstances, the bondsmen ask for leave to intervene under rule 60.

Counsel for Norcan Ltd., the appellant, opposes the application relying on decisions under the provisions of the Quebec *Code of Civil Procedure* respecting intervention. These decisions are to the effect that the interest required to file an intervention must be an interest in the subject-matter of the litigation, not merely an interest in the result. As a consequence, the right of intervention has been denied to bondsmen, the latest case being *Druckman v. Stand Built Upholstery Corporation*[1] affirmed in this Court[2]. Seeing that the provisions of the old Quebec *Code of Civil Procedure* concerning intervention were practically identical with rule 60 and seem to have inspired it (Cameron, Supreme Court Practice, 3rd ed., p. 430), the objection appeared serious and I referred the matter to the Court.

Having now made a review of past decisions under rule 60, I have come to the conclusion that it should not be narrowly construed. It seems clear that any interest is sufficient to support an application under that rule subject always to the exercise of discretion.

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[1] [1965] Que. Q.B. 615.

[2] [1966] S.C.R. v.

In *Massie & Renwick v. Underwriters' Survey Bureau* (unreported; reported on merits[3]), leave to intervene in an action for infringement of copyright was granted to persons against whom similar actions were pending. They were held to be "vitally interested and concerned with the questions involved in these appeals".

In *Winner v. S.M.T.* (unreported; reported on merits[4], varied by P.C.[5]), railway companies were granted leave to intervene in a case respecting the constitutional validity and application of provincial regulations of motor carriers in interprovincial or international operations.

I should also note that our rule is quite different from that which was held to have a narrow scope in *Moser v. Marsden*[6].

Finally, I should observe that in *Druckman v. Stand Built Upholstery*, the application was made only after judgment had been rendered dismissing the appeal. It is well settled that an application for permission to intervene may be made only as long as the case is pending. For that reason, all that was said in the Court of Queen's Bench as to the required interest is undoubtedly *obiter*.

On the merits of the application no reason was given for opposing it, except the contention that the bondsmen should not be considered as having the required interest.

Under the circumstances of this case it seems proper to make the order requested. The costs will be reserved for adjudication at the same time as the merits of the appeal.

Application granted.

Solicitor for the applicants: J. M. Schlesinger, Montreal.

Solicitor for the appellant: Stewart, Crépault, McKenna, Wagner & Loriot, Montreal.

[3] [1937] S.C.R. 265, [1937] 2 D.L.R. 213 and [1940] S.C.R. 218, 7 I.L.R. 19, [1940] 1 D.L.R. 625.

Indexed as:
R. v. N.T.C. Smokehouse Ltd. (S.C.C.)

N.T.C. Smokehouse Ltd.
v.
Her Majesty The Queen in right of the Province of British Columbia

[1993] S.C.C.A. No. 420

Supreme Court of Canada
File No.: 23800
ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

.....

Status: Appeal heard November 27 to 29, 1995 and reserved November 29, 1995.

.....

Indians -- Constitutional -- Fisheries -- Whether native Indians have a right to dispose of fish which were legally caught under licence from their traditional, customary fishery.

COUNSEL:
David M. Rosenberg (Rosenberg & Rosenberg), for the motion.
S. David Frankel, Q.C. (Department of Justice), contra.

At the motion to extend the time in which to serve and file a response:
W.G. Burke-Robertson, Q.C., for the Attorney General of British Columbia.
Robert Frater, for the Attorney General of Canada.
B.A. Crane, Q.C., contra.
Consents filed by all other applicants.

At the motion to state a constitutional question:
Hugh Braker, for the appellant.
Van Whitehall, Q.C. and S. David Frankel, Q.C., for the respondent.

At motion for leave to intervene:
Hugh Braker, for NTC Smokehouse Ltd.
Brian Crane, Q.C., for Donald Gladstone et al.
Harry Slade, for Allan Frances Lewis et al.
Louise Mandell, for Dorothy Marie Van Der Peet.
Peter R. Grant, for Jerry Benjamin Nikal.
S. David Frankel, Q.C. and Ivan Whitehall, Q.C., for the respondent.

At motions to file additional documents:
Hugh Braker, for NTC Smokehouse Ltd.
Clarice Ostrove, for Alliance of Tribal Councils and Dorothy Marie Van Der Peet.
Peter R. Grant, for Jerry Benjamin Nikal.
S. David Frankel, Q.C., for the respondent.

At motion to amend order:
S. David Frankel, Q.C., for the respondent.
Hugh Braker, for NTC Smokehouse Ltd.
Henry S. Brown, Q.C., for Jerry Benjamin Nikal.

At motion for acceptance of factum on appeal over 40 pages:
V. Jennifer Mackinnon, for the motion.
Brian A. Crane, Q.C., contra.
Respondent not objecting.

At motion for leave to intervene by Howard Pamajewon et al.:
Heather Perkins-McVey, for the motion.
Henry S. Brown, Q.C., for the appellants.
Robert Frater, for the respondent.

At motion to extend the time to serve a factum and documents:
James I. Minnes and Christopher Harvey, Q.C., for the motion.
Hugh Braker, for NTC Smokehouse Ltd.
S. David Frankel, Q.C., for the respondent.

At motion for an order permitting the filing of a memorandum as to costs:
S. David Frankel, Q.C., for the motion.
Hugh Braker, for NTC Smokehouse Ltd.

At motion to adduce new evidence:
Hugh Braker, for the motion.
S. David Frankel, Q.C., for the respondent.

At motion to strike out:
Hugh Braker, for the motion.
S. David Frankel, Q.C., for the respondent.
Patrick Foy, for C.N.R.

At motion on behalf of Attorney General of British Columbia to vary an order permitting a lengthier time for oral argument:
V. Jennifer Mackinnon, for the motion.
Hugh Braker, for NTC Smokehouse Ltd.
S. David Frankel, Q.C., for the respondents.

At motion to strike out passages from the respondent's factums:
Hugh Braker, for NTC.
S. David Frankel, Q.C., contra.

At hearing of appeal:
Louise Mandell and Leslie J. Pinder, for the appellant D.M. Van Der Peet.
S. David Frankel, Q.C. and Cheryl J. Tobias, for the respondent.
David M. Rosenberg and Hugh Braker, for the appellant NTC Smokehouse.
Marvin R.V. Storrow, Q.C. and Maria A. Morellato, for the appellants Donald and William Gladstone.
Arthur C. Pape and Clayton C. Ruby, for the interveners H. Pamajewon et al.
Harry A. Slade, Arthur C. Pape and Robert C. Freedman, for the intervener First Nation Summit.
Stuart Rush, Q.C. and Michael Jackson, for the interveners Delgamuukw et al.
Paul J. Pearlman, for the intervener the A.G. of British Columbia.
René Morin, pour l'intervenant le procureur général du Québec.
Robert J. Normey, for the intervener the A.G. of Alberta.
J. Keith Lowes, for the intervener Fisheries Council of B.C.
Patrick G. Foy, for the intervener the Canadian National Railway.
Christopher Harvey, Q.C. and Robert M. Lonergan, for the intervener B.C. Fisheries Survival Coalition.

CHRONOLOGY:

1. Application for leave to appeal:

   FILED: October 20, 1993. S.C.C. Bulletin, 1993, p. 2045.

2. Motion to extend the time in which to serve and filed a response granted November 19, 1993. Time extended to December 31, 1993. Before: A. Roland, Registrar. S.C.C. Bulletin, 1993, p. 2147.

3. Application for leave to appeal:

   SUBMITTED TO THE COURT: January 27, 1994. S.C.C. Bulletin, 1994, p. 83.
   GRANTED: March 10, 1994 (without reasons). S.C.C. Bulletin, 1994, p. 407.

Before: Lamer C.J. and Cory and Iacobucci JJ.

4. Notice of appeal filed April 8, 1994. S.C.C. Bulletin, 1994, p. 591.

5. Motion to state a constitutional question granted September 30, 1994. Before: Lamer C.J. S.C.C. Bulletin, 1994, p. 1574.

[La version français se trouve ci-dessous]

1. Is section 4(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, as it read in September of 1986, of no force and effect with respect to the Appellant in the circumstances of these proceedings, in virtue of section 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of section 35 of the Constitution Act, 1982 invoked by the Appellant?

2. Is section 27(5) of the British Columbia Fishery (General) Regulations, SOR 84-248, as it read in September of 1986, of no force and effect with respect to the Appellant in the circumstances of these proceedings, in virtue of section 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of section 35 of the Constitution Act, 1982 invoked by the Appellant?

La version français:

1. Le paragraphe 4(5) du Règlement de pêche général de la Colombie-Britannique, DORS/84-248, tel qu'il se lisait en septembre 1986, est-il, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la Loi constitutionnelle de 1982, en raison des droits ancestraux au sens de l'art. 35 de la Loi constitutionnelle de 1982, qu'elle invoque?

2. Le paragraphe 27(5) du Règlement de pêche général de la Colombie-Britannique, DORS/84-248, tel qu'il se lisait en septembre 1986, est-il, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la Loi constitutionnelle de 1982, en raison des droits ancestraux au sens de l'art. 35 de la Loi constitutionnelle de 1982, qu'elle invoque?

6. Motion for leave to intervene

By: Louise Mandell, for Alliance of Tribal Councils.
Harry A. Slade, for First Nations Summit.
Paul Pearlman, for Attorney General of British Columbia.
Patrick G. Foy, for C.N.R..
Christopher Harvey, Q.C., for B.C. Fisheries Survival Coalition and B.C. Wildlife Society.
J. Keith Lowes, for Fisheries Council of B.C.
Gordon F. Gregory, Q.C., for Atlantic Salmon Federation (Canada).

Heard September 30, 1994. Judgment rendered on October 3, 1994. Before: McLachlin J. S.C.C. Bulletin, 1994, p. 1576.

McLACHLIN J. -- I have before me seven motions to intervene on various of these appeals. I will deal with each in turn. The applications also included requests relating to the length of factums and raised concerns about additional materials which the proposed interventions might entail. These aspects of the applications are not dealt with in these reasons and are deferred to a later date.

Application of the Alliance of Tribal Councils

This applicant seeks to leave to intervene on the Lewis and Nikal appeals. It was an interveners in the courts below. For the past decade the Alliance has been immersed in the issues raised by these appeals. I am satisfied that its application meets the requirements of Rule 18 and would allow the application.

Application of the First Nations Summit

This applicant seeks leave to intervene on the N.T.V., Gladstone and Van Der Peet appeals. The application was opposed on the basis that this applicant would offer no new perspective. The applicant represents 140 of 197 Indians bands in British Columbia. It is involved in treaty negotiations on their behalf. I am satisfied that these appeals may impact on these negotiations and that the First Nations Summit has a unique and helpful perspective to offer. I would allow the application.

Application of the Attorney-General for British Columbia

The Attorney-General seeks leave to intervene on the

N.T.C., Gladstone, Lewis and Nikal appeals. It intervened below. There is no doubt of its interest or ability to make a useful contribution on the appeal. I would allow the application.

Application of the C.N.R.

The C.N.R. seeks leave to intervene on the N.T.C., Lewis, and Nikal appeals. It intervened in the courts below. The application is opposed by those appellants. I am satisfied that the interests of the C.N.R. may be affected by the outcome of these appeals and that the C.N.R. has a unique and valuable perspective to offer. I would allow the application.

Application of the B.C. Fisheries Survival Coalition and the B.C. Wildlife Federation

This is a joint application. The applicants seek leave to intervene in all five appeals. The Coalition was an intervener in the proceedings below; the Wildlife Federation was not. The Coalition represents the commercial fishing interests; the Federation represents sports fishermen. The interests of both may well be affected by the outcome of these appeals and I am satisfied that they will both make a contribution not otherwise available to the court. I would allow the application.

Application of the Fisheries Council of B.C.

This applicant seeks leave to intervene in all five appeals. The application is opposed. The applicant was an intervener below. It represents fish processors and is concerned with all aspects of the fishery, from harvesting to international marketing. Unlike the B.C. Fisheries Survival Coalition, it claims to count aboriginal fishers among the interests it represents. I am satisfied that it offers a distinct perspective and may assist on the appeal, and that it will not, as contended, merely duplicate the submissions of others. I would allow the application.

Application of the Atlantic Salmon Federation

This applicant seeks to intervene in the N.T.C., Gladstone and Van Der Peet appeals. The application is opposed. The applicant was not an intervener below. It seeks to

put before the court information and submissions on how the decisions on these appeals might affect the Atlantic salmon fishery. Its goal would be to urge the Court to reject extension of any commercial aboriginal right of fishery to situations where stocks may be endangered. This argument relates to the "justification" issue which was raised below but upon which the courts below did not pronounce. It therefore may or may not figure on the appeal. If the issue does arise, it appears that the concern expressed by this applicant for the need to preserve endangered species is shared by all parties to this appeal, and is one which may be expected to be fully defended, should the need arise, by the Attorneys-General. The aboriginal interest claims relevant to the Atlantic fishery are largely related to treaties, while the claims at issue on the appeals do not. Finally, the intervention would involve introducing a new subject matter to the appeals, namely the state of the Atlantic salmon fishery. These considerations lead me to conclude that the general perspective offered by this applicant will be put before the Court by others, and that the details it seeks to add would expand the appeal into new and different areas of dispute. I would dismiss the application.

7. Notice of intervention

   By: Attorney General of British Columbia

   Filed during the week ending November 4, 1994. S.C.C. Bulletin, 1994, p. 1699.

8. Notice of intervention

   By: Attorney General of Alberta
   Attorney General of Newfoundland
   Attorney General of Ontario
   Attorney General of Saskatchewan

   Filed during the week ending November 18, 1994. S.C.C. Bulletin, 1994, p. 1789.

9. Motion for leave to intervene:

   By: Delgamuukw et al.

   With the consent of the parties, granted January 11, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 66.

Factum limited to 30 pages.

10. Motions to file additional documents

By: 1) Edward Chiasson, Q.C., for C.N.R.
2) Boris Tyzuk, for Attorney General British Columbia.
3) Harry A. Slade and John Rich, for Lewis, et al.
4&5) J. Keith Lowes, for Fisheries Council of B.C. & B.C.
Fisheries Survival Coalition & B.C. Wildlife Society.
6) Brian Crane, Q.C., for Gladstone, et al.

Decided January 26, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 262.

McLACHLIN J.:-- I have before me four applications to permit the filing of supplementary documents as part of the Case on Appeal brought respectively by: the CNR; the Attorney-General for B.C.; The Fisheries Council of B.C. and the B.C. Fisheries Survival Coalision and B.C. Wildlife Society; and Gladstone et al. A fifth application is brought by Lewis to file responsive documents in the event that the applications by the CNR and Fisheries Council are allowed. The first four applications are opposed.

As a preliminary comment, I state that I view my function on these applications as that of screening, to the end of ensuring that such materials as may be relevant are available to the Court in convenient form. I am not deciding on the admissibility or the ultimate value of the documents in question.

The documents which are the subject of the Gladstone application, being writings by learned authors, may be included in the Case on Appeal. This Court has often referred to such documents, even when they have not been included in the Case on Appeal.

The documents sought to be filed by CNR and the Fisheries Council et al. may also be placed in the Case on Appeal. They were before the Court of Appeal and some are referred to in the reasons for judgment. Accordingly, this Court may well find it necessary or convenient to refer to them. I do not comment on their relevance, except to say that I am satisfied that all may be tied in some way to these proceedings. The fact that these applicants are

intervenors does not preclude them introducing documents, given that their interventions were based in part on the fact that they had access to special information. This disposes of the Attorney-General's application which concerned the same documents.

The application of Lewis to produce responsive documents is allowed. I note that counsel for some of the applicants expressed a willingness to add to the Case on Appeal any documents produced by the respondents which may be necessary to provide a fair record. I urge all counsel to cooperate to ensure that this occurs.

11. Motion to extend the time in which to file the intervener's factum, with the consent of the parties, granted March 30, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 679.

Time to file the factum of First Nations Summit extended to April 7, 1995.

12. Motion to amend order granted July 6, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1238.

The order of January 10, 1995 is varied as follows:

The respondent's facta are to be filed on or before August 15, 1995.
The facta of the intervenors supporting the respondent are to be filed on or before September 15, 1995; and
The reply facta of the appellants are to be filed on or before October 31, 1995.
The above appeal will proceed on the week of November 27, 1995.

13. Motion for acceptance of factum on appeal over 40 pages dismissed August 10, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1323.

The motion to deliver two facta in the above appeal is granted, provided that the two facta in total do not exceed 30 pages.

14. Motion for leave to intervene:

By: Howard Pamajewon et al.

Granted September 6, 1995. Before: Lamer C.J. S.C.C.

Bulletin, 1995, p. 1367.

UPON APPLICATION by counsel on behalf of the Applicants, Howard Pamajewon and Roger Jones, and Arnold Gardner, Jack Pitchenese and Allan Gardner, for an order granting leave to intervene in the within appeals, to file a joint factum of 25 pages and to make a 15 minute oral submission during the hearing of these appeals, and for an order extending the time for this application;

AND HAVING read the material filed and heard the submissions of the parties;

IT IS HEREBY ORDERED THAT:

The motion for leave to intervene is granted. All other matters are referred to Justice McLachlin for determination.

15. Motion for an order permitting the filing of ten (10) copies of Historical Documents, with the consent of the parties, granted September 22, 1995. Before: A. Roland, Registrar. S.C.C. Bulletin, 1995, p. 1409.

16. Notice of intervention:

By: Howard Pamajewon
Roger Jones
Jack Pitchenese
Arnold Gardner
Allan Gardner

Filed during the two week period ending September 29, 1995. S.C.C. Bulletin, 1995, p. 1417.

17. Appeal inscribed for hearing during the session commencing October 2, 1995. S.C.C. Bulletin, 1995, p. 1512.

18. Motion to extend the time to serve a factum and documents granted November 17, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1893.

UPON APPLICATION by counsel on behalf of the interveners, B.C. Fisheries Survival Coalition and B.C. Wildlife Federation, for an order extending the time for service of their factums and brief of documents;

IT IS HEREBY ORDERED THAT:

1. The motion for an extension of time is granted;

2. Reply factums, if any, shall be filed by November 24, 1995.

3. The appellants shall tax their costs flowing from the interveners' failure to serve their factums when they should have been served;

4. The sum of $7,500.00 shall be deposited in trust for each of the appellants as security for payment of their taxed costs.

19. Motion for an order permitting the filing of a memorandum as to costs dismissed November 17, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1894.

UPON APPLICATION by counsel on behalf of the respondent for an order permitting the filing of a memorandum as to costs, including the affidavit of Thomas Malloch, sworn September 13, 1995;

IT IS HEREBY ORDERED THAT:

The motion is dismissed and costs are awarded on a solicitor-client basis in any event of the cause; if costs become a material issue, the Court may seek such assistance as it sees fit from counsel on the matter.

20. Motion to adduce new evidence granted November 17, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1895.

21. Motion to strike out dismissed November 17, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1895.

UPON APPLICATION by counsel on behalf of the appellant for an order striking the factum filed by the Canadian National Railway Company, striking evidence filed by that intervener and denying that intervener leave to present oral arguments;

IT IS HEREBY ORDERED THAT:

The motion is dismissed.

22. Motion to vary an order permitting a lengthier time for oral argument granted November 17, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1896.

UPON APPLICATION by counsel on behalf of the intervener, Attorney General of British Columbia, for an order varying the order of McLachlin J. dated October 3, 1994 to permit a lengthier time for oral argument;

IT IS HEREBY ORDERED THAT:

The motion is granted.

23. Motion to strike out passages from the respondent's factums dismissed November 17, 1995. Before: McLachlin J. S.C.C. Bulletin, 1995, p. 1897.

24. Appeal:

HEARD: November 27 to 29, 1995; RESERVED: November 29, 1995. S.C.C. Bulletin, 1995, p. 1955.
Before: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ.

PROCEDURAL HISTORY:

Judgment at first instance: Conviction: one count of unlawfully buying fish not lawfully caught; one count of selling fish caught under Indian Food Fish Licence. British Columbia Provincial Court, MacLeod Prov. Ct. J., August 19, 1988.

Judgment on appeal: Summary Conviction Appeal dismissed. British Columbia County Court, Melvin J., January 15, 1990.
[1990] B.C.J. No. 434.

Judgment on further appeal: Appeal dismissed. British Columbia Court of Appeal, Wallace, Taggart, McFarlane, Hutcheon and Lambert [dissenting] JJ.A., June 25, 1993.
48 W.A.C. 273; 29 B.C.A.C. 273; [1993] B.C.J. No. 1400.

End of document list.

IN THE MATTER s. 13 of Part I of *The Judicature Act, 1986*, c. 42, S.N. 1986;

IN THE MATTER OF ss. 32 and 34 of *The Workers' Compensation Act, 1983*, c. 48, S.N. 1983;

AND IN THE MATTER OF a Reference of the Lieutenant-Governor in Council to the Court of Appeal for its hearing, consideration and opinion on the constitutional validity of ss. 32 and 34 of *The Workers' Compensation Act, 1983*.

INDEXED AS: REFERENCE RE WORKERS' COMPENSATION ACT, 1983 (NFLD.) (APPLICATION TO INTERVENE)

File No.: 20697.

1988: December 7; 1989: February 13.

Present: Sopinka J.

MOTION FOR LEAVE TO INTERVENE

Practice — Application to intervene — Applicant contesting constitutionality of similar provisions in another province — Attorney General of that province intervening as of right — Factors to be considered in according individual right to intervene — Supreme Court Act, R.S.C. 1970, c. S-19, s. 55(4) — Rules of the Supreme Court of Canada, SOR/83-74, s. 18(3)(a), (c) — Canadian Charter of Rights and Freedoms, s. 15 — Constitution Act, 1982, s. 52(2) — Workers' Compensation Act, 1983, S.N. 1983, c. 48, ss. 32, 34 — Workers Compensation Act, R.S.B.C. 1979, c. 437, ss. 10, 11.

The Attorney General of Newfoundland presented a reference to the Newfoundland Court of Appeal on the issue of the constitutionality of ss. 32 and 34 of *The Workers' Compensation Act, 1983* which provided that the right of compensation for injuries arising in the course of a worker's employment was limited to that specifically provided for by the Act. An injured worker, who brought a challenge of similar provisions in British Columbia, applied to intervene pursuant to Rule 18 of the *Rules of the Supreme Court of Canada*. At issue is whether this application satisfied the requirements of Rule 18(3)(*a*) and (*c*) that the intervener have an interest and that the intervener's submissions be useful and different from those of the other parties.

DANS L'AFFAIRE de l'art. 13 de la partie I de *The Judicature Act, 1986*, chap. 42, S.N. 1986;

DANS L'AFFAIRE des art. 32 et 34 de *The Workers' Compensation Act, 1983*, chap. 48, S.N. 1983;

ET DANS L'AFFAIRE d'un renvoi adressé par le lieutenant-gouverneur en conseil à la Cour d'appel sur la constitutionnalité des art. 32 et 34 de *The Workers' Compensation Act, 1983*.

RÉPERTORIÉ: RENVOI: WORKERS' COMPENSATION ACT, 1983 (T.-N.) (DEMANDE D'INTERVENTION)

N° du greffe: 20697.

1988: 7 décembre; 1989: 13 février.

Présent: Le juge Sopinka.

REQUÊTE EN AUTORISATION D'INTERVENTION

Pratique — Demande d'intervention — Contestation par le requérant de la constitutionnalité de dispositions semblables dans une autre province — Intervention de plein droit du procureur général de cette province — Facteurs à considérer pour accorder à un individu le droit d'intervenir — Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 55(4) — Règles de la Cour suprême du Canada, DORS/83-74, art. 18(3)a), c) — Charte canadienne des droits et libertés, art. 15 — Loi constitutionnelle de 1982, art. 52(2) — Workers' Compensation Act, 1983, S.N. 1983, chap. 48, art. 32, 34 — Workers Compensation Act, R.S.B.C. 1979, chap. 437, art. 10, 11.

Le procureur général de Terre-Neuve a adressé un renvoi à la Cour d'appel de Terre-Neuve sur la constitutionnalité des art. 32 et 34 de *The Workers' Compensation Act, 1983*, qui prévoient que le droit à une indemnité pour les blessures subies par un travailleur dans l'exercice de ses fonctions est limité à ce que la Loi prévoit expressément. Une personne qui a subi des blessures et qui conteste des dispositions semblables en Colombie-Britannique a demandé l'autorisation d'intervenir conformément à l'art. 18 des *Règles de la Cour suprême du Canada*. La question est de savoir si cette requête satisfait aux exigences des al. 18(3)*a*) et *c*) des Règles selon lesquelles l'intervenant doit avoir un intérêt et présenter des allégations utiles et différentes de celles des autres parties.

Held: The motion for leave to intervene should be allowed.

Involvement in a similar case may satisfy the criterion that there be an interest in the litigation. "Any interest" extends to an interest in the outcome of an appeal when the determination of a legal issue in that appeal will be binding on other pending litigation to which the applicant is a party. Some courts, however, have declined to exercise their discretion to grant this status on the basis of similar interest alone. Here, the aura of unfairness about a party in litigation, which involved similar issues, facing an opponent who has the right to intervene in this appeal should be remedied by granting the motion to intervene absent other criteria dictating a contrary conclusion.

That other counsel would argue the constitutional issues was not a disqualifying factor. An applicant who has a history of involvement in the issue may have an expertise which can shed fresh light or provide new information on the matter.

Cases Cited

Referred to: *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373; *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665; *Solosky v. The Queen*, [1978] 1 F.C. 609; *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 15.
Constitution Act, 1982, s. 52(2).
Rules of the Supreme Court of Canada, SOR/83-74, s. 18 (*a*), (*c*).
Supreme Court Act, R.S.C. 1970, c. S-19, s. 55(4).
Workers Compensation Act, R.S.B.C. 1979, c. 437, ss. 10, 11.
Workers' Compensation Act, 1983, S.N. 1983, c. 48, ss. 32, 34.

Authors Cited

Crane, Brian. *Practice and Advocacy in the Supreme Court*. Vancouver: Continuing Legal Education Society of British Columbia, 1983.

MOTION for leave to intervene in an appeal from an opinion pronounced by the Newfoundland

Arrêt: La demande d'autorisation d'intervenir est accueillie.

Le fait d'être dans une situation semblable peut satisfaire au critère de l'existence d'un intérêt dans le litige. L'expression «tout intérêt» vise un intérêt dans l'issue d'un pourvoi si la réponse donnée à la question de droit soumise doit s'appliquer à un autre litige en cours auquel le requérant est partie. Certains tribunaux ont cependant refusé d'exercer leur pouvoir discrétionnaire d'accorder ce statut sur le seul fondement d'un intérêt semblable. En l'espèce, il faut dissiper l'impression d'injustice que subirait la partie dont le litige comporte des questions semblables et dont l'adversaire a le droit d'intervenir dans ce pourvoi en accueillant la demande d'intervention, en l'absence d'autres critères dictant une conclusion contraire.

Le fait qu'un autre avocat débattrait les questions constitutionnelles en litige ne contribue pas à faire perdre qualité pour agir. Le requérant qui a fait face à la question peut avoir acquis une connaissance approfondie qui puisse lui permettre d'apporter un point de vue nouveau ou de fournir des renseignements supplémentaires à son sujet.

Jurisprudence

Arrêts mentionnés: *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373; *Norcan Ltd. v. Lebrock*, [1969] R.C.S. 665; *Solosky c. La Reine*, [1978] 1 C.F. 609; *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764; *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 15.
Loi constitutionnelle de 1982, art. 52(2).
Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 55(4).
Règles de la Cour suprême du Canada, DORS/83-74, art. 18*a*), *c*).
Workers Compensation Act, R.S.B.C. 1979, chap. 437, art. 10, 11.
Workers' Compensation Act, 1983, S.N. 1983, chap. 48, art. 32, 34.

Doctrine citée

Crane, Brian. *Practice and Advocacy in the Supreme Court*. Vancouver: Continuing Legal Education Society of British Columbia, 1983.

REQUÊTE en autorisation d'intervention dans un pourvoi formé contre une opinion prononcée

Court of Appeal[1] (1988), 67 Nfld. & P.E.I.R. 16, 44 D.L.R. 501, on a reference to determine the constitutional validity of ss. 32 and 34 of *The Workers' Compensation Act, 1983*. Motion granted.

D. Geoffrey Cowper, for the applicant.

W. G. Burke-Robertson, Q.C., for the respondent.

The following are the reasons for the Order delivered by

SOPINKA J.—This application to intervene arises in an appeal from a reference which was directed to the Newfoundland Court of Appeal by the Newfoundland Lieutenant-Governor in Council (*Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.)) The reference has its roots in the case of *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373 (Nfld. S.C.T.D.) Samuel Piercey was an employee of General Bakeries Ltd. allegedly in the course of his employment, when he was electrocuted. It was alleged by his wife, Mrs. Shirley Piercey, that her husband's death was due to the negligence of his employer, General Bakeries Ltd.

In the Trial Division of the Newfoundland Supreme Court, Mrs. Piercey argued that the employer could not rely upon ss. 32 and 34 of *The Workers' Compensation Act, 1983*, S.N. 1983, c. 48, which provide that the right to compensation for injuries arising in the course of a worker's employment is limited to that specifically provided for by the Act. Mrs. Piercey claimed that ss. 32 and 34 of *The Workers' Compensation Act, 1983* were of no force and effect under s. 52(2) of the *Constitution Act, 1982* as they violated s. 15 of the *Canadian Charter of Rights and Freedoms*.

The trial judge, Hickman C.J., agreed that the provisions unjustifiably denied the right of access to the courts which was held to be an element of s. 15 equality rights. However, Hickman C.J. also held that Mrs. Piercey was unable to rely upon the

[1] An appeal from the judgment of the Newfoundland Court of Appeal was dismissed: see [1989] 1 S.R.C. 922.

par la Cour d'appel de Terre-Neuve[1] (1988), 67 Nfld. & P.E.I.R. 16, 44 D.L.R. 501, dans un renvoi portant sur la validité constitutionnelle des art. 32 et 34 de *The Workers' Compensation Act, 1983*. Requête accueillie.

D. Geoffrey Cowper, pour la requérante.

W. G. Burke-Robertson, c.r., pour l'intimé.

Version française des motifs de l'ordonnance rendus par

LE JUGE SOPINKA—Cette demande d'intervention est présentée dans le cadre d'un pourvoi relatif à un renvoi adressé à la Cour d'appel de Terre-Neuve par le lieutenant-gouverneur en conseil de Terre-Neuve (*Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (C.A.T.-N.)) Le renvoi tire son origine de la décision *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373 (D.P.I.C.S.T.-N.) Samuel Piercey était un employé de General Bakeries Ltd. qui, allègue-t-on, a été électrocuté dans l'exercice de ses fonctions. Son épouse, M^me^ Shirley Piercey, a allégué que le décès de son époux était dû à la négligence de son employeur, General Bakeries Ltd.

Devant la Division de première instance de la Cour suprême de Terre-Neuve, M^me^ Piercey a fait valoir que l'employeur ne pouvait invoquer les art. 32 et 34 de *The Workers' Compensation Act, 1983*, S.N. 1983, chap. 48, qui prévoient que le droit à une indemnité pour les blessures subies par un travailleur dans l'exercice de ses fonctions est limité à ce que la Loi prévoit expressément. Madame Piercey soutenait que les art. 32 et 34 de *The Workers' Compensation Act, 1983* étaient inopérants en vertu du par. 52(2) de la *Loi constitutionnelle de 1982* parce qu'ils violaient l'art. 15 de la *Charte canadienne des droits et libertés*.

Le juge de première instance, le juge en chef Hickman, a reconnu que les dispositions niaient de manière injustifiable le droit d'accès aux tribunaux qui a été considéré comme une composante des droits à l'égalité garantis par l'art. 15. Cependant,

[1] Un pourvoi formé contre le jugement de la Cour d'appel de Terre-Neuve a été rejeté: voir [1989] 1 R.C.S. 922.

Charter as her husband's death occurred on July 22, 1984, prior to April 17, 1985 when s. 15 came into force. It was held that s. 15 could not apply retrospectively.

As the opinion of Hickman C.J. on the constitutionality of ss. 32 and 34 of *The Workers' Compensation Act, 1983* was *obiter dictum*, there was no ground upon which the Crown could appeal. Mrs. Piercey did not appeal. As a result, a Reference on this issue was directed to the Newfoundland Court of Appeal.

In the Court of Appeal, the Attorney General of Newfoundland presented the Reference. Acting as interveners by original order or by subsequent leave were: the Workers' Compensation Commission of Newfoundland and Labrador; la Commission de la santé et de la sécurité au travail du Quebec; the Attorney General of Nova Scotia; the Workers' Compensation Board of New Brunswick; the Workers' Compensation Board of Manitoba; the Attorney General of British Columbia; the Workers' Compensation Board of British Columbia; the Workers' Compensation Board of Prince Edward Island; the Workers' Compensation Board of Alberta; the Workers' Compensation Board of Yukon; the Canadian Manufacturers Association; the Canadian Labour Congress; the Newfoundland and Labrador Federation of Labour; Canadian National Railways; Marine Atlantic Limited; General Bakeries Limited, and Shirley Piercey. All but Mrs. Piercey supported the legislation. The Court of Appeal held that ss. 32 and 34 of *The Workers' Compensation Act, 1983* were not inconsistent with s. 15(1) of the *Charter*. In addition, Goodridge C.J.N. held that s. 15 does not apply to causes of action arising before April 17, 1985.

This application by Mr. Cowper is on behalf of Suzanne Côté to intervene in this case pursuant to Rule 18 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicant is an injured

il a également conclu que M^me^ Piercey ne pouvait invoquer la *Charte* parce que le décès de son époux était survenu le 22 juillet 1984, soit avant l'entrée en vigueur de l'art. 15, le 17 avril 1985. Il a conclu que l'art. 15 ne pouvait s'appliquer rétroactivement.

Comme l'opinion du juge en chef Hickman sur la constitutionnalité des art. 32 et 34 de *The Workers' Compensation Act, 1983* était une opinion incidente, il n'existait aucun moyen sur lequel Sa Majesté pouvait fonder un appel. Madame Piercey n'a pas interjeté appel. En conséquence, la question a fait l'objet d'un renvoi à la Cour d'appel de Terre-Neuve.

En Cour d'appel, le procureur général de Terre-Neuve a présenté le renvoi. Agissaient comme intervenants en vertu de l'ordonnance initiale ou par autorisation subséquente: la Workers' Compensation Commission of Newfoundland and Labrador, la Commission de la santé et de la sécurité au travail du Québec, le procureur général de la Nouvelle-Écosse, la Commission des accidents du travail du Nouveau-Brunswick, la Commission des accidents du travail du Manitoba, le procureur général de la Colombie-Britannique, la Workers' Compensation Board of British Columbia, la Workers' Compensation Board of Prince Edward Island, la Workers' Compensation Board of Alberta, la Workers' Compensation Board of Yukon, l'Association des manufacturiers canadiens, le Congrès du travail du Canada, la Newfoundland and Labrador Federation of Labour, la Compagnie des chemins de fer nationaux du Canada, Marine Atlantic Limited, General Bakeries Limited et Shirley Piercey. Tous, sauf M^me^ Piercey, appuyaient les dispositions en cause. La Cour d'appel a conclu que les art. 32 et 34 de *The Workers' Compensation Act, 1983* n'étaient pas incompatibles avec le par. 15(1) de la *Charte*. En outre, le juge en chef Goodridge de Terre-Neuve a conclu que l'art. 15 ne s'appliquait pas aux causes d'action ayant pris naissance avant le 17 avril 1985.

M^e^ Cowper, agissant pour le compte de Suzanne Côté sollicite par la présente requête l'autorisation d'intervenir en l'espèce conformément à l'art. 18 des *Règles de la Cour suprême du Canada*,

person who has brought a challenge of similar British Columbia provisions (ss. 10 and 11 of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437) based on the unconstitutionality of a statutory bar to private compensation. The action of Mrs. Côté has been stayed by an order of the British Columbia Supreme Court pending the outcome of this appeal. Mr. Cowper has been retained by several other plaintiffs who are in circumstances similar to Suzanne Côté and who wish to have him present argument in this appeal.

Our Rule 18 gives this Court a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention. As well, s. 55(4) of the *Supreme Court Act*, R.S.C. 1970, c. S-19, provides for submissions from persons interested in a reference.

The criteria for the exercise of this discretion were the subject of considerable argument on this motion. Counsel were understandably handicapped because these criteria have, perhaps purposely, not been commented on by this Court in recent cases. Threshold requirements are set out in Rule 18(3)(*a*) and (*c*). These criteria can be summarized as follows: (1) an interest and (2) submissions which will be useful and different from those of the other parties.

The application was resisted principally on the basis that having a similar case does not satisfy the interest requirement. It was also argued that the applicant has not demonstrated that his argument will differ from that of Mrs. Piercey's counsel.

(1) Interest

One of the few authorities in this Court on the exercise of the Court's discretion is *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665, in which Pigeon J. held that any interest is sufficient, subject always to the exercise of discretion. From the cases cited by Justice Pigeon, it is apparent that having a

DORS/83-74. La requérante est une personne qui a subi des blessures et qui conteste des dispositions semblables en Colombie-Britannique (les art. 10 et 11 de la *Workers Compensation Act*, R.S.B.C. 1979, chap. 437) en invoquant l'inconstitutionnalité d'une interdiction légale d'obtenir une indemnité autre que celle prévue par la loi. La Cour suprême de la Colombie-Britannique a ordonné la suspension de l'action de M^me^ Côté en attendant l'issue du présent pourvoi. Les services de M^e^ Cowper ont été retenus par plusieurs autres demandeurs qui sont dans une situation semblable à celle de Suzanne Côté et qui souhaitent qu'il plaide dans le cadre du présent pourvoi.

L'article 18 des Règles confère à notre Cour un vaste pouvoir discrétionnaire pour décider s'il y a lieu d'autoriser ou non une personne à intervenir ainsi que le pouvoir discrétionnaire de fixer les modalités de l'intervention. De même, le par. 55(4) de la *Loi sur la Cour suprême*, S.R.C. 1970, chap. S-19, prévoit que des personnes intéressées peuvent être entendues dans un renvoi.

Les critères de l'exercice de ce pouvoir discrétionnaire ont fait l'objet d'un long débat dans la présente requête. Les avocats étaient naturellement désavantagés du fait que, peut-être à dessein, notre Cour n'a pas commenté ces critères dans des affaires récentes. Les exigences minimales sont énoncées aux al. 18(3)*a*) et *c*) des Règles. Ce sont en résumé: (1) un intérêt et (2) des allégations qui seront utiles et différentes de celles des autres parties.

L'opposition à la demande repose principalement sur l'argument que le fait d'être dans une situation semblable ne satisfait pas à l'exigence de l'intérêt. On a également soutenu que la requérante n'a pas démontré que son argumentation serait différente de celle de l'avocat de M^me^ Piercey.

(1) L'intérêt

Un des rares arrêts que notre Cour a rendus sur l'exercice de son pouvoir discrétionnaire est *Norcan Ltd. v. Lebrock*, [1969] R.C.S. 665, dans lequel le juge Pigeon a conclu que tout intérêt suffit, sous réserve toujours de l'exercice du pouvoir discrétionnaire. Il ressort de la jurisprudence

similar case can satisfy this requirement. The discretion, however, will not ordinarily be exercised in favour of an applicant just because the applicant has a similar case. Indeed it has been held in some courts that this is not a sufficient interest. See *Solosky v. The Queen*, [1978] 1 F.C. 609, and *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764 (C.A.)

I agree with Pigeon J. that "any interest" extends to an interest in the outcome of an appeal when a legal issue to be determined therein will be binding on other pending litigation to which the applicant is a party. Although this is usually a tenuous basis upon which to base an application for intervention, in this appeal Mr. Cowper's client is in the unenviable position of facing an opponent in the British Columbia litigation, the Attorney General of British Columbia, who has the right to intervene in this appeal. There is an aura of unfairness about this which should be remedied by granting this application unless the other criteria dictate the contrary conclusion. This unfairness is exacerbated by the imbalance of representation in favour of those supporting the constitutionality of the legislation which would occur if the applicant were denied the right to intervene.

(2) Useful and Different Submissions

This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter. As stated by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05: "an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue". It is more difficult for a private litigant to demonstrate that his or her argument will be different. This submission is usually met by the response that the able and

citée par le juge Pigeon que le fait d'être dans une situation semblable peut satisfaire à cette exigence. Cependant, le pouvoir discrétionnaire ne sera habituellement pas exercé en faveur d'un requérant seulement parce qu'il est dans une situation semblable. Certains tribunaux ont même conclu que cela ne constitue pas un intérêt suffisant. Voir *Solosky c. La Reine*, [1978] C.F. 609, et *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764 (C.A.)

Je suis d'accord avec le juge Pigeon que «tout intérêt» vise un intérêt dans l'issue d'un pourvoi si la réponse donnée à la question de droit soumise doit s'appliquer à un autre litige en cours auquel le requérant est partie. Cela est ordinairement considéré comme une justification assez faible d'une demande d'intervention, mais la cliente de Me Cowper en l'espèce se trouve dans la situation peu enviable d'avoir comme adversaire dans son litige en Colombie-Britannique le procureur général de la Colombie-Britannique qui, lui, a le droit d'intervenir en l'espèce. Cette situation dégage une impression d'injustice qui devrait être dissipée en accueillant la présente demande, à moins que les autres critères ne dictent une conclusion contraire. Cette injustice serait accentuée par la surabondance de représentation des tenants de la constitutionnalité des dispositions en cause si on refusait à la requérante le droit d'intervenir.

(2) Des allégations utiles et différentes

Ce critère est largement respecté lorsque le requérant a fait face à la question et en a acquis une connaissance approfondie qui peut donc lui permettre d'apporter un point de vue nouveau ou de fournir des renseignements supplémentaires à son sujet. Comme l'a affirmé Brian Crane dans *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), à la p. 1.1.05: [TRADUCTION] «une intervention est bienvenue lorsque l'intervenant peut fournir à la Cour des renseignements nouveaux et un point de vue nouveau sur une importante question constitutionnelle ou publique». Il est plus difficile pour un particulier de démontrer que ses allégations seront différentes. On répond habituellement à cet argument que l'avocat

experienced counsel already in the case will cover all bases.

In my opinion this is not a disqualifying factor here. The only party advancing the position taken by the applicant will be Mrs. Piercey. Her interest in the outcome is somewhat tenuous given the conclusion at trial that s. 15 could not be invoked to retroactively apply to a cause of action arising prior to April 17, 1985. Unlike Mrs. Piercey, the applicant has a definite stake in the outcome. In my view, the applicant can add to the effective adjudication of the issue by ensuring that all the issues are presented in a full adversarial context. This need for an adversarial relationship was one of the factors considered by this Court when granting applicant intervener status in *Norcan*, *supra*, and in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

In the circumstances of this case, therefore, I grant leave to the applicant and others in similar circumstances represented by Mr. Cowper to intervene in this appeal. Pursuant to Rule 18, the applicant may file a factum and present oral argument to be limited to not more than fifteen minutes. There will be no costs of the application.

Motion granted.

Solicitors for the applicant: Russell & DuMoulin, Vancouver.

Solicitor for the respondent: The Attorney General of Newfoundland, St. John's.

compétent et expérimenté déjà inscrit au dossier traitera de toutes les aspects de la question.

À mon avis, cela ne contribue pas à faire perdre qualité pour agir en l'espèce. La seule partie qui soutient la même thèse que la requérante est M^me^ Piercey. Son intérêt dans l'issue du pourvoi est quelque peu négligeable étant donné la conclusion, formulée en première instance, que l'art. 15 ne peut s'appliquer rétroactivement à une cause d'action ayant pris naissance avant le 17 avril 1985. Contrairement à M^me^ Piercey, la requérante a un enjeu précis dans le résultat. À mon avis, la requérante peut contribuer à l'efficacité du processus de décision dans ce litige en assurant que toutes les questions litigieuses sont présentées dans un contexte pleinement contradictoire. Cette nécessité d'un rapport contradictoire est un des facteurs dont cette Cour a tenu compte quand elle a accordé au requérant le statut d'intervenant dans les affaires *Norcan*, précitée, et *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357.

Dans les circonstances de la présente affaire, j'accorde donc à la requérante et aux autres personnes qui se trouvent dans une situation semblable et qui sont représentées par M^e^ Cowper, l'autorisation d'intervenir dans ce pourvoi. Conformément à l'art. 18 des Règles, la requérante peut produire un mémoire et plaider pendant une durée maximale de quinze minutes. Il n'y aura pas d'adjudication de dépens relativement à la requête.

Requête accueillie.

Procureurs de la requérante: Russell & DuMoulin, Vancouver.

Procureur de l'intimé: Le procureur général de Terre-Neuve, St. John's.

Court File No. 24668

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

THE BRANT COUNTY BOARD OF EDUCATION

Appellant

- and -

CAROL EATON AND CLAYTON EATON

Respondents

- and -

ONTARIO ASSOCIATION FOR COMMUNITY LIVING, CANADIAN DISABILITY RIGHTS COUNCIL, and ATTORNEY GENERAL OF ONTARIO

Intervenors

I N D E X

1. *Reference Re Worker's Compensation Act*, 1983 (Nfld.), [1989] 2 S.C.R. 335

2. *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665

3. *R. v. N.T.C. Smokehouse Ltd.* [1993] S.C.C.A. No 420 [unreported]

4. *Canadian Council of Churches v. Minister of Employment and Immigration*, [1992] 1 S.C.R. 236

5. Rule 5 of the Supreme Court Rules

6. Rules 18(3)(a) and 18(3)(c) of the *Supreme Court Rules*

However, certain minimum standards are expected, and the first obligation of counsel is to comply with the provisions of the rules and the Act.

Extending or Abridging Time

5. Notwithstanding anything in these Rules, but subject to any other Act, the Court or a Judge, or the Registrar when authorized by these Rules, may at any time extend or abridge the time for doing any act or taking any proceeding.

Extensions of Time

Because of the final nature of the Court's jurisdiction, judges are reluctant to refuse necessary extensions of time, though terms may be imposed. The following principles may be extracted from the practice and the authorities. They all point to the need for careful documentation, particularly if a motion is likely to be contested.

1. A *bona fide* intention to proceed should be formed and communicated to the opposite party within the time allowed: see *Neveu v. Côté*, [1989] 2 S.C.R. 342; *R. v. K.C. Irving Ltd.*, [1976] 2 S.C.R. 366; *Radclyffe v. Rennie* (1964), 49 W.W.R. 187 (Man. C.A.); *Reaume v. Windsor (City)* (1915), 34 O.L.R. 384 (C.A.). If the applicant failed to form an intention to proceed within time, an explanation is required.

2. Once delay is recognized, or if special relief is otherwise required from the Court, counsel must move diligently: *Borowski v. A.G. (Can.)* (26 January 1988).

3. While the substance of an application for leave or an appeal is for the Court, the merits may be relevant on an extension application. An extension to file a notice of appeal as of right in a criminal case was refused where the applicant failed to make out "an arguable case" that the dissent involved was a dissent on a question of law: *Wedow v. R.* (18 April 1984). See also *Robertson v. R.* (2 December 1982) in which an extension was refused where the applicant "had not shown an arguable case can be made out", and *Pieszkor v. R.* (7 September 1988) where the application had no merit and the extension was refused.

4. At the hearing, a respondent may be called upon to show actual prejudice in order to successfully resist an application to extend time. This is especially the situation once an arguable case has been made out, and an explanation given for the delay.

5. Where a time period has been missed through counsel's inadvertence, an affidavit should set out the mistake for the chambers judge. Generally, a party will not be penalized if the delay is the fault of counsel: *Pont Viau (Cité) v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516.

6. Time may be shortened in cases of urgency: cases involving young offenders, especially if incarcerated, or involving medical emergency, or public issues calling for immediate resolution are examples.

7. The Court is willing to assist counsel to settle cases and may extend time where the parties have been attempting, *bona fide*, to resolve their differences and have missed or are likely to miss a deadline. The Court has extended time to bring a leave application in order to assist the parties to settle. For example, in *National Bank of Canada v. Claiborne Industries Ltd.*, five extensions were granted (12 October, 29 November 1989, 8 January, 26 January and 2 May 1990). More recently, the Chief Justice delayed the hearing of an appeal by a year to allow settlement negotiations and ordered a filing timetable to commence at the end of the delay: *Delgamuukw v. R.* (11 July 1994).

8. If the parties acquiesce in the judgment sought to be appealed, the appeal may be quashed notwithstanding an extension: *Cdn. Cablesystems (Ont.) Ltd. v. Consumers' Assn. of Canada*, [1977] 2 S.C.R. 740. Payment of costs under threat of execution is not acquiesence: *Morin v. Walter*, [1923] 4 D.L.R. 696 (S.C.C.).

9. Where a party is applying to the Court of Appeal for a rehearing or to settle an unresolved point, the Court has granted extensions of time for leave to appeal until the matter has been disposed of below.

There is no appeal from the dismissal of a motion to extend time. In *R. v. Hodd* (7 August 1970) the chambers judge dismissed the Crown's motion to extend time. The Crown then sought and obtained leave to appeal subject to the determination by the Court that it had jurisdiction to hear an appeal (6 October 1970). Subsequently the appeal was quashed (1971), 1 C.C.C. (2d) 363. Similarly, reargument of a motion has been refused even if the formal order had not yet been taken out: *Leon v. Forster* (15 July 1937). In the same case (18 October 1937) a motion by way of appeal from the dismissal was dismissed by the full Court. See also the commentary on rule 21. However, more recently, judges have reviewed orders previously made by them when new material is advanced or oversight alleged, and where the order first made has not yet been signed and entered. See *Macooh v. R.* (8 December 1992), *Grewal v. Salama Enterprises* (1988) Ltd. (22 June 1992), and *R. v. Finta* (23 April 1993).

Written reasons are rarely given on motions to extend time. Each case usually turns on its unique facts. However, there are a few cases which consider the tests.

1993). The pitfalls associated with the legislation reviewed in these cases have largely been removed through statute amendments.

Postponement of Hearing

6. The Chief Justice or, in his absence or at his request, one of the puisne judges, may postpone the hearing of any proceeding.

Commentary

Postponement of a case inscribed for hearing may be sought for many reasons, often related to the availability of counsel. Successive Chief Justices have accommodated sensible requests for postponements: illness, family emergency, and counsel's inadvertence may be grounds upon which to seek relief. But the Court wants its business done in an orderly way and counsel must recognize that postponements are disruptive. Conflict with proceedings in a lower court is not usually a good reason for postponement.

A motion is required returnable before the Chief Justice (who may designate a puisne justice to hear it). The motion must be supported by an affidavit fully explaining the facts — see rule 19(1).

Where no Provision

7. Whenever these Rules contain no provision for exercising any right, any procedure that is specified by the Court, a Judge or the Registrar and that is not inconsistent with these Rules or the Act may be adopted.

Commentary

The Supreme Court has its own version of "gap-rule", which recognizes that the rules cannot anticipate every eventuality.

Rule 7 was relied upon in *Reekie v. Messervey*, [1990] 1 S.C.R. 219, where the Court held that a rehearing of an application for leave to appeal is available, notwithstanding the specific contrary provision of rule 51(12), in order to prevent an "injustice" from occurring.

In *Reference Re Section 23 of the Manitoba Act, 1870* (7 December 1990) the parties had a limited right to return to the Court for further determination "in the case of necessity". Manitoba relied on rule 7 in seeking answers to a number of additional questions. Canada argued these were "new questions" outside those

This happened in *Neposse v. R.* (15 March 1990). There, counsel delayed over 1 year after the first order. A second, but very short extension was granted but only "peremptorily" where the first delay was missed and the Crown suggested that footdragging had taken place: *Lucovitch v. R.* (15 June 1989).

In an effort to see cases processed diligently and in accordance with the rules and statutory guidelines (*e.g.*, s. 695(2) of the *Criminal Code*), the Court instituted "show cause" hearings in 1990. Failure to explain delay will result in the appeal being quashed. See *Notice to the Profession* (April 1991) in Part 3.

Motions to Abridge Time. As noted above, time may be shortened in cases of urgency. However, the Court's processes require a minimum degree of deliberation. In *National Party of Canada v. C.B.C.*, [1993] 3 S.C.R. 651, the Court refused to abridge time so that an application for leave to appeal the Federal Court's judgment of October 1, 1993 could be heard, and the appeal argued, before the October general election. The Court stated that "it is only in the most extraordinary situations, such as issues of life and death, that we have abridged notice which this Court and responding and intervening litigants require to dispense justice adequately". See the discussion under section 34.

Appeals from the Federal Court of Appeal. A long standing problem in matters arising from the Federal Court of Appeal has been resolved by section 59(1) of the Act. In *Saskatchewan Power Corp. v. Transcanada Pipelines Ltd.*, the Court held that in the event that the applicant is not within the time an extension of time could be granted in a case in which leave was not sought within 60 days of a judgment of the Federal Court of Appeal (17 May 1977). However, in *Canada (Cdn. Human Rights Commn.) v. Cdn. Pacific Ltd.*, [1988] 2 S.C.R. 271 the Court held that it was without jurisdiction to extend time in an application from the Federal Court of Appeal. Section 59(1) now confers jurisdiction to extend time in cases from the Federal Court of Appeal on the Supreme Court and its judges (and, incidentally, upon the Federal Court of Appeal and its judges also).

Jurisdictional Considerations. The Court has shown a reluctance to permit technical considerations concerning the timing of an application, to oust the Court's jurisdiction to consider the merits of the case. In *R. v. K.C. Irving, Ltd.*, [1976] 2 S.C.R. 366, the Court held it had jurisdiction to extend time (under section 618(1)(b) and 621(1)(b) of the Criminal Code as they then read) notwithstanding the application was made outside the prescribed period. A similar approach was followed in two cases under the 1968 Divorce Act. In *Novic v. Novic*, [1983] 1 S.C.R. 700, the Court held it had granted the necessary extension (without motion by the party) where the regularly scheduled hearing date was after the date of filing. And in *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, it was held that an order granting leave to appeal was retroactive to the date of the application. See also *Bell v. United Mine Workers of America Int. Union* (8 June

opposing necessary motions, and may deprive a party of costs where a dog in the manger approach is evidenced: *Lanificio Fratelli Bettazzi S.N.C. v. Tissus Ranchar Inc.* (3 October 1990).

Inordinate delay is more difficult to excuse. In *Aladdin Industries, Inc. v. Cdn. Thermos Products Ltd.*, [1974] S.C.R. 845 the appellant delayed proceeding for 18 months after filing a notice of appeal, partly to enable second counsel to be retained and review the extensive record. The delay was held inordinate and not acceptably explained; the motion to extend time was dismissed. The chambers judge refused to extend time where there had been a 16-month delay during which the accused had been attempting to raise funds for an appeal: *Blundon v. R.* (20 February 1989).

Until the late 1980's, application for extensions were seldom refused. Recently, however, counsel can be far less certain of an extension. This no doubt reflects, in part, the Court's increasing concern with setting an example in respect of delay, shown dramatically in the success the Court has made in clearing up its own backlog.

A motion to extend time was dismissed where a quadriplegic missed the deadline in consulting a second lawyer as to the conduct of her first lawyer notwithstanding no serious prejudice was argued by the respondent: *Marcoux v. Martineau* (18 December 1989). In *Babecky v. Deloitte & Touche Inc.* (28 June 1991), an extension was refused where the respondent had closed a transaction upon the expiry of the 60-day period, the applicant not having proceeded within time. In *Spruyt v. R.* (10 January 1992), an application to extend time in a criminal case was dismissed notwithstanding that the delay of 16 months was entirely attributable to legal aid and (primarily) counsel, the accused being incarcerated throughout. And in *McKinnon v. R.* (26 February 1992), an accused's application for a 10-month extension was dismissed, where again the delay was all attributable to legal aid and his lawyer.

On occasion the Court has extended time to reasonably accommodate the busy schedules of members of the bar. However, there is a limit, as seen in *Pilon v. Bouaziz* (22 December 1993), where the applicant's new lawyer sought a six-month extension but was allowed only two and one-half months since very special circumstances would need to be presented to warrant a six-month extension. There were also funding issues as between the applicant and his new lawyer in this case.

It is acceptable and now common practice to combine the application for an extension with the application for leave in the leave to appeal motion book. Both are then dealt with, without an oral hearing, by the judges of the leave panel.

Counsel has a heavy onus when applying for a second extension where there has been a failure to comply with the terms of the first, and may be denied relief.

In *Blundon v. Storm* (1970), 10 D.L.R. (3d) 576 (N.S.C.A.) the applicant was granted an extension where the lawyer had a mistaken belief as to the date on which time began to run. The case is one of the rare instances where extensive reasons were given. In *Neveu v. Côté*, [1989] 2 S.C.R. 342, Gonthier J. gave reasons and extended time where the applicant had failed to communicate her intention within the delay period. Pigeon J. extended time to serve a notice of appeal in *University of Saskatchewan v. C.U.P.E., Local 1975*, [1978] 2 S.C.R. 830, noting that "an extension is justified under the circumstances by reason of the principle that, if it can be done without serious prejudice to the other party, relief should be granted in order to prevent serious prejudice to a litigant".

An accurate and timeless statement of the guiding philosophy is that of Brett, M.R. who said "...I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that leave should be given": *Re Manchester Economic Building Society* (1883), 24 Ch. D. 488 at 497.

In *Thomas v. R.*, [1990] 1 S.C.R. 713 the Court dismissed an application for a three-year extension to seek leave. There an accused was not informed until several years later that the Court was considering an appeal, which raised issues similar to those in his case, when he was still within time. He could have sought leave then, but did not. The Court declined to find the accused was "still within the system" per *R. v. Wigman*, [1987] 1 S.C.R. 246 by extending the time, although it noted that there was no intention to appeal within the time, and that the delay had not been adequately explained in any event.

One of the lengthiest extensions was granted in *Gillespie v. R.* (7 February 1994). The accused was convicted of second degree murder in 1984 and his appeal was dismissed in February 1988. Starting within 30 days of that judgment he began dealing with a series of lawyers, the last of whom was appointed counsel (on consent) in May 1992 but did not file her application for leave until December 1993. After two hearings, the extension was granted on 7 January 1994. The application for leave was dismissed on 27 February 1994.

Appropriate terms can be imposed as a condition for granting an extension — see rule 8 and section 59(2) of the Act. For example, the applicant was ordered to pay costs "forthwith" both in the courts below and of the motion in *National Development Corp. v. Halifax Ins. Co.* (29 August 1985). Similarly, the chambers judge may impose special deadlines for the further proceedings, and direct the Registrar to forward the dossier to the judges on an expedited basis — see, for example, *R. v. J.C.S.* (11 July 1990), a case involving a young offender and a mistake by Crown counsel as to section 27(5) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1. A respondent may be awarded costs, at least of the motion, "in any event" if such a request is reasonably made; see *Bovey v. Gananoque (Town)* (11 July 1990). By the same token, the Court discourages counsel from unreasonably

The problem of carriage where the unsuccessful named party is unwilling to seek leave to appeal was addressed in *Canada (Cdn. Human Rights Comm.) v. Canada (Department of Secretary of State)* (30 October 1990). There, the Commission was given an order enabling it to seek leave to appeal in its own right.

In *Vickers (guardian ad litem of infant K.) v. Mrs. K.*, [1985] 1 S.C.R. xiv, the Court held that the record revealed no person with standing to bring the application, and that it had no jurisdiction to grant standing to the applicant.

In *Robinson v. Royal Trust Co.* [1939] S.C.R. 75, the Court's attention was drawn to the fact that the infant daughter of the appellant was not represented. The Court ordered that the Official Guardian be added as a party to represent the infant and the appellant's unborn children.

In *Canada (Employment & Immigration Comm.) v. Schacter and Women's Legal Education Action Fund (L.E.A.F.)* (18 March 1991), the appellant sought and obtained leave to appeal against two parties it styled "respondents". However, L.E.A.F., had only been granted leave to intervene as an added party at trial, and was therefore not properly before the Court. Upon application, L.E.A.F. was added as a party under rule 17, with costs against the appellant.

If a party to an appeal dies, sections 72 to 78 of the Act, dealing with "suggestions" must be followed if the appeal is to continue.

In a criminal case, the appeal abates on the death of the accused: see *Re Collins and R.* (1973), 3 O.R. 672 (C.A.) and *Re Cadeddu and R.* (1983), 41 O.R. (2d) 481 (C.A.). In *Mercure v. A.G. (Sask.)*, [1988] 1 S.C.R. 234 an intervener was given leave to assume carriage of the appeal upon the death of the appellant. In *Lofthouse v. R.* (1990), 149 N.R. 236 (S.C.C.) the accused appellant died, the statutory provisions set out in section 73 were not followed, and the appeal was quashed. Likewise, in *R. v. K. (M.)* (16 June 1993), the appeal was quashed where the respondent died after leave was granted. The respondent had been convicted at trial, but the court of appeal stayed proceedings.

Likewise in a civil appeal, on the death of a party a suggestion must be filed, or the appeal may be struck as against the party who has died pursuant to sections 72 to 78 of the Act. If the statutory procedure is followed on the death of a party, the appeal may continue: *Robert v. Marquis*, [1958] S.C.R. 20; *Price v. Fraser* (1901), 31 S.C.R. 505.

Intervention

18. (1) Any person interested in an appeal or a reference may, by leave of a Judge, intervene therein upon such terms and conditions and with such rights and privileges as the Judge may determine.

(2) An application for intervention shall be made by filing and serving, within 60 days after the filing of the notice of appeal or the reference, a notice of motion in Form B.2 supported by an affidavit, and the motion shall be heard on a date to be fixed by the Registrar.

(3) An application for intervention shall briefly

(*a*) describe the intervener and the intervener's interest in the appeal or reference;

(*b*) identify the position be taken by the intervener on the appeal or reference; and

(*c*) set out the submissions to be advanced by the intervener, their relevancy to the appeal or reference and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

(4) An intervener has the right to file a factum.

(5) Unless otherwise ordered by a Judge, an intervener

(*a*) shall not file a factum that exceeds 20 pages;

(*b*) shall be bound by the case on appeal and may not add to it; and

(*c*) shall not present oral argument.

(6) The order granting leave to intervene shall specify the filing date for the factum of the intervener and shall, unless there are exceptional circumstances, make provisions as to additional disbursements incurred by the appellant or the respondent as a result of the intervention.

(7) Subsections (1) to (3), paragraphs (5)(*a*) and (*c*) and subsection (6) do not apply to the Attorney General of Canada, the attorneys general of the provinces and the ministers of justice of the governments of the territories who file a notice of intervention referred to in subsection 32(4).

(8) Paragraphs (5)(*a*) and (*c*) do not apply to the Attorney General of Canada, the attorneys general of the provinces and the ministers of justice of the governments of the territories referred to in subsection 32(7). SOR/83-930, s. 1; SOR/87-292, s. 1; SOR/91-347, s. 8; SOR/92-674, s. 1.

Interventions

Rule 18 was revised in May, 1987 to clarify the material to be filed and to give greater flexibility in granting interventions. Note that in Supreme Court practice, "intervener" rather than "intervenor" is used.

The judges have the power to grant intervener status to interested persons at any stage in an appeal. However, under the rules the motion should be made within 60 days of the filing of the notice of appeal.

The Attorney General of Canada or of a province may intervene as of right in a constitutional case (*i.e.*, where an order has been made for a constitutional question under rule 32(4), or when the somewhat unusual circumstances of rule 32(8) apply. Attorneys general are permitted to intervene under rule 32 only on constitutional questions.

All other interested parties, including attorneys general wishing to intervene on issues not covered by a constitutional question, must apply to a chambers judge for leave to intervene.

Intervener in the Court Below. A fresh application for leave to intervene to a judge of the Court must be made even if leave to intervene has been granted in the courts below. An interested person made an intervener in the courts below — even one granted "leave to intervene as an added party" — has no standing without an order of the Court or one of its judges: *Toronto (City) v. Morencie* (24 April 1989); *Law Society (Upper Canada) v. Skapinker*, [1984] 1 S.C.R. 357 at 360. And see *A.G. (N.S.) v. Burke*, [1983] 1 S.C.R. 55, where an appeal launched by the Attorney General of Nova Scotia was quashed by the Court at the hearing of the appeal and on its own motion. The A.G. (N.S.) had intervened in the courts below, the party which would have appealed had ceased to participate, there was no longer a *lis* between the parties, and the A.G. (N.S.) could not carry on with an appeal.

However, in *A.G. (Ont.) v. Pembina Exploration Can. Ltd.*, [1990] 1 S.C.R. 206, the Attorney General of Ontario intervened in the courts below, and subsequently applied for leave and prosecuted the appeal on the constitutional point without any participation by the original plaintiff. The Court was advised, however, that the plaintiff proposed to pursue the matter if the decision on the constitutional point permitted. No application to intervene was made.

In *Quebec Assn. of Protestant School Bds. v. A.G. (Que.)* (3 July 1991), the appellant was granted leave to intervene in a provincial reference by the court of appeal. It and four other entities similarly before the court of appeal, appealed as of right under section 36 of the Act. Another entity, which had the same status in the court of appeal as the appellant, applied for an order that it was entitled to the rights of a party in all five appeals. The motion was dismissed.

Between January 23, 1983 and December 28, 1983, interveners in the courts below were automatically afforded intervener status under rule 18(2), but this rule was then repealed. See *Notice to the Profession*, January 16, 1984.

The Principles. Previously, applications to intervene were not granted in criminal cases and only occasionally in civil cases. Now, however, interventions are possible in all classes of cases and are available to a broad range of interested persons.

Generally speaking, the Court now appears to favour interventions if the intervener will provide the Court with a fresh perspective on an important constitutional or public law issue. The Court may also grant leave to intervene to enable an interested person to protect a legal interest.

Counsel considering an intervention should review *R. v. Finta*, [1993] 1 S.C.R. 1138, *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, and *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665 in which reasons were given. In *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, *supra*, Sopinka J. summarized the criteria of rule 18 as requiring "an interest" and "submissions which will be useful and different from those of the other parties". In *Norcan*, *supra*, Pigeon J. specifically held that rule 60 (the predecessor to rule 18) "should not be narrowly construed. It seems clear that any interest is sufficient to support an application under that rule subject always to the exercise of discretion." Lamer, J. (as he then was) held, in dismissing an application by the National Metis Council, that there must be a specific interest not represented by the existing parties: *Dumont v. A.G. (Can.)* (21 July 1989).

Leave to intervene is granted on the legal issues arising out of the facts before the Court. However, since one of the requirements to obtain leave is a fresh perspective, interveners have some latitude to raise issues not dealt with by the parties. If new arguments are indicated at the time intervention is sought, and a party complains, the chambers judge may nonetheless grant leave without prejudice to the party opposed arguing against the raising of the new issues on the appeal itself: see *Norberg v. Wynrib*, [1992] 2 S.C.R. 224 (new *Charter* argument raised by intervener). However in *R. v. Morgentaler*, [1993] 1 S.C.R. 462, an intervener was prohibited from presenting argument on a constitutional point not raised by the parties where the evidence in the case on appeal had been culled on the basis of the existing issues, and where leave to intervene had been sought on the basis that the intervener only wished to speak to the existing issues. More recently, an intervener was allowed to raise issues which had not been advanced in the courts below which, while cast in new form, covered the same subject matter as the issues already before the Court: *Badger v. R.* (12 September 1994). In such cases, the opposing party will usually be given the right to file a reply factum, since interveners file after the appellant and the respondent unless there is an order to the contrary. In *O'Connor v. R.* (20 September 1994) two public interest interveners were allowed to intervene (the motion was not opposed) and present argument concerning the production of counselling records in a criminal case, an issue that neither the appellant nor the respondent had raised in the appeal

but which had been dealt with by the court of appeal. Subsequently, a motion by the appellant for an order rescinding the intervention was dismissed (10 January 1995).

The Court has ruled that intervener status "is not granted to allow the intervener to raise an entirely new set of issues which are not addressed by the principal parties:" see *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445.

Where there are numerous interventions, the judge may limit the interventions. For example, in *Apsassin v. R.* (9 March 1994) four applications were allowed, but the interventions were ordered not to be repetitive or to raise issues not put in issue by the parties below. Moreover, the issues permitted were defined and the interveners were ordered not to make submissions requiring new evidence.

In five cases now before the Court involving aboriginal fishing rights in British Columbia which have been grouped for hearing, McLachlin J., acting as motions judge for these cases, granted several applications to intervene, including two by organizations representing commercial fishing interests in the province. However, an application by the Atlantic Salmon Federation was refused as being too remote and raising extraneous issues: *N.T.C. Smokehouse v. R.* (1 October 1994). Later, in a related case, an application by the Ontario Federation of Anglers and Hunters was refused in the interests of fairness because it was late and would require the Court to consider new evidence: *R. v. Gladstone* (20 March 1995).

Public Interest Organizations. Public interest organizations are likely to succeed in applying for leave to intervene, where once they fared quite poorly. In 1978 the British Columbia Civil Liberties Association was refused leave in a case involving the provincial human rights code: *Gay Alliance Toward Equality v. Vancouver Sun (The)* (26 May 1978) and the Canadian Civil Liberties Association was refused leave on a case involving sexual equality: *Bliss v. A.G. (Can.)* (20 February 1978). The Canadian Association of Provincial Court Judges was refused leave to intervene in *Valente v. R.* (17 October 1983), while the Ontario Association of Provincial Court Judges was later allowed leave in the same appeal (2 October 1984). The Canadian Civil Liberties Association, however, did obtain leave in the celebrated case of *McNeil v. Nova Scotia (Board of Censors)* (25 March 1975).

More recently, however, public interest groups have been granted leave to intervene in many cases. For example, the Canadian Abortion Rights Action League, Campaign Life Coalition, Fonds d'action et d'education juridique pour les femmes, Canadian Physicians for Life, R.E.A.L. Women of Canada, Canadian Civil Liberties Association, and the Women's Legal Education Action Fund (L.E.A.F.) were granted leave in *Daigle v. Tremblay* (1 August 1989). The Canadian Jewish Congress was granted leave to intervene in *Bhinder v. C.N.R.*

and *Simpson Sears v. O'Malley* (17 January 1985), the Canadian Association of Chiefs of Police were allowed to intervene in *Beare v. R.*; *R. v. Higgins* (10 November 1988), the Criminal Law Association was granted leave in *R. v. Morales*; *R. v. Pearson* (21 April 1992), three public interest organizations (The Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada and InterAmicus) were granted leave in *R. v. Finta*, [1993] 1 S.C.R. 1138, and there have been many, many other instances.

Private Interests. In some cases, private individuals or organizations have been granted leave to intervene. In *National Bank of Canada v. Atomic Slipper Co.* (10 August 1989), the Canadian Bankers Association was granted leave. The Canadian Manufacturers' Association was allowed to intervene in *Reference Re Workers' Compensation Act (Nfld.)* (7 September 1988), as were the Canadian Labour Congress (28 September 1988), and The Canadian National Railway Company (5 October 1988).

On the other hand, the Law Society of Saskatchewan was refused leave in the interprovincial law firm appeal *Alberta (Law Society) v. Black* (28 October 1986) probably because the Federation of Law Societies had already been accorded intervener standing.

Private litigants whose case might be affected by an appeal face a very mixed jurisprudence. Successful applications were made in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (29 April 1994), *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, and *A.G. (Que.) v. Irwin Toys* (28 May 1987). However, they have more frequently been refused, as in *Bank of Montreal v. Commission Hydroélectrique du Québec* (28 August 1990), *Valente v. R.* (5 October 1984); and *Kirkpatrick v. Maple Ridge (Town)* (14 September 1984 and 18 March 1985). Much will depend on the potential contribution and the extent to which the party's interests are affected.

Public Agencies and Tribunals. Public agencies may also be granted leave in cases involving similar legislation. For an early example, the Saskatchewan, Alberta, Manitoba and Canadian human rights tribunals were granted leave to intervene in the human rights case of *Simpson Sears v. O'Malley* (5 January 1983). And the Yukon, Ontario, British Columbia and New Brunswick workers compensation boards were all allowed to intervene into *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers Compensation Bd.)* (12 July 1983).

More recently, the Alberta Human Rights Commission was granted leave in *Ontario (Human Rights Commn.) v. Zurich Ins. Co.* (15 October 1990). There, Cory, J., observed that since the appeal raised important public issues, the Court should have the benefit in the circumstances "of the submissions of responsible organizations particularly public bodies with a past history of helpful intervention."

Administrative Tribunals. It has been the policy of the Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the tribunal and representations relating to jurisdiction: *T.W.U. v. Canadian Radio-television & Telecommunications Commission* (10 February 1994); *C.A.I.M.A.W., Local 14 v. Paccar Can. Ltd.*, [1989] 2 S.C.R. 983; *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684. In *Ward v. A.G. (Can.)* (12 March 1991) the Immigration and Refugee Board was granted leave to intervene in an appeal arising out of a decision made by its predecessor, the Immigration Appeal Board. While not permitted to argue at large, the Board was permitted to address the central issues in the appeal namely the interpretation of "Convention refugee" and the state complicity factor. Similarly, in *Chan v. Canada (Minister of Employment & Immigration)* (11 August 1994) the Board was given leave to file written argument again limited to the Convention refugee definition and to argue briefly at the hearing if called on by the Court. And in *Matsqui Indian Band v. Canadian Pacific Ltd.* (17 February 1994) the Indian Taxation Advisory Board was granted intervener status in a case dealing with the operation of tax assessment appeal tribunals on Indian reserves. In *Maple Lodge Farms v. Canada* (5 December 1980) the Canadian Chicken Marketing Agency was granted leave to intervene in an appeal involving a demand that the government issue import permits for live chickens, a product marketed by the Agency.

Criminal Cases. The Court previously held that the predecessor of rule 18 did not apply in criminal cases, reflecting the thinking that a criminal case only involves the citizen and the state: *Ogg-Moss v. R.* (3 November 1983). Now, however, interventions are occasionally granted in criminal cases where an important public issue is at stake. Leave was granted to the Canadian Jewish Congress, the Canadian Civil Liberties Association and to B'Nai Brith Canada to intervene in *Zundel v. R.* (28 January 1991). By comparison, the Canadian Jewish Congress and B'nai Brith Canada were denied intervener status in the Ontario Court of Appeal: *R. v. Zundel* (1986), 16 O.A.C. 244. See also *R. v. Finta* (1990), 69 O.R. (2d) 557 (H.C.). In *R. v. Finta*, [1993] 1 S.C.R. 1138, several organizations were allowed to intervene in a war crimes case on interpretational issues but denied leave to argue the legality of the address to the jury. The Canadian Civil Liberties Association and the Manitoba Association for Rights and Liberties were granted leave in *Butler v. R.* (2 February 1991), an appeal involving alleged obscene videos.

Two different accused, charged under similar legislation, who intended to advance different arguments were each granted leave to intervene in *Wholesale Travel Group Inc. v. R.* (11 February 1991). This case is also instructive because the interveners had applied for leave to appeal which had not yet been granted (leave was granted shortly afterwards).

In *Butler v. R.* (10 April 1991), two public interest advocacy organizations (Women's Legal Education and Action Fund and Group Against Pornography) were granted leave to intervene, but each were also ordered to pay for additional disbursements and costs incurred by the accused in preparation of argument to address the added issues raised by the intervention. See rule 18(*b*).

In special circumstances, other attorneys general have been allowed to intervene in criminal cases: *Gamble v. R.* (3 June 1988) where the case was originally tried in Alberta and the A.G. Alberta was granted leave in a subsequent *habeas corpus* application brought against the A.G. Canada; and *Morrissette v. R.*; *Chaulk v. R.* (7 March 1989) where the A. G. Canada was allowed to address amendments to the *Supreme Court Act*. However, the A.G. Ontario was refused leave to intervene in *Dersch v. R.* (8 April 1990), an appeal involving wiretap legislation. The point was considered in *Osolin v. R.*, [1993] 2 S.C.R. 313 where Ontario's application to intervene was dismissed. The chambers judge said that very special circumstances must be shown in order to permit an intervention by a provincial attorney general in respect of a non-constitutional issue in a criminal appeal. The applicant had failed to show any special interest or expertise, or either a fresh perspective or fresh information.

Canada was granted leave to intervene in *Lord v. R.* (12 December 1994), where one aspect of the law of conspiracy (the co-conspirators exception rule) and its constitutional validity was in issue. Ontario was also granted leave in the same appeal (7 February 1995). Normally, where a constitutional issue arises, the attorneys general intervene as of right once an order stating a constitutional question under rule 32 is made by the Chief Justice. But since no constitutional question is stated where the attack is on a common law rule — only when federal or provincial legislation is "at risk" — both Canada and Ontario were required to seek leave to intervene under rule 18. The practice is that such interventions are limited to the legal issues; the intervening attorney general should not address guilt or innocence, which is a matter between the prosecuting attorney general and the accused.

Reference Appeals. Interventions may also be made in a federal reference under section 53, and in an appeal from a provincial reference under section 36. The test is the same: the intervener must have a significant interest and something useful or valuable to add. Soon after a federal reference is initiated, the Attorney General of Canada applies to the Chief Justice for directions including a time frame for the prosecution of the case. The order will include a deadline within which proposed interveners must apply for leave. In this connection, see rule 30. An appeal from a provincial reference is prosecuted as an appeal, and the normal provisions of rule 18 apply.

Foreign States. In the extradition case *Reference Re Ng* (18 December 1990), the State of California was granted leave to intervene. The extradition of

Ng was sought in respect of charges pending in that State. Cory J. held that California had a significant interest and that the intervener would be helpful to the Court. In *Crown Forest Industries Inc. v. R.* (26 January 1995) a case involving the definition of residence under the Canada-United States Convention on Double Taxation, the United States was granted leave to intervene to address the meaning of the tax convention.

Intervention on Application for Leave to Appeal. Leave to intervene can be granted at the application for leave stage, but such instances are rare. Under rule 24(5) leave is required. The issue at this stage is whether the proposed appeal is of sufficient national or public importance to warrant leave. If the parties have sufficiently canvassed that point, an intervention would likely be refused. In *Crown Trust v. A.G. (Ont.)* (15 September 1983), certain preferred shareholders who had been given status in the Court of Appeal were permitted to intervene at the leave stage. In *Gamble v. R.*, the applicant applied for leave from the Ontario Court of Appeal which had refused to grant *habeas corpus* against her committal for a crime in Alberta. The Attorney General of Alberta was permitted to intervene at the leave stage (12 June 1987). In *Eastmain Band v. Robinson* (12 March 1993), the Inuit were allowed to intervene in an application brought by the Cree living in the same area to challenge the Federal Court of Appeal's ruling that no environmental assessment was needed — a matter of fundamental importance to the Inuit people. In *Scanlon v. Castlepoint Development Corp.* (24 March 1993) leave to intervene was granted where the intervener was identically situated in interest to the applicant.

In *R.J.R. MacDonald Inc. v. A.G. (Can.)* (4 October 1993) the Court granted the Heart and Stroke Foundation of Canada, on consent, leave to intervene in an application to stay certain proposed federal regulations pending an application for leave to appeal, stating: "let no record reflect that it is only in very exceptional circumstances that intervener status is granted in proceedings of this nature".

Such applications are difficult. Motions by the Attorney General of Alberta to intervene in applications or leave to appeal brought by Manitoba involving the role of the appeal courts in sentencing criminal accused were dismissed in *R. v. Reimer* and *R. v. King* (8 November 1990). And in *Cdn. Council of Churches v. R.* (4 July 1990), Amnesty International was refused leave to intervene at the leave to appeal stage. And in *C.B.C. v. Dagenais* (8 April 1993), the author of a TV show was refused leave to intervene in the application for leave brought by the broadcaster, even though the author had a substantial stake in the outcome. The application was adjourned until after the decision on the leave, to be dismissed if leave was refused and reargued if leave were granted.

Practice and Procedure

Affidavit. In an application for leave to intervene, the need for careful documentation by way of a proper affidavit is essential. The status, interest and potential contribution of the applicant must be demonstrated. In addition to the points covered in rule 18(3), the applicant should show it is a credible organization with the potential to make a useful contribution. The incorporating, statutory or other documents outlining the organization's objects and purposes should be described. Careful attention should be given to describe the position to be taken, and, if possible, how that differs or is likely to differ from the position of the parties. And, of course, details should be provided to indicate the applicant's "interest" in the outcome, *e.g.*, involvement in other proceedings, its statutory duties or responsibilities, and its educational or advocacy functions. In practice, counsel must be prepared to answer the question: "What will you add to the argument?" This is not always easy, particularly at an early stage, since the motion must be made within 60 days of the notice of appeal, well before the parties have filed their factums.

Types of Orders. The degree of intervention permitted to an intervener can be varied in many ways. For example, an order might be made permitting only a written intervention, *i.e.* the filing of a factum, which is normal under rule 18(5)(*a*). The order might allow a factum and permit counsel to apply to be heard at the appeal itself — see *National Bank of Canada v. Atomic Slipper Co.* (10 August 1989), *Taylor v. Canada (Cdn. Human Rights Commission)* (24 October 1989). Or, more usually, an order allowing a factum and granting the right to appear through counsel at the appeal may be granted. It is usual for the chambers judge to limit oral argument to 10-15 minutes. Factums of 20 pages are the maximum usually permitted.

An intervener has only those rights conferred in the order, namely, to file a factum and if applicable, to appear on the appeal. Of course the intervener is also entitled to a copy of the case on appeal and the factums of the other parties — see rules 1, 34(1) and 38(1) and (2). In practice, interveners are not generally involved in motions to state constitutional questions, subsequent applications to intervene or other interlocutory proceedings in the appeal. However, an intervener may have an important role: in *Mercure v. A.G. (Sask.)*, [1988] 1 S.C.R. 234, the intervener was given carriage of the appeal on the death of the appellant. And see the definition of "party" in rule 1.

If an appeal raises an issue which is similar to the issue in another matter before the Court, it makes sense to arrange the hearing dates so that the appeals are heard by the same panel one after the other. However, this is not always possible. Therefore, a practice has developed for the Chief Justice to permit the parties to intervene in each other's appeals. For example, the Ontario Labour

Relations Board and Cuddy Chicks Limited were granted leave to intervene in *Tétreault-Gadoury v. Cdn. Employment & Immigration Commission* (11 January and 25 January 1991) where the two appeals could not be scheduled together. Likewise, Grant was permitted to intervene in *Wiley v. R.* (2 November 1992) and, in turn, Wiley was allowed to intervene in *R. v. Grant* (8 February 1993). The same principle was applied in *Wholesale Travel Group Inc. v. R.* (11 February 1991) where leave to intervene was granted to Ellis-Don Ltd. and Rocco Morra. There, the two interveners were separately seeking leave to appeal but had not yet been granted leave to appeal.

Terms Imposed. Occasionally an intervener is required to pay the added costs to the parties of its intervention. In *Matsqui Indian Band v. Canadian Pacific Ltd.* (17 February 1994), the intervener was required to deposit $1,000 as security for costs. In *Daigle v. Tremblay* (1 August 1989), a number of interveners were allowed in on condition they deposit $1000 with the Registrar "for additional disbursements" incurred by the appellant as a result of the intervention. This order was subsequently construed to cover solicitor and client fees as well as disbursements (11 October 1989). In *Reference Re Workers' Compensation Act (Nfld.)*, the interveners were required to pay the costs to the appellant of the preparation of supplementary factums and the cost of preparation for argument to address the additional issues (7, 21 September and 5 October 1988). Likewise, in *Federal Business Development Bank v. La Commission de la Santé et la Securité du Travail* (18 February 1988), the Alberta Workers' Compensation Board was granted leave but ordered to assume the costs for the preparation of the supplementary factums and preparation of argument to address the additional issues raised by the intervener.

As a rule, and except for disbursements covered by rule 18(6), costs generally are not awarded either for or against an intervener. In an unusual case, the Court ordered the unsuccessful appellant to pay the costs of several interveners: *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211.

In *Butler v. R.* (10 April 1991), two public interest advocacy organizations (Women's Legal Education and Action Fund, and Group Against Pornography) were granted leave to intervene, but each were also ordered to pay for additional disbursements and costs incurred by the accused in preparation of argument to address issues raised by the intervention. See rule 18(*b*).

New Evidence. The jurisprudence on the admission of fresh evidence by interveners on appeals continues to evolve. Generally speaking, interveners are expected to take the case as they find it and not to introduce new evidence. However, in public law cases where the evidence may be in the nature of "legislative facts" the Court is more generous.

In the important case of *R.J.R. MacDonald Inc. v. A.G. (Can.)* an intervener sought to file a "Brandeis brief" containing new scientific studies on the effects of smoking without obtaining the leave of the Court. In interlocutory motions it was ordered that the procedure was improper and leave to adduce the evidence was necessary (7 June 1994) and later that the new material should be rejected (4 August 1994).

In the aboriginal fishing cases from British Columbia which are now before the Court, interveners were permitted to file historical and other documents which, while not strictly speaking in the record, had been filed in the British Columbia Court of Appeal: *N.T.C. Smokehouse v. R.* (1 October 1994). See section 63 and Commentary on Fresh Evidence. The judges are reluctant to permit interveners to expand the case on appeal. However, a chambers judge granted leave to the Fisheries Council of British Columbia and British Columbia Wildlife to intervene with the right "to apply, if deemed necessary, to vary the case on appeal" in *Sparrow v. R.* (7 October 1987). And in *A.G. (Que.) v. Sioui* (11 October 1989) The Assembly of First Nations was allowed to file additional documents, subject to objection by the other parties before the hearing of the appeal. In *K.M. v. H.M.*, [1992] 3 S.C.R. 3, leave to intervene was granted to L.E.A.F. which stated that it wished to file studies and expert reports to support new *Charter* arguments. The intervener was ordered to submit such proposed new material to the opposing party and ruled that if it was objected to it could not be filed without leave of the Court on the hearing of the appeal. In a case involving the construction of an Indian treaty, the Ontario Federation of Anglers and Hunters was allowed to file historical and scientific evidence provided that any objections would be ruled upon — before the appeal — by the chambers judge: *Howard v. R.* (10 March 1993). Subsequently, the chambers judge excluded certain of the material which had been filed by the intervener (31 January 1994).

Unauthorized supplementary material filed by an intervener with its factum may be rejected: *Daigle v. Tremblay* (4 August 1989).

Timing and Other Matters of Procedure. Rule 18(2) requires that the motion for leave to intervene is to be made within 60 days of the serving and filing of the notice of appeal. Form B.2 is to be used, which indicates the return date will be fixed by the Registrar. The Court has directed that all applications made within this time are to be grouped and heard together — see *Notice to the Profession*, June, 1990. Motions for leave to intervene are not uncommonly made out of time. Provided they are not too late in the day, it seems that the failure to proceed within the 60-day period will be excused if adequately explained. The explanation should be included in the affidavit and the motion in that event should also seek the necessary extension.

An intervener files a factum two weeks after the factum of the respondent rule 38(3)(*c*). This is the same as the practice in constitutional cases where the

attorneys general file after the principal parties. However, the chambers judge may order the intervener's factum filed after the factum of the party supported: *Bear Island Foundation v. A.G. (Ont.)* (22 November 1990).

Procedurally, interveners, where permitted oral argument, address the Court after the party whose position they support, and the provincial attorneys general address the Court likewise, but in the order in which their province joined Confederation. Interveners have no right of reply unless the Court orders otherwise — see rule 46(4).

Affidavits

19. (1) An affidavit shall be filed to substantiate any fact that is not a matter of record in the Court.

(2) When the record of the court appealed from or of the trial court is deposited with the Registrar, such record is part of the record of the Court.

(3) An affidavit to be used in a proceeding shall be confined to the statement of facts within the knowledge of the deponent, but statements based on information or belief that state the source of the information or the grounds for the belief may be admitted by the Court, a Judge or the Registrar. SOR/88-247, s. 3.

Commentary

The Court accepts affidavits in the form generally used in the province or territory in which the affidavit is sworn.

Prior to 1983, the rules prohibited counsel from appearing on a motion supported by their own affidavit, but the restriction was repealed in the 1983 revisions. While counsel from Quebec may appear on motions supported by their own affidavits, in the common law provinces it is generally considered that counsel should not give evidence for a party: *Stanley v. Douglas*, [1952] 1 S.C.R. 260. See also the Canadian Bar Association's *Code of Professional Conduct*, chapter IX-5 of which states, in part, "the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings". It would seem appropriate, however, for the lawyer whose evidence below was purely formal and uncontroverted to appear on an appeal, provided counsel's original participation is entirely within this exception.

BETWEEN:

THE BRANT COUNTY BOARD OF EDUCATION and CAROL EATON AND CLAYTON EATON

Court File No. 24668

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)
Proceeding Commenced at TORONTO

BRIEF OF AUTHORITIES OF THE MOVING PARTY

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Solicitors for the Moving Party,
The Down Syndrome Association of Ontario

The Canadian Council of Churches *Appellant*

v.

Her Majesty The Queen and The Minister of Employment and Immigration *Respondents*

and

The Coalition of Provincial Organizations of the Handicapped, The Quebec Multi Ethnic Association for the Integration of Handicapped People, League for Human Rights of B'Nai Brith Canada, Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC) *Interveners*

INDEXED AS: CANADIAN COUNCIL OF CHURCHES v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

File No.: 21946.

1991: October 11; 1992: January 23.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Stevenson and Iacobucci JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Standing — Public interest group — Immigration Act amendments making provisions with respect to determination of refugee status more stringent — Public interest group active in work amongst refugees and immigrants — Action commenced to challenge constitutionality of Act under the Charter — Whether standing should be granted to challenge provisions — Immigration Act, 1976, S.C. 1976-77 — Canadian Charter of Rights and Freedoms, s. 7.

The Canadian Council of Churches is a federal corporation which represents the interests of a broad group of member churches including the protection and resettlement of refugees. The Council had expressed its concerns about the refugee determination process in the proposed amendments to the *Immigration Act, 1976*

Conseil canadien des Églises *Appelant*

c.

Sa Majesté la Reine et le ministre de l'Emploi et de l'Immigration *Intimés*

et

La Coalition des Organisations Provinciales Ombudsman des Handicapés, l'Association multi-ethnique pour l'intégration des personnes handicapées du Québec, la Ligue des droits de la personne de B'Nai Brith Canada, le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ) et le Conseil canadien des droits des personnes handicapées (CCDPH) *Intervenants*

RÉPERTORIÉ: CONSEIL CANADIEN DES ÉGLISES c. CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION)

N° du greffe: 21946.

1991: 11 octobre; 1992: 23 janvier.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Stevenson et Iacobucci.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Qualité pour agir — Groupe d'intérêt public — Modifications de la Loi sur l'immigration qui rendent plus stricte la détermination du statut de réfugié — Groupe d'intérêt public actif chez les réfugiés et les immigrants — Action intentée pour contester la constitutionnalité de la Loi en vertu de la Charte — Faut-il reconnaître au groupe qualité pour agir aux fins de la contestation des dispositions? — Loi sur l'immigration de 1976, S.C. 1976-77 — Charte canadienne des droits et libertés, art. 7.

Le Conseil canadien des Églises est une société à charte fédérale qui représente les intérêts d'un vaste groupe d'Églises membres, y compris la protection et le rétablissement des réfugiés. Le Conseil a fait connaître aux membres du gouvernement et aux comités parlementaires chargés de l'étude du projet de loi ses préoc-

(which later came into force on January 1, 1989) to members of the government and to the parliamentary committees considering the legislation. These amendments changed the procedures for determining whether applicants came within the definition of a Convention Refugee.

The Council sought a declaration that many, if not most, of the amended provisions violated the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to bring the action and had not demonstrated a cause of action. The application to strike out was dismissed at trial but to a large extent was granted on appeal. Appellant appealed and respondents cross-appealed. At issue here is whether the appellant should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended *Immigration Act, 1976*.

Held: The appeal should be dismissed; the cross-appeal should be allowed.

Recognition of the need to grant public interest standing, whether because of the importance of public rights or the need to conform with the *Constitution Act, 1982*, in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. A balance must be struck between ensuring access to the courts and preserving judicial resources. The courts must not be 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.

Status has been granted to prevent the immunization of legislation or public acts from any challenge. Public interest standing, however, is not required when it can be shown on a balance of probabilities that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court, while they should be given a liberal and generous interpretation, need not and should not be expanded.

cupations relativement au processus de détermination du statut de réfugié, prévu dans les modifications proposées à la *Loi sur l'immigration de 1976* (entrées en vigueur le 1er janvier 1989). Ces modifications portaient sur les dispositions visant à déterminer si un requérant est un réfugié au sens de la Convention.

Le Conseil a cherché à faire déclarer qu'un grand nombre sinon la plupart des dispositions modifiées contrevenaient à la *Charte canadienne des droits et libertés* et à la *Déclaration canadienne des droits*. Le procureur général du Canada a déposé une requête en radiation de la demande au motif que le Conseil n'avait pas qualité pour intenter l'action et qu'il n'avait pas démontré une cause d'action. Cette demande a été rejetée en première instance, mais a en grande partie été accueillie en appel. L'appelant se pourvoit devant notre Cour et les intimés ont présenté un pourvoi incident. Le présent pourvoi vise à déterminer si l'appelant a qualité pour agir dans une action portant, en grande partie, sur la validité des modifications apportées à la *Loi sur l'immigration de 1976*.

Arrêt: Le pourvoi est rejeté. Le pourvoi incident est accueilli.

La reconnaissance de la nécessité d'accorder qualité pour agir dans l'intérêt public dans certaines circonstances, que ce soit à cause de l'importance des droits publics ou de la nécessité de se conformer à la *Loi constitutionnelle de 1982*, ne signifie pas que l'on reconnaît pour autant qualité pour agir à toutes les personnes qui désirent intenter une poursuite sur une question donnée. Il est essentiel d'établir un équilibre entre l'accès aux tribunaux et la nécessité d'économiser les ressources judiciaires. Il ne faut pas que les tribunaux deviennent complètement submergés en raison d'une prolifération inutile de poursuites insignifiantes ou redondantes intentées par des organismes bien intentionnés dans le cadre de la réalisation de leurs objectifs.

La reconnaissance de la qualité pour agir a pour objet d'empêcher que la loi ou les actes publics soient à l'abri des contestations. Il n'est pas nécessaire toutefois de reconnaître qualité pour agir dans l'intérêt public lorsque, selon une prépondérance des probabilités, on peut établir qu'un particulier contestera la mesure. Il n'est pas nécessaire d'élargir les principes régissant la reconnaissance de la qualité pour agir dans l'intérêt public, mais il faut les interpréter d'une façon libérale et souple.

Three aspects of the claim must be considered when public interest standing is sought. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the Court?

Although the claim at issue made a sweeping attack on most of the many amendments to the Act, some serious issues as to the validity of the legislation were raised. Appellant had a genuine interest in this field. Each refugee claimant, however, has standing to initiate a constitutional challenge to secure his or her own rights under the *Charter* and the disadvantages faced by refugees as a group do not preclude their effective access to the court. Many refugee claimants can and have appealed administrative decisions under the statute and each case presented a clear concrete factual background upon which the decision of the court could be based. The possibility of the imposition of a 72-hour removal order against refugee claimants does not undermine their ability to challenge the legislative scheme. The Federal Court has jurisdiction to grant injunctive relief against a removal order. Given the average length of time required for an ordinary case to reach the initial "credible basis" hearing, there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim.

On doit tenir compte de trois aspects lorsqu'il s'agit de déterminer s'il y a lieu de reconnaître la qualité pour agir dans l'intérêt public. Premièrement, la question de l'invalidité de la loi en question se pose-t-elle sérieusement? Deuxièmement, a-t-on démontré que le demandeur est directement touché par la loi ou qu'il a un intérêt véritable quant à sa validité? Troisièmement, y a-t-il une autre manière raisonnable et efficace de soumettre la question à la cour?

Bien que la déclaration en l'espèce attaque la plupart des nombreuses modifications apportées à la Loi, elle soulève certaines questions sérieuses quant à la validité de la loi. L'appelant avait un intérêt véritable à cet égard. Cependant, tous les demandeurs du statut de réfugié au pays ont qualité pour contester la constitutionnalité de la loi afin de faire assurer le respect des droits que leur garantit la *Charte*, et les désavantages que subissent les réfugiés en tant que groupe ne les empêchent pas d'utiliser efficacement l'accès qu'ils ont aux tribunaux. De nombreux demandeurs du statut de réfugié peuvent interjeter appel contre les décisions administratives prises en vertu de la loi et ils l'ont fait; chaque dossier renfermait un contexte factuel concret sur lequel le tribunal pouvait fonder sa décision. Le fait qu'un demandeur de statut risque d'être renvoyé dans un délai de 72 heures ne restreint pas sa possibilité de contester la loi. La Cour fédérale a compétence pour accorder une injonction relativement à une mesure de renvoi. Compte tenu du temps qui s'écoule en moyenne avant la tenue du premier palier d'audience visant à déterminer si la revendication possède «un minimum de fondement», un demandeur a plus de temps que nécessaire pour préparer une poursuite relative à l'éventuel rejet de sa revendication.

Cases Cited

Considered: *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435; *Australian Conservation Foundation Incorporated v. Commonwealth of Australia* (1980), 28 A.L.R. 257; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; **referred to:** *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; *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

Jurisprudence

Arrêts examinés: *Gouriet c. Union of Post Office Workers*, [1978] A.C. 435; *Australian Conservation Foundation Incorporated c. Commonwealth of Australia* (1980), 28 A.L.R. 257; *Valley Forge Christian College c. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Finlay c. Canada (Ministre des Finances)*, [1986] 2 R.C.S. 607; **arrêts mentionnés:** *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265; *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575; *Toth c. Ministre de l'Emploi et de l'Immigration* (1988), 86 N.R. 302; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959.

(LEAF) and Canadian Disability Rights Council (CDRC).

The judgment of the Court was delivered by

CORY J.—At issue on this appeal is whether the Canadian Council of Churches should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended *Immigration Act, 1976* which came into effect January 1, 1989.

Factual Background

The Canadian Council of Churches (the Council), a federal corporation, represents the interests of a broad group of member churches. Through an Inter-Church Committee for Refugees it co-ordinates the work of the churches aimed at the protection and resettlement of refugees. The Council together with other interested organizations has created an organization known as the Concerned Delegation of Church, Legal, Medical and Humanitarian Organizations. Through this body the Council has commented on the development of refugee policy and procedures both in this country and in others.

In 1988 the Parliament of Canada passed amendments to the *Immigration Act, 1976*, S.C. 1976-77, c. 52, by S.C. 1988, c. 35 and c. 36. The amended act came into force on January 1, 1989. It completely changed the procedures for determining whether applicants come within the definition of a Convention Refugee. While the amendments were still under consideration the Council expressed its concerns about the proposed new refugee determination process to members of the government and to the parliamentary committees which considered the legislation. On the first business day after the amended act came into force, the Council commenced this action, seeking a declaration that many if not most of the amended provisions violated the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, R.S.C., 1985, App. III. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to

pour les femmes (FAEJ) et le Conseil canadien des droits des personnes handicapées (CCDPH).

Version française du jugement de la Cour rendu par

LE JUGE CORY—Le présent pourvoi vise à déterminer si le Conseil canadien des Églises a qualité pour agir dans une action portant, presque dans sa totalité, sur la validité des modifications apportées à la *Loi sur l'immigration de 1976*, entrées en vigueur le 1er janvier 1989.

Les faits

Le Conseil canadien des Églises (le Conseil), société à charte fédérale, représente les intérêts d'un vaste groupe d'Églises membres. Par l'intermédiaire du Comité inter-Églises pour les réfugiés, il coordonne le travail des Églises en ce qui a trait à la protection et au rétablissement des réfugiés. Le Conseil et d'autres organismes intéressés ont constitué une organisation appelée Concerned Delegation of Church, Legal, Medical and Humanitarian Organizations. Par l'intermédiaire de cet organisme, le Conseil a fait des commentaires sur l'élaboration des politiques et des procédures applicables aux réfugiés, tant au Canada qu'à l'étranger.

En 1988, le Parlement du Canada a adopté des modifications à la *Loi sur l'immigration de 1976*, S.C. 1976-77, ch. 52, par S.C. 1988, ch. 35 et 36. La loi modifiée est entrée en vigueur le 1er janvier 1989. Elle a modifié en profondeur les dispositions visant à déterminer si un requérant est un réfugié au sens de la Convention. Pendant que les modifications étaient encore à l'étude, le Conseil a fait connaître aux membres du gouvernement et aux comités parlementaires chargés de l'étude des modifications ses préoccupations relativement au nouveau processus de détermination du statut de réfugié. Le Conseil a intenté la présente action le premier jour ouvrable après l'entrée en vigueur de la loi modifiée et a cherché à faire déclarer qu'un grand nombre sinon la plupart des dispositions modifiées contrevenaient à la *Charte canadienne des droits et libertés* et à la *Déclaration canadienne des droits*, L.R.C. (1985), app. III. Le procureur général du Canada a déposé une requête en

bring the action and had not demonstrated a cause of action.

Proceedings in the Courts Below

Federal Court, Trial Division, Rouleau J., [1989] 3 F.C. 3

Rouleau J. dismissed the application. His judgment reflects his concern that there might be no other reasonable, effective or practical manner to bring the constitutional question before the Court. He was particularly disturbed that refugee claimants might be faced with a 72-hour removal order. In his view, such an order would not leave sufficient time for an applicant to attempt either to stay the proceedings or to obtain an injunction restraining the implementation removal order.

Federal Court of Appeal, [1990] 2 F.C. 534

MacGuigan J.A. speaking for a unanimous Court allowed the appeal and set aside all but four aspects of the statement of claim.

In his view the real issue was whether or not there was another reasonably effective or practical manner in which the issue could be brought before the Court. He thought there was. He observed that the statute was regulatory in nature and individuals subject to its scheme had, by means of judicial review, already challenged the same provisions impugned by the Council. Thus there was a reasonable and effective alternative manner in which the issue could properly be brought before the Court.

He went on to consider in detail the allegations contained in the statement of the claim. He concluded that some were purely hypothetical, had no merit and failed to disclose any reasonable cause of action. He rejected other claims on the grounds that they did not raise a constitutional challenge and others on the basis that they raised issues that had already been resolved by recent decisions of the Federal Court of Appeal.

radiation de la demande au motif que le Conseil n'avait pas qualité pour intenter l'action et qu'il n'avait pas démontré qu'il y avait une cause d'action.

Les décisions des tribunaux d'instance inférieure

Section de première instance de la Cour fédérale, le juge Rouleau, [1989] 3 C.F. 3

Le juge Rouleau a rejeté la requête. Sa décision indique qu'il s'est préoccupé du fait qu'il pourrait bien n'exister aucune autre manière raisonnable, efficace ou pratique de soumettre la question constitutionnelle à la cour. Il s'est dit particulièrement troublé par le fait que les demandeurs du statut de réfugié sont susceptibles d'être renvoyés dans les 72 heures. À son avis, un demandeur n'aurait pas suffisamment de temps pour tenter d'obtenir un arrêt des procédures ou une injonction qui empêcherait l'exécution de la mesure de renvoi.

La Cour d'appel fédérale, [1990] 2 C.F. 534

Le juge MacGuigan, s'exprimant au nom de la cour à l'unanimité, a fait droit à l'appel, excepté quant à quatre allégations contenues dans la déclaration.

À son avis, la véritable question est de savoir s'il existe une autre manière raisonnablement efficace ou pratique de soumettre la question à la cour. À son avis, la réponse est affirmative. Il fait remarquer qu'il s'agit d'une loi de nature réglementaire et que des personnes qu'elle vise ont déjà, au moyen de l'examen judiciaire, contesté les dispositions attaquées par le Conseil. Il existe donc à son avis une autre manière raisonnable et efficace de soumettre la question à la cour.

Il examine ensuite en détail les allégations contenues dans la déclaration. Il conclut que certaines d'entre elles sont purement hypothétiques, sont dénuées de fondement et ne soulèvent aucune cause raisonnable d'action. Il en rejette d'autres au motif qu'elles ne procèdent pas d'une atteinte à la Constitution et d'autres au motif qu'elles soulèvent des questions déjà tranchées par la Cour d'appel fédérale dans des décisions récentes.

The Approaches Taken in Other Common Law Jurisdictions to Granting Parties' Status to Bring Action

It may be illuminating to consider by way of comparison the position taken in other common law jurisdictions on this issue of standing. The highest Courts of the United Kingdom, Australia and the United States have struggled with the problem. They have all recognized the need to balance the access of public interest groups to the Courts against the need to conserve scarce judicial resources. It will be seen that each of these jurisdictions has taken a more restrictive approach to granting status to parties than have the courts in Canada.

The United Kingdom

Traditionally only the Attorney General of the United Kingdom had standing to litigate matters for the protection of public rights. The Attorney General was not a member of cabinet and as a result had a greater appearance of independence from the political branch of government than holders of the same office in other jurisdictions. As well, it must be remembered that in the United Kingdom, Parliament is supreme. Thus there is no prospect of the courts' finding that the government has acted unconstitutionally as there is in Canada and the United States.

The English courts have developed three exceptions to the rule that only the Attorney General can represent the interests of the public. First an individual may have standing to litigate a question of public right if the impugned activity simultaneously affects the individual's private rights. Second, an individual may bring an action claiming a violation of a public right if that individual suffered special damage as a result of the impugned activity. Thirdly, a local authority may bring an action where it considers it necessary to protect or promote the interests of the citizens within its borders.

These exceptions were affirmed in *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, at

Les méthodes adoptées dans les autres pays de common law relativement à la reconnaissance de l'intérêt requis pour intenter une action

Il peut être intéressant de comparer la position adoptée par d'autres pays de common law relativement à la question de la qualité pour agir. Les tribunaux de la plus haute instance au Royaume-Uni, en Australie et aux États-Unis se sont trouvés aux prises avec ce problème. Ils ont tous reconnu la nécessité de soupeser l'accès des groupes d'intérêt public aux tribunaux par rapport à la nécessité d'économiser les ressources judiciaires limitées. On se rendra compte que chacun de ces pays a adopté une attitude plus restrictive que les tribunaux canadiens relativement à la reconnaissance de l'intérêt pour agir.

Le Royaume-Uni

Traditionnellement, seul le procureur général du Royaume-Uni avait qualité pour agir dans les poursuites visant la protection des droits publics. Le procureur général ne faisait pas partie du Cabinet et avait donc une plus grande apparence d'indépendance du pouvoir politique que les titulaires de fonctions similaires dans d'autres pays. On doit aussi se rappeler que le Royaume-Uni reconnaît la suprématie du Parlement. En conséquence, les tribunaux ne peuvent statuer que le gouvernement a agi d'une façon inconstitutionnelle comme ce peut être le cas au Canada et aux États-Unis.

Les tribunaux anglais ont élaboré trois exceptions à la règle selon laquelle seul le procureur général peut représenter les intérêts du public. Premièrement, un particulier peut avoir qualité pour agir dans une poursuite concernant un droit public si l'activité attaquée lèse en même temps ses droits privés. Deuxièmement, un particulier peut intenter une action alléguant la violation d'un droit public s'il a subi un dommage spécial en raison de l'activité attaquée. Troisièmement, une autorité locale peut intenter une action dans les cas où elle l'estime nécessaire pour protéger ou favoriser les intérêts des citoyens à l'intérieur de ses limites.

Ces exceptions ont été confirmées dans l'arrêt *Gouriet c. Union of Post Office Workers*, [1978]

(1) Open Door Policy. This would allow any person to take any proceedings in the public law area and reliance would be placed on the discipline of costs to limit the number of these cases.

(2) United States Method. The so called United States method would enable the Courts to screen the proposed plaintiffs as a part of the determination of the particular case.

(3) Preliminary Screening. This method would institute a preliminary screening procedure which would be undertaken by the Court before the substantive issue was considered.

The Commission recommended the open-ended approach. The report did not discuss the relative merits of introducing reforms by means of legislation or through the evolution of the common law. Nor did it address concerns as to what should be the role of the courts, a matter which is crucial to the American approach to the question.

Subsequent to the publication of the Law Reform Report the High Court of Australia considered the problem in *Australian Conservation Foundation Incorporated v. Commonwealth of Australia* (1980), 28 A.L.R. 257 (H.C.). The Foundation was an environmental group very active in Australia. It challenged a decision made by the Government of Australia to establish a resort area. The challenge was based upon environmental legislation which, the majority of the High Court concluded, did not create any private rights. It determined the only duty the legislation imposed was a public one cast upon the Minister, which was not owed to any one individual. The application of the Conservation Foundation for status as a party was therefore rejected.

Gibbs J. put the position in this way at p. 270:

A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. If that were not

(1) La politique de la porte ouverte. Cette politique permettrait à qui que ce soit d'intenter une poursuite dans le domaine du droit public, mais c'est au moyen des coûts que l'on réussirait à restreindre le nombre de poursuites.

(2) La méthode américaine. La méthode dite américaine permettrait aux tribunaux de filtrer les demandeurs dans le cadre de la détermination d'une affaire particulière.

(3) L'examen préliminaire. Cette méthode établirait une procédure d'examen préliminaire par le tribunal qui aurait lieu avant celui de la question de fond.

La Commission a recommandé la politique de la porte ouverte. Elle n'a pas analysé le bien-fondé relatif de mesures de réforme introduites par voie législative ou suivant l'évolution de la common law. Elle n'a pas non plus examiné quel devrait être le rôle des tribunaux, question essentielle dans le cadre de la méthode américaine.

À la suite de la publication du rapport de la Commission de réforme du droit, la Haute Cour de l'Australie a analysé le problème dans l'arrêt *Australian Conservation Foundation Incorporated c. Commonwealth of Australia* (1980), 28 A.L.R. 257 (H.C.). La Foundation était un groupe environnemental fort actif en Australie. Elle contestait une décision prise par le gouvernement de l'Australie relativement à l'établissement d'une zone touristique. Cette contestation était fondée sur une loi environnementale qui, comme l'a conclu la Haute Cour à la majorité, ne créait aucun droit privé. La Haute Cour a statué que la seule obligation prescrite par la loi était une obligation publique imposée au ministre et dont il n'avait pas à s'acquitter envers les particuliers. La cour a donc rejeté la demande de la Conservation Foundation qui voulait qu'on lui reconnaisse qualité pour agir dans cette affaire.

Le juge Gibbs présente ainsi son point de vue, à la p. 270:

[TRADUCTION] La croyance, si forte soit-elle, que la loi en général, ou une loi particulière, doit être respectée, ou qu'il y a lieu d'empêcher une conduite particulière, ne suffit pas pour conférer à son auteur qualité pour agir. Si

so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

He specifically rejected the Foundation's claim that it had a special interest either as a result of its communication with the Government on the issue or because its membership had chosen to specify environmental protection as one of its objects.

In concurring reasons Mason J. observed that the Canadian approach as expressed in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, was directly contradicted in Australia by cases holding that the taxpayer has no standing to challenge the validity of a statute which authorizes the appropriation or expenditure of funds in a suit for declaratory relief.

Thus, despite the report and recommendation of the Australian Law Reform Commission, the position taken in that country on the issue of granting status is far more restrictive than it is in Canada.

The United States of America

Article III of the Constitution of the United States is the source of the authority of Federal Courts which extends to all "cases and controversies". This provision provides:

Section 2, Clause 1. Subjects of jurisdiction. 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

tel n'était pas le cas, la règle exigeant un intérêt spécial n'aurait aucune signification. Tout demandeur assez fermement convaincu pour intenter une action pourrait le faire.

Le juge Gibbs a spécifiquement refusé de reconnaître un intérêt spécial à la Foundation, que ce soit parce qu'elle aurait eu des communications avec le gouvernement sur la question ou parce que ses membres avaient choisi expressément la protection de l'environnement comme l'un de ses objets.

Dans des motifs concordants, le juge Mason a fait remarquer que la démarche canadienne exprimée dans l'arrêt *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, a été directement contredite par les tribunaux australiens qui ont statué que le contribuable n'avait pas qualité pour contester, dans le cadre d'une demande de jugement déclaratoire, la validité d'une loi autorisant l'affectation ou la dépense de fonds.

En conséquence, malgré le rapport et la recommandation de la Commission de réforme du droit de l'Australie, la position australienne a été beaucoup plus restrictive qu'au Canada pour ce qui est de la reconnaissance de la qualité pour agir.

Les États-Unis d'Amérique

L'article III de la Constitution des États-Unis est le fondement du pouvoir dévolu aux tribunaux fédéraux, lequel s'étend à l'ensemble des «causes et des différends». Il prévoit, entre autres:

[TRADUCTION*] SECTION 2.—(1) Le pouvoir judiciaire s'étendra à toutes les causes, en droit (*Law*) et en équité (*Equity*), survenues sous l'empire de la présente constitution, des lois des États-Unis, des traités conclus, ou qui seraient conclus, sous leur autorité; à toutes les causes concernant les ambassadeurs, les autres ministres et les consuls; à toutes les causes d'amirauté et de juridiction maritime; aux différends dans lesquels les États-Unis seront partie; aux différends entre deux ou plusieurs États; [*entre un État et les citoyens d'un autre État*]; entre citoyens de différents États; entre citoyens d'un même État réclamant des terres en vertu de conces-

* Traduit par S. Rials, *Textes constitutionnels étrangers* (1982), à la p. 33.

between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The United States Supreme Court has interpreted this provision as restricting access to the courts to litigants who have suffered a personal injury which they wish to redress. The leading decision on the question is *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In that case, a group of citizens challenged the Federal Government's decision to give property to a Christian educational institution without charge. It was the group's contention that the gift of state property violated the Constitution. It claimed standing on the basis that each of their members was an individual taxpayer and that the gift constituted an improper use of their taxes. Rehnquist J. gave the reasons for the majority denying standing to the group. He interpreted Article III as demanding the fulfilment of three conditions. In order to secure standing a plaintiff must show:

(1) "he has personally suffered some actual or threatened injury" as a result of the impugned act,

(2) that the injury "fairly can be traced to the challenged action" and

(3) that the injury is "likely to be redressed by a favorable decision".

To these constitutional requirements for standing, Rehnquist J. added "prudential principles". He determined that a court may exercise its discretion to deny standing even if all the above conditions were met if the plaintiff presents "abstract questions of wide public significance", rests its claim on the rights of third parties, or does not present a claim falling within the "zone of interests" protected by the law in question.

sions d'autres États; [*entre un État ou ses citoyens et des États, citoyens ou sujets étrangers*].

Selon l'interprétation donnée à cette disposition par la Cour suprême des États-Unis, l'accès aux tribunaux est restreint aux parties qui ont subi un préjudice personnel relativement auquel elles désirent obtenir réparation. L'arrêt de principe sur la question est *Valley Forge Christian College c. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Dans cette affaire, un groupe de citoyens contestaient la décision du gouvernement fédéral de donner une propriété, à titre gratuit, à un établissement d'enseignement chrétien. Le groupe soutenait qu'il était contraire à la Constitution de donner des biens de l'État. Il prétendait avoir qualité pour agir au motif que chacun de ses membres était un contribuable et que cette donation constituait un usage abusif de leurs impôts. Le juge Rehnquist, s'exprimant au nom de la majorité, a refusé de reconnaître au groupe qualité pour agir. Selon son interprétation, l'application de l'Article III doit respecter trois conditions. Pour se faire reconnaître qualité pour agir, le demandeur doit établir trois choses:

(1) [TRADUCTION] «il a personnellement subi ou risque de subir un préjudice» en raison de l'action contestée;

(2) le préjudice [TRADUCTION] «peut en toute équité être attribué à l'action contestée»;

(3) le préjudice [TRADUCTION] «sera vraisemblablement réparé par une décision favorable».

Outre ces exigences constitutionnelles relatives à la qualité pour agir, le juge Rehnquist a mentionné l'existence de «principes de prudence». Il a statué qu'un tribunal peut, dans l'exercice de son pouvoir discrétionnaire, refuser de reconnaître la qualité pour agir même si toutes les conditions qui précèdent sont respectées, lorsque le demandeur soulève [TRADUCTION] «des questions abstraites d'une grande importance pour le public», fait reposer sa demande sur les droits de tierces parties ou ne présente pas une demande qui entre dans le [TRADUCTION] «champ des intérêts» protégés par le texte législatif en question.

He observed that, "This Court repeatedly has rejected claims of standing predicated "'on the right, possessed by every citizen, to require that the Government be administered according to law' . . ." He expressed his concern that the Federal Court should not overstep its traditional role by entering into conflict with the legislative branch over claims asserted by individuals who have not suffered a "cognizable injury".

Tribe has referred to the position taken by the Supreme Court of the United States as "one of the most criticized aspects of constitutional law". (See *American Constitutional Law* (2nd ed. 1988), at p. 110.) However, he carefully noted that the court's position was a legitimate approach to standing based upon a coherent view of the role of the courts. He observed that a narrow rule of standing enhanced the view that the Federal Court should determine issues between private parties and not take on a role "as the branch of government best able to develop a coherent interpretation of the Constitution . . . ." He noted that the courts' resistance to hearing cases brought by those without a personal interest in the impugned activity of the state is founded on a policy of deference to the legislature. He observed that the Congress may, if it wishes, pass legislation which allows for more generous standing than that which the court has discretion to award since Article III limits the court's discretion on standing but not that of the legislature.

Once again it will be seen that the principles enunciated by the United States Supreme Court on standing are more restrictive than those that are applicable in Canada.

The Question of Standing in Canada

Courts in Canada like those in other common law jurisdictions traditionally dealt with individu-

Il a fait remarquer que [TRADUCTION] «la Cour a maintes fois refusé de reconnaître la qualité pour agir «à une personne dont la demande reposait sur le droit de tout citoyen d'exiger que le gouvernement soit administré conformément à la loi» . . .» Il a ensuite indiqué que la Cour fédérale ne devrait pas outrepasser son rôle traditionnel en entrant en conflit avec le pouvoir législatif relativement à des demandes émanant de particuliers qui n'ont pas subi un [TRADUCTION] «préjudice réglable par les voies de justice».

Tribe a dit que la position adoptée par la Cour suprême des États-Unis constitue [TRADUCTION] «l'un des aspects les plus critiqués du droit constitutionnel». (Voir *American Constitutional Law* (2e éd. 1988), à la p. 110.) Toutefois, il a pris soin de noter que la position adoptée par la cour constituait une méthode légitime d'aborder la question de la qualité pour agir, qui se fondait sur une analyse cohérente du rôle des tribunaux. Il a fait remarquer qu'une interprétation restrictive de la qualité pour agir renforçait la position que la Federal Court devrait trancher des litiges opposant des particuliers et ne pas assumer un rôle [TRADUCTION] «à titre de branche gouvernementale la mieux en mesure de formuler une interprétation cohérente de la Constitution . . .» Selon M. Tribe, c'est par respect pour la législature que les tribunaux s'opposent à instruire des actions intentées par des personnes n'ayant pas un intérêt personnel dans l'activité contestée de l'État. Il a ajouté que le Congrès peut, s'il le désire, adopter un texte législatif qui permettra d'interpréter la question de la qualité pour agir d'une façon plus libérale que ne le peut un tribunal dans l'exercice de son pouvoir discrétionnaire, puisque l'Article III restreint le pouvoir discrétionnaire du tribunal quant à la qualité pour agir, mais pas celui de la législature.

On constate encore une fois que les principes formulés par la Cour suprême des États-Unis relativement à la qualité pour agir sont plus limitatifs que ceux qui sont applicables au Canada.

La question de la qualité pour agir au Canada

À l'instar des autres ressorts de common law, les tribunaux canadiens ont traditionnellement

als. For example, courts determine whether an individual is guilty of a crime; they determine rights as between individuals; they determine the rights of individuals in their relationships with the state in all its various manifestations. One great advantage of operating in the traditional mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not overextended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing.

tranché des litiges touchant des particuliers. Par exemple, les tribunaux déterminent si une personne est coupable d'un acte criminel, ils tranchent les droits entre les particuliers et ils déterminent les droits des particuliers dans tous leurs rapports avec l'État. Un grand avantage de cette conception traditionnelle est que les tribunaux peuvent prendre leurs décisions en fonction de faits clairement établis. C'est ainsi que les tribunaux ont établi la primauté du droit et constitué un mode pacifique de règlement des différends. Oeuvrant principalement, sinon presque exclusivement de la façon traditionnelle, les tribunaux de la plupart des régions fonctionnent à pleine capacité. Les tribunaux jouent un rôle important dans notre société. Si l'on veut qu'ils continuent d'assumer ce rôle, on doit s'assurer qu'il n'y a pas surutilisation des ressources judiciaires. C'est là un facteur dont on doit toujours tenir compte quand on envisage d'étendre la qualité pour agir.

On the other hand there can be no doubt that the complexity of society has spawned ever more complex issues for resolution by the courts. Modern society requires regulation to survive. Transportation by motor vehicle and aircraft requires greater regulation for public safety than did travel by covered wagon. Light and power provided by nuclear energy requires greater control than did the kerosene lamp.

Par contre, on ne peut mettre en doute que la complexité de la société ait donné naissance à des questions encore plus complexes qui doivent être tranchées par les tribunaux. La société moderne a besoin de réglementation pour survivre. Le transport routier et aérien exige une plus grande réglementation pour la sécurité du public que ne le demandait le transport par chariot couvert. La production de lumière et d'électricité par énergie nucléaire nécessite une plus grande réglementation que l'éclairage à la lampe à pétrole.

The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the *Charter* this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; *Thorson v. Attorney General of Canada*, *supra*, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575. Writing for the majority in *Borowski*, *supra*, Martland J. set forth the condi-

L'État a dû intervenir d'une façon encore plus étendue dans la vie de ses citoyens. L'activisme accru de l'État a donné lieu à un élargissement du concept des droits publics. La validité de l'intervention gouvernementale doit être examinée par les tribunaux. Même avant l'adoption de la *Charte*, notre Cour avait soupesé le bien-fondé d'accroître l'accès aux tribunaux par rapport à la nécessité d'économiser les ressources judiciaires limitées. La Cour a élargi les règles de la qualité pour agir dans une trilogie d'arrêts: *Thorson c. Procureur général du Canada*, précité, *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265, et *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575. S'exprimant au nom de la majorité

tions which a plaintiff must satisfy in order to be granted standing, at p. 598:

> . . . 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.

Those then were the conditions which had to be met in 1981.

In 1982 with the passage of the *Charter* there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. The *Charter* enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those *Charter* rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the *Charter*. By its terms the *Charter* indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, *Charter* rights might be unenforced and *Charter* freedoms shackled. The *Constitution Act, 1982* does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with the law.

The rule of law is recognized in the preamble of the *Charter* which reads:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

The rule of law is thus recognized as a corner stone of our democratic form of government. It is the rule of law which guarantees the rights of citizens to protection against arbitrary and unconstitutional government action. This same right is affirmed in s. 52(1) which states:

dans *Borowski*, précité, le juge Martland a énoncé les conditions auxquelles un demandeur doit satisfaire pour se voir reconnaître qualité pour agir, à la p. 598:

> . . . pour établir l'intérêt pour agir à titre de demandeur dans une poursuite visant à déclarer qu'une loi est invalide, si cette question se pose sérieusement, il suffit qu'une personne démontre qu'elle est directement touchée ou qu'elle a, à titre de citoyen, un intérêt véritable quant à la validité de la loi, et qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour.

C'étaient là les conditions auxquelles on devait satisfaire en 1981.

L'adoption de la *Charte* en 1982 a restreint pour la première fois la souveraineté du Parlement d'adopter des lois relevant de sa compétence. La *Charte* constitutionnalise les droits et libertés des Canadiens. Il appartient aux tribunaux de préserver et de faire respecter les droits garantis par la *Charte*. À cette fin, ils doivent notamment veiller à ce que les lois ne contreviennent pas aux dispositions de la *Charte*. Le texte même de la *Charte* indique qu'il faut interpréter d'une façon souple et libérale la question de la qualité pour agir. Sinon, on ne pourrait assurer le respect des droits garantis par la *Charte* et on entraverait l'exercice des libertés prévues par la *Charte*. Il va sans dire que la *Loi constitutionnelle de 1982* ne modifie pas le pouvoir discrétionnaire que les tribunaux ont de reconnaître qualité pour agir à des parties d'intérêt public. Elle constitutionnalise le droit fondamental du public d'être gouverné conformément aux règles de droit.

La primauté du droit est d'ailleurs reconnue dans le préambule de la *Charte*:

> Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit:

La primauté du droit est donc reconnue comme la pierre angulaire de notre système démocratique. C'est la primauté du droit qui garantit au citoyen le droit d'être protégé contre toute mesure gouvernementale arbitraire et inconstitutionnelle. Ce même droit est confirmé au par. 52(1):

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.

Parliament and the legislatures are thus required to act within the bounds of the constitution and in accordance with the *Charter*. Courts are the final arbitors as to when that duty has been breached. As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the *Charter*.

The question of standing was first reviewed in the post-*Charter* era in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. In that case Le Dain J. speaking for the Court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for "the limits of statutory authority".

The standard set by this Court for public interest plaintiffs to receive standing also addresses the concern for the proper allocation of judicial resources. This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation. In *Finlay*, *supra*, it was specifically recognized that the traditional concerns about widening access to the courts are addressed by the conditions imposed for the exercise of judicial discretion to grant public interest standing set out in the trilogy. Le Dain J. put it in this way, at p. 631:

> ... the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody;

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Le Parlement et les législatures sont donc tenus d'agir à l'intérieur des limites de la Constitution et en conformité avec la *Charte*. C'est aux tribunaux qu'il incombe en dernier ressort de déterminer s'il y a eu violation de cette obligation. En conséquence, ils veilleront indubitablement à exercer leur pouvoir discrétionnaire de façon à reconnaître qualité pour agir dans les cas où ils doivent le faire pour s'assurer que la loi en question est compatible avec la Constitution et la *Charte*.

Après l'adoption de la *Charte*, c'est dans l'arrêt *Finlay c. Canada (Ministre des Finances)*, [1986] 2 R.C.S. 607, que la question de la qualité pour agir a été examinée pour la première fois. Dans cet arrêt, le juge Le Dain, au nom de la Cour, a élargi la portée de la trilogie et statué que les tribunaux peuvent, dans l'exercice de leur pouvoir discrétionnaire, reconnaître la qualité pour agir dans l'intérêt public pour contester un exercice de l'autorité administrative aussi bien qu'un texte de loi. Il a fondé cette conclusion sur le principe sous-jacent à l'exercice du pouvoir discrétionnaire à l'égard de la qualité pour agir, qu'il définit comme une reconnaissance de l'intérêt public dans le maintien et le respect des «limites de l'autorité législative».

Le critère énoncé par notre Cour quant à la reconnaissance de la qualité pour agir à des parties d'intérêt public tient également compte de la question de l'affectation judicieuse des ressources judiciaires. À cette fin, le tribunal limite la reconnaissance de la qualité pour agir aux cas où il s'attend qu'aucune personne directement lésée n'intentera de poursuite. Dans l'arrêt *Finlay*, précité, on a spécifiquement reconnu que les préoccupations traditionnelles concernant l'élargissement de l'accès aux tribunaux trouvent leur réponse dans les critères d'exercice du pouvoir discrétionnaire des juges de reconnaître qualité pour agir dans l'intérêt public, exposés dans la trilogie. Le juge Le Dain s'exprime ainsi, à la p. 631:

> ... la crainte d'une dissipation de ressources judiciaires limitées et la nécessité d'écarter les trouble-fête; la pré-

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. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson, McNeil* and *Borowski*.

occupation des tribunaux, quand ils statuent sur des points litigieux, d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vues et la préoccupation relative au rôle propre des tribunaux et à leur relation constitutionnelle avec les autres branches du gouvernement. Ces préoccupations trouvent leur réponse dans les critères d'exercice du pouvoir discrétionnaire des juges de reconnaître qualité pour demander dans l'intérêt public un jugement déclaratoire, que les arrêts *Thorson, McNeil* et *Borowski* exposent.

Should the Current Test for Public Interest Standing be Extended

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 a 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.

Devrait-on élargir le critère actuel de la reconnaissance de la qualité pour agir dans l'intérêt public?

La reconnaissance grandissante de l'importance des droits publics dans notre société vient confirmer la nécessité d'élargir la reconnaissance du droit à la qualité pour agir par rapport à la tradition de droit privé qui reconnaissait qualité pour agir aux personnes possédant un intérêt privé. En outre, un élargissement de la qualité pour agir au delà des parties traditionnelles est compatible avec les dispositions de la *Loi constitutionnelle de 1982*. Toutefois, je tiens à souligner que la reconnaissance de la nécessité d'accorder qualité pour agir dans l'intérêt public dans certaines circonstances ne signifie pas que l'on reconnaîtra pour autant qualité pour agir à toutes les personnes qui désirent intenter une poursuite sur une question donnée. Il est essentiel d'établir un équilibre entre l'accès aux tribunaux et la nécessité d'économiser les ressources judiciaires. Ce serait désastreux si les tribunaux devenaient complètement submergés en raison d'une prolifération inutile de poursuites insignifiantes ou redondantes intentées par des organismes bien intentionnés dans le cadre de la réalisation de leurs objectifs, convaincus que leur cause est fort importante. Cela serait préjudiciable, voire accablant, pour notre système de justice et injuste pour les particuliers.

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

La reconnaissance de la qualité pour agir a pour objet d'empêcher que la loi ou les actes publics soient à l'abri des contestations. Il n'est pas nécessaire de reconnaître qualité pour agir dans l'intérêt public lorsque, selon une prépondérance des probabilités, on peut établir qu'un particulier contestera la mesure. Il n'est pas nécessaire d'élargir les principes régissant la reconnaissance de la qualité

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.

The Application of the Principles for Public Interest Standing to this Case

It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

(1) *Serious Issue of Invalidity*

It was noted in *Finlay*, *supra*, that the issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge. In the case at bar the Federal Court of Appeal in its careful reasons turned its attention to the question of whether the amended statement of claim raised a reasonable cause of action. The claim makes a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the *Immigration Act, 1976*. Some of the allegations are so hypothetical in nature that it would be impossible for any court to make a determination with regard to them. In many ways the statement of claim more closely resembles submissions that might be made to a parliamentary committee considering the legislation than it does an attack on the validity of the provisions of the legislation. No doubt the similarity can be explained by the fact that the action was brought on the first working day following the passage of the legislation. It is perhaps unfortunate that this court is asked to fulfil the function of a motion's

pour agir dans l'intérêt public établis par notre Cour. La décision d'accorder la qualité pour agir relève d'un pouvoir discrétionnaire avec tout ce que cette désignation implique. Les demandes sans mérite peuvent donc être rejetées. Néanmoins, dans l'exercice du pouvoir discrétionnaire, il faut interpréter les principes applicables d'une façon libérale et souple.

L'application à l'espèce des principes de la reconnaissance de la qualité pour agir dans l'intérêt public

On a vu qu'il faut tenir compte de trois aspects lorsqu'il s'agit de déterminer s'il y a lieu de reconnaître la qualité pour agir dans l'intérêt public. Premièrement, la question de l'invalidité de la loi en question se pose-t-elle sérieusement? Deuxièmement, a-t-on démontré que le demandeur est directement touché par la loi ou qu'il a un intérêt véritable quant à sa validité? Troisièmement, y a-t-il une autre manière raisonnable et efficace de soumettre la question à la cour?

(1) *Question sérieuse quant à l'invalidité de la loi*

Dans l'arrêt *Finlay*, précité, on a fait remarquer que les questions de la qualité pour agir et de la cause d'action raisonnable sont étroitement liées et ont tendance à se chevaucher. En l'espèce, la Cour d'appel fédérale, dans des motifs soigneusement rédigés, a analysé la question de savoir si la déclaration modifiée soulevait une cause d'action raisonnable. La déclaration attaque globalement et d'une façon quelque peu décousue la plupart des nombreuses modifications apportées à la *Loi sur l'immigration de 1976*. Certaines des allégations sont tellement hypothétiques qu'aucun tribunal ne pourrait se prononcer à leur sujet. À de nombreux égards, la déclaration ressemble davantage à des propos qui pourraient être présentés devant un comité parlementaire chargé de l'examen d'une loi qu'à une attaque contre la validité de la loi. La similitude peut sans doute s'expliquer par le fait que l'action a été intentée le premier jour ouvrable suivant l'adoption de la loi. Il est peut-être regrettable que l'on demande à notre Cour d'exercer les fonctions d'un juge des requêtes qui doit se pro-

court judge reviewing the provisions of a statement of claim. However, I am prepared to accept that some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation.

(2) *Has the Plaintiff Demonstrated a Genuine Interest?*

There can be no doubt that the applicant has satisfied this part of the test. The Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

(3) *Whether there is Another Reasonable and Effective Way to Bring the Issue Before the Court*

It is this third issue that gives rise to the real difficulty in this case. The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the *Charter*. The applicant Council recognizes the possibility that such actions could be brought but argues that the disadvantages which refugees face as a group preclude their effective use of access to the court. I cannot accept that submission. Since the institution of this action by the Council, a great many refugee claimants have, pursuant to the provisions of the statute, appealed administrative decisions which affected them. The respondents have advised that nearly 33,000 claims for refugee status were submitted in the first 15 months following the enactment of the legislation. In 1990, some 3,000 individuals initiated claims every month. The Federal Court of Appeal has a wide experience in this field. MacGuigan J.A., writing for the court, took judicial notice of the fact that refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis. I accept without hesitation this observation. It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear concrete

noncer sur les énoncés d'une déclaration. Toutefois, je suis disposé à accepter que certains aspects de la déclaration soulèvent une question sérieuse quant à la validité de la loi.

(2) *Le demandeur a-t-il démontré un intérêt véritable?*

Il n'y a pas de doute que le requérant a satisfait à cette partie du critère. Le Conseil jouit de la meilleure réputation possible et il a démontré un intérêt réel et constant dans les problèmes des réfugiés et des immigrants.

(3) *Y a-t-il une autre manière raisonnable et efficace de soumettre la question à la cour?*

C'est cette troisième question qui soulève la véritable difficulté en l'espèce. La loi contestée est de nature réglementaire et elle touche directement tous les demandeurs du statut de réfugié au pays. Chacun d'entre eux a qualité pour contester la constitutionnalité de la loi afin de faire assurer le respect des droits que lui garantit la *Charte*. Le Conseil requérant reconnaît que ces actions pourraient être intentées, mais soutient que les désavantages que subissent les réfugiés en tant que groupe les empêchent d'utiliser efficacement l'accès qu'ils ont aux tribunaux. Je ne peux accepter cette prétention. Depuis que le Conseil a intenté la présente action, un grand nombre de demandeurs du statut de réfugié ont, conformément aux dispositions de la loi, interjeté appel de décisions administratives les concernant. Selon les intimés, presque 33 000 demandes de statut de réfugié ont été présentées au cours des 15 premiers mois suivant l'adoption de la loi. En 1990, quelque 3 000 demandes ont été présentées chaque mois. La Cour d'appel fédérale a une vaste expérience dans ce domaine. Le juge MacGuigan, s'exprimant au nom de la cour, a admis d'office que des demandeurs de statut intentaient déjà couramment des actions semblables à celles intentées par le Conseil. J'accepte cette observation sans hésitation. Il est donc évident que de nombreux demandeurs de statut peuvent interjeter appel contre les décisions administratives prises en vertu de la loi et qu'ils l'ont fait. Les tribunaux ont fréquemment été saisis de ces demandes.

factual background upon which the decision of the court could be based.

The appellant also argued that the possibility of the imposition of a 72-hour removal order against refugee claimants undermines their ability to challenge the legislative scheme. I cannot accept that contention. It is clear that the Federal Court has jurisdiction to grant injunctive relief against a removal order: see *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302 (F.C.A.). Further, from the information submitted by the respondents it is evident that persons submitting claims to refugee status in Canada are in no danger of early or speedy removal. As of March 31, 1990 it required an average of five months for a claim to be considered at the initial "credible basis" hearing. It is therefore clear that in the ordinary case there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim. However, even where the claims have not been accepted "the majority of removal orders affecting refugee claimants have not been carried out". (See *Report of the Auditor General of Canada to the House of Commons, Fiscal Year Ended 31 March 1990*, at pp. 352-53, paragraph 14.43.) Even though the Federal Court has been prepared in appropriate cases to exercise its jurisdiction to prevent removal of refugee claimants there is apparently very little need for it to do so. The means exist to ensure that the issues which are sought to be litigated on behalf of individual applicants may readily be brought before the court without any fear that a 72-hour removal order will deprive them of their rights.

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 inter-

Chaque dossier renfermait un contexte factuel concret sur lequel le tribunal pouvait fondée sa décision.

L'appelant soutient aussi que le fait qu'un demandeur de statut risque d'être renvoyé dans un délai de 72 heures restreint sa possibilité de contester la loi. Je ne puis accepter cette prétention. Il est évident que la Cour fédérale a compétence pour accorder une injonction relativement à une mesure de renvoi, voir *Toth c. Ministre de l'Emploi et de l'Immigration* (1988), 86 N.R. 302 (C.A.F.). Par ailleurs, d'après les renseignements fournis par les intimés, il est évident que les demandeurs du statut de réfugié au Canada ne risquent pas de faire l'objet d'une mesure de renvoi hâtive ou accélérée. Selon les données existantes au 31 mars 1990, il fallait en moyenne cinq mois avant la tenue du premier palier d'audience visant à déterminer si la revendication possède «un minimum de fondement». Il est donc évident qu'en temps normal un demandeur a plus de temps que nécessaire pour préparer une poursuite relative à l'éventuel rejet de sa revendication. Toutefois, même dans les cas où les revendications ne sont pas acceptées, «la majorité des ordonnances de renvoi touchant des demandeurs du statut de réfugié n'ont pas été exécutées». (Voir *Rapport du vérificateur général du Canada à la Chambre des communes, pour l'exercice financier clos le 31 mars 1990*, à la p. 390, par. 14.43.) Bien que la Cour fédérale ait été disposée dans les cas appropriés à exercer sa compétence afin d'empêcher le renvoi de demandeurs de statut, elle n'aurait apparemment guère besoin de le faire. Il existe des moyens d'assurer que la cour puisse rapidement être saisie des questions que l'on cherche à faire trancher pour le compte d'un requérant particulier, sans crainte qu'une mesure de renvoi dans un délai de 72 heures puisse le priver de ses droits.

Il ressort des documents présentés que des demandeurs individuels du statut de réfugié, qui ont le droit de contester la loi, s'en sont prévalu. Il existe donc d'autres méthodes raisonnables de saisir la cour de la question. Pour ce motif, le Conseil requérant ne peut avoir gain de cause. Je m'empresserais d'ajouter que cette décision ne devrait

preted 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. The Council must, therefore, be denied standing on each of the counts of the statement of claims. This is sufficient to dispose of the appeal. The respondents must also succeed on their cross-appeal to strike out what remained of the claim as the plaintiff council does not satisfy the test for standing on any part of the statement of claim. I would simply mention two other matters.

pas être interprétée comme le résultat d'une application mécaniste d'une exigence technique. On doit plutôt se rappeler que l'objet fondamental de la reconnaissance de la qualité pour agir dans l'intérêt public est de garantir qu'une loi n'est pas à l'abri de la contestation. En l'espèce, la loi ne l'est pas puisque des demandeurs du statut de réfugié la conteste. En conséquence, le motif à la base même de la reconnaissance à une partie de la qualité pour agir dans l'intérêt public disparaît. Le Conseil n'a donc pas qualité pour agir relativement à chacun des énoncés de la déclaration. Cela suffit pour trancher le présent pourvoi. En outre, les intimés doivent avoir gain de cause dans leur pourvoi incident visant à faire annuler les dispositions restantes de la demande puisque le Conseil demandeur ne répond au critère de la qualité pour agir pour aucune partie de la déclaration. Je ne mentionnerais que deux autres questions.

Intervener Status

It has been seen that a public interest litigant is more likely to be granted standing in Canada than in other common law jurisdictions. Indeed if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. Yet the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained.

L'intérêt pour agir de l'intervenant

On a soutenu qu'une partie d'intérêt public a plus de chances de se voir reconnaître qualité pour agir au Canada que dans les autres pays de common law. En effet, si l'on élargissait sensiblement la qualité pour agir, ces parties d'intérêt public supplanteraient les particuliers. Toutefois, le point de vue de ces parties qui ne peuvent se faire reconnaître qualité pour agir ne doit pas nécessairement passer inaperçu. Des organismes de défense de l'intérêt public se voient souvent accorder, à bon droit, le statut d'intervenant. Les opinions et les arguments des intervenants sur des questions d'importance publique sont souvent d'une aide considérable pour les tribunaux. Cette aide est apportée en fonction de faits établis et dans des délais et suivant le contexte que déterminent les tribunaux. On maintient alors un juste équilibre entre la possibilité pour les groupes d'intérêt public de présenter leurs arguments et la nécessité d'économiser les ressources judiciaires.

Review of the Statement of Claim to Determine if it Discloses a Cause of Action

In light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail. Had it

Examen de la déclaration pour déterminer s'il existe une cause d'action

Étant donné la conclusion que l'appelant n'a pas d'intérêt pour intenter la présente action, il n'est pas nécessaire d'examiner la déclaration en détail.

been necessary to do so I would have had some difficulty agreeing with all of the conclusions of the Federal Court of Appeal on this issue. Perhaps it is sufficient to set out once again the principles which should guide a court in considering whether a reasonable cause of action has been disclosed by a statement of claim. It was put in this way by Wilson J. giving the reasons of this Court in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:

> ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

If these guidelines had been followed a different result would have been reached with regard to some aspects of this statement of claim. A party who did have standing might well find in this vast broadside of grievances some telling shots that would form the basis for a cause of action somewhat wider than that permitted by the Federal Court of Appeal.

Disposition of the Result

In the result I would dismiss the appeal and allow the cross-appeal on the basis that the plaintiff does not satisfy the test for public interest standing. Both the dismissal of the appeal and the allowance of the cross-appeal are to be without costs.

Appeal dismissed and cross-appeal allowed.

Solicitors for the appellant: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondents: John C. Tait, Ottawa.

Solicitors for the interveners The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Inte-

S'il s'était révélé nécessaire de le faire, j'aurais eu certaines difficultés à souscrire à toutes les conclusions de la Cour d'appel fédérale. Peut-être suffit-il d'énoncer encore une fois les principes qui devraient guider le tribunal lorsqu'il doit déterminer si une déclaration révèle une cause raisonnable d'action. Pour reprendre les propos du juge Wilson, s'exprimant au nom de la Cour, dans l'arrêt *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, à la p. 980:

> ... dans l'hypothèse où les faits mentionnés dans la déclaration peuvent être prouvés, est-il «évident et manifeste» que la déclaration du demandeur ne révèle aucune cause d'action raisonnable? Comme en Angleterre, s'il y a une chance que le demandeur ait gain de cause, alors il ne devrait pas être «privé d'un jugement». La longueur et la complexité des questions, la nouveauté de la cause d'action ou la possibilité que les défendeurs présentent une défense solide ne devraient pas empêcher le demandeur d'intenter son action.

Si elle avait suivi ces directives, la Cour d'appel fédérale serait arrivée à une conclusion différente relativement à certains aspects de la déclaration. Une partie qui avait qualité pour agir pouvait bien trouver dans cette avalanche de revendications des éléments qui serviraient de base à une cause d'action plus large que celle qu'a accordée la Cour d'appel fédérale.

Dispositif

En définitive, je suis d'avis de rejeter le pourvoi et d'accueillir le pourvoi incident au motif que le demandeur ne répond pas au critère de la qualité pour agir dans l'intérêt public, le tout sans dépens tant pour le pourvoi que pour le pourvoi incident.

Pourvoi rejeté; pourvoi incident accueilli.

Procureurs de l'appelant: Sack Goldblatt Mitchell, Toronto.

Procureur des intimés: John C. Tait, Ottawa.

Procureurs des intervenants la Coalition des Organisations Provinciales Ombudsman des Handicapés et l'Association multi-ethnique pour l'inté-

gration of Handicapped People: Advocacy Resource Centre for the Handicapped, Toronto.

Solicitors for the intervener League for Human Rights of B'Nai Brith Canada: David Matas, Winnipeg, and Dale Streiman and Kurz, Brampton.

Solicitors for the interveners Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC): Tory, Tory, DesLauriers & Binnington, Toronto and Dulcie McCallum, Victoria.

gration des personnes handicapées du Québec: Advocacy Resource Centre for the Handicapped, Toronto.

Procureurs de l'intervenant la Ligue des droits de la personne de B'Nai Brith Canada: David Matas, Winnipeg, et Dale Streiman and Kurz, Brampton.

Procureurs des intervenants le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ) et le Conseil canadien des droits des personnes handicapées (CCDPH): Tory, Tory, DesLauriers & Binnington, Toronto et Dulcie McCallum, Victoria.