Court File No.: T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA and THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

RESPONDENTS' MOTION RECORD
[June 22, 2016 hearing re: Mootness - Authorities]
Volume II of II

Aniz Alani, on his own behalf
[redacted]
Telephone: 604-600-1156
Email: senate.vacancies@anizalani.com

Applicant

William F. Pentney, Q.C.
Deputy Attorney General of Canada
Per: Jan Brongers/Oliver Pulleyblank
Department of Justice
BC Regional Office
900 - 840 Howe Street
Vancouver, BC V6Z 2S9

Telephone: (604) 666-0110
Facsimile: (604) 666-1585
Email: jan.brongers@justice.gc.ca

Solicitor for the Respondents

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Federal Court  Cour fédérale

Date: 20150521

Docket: T-2506-14

Citation: 2015 FC 649

2015 FC 649 (CanLII)

Ottawa, Ontario, May 21, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA AND THE GOVERNOR GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] Last December, Prime Minister Harper is said to have publicly communicated his decision not to advise the Governor General to fill existing vacancies in the Senate. Mr. Alani, a Vancouver lawyer, considers this "decision" illegal. He has applied for judicial review thereof. He seeks various declarations, the main one being that the Prime Minister must call upon the Governor General to appoint his nominees to the Senate within a reasonable time after a vacancy occurs. He does not ask that the Prime Minister be so ordered.

[2] The Deputy Attorney General, on behalf of the Prime Minister and the Governor General, has moved this Court for an order that the application for judicial review be struck at the outset, before it is heard on the merits. He submits it is plain and obvious that the application is bereft of any chance of success.

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[3] For the reasons that follow, I am not persuaded, on the record presently before me, that it is plain and obvious that Mr. Alani has no chance of success. No matter the generality of the language which follows, it is always cushioned by this "plain and obvious" concept.

[4] The respondents' motion references s. 221(1)(*a*) of the *Federal Courts Rules* which provides:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;

[5] No evidence is to be heard on such a motion. The facts pleaded are taken to be true. The burden falls upon the respondents to persuade me that even if the facts are true, no cause of action is made out.

[6] The leading case on point is the decision in *Hunt v Carey Canada Inc,* [1990] 2 SCR 959. The Supreme Court held that the test to be applied was whether it was "plain and obvious" that

the pleadings disclosed no reasonable claim. "[I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat"." It is certainly not for the Court, at this stage, to weigh the applicant's chances of success. See also *Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735 and *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

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[7] Also relevant is *Dyson v Attorney-General*, [1911] 1 KB 410 at 419, in which Fletcher Moulton LJ said:

> Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers.

I. Issues

[8] The following issues arise:

a. Should the motion to strike be heard now, or at the same time as the application is heard on the merits?

b. Does Mr. Alani have standing?

c. Was there a decision to be judicially reviewed?

d. Is there a constitutional convention by which the timing of Senate appointments is left to the Prime Minister's discretion?

e. If there is such a convention, is it valid if contrary to an imperative requirement of the constitution?

f. Is this a question of statutory interpretation, no more, no less?

g. Is the matter justiciable or better left to the political arena?

h. If justiciable, does the Federal Court have jurisdiction?

i. Costs.

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A. *Should the motion have been postponed?*

[9] Applications to this Court, by way of judicial review or otherwise, are supposed to be summary in nature (*Federal Courts Act*, s 18.4). Interlocutory motions interrupt the flow of proceedings. Nevertheless, there are circumstances, whether under *Federal Courts Rule* 221 or otherwise, in which the Court in control of its own process will not permit an application to run its course (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA)). More recently, Mr. Justice Stratas speaking for the Court of Appeal referred to *David Bull Laboratories* and said "[t]here must be a "show stopper" or a "knockout punch" – an obvious fatal flaw striking at the root of this Court's power to entertain the application" (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47).

[10] This application was put under case management and a case management conference has already been held. Serious issues were raised which is why, in my discretion, I decided to hear the motion to strike now.

B. *Does Mr. Alani have standing?*

[11] The respondents have not challenged Mr. Alani's standing as such, at least not at this stage. Section 18.1 of the *Federal Courts Act* provides that: "An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought." Is Mr. Alani directly affected? In any event, as this is a matter which falls within my discretion, I grant him standing on a public interest basis to oppose the motion to have his application struck (*Thorson v Attorney General of Canada,* [1975] 1 SCR 138).

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[12] The respondents submit that Mr. Alani is really referring a point of law to this Court for decision. Only federal boards, commissions and tribunals, and the Attorney General of Canada may refer a question of law to this Court (s. 18.3 of the *Federal Courts Act*). On the other hand, it is open to the Court to grant declaratory relief in accordance with s. 18 of the Act. The application is framed as a judicial review of a decision, not as a reference.

C. *Is there a decision to be judicially reviewed?*

[13] The language of this decision, and the circumstances in which it was allegedly made, are not set out in the pleadings. Was this a statement made in the House of Commons? Or was it a statement made during a media scrum? An off-the-cuff remark may not be a decision at all. Nevertheless, I am required to assume, at this stage, that a decision was made.

[14] For their part, the respondents do not deny at this stage that a decision was made. Perhaps, otherwise, we would be facing the thorny issue as to whether *mandamus* to fulfill a public duty lies.

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[15] As mentioned by Mr. Justice Stratas at paragraph 40 of *JP Morgan*, above, a "concise" statement of the grounds on which judicial review is sought must include the material facts necessary to establish that the Court can and should grant the relief sought. However, it does not include the evidence. As judge, I certainly would have preferred better particulars.

D. *Is there a constitutional convention?*

[16] All agree that a constitutional convention has developed whereby the Governor General will only fill vacancies in the Senate on the advice of the Prime Minister (*Reference re Senate Reform*, [2014] 1 SCR 704 at para 50). The Prime Minister's role may have developed and be evidenced by Minutes of Council going back to 1896. The parties disagree as to whether these Minutes of Council simply constitute recognition of a convention, or whether they show that the Prime Minister's advice is provided pursuant to Crown prerogative.

[17] However, no constitutional convention has been brought to my attention as to the timing of the Prime Minister's recommendations. Certainly, at some stage, senators have to be appointed. If there were to be no quorum, (the quorum being fifteen), Parliament could not function as it is composed of both the House of Commons and the Senate.

E. *Is the Convention Valid?*

[18] The convention is that the Governor General will not do something except on the recommendation of the Prime Minister. In the past, there were conventions that Parliament in Westminster would not amend the *British North America Act* except on Canada's request. These are conventions that provide that something will not be done except in certain circumstances. However, if the Constitution requires something to be done promptly, *i.e.* that Senate vacancies be filled, can the law be flaunted by convention? This goes to the merits of the application and cannot be answered at this time as the full scope of the convention has not been laid out before me.

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F. *Is this a question of statutory interpretation?*

[19] Mr. Alani submits that this is a straightforward case of statutory interpretation. For instance, it had to go all the way to the Judicial Committee of the Privy Council before it was decided that women were "persons" eligible to be appointed to the Senate (*Edwards v Attorney–General for Canada*, [1930] AC 124).

[20] Mr. Alani's case is based upon section 32 of the *Constitution Act, 1867* which provides:

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.	32. Quand un siège deviendra vacant au Sénat par démission, décès ou toute autre cause, le gouverneur-général remplira la vacance en adressant un mandat à quelque personne capable et ayant les qualifications voulues.

When shall a vacancy be filled? When it happens, not at the pleasure of the Prime Minister.

[21] Sections 21 and following of the same Act provide that the Senate shall consist of 105 members. Quebec and Ontario shall each be represented by 24, 10 from Nova Scotia, 10 from New Brunswick, 4 from Prince Edward Island, 6 from Manitoba, 6 from British Columbia, 6 from Saskatchewan, 6 from Alberta and 6 from Newfoundland and Labrador. The Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented by one senator each. As noted above, the quorum is 15.

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[22] Mr. Alani's other point is that the Senate was not intended to serve as a rest home for old political war horses. Apart from being a sober second chamber, it provides for regional representation. As of 20 March 2015, only 87 of the 105 seats in the Senate were filled, with no one having been appointed since 25 March 2013. Seven provinces are currently shortchanged, with Manitoba only having three of its six allocated seats.

[23] Again, the timing question cannot be answered at this time as we do not know the actual scope of the constitutional convention. The respondents must provide proof thereof as indeed stated at page 888 of *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 (the *First Reference*):

> 2. Requirements for establishing a convention
>
> The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must be normative. We adopt the following passage of Sir W. Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at p. 136:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

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[24] The parties will have an opportunity to provide proof of the existence and scope of any relevant convention at the hearing of the application on the merits.

G. *Is the matter justiciable?*

[25] The respondents submit there is no justiciable issue because the Prime Minister advises on Senate appointments by constitutional convention (true); constitutional conventions are not enforced by the courts (true); constitutional conventions do not become rules of law unless adopted by statute (true); and advice on Senate appointments is not given pursuant to the Crown prerogative (there is some debate on this point). It is further submitted that this Court, as a statutory court created by virtue of s. 101 of the *Constitution Act, 1867*, only has jurisdiction conferred by or under an act of Parliament or Crown prerogative (s. 2 of the *Federal Courts Act*). Consequently, even if the Prime Minister's advice in respect of Senate appointments were justiciable, this Court lacks jurisdiction. Since a constitutional convention does not arise from statute and is not a prerogative of the Crown, the Prime Minister is not a federal board, commission or other tribunal when performing this advice-giving function.

[26] Courts are certainly called upon to determine whether or not a convention exists. In addition to the *First Reference*, the Supreme Court again referred to constitutional conventions in *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793 (the *Quebec Veto Reference*). More recently, this Court was called upon to review the Prime Minister's decision advising the Governor General to dissolve Parliament and to set an election date, in light of the *Canada Elections Act* having been amended to provide fixed election dates (*Conacher v Canada (Prime Minister)*, 2009 FC 920, [2010] 3 FCR 411). Mr. Justice Shore was not satisfied that a new convention existed that limited the ability of the Prime Minister to advise the Governor General. He was upheld by the Federal Court of Appeal from the bench (2010 FCA 131) and leave to appeal to the Supreme Court was refused ([2010] SCCA No 315).

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[27] Consequently, it is arguable at this stage that we are only left with the interpretation of statute, albeit a very important one. In the circumstances, it is not necessary for this Court to consider constitutional conventions in detail. Suffice it to say that both the majority and the minority in the *First Reference* and the Court in the *Quebec Veto Reference* adopted the definition given by Chief Justice Freedman in the *Reference re: Amendment of Constitution of Canada*, [1981] MJ No 95 (CA) (the *Manitoba Reference*), as quoted in the *Quebec Veto Reference* as follows at page 802:

> The majority opinion as well as the dissenting opinion both approved, at pp. 852 and 883, the definition of a convention given by Freedman C.J.M. in the Manitoba Reference and quoted at p. 883 of the *First Reference*:
>
> > What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth

> with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies". Hogg, *Constitutional Law of Canada* (1977), p. 9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal.

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[28] If there is a valid constitutional convention, it is clear that the Court will not enforce it. The respondents submit that the Court should not even make a declaration on the point, because failure to adhere to a declaration may, in some circumstances, lead to contempt of Court and, thereby, indirect enforcement of a convention. They base themselves on *Assiniboine v Meeches*, 2013 FCA 114.

[29] *Assiniboine v Meeches* was a decision of Mr. Justice Mainville of the Federal Court of Appeal, sitting alone as duty judge. The appellants were seeking to stay a judgment of the Federal Court which declared that an Indian band election appeal committee had made a final and binding decision requiring new elections. At paragraphs 14 to 15 he referred to the decision of Mr. Justice MacGuigan in *LeBar v Canada*, [1989] 1 FC 603 (CA) and to the decision of the Supreme Court in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62. It was said in the latter that in appropriate cases, if public bodies or officials do not comply with a declaratory order, contempt proceedings could lie against the Crown.

[30] However, those circumstances were not spelled out. The statement in respect of contempt was in the majority reasons, written by Mr. Justice Iacobucci and Madam Justice Arbour, in which they disagreed with Mr. Justice Lebel and Madam Justice Deschamps, dissenting, that the trial judge's order that the court supervise the implementation of its decision was void.

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[31] If we took this point to its logical extreme, there would be no scope for a declaration that a constitutional convention requires a government official to do something.

[32] *LeBar* was an appeal from a judgment of the Federal Court Trial Division which declared that Mr. LeBar was entitled to have been released from prison earlier than when he in fact was released.

[33] Mr. Justice MacGuigan set out the principles of declarations in great detail. For these purposes it is sufficient to note that at pages 610-611, he said:

> ... [A] declaration is a peculiarly apt instrument in dealing with bodies "invested with public responsibilities" because it can be assumed that they will, without coercion, comply with the law as stated by the courts. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory proceedings vis-à-vis the Government. Any power to enforce such a judgment against the Government would be superfluity.
>
> In my opinion, the necessity for the Government and its officials to obey the law is the fundamental aspect of the principle of the rule of law, which is now enshrined in our Constitution by the preamble to the Canadian Charter of Rights and Freedoms...
>
> ...
>
> Elusive as it is as a concept, the rule of law must in all events mean "the law is supreme" and that officials of the Government have no option to disobey it. It would be unthinkable, under the rule of law,

> to assume that a process of enforcement is required to ensure that the Government and its officials will faithfully discharge their obligations under the law. That the Government must and will obey the law is a first principle of our Constitution.

[34] It is to be emphasized that Mr. Alani only seeks a declaration, and does not ask that it be enforced.

[35] Certainly it is premature to say now that this matter is not justiciable. If this is merely a matter of interpreting a statute, and it is not plain and obvious that it is not, then certainly the matter is justiciable.

[36] Without a doubt there is a political aspect to Senate appointments. From time to time the Senate, or some Senators, may be a source of embarrassment to the Government, to the House of Commons as a whole, and indeed, to many Canadians. However, I know of no law which provides that one may not do what one is otherwise obliged to do simply because it would be embarrassing. The Supreme Court made it perfectly clear in the *Reference re Senate Reform* that significant changes to the Senate, including its abolishment, require a formal constitutional amendment.

H. *Does this Court have jurisdiction?*

[37] I think some confusion arises between the concepts of justiciability and jurisdiction. If there is a valid constitutional convention the courts will not enforce it, but may make declarations in respect of its content. However, the jurisdiction to hear this application is quite a different matter. In accordance with sections 2 and 18 and following of the *Federal Courts Act*,

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this Court may judicially review the decisions of federal boards, commissions or other tribunals, which are defined as any body or person having, exercising or purporting to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown...". Many decisions of Ministers of the Crown are subject to judicial review *(Irving Shipbuilding Inc v Canada (Attorney General)*, [2010] 2 FCR 488 (CA)). Current thought is that the Constitution, although originally enacted by the United Kingdom, is, following the patriation of our constitution, a law of Canada (*Canadian Transit Company v Windsor (Corporation of the City)*, 2015 FCA 88 at paras 47-49).

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[38] The respondents submit that constitutional conventions do not form part of the Crown prerogative, and therefore are not subject to judicial review. However, at this stage it cannot be said with any certainty whether or not the decision was grounded on a valid constitutional convention. Furthermore, there are some who would argue that constitutional conventions are akin to the Crown prerogative so that *Dyson*, above, would call for a hearing on the merits.

[39] In the alternative, Mr. Alani states that this Court has jurisdiction by virtue of section 17 of the *Federal Courts Act* as the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

[40] There are not enough established facts to justify going down that road at this time.

I. *Costs*

[41] Both sides sought costs. The respondents seek an order for $1,000.00 all inclusive, which is clearly much less than any amount which might be set under the tariff. Mr. Alani seeks costs in the same amount in any event of the cause on the basis that it was "plain and obvious" that this motion to strike at this stage was "doomed to failure". If an award is not granted now he reserves his right to seek a higher amount. He also seeks a public interest immunity from costs. I think it better to simply order that costs be in the cause.

II. Amendments to the Notice of Application

[42] In his reply to the respondents' motion to strike, Mr. Alani proposed certain amendments should the motion fail, and other amendments should it succeed, as in such instances the Court may strike with leave to amend. These latter proposed amendments need not be considered as the motion is dismissed.

[43] A good part of the proposed amendments simply reflect a shuffling of parts of the application to the grounds therefore, and pose no problem.

[44] He also proposes that the Queen's Privy Council for Canada be added as a respondent in light of the cabinet minutes referred to above. This is simply meant to cover the bases, and I see no issue.

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[45] However, he wishes to delete his reference to the Prime Minister making a decision. He rather seeks a declaration with respect to the Prime Minister's failure, refusal or unreasonable delay, or alternatively the Queen's Privy Council acting on his recommendation to advise the Governor General to fill existing vacancies in the Senate. This is not acceptable.

[46] The whole basis on which this application has proceeded is that it is a judicial review of a decision. If those assertions are deleted, the application would look like a reference. Only federal boards and tribunals and the Attorney General of Canada may refer matters to the Court. Mr. Alani cannot.

[47] Thus the opening of the amended application shall read as it did in the original Notice of Application:

> THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of the decision of the Prime Minister, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate.
>
> THE APPLICANT makes application for:
>
> 1) A declaration that:
>
> a) the Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate.

[48] The rest of the application and the grounds therefore may be amended as requested save and except for the beginning of number 12 of the Grounds of the amended application, which will read: "The Prime Minister's decision not to recommend..."

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[49] This amended application is to be formally served and filed forthwith. Thereafter the normal delays set out in Rule 304 and following of the *Federal Courts Rules* shall be followed.

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ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. This motion to strike is dismissed, costs in the cause.

2. The style of cause is amended to add the Queen's Privy Council for Canada as a party respondent. It now reads:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA AND THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

"Sean Harrington"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2506-14
STYLE OF CAUSE:	ANIZ ALANI v THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA AND THE QUEEN'S PRIVY COUNCIL FOR CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 23, 2015
ORDER AND REASONS	JUSTICE HARRINGTON
DATED:	MAY 21, 2015

2015 FC 649 (CanLII)

APPEARANCES:

Mr. Aniz Alani	THE APPLICANT (ON HIS OWN BEHALF)
Jan Brongers Oliver Pulleyblank	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENTS

Federal Court  Cour fédérale

Date: 20150714

Docket: T-2506-14

Citation: 2015 FC 859

2015 FC 859 (CanLII)

Ottawa, Ontario, July 14, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA AND THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

ORDER AND REASONS

[1] This motion arises in the context of an application brought by Mr. Aniz Alani before this Court for judicial review of the Prime Minister's decision, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified persons to fill existing vacancies in the Senate. As general elections are expected to be held on October 19, 2015, Mr. Alani is asking the Court to abridge the timeline fixed by the Order dated June 9, 2015

of the Case management Judge Roger Lafrenière in relation to the remaining steps in the proceeding, and asks to immediately set a pre-election hearing date.

[2] He is further seeking an order granting leave to the Respondents to cross-examine him – or any other deponent - on his affidavit, before the Respondents have served their own affidavits and, as a corollary, to file their affidavits after having cross-examined him – or any other deponent - on his or their affidavit.

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[3] The main question is therefore whether the Court ought to depart from the timelines prescribed in Part 5 of the *Federal Courts Rules*, SOR/98-106 [Rules] more particularly Rules 307, 308, 309, 310 and 314.

I. Background

[4] After having heard the declaration publicly made by the Prime Minister that he did not intend to fill the 16 vacancies then existing in the Senate, the Applicant filed a notice of application for judicial review seeking, *inter alia*, a declaration that the Prime Minister must advise the Governor General to summon a qualified person to the Senate, within a reasonable time after the vacancy happens.

[5] Within a month from the filing of his application for judicial review, the Applicant sought to avail himself of the Court's procedure for requesting a hearing date before the perfection of the application. He wrote to counsel for the Respondents and proposed a timetable that would have caused the file to have been perfected by April 27, 2015.

[6] Instead, the Respondents served a motion to strike the application for judicial review which was heard by my colleague Harrington J. on April 23, 2015. The Respondents essentially argued that Mr. Alani had no standing in the claim before the Court, that there was no real decision to be judicially reviewed and that in any event, there was a constitutional convention by which the timing of Senate appointments is left to the Prime Minister's discretion, and that a breach of that constitutional convention is not justiciable but rather left to the political arena.

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[7] On May, 21, 2015, Harrington J. observed that on most issues raised before him, there were insufficient facts established to permit him to undertake a thorough analysis. He therefore found that it was not plain and obvious that Mr. Alani's application had no chance of success and he dismissed the Respondents' motion to strike. Harrington J. also allowed most of the proposed amendments to Mr. Alani's Notice of Application and stated that the normal procedure of the Rules, including the delays set out in Rule 304 and following of the Rules should be followed thereafter.

[8] From May 21, 2015 to June 1, 2015, the Applicant attempted, without success, to have the Respondents' consent on abridging the timetable that would cause the file to be perfected on or around August 4, 2015. During a case management conference held on June 1st, counsel for the Respondents advised the Court they anticipated commissioning an expert to provide affidavit evidence speaking to the issues relating to constitutional conventions. As a result, they further advised they might need additional time to do so. A week after, the Respondents advised they would be able to serve their responding affidavits by July 31, 2015 and that they were hoping the Applicant would consent to this extension of time without the need to file a formal Rule 8

motion. The Applicant consented to the Respondents' informal request but reiterated that he was hoping for the Respondents to consent to the proposed timetable for the remaining steps in the proceedings.

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[9] On June 11, 2015, as these discussions were ongoing, the Applicant raised the potential for his application to become moot after the general election anticipated for October 19, 2015.

[10] On June 15, 2015, counsel for the Respondents advised the Applicant that:

> In the absence of a formal motion to expedite or any evidence in support of your assertions, we see no utility in engaging in an academic debate on the merits of your apparent position at this time. Suffice it to say, in our respectful submission, we find neither of the grounds you have raised to be persuasive. They certainly do not provide a justification for denying either party the opportunity to properly prepare their respective cases. In sum, it is our position that the timing of the next federal election is not a factor that ought to govern the determination of either the procedural deadlines or the hearing date of this application.

[11] The Respondents also declined to provide a time estimate for the hearing and to reveal their availability until after the production of their Application Record. In any event, counsel for the Respondents then advised the Applicant that they were unavailable from September 28 to October 16, having previously scheduled other hearings or professional commitments.

[12] As a result, the Applicant served and filed his present Rule 8 motion on June 17, 2015. As things stand, the file is case managed by Prothonotary Lafrenière and it is expected to be perfected by September 9, 2015, at which time the Applicant is expected to file his Requisition for hearing in accordance with Rule 314.

II. Analysis

[13] The only issue raised by this motion is whether the Court should exercise its discretion to expedite this application in order to accommodate a hearing date before the federal election which will be held on October 19, 2015.

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[14] Rule 8 authorizes the Court to "extend or abridge a period provided by these Rules or fixed by an order". It does not set out the test this Court should apply while exercising its discretion but both parties rely on the factors that emanate from this Court's few decisions where abridgment was considered in order to expedite the proceeding so it could be heard prior to a particular event (*May v CBC/Radio Canada*, 2011 FCA 130 at paras 12 and 13; *Canada (Minister of Citizenship and Immigration) v Dragan*, 2003 FCA 139 at para 7; *Trotter v Canada (Auditor General)*, 2011 FC 498 at paras 5-7; *Conacher v Canada (Prime Minister)*, 2008 FC 1119 at para 16; *Canadian Wheat Board v Canada (Attorney General)*, 2007 FC 39 at para 13 and *Gordon v Canada (Minister of National Defence)*, 2004 FC 1642 at para 11) . They can be summarized as follows:

i. Whether the proceeding is really urgent or does the moving party simply prefer that the matter be expedited (Respondents rather formulate this first branch of the test as being: whether prejudice will ensue to the moving party if the matter is not expedited);

ii. Whether prejudice will ensue to the responding party if the matter is expedited;

iii. Whether the matter will become moot if it is not expedited; and

iv. Whether expediting the matter will prejudice other litigants by "queue jumping".

[15] The consideration of these factors is not mandatory but should be used by the Court as guidance, bearing in mind that the scheduling deadlines presumptively imposed by Part 5 of the Rules are designed as a "compromise" between the need to have applications for judicial review heard summarily and the need to ensure the parties have sufficient time to adequately prepare their cases. The burden to show the need to depart from these Rules lies on the party seeking the abridgement.

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[16] In the case at bar, I am of the view, mainly mindful of the factors set-out in i) and iii) above, that the Applicant failed to meet his burden and that this case should continue to proceed in accordance with the Rules, with the assistance of the Case Management Judge.

[17] The Applicant's main complaint concerns the soon to be 22 vacancies of the Senate and the fact that those vacancies would deny the Canadian population the guaranteed level of regional representation set out in the *Constitution Act, 1867*, ss. 21–22. He seeks a declaratory relief interpreting and giving effect to section 32 of the *Constitution Act, 1867* and, in particular, in determining whether, in the circumstances "when a vacancy happens", the requirement to summon qualified persons to the Senate imposes an obligation to cause appointments to be made within a reasonable time.

[18] As can be read from the judgment of Harrington J. on the Respondents' motion to strike, the Applicant's application for judicial review raises complex and novel constitutional issues and, as such, it will require a complete evidentiary record placed before the Court. Amongst other things, that will include expert evidence on the existence, validity and content of a

constitutional convention on Senate appointments. Neither the parties nor the Court should be rushed, without compelling reasons, into an early hearing or a decision on the merits.

[19] The Applicant argues that the urgency to proceed with his application and to obtain a ruling from the Court emanates from one of the defence arguments advanced by the Respondents. The Respondents argue that the matter raised by this application is non-justiciable and that any remedy related to the Prime Minister's inaction must be found in the political realm. If the Court ought to agree with the Respondents on that specific issue and if the decision is not rendered before the October 19, 2015 election, the individual voters will be deprived of a singular opportunity to effect an obviously available political remedy. In other words, says the applicant, we are dealing here with a "ballot box" issue.

[20] Although this is a possible outcome, it is not the only one. However, the Applicant does not argue that urgency would exist in any other scenario - for example, in the instance where the Court finds in his favour or rather finds that it lacks jurisdiction over the matter.

[21] Not only is the applicant's sense of urgency rather speculative but he has not presented evidence that the Canadian electorate, or himself for that matter, requires the benefit of a ruling from this Court on Senate vacancies in order to make an informed decision at the next election.

[22] Vacancies at the Senate exist and they are known to the public. In fact, many issues regarding the Senate and Senators have received extensive media coverage during the last few years. As things stand, the issues raised by this application for judicial review are exposed in

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Harrington J.'s public decision of May 21, 2015 and they will be further enunciated in the parties' public written submissions which will be filed in the Court record prior to October 19, 2015.

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[23] Even if the Court could accommodate the parties and hold a hearing between September 10 and September 28 (again, both counsel for the Respondents are unavailable from September 28 and October 16), it is not to say that the Court would issue its Judgment and Reasons before October 19, 2015. Considering the importance of the issues raised, it is not excluded either that this Court's judgment will be appealed before the Federal Court of Appeal. Therefore, even if I see the next general election as a relevant factor favouring an abridgment of the delays and scheduling of a hearing before the file is perfected, which is not the case, it is unlikely that the individual voters would benefit from a final decision of this Court or the Federal Court of Appeal before October 19, 2015.

[24] Similar comments can be made as regards the Applicant's mootness argument. The Applicant acknowledges that the result of the October 19 election cannot be predicted, nor can its impact on his application for judicial review. The Applicant says that his application could become moot: i) if the Prime Minister "resiles from his stated intention not to appoint senators"; or ii) if the Prime Minister does not remain in office following the election. My answer to that argument is also twofold: If the applicant's objective is to have the Senate vacancies filled, he should be satisfied if his first hypothesis becomes reality. However, if his real intention is to have a declaration from the Court dealing with a Prime Minister's duties and obligations with respect to Senate appointments, this application for judicial review might not be moot if the vacancies

are filled before a final judgment is rendered. In any case, the Applicant's argument is hypothetical and highly speculative.

[25] Finally, in his written submissions, the Applicant states that he would also wish to have his application for judicial review heard before the third week of November as his wife is expected to give birth to his child. The Applicant did not raise that issue during the hearing but I agree with the Respondents that the Court should be able to accommodate the parties and set a hearing date between mid-October and mid-November. A note should be added to that effect in the Applicant's request for hearing.

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III. Conclusion

[26] For these reasons, and keeping in mind that this file is case managed by Case Management Judge Lafrenière, I do not think that the Court's intervention is warranted and that a hearing should be scheduled before the file is perfected and before counsel for the parties can provide the Court with an estimate of the time they require to present their case.

[27] However, in the same way that I do not think this file's timetable should be influenced by the general election expected on October 19, the general election equally should not be used by the Respondents in an attempt to delay the hearing and avoid the media attention it may attract. I have no evidence that these concerns have been the case so far, and I am confident that the Case Management Judge will ensure that it does not become the case in the near future.

[28] Considering the special circumstances of this case and the fact that the Applicant has brought and conducted the proceedings in a timely manner, no costs will be granted.

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ORDER

THIS COURT ORDERS that:

1. The Applicant's motion be dismissed;

2. No costs be granted.

"Jocelyne Gagné"

Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2506-14
STYLE OF CAUSE:	ANIZ ALANI v THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA AND THE QUEEN'S PRIVY COUNCIL FOR CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 30, 2015
ORDER AND REASONS:	GAGNÉ J.
DATED:	JULY 14, 2015

2015 FC 859 (CanLII)

APPEARANCES:

Mr. Aniz Alani	FOR THE APPLICANT (ON HIS OWN BEHALF)
Me Jan Brongers Me Oliver Pulleyblank	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Mr. Aniz Alani Vancouver, British Columbia	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS

Federal Court  Cour fédérale

Date: 20140306

Docket: IMM-994-13

Citation: 2014 FC 219

2014 FC 219 (CanLII)

Ottawa, Ontario, March 6, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

VICTOR AZHAEV

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of S. Behrue, an Inland Enforcement Officer [the Officer], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Officer dismissed the Applicant's claim for a deferral of his removal from Canada.

I. Issue

[2] A. Is this judicial review moot?

i. If so, should the Court nevertheless exercise its discretion to hear the merits of the requested review?

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II. Background

[3] The Applicant is an Israeli citizen. He first entered Canada on December 16, 2008, on a six-month temporary residence permit. On June 22, 2009, he made a claim for refugee protection. His claim was refused by the Refugee Protection Division of the Immigration and Refugee Protection Board on April 10, 2012, and leave to the Federal Court was denied on July 3, 2012.

[4] The Applicant made an Application for Permanent Residence under the Spouse or Common-Law Partner in Canada Class [Permanent Residence Claim] on July 20, 2012.

[5] On January 15, 2013, the Applicant was notified that he was the subject of an in-force removal order and was asked to attend the Canadian Border Services Agency [CBSA] office in Toronto on January 31, 2013.

[6] On January 24, 2013, the Applicant's Permanent Residence Claim was approved in principle.

[7] On January 26, 2013, the Applicant married Svetlana Batyrshina, the sponsor indicated in his Permanent Residence Claim.

[8] On January 30, 2013, CBSA officers did a bond compliance check. The Applicant was not living at his stated address.

[9] On January 31, 2013, the Applicant attended CBSA offices and admitted that he was in fact living in a common-law relationship with another woman and his marriage with Ms. Batyrshina was one of convenience.

[10] On February 2, 2013, the Applicant was notified he was scheduled for removal on February 7, 2013.

[11] On February 4, 2013, the Applicant's Permanent Residence Claim was rejected.

[12] On February 6, 2013, the Applicant requested a deferral of his removal for either 30-60 days or until he had an opportunity to have a judicial review of the refusal of his Permanent Residence Claim heard by the Federal Court. The Applicant's request for a deferral was rejected the same day by the Officer and the Applicant immediately launched a judicial review of the Officer's decision. This decision is the subject of the instant application.

[13] In his refusal letter, the Officer stated:

> The Canada Border Services Agency (CBSA) has an obligation under section 48 of the Immigration and Refugee Protection Act to carry out removal orders as soon as possible. Having considered your request, I do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case.

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[14] On February 7, 2013, Justice John A. O'Keefe granted a stay of the Applicant's removal until the instant application was heard or leave denied.

[15] On February 19, 2013, the Applicant applied for judicial review of the February 4, 2013, rejection of his Permanent Residence Claim.

[16] On June 25, 2013, Chief Justice Paul S. Crampton refused leave for judicial review of the Applicant's Permanent Residence Claim.

[17] I find that based on the facts before me, the matter is moot for the reasons that follow.

III. Analysis

[18] The Applicant argues that the Court may exercise discretion where there is still an adversarial relationship between the parties, if deciding the issues is in consideration of the judicial economy, and if it would not result in the court intruding into the legislative sphere (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]).

[19] The Applicant suggests there is still an adversarial relationship, as the Applicant and Respondent have different positions on how much time the Applicant should have to liquidate his assets prior to his removal from Canada.

[20] The Applicant also asserts that he has "exigent personal circumstances" which warrant a deferral being granted (*Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*,

2014 FC 219 (CanLII)

2011 FCA 286, at para 44; *Ramada v Canada (Solicitor General)*, 2005 FC 1112, at para 3). These exigencies include the failure of the Officer to consider the best interests of the Applicant's son (*Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, at para 7) and language difficulties which led to the denial of his Permanent Residence Claim.

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[21] The basis of the Applicant's February 6, 2013, deferral request was to allow the Applicant to remain in Canada until 30-60 days had elapsed from the date of the deferral decision or until a judicial review of his Permanent Residence Claim was heard. As both the time requested has elapsed and the Applicant's application for judicial review of his Permanent Residence Claim has been denied at the leave stage, a judicial review of the Officer's deferral decision is now moot, as there is no live controversy to be resolved based on the original controversy between the parties (*Borowski*, above, at para 15).

[22] While this Court has room to exercise its discretion to hear the merits of the instant application, as guided by the principles in *Borowski*, I disagree with the Applicant that there is an adversarial context remaining in this matter. In *Borowski*, the Court discussed an adversarial context as one where "collateral consequences" arise in related proceedings. For example, if the resolution of an issue in an otherwise moot proceeding determines the availability of liability or prosecution in a related proceeding between the parties, there remains an adversarial context between them. In the instant application, no collateral consequences will arise as a result of whether the Officer erred in his decision.

[23] The second factor enunciated in *Borowski*, that of judicial economy, weighs against the Applicant as well. In one sense, judicial economy is related to being mindful of expending scarce judicial resources to hear an academic argument (*Borowski* at para 34). This is not relevant in the instant application, as Court resources have already been allocated. However, *Borowski* does refer to judicial economy in another way: to resolve ongoing uncertainty in the law to facilitate the expeditious resolution of similar cases in the future (*Borowski* at para 35). The Applicant's argument for this Court to exercise its discretion is based largely on this principle. He argues that it will help future litigants, including himself, to develop the jurisprudence on what "personal exigencies" justify a deferral of removal. However, the Court in *Borowski* at para 36 specifically warned against the application of this factor in the manner suggested by the Applicant:

> The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[24] I find that this factor also weights against hearing the instant application.

[25] The third principle in *Borowski* is not relevant in this case.

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JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed;

2. No question is to be certified.

"Michael D. Manson"

Judge

2014 FC 219 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-994-13
STYLE OF CAUSE:	Azhaev v. MPSEP
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 5, 2014
REASONS FOR JUDGMENT AND JUDGMENT BY:	Justice Manson
DATED:	March 6, 2014

2014 FC 219 (CanLII)

APPEARANCES:

Mr. Joel Etienne	FOR THE APPLICANT
Mr. John Lancar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Joel Etienne Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT

Joseph Borowski *Appellant*

v.

The Attorney General of Canada *Respondent*

and

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

INDEXED AS: BOROWSKI v. CANADA (ATTORNEY GENERAL)

File No.: 20411.

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

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

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

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

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

Civil procedure — Standing — Standing originally found because action seeking declaration as to legislation's validity — Provisions under challenge already found invalid — Whether or not standing as originally

Joseph Borowski *Appelant*

c.

Le procureur général du Canada *Intimé*

et

Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada et Fonds d'action et d'éducation juridiques pour les femmes (FAEJ) *Intervenants*

RÉPERTORIÉ: BOROWSKI c. CANADA (PROCUREUR GÉNÉRAL)

N° du greffe: 20411.

1988: 3, 4 octobre; 1989: 9 mars.

Présents: Le juge en chef Dickson et les juges McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Pourvoi — Caractère théorique — Dispositions du Code criminel relatives à l'avortement — Dispositions contestées déjà déclarées inopérantes — Questions accessoires relatives aux droits du fœtus en vertu de la Charte — La question est-elle théorique? — La Cour doit-elle exercer son pouvoir discrétionnaire pour entendre l'affaire? — Code criminel, S.R.C. 1970, chap. C-34, art. 251 — Charte canadienne des droits et libertés, art. 7, 15.

Droit criminel — Avortement — Dispositions contestées déjà déclarées inopérantes — Questions accessoires sur les droits du fœtus en vertu de la Charte — La question est-elle théorique? — La Cour doit-elle exercer son pouvoir discrétionnaire pour entendre l'affaire?

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Droit à l'égalité devant et dans la loi — Les droits garantis par la Charte s'appliquent-ils au fœtus? — Questions relatives à la Charte accessoires à la question de la validité des dispositions du Code criminel sur l'avortement — Dispositions contestées déjà déclarées inopérantes — La question est-elle théorique? — La Cour doit-elle exercer son pouvoir discrétionnaire pour entendre l'affaire?

Procédure civile — Qualité pour agir — Qualité pour agir reconnue initialement parce que l'action visait un jugement déclarant l'invalidité de dispositions législatives — Dispositions contestées déjà déclarées inopéran-

1989 CanLII 123 (SCC)

determined — Whether or not s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 able to support claim for standing.

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

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the *Charter* as a foetus was not protected by either s. 7 or s. 15 of the *Charter* and also held that s. 1 of the *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the *Charter* applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the *Charter*; (2) if so, whether s. 251(4), (5) and (6) of the *Code* violated the principles of fundamental justice contrary to s. 7 of the *Charter*; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the *Charter*; (4) if so, whether s. 251(4), (5) and (6) of the *Code* violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the *Code* were justified by s. 1 of the *Charter*. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in *R. v. Morgentaler (No. 2)*.

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

tes — La qualité pour agir reconnue initialement subsiste-t-elle? — L'article 24(1) de la Charte et l'art. 52(1) de la Loi constitutionnelle de 1982 peuvent-ils fonder la qualité pour agir?

L'appelant conteste la validité des par. 251(4), (5) et (6) du *Code criminel* relatives à l'avortement pour le motif qu'ils enfreignent les droits à la vie, à la sécurité et à l'égalité garantis au fœtus, en tant que personne, par les art. 7 et 15 de la *Charte canadienne des droits et libertés*. La qualité pour agir avait été reconnue à l'appelant parce qu'il demandait un jugement déclarant une loi invalide, parce que la question de la validité de la loi se posait sérieusement, parce qu'il avait, à titre de citoyen, un intérêt véritable quant à la validité de la loi et parce qu'il n'y avait pas d'autre manière raisonnable et efficace de soumettre la question à la Cour.

La Cour du Banc de la Reine a conclu que les par. 251(4), (5) et (6) ne violent pas la *Charte* puisque le fœtus n'est protégé ni par son art. 7 ni par son art. 15 et, en outre, que l'article premier de la *Déclaration canadienne des droits* ne permet pas aux tribunaux de juger de la teneur ou de la sagesse des lois. La Cour d'appel a conclu que ni l'art. 7, ni l'art. 15 de la *Charte* ne s'appliquent au fœtus. Les questions constitutionnelles en cette Cour visent à déterminer: (1) si le fœtus a le droit à la vie que garantit l'art. 7 de la *Charte*; (2) dans l'affirmative, si les par. 251(4), (5) et (6) du *Code* violent les principes de justice fondamentale contrairement à l'art. 7 de la *Charte*; (3) si le fœtus a le droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination en raison de l'âge ou de déficiences mentales ou physiques, selon l'art. 15 de la *Charte*; (4) dans l'affirmative, si les par. 251(4), (5), (6) du *Code* violent l'art. 15; et (5) dans le cas d'une réponse affirmative aux questions (2) et (4), si les par. 251(4), (5) et (6) du *Code* sont justifiés par l'article premier de la *Charte*. Toutefois, après l'arrêt de la Cour d'appel mais avant l'audition du pourvoi en cette Cour, l'ensemble de l'art. 251 a été déclaré inopérant par l'arrêt *R. c. Morgentaler (n° 2)*.

Dès le début du pourvoi, la question du caractère théorique du pourvoi se posait sérieusement. En outre, il paraissait douteux que le demandeur ait encore qualité pour agir et même que la question puisse être réglée par voie de justice. Ces points ont été débattus à titre de questions préliminaires et ont été mis en délibéré. La Cour a alors entendu le pourvoi au fond, de manière à être en mesure de statuer sur la totalité du pourvoi sans devoir rappeler les parties pour plaider si, malgré les questions préliminaires, elle décidait que le pourvoi devait suivre son cours.

1989 CanLII 123 (SCC)

Held: The appeal should be dismissed.

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

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

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

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

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

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

Arrêt: Le pourvoi est rejeté.

Le pourvoi est théorique et la Cour ne devrait pas exercer son pouvoir discrétionnaire pour le trancher au fond. De plus, l'appelant n'a plus qualité pour continuer le pourvoi puisque les circonstances qui fondaient initialement la qualité pour agir ont disparu.

La doctrine relative au caractère théorique relève du principe général en vertu duquel un tribunal peut refuser de trancher une affaire qui ne soulève qu'une question hypothétique ou abstraite. Un appel est théorique lorsque la décision du tribunal n'aura pas pour effet de résoudre un litige qui a, ou peut avoir, des conséquences sur les droits des parties. Un litige actuel doit exister non seulement quand l'action ou les procédures sont engagées, mais aussi au moment où le tribunal doit rendre une décision. Le principe général s'applique aux litiges devenus théoriques à moins que le tribunal n'exerce son pouvoir discrétionnaire de ne pas l'appliquer.

La démarche à suivre pour déterminer si le litige est théorique comporte une analyse en deux temps. En premier, il faut se demander si le différend concret et tangible a disparu et si la question est devenue purement théorique. Si c'est le cas, le tribunal décide alors s'il doit exercer son pouvoir discrétionnaire et entendre l'affaire. (Pour être précis, une affaire est «théorique» si elle ne présente pas de litige concret même si le tribunal choisit de trancher la question théorique.)

Le présent pourvoi est théorique puisqu'il n'y a plus de différend juridique concret. Le litige qui fondait le présent pourvoi—la contestation de la constitutionnalité des par. 251(4), (5) et (6) du *Code*—a disparu quand la Cour a déclaré cet article inopérant dans *R. c. Morgentaler (n° 2)*. Aucun des redressements demandés dans la déclaration n'est pertinent. Trois des cinq questions constitutionnelles énoncées visent expressément l'art. 251 et n'ont plus d'objet. Les deux autres ont trait à la portée des droits garantis par les art. 7 et 15 de la *Charte* et ne peuvent être traitées séparément de la contestation initiale de l'art. 251.

Une question constitutionnelle ne lie pas la Cour et ne peut pas servir non plus à transformer un pourvoi en renvoi. Les questions constitutionnelles visent à définir avec précision les points litigieux dans une affaire constitutionnelle et non à introduire de nouvelles questions. Les questions ne peuvent donc servir de fondement distinct à un pourvoi qui est par ailleurs théorique.

La deuxième partie de l'analyse consiste pour le tribunal à déterminer s'il devrait exercer son pouvoir discrétionnaire pour trancher l'affaire au fond, même en l'absence de litige actuel. Dans l'exercice de ce pouvoir

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their discretion by considering the underlying rationale of the mootness doctrine.

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

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

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost certainly be brought before the Court within a specific legislative context or possibly in review of specific governmental action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the *Charter* protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not

discrétionnaire, les tribunaux peuvent être guidés par l'étude des assises mêmes de la doctrine du caractère théorique.

La première raison d'être de la politique en matière de causes théoriques tient à ce que la capacité des tribunaux de trancher des litiges a sa source dans le système contradictoire. Le contexte réellement contradictoire, dans lequel les deux parties ont un intérêt dans l'issue du litige, est un élément fondamental de notre système juridique. La deuxième raison tient à l'économie des ressources judiciaires qui oblige les tribunaux à se demander si, compte tenu des circonstances d'une affaire, il y a lieu de consacrer des ressources judiciaires limitées à la solution d'un litige devenu théorique. La troisième raison d'être de la doctrine tient à la nécessité pour les tribunaux d'être sensibles à l'efficacité et à l'efficience de l'intervention judiciaire et d'être conscients de leur fonction juridictionnelle dans notre structure politique. En exerçant son pouvoir discrétionnaire à l'égard d'un pourvoi théorique, la Cour doit tenir compte de chacune de ces trois principales raisons d'être. Il ne s'agit pas d'un processus mécanique. Il se peut que les principes ne tendent pas tous vers la même conclusion. L'absence d'un facteur peut prévaloir malgré la présence de l'un ou des deux autres, ou inversement.

La Cour devrait refuser d'exercer son pouvoir discrétionnaire de trancher le pourvoi au fond par souci d'économie des ressources judiciaires et en raison de sa fonction véritable dans l'élaboration du droit. L'absence de rapport contradictoire ne fait pas problème: le pourvoi a été plaidé aussi pleinement que s'il n'avait pas été théorique.

Aucun des facteurs qui justifieraient l'utilisation de ressources judiciaires ne s'applique. La décision n'aurait pas d'effets accessoires pratiques sur les droits des parties. Il ne s'agit pas d'une situation susceptible à la fois de se répéter et de ne jamais être soumise aux tribunaux. Il est en effet très probable que la question sera soumise à cette Cour à propos d'une loi précise ou peut-être à propos d'un acte gouvernemental précis. Une décision dans l'abstrait sur les droits du fœtus n'éliminerait pas nécessairement des litiges répétés à l'avenir. Malgré la grande importance de la question, il n'est pas dans l'intérêt public de statuer sur le fond pour déterminer l'état du droit. Une décision sur la question de savoir si les art. 7 et 15 de la *Charte* protègent les droits du fœtus n'est pas dans l'intérêt public vu l'état d'incertitude qui pourrait résulter d'une telle décision en dehors de tout contexte législatif.

La considération de la fonction véritable de la Cour dans l'élaboration du droit est une autre raison de refuser d'exercer son pouvoir discrétionnaire pour tran-

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the question raised in the original action. Indeed, what was sought—a *Charter* interpretation in the absence of legislation or other governmental action bringing it into play—would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

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

Cases Cited

Referred to: *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Morgentaler v. The Queen (No. 1)*, [1976] 1 S.C.R. 616; *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii; *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69; *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385; *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111; *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481; *R. v. Mercure*, [1988] 1 S.C.R. 234; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Re Maltby and Attorney-*

cher le pourvoi au fond. La question soumise à cette Cour n'est plus celle qui était l'objet de l'action initiale. En réalité, ce qu'on demande—une interprétation de la *Charte* en l'absence de texte législatif ou d'acte gouvernemental la faisant entrer en jeu—transformerait le pourvoi en renvoi d'initiative privée. Si elle exerçait son pouvoir discrétionnaire dans un tel cas, la Cour empiéterait sur le droit du pouvoir exécutif d'ordonner un renvoi et pourrait empêcher la législateur de prendre une décision, en lui dictant les termes des dispositions législatives à adopter. Ce serait une dérogation marquée au rôle traditionnel de la Cour.

De plus, l'appelant n'a plus qualité pour continuer le pourvoi puisque le fondement initial de sa qualité pour agir n'existe plus. Il s'est produit deux changements importants dans la nature de l'action en l'espèce depuis que la Cour a reconnu à l'appelant qualité pour agir, en 1981. Premièrement, la demande actuelle se fonde principalement sur l'allégation que le droit du fœtus à la vie et à l'égalité est garanti par les art. 7 et 15 de la *Charte*. Deuxièmement, en déclarant l'art. 251 du *Code* inopérant, la Cour a fait disparaître le contexte législatif de la demande. Il n'est pas possible d'invoquer en l'espèce le par. 24(1) comme fondement de la qualité pour agir puisqu'il faut qu'il y ait violation ou négation d'un droit garanti par la *Charte* à la personne qui l'invoque. En l'espèce, les droits qui auraient été violés sont ceux du fœtus. La qualité pour agir ne peut être accordée en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* parce qu'une action fondée sur le par. 52(1) doit se limiter à la contestation d'une loi ou d'un acte gouvernemental pris en vertu d'un pouvoir conféré par la loi.

Jurisprudence

Arrêts suivis: *R. c. Morgentaler (nº 2)*, [1988] 1 R.C.S. 30; *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575; *Morgentaler c. La Reine (nº 1)*, [1976] 1 R.C.S. 616; *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), autorisation de pourvoi refusée [1981] 1 R.C.S. viii; *The King ex rel. Tolfree v. Clark*, [1944] R.C.S. 69; *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 R.C.S. 363; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] R.C.S. 385; *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111; *Vic Restaurant Inc. v. City of Montreal*, [1959] R.C.S. 58; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] R.C.S. 628; *Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481; *R. c. Mercure*, [1988] 1 R.C.S. 234; *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357; *Re Maltby*

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Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).
Supreme Court Rules, SOR/83-74, s. 32.

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and Attorney-General of Saskatchewan (1984), 10 D.L.R. (4th) 745; *Hall v. Beals*, 396 U.S. 45 (1969); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Sibron v. New York*, 392 U.S. 40 (1968); *Vadeboncœur c. Landry*, [1977] 2 R.C.S. 179; *Bisaillon c. Keable*, [1983] 2 R.C.S. 60; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911); *Le Syndicat des Employés du Transport de Montréal c. Procureur général du Québec*, [1970] R.C.S. 713; *Wood, Wire and Metal Lathers' Int. Union c. United Brotherhood of Carpenters and Joiners of America*, [1973] R.C.S. 756; *Ministre de la Main-d'œuvre et de l'Immigration c. Hardayal*, [1978] 1 R.C.S. 470; *Renvoi sur l'opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793; *Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90; *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.

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POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (1987), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, qui a rejeté un appel contre un jugement du juge Matheson (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984]

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15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

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

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

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

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

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

The judgment of the Court was delivered by

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

From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the

1 W.W.R. 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Pourvoi rejeté.

Morris C. Shumiatcher, *c.r.*, et *R. Bradley Hunter*, pour l'appelant.

Claude R. Thomson, *c.r.*, et *Robert W. Staley*, pour l'intervenante Interfaith Coalition on the Rights and Wellbeing of Women and Children.

Angela M. Costigan et *Karla Gower*, pour l'intervenante R.E.A.L. Women of Canada.

Edward Sojonky, *c.r.*, pour l'intimé.

Mary Eberts et *Helena Orton*, pour l'intervenant Fonds d'action et d'éducation juridiques pour les femmes (FAEJ).

Version française du jugement de la Cour rendu par

LE JUGE SOPINKA—Le présent pourvoi, sur autorisation de cette Cour, attaque un arrêt de la Cour d'appel de la Saskatchewan, [1987] 4 W.W.R. 385, confirmant le jugement du juge Matheson de la Cour du Banc de la Reine de la Saskatchewan, [1984] 1 W.W.R. 15, qui avait rejeté l'action du demandeur (l'appelant en cette Cour). Devant les cours d'instance inférieure, le demandeur a contesté la validité des par. 251(4), (5) et (6) du *Code criminel*, S.R.C. 1970, chap. C-34, relatifs à l'avortement pour le motif qu'ils enfreignent des droits garantis au fœtus. Après l'arrêt de la Cour d'appel de la Saskatchewan et avant l'audition du présent pourvoi en cette Cour, l'art. 251, et donc les paragraphes contestés en l'espèce, a été déclaré inopérant par l'arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30 (ci-après *R. c. Morgentaler (n° 2)*).

Vu l'évolution de la procédure, il était évident dès le début du pourvoi que la question de son caractère théorique se posait sérieusement. En outre, il paraissait douteux que le demandeur ait encore qualité pour agir et même que la question puisse être réglée par voie de justice. La Cour a donc demandé aux avocats de débattre ces points à titre de questions préliminaires. Après leurs plaidoiries, nous avons mis ces questions en délibéré et nous avons entendu le pourvoi au fond, de manière

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appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

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

History of the Action

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

(a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the *Criminal Code* invalid and inoperative;
(b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is *ultra vires* and unlawful;
(c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;
(d) The costs of this action; and
(e) Such further and other relief as to this Honourable Court seems just and expedient.

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

à être en mesure de statuer sur la totalité du pourvoi sans devoir rappeler les parties pour plaider si, malgré les questions préliminaires, nous décidions que le pourvoi devait suivre son cours.

Compte tenu de la conclusion à laquelle je suis arrivé, il suffit de traiter des questions du caractère théorique et de la qualité pour agir. Puisque celles-ci résultent d'un changement dans la nature des procédures, il faut faire l'historique de l'action.

Historique de l'action

Monsieur Borowski a intenté une action devant la Cour du Banc de la Reine de la Saskatchewan en produisant, le 5 septembre 1978, une déclaration pour demander les redressements suivants:

[TRADUCTION]

a) Une ordonnance de la Cour déclarant que les par. 251(4), (5) et (6) du *Code criminel* sont nuls et inopérants;
b) Une ordonnance de la Cour déclarant que toutes les dispositions des lois du Parlement du Canada et tous les textes juridiques qui visent à autoriser l'utilisation de fonds publics pour les objets mentionnés aux par. 251(4), (5) et (6) sont nuls et inopérants et que le versement de ces sommes est *ultra vires* et illégal;
c) Une injonction permanente interdisant au ministre des Finances, ses agents et ses préposés, d'attribuer, de débourser ou de rendre autrement disponible quelque somme que ce soit sur le Fonds du revenu consolidé pour l'établissement ou le maintien de comités d'avortement thérapeutique, pour la pratique d'avortements ou pour tout acte ou objet afférent à l'avortement et à la destruction de fœtus humains;
d) Les dépens de la présente action;
e) Tout autre redressement que la Cour estime juste et approprié.

Avant l'audition de l'affaire, les intimés ont contesté par requête la compétence de la Cour du Banc de la Reine. Cette requête a abouti à un pourvoi en cette Cour qui portait principalement sur la qualité pour agir de M. Borowski. Selon la décision de cette Cour à la majorité, publiée sous l'intitulé *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575, M. Borowski avait qualité pour contester les dispositions du *Code*

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Martland J., speaking for the majority, stated, at p. 598:

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

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

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

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

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

(c) The costs of this action; and

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

The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the *Canadian Bill of Rights*.

mentionnées dans sa déclaration. Le juge Martland dit au nom de la majorité, à la p. 598:

Selon mon interprétation, ces arrêts décident que 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. À mon avis, l'intimé répond à ce critère et devrait être autorisé à poursuivre son action.

Le juge en chef Laskin, avec l'appui du juge Lamer, aurait statué que M. Borowski n'avait pas qualité pour agir parce qu'il n'était pas touché par la loi alors que d'autres, comme les médecins et les hôpitaux, pouvaient l'être. Le Juge en chef a conclu qu'en conséquence M. Borowski n'avait pas un intérêt judiciaire suffisant dans la question et que la Cour devrait exercer son pouvoir discrétionnaire pour lui nier la qualité pour agir.

Le 18 avril 1983, le demandeur a produit une déclaration amendée par laquelle il renouvelait les allégations de violation de la *Déclaration canadienne des droits*, S.R.C. 1970, app. III. Il ajoutait des allégations de violation de la *Charte canadienne des droits et libertés*, qui était entrée en vigueur le 17 avril 1982. Il demandait les redressements suivants:

[TRADUCTION]

a) Une ordonnance de la Cour déclarant que les par. 251(4), (5) et (6) du *Code criminel* sont *ultra vires*, inconstitutionnels, nuls et inopérants;

b) Une ordonnance de la Cour déclarant que toutes les dispositions des lois du Parlement du Canada et tous les textes juridiques qui visent à autoriser l'utilisation de fonds publics pour les objets mentionnés aux par. 251(4), (5) et (6) du *Code criminel* sont *ultra vires*, inconstitutionnels, nuls et inopérants et que le versement de ces sommes est illégal;

c) Les dépens de la présente action;

d) Tout autre redressement que la Cour estime juste et approprié.

La Cour du Banc de la Reine de la Saskatchewan a rejeté les arguments de M. Borowski fondés sur l'article premier de la *Déclaration canadienne*

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

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

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

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

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

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

des droits. Le juge Matheson a décidé que les arrêts *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616 (ci-après *Morgentaler c. La Reine (nº 1)*), et *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), (autorisation de pourvoi refusée, [1981] 1 R.C.S. viii), concluaient que la *Déclaration canadienne des droits* ne permettait pas aux tribunaux de juger de la teneur ou de la sagesse des lois.

Le juge Matheson souligne que M. Borowski soutient essentiellement, en vertu de la *Charte*, que le fœtus est une personne et devrait donc être protégé par l'art. 7 de la *Charte*. La Cour conclut toutefois que les par. 251(4), (5) et (6) ne violent pas la *Charte* puisque le fœtus n'est pas visé par le mot «chacun» et ne bénéficie donc pas de l'application de l'art. 7.

En appel, M. Borowski n'a plus soutenu que la contribution du gouvernement au financement des avortements était illégale. La Cour d'appel de la Saskatchewan a rejeté l'appel de M. Borowski en statuant que ni l'art. 7 ni l'art. 15 (qui était entré en vigueur le 17 avril 1985, avant l'audition de l'appel) ne s'appliquent au fœtus. Au nom de la cour, le juge Gerwing a examiné l'histoire du droit relatif au fœtus ainsi que la formulation de l'art. 7 et sa genèse législative, et il a conclu que les garanties de l'art. 7 ne s'appliquent pas à l'enfant à naître. De même, la cour a conclu que le fœtus n'est pas visé par les mots «personne» et «tous» aux fins de l'art. 15.

Cette Cour a accordé l'autorisation de pourvoi le 3 septembre 1987. Les moyens invoqués par l'appelant dans sa requête en autorisation visent principalement les art. 7 et 15 de la *Charte*. Le 7 octobre 1987, le juge McIntyre formulait ainsi les questions constitutionnelles, conformément à l'art. 32 des *Règles de la Cour suprême*, DORS/83-74:

1. Un enfant conçu a-t-il le droit à la vie que garantit l'art. 7 de la *Charte canadienne des droits et libertés*?

2. Si la réponse à la question 1 est affirmative, les par. 251(4), (5), (6) du *Code criminel* violent-ils ou nient-ils les principes de justice fondamentale contrairement à l'art. 7 de la *Charte canadienne des droits et libertés*?

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

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

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

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

In July of 1988 in light of this Court's judgment in *R. v. Morgentaler (No. 2)*, *supra*, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the *Criminal Code* had been nullified and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child *en ventre sa mère* is entitled to the protection of ss. 7 and 15 of the *Charter* respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

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

3. L'enfant conçu a-t-il le droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination en raison de l'âge ou de déficiences mentales ou physiques, que garantit l'art. 15 de la *Charte canadienne des droits et libertés*?

4. Si la réponse à la question 3 est affirmative, les par. 251(4), (5), (6) du *Code criminel* violent-ils ou nient-ils les droits garantis par l'art. 15?

5. Si la réponse à la question 2 est affirmative et si la réponse à la question 4 est affirmative, les par. 251(4), (5), (6) du *Code criminel* sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Le 28 janvier 1988, après avoir autorisé le pourvoi en l'espèce, la Cour a rendu l'arrêt *R. c. Morgentaler (N° 2)*, précité, dans lequel elle a jugé que l'art. 251 viole l'art. 7 de la *Charte*. En conséquence, elle a déclaré inopérant l'ensemble de l'art. 251.

En juillet 1988, en raison de l'arrêt *R. c. Morgentaler (n° 2)* de cette Cour, le procureur général du Canada a demandé l'ajournement de l'audition du pourvoi. L'intimé soutenait que le litige concernant l'art. 251 du *Code criminel* était maintenant sans objet puisque cet article avait été déclaré inopérant et que les deux autres questions constitutionnelles (les questions 1 et 3), concernant le droit de l'enfant à naître à la protection des art. 7 et 15 de la *Charte*, ne pouvaient être séparées des questions constitutionnelles qui étaient devenues théoriques. Bien que l'intimé ait soutenu que la cause était théorique, il n'a pas demandé l'annulation du pourvoi. Le juge en chef Dickson a rejeté la demande d'ajournement le 19 juillet 1988. La Cour doit donc traiter de la question du caractère théorique du litige.

Je suis d'avis de rejeter le pourvoi pour les motifs suivants: (1) la cause de M. Borowski est devenue théorique et (2) il a perdu la qualité nécessaire pour agir. L'annulation de l'art. 251 a fait disparaître sa cause d'action. La demande initiale de redressement n'a plus d'objet. Le fondement même de la qualité pour agir reconnue par cette Cour dans sa décision antérieure a lui aussi disparu.

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Mootness

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

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

Le caractère théorique

La doctrine relative au caractère théorique est un des aspects du principe ou de la pratique générale voulant qu'un tribunal peut refuser de juger une affaire qui ne soulève qu'une question hypothétique ou abstraite. Le principe général s'applique quand la décision du tribunal n'aura pas pour effet de résoudre un litige qui a, ou peut avoir, des conséquences sur les droits des parties. Si la décision du tribunal ne doit avoir aucun effet pratique sur ces droits, le tribunal refuse de juger l'affaire. Cet élément essentiel doit être présent non seulement quand l'action ou les procédures sont engagées, mais aussi au moment où le tribunal doit rendre une décision. En conséquence, si, après l'introduction de l'action ou des procédures, surviennent des événements qui modifient les rapports des parties entre elles de sorte qu'il ne reste plus de litige actuel qui puisse modifier les droits des parties, la cause est considérée comme théorique. Le principe ou la pratique général s'applique aux litiges devenus théoriques à moins que le tribunal n'exerce son pouvoir discrétionnaire de ne pas l'appliquer. J'examinerai plus loin les facteurs dont le tribunal tient compte pour décider d'exercer ou non ce pouvoir discrétionnaire.

La démarche suivie dans des affaires récentes comporte une analyse en deux temps. En premier, il faut se demander si le différend concret et tangible a disparu et si la question est devenue purement théorique. En deuxième lieu, si la réponse à la première question est affirmative, le tribunal décide s'il doit exercer son pouvoir discrétionnaire et entendre l'affaire. La jurisprudence n'indique pas toujours très clairement si le mot «théorique» (*moot*) s'applique aux affaires qui ne comportent pas de litige concret ou s'il s'applique seulement à celles de ces affaires que le tribunal refuse d'entendre. Pour être précis, je considère qu'une affaire est «théorique» si elle ne répond pas au critère du «litige actuel». Un tribunal peut de toute façon choisir de juger une question théorique s'il estime que les circonstances le justifient.

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When is an Appeal Moot?—The Authorities

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

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

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

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

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

Quand un pourvoi est-il théorique?—La jurisprudence

La première étape de l'analyse exige qu'on se demande s'il reste un litige actuel. Diverses circonstances, dont je vais donner des exemples, peuvent faire disparaître un litige et rendre la question théorique.

Dans l'arrêt *The King ex rel. Tolfree v. Clark*, [1944] R.C.S. 69, cette Cour a refusé d'accorder une autorisation de pourvoi à des requérants qui demandaient un jugement interdisant aux intimés d'exercer leurs fonctions de députés de l'assemblée législative de l'Ontario et de participer à ses délibérations. L'assemblée législative avait été dissoute avant l'audition de l'affaire par cette Cour. Le juge en chef Duff, au nom de la Cour, dit à la p. 72:

> [TRADUCTION] Il s'agit d'une de ces affaires où les circonstances auxquelles les procédures des tribunaux d'instance inférieure se rapportent et sur lesquelles elles sont fondées n'existent plus, le substratum du litige a disparu. Selon les principes reconnus, il n'est plus possible de connaître du pourvoi. [Je souligne.]

Dans l'affaire *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 R.C.S. 363, l'abrogation du règlement municipal contesté avant l'audition du pourvoi a entraîné la conclusion que l'appelant n'avait pas d'intérêt réel et qu'une décision n'aurait pas de conséquence pour les parties, sauf pour les dépens. De même, dans une situation analogue à l'espèce, le Conseil privé a refusé de se prononcer sur la constitutionnalité de dispositions législatives contestées parce que les lois en cause avaient été abrogées avant l'audition: *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (C.P.)

Certains pourvois n'ont pas été entendus dans des cas où l'appelant avait pris l'engagement de verser à l'intimé les dommages-intérêts accordés par les cours d'instance inférieure et les dépens, quelle que soit l'issue du pourvoi: *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] R.C.S. 385, et *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111. Dans l'affaire *Coca-Cola v. Mathews*, le juge en chef Rinfret a statué que l'engagement avait comme conséquence

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that the Court would have been forced to decide an abstract proposition of law.

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

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

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

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

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,

d'éliminer tout litige entre les parties de sorte que la Cour aurait été forcée de se prononcer sur une question juridique abstraite.

Dans un autre cas, la vente d'un restaurant pour lequel on cherchait à obtenir un renouvellement du permis exigé par le règlement municipal contesté avait rendu la question théorique: *Vic Restaurant Inc. v. City of Montreal*, [1959] R.C.S. 58. Pour certains problèmes de courte durée, le litige n'existe plus quand l'affaire est portée en appel. C'est ce qui est arrivé dans l'affaire *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] R.C.S. 628, quand la fin de la grève qui opposait les parties a mis fin au litige concernant la validité de l'injonction qui interdisait certains actes de grève à l'une de ces parties.

Un changement dans la situation des parties à une action peut aussi éliminer l'aspect tangible du litige. Le décès d'une partie qui contestait la validité d'une audition sur la révocation de sa libération conditionnelle (*Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481 (C.A.)) et, dans un autre cas, le décès d'une partie qui contestait une contravention pour excès de vitesse (*R. c. Mercure*, [1988] 1 R.C.S. 234) ont mis fin à des litiges concrets.

De même, l'inapplicabilité d'une loi à celui qui en conteste la validité rend le litige théorique: *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357. Une situation semblable se présente quand l'appel d'une déclaration de culpabilité est considéré comme théorique parce que l'accusé a purgé la peine avant l'audition de l'appel: *Re Maltby and Attorney-General of Saskatchewan* (1984), 10 D.L.R. (4th) 745 (C.A. Sask.)

La question du caractère théorique a été étudiée plus fréquemment aux États-Unis, dans la jurisprudence et la doctrine, et l'analyse du principe y est plus développée. Cela tient vraisemblablement au par. 2(1) de l'article III de la Constitution américaine qui exige qu'il y ait «une cause ou un différend»:

> **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

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or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

États-Unis, des traités conclus, ou qui seraient conclus, sous leur autorité; à toute 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 concessions d'autres États; entre un État ou ses citoyens et des États, citoyens ou sujets étrangers.

(Traduction de S. Rials, Presses Universitaires de France.)

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Supreme Court" (1974), 88 *Harvard L.R.* 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in *Hall v. Beals*, 396 U.S. 45 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in *Sibron v. New York*, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

Cependant, en dépit de la consécration du principe dans la Constitution, la doctrine du caractère théorique a ses sources dans des principes de *common law* semblables à ceux qui prévalent au Canada: voir «The Mootness Doctrine in the Supreme Court» (1974), 88 *Harvard L.R.* 373, à la p. 374. Les cas où l'on a conclu au caractère théorique de l'action sont semblables à ceux du Canada. Par exemple, dans *Hall v. Beals*, 396 U.S. 45 (1969), la contestation par un électeur du Colorado de la condition de résidence de six mois a été déclarée théorique parce qu'une modification de la loi avait soustrait le demandeur à l'application de cette loi. La question a été soulevée dans l'affaire *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), parce que le défendeur avait volontairement mis fin à la conduite illégale alléguée. De même, dans *Sibron v. New York*, 392 U.S. 40 (1968), le caractère théorique a été invoqué parce que l'accusé avait fini de purger sa peine avant l'appel de sa déclaration de culpabilité.

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

La jurisprudence américaine manifeste le même souci de juger une action au fond dans certaines circonstances même si le litige n'est plus ni concret ni tangible. La règle selon laquelle les tribunaux ne se prononcent pas sur des questions abstraites, hypothétiques ou contingentes n'est pas absolue (voir: Tribe, *American Constitutional Law* (2e éd. 1988), à la p. 84; Kates et Barker, «Mootness in Judicial Proceedings: Toward a Coherent Theory» (1974), 62 *Calif. L.R.* 1385). L'analyse en deux temps permet à une cour d'entendre un appel au fond même si la question est théorique.

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Is this Appeal Moot?

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

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

32. (1) When a party to an appeal

(a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,

(b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.

such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court

Le présent pourvoi est-il théorique?

À mon avis, il n'y a plus de litige actuel ni de différend concret puisque le substratum du pourvoi de M. Borowski a disparu. Son action était fondée sur une contestation de la constitutionnalité des par. 251(4), (5) et (6) du *Code criminel*. Cet article ayant été déclaré inopérant par l'arrêt *R. c. Morgentaler (nº 2)*, précité, la raison d'être de l'action a disparu. Aucun des redressements demandés dans la déclaration n'est pertinent. Trois des cinq questions constitutionnelles énoncées visent expressément l'art. 251 et n'ont plus d'objet. Les deux autres ont trait à la portée des droits garantis par les art. 7 et 15 de la *Charte* et ne peuvent être traitées séparément de la contestation de l'art. 251. Ces questions étaient accessoires à la question principale de l'inconstitutionnalité des dispositions du *Code criminel* relatives à l'avortement. Elles n'étaient qu'une étape du processus d'examen des dispositions contestées en vertu de la *Charte*.

De toute façon, cette Cour n'est pas liée par la formulation d'une question constitutionnelle. La question ne peut servir non plus à transformer un pourvoi en renvoi: *Vadeboncœur c. Landry*, [1977] 2 R.C.S. 179, aux pp. 187 et 188, et *Bisaillon c. Keable*, [1983] 2 R.C.S. 60, à la p. 71. La procédure établie par l'art. 32 des *Règles de la Cour suprême* ne vise pas à introduire de nouvelles questions, mais à définir avec précision les questions constitutionnelles litigieuses qui ressortent du dossier. L'article 32 dit:

32. (1) Lorsque, dans le cas d'un pourvoi autorisé par la Cour, par la cour de dernier ressort d'une province, par la Cour d'appel fédérale ou d'un pourvoi de plein droit, une partie

a) entend contester la validité ou l'applicabilité constitutionnelle d'une loi du Parlement du Canada ou d'une loi, de la législature d'une province, ou de l'un de leurs règlements d'application,

b) entend plaider le caractère inopérant d'une loi du Parlement du Canada ou d'une loi de la législature d'une province ou de leurs règlements d'application,

elle doit, après avoir donné un avis aux autres parties et dans les 30 jours de l'autorisation de pourvoi ou de

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of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

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

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

The Exercise of Discretion: Relevant Criteria

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

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

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully

l'inscription de l'avis de pourvoi, s'adresser au Juge en chef ou à un juge pour que soit formulée la question.

Les questions ne peuvent donc pas servir de fondement distinct à un pourvoi qui est par ailleurs théorique.

Compte tenu de ce qui précède, je conclus que le pourvoi est théorique. Il est donc nécessaire d'aborder la seconde étape de l'analyse et d'examiner les éléments sur lesquels la Cour devrait se fonder pour décider d'exercer son pouvoir discrétionnaire pour entendre ou refuser d'entendre le pourvoi.

L'exercice du pouvoir discrétionnaire: les critères applicables

Puisque le pouvoir discrétionnaire à exercer concerne l'application d'une politique ou d'une pratique de la Cour, il n'est pas surprenant de ne pas pouvoir dégager de la jurisprudence un ensemble précis de critères. Aux États-Unis, le même problème a amené des commentateurs à dire que [TRADUCTION] «le droit est un fatras de théories incohérentes et disparates, ce qui rend indispensable une généralisation judiciaire convaincante.» (Kates et Barker, «Mootness in Judicial Proceedings: Toward a Coherent Theory», précité, à la p. 1387). J'ajouterais qu'il n'est pas souhaitable d'aller au-delà d'une généralisation convaincante parce qu'une liste exhaustive aurait comme conséquence d'entraver indûment, pour l'avenir, le pouvoir discrétionnaire de la Cour. Il s'agit néanmoins d'un pouvoir discrétionnaire à exercer de façon judiciaire selon les principes établis.

Pour formuler des lignes directrices applicables à l'exercice du pouvoir discrétionnaire visant à écarter une pratique habituelle, il est utile d'en étudier les assises. Dans la mesure où une assise donnée de cette pratique est faible ou inexistante, les raisons de l'appliquer diminuent ou disparaissent.

La première raison d'être de la politique ou de la pratique en question tient à ce que la capacité des tribunaux de trancher des litiges a sa source dans le système contradictoire. L'exigence du débat contradictoire est l'un des principes fondamentaux de notre système juridique et elle tend à garantir

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argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in *Vic Restaurant Inc. v. City of Montreal*, *supra*. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

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

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

que les parties ayant un intérêt dans l'issue du litige en débattent complètement tous les aspects. Il semble que cette exigence puisse être remplie si, malgré la disparition du litige actuel, le débat contradictoire demeure. Par exemple, même si la partie qui a engagé des procédures en justice n'a plus d'intérêt direct dans l'issue, il peut subsister des conséquences accessoires à la solution du litige qui fournissent le contexte contradictoire nécessaire. C'est un des facteurs qui a joué dans la décision de cette Cour d'exercer son pouvoir discrétionnaire dans l'affaire *Vic Restaurant Inc. v. City of Montreal*, précitée. Après la vente du restaurant pour lequel on demandait le renouvellement du permis d'exploitation et de vente de boissons alcooliques, il n'était plus possible de délivrer le *mandamus* relatif au permis. Néanmoins, subsistaient des poursuites contre l'appelante pour infraction au règlement municipal que visait l'action en justice. La détermination de la validité du règlement avait des conséquences accessoires pour l'appelante et lui donnait l'intérêt requis pour agir qu'autrement elle n'aurait pas eu.

Aux États-Unis, les conséquences accessoires ont un rôle reconnu dans la décision d'exercer le pouvoir discrétionnaire d'entendre une affaire. Dans *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), on avait demandé à la Cour suprême des États-Unis de se prononcer sur une ordonnance de l'Interstate Commerce Commission qui imposait un plafond sur certains prix de transport. Malgré la caducité de l'ordonnance, la Cour a conclu, entre autres choses, que la responsabilité éventuelle de la société de chemins de fer envers les expéditeurs constituait une conséquence accessoire qui justifiait une décision sur le fond. L'arrêt *Sibron v. New York*, précité, consacre le principe d'après lequel les conséquences accessoires d'une cause d'action terminée justifient un appel. Dans cette affaire, l'appelant avait interjeté appel de sa déclaration de culpabilité après avoir déjà purgé sa peine. Le juge en chef Warren dit, à la p. 55:

> [TRADUCTION] . . . la plupart des déclarations de culpabilité comportent des conséquences juridiques accessoires défavorables. Cette seule «possibilité» suffit pour empêcher qu'une affaire pénale se termine «ignominieusement dans les limbes des affaires théoriques».

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

The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation.*) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

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

Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, *supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case

Au Canada, les arrêts *Law Society of Upper Canada c. Skapinker* et *R. c. Mercure*, précités, illustrent le mécanisme de ce principe. Dans ces affaires, l'intérêt des intervenants dans l'issue du pourvoi fournissait le contexte contradictoire nécessaire pour permettre à la Cour d'entendre ces causes.

La deuxième grande raison d'être de la doctrine du caractère théorique tient à l'économie des ressources judiciaires. (Voir: Sharpe, «Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide», *Charter Litigation.*) La triste réalité est qu'il nous faut rationner et répartir entre les justiciables des ressources judiciaires limitées. Le fait que les litiges actifs qui reçoivent une autorisation de pourvoi en cette Cour représentent une faible proportion du nombre total des demandes présentées, témoigne de cette réalité. La saine économie des ressources judiciaires n'empêche pas l'utilisation de ces ressources, si limitées soient-elles, à la solution d'un litige théorique, lorsque les circonstances particulières de l'affaire le justifient.

L'économie des ressources judiciaires n'empêche pas non plus d'entendre des affaires devenues théoriques dans les cas où la décision de la cour aura des effets concrets sur les droits des parties même si elle ne résout pas le litige qui a donné naissance à l'action. L'influence de ce facteur, combiné au premier facteur mentionné plus haut, est évidente dans l'affaire *Vic Restaurant Inc. v. City of Montreal*, précitée.

De même, il peut être justifié de consacrer des ressources judiciaires à des causes théoriques qui sont de nature répétitive et de courte durée. Pour garantir que sera soumise aux tribunaux une question importante qui, prise isolément, pourrait échapper à l'examen judiciaire, on peut décider de ne pas appliquer strictement la doctrine du caractère théorique. Ce fut le cas dans l'arrêt *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, précité. L'affaire portait sur la validité d'une injonction interlocutoire qui interdisait certains actes de grève. Quand l'affaire a été soumise à cette Cour, la grève avait déjà fait l'objet d'un règlement. C'est le résultat habituel d'une injonction provi-

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that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, and Kates and Barker, *supra*, at pp. 1429-31. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, *supra*, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

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

> While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court.

soire dans les conflits du travail. Si la question devait être tranchée un jour, il était presque inévitable qu'elle le soit dans un cas devenu théorique. La Cour a donc exercé son pouvoir discrétionnaire pour entendre l'affaire. D'autres exemples sont: *Le Syndicat des Employés du Transport de Montréal c. Procureur général du Québec*, [1970] R.C.S. 713, et *Wood, Wire and Metal Lathers' Int. Union c. United Brotherhood of Carpenters and Joiners of America*, [1973] R.C.S. 756. Le simple fait, cependant, que la même question puisse se présenter de nouveau, et même fréquemment, ne justifie pas à lui seul l'audition de l'appel s'il est devenu théorique. Il est préférable d'attendre et de trancher la question dans un véritable contexte contradictoire, à moins qu'il ressorte des circonstances que le différend aura toujours disparu avant d'être résolu.

On justifie également de façon assez imprécise, l'utilisation de ressources judiciaires dans des cas où se pose une question d'importance publique qu'il est dans l'intérêt public de trancher. Il faut mettre en balance la dépense de ressources judiciaires et le coût social de l'incertitude du droit. Voir *Ministre de la Main-d'œuvre et de l'Immigration c. Hardayal*, [1978] 1 R.C.S. 470, et Kates et Barker, dans l'ouvrage précité, aux pp. 1429 à 1431. Le juge Locke a fait allusion à cela dans l'arrêt *Vic Restaurant Inc. v. City of Montreal*, précité, à la p. 91: [TRADUCTION] «La question a, je l'ai dit, de l'importance pour toutes les institutions municipales du Canada.»

C'est le motif pour lequel cette Cour a décidé d'exercer son pouvoir discrétionnaire dans le *Renvoi sur l'opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793. La question de la constitutionnalité du rapatriement de la Constitution était devenue théorique après le rapatriement. La Cour dit à la p. 806:

> Tout en conservant son pouvoir discrétionnaire d'entendre ou non un pourvoi de plein droit lorsque la question est devenue théorique, la Cour peut, dans l'exercice de ce pouvoir, tenir compte de l'importance de la question constitutionnelle tranchée par une cour d'appel dont la décision serait soustraite à l'examen ultérieur de cette Cour.

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In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed heavily in the decision of the majority of this Court in *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90.

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

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

The latter function of the mootness doctrine—political flexibility—can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it

Dans les présentes circonstances, il appert souhaitable de répondre à la question constitutionnelle afin de dissiper tous les doutes qu'elle suscite; voilà pourquoi il y sera répondu.

Manifestement, la présence d'une question d'importance nationale dans un pourvoi, qui est par ailleurs théorique, ne suffit pas. Tous les pourvois en cette Cour doivent avoir une importance nationale, à l'exception des pourvois de plein droit considérés assez importants par le législateur pour être soumis à cette Cour. Il faut aussi l'élément additionnel que constitue le coût social de laisser une question sans réponse. Ce facteur paraît avoir largement influencé la décision de la majorité dans l'arrêt de cette Cour *Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90.

La troisième raison d'être de la doctrine du caractère théorique tient à ce que la Cour doit prendre en considération sa fonction véritable dans l'élaboration du droit. La Cour doit se montrer sensible à sa fonction juridictionnelle dans notre structure politique. On pourrait penser que prononcer des jugements sans qu'il y ait de litige pouvant affecter les droits des parties est un empiétement sur la fonction législative. La nécessité de garder une certaine souplesse à cet égard a été plus clairement reconnue aux États-Unis où la notion de caractère théorique est un aspect du concept plus large de justiciabilité. (Voir: Kates et Barker, «Mootness in Judicial Proceedings: Toward a Coherent Theory», précité, et Tribe, *American Constitutional Law*, précité, à la p. 67.)

À mon avis, c'est aussi l'un des trois objets fondamentaux de la doctrine canadienne du caractère théorique et un facteur très important en l'espèce. Je suis essentiellement d'accord avec ce que disent P. Macklem et E. Gertner dans «Re Skapinker and Mootness Doctrine» (1984), 6 *Sup. Ct. L. Rev.* 369, à la p. 373:

[TRADUCTION] Cette dernière fonction de la doctrine du caractère théorique—la souplesse politique—peut être considérée comme le degré supplémentaire de souplesse, à l'égard d'un différend tenu pour théorique, dans le rôle que joue la Cour dans l'élaboration du droit. La doctrine du caractère théorique permet à la Cour de ne pas entendre une affaire parce qu'il n'existe plus de

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is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

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

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

Exercise of Discretion: Application of Criteria

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

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

litige entre les parties, même si la Cour estime que la question a une importance nationale. Même si elle a des liens avec le facteur d'économie des ressources judiciaires, parce qu'il s'agit de déterminer si la décision de l'affaire aura comme conséquence de créer une jurisprudence inutile, la souplesse politique permet à la Cour de tenir compte de son rôle dans le cadre constitutionnel canadien et traduit en même temps la mesure dans laquelle la Cour peut diriger l'évolution du droit.

Je préfère toutefois ne pas utiliser l'expression «souplesse politique», afin d'éviter toute confusion possible avec la doctrine des questions politiques. Au moment de décider d'exercer le pouvoir discrétionnaire d'entendre une affaire théorique, la Cour doit être consciente de la mesure dans laquelle elle pourrait s'écarter de son rôle traditionnel.

En exerçant son pouvoir discrétionnaire à l'égard d'un pourvoi théorique, la Cour doit tenir compte de chacune des trois raisons d'être de la doctrine du caractère théorique. Cela ne signifie pas qu'il s'agit d'un processus mécanique. Il se peut que les principes examinés ici ne tendent pas tous vers la même conclusion. L'absence d'un facteur peut prévaloir malgré la présence de l'un ou des deux autres, ou inversement.

L'exercice du pouvoir discrétionnaire: application des critères

Pour l'application de ces critères au présent pourvoi, je ne crains pas vraiment l'absence de débat contradictoire. Le pourvoi a été plaidé avec autant de zèle et de ferveur de la part des deux parties que si la question n'avait pas été théorique.

Le second facteur à considérer est l'économie des ressources judiciaires. L'avocat de l'appelant soutient qu'un dossier imposant a été constitué devant les tribunaux d'instance inférieure et que ce dossier deviendrait inutile si l'affaire n'était pas jugée au fond. Quoique cet argument ait du mérite, on peut dire la même chose de presque tous les pourvois soumis à cette Cour. Faire droit à cet argument aurait comme conséquence d'affaiblir la doctrine du caractère théorique qui par définition s'applique si, à quelque étape que ce soit, le fondement de l'action disparaît. Il n'est pas possible non plus de faire jouer en faveur de l'appelant le fait que la Cour a mis les questions préliminaires en délibéré et a entendu le pourvoi. À défaut de

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course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

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

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

requête en annulation, c'était la seule solution pratique pour éviter la division du pourvoi. Il serait anormal qu'en mettant en délibéré la question de la nature théorique et en entendant le pourvoi au fond, la Cour compromette son pouvoir discrétionnaire de le décider.

Aucun des autres facteurs dont j'ai parlé et qui justifieraient de consacrer des ressources judiciaires à l'affaire ne s'applique. L'affaire n'aura pas d'effets accessoires pratiques sur les droits des parties. Il ne s'agit pas d'une situation susceptible à la fois de se répéter et de ne jamais être soumise aux tribunaux. Il sera probablement possible de soumettre la question à la Cour à propos d'une loi précise ou peut-être à propos de l'examen d'un acte gouvernemental précis. De plus en l'espèce, une décision dans l'abstrait sur les droits du fœtus ne favoriserait pas nécessairement l'économie des ressources judiciaires puisqu'il est probable que, de toute façon, les tribunaux soient appelés à se prononcer sur des textes législatifs ou des actes gouvernementaux précis. Quoique je n'exprime pas d'opinion sur les droits du fœtus, je ne suis pas certain du tout qu'une décision sur le fond éliminerait la nécessité de litiges répétés.

De plus, même s'il soulève une question de grande importance pour le public, il ne s'agit pas d'un cas où il serait dans l'intérêt du public de statuer sur le fond de la question pour déterminer l'état du droit. L'appelant demande une interprétation générale des art. 7 et 15 de la *Charte canadienne des droits et libertés*. Dans le contexte d'une loi, les droits du fœtus pourraient être examinés ou, du moins, considérés par rapport aux droits garantis à la femme par l'art. 7: voir *R. c. Morgentaler (n° 2)*, précité, le juge en chef Dickson, à la p. 75, le juge Beetz, aux pp. 122 et 123, et le juge Wilson, aux pp. 181 et 182. Un jugement en faveur de la thèse de l'appelant, suivant laquelle le fœtus jouit des droits garantis par l'art. 7 dès sa conception, reviendrait à trancher la question hors de son contexte. Les médecins et les hôpitaux seraient alors obligés de se demander comment appliquer une telle décision et respecter les droits garantis aux femmes par l'art. 7. Pendant les plaidoiries, on a demandé à l'avocate de R.E.A.L. Women ce que les médecins feraient, si l'appelant

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appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

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

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

Standing

Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the *Criminal Code*

avait gain de cause, dans le cas d'une femme enceinte dont la vie ne pourrait être sauvée que par un avortement. Il a répondu que les médecins et les législateurs passeraient quelques nuits blanches à chercher une solution. Un tel état d'incertitude n'est certainement pas dans l'intérêt public. Au lieu de clarifier le droit, une décision en faveur de l'appelant aurait l'effet contraire.

Même si j'étais enclin à me prononcer en faveur de l'appelant pour les deux premiers facteurs, je refuserais d'exercer le pouvoir discrétionnaire de rendre une décision sur le fond du pourvoi à cause du troisième facteur. Un des éléments de ce troisième facteur est la nécessité d'être sensible à l'efficacité et à l'efficience de l'intervention judiciaire. La nécessité pour les tribunaux de faire preuve d'une certaine souplesse dans l'application de la doctrine du caractère théorique exige plus que la simple considération de l'importance de la question. L'appelant demande une opinion juridique sur l'interprétation de la *Charte canadienne des droits et libertés* en l'absence de loi ou d'acte gouvernemental qui donnerait lieu à l'application de la *Charte*. Seul le gouvernement peut le faire. L'appelant cherche en réalité à transformer le pourvoi en renvoi d'initiative privée. En fait, il ne cherche même pas à faire trancher la question qui était l'objet de l'action, c'est-à-dire la validité de l'art. 251 du *Code criminel*. Il veut maintenant poser une question qui a trait à la *Charte canadienne des droits et libertés* uniquement. On ne demande pas une réponse à une question théorique, mais une réponse à une question différente, à une question abstraite. Faire droit à cette demande empiéterait sur le droit du pouvoir exécutif d'ordonner un renvoi et pourrait empêcher le législateur de prendre une décision, en lui dictant les termes des dispositions législatives à adopter. Ce serait une dérogation marquée au rôle traditionnel de la Cour.

Ayant décidé que le pourvoi est théorique, je suis d'avis de refuser d'exercer le pouvoir discrétionnaire de la Cour pour le trancher au fond.

La qualité pour agir

Dans son action initiale, M. Borowski soutenait que les par. 251(4), (5) et (6) du *Code criminel*

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violated the s. 1 right to life of the *Canadian Bill of Rights*: *Minister of Justice of Canada v. Borowski*, *supra*. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

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

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

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

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

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

By virtue of s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*, there are two possi-

enfreignaient le droit à la vie garanti par l'article premier de la *Déclaration canadienne des droits*: *Ministre de la Justice du Canada c. Borowski*, précité. Cette Cour a statué que M. Borowski avait qualité pour agir parce qu'il pouvait faire la preuve d'«un intérêt véritable» quant à la validité de la loi.

La qualité pour agir a été reconnue à M. Borowski parce que celui-ci voulait contester une loi précise. Le juge Martland a examiné les arrêts antérieurs de cette Cour relatifs à la qualité pour agir, *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, et *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265, et il a conclu que l'appelant avait qualité pour agir parce que «à titre de citoyen, [il avait] un intérêt véritable quant à la validité de la loi» contestée (à la p. 598).

La Cour s'est essentiellement appuyée sur l'arrêt *Thorson*, précité, dans lequel le juge Laskin (plus tard Juge en chef) a dit, au nom de la majorité, à la p. 161:

> À mon avis, la qualité pour agir d'un contribuable fédéral qui cherche à contester la constitutionnalité d'une loi fédérale est une matière qui relève particulièrement de l'exercice du pouvoir discrétionnaire des cours de justice, puisqu'elle se rapporte à l'efficacité du recours. La question de savoir si la question qu'on cherche à soulever peut être réglée par les tribunaux est au cœur de ce pouvoir discrétionnaire . . . [Je souligne.]

Je crois que ces arrêts ont clairement élargi le fondement de la qualité pour agir quand une loi précise fait l'objet d'une contestation fondée sur des moyens constitutionnels.

Il s'est produit deux changements importants dans la nature de l'action en l'espèce depuis que la Cour a reconnu à M. Borowski la qualité pour agir en 1981. D'abord la demande actuelle se fonde principalement sur l'allégation que le droit du fœtus à la vie et à l'égalité est garanti par les art. 7 et 15 de la *Charte canadienne des droits et libertés*. Deuxièmement, en déclarant l'art. 251 inopérant, l'arrêt *R. c. Morgentaler (nº 2)*, précité, a fait disparaître le contexte législatif de la demande.

Par application du par. 24(1) de la *Charte* et du par. 52(1) de la *Loi constitutionnelle de 1982*, il y

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ble means of gaining standing under the *Charter*. Section 24(1) provides:

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

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

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

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

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

Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the *Constitution Act, 1982* is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the *Charter*. What the appellant now seeks is a naked interpretation of two provisions of the *Charter*. This would require the Court to answer a purely abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in

a deux moyens d'avoir qualité pour agir en vertu de la *Charte*. Le paragraphe 24(1) dit:

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

À mon avis, il n'est pas possible d'invoquer en l'espèce le par. 24(1) comme fondement de la qualité pour agir. Le paragraphe 24(1) exige expressément qu'il y ait violation ou négation d'un droit garanti par la *Charte*. La demande de l'appelant ne remplit pas cette condition puisqu'il allègue la violation des droits du fœtus, et non de ses propres droits.

On ne peut non plus se fonder sur le par. 52(1) de la *Loi constitutionnelle de 1982* pour reconnaître à M. Borowski qualité pour agir. Le paragraphe 52(1) dit:

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

Ce paragraphe prévoit donc un autre moyen d'avoir qualité pour agir selon les trois arrêts qui ont étendu la doctrine relative à cette question, les arrêts *Thorson*, *McNeil* et *Borowski*.

Cependant ces trois arrêts portaient sur la contestation d'une loi précise et, de la même manière, une action fondée sur le par. 52(1) de la *Loi constitutionnelle de 1982* doit se limiter à la contestation d'une loi ou d'un acte gouvernemental pris en vertu d'un pouvoir conféré par la loi. Ici, l'appelant ne conteste ni «une loi» ni un acte gouvernemental qui fait jouer les dispositions de la *Charte*. L'appelant demande une interprétation pure et simple de deux dispositions de la *Charte*. Pour ce faire, la Cour devrait ainsi répondre à une question totalement abstraite et, par la même occasion, sanctionner un renvoi d'initiative privée. À mon avis, le fondement initial de la qualité pour agir a disparu et le demandeur n'a plus qualité pour continuer ce pourvoi.

En conséquence, le pourvoi est rejeté et pour le motif qu'il est théorique et pour le motif que l'appelant n'a plus qualité pour agir. À mon avis,

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

Appeal dismissed.

Solicitors for the appellant: Shumiatcher-Fox, Regina.

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

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

Solicitor for the respondent: Frank Iacobucci, Ottawa.

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

au lieu de demander l'ajournement du pourvoi, l'intimé aurait dû demander son annulation. Cette demande aurait certainement dû être présentée après le refus de la demande d'ajournement. En ne le faisant pas, on a occasionné des dépenses inutiles à l'appelant en l'obligeant à préparer et soutenir le présent pourvoi. Dans les circonstances, il convient que l'intimé paie à l'appelant les dépens du présent pourvoi depuis la décision rendue sur la demande d'ajournement le 19 juillet 1988.

Pourvoi rejeté.

Procureurs de l'appelant: Shumiatcher-Fox, Regina.

Procureurs de l'intervenante Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.

Procureur de l'intervenante R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.

Procureur de l'intimé: Frank Iacobucci, Ottawa.

Procureurs de l'intervenant Fonds d'action et d'éducation juridiques pour les femmes (FAEJ): Tory, Tory, DesLauriers & Binnington, Toronto.

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Federal Court of Appeal

Cour d'appel fédérale

Date: 20160125

Docket: A-265-15

Citation: 2016 FCA 22

2016 FCA 22 (CanLII)

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

THE PRIME MINISTER OF CANADA AND THE GOVERNOR GENERAL OF CANADA

Appellants

And

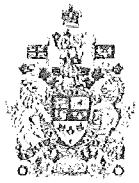
ANIZ ALANI

Respondent

Heard at Vancouver, British Columbia, on January 25, 2016.
Judgment delivered from the Bench at Vancouver, British Columbia, on January 25, 2016.

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.

Federal Court of Appeal



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CORAM: **PELLETIER J.A.**
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BETWEEN:

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Appellants

and

ANIZ ALANI

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on January 25, 2016).

PELLETIER J.A.

[1] We have not been persuaded that the motions judge erred in concluding that it was not plain and obvious that Mr. Alani's application was bound to fail.

[2] We further add that, notwithstanding the Supreme Court's decision in *Hryniak v. Maudlin*, 2014 SCC 7, [2014] 1 S.C.R. 87, it is preferable that the important and complex issues

raised by the application, if they are to be decided, be decided on as complete a record as possible.

[3] The appeal will be dismissed with costs fixed in the amount of $1,500 all inclusive.

"J.D. Denis Pelletier"

J.A.

2016 FCA 22 (CanLII)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-265-15
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON OF THE FEDERAL COURT, DATED MAY 21, 2015, DOCKET NO. T-2506-14)	
STYLE OF CAUSE:	THE PRIME MINISTER OF CANADA AND THE GOVERNOR GENERAL OF CANADA v. ANIZ ALANI
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	JANUARY 25, 2016
REASONS FOR JUDGMENT OF THE COURT BY:	PELLETIER J.A. DE MONTIGNY J.A. GLEASON J.A.
DELIVERED FROM THE BENCH BY:	PELLETIER J.A.

APPEARANCES:

Jan Brongers Oliver Pulleyblank	FOR THE APPELLANTS
Aniz Alani	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPELLANTS
Self-Represented Vancouver, British Columbia	FOR THE RESPONDENT

2016 FCA 22 (CanLII)

Federal Court | Cour fédérale

Date: 20150828

Docket: IMM-7782-14

Citation: 2015 FC 1026

2015 FC 1026 (CanLII)

Toronto, Ontario, August 28, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MAREK HARVAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a negative decision [Decision] of the Refugee Protection Division [RPD] of the Immigration and Refugee Protection Board, dated October 8,

2014, in which the RPD determined that the Applicant is not a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

II. Background

[2] The Applicant, self-represented through the course of the written pleadings, did not attend at Court for his judicial review on August 12, 2015 despite the best efforts of both the Court Registry and the Respondent to communicate with him, including the inability to serve documents on the Applicant over the past few weeks and months.

[3] Furthermore, no counsel or other representative of the Applicant contacted the Court and/or the Respondent in the months leading up to the hearing, or attended at Court for the said judicial review (the date of which has been set since the Order for Leave and Judicial Review was granted by Justice Mactavish on May 14, 2015).

[4] The Respondent contends that this application is moot because the Applicant was removed to the Slovak Republic, pursuant to an Affidavit of Gillian Dale, a paralegal in the Respondent's Office at the Department of Justice, Toronto. This Affidavit sets out the steps that led to the removal of the Applicant to Slovakia, the country in which he claimed persecution. The RPD had refused to grant refugee status in its decision of October 8, 2014, on the basis of concerns regarding (i) credibility and (ii) state protection.

[5] The Respondent contends that this application is now moot because the Applicant can no longer be found to be a Convention refugee under section 96 of the Act in that he is not outside

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his country of nationality. There is no evidence that the Applicant, since his removal to the Slovak Republic on Feb. 16, 2015, has left his native country since his deportation over six months ago.

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[6] Moreover, the Respondent contends that Mr. Harvan is not a person in need of protection pursuant to section 97 of the Act, because according to that section, persons in need of protection are persons in Canada whose removal to their country of nationality would subject them to a danger of torture or risk to life, or of cruel and unusual treatment or punishment.

III. Analysis

[7] The test for mootness comprises a two-step analysis. The first step asks whether the Court's decision would have any practical effect on solving a live controversy between the parties, and the Court should consider whether the issues have become academic, and whether the dispute has disappeared, in which case the proceedings are moot. If the first step of the test is met, the second step is – notwithstanding the fact that the matter is moot – that the Court must consider whether to nonetheless exercise its discretion to decide the case. The Court's exercise of discretion in the second step should be guided by three policy rationales which are as follows:

i. the presence of an adversarial context;

ii. the concern for judicial economy;

iii. the consideration of whether the Court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government.

(See *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at paras 15-17, and 29-40 [*Borowski*]).

[8] With respect to the first step of the *Borowski* test, there is no evidence in this case of any continuing tangible and concrete dispute between the parties, because the Applicant is no longer in Canada to pursue his case, and neither he nor any representative has made any attempt to contact the Respondent or the Court to express any willingness to pursue the matter.

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IV. Applicable Jurisprudence on Mootness

[9] The Respondent points to the Federal Court of Appeal's [FCA] decision in *Solis Perez v Canada (Citizenship and Immigration)*, 2009 FCA 171 [*Solis Perez*] , which held that applications for judicial review in the context of PRRA decisions are moot once the Applicant has been removed from Canada (*Solis Perez* at para 5).

[10] The Chief Justice of this Court subsequently referred to *Solis Perez* in his decision in *Rosa v Canada (Citizenship and Immigration)*, 2014 FC 1234 [*Rosa*], where he held that:

> [37] In my view, the RPD does have the jurisdiction to reconsider an application initially made pursuant to section 96 and in accordance with subsection 99(3) in such circumstances, provided that the applicant is outside each of his or her countries of nationality. Contrary to the Respondent's position, there continues to be a "live controversy" in respect of the application in those circumstances, and therefore, an application for judicial review of the RPD's initial decision is not moot.
>
> ...
>
> [42] In my view, this argument fails to recognize that persons in Mr. Escobar Rosa's situation made their application, pursuant to subsection 99(3), while they were in Canada. If they are able to

> demonstrate that the RPD erred in reaching its decision, they are entitled to have that same application reheard by a differently constituted panel of the RPD, provided that they remain outside each of their countries of nationality, or, if they do not have a country of nationality, outside the country of their former habitual residence, as required by paragraphs 96(a) and (b), respectively.

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[11] Chief Justice Crampton, based on the facts in *Rosa*, held that the application was not moot, and cited jurisprudence holding that negative RPD decisions do not become moot after removal (*San Vincente Freitas v Canada (Citizenship and Immigration),* [1999] 2 F.C. 432 at para 29; *Magusic v Canada (Citizenship and Immigration),* 2014 FC 823 [*Magusic*]; *Thamotharampillai v Canada (Solicitor General*), 2005 FC 756 at para 16).

[12] I note that in *Magusic* at para 4, the Court refused to dismiss the judicial review application for mootness, and concluded that the remedy would not be academic under the first prong of the *Borowski* test, and it was on that basis that the judicial review application was heard and later dismissed.

[13] The facts of this case are different from *Rosa* and the other cases it cited. Rather, it is more analogous to *Dogar v Canada (Minister of Citizenship and Immigration)*, IMM-5719-13, February 16, 2015 [*Dogar*] (an unreported judgment), where Justice Heneghan granted the Respondent's motion to dismiss the judicial review of an RPD decision for mootness. Justice Heneghan ruled that there was no longer an adversarial context between the parties once the applicant had been removed from Canada to her country of nationality. Justice Heneghan concluded that in those circumstances an applicant is barred by the operation of the Act from advancing a claim for protection in Canada against her country of nationality.

[14] In another recent case – *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 345, the Minister's motion for mootness was dismissed. Justice Fothergill certified the following question, currently awaiting a hearing at the Federal Court of Appeal: "[i]s an application for judicial review of a decision of the Refugee Protection Division moot where the individual who is the subject of the decision has involuntarily returned to his or her country of nationality, and, if yes, should the Court normally refuse to exercise its discretion to hear it?"

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[15] After considering the case law referenced above, I, like Justice Heneghan in *Dogar*, find this matter is moot based on the first step of Borowski test: the dispute has disappeared. Furthermore, on the second step, there is no longer an adversarial context, based on the specific and particular factual circumstances before me, namely that (a) the Applicant is no longer in Canada, and is back in his country of nationality, and (b) more significantly, he has not made any effort to continue this or any other litigation leading up to and since his removal on February 16, 2015.

[16] The factors that weigh into my analysis include the following:

i. attempted service of documents by the Respondent on the Applicant were refused;

ii. the Court has been unable to contact the Applicant since the time that the Order granting the Application for Judicial Review was sent by registered mail to the Applicant by the Court's Registry on May 14, 2015 and delivery was refused on May 20, 2015; and

iii. both the Respondent and Registry have since unsuccessfully tried to communicate with the Applicant in preparation for today's hearing. These efforts included attempting to send to the Applicant a Court direction I provided on August 10,

2015 in response to the Respondent's letter dated August 7, 2015, again by registered mail, as well as subsequent attempts to contact the Applicant by email and telephone, all of which were unsuccessful.

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[17] Presumably, this lack of success in contacting the Applicant was at least in part due to the fact that he has been removed from Canada; however, the Court notes that that Applicant neither appointed a representative to continue his litigation, nor provided any forwarding address. These facts are very different from *Molnar* and the cases cited by the Chief Justice in *Rosa* above. In *Molnar*, for instance, the family continued the adversarial context by appointing a legal representative who continued on with the litigation despite their removal to their country of origin (Hungary).

[18] Finally, I note that no application was brought to this Court to stay Mr. Harvan's removal in this case, unlike in *Molnar*, for instance, where the applicants attempted to defer removal through the Canada Border Services Agency [CBSA], and then brought a stay application to this Court challenging that negative CBSA decision.

V. Conclusion

[19] There is no evidence that the Applicant has attempted to continue litigation of this matter and/or his removal. He has failed to contact the Court or his litigation adversary, the Respondent, in the six months since his removal from Canada. Furthermore all efforts of the Court and the Respondent to contact the Applicant over this period have been for naught. I accordingly find

that both prongs of the *Borowski* test have been met, in that there is neither a live controversy under step 1, nor any adversarial context under step 2.

[20] No certified question was raised, and none will issue, although as noted above, guidance on this issue will ensue from a higher court if and when the FCA rules on *Molnar*.

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JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. There are no questions for certification.

3. There is no award as to costs.

"Alan S. Diner"

Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7782-14
STYLE OF CAUSE:	MAREK HARVAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 12, 2015
JUDGMENT AND REASONS	DINER J.
DATED:	AUGUST 27, 2015

2015 FC 1026 (CanLII)

APPEARANCES:

Unrepresented	FOR THE APPLICANT
Nina Chandy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Unrepresented	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT

Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada *Intervener*

INDEXED AS: R. *v.* MORGENTALER

File No.: 19556.

1986: October 7, 8, 9, 10; 1988: January 28.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Life, liberty and security of the person — Fundamental justice — Abortion — Criminal Code prohibiting abortion except where life or health of woman endangered — Whether or not abortion provisions infringe right to life, liberty and security of the person — If so, whether or not such infringement in accord with fundamental justice — Whether or not impugned legislation reasonable and demonstrably justified in a free and democratic society — Canadian Charter of Rights and Freedoms, ss. 1, 7 — Criminal Code, R.S.C. 1970, c. C-34, s. 251.

Constitutional law — Jurisdiction — Superior court powers and inter-delegation — Whether or not therapeutic abortion committees exercising s. 96 court functions — Whether or not abortion provisions improperly delegate criminal law powers — Constitution Act, 1867, ss. 91(27), 96.

Constitutional law — Charter of Rights — Whether or not Attorney General's right of appeal constitutional — Costs — Whether or not prohibition on costs constitutional — Criminal Code, R.S.C. 1970, c. C-34, ss. 605, 610(3).

Criminal law — Abortion — Criminal Code prohibiting abortion and procuring of abortion except where life or health of woman endangered — Whether or not abortion provisions ultra vires Parliament — Whether or not abortion provisions infringe right to life, liberty and security of the person — If so, whether or not such infringement in accord with fundamental justice —

Dr Henry Morgentaler, Dr Leslie Frank Smoling et Dr Robert Scott *Appelants*

c.

Sa Majesté La Reine *Intimée*

et

Le procureur général du Canada *Intervenant*

RÉPERTORIÉ: R. *c.* MORGENTALER

N° du greffe: 19556.

1986: 7, 8, 9, 10 octobre; 1988: 28 janvier.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Lamer, Wilson et La Forest.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Vie, liberté et sécurité de la personne — Justice fondamentale — Avortement — Le Code criminel interdit l'avortement, sauf si la vie ou la santé de la femme est en danger — Les dispositions sur l'avortement portent-elles atteinte au droit à la vie, à la liberté et à la sécurité de la personne? — Si oui, une telle atteinte est-elle en conformité avec la justice fondamentale? — La loi en cause est-elle raisonnable et peut-elle être justifiée dans une société libre et démocratique? — Charte canadienne des droits et libertés, art. 1, 7 — Code criminel, S.R.C. 1970, chap. C-34, art. 251.

Droit constitutionnel — Compétence — Pouvoirs des cours supérieures et délégation — Les comités de l'avortement thérapeutique exercent-ils les fonctions d'une cour créée en vertu de l'art. 96? — Les dispositions sur l'avortement constituent-elles une délégation irrégulière de la compétence en matière criminelle? — Loi constitutionnelle de 1867, art. 91(27), 96.

Droit constitutionnel — Charte des droits — Le droit d'appel du procureur général est-il constitutionnel? — Dépens — L'interdiction relative aux dépens est-elle constitutionnelle? — Code criminel, S.R.C. 1970, chap. C-34, art. 605, 610(3).

Droit criminel — Avortement — Le Code criminel interdit l'avortement et de procurer un avortement, sauf si la vie ou la santé de la femme est en danger — Les dispositions sur l'avortement excèdent-elles les pouvoirs du Parlement? — Les dispositions sur l'avortement portent-elles atteinte au droit à la vie, à la liberté et à la sécurité de la personne? — Si oui, une telle atteinte est-elle en conformité avec la justice fondamentale? — La loi en cause est-elle raisonnable et

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Whether or not impugned legislation reasonable and demonstrably justified in a free and democratic society.

Criminal law — Juries — Address to jury advising them to ignore law as stated by judge — Counsel wrong.

Appellants, all duly qualified medical practitioners, set up a clinic to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4) of the *Criminal Code*. The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances. Indictments were preferred against the appellants charging that they had conspired with each other with intent to procure abortions contrary to ss. 423(1)(*d*) and 251(1) of the *Criminal Code*.

Counsel for the appellants moved to quash the indictment or to stay the proceedings before pleas were entered on the grounds that s. 251 of the *Criminal Code* was *ultra vires* the Parliament of Canada, in that it infringed ss. 2(*a*), 7 and 12 of the *Charter*, and was inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. The trial judge dismissed the motion, and the Ontario Court of Appeal dismissed an appeal from that decision. The trial proceeded before a judge sitting with a jury, and the three accused were acquitted. The Crown appealed the acquittal and the appellants filed a cross-appeal. The Court of Appeal allowed the appeal, set aside the acquittal and ordered a new trial. The Court held that the cross-appeal related to issues already raised in the appeal, and the issues, therefore, were examined as part of the appeal.

The Court stated the following constitutional questions:

1. Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?
2. If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

peut-elle être justifiée dans une société libre et démocratique?

Droit criminel — Jury — Exposé au jury lui conseillant d'ignorer les règles de droit énoncées par le juge — Erreur de l'avocat.

Les appelants sont tous docteurs en médecine; ensemble, ils ont ouvert une clinique pour pratiquer des avortements sur des femmes qui n'avaient pas obtenu le certificat du comité de l'avortement thérapeutique d'un hôpital accrédité ou approuvé requis par le par. 251(4) du *Code criminel*. Les médecins ont fait des déclarations publiques dans lesquelles ils ont mis en doute la sagesse de la législation canadienne sur l'avortement et ont affirmé qu'une femme a le droit souverain de décider si un avortement s'impose ou non dans sa situation personnelle. Des actes d'accusation ont été portés contre les appelants les inculpant de complot, les uns avec les autres, avec l'intention de procurer des avortements, infractions prévues à l'al. 423(1)*d*) et au par. 251(1) du *Code criminel*.

L'avocat des appelants a demandé l'annulation de l'acte d'accusation ou la suspension des poursuites avant d'inscrire les plaidoyers, pour le motif que l'art. 251 du *Code criminel* excéderait les pouvoirs du Parlement du Canada, enfreindrait l'al. 2*a*) et les art. 7 et 12 de la *Charte* et entrerait en conflit avec l'al. 1*b*) de la *Déclaration canadienne des droits*. Le juge de première instance a rejeté la requête et l'appel interjeté à la Cour d'appel de l'Ontario a aussi été rejeté. Le procès s'est poursuivi devant juge et jury et les trois accusés ont été acquittés. Le ministère public a interjeté appel de l'acquittement et les appelants ont formé un appel incident. La Cour d'appel a accueilli l'appel, annulé le verdict d'acquittement et ordonné un nouveau procès. La Cour a jugé que l'appel incident se rapportait à des points déjà soulevés dans l'appel principal et on les a donc étudiés dans le cadre de ce dernier.

La Cour a formulé les questions constitutionnelles suivantes:

1. L'article 251 du *Code criminel* du Canada porte-t-il atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*?
2. Si l'article 251 du *Code criminel* du Canada porte atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?

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3. Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?
4. Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?
5. Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?
6. Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?
7. If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*) 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Held (McIntyre and La Forest JJ. dissenting): The appeal should be allowed and the acquittals restored. The first constitutional question should be answered in the affirmative as regards s. 7 and the second in the negative as regards s. 7. The third, fourth and fifth constitutional questions should be answered in the negative. The sixth constitutional question should be answered in the negative with respect to s. 605 of the *Criminal Code* and should not be answered as regards s. 610(3). The seventh constitutional question should not be answered.

Per Dickson C.J. and Lamer J.: Section 7 of the *Charter* requires that the courts review the substance of legislation once the legislation has been determined to infringe an individual's right to "life, liberty and security of the person". Those interests may only be impaired if the principles of fundamental justice are respected. It was sufficient here to investigate whether or not the impugned legislative provisions met the procedural standards of fundamental justice and the Court accordingly did not need to tread the fine line between substantive review and the adjudication of public policy.

State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person. Section 251 clearly interferes with a woman's physical and bodily integrity. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference

3. L'article 251 du *Code criminel* du Canada excède-t-il les pouvoirs du Parlement du Canada?
4. L'article 251 du *Code criminel* du Canada viole-t-il l'art. 96 de la *Loi constitutionnelle de 1867*?
5. L'article 251 du *Code criminel* du Canada délègue-t-il illégalement la compétence fédérale en matière criminelle aux ministres de la Santé provinciaux ou aux comités de l'avortement thérapeutique et, ce faisant, le gouvernement fédéral a-t-il abdiqué son autorité dans ce domaine?
6. L'article 605 et le par. 610(3) du *Code criminel* du Canada portent-ils atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*?
7. Si l'article 605 et le par. 610(3) du *Code criminel* du Canada portent atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Arrêt (les juges McIntyre et La Forest sont dissidents): Le pourvoi est accueilli et les acquittements sont rétablis. La première question constitutionnelle reçoit une réponse affirmative en ce qui concerne l'art. 7 et la deuxième question une réponse négative en ce qui concerne l'art. 7. Les troisième, quatrième et cinquième questions reçoivent une réponse négative. La sixième question reçoit une réponse négative en ce qui concerne l'art. 605 du *Code criminel* et ne reçoit aucune réponse en ce qui concerne le par. 610(3). Il n'est pas nécessaire de répondre à la septième question.

Le juge en chef Dickson et le juge Lamer: L'article 7 de la *Charte* impose aux tribunaux le devoir d'examiner, au fond, les textes législatifs une fois qu'il a été jugé qu'ils enfreignent le droit de l'individu «à la vie, à la liberté et à la sécurité de sa personne». Il ne peut être porté atteinte à ces intérêts que si les principes de justice fondamentale sont respectés. Il suffit en l'espèce d'examiner si les dispositions législatives en cause sont conformes aux normes procédurales de justice fondamentale et il n'est donc pas nécessaire que la Cour touche à l'équilibre fragile entre examen du fond et décision de politiques générales.

L'atteinte que l'État porte à l'intégrité physique et la tension psychologique causée par l'État, du moins dans le contexte du droit criminel, constituent une violation de la sécurité de la personne. L'article 251 constitue clairement une atteinte à l'intégrité physique et émotionnelle d'une femme. Forcer une femme, sous la menace d'une sanction criminelle, à mener le fœtus à terme, à moins qu'elle ne remplisse certains critères indépendants

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with a woman's body and thus an infringement of security of the person. A second breach of the right to security of the person occurs independently as a result of the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 which results in a higher probability of complications and greater risk. The harm to the psychological integrity of women seeking abortions was also clearly established.

Any infringement of the right to life, liberty and security of the person must comport with the principles of fundamental justice. These principles are to be found in the basic tenets of our legal system. One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory.

The procedure and restrictions stipulated in s. 251 for access to therapeutic abortions make the defence illusory resulting in a failure to comply with the principles of fundamental justice. A therapeutic abortion may be approved by a "therapeutic abortion committee" of an "accredited or approved hospital". The requirement of s. 251(4) that at least four physicians be available at that hospital to authorize and to perform an abortion in practice makes abortions unavailable in many hospitals. The restrictions attaching to the term "accredited" automatically disqualifies many Canadian hospitals from undertaking therapeutic abortions. The provincial approval of a hospital for the purpose of performing therapeutic abortions further restricts the number of hospitals offering this procedure. Even if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. Provincial regulation as well can heavily restrict or even deny the practical availability of the exculpatory provisions of s. 251(4).

The administrative system established in s. 251(4) fails to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. The word "health" is vague and no adequate guidelines have been established for therapeutic abortion committees. It is typically impossible for women to know in advance what standard of health will be applied by any given committee.

The argument that women facing difficulties in obtaining abortions at home can simply travel elsewhere would not be especially troubling if those difficulties

de ses propres priorités et aspirations, est une ingérence profonde à l'égard de son corps et donc une atteinte à la sécurité de sa personne. Une deuxième violation du droit à la sécurité de la personne se produit indépendamment par suite du retard à obtenir un avortement thérapeutique en raison de la procédure imposée par l'art. 251 qui entraîne une augmentation de la probabilité de complications et accroît les risques. Il a été clairement établi que l'art. 251 porte atteinte à l'intégrité psychologique des femmes voulant un avortement.

Toute atteinte au droit à la vie, à la liberté et à la sécurité de la personne doit être en accord avec les principes de justice fondamentale. On trouve ces principes dans les préceptes fondamentaux de notre système juridique. L'un des préceptes fondamentaux de notre système de justice criminelle est que, lorsque le Parlement crée une défense à l'égard d'une accusation criminelle, celle-ci ne doit être ni illusoire ni à ce point difficile à faire valoir qu'elle soit pratiquement illusoire.

La procédure et les restrictions établies par l'art. 251 pour avoir droit à un avortement rendent la défense illusoire et reviennent au non-respect des principes de justice fondamentale. Un avortement thérapeutique doit être approuvé par un «comité de l'avortement thérapeutique» d'un hôpital «accrédité ou approuvé». L'obligation du par. 251(4) qu'au moins quatre médecins soient disponibles dans cet hôpital pour autoriser et pratiquer un avortement, signifie en pratique que beaucoup d'hôpitaux ne peuvent pas pratiquer des avortements. Les restrictions découlant du terme «accrédité» interdisent automatiquement à un grand nombre d'hôpitaux canadiens de pratiquer des avortements thérapeutiques. L'accréditation provinciale d'un hôpital aux fins de pratiquer des avortements thérapeutiques restreint encore plus le nombre d'hôpitaux où on peut les pratiquer. Même si un hôpital est autorisé à former un comité de l'avortement thérapeutique, rien dans l'art. 251 ne l'oblige à le faire. La réglementation provinciale peut fortement limiter et même supprimer le recours en pratique aux dispositions disculpatoires du par. 251(4).

Le système administratif établi par le par. 251(4) n'offre pas de norme adéquate à laquelle les comités de l'avortement thérapeutique doivent se référer lorsqu'ils ont à décider si un avortement thérapeutique devrait, en droit, être autorisé. Le terme «santé» est vague et aucunes directives adéquates n'ont été établies pour les comités de l'avortement thérapeutique. Il est, en général, impossible que les femmes sachent à l'avance quelle norme de santé un comité donné appliquera.

L'argument voulant que les femmes qui éprouvent des difficultés à se faire avorter au lieu de leur domicile n'ont qu'à se rendre ailleurs ne serait pas spécialement

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were not in large measure created by the procedural requirements of s. 251. The evidence established convincingly that it is the law itself which in many ways prevents access to local therapeutic abortion facilities.

Section 251 cannot be saved under s. 1 of the *Charter*. The objective of s. 251 as a whole, namely to balance the competing interests identified by Parliament, is sufficiently important to pass the first stage of the s. 1 inquiry. The means chosen to advance its legislative objectives, however, are not reasonable or demonstrably justified in a free and democratic society. None of the three elements for assessing the proportionality of means to ends is met. Firstly, the procedures and administrative structures created by s. 251 are often unfair and arbitrary. Moreover, these procedures impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved and may actually defeat the objective of protecting the life and health of women.

Per Beetz and Estey JJ.: Before the advent of the *Charter*, Parliament recognized, in adopting s. 251(4) of the *Criminal Code*, that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". This standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the *Canadian Charter of Rights and Freedoms* at s. 7.

"Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.

gênant si ces difficultés ne résultaient pas dans une large mesure des exigences de procédure de l'art. 251. La preuve établit de façon convaincante que c'est la loi elle-même qui, de bien des manières, empêche de s'adresser aux institutions locales offrant l'avortement thérapeutique.

L'article 251 ne peut être sauvé par l'article premier de la *Charte*. L'objectif de l'art. 251 dans son ensemble, soit d'équilibrer les intérêts en concurrence identifiés par le Parlement, est suffisamment important pour passer le premier stade de l'examen au regard de l'article premier. Les moyens choisis pour mettre en œuvre ces objectifs législatifs ne sont pas raisonnables et leur justification ne peut se démontrer dans une société libre et démocratique. On ne trouve aucun des trois éléments permettant d'évaluer la proportionnalité des moyens et de la fin. Premièrement, la procédure et les structures administratives instaurées par l'art. 251 sont souvent arbitraires et injustes. En outre, ces procédures portent atteinte aux droits garantis par l'art. 7 au-delà de ce qui est nécessaire, puisqu'elle ne fournit qu'une défense illusoire à nombre de femmes qui, *prima facie*, pourraient se prévaloir des dispositions disculpatoires du par. 251(4). Enfin, les effets de la limitation des droits garantis par l'art. 7, pour nombre de femmes enceintes, sont disproportionnés par rapport à l'objectif recherché et peuvent effectivement mettre en échec l'objectif de protection de la vie et de la santé des femmes.

Les juges Beetz et Estey: Avant l'avènement de la *Charte*, le Parlement a reconnu, en adoptant le par. 251(4) du *Code criminel*, que l'intérêt que représente la vie ou la santé de la femme enceinte l'emporte sur celui qu'il y a à interdire les avortements, y compris l'intérêt qu'a l'État dans la protection du fœtus, lorsque «la continuation de la grossesse de cette personne du sexe féminin mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière». Ce critère du par. 251(4) a été consacré, au moins comme minimum, lorsque le «droit à la vie, à la liberté et à la sécurité de la personne» a été enchâssé dans la *Charte canadienne des droits et libertés*, à l'art. 7.

L'expression «sécurité de la personne», au sens de l'art. 7 de la *Charte*, doit inclure le droit au traitement médical d'un état dangereux pour la vie ou la santé, sans menace de répression pénale. Si une loi du Parlement force une femme enceinte dont la vie ou la santé est en danger à choisir entre, d'une part, la perpétration d'un crime pour obtenir un traitement médical efficace en temps opportun et, d'autre part, un traitement inadéquat, voire aucun traitement, son droit à la sécurité de sa personne a été violé.

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According to the evidence, the procedural requirements of s. 251 of the *Criminal Code* significantly delay pregnant women's access to medical treatment resulting in an additional danger to their health, thereby depriving them of their right to security of the person. This deprivation does not accord with the principles of fundamental justice. While Parliament is justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the foetus, and while any such statutory mechanism will inevitably result in some delay, certain of the procedural requirements of s. 251 of the *Criminal Code* are nevertheless manifestly unfair. These requirements are manifestly unfair in that they are unnecessary in respect of Parliament's objectives in establishing the administrative structure and in that they result in additional risks to the health of pregnant women.

The following statutory requirements contribute to the manifest unfairness of the administrative structure imposed by the *Criminal Code*: (1) the requirement that all therapeutic abortions must take place in an "accredited" or "approved" hospital as defined in s. 251(6); (2) the requirement that the committee come from the accredited or approved hospital in which the abortion is to be performed; (3) the provision that allows hospital boards to increase the number of members of a committee; (4) the requirement that all physicians who practise lawful therapeutic abortions be excluded from the committees.

The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the *Charter*, justify reasonable limits to be put on a woman's right. However, the means chosen in s. 251 are not reasonable and demonstrably justified. The rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as the above-mentioned rules contained in s. 251, cannot be said to be rationally connected to these objectives under s. 1 of the *Charter*. Consequently, s. 251 does not constitute a reasonable limit to the security of the person.

It is not necessary to answer the question concerning the circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the

D'après la preuve soumise, les exigences procédurales de l'art. 251 du *Code criminel* ont pour effet de retarder considérablement l'obtention par les femmes enceintes d'un traitement médical, ce qui cause un danger additionnel pour leur santé et porte atteinte, par le fait même, à leur droit à la sécurité de leur personne. Cette atteinte n'est pas compatible avec les principes de justice fondamentale. Quoique le Parlement soit justifié d'exiger une opinion médicale éclairée, indépendante et fiable relativement à la vie ou à la santé de la femme enceinte pour protéger l'intérêt qu'a l'État à l'égard du fœtus et quoiqu'un tel dispositif législatif entraîne inévitablement des délais, certaines des exigences procédurales de l'art. 251 du *Code criminel* sont néanmoins nettement injustes. Ces exigences sont nettement injustes en ce sens qu'elles sont inutiles au regard des objectifs poursuivis par le Parlement en établissant la structure administrative et qu'elles entraînent des risques additionnels pour la santé des femmes enceintes.

Les exigences législatives suivantes rendent nettement injuste la structure administrative imposée par le *Code criminel*: (1) l'obligation que tous les avortements thérapeutiques soient pratiqués dans des hôpitaux «accrédités» ou «approuvés» selon la définition du par. 251(6); (2) l'obligation que le comité provienne de l'hôpital accrédité ou approuvé où l'avortement doit être pratiqué; (3) la disposition qui autorise un conseil d'hôpital à augmenter le nombre de membres d'un comité; (4) l'exclusion du sein de ces comités de tous les médecins qui pratiquent des avortements thérapeutiques licites.

L'objectif premier de l'art. 251 du *Code criminel* est la protection du fœtus. La protection de la vie et de la santé de la femme enceinte est un objectif secondaire. L'objectif premier, celui de la protection du fœtus, touche effectivement à des questions qui sont urgentes et importantes dans une société libre et démocratique et qui, conformément à l'article premier de la *Charte*, justifient que des limites raisonnables soient imposées au droit d'une femme. Toutefois, les moyens choisis par l'art. 251 ne sont pas raisonnables et leur justification ne peut être démontrée. On ne peut dire que les règles inutiles aux fins des objectifs premier et secondaire qu'elles sont censées appuyer, comme les règles susmentionnées de l'art. 251, ont un lien rationnel avec ces objectifs aux termes de l'article premier de la *Charte*. Par conséquent, l'art. 251 ne constitue pas une limite raisonnable à la sécurité de la personne.

Il n'est pas nécessaire de répondre à la question relative aux circonstances dans lesquelles il y a proportionnalité entre les effets de l'art. 251 qui limite le droit des femmes enceintes à la sécurité de leur personne et

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objective of the protection of the foetus. In any event, the objective of protecting the foetus would not justify the severity of the breach of pregnant women's right to security of the person which would result if the exculpatory provision of s. 251 was completely removed from the *Criminal Code*. However, it is possible that a future enactment by Parliament that would require a higher degree of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful, could achieve a proportionality which would be acceptable under s. 1 of the *Charter*.

Given the conclusion that s. 251 contains rules unnecessary to the protection of the foetus, the question as to whether a foetus is included in the word "everyone" in s. 7, so as to have a right to "life, liberty and security of the person" under the *Charter*, need not be decided.

Section 251 is not colourable provincial legislation in relation to health but rather a proper exercise of Parliament's criminal law power pursuant to s. 91(27) of the *Constitution Act, 1867*. The section does not offend s. 96 of the *Constitution Act, 1867* because the therapeutic abortion committees are not given judicial powers which were exercised by county, district and superior courts at the time of Confederation. These committees exercise a medical judgment on a medical question. Finally, s. 251 does not constitute an unlawful delegation of federal legislative power nor does it represent an abdication of the criminal law power by Parliament.

There is no merit in the argument based on s. 605(1)(*a*) of the *Criminal Code*. It is unnecessary to decide whether or not s. 610(3) of the *Criminal Code* violates ss. 7, 11(*d*), (*f*), (*h*) and 15 of the *Charter* or whether this Court has the power to award costs on appeals under s. 24(1) of the *Charter*. Whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

Per Wilson J.: Section 251 of the *Criminal Code*, which limits the pregnant woman's access to abortion, violates her right to life, liberty and security of the person within the meaning of s. 7 of the *Charter* in a way which does not accord with the principles of fundamental justice.

The right to "liberty" contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her pri-

l'objectif de la protection du fœtus. De toute façon, l'objectif de la protection du fœtus ne justifierait pas la gravité de la violation du droit des femmes enceintes à la sécurité de leur personne qui se produirait si la disposition disculpatoire de l'art. 251 était totalement exclue du *Code criminel*. Toutefois, il est possible qu'une loi éventuelle adoptée par le Parlement qui imposerait que la santé soit plus gravement menacée dans les derniers mois de la grossesse que dans les premiers mois pour qu'un avortement soit licite, pourrait atteindre un degré de proportionnalité acceptable aux termes de l'article premier de la *Charte*.

Vu la conclusion que l'art. 251 contient des règles inutiles pour la protection du fœtus, il n'est pas nécessaire de décider si un fœtus est visé par le mot «chacun» à l'art. 7 de la *Charte* de façon à avoir le droit «à la vie, à la liberté et à la sécurité de sa personne» en vertu de la *Charte*.

L'article 251 n'est pas un texte législatif provincial déguisé relatif à la santé, mais il constitue plutôt un exercice valide de la compétence du Parlement en matière de droit criminel conformément au par. 91(27) de la *Loi constitutionnelle de 1867*. L'article n'enfreint pas l'art. 96 de la *Loi constitutionnelle de 1867* parce qu'il ne donne pas aux comités de l'avortement thérapeutique les pouvoirs judiciaires que les cours de comté, de district et supérieures exerçaient au moment de la Confédération. Ces comités portent un jugement médical sur une question médicale. Enfin, l'art. 251 ne constitue pas une délégation illégale d'un pouvoir législatif fédéral et ne représente pas non plus une renonciation du Parlement à son pouvoir en matière de droit criminel.

L'argument fondé sur l'al. 605(1)*a*) du *Code criminel* est mal fondé. Il n'est pas nécessaire de décider si le par. 610(3) du *Code criminel* viole l'art. 7 et les al. 11*d*), *f*), *h*) et l'art. 15 de la *Charte* ni si cette Cour a le pouvoir d'accorder des dépens lors d'un pourvoi en vertu du par. 24(1) de la *Charte*. Quel que soit le pouvoir de cette Cour d'accorder des dépens dans des pourvois comme celui-ci, aucuns dépens ne devraient être accordés en l'espèce.

Le juge Wilson: L'article 251 du *Code criminel*, qui limite le recours d'une femme enceinte à l'avortement, viole son droit à la vie, à la liberté et à la sécurité de sa personne au sens de l'art. 7 de la *Charte* d'une façon qui n'est pas conforme avec les principes de justice fondamentale.

Le droit à la «liberté» énoncé à l'art. 7 garantit à chaque individu une marge d'autonomie personnelle sur les décisions importantes touchant intimement à sa vie

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vate life. Liberty in a free and democratic society does not require the state to approve such decisions but it does require the state to respect them.

A woman's decision to terminate her pregnancy falls within this class of protected decisions. It is one that will have profound psychological, economic and social consequences for her. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well.

Section 251 of the *Criminal Code* takes a personal and private decision away from the woman and gives it to a committee which bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations".

Section 251 also deprives a pregnant woman of her right to security of the person under s. 7 of the *Charter*. This right protects both the physical and psychological integrity of the individual. Section 251 is more deeply flawed than just subjecting women to considerable emotional stress and unnecessary physical risk. It asserts that the woman's capacity to reproduce is to be subject, not to her own control, but to that of the state. This is a direct interference with the woman's physical "person".

This violation of s. 7 does not accord with either procedural fairness or with the fundamental rights and freedoms laid down elsewhere in the *Charter*. A deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice.

The deprivation of the s. 7 right in this case offends freedom of conscience guaranteed in s. 2(*a*) of the *Charter*. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state. Indeed, s. 2(*a*) makes it clear that this freedom belongs to each of us individually. "Freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. The state here is endorsing one conscientiously-held view at the expense of another. It is denying freedom of conscience to some, treating them as means to an end, depriving them of their "essential humanity".

privée. La liberté, dans une société libre et démocratique, n'oblige pas l'État à approuver ces décisions, mais elle l'oblige cependant à les respecter.

La décision que prend une femme d'interrompre sa grossesse relève de cette catégorie de décisions protégées. Cette décision aura des conséquences psychologiques, économiques et sociales profondes pour la femme enceinte. C'est une décision qui reflète profondément l'opinion qu'une femme a d'elle-même, ses rapports avec les autres et avec la société en général. Ce n'est pas seulement une décision d'ordre médical; elle est aussi profondément d'ordre social et éthique.

L'article 251 du *Code criminel* enlève une décision personnelle et privée à la femme pour la confier à un comité qui fonde sa décision sur "des critères totalement sans rapport avec ses [celles de la femme enceinte] propres priorités et aspirations".

L'article 251 prive également une femme enceinte du droit à la «sécurité de sa personne» garanti par l'art. 7 de la *Charte*. Ce droit protège à la fois l'intégrité physique et psychologique de la personne. Le défaut de l'art. 251 est beaucoup plus profond qu'un simple assujettissement des femmes à une tension émotionnelle considérable et à un risque physique inutile. Il affirme que la capacité de reproduction de la femme ne doit pas être soumise à son propre contrôle, mais à celui de l'État. C'est aussi une atteinte directe à sa «personne» physique.

Cette violation du droit conféré par l'art. 7 n'est conforme ni à l'équité dans la procédure ni aux droits et libertés fondamentaux énoncés par ailleurs dans la *Charte*. Une atteinte au droit conféré par l'art. 7 qui a pour effet d'enfreindre un droit que garantit par ailleurs la *Charte* ne peut être conforme aux principes de justice fondamentale.

L'atteinte au droit conféré par l'art. 7 en l'espèce enfreint la liberté de conscience garantie par l'al. 2*a*) de la *Charte*. La décision d'interrompre ou non une grossesse est essentiellement une décision morale et, dans une société libre et démocratique, la conscience de l'individu doit primer sur celle de l'État. D'ailleurs l'al. 2*a*) dit clairement que cette liberté appartient à chacun de nous pris individuellement. La «liberté de conscience et de religion» devrait être interprétée largement et s'étendre aux croyances dictées par la conscience, qu'elles soient fondées sur la religion ou sur une morale laïque et les termes «conscience» et «religion» ne devraient pas être considérés comme tautologiques quand ils peuvent avoir un sens distinct, quoique relié. L'État épouse en l'espèce une opinion dictée par la conscience des uns aux dépens d'une autre. Il nie la liberté de conscience à certains, en les traitant comme un moyen pour une fin, en les privant de «l'essence de leur humanité».

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The primary objective of the impugned legislation is the protection of the foetus. This is a perfectly valid legislative objective. It has other ancillary objectives, such as the protection of the life and health of the pregnant woman and the maintenance of proper medical standards.

The situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and some statutory control may be appropriate. Section 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body.

The value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place between these two extremes and it has a direct bearing on the value of the foetus as potential life. Accordingly, the foetus should be viewed in differential and developmental terms. This view of the foetus supports a permissive approach to abortion in the early stages where the woman's autonomy would be absolute and a restrictive approach in the later stages where the states's interest in protecting the foetus would justify its prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" should be left to the informed judgment of the legislature which is in a position to receive submissions on the subject from all the relevant disciplines.

Section 251 of the *Criminal Code* cannot be saved under s. 1 of the *Charter*. It takes the decision away from the woman at all stages of her pregnancy and completely denies, as opposed to limits, her right under s. 7. Section 251 cannot meet the proportionality test; it is not sufficiently tailored to the objective; it does not impair the woman's right "as little as possible". Accordingly, even if s. 251 were to be amended to remedy the procedural defects in the legislative scheme, it would still not be constitutionally valid.

The question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section was not dealt with.

Per McIntyre and La Forest JJ. (dissenting): Save for the provisions of the *Criminal Code* permitting abortion where the life or health of the woman is at risk, no right of abortion can be found in Canadian law, custom or tradition and the *Charter*, including s. 7, does not create

L'objectif premier de la loi contestée est la protection du fœtus. C'est un objectif législatif parfaitement valide. Elle a d'autres objectifs secondaires, telle la protection de la vie et de la santé de la femme enceinte et le maintien de normes médicales appropriées.

La situation en ce qui a trait au droit d'une femme d'être maîtresse de sa propre personne se complique lorsqu'elle devient enceinte et qu'un certain contrôle de la loi peut être approprié. L'article premier de la *Charte* permet de fixer des limites raisonnables au droit de la femme compte tenu du fœtus qui se développe dans son corps.

La valeur attribuée au fœtus en tant que vie potentielle est directement reliée au stade de son développement au cours de la grossesse. Le fœtus au stade embryonnaire provient d'un ovule nouvellement fécondé; le fœtus totalement développé devient en définitive un nouveau-né. Le développement progresse entre ces deux extrêmes et il influe directement sur la valeur à attribuer au fœtus en tant que vie potentielle. On devrait donc considérer le fœtus en termes de développement et de phases. Cette conception du fœtus appuie une approche permissive de l'avortement dans les premiers stades de la grossesse, où l'autonomie de la femme serait absolue, et une approche restrictive dans les derniers stades, où l'intérêt qu'a l'État de protéger le fœtus justifierait l'imposition de conditions. Le point précis du développement du fœtus où l'intérêt qu'a l'État de le protéger devient "supérieur" relève du jugement éclairé du législateur, qui est en mesure de recevoir des avis à ce sujet de l'ensemble des disciplines pertinentes.

L'article 251 du *Code criminel* ne peut être sauvé par l'article premier de la *Charte*. Il enlève la décision à la femme à tous les stades de la grossesse et nie complètement au lieu de simplement limiter son droit garanti par l'art. 7. L'article 251 ne saurait répondre aux critères de la proportionnalité: il n'est pas suffisamment adapté à l'objectif et ne porte pas «le moins possible» atteinte au droit de la femme. Par conséquent, même si l'art. 251 devait être modifié pour remédier aux vices de procédure de la structure législative, il demeurerait inconstitutionnel.

La question de savoir si le terme «chacun», à l'art. 7, vise aussi le fœtus et lui confère un droit indépendant à la vie en vertu de cet article n'a pas été traitée.

Les juges McIntyre et La Forest (dissidents): À part les dispositions du *Code criminel* qui autorisent l'avortement lorsque la vie ou la santé de la femme est en danger, il n'existe aucun droit à l'avortement en droit canadien ou selon la coutume ou la tradition canadien-

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such a right. Section 251 of the *Criminal Code* accordingly does not violate s. 7 of the *Charter*.

The power of judicial review of legislation, although given greater scope under the *Charter*, is not unlimited. The courts must confine themselves to such democratic values as are clearly expressed in the *Charter* and refrain from imposing or creating rights with no identifiable base in the *Charter*. The Court is not entitled to define a right in a manner unrelated to the interest that the right in question was meant to protect.

The infringement of a right such as the right to security of the person will occur only when legislation goes beyond interfering with priorities and aspirations and abridges rights included in or protected by the concept. The proposition that women enjoy a constitutional right to have an abortion is devoid of support in either the language, structure or history of the constitutional text, in constitutional tradition, or in the history, traditions or underlying philosophies of our society.

Historically, there has always been a clear recognition of a public interest in the protection of the unborn and there is no evidence or indication of general acceptance of the concept of abortion at will in our society. The interpretive approach to the *Charter* adopted by this Court affords no support for the entrenchment of a constitutional right of abortion.

As to the asserted right to be free from state interference with bodily integrity and serious state-imposed psychological stress, an invasion of the s. 7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection. This would be limited to cases where the state-action complained of, in addition to imposing stress and strain, also infringed another right, freedom or interest which was deserving of protection under the concept of security of the person. Abortion is not such an interest. Even if a general right to have an abortion could be found under s. 7, the extent to which such right could be said to be infringed by the requirements of s. 251 of the *Code* was not clearly shown.

A defence created by Parliament could only be said to be illusory or practically so when the defence is not available in the circumstances in which it is held out as

nes, et la *Charte*, y compris l'art. 7, ne crée pas un tel droit. L'article 251 du *Code criminel* ne viole donc pas l'art. 7 de la *Charte*.

Le pouvoir d'exercer un contrôle judiciaire sur les lois, qui a pris de l'envergure aux termes de la *Charte*, n'est pas illimité. Les tribunaux doivent s'en tenir aux valeurs démocratiques qui sont clairement énoncées dans la *Charte* et s'abstenir d'imposer ou de créer des droits sans fondement identifiable dans la *Charte*. La Cour ne peut définir un droit d'une façon qui n'a aucun rapport avec l'intérêt que le droit en question est destiné à protéger.

L'atteinte à un droit comme le droit à la sécurité de la personne se produira seulement lorsque la loi va au-delà de l'ingérence dans les priorités et aspirations et restreint des droits compris et protégés par cette notion. La proposition selon laquelle les femmes jouissent d'un droit constitutionnel à l'avortement ne trouve aucun appui dans le texte, la structure ou l'historique du texte constitutionnel ni dans la tradition constitutionnelle ou l'histoire, les traditions et les philosophies sous-jacentes dans notre société.

Historiquement, l'existence d'un intérêt public dans la protection des enfants non encore nés a toujours été clairement reconnue et rien ne prouve ni n'indique que le concept de l'avortement à volonté soit généralement accepté dans notre société. La façon d'interpréter la *Charte* adoptée par cette Cour ne justifie aucunement l'enchâssement d'un droit constitutionnel à l'avortement.

Pour ce qui de la revendication d'un droit à la protection contre toute atteinte de l'État à l'intégrité physique et contre toute tension psychologique causée par l'État, une atteinte au droit à la sécurité de la personne garanti par l'art. 7 nécessite plus que des tensions ou de l'angoisse causées par l'État. Une violation de ce droit doit dépendre d'une atteinte à un intérêt dont la nature et l'importance justifieraient une protection constitutionnelle. Cette violation se limite aux cas où l'action de l'État dont on se plaint a, en plus d'engendrer des tensions et de l'angoisse, porté également atteinte à un autre droit, à une autre liberté ou à un autre intérêt qui mérite d'être protégé selon le concept de la sécurité de la personne. L'avortement ne constitue pas un tel intérêt. Même s'il était possible de conclure à l'existence d'un droit général à l'avortement en vertu de l'art. 7, on n'a pas démontré clairement la mesure dans laquelle on pourrait dire que les exigences de l'art. 251 du *Code* peuvent porter atteinte à ce droit.

Un moyen de défense créé par le Parlement n'est illusoire ou pratiquement illusoire que lorsqu'on ne peut pas y recourir dans les circonstances où l'on a dit qu'il

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being available. The very nature of the test assumes that Parliament is to define the defence and, in so doing, designate the terms upon which it may be available. The allegation of procedural unfairness is not supported by the claim that many women wanting abortions have been unable to get them in Canada because the failure of s. 251(4) to respond to this need. This machinery was considered adequate to deal with the type of abortion Parliament had envisaged. Any inefficiency in the administrative scheme is caused principally by forces external to the statute — the general demand for abortion irrespective of the provisions of s. 251. A court cannot strike down a statutory provision on this basis.

Section 605(1)(*a*), which gives the Crown a right of appeal against an acquittal in a trial court on any ground involving a question of law alone, does not offend ss. 7, 11(*d*), (*f*) and (*h*) of the *Charter*. The words of s. 11(*h*), "if finally acquitted" and "if finally found guilty", must be construed to mean after the appellate procedures have been completed, otherwise there would be no point or meaning in the word "finally".

Section 251 did not infringe the equality rights of women, abridge freedom of religion, or inflict cruel or unusual punishment. The section was not in pith and substance legislation for the protection of health and therefore within provincial competence but rather was validly enacted under the federal criminal law power. There was no merit to the arguments that s. 251 purported to give powers to therapeutic abortion committees exercised by county, district, and superior courts at the time of Confederation or that it delegated powers relating to criminal law to the provinces generally. No evidence supported the defence of necessity.

Per Curiam: In a trial before judge and jury, the judge's role is to state the law and the jury's role is to apply that law to the facts of the case. To encourage a jury to ignore a law it does not like could not only lead to gross inequities but could also irresponsibly disturb the balance of the criminal law system. It was quite simply wrong to say to the jury that if they did not like the law they need not enforce it. Such practice, if commonly adopted, would undermine and place at risk the whole jury system.

était possible de le faire. De par sa nature même, ce critère sous-entend que c'est au Parlement qu'il incombe de définir le moyen de défense et, ce faisant, de préciser les conditions à remplir pour pouvoir l'invoquer. L'allégation de l'inéquité dans la procédure n'est pas justifiée par la prétention qu'un bon nombre de femmes désireuses d'obtenir un avortement n'ont pas pu l'obtenir au Canada parce que le par. 251(4) ne répond pas à ce besoin. Ce mécanisme a été considéré comme suffisant pour traiter le type d'avortement envisagé par le Parlement. L'inefficacité du régime administratif est principalement due à des facteurs étrangers à la loi, savoir la demande générale d'avortements en dépit des dispositions de l'art. 251. Un tribunal ne peut, pour ce motif, invalider une disposition législative.

L'alinéa 605(1)*a*), qui habilite le ministère public à interjeter appel contre un verdict d'acquittement prononcé en première instance pour tout motif comportant une question de droit seulement n'est pas contraire à l'art. 7 et aux al. 11*d*), *f*) et *h*) de la *Charte*. Les expressions «définitivement acquitté» et «définitivement déclaré coupable» employées à l'al. 11*h*) doivent s'interpréter comme signifiant après que toutes les procédures d'appel sont terminées, sinon le mot «définitivement» serait inutile ou dénué de tout sens.

L'article 251 du *Code criminel* ne porte pas atteinte aux droits des femmes à l'égalité, ni à la liberté de religion et n'inflige pas non plus une peine cruelle et inusitée. L'article ne vise pas, de par son caractère véritable, la santé, relèvent donc de la compétence provinciale, mais il a été validement adopté en vertu de la compétence fédérale en matière criminelle. Les arguments voulant que l'art. 251 ait pour effet d'investir les comités de l'avortement thérapeutique de pouvoirs exercés, à l'époque de la Confédération, par les cours de comté et de district et les cours supérieures et qu'il délègue aux provinces en général des pouvoirs en matière de droit criminel sont mal fondés. Aucun élément de preuve ne justifie le moyen de défense de nécessité.

La Cour: Au cours d'un procès devant juge et jury, le rôle du juge est d'énoncer les règles de droit, et le rôle du jury de l'appliquer aux faits de l'espèce. Encourager le jury à ignorer une règle de droit qu'il n'aime pas pourrait non seulement entraîner de graves inéquités, mais pourrait aussi perturber de façon irresponsable l'équilibre du système de justice criminelle. Il était absolument erroné de dire au jury que, s'il n'aime pas la règle de droit, il n'a pas besoin de l'appliquer. Une telle pratique, communément adoptée, minerait et mettrait en danger tout le système des procès par jury.

1988 CanLII 90 (SCC)

Federal Court  Cour fédérale

Date: 20160307

Docket: IMM-2913-15

Citation: 2016 FC 267

2016 FC 267 (CanLII)

Ottawa, Ontario, March 7, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

OSATO OSAKPAMWAN,
(BARRY) EGUAKUN ERHARUY JOHNSON
(BEATRICE) EGUAKUN OGHOSA JOHNSON

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Canada Border Services Agency dated June 20, 2015, wherein an Inland Enforcement Officer [the Officer] refused the Applicants' request for deferral of their removal from Canada to Nigeria.

[2] For the reasons that follow, this application is dismissed as moot.

I. Background

[3] The Applicants entered Canada on March 5, 2013. The Principal Applicant, Osato Osakpamwan, is a Nigerian citizen and obtained Italian permanent residency in 2004. Her two children, the Minor Applicants, were born in 2001 and 2007 respectively. On March 25, 2013, the Applicants initiated a claim for status as Convention Refugees, which was refused by the Refugee Protection Division [RPD] of the Immigration and Refugee Board on November 13, 2013, as they were excluded under Article 1(e) of the Convention because of their status as permanent residents of Italy. On January 29, 2014, the Refugee Appeal Division [RAD] dismissed their appeal, and leave to challenge this decision by judicial review was subsequently denied by the Federal Court. The Applicants state that, since their RPD hearing, their permanent residence status in Italy has lapsed.

[4] Subsequently, the Applicants applied for a Pre-Removal Risk Assessment [PRRA]. On March 10, 2015, they were granted a 60 day deferral of their removal to allow for expedited processing of a spousal sponsorship of the Principal Applicant. This was refused on March 26, 2015 and challenged by judicial review.

[5] On June 18, 2015, the Applicants submitted a request for redetermination of the PRRA, based on the fact that the risk of return to Nigeria had never been assessed, as the RPD, RAD and PRRA officer had all considered only the risk of return to Italy. The Applicants also requested that their removal to Nigeria be deferred due to the pending judicial review of the spousal

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sponsorship application, to allow a redetermination of the PRRA, and due to the best interests of the children whose formative years had been in Canada.

[6] On June 19, 2015, the Officer issued the decision refusing the deferral request. On June 22, 2015, the Applicants applied for leave and judicial review and sought a stay of removal from the Court. However, CBSA subsequently cancelled their removal to Nigeria, and they continue to live in Canada. The judicial review of the sponsorship decision was also subsequently resolved, and the sponsorship application is now being redetermined. Neither party has any information on the status of the Applicants' request for redetermination of the PRRA.

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II. Impugned Decision

[7] The Officer noted that the pending application for judicial review of the spousal sponsorship does not deter the enforcement of a removal order. The Applicants did not present any evidence to demonstrate that they could not pursue their application for judicial review outside Canada following the enforcement of this removal order. Also, they did not present any evidence to establish that Citizenship and Immigration Canada had agreed to re-determine the PRRA and that a decision would be imminent.

[8] Moreover, the Officer noted that a request to defer removal submitted to an Inland Enforcement Officer is not the appropriate mechanism to advance allegations of risk that one could have reasonably advanced to the RPD and in the PRRA process, namely the prospect that the Applicants allegedly face risk in Nigeria. The evidence postdating the PRRA decision did not

satisfy the Officer that there was a compelling risk in Nigeria that would warrant the delay of removal.

[9] The Officer also referred to being alert and sensitive to the best interests of the Minor Applicants but noted that the Principal Applicant made arrangements to travel with her children and that there was no evidence that, as their sole custodial parent, she would be unable to represent their best interests.

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[10] Having reviewed all the evidence submitted, the Officer was not satisfied that it established the exceptional nature of a case that would provide grounds to justify deferral of removal from Canada.

III. Issues and Standard of Review

[11] The Applicants submit the following issues for consideration by the Court:

A. Did the Officer err in denying the Applicants' deferral request when the failure to defer will expose the Applicants to the risk of death, extreme sanction or inhumane treatment?

B. Did the Officer fail to consider and misconstrue relevant evidence?

C. Did the Officer err in that he/she was not alert, alive and sensitive to the short-term best interests of the Principal Applicant's son?

D. Did the Officer err in not considering the new risks that have occurred following the consideration of the Applicants' first PRRA decision that warrant a new review?

E. Was the Officer reasonable in his or her analysis in that there was justification, transparency and intelligibility within the decision-making process and therefore, his or her decision should be allowed to stand?

F. Did the cumulative errors made by the Officer render his or her decision unfair or constitute errors that were central to the issues in the case and therefore warrant another consideration be made by another panel comprised of another officer?

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[12] The standard of review applicable to this application is reasonableness (*New Brunswick (Board of Management) v. Dunsmuir,* 2008 SCC 9 at para 47).

[13] Based on the arguments canvassed below, I consider the issues for consideration on this application to be:

A. Is the application moot?

B. Was the Officer's decision reasonable?

IV. Submissions of the Parties

(1) Is the application moot?

A. Respondent's Position

[14] The Respondent notes that the Applicants' removal was cancelled by CBSA and they continue to reside in Canada while awaiting the redetermination of the Principal Applicant's sponsorship and PRRA. As such, the fundamental remedy sought by the Applicants before this Court, which was to defer their removal, has been achieved, rendering the challenge in the application for judicial review moot. The Respondent relies on *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*].

B. Applicants' Position

[15] In support of their position that the Court should hear and decide this application, notwithstanding that their removal was cancelled, the Applicants submit that there continues to be an adversarial relationship between the parties to this application with respect to the circumstances under which the Applicants may be removed from Canada. The question remains as to whether the Applicants may be removed from Canada to Nigeria prior to the completion of an assessment of their risk of return to Nigeria.

[16] On the subject of judicial economy, the Applicants submit that both parties have already expended considerable resources on this application and, absent any indication from the Respondent that there is no intention to remove the Applicants prior to the determination of the

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second PRRA, it is apparent that the same issues raised in these materials will arise again in subsequent litigation if/when there is a further attempt to remove the Applicants.

[17] Finally, the Applicants submit that there is no concern that deciding the issues raised in this application would result in this Court intruding into the legislative sphere.

(2) *Was the Officer's decision reasonable?*

A. Applicant's Position

[18] The Applicants submits that they are not in a situation where the negative consequences of the removal can be remedied by re-admittance to Canada. Rather, the Officer should have considered the new evidence provided by the Applicants in their deferral request that arose following the first PRRA decision that exposes them to a risk of serious personal harm if returned to Nigeria. The Applicants emphasize that they have had their risk assessed only in relation to Italy. The Officer should therefore have deferred removal until the PRRA unit has had an opportunity to reassess the PRRA in light of the new information now available that the country to which the Applicants were being removed was Nigeria. They rely on *Shpati v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 286 at para 52 and *Etienne v Canada (Minister of Public Safety & Emergency Preparedness),* 2015 FC 415 at paras 53-55.

[19] Lastly, the Applicants argue that the Officer erred in assessing the best interests of the children affected by the decision.

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B. Respondent's Position

[20] The Respondent argues that the Officer considered this matter and noted that there was insufficient evidence that the Applicants face a compelling risk in Nigeria.

[21] The Officer also noted that no evidence was presented that their PRRA application would be redetermined. Taking into account the fact that the mere filing of a Court application does not necessarily affect normal immigration processing and does not preclude the Respondent from enforcing a removal order, it was reasonable for the Officer not to defer removal.

[22] The Respondent also argues that it is not within the purview of an Officer to conduct a full humanitarian and compassionate assessment. The Respondent notes that the Applicants did not submit a humanitarian and compassionate application throughout their time in Canada and argues that they did not present sufficient evidence of exigent personal circumstance relating to the Minor Applicants.

V. Analysis

[23] My decision is to dismiss this application on the basis that it is moot. The parties both rely on *Borowski* for the principles governing the Court's analysis of mootness. In the recent decision in *Harvan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1026, Justice Diner succinctly outlined the relevant principles to be derived from *Borowski*:

> [7] The test for mootness comprises a two-step analysis. The first step asks whether the Court's decision would have any practical effect on solving a live controversy between the parties,

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> and the Court should consider whether the issues have become academic, and whether the dispute has disappeared, in which case the proceedings are moot. If the first step of the test is met, the second step is — notwithstanding the fact that the matter is moot — that the Court must consider whether to nonetheless exercise its discretion to decide the case. The Court's exercise of discretion in the second step should be guided by three policy rationales which are as follows:
>
> i. the presence of an adversarial context;
>
> ii. the concern for judicial economy;
>
> iii. the consideration of whether the Court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government.
>
> (See *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at paras 15-17, and 29-40 [*Borowski*])

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[24] The Applicants acknowledge that this proceeding is moot for purposes of the first step in the *Borowski* test. I agree with that position, as the Applicants' removal from Canada has been deferred, and a determination whether the Officer had previously erred in refusing to defer their removal therefore cannot have any practical effect on solving a live controversy between the parties.

[25] I am therefore required to consider, applying the second step in the *Borowski* analysis, whether to exercise my discretion to decide this matter notwithstanding that it is moot. The first policy rationale under that analysis is whether there remains an adversarial relationship between the parties. The Applicants note that no decision has been made on the request for re-determination of their PRRA or even whether it will be re-determined. Nor do they know what they outcome of the sponsorship application will be. They are concerned that they may in the future find themselves in the same position they were in when the impugned decision was made,

facing a removal order, and argue that this represents the sort of adversarial context contemplated by *Borowski*.

[26] In considering this question, I am guided by the decision in *Azhaev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 219 [*Azhaev*], in which Justice Manson concluded as follows when considering the policy rationale of an adversarial relationship in the context of a moot deferral decision:

> 22 While this Court has room to exercise its discretion to hear the merits of the instant application, as guided by the principles in *Borowski*, I disagree with the Applicant that there is an adversarial context remaining in this matter. In *Borowski*, the Court discussed an adversarial context as one where "collateral consequences" arise in related proceedings. For example, if the resolution of an issue in an otherwise moot proceeding determines the availability of liability or prosecution in a related proceeding between the parties, there remains an adversarial context between them. In the instant application, no collateral consequences will arise as a result of whether the Officer erred in his decision.

[27] I do not consider the present case to be one where the Applicants can establish collateral consequences to result from whether the Officer erred in the impugned deferral decision. As argued by the Respondent, the Applicants are currently residing in Canada with no removal scheduled. The outcome of the sponsorship application and the request for redetermination of the PRRA are unknown. While the Applicants could face a future removal order, that is at this stage entirely speculative. Nor can the Court know what the status or outcome of the sponsorship and PRRA or other relevant circumstances may be at the time of any such removal order.

[28] There is no basis presently to conclude that the Applicants face collateral consequences arising from the particular errors alleged to have been made in the impugned deferral decision. If

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the Applicants do in the future face another removal order and in turn request deferral, the enforcement officer considering that request will have to consider the circumstances existing at that time, and if deferral is refused, any challenge to that refusal should be raised in the context of those circumstances and the reasons for that refusal. As one can currently only speculate about any of these future events, I do not consider the necessary adversarial context contemplated by the *Borowski* analysis to presently exist.

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[29] Turning to the second policy rationale under *Borowski*, the concern for judicial economy, the Applicants argue that the parties and the Court have already expended substantial resources in the preparation for and hearing of this application. Again, consideration of the Court's analysis of this factor in *Azhaev* is instructive. At paragraphs 23 to 24 of that decision, Justice Manson stated as follows:

> 23 The second factor enunciated in *Borowski*, that of judicial economy, weighs against the Applicant as well. In one sense, judicial economy is related to being mindful of expending scarce judicial resources to hear an academic argument (*Borowski* at para 34). This is not relevant in the instant application, as Court resources have already been allocated. However, *Borowski* does refer to judicial economy in another way: to resolve ongoing uncertainty in the law to facilitate the expeditious resolution of similar cases in the future (*Borowski* at para 35). The Applicant's argument for this Court to exercise its discretion is based largely on this principle. He argues that it will help future litigants, including himself, to develop the jurisprudence on what "personal exigencies" justify a deferral of removal. However, the Court in *Borowski* at para 36 specifically warned against the application of this factor in the manner suggested by the Applicant:
>
> > The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

> 24 I find that this factor also weights against hearing the instant application.

[30] As in *Azhaev*, Court resources have already been allocated to the hearing of this application. On that basis, Justice Manson considered the factor of judicial economy to be irrelevant. However, he also considered this factor from the perspective argued by the applicant in that case, that deciding the moot matter might facilitate expeditious resolution of future disputes, involving that applicant or other litigants. In a sense, this is the same argument raised by the Applicants in the present case, not from the perspective of adding to the jurisprudence for the benefit of litigants generally, but because a decision on the alleged errors in the deferral decision would assist the Applicants if they faced a removal order in the future.

[31] I reach the same decision on this argument as did the Court in *Azhaev*. There is no suggestion that this is the sort of dispute that will have always disappeared before it is ultimately resolved. It is therefore preferable to wait and determine the issues raised by the Applicants in a genuine adversarial context if they do arise again.

[32] I agree with the Applicants that the third factor under *Borowski* analysis, intrusion into the legislative sphere, is not a concern in this case, such that this factor arguably favours the Applicants. However, the first two factors weigh against the Applicants and, considering and weighing all three factors, I do not consider this to be a case where the Court should exercise its discretion to decide the application notwithstanding that it is moot.

[33] Neither party proposed a question of general importance for certification for appeal.

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JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed. No question is certified for appeal.

"Richard F. Southcott"

Judge

2016 FC 267 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2913-15
STYLE OF CAUSE:	OSATO OSAKPAMWAN (BARRY) EGUAKUN ERHARUY JOHNSON (BEATRICE) EGUAKUN OGHOSA JOHNSON V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 18, 2016
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	MARCH 7, 2016

2016 FC 267 (CanLII)

APPEARANCES:

Don Maierovitz	FOR THE APPLICANTS
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Don Maierovitz Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT

IN THE MATTER OF Section 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26;

AND IN THE MATTER OF a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996

INDEXED AS: REFERENCE RE SECESSION OF QUEBEC

File No.: 25506.

1998: February 16, 17, 18, 19; 1998: August 20.

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

REFERENCE BY GOVERNOR IN COUNCIL

Constitutional law — Supreme Court of Canada — Reference jurisdiction — Whether Supreme Court's reference jurisdiction constitutional — Constitution Act, 1867, s. 101 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Courts — Supreme Court of Canada — Reference jurisdiction — Governor in Council referring to Supreme Court three questions relating to secession of Quebec from Canada — Whether questions submitted fall outside scope of reference provision of Supreme Court Act — Whether questions submitted justiciable — Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Constitutional law — Secession of province — Unilateral secession — Whether Quebec can secede unilaterally from Canada under Constitution.

International law — Secession of province of Canadian federation — Right of self-determination — Effectivity principle — Whether international law gives Quebec right to secede unilaterally from Canada.

Pursuant to s. 53 of the *Supreme Court Act*, the Governor in Council referred the following questions to this Court:

DANS L'AFFAIRE DE l'article 53 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26;

ET DANS L'AFFAIRE D'UN renvoi par le Gouverneur en conseil au sujet de certaines questions ayant trait à la sécession du Québec du reste du Canada formulées dans le décret C.P. 1996-1497 en date du 30 septembre 1996

RÉPERTORIÉ: RENVOI RELATIF À LA SÉCESSION DU QUÉBEC

N° du greffe: 25506.

1998: 16, 17, 18, 19 février; 1998: 20 août.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache et Binnie.

RENVOI PAR LE GOUVERNEUR EN CONSEIL

Droit constitutionnel — Cour suprême du Canada — Compétence en matière de renvoi — La compétence de la Cour suprême en matière de renvoi est-elle constitutionnelle? — Loi constitutionnelle de 1867, art. 101 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 53.

Tribunaux — Cour suprême du Canada — Compétence en matière de renvoi — Trois questions relatives à la sécession du Québec du Canada soumises par le gouverneur en conseil à la Cour suprême — Les questions soumises relèvent-elles de la compétence de la Cour suprême en matière de renvoi? — Les questions sont-elles justiciables? — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 53.

Droit constitutionnel — Sécession d'une province — Sécession unilatérale — Le Québec peut-il, en vertu de la Constitution, procéder unilatéralement à la sécession?

Droit international — Sécession d'une province de la fédération canadienne — Droit à l'autodétermination — Principe de l'effectivité — Le Québec a-t-il, en vertu du droit international, le droit de procéder unilatéralement à la sécession?

Le gouverneur en conseil a soumis à la Cour, en vertu de l'art. 53 de la *Loi sur la Cour suprême*, les questions suivantes:

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1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Issues regarding the Court's reference jurisdiction were raised by the *amicus curiae*. He argued that s. 53 of the *Supreme Court Act* was unconstitutional; that, even if the Court's reference jurisdiction was constitutionally valid, the questions submitted were outside the scope of s. 53; and, finally, that these questions were not justiciable.

Held: Section 53 of the *Supreme Court Act* is constitutional and the Court should answer the reference questions.

(1) *Supreme Court's Reference Jurisdiction*

Section 101 of the *Constitution Act, 1867* gives Parliament the authority to grant this Court the reference jurisdiction provided for in s. 53 of the *Supreme Court Act*. The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. While, in most instances, this Court acts as the exclusive ultimate appellate court in the country, an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction. Even if there were any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal". A "general court of appeal" may also properly undertake other legal functions, such as the rendering of advisory opinions. There is no con-

1. L'Assemblée nationale, la législature, ou le gouvernement du Québec peut-il, en vertu de la Constitution du Canada, procéder unilatéralement à la sécession du Québec du Canada?

2. L'Assemblée nationale, la législature, ou le gouvernement du Québec possède-t-il, en vertu du droit international, le droit de procéder unilatéralement à la sécession du Québec du Canada? À cet égard, en vertu du droit international, existe-t-il un droit à l'autodétermination qui procurerait à l'Assemblée nationale, la législature, ou le gouvernement du Québec le droit de procéder unilatéralement à la sécession du Québec du Canada?

3. Lequel du droit interne ou du droit international aurait préséance au Canada dans l'éventualité d'un conflit entre eux quant au droit de l'Assemblée nationale, de la législature ou du gouvernement du Québec de procéder unilatéralement à la sécession du Québec du Canada?

L'*amicus curiae* a soulevé des questions concernant la compétence de la Cour en matière de renvoi, plaidant que l'art. 53 de la *Loi sur la Cour suprême* est inconstitutionnel; que, même si la compétence de la Cour en matière de renvoi est constitutionnellement valide, les questions soumises ne relèvent pas du champ d'application de l'art. 53; et enfin que les questions ne sont pas justiciables.

Arrêt: L'article 53 de la *Loi sur la Cour suprême* est constitutionnel et la Cour doit répondre aux questions du renvoi.

(I) *La compétence de la Cour suprême en matière de renvoi*

L'article 101 de la *Loi constitutionnelle de 1867* donne au Parlement le pouvoir de conférer à la Cour la compétence en matière de renvoi prévue à l'art. 53 de la *Loi sur la Cour suprême*. Les mots «cour générale d'appel» à l'art. 101 indiquent le rang de la Cour au sein de l'organisation judiciaire nationale et ne doivent pas être considérés comme une définition restrictive de ses fonctions. Même si, dans la plupart des cas, la Cour exerce le rôle de juridiction d'appel suprême et exclusive au pays, une cour d'appel peut, à titre exceptionnel, se voir attribuer une compétence de première instance qui n'est pas incompatible avec sa compétence en appel. Même si la compétence de la Cour en matière de renvoi entrait en conflit avec la compétence des cours supérieures provinciales en première instance, un tel conflit devrait être résolu en faveur de l'exercice par le Parlement de son pouvoir plein et entier de créer une «cour générale d'appel». Une «cour générale d'appel» peut également exer-

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stitutional bar to this Court's receipt of jurisdiction to undertake an advisory role.

The reference questions are within the scope of s. 53 of the *Supreme Court Act*. Question 1 is directed, at least in part, to the interpretation of the *Constitution Acts*, which are referred to in s. 53(1)(*a*). Both Questions 1 and 2 fall within s. 53(1)(*d*), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are "important questions of law or fact concerning any matter" and thus come within s. 53(2). In answering Question 2, the Court is not exceeding its jurisdiction by purporting to act as an international tribunal. The Court is providing an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation. Further, Question 2 is not beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law. More importantly, Question 2 does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the legislature or government of Quebec, institutions that exist as part of the Canadian legal order. International law must be addressed since it has been invoked as a consideration in the context of this Reference.

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise. Finally, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

cer à bon droit d'autres fonctions juridiques, comme donner des avis consultatifs. Rien dans la Constitution n'empêche la Cour de se voir attribuer le pouvoir d'exercer un rôle consultatif.

Les questions du renvoi entrent dans le champ d'application de l'art. 53 de la *Loi sur la Cour suprême*. La question 1 touche, du moins en partie, l'interprétation des *Lois constitutionnelles* dont il est fait mention à l'al. 53(1)*a*). Les questions 1 et 2 relèvent l'une et l'autre de l'al. 53(1)*d*), puisqu'elles se rapportent aux pouvoirs de la législature ou du gouvernement d'une province canadienne. Enfin, chacune des trois questions est une «question importante de droit ou de fait touchant toute autre matière» et est, de ce fait, visée au par. 53(2). En répondant à la question 2, la Cour n'outrepasse pas sa compétence en prétendant agir en tant que tribunal international. La Cour donne au gouverneur en conseil, en sa qualité de tribunal national, un avis consultatif sur des questions juridiques qui touchent l'avenir de la fédération canadienne. En outre, on ne peut pas dire que la question 2 échappe à la compétence de la Cour, en tant que tribunal interne, parce qu'elle l'oblige à examiner le droit international plutôt que le droit interne. Plus important, la question 2 n'est pas une question abstraite de droit international «pur» mais vise à déterminer les droits et obligations juridiques de la législature ou du gouvernement du Québec, institutions qui font partie de l'ordre juridique canadien. Enfin il faut traiter du droit international puisqu'on a plaidé qu'il fallait le prendre en considération dans le contexte du renvoi.

Les questions du renvoi sont justiciables et doivent recevoir une réponse. Elles ne demandent pas à la Cour d'usurper un pouvoir de décision démocratique que la population du Québec peut être appelée à exercer. Suivant l'interprétation de la Cour, les questions se limitent strictement au cadre juridique dans lequel cette décision démocratique doit être prise. Les questions peuvent clairement être considérées comme visant des questions juridiques et, de ce fait, la Cour est en mesure d'y répondre. La Cour ne peut pas exercer son pouvoir discrétionnaire et refuser d'y répondre pour des raisons d'ordre pragmatique. Les questions revêtent une importance fondamentale pour le public et ne sont pas trop imprécises ou ambiguës pour qu'il soit possible d'y répondre correctement en droit. On ne peut pas dire non plus que la Cour n'a pas reçu suffisamment d'information sur le contexte actuel dans lequel les questions sont soulevées. En dernier lieu, la Cour peut, dans un renvoi, examiner des questions qui pourraient autrement ne pas être considérées «mûres» pour une décision judiciaire.

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(2) *Question 1*

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

(2) *Question 1*

La Constitution n'est pas uniquement un texte écrit. Elle englobe tout le système des règles et principes qui régissent l'exercice du pouvoir constitutionnel. Une lecture superficielle de certaines dispositions spécifiques du texte de la Constitution, sans plus, pourrait induire en erreur. Il faut faire un examen plus approfondi des principes sous-jacents qui animent l'ensemble de notre Constitution, dont le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, ainsi que le respect des minorités. Ces principes doivent guider notre appréciation globale des droits et obligations constitutionnels qui entreraient en jeu si une majorité claire de Québécois, en réponse à une question claire, votaient pour la sécession.

Le renvoi demande à la Cour de déterminer si le Québec a le droit de faire sécession unilatéralement. Les arguments à l'appui de l'existence d'un tel droit étaient fondés avant tout sur le principe de la démocratie. La démocratie, toutefois, signifie davantage que la simple règle de la majorité. La jurisprudence constitutionnelle montre que la démocratie existe dans le contexte plus large d'autres valeurs constitutionnelles. Depuis la Confédération, les habitants des provinces et territoires ont noué d'étroits liens d'interdépendance (économique, sociale, politique et culturelle) basés sur des valeurs communes qui comprennent le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, ainsi que le respect des minorités. Une décision démocratique des Québécois en faveur de la sécession compromettrait ces liens. La Constitution assure l'ordre et la stabilité et, en conséquence, la sécession d'une province ne peut être réalisée unilatéralement «en vertu de la Constitution», c'est-à-dire sans négociations, fondées sur des principes, avec les autres participants à la Confédération, dans le cadre constitutionnel existant.

Nos institutions démocratiques permettent nécessairement un processus continu de discussion et d'évolution, comme en témoigne le droit reconnu par la Constitution à chacun des participants à la fédération de prendre l'initiative de modifications constitutionnelles. Ce droit emporte l'obligation réciproque des autres participants d'engager des discussions sur tout projet légitime de modification de l'ordre constitutionnel. Un vote qui aboutirait à une majorité claire au Québec en faveur de la sécession, en réponse à une question claire, conférerait au projet de sécession une légitimité démocratique que tous les autres participants à la Confédération auraient l'obligation de reconnaître.

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Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution" and not to usurp the prerogatives of the political forces that operate within that framework. The obligations identified by the Court are binding obligations under the Constitution. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle.

Le Québec ne pourrait, malgré un résultat référendaire clair, invoquer un droit à l'autodétermination pour dicter aux autres parties à la fédération les conditions d'un projet de sécession. Le vote démocratique, quelle que soit l'ampleur de la majorité, n'aurait en soi aucun effet juridique et ne pourrait écarter les principes du fédéralisme et de la primauté du droit, les droits de la personne et des minorités, non plus que le fonctionnement de la démocratie dans les autres provinces ou dans l'ensemble du Canada. Les droits démocratiques fondés sur la Constitution ne peuvent être dissociés des obligations constitutionnelles. La proposition inverse n'est pas acceptable non plus: l'ordre constitutionnel canadien existant ne pourrait pas demeurer indifférent devant l'expression claire, par une majorité claire de Québécois, de leur volonté de ne plus faire partie du Canada. Les autres provinces et le gouvernement fédéral n'auraient aucune raison valable de nier au gouvernement du Québec le droit de chercher à réaliser la sécession, si une majorité claire de la population du Québec choisissait cette voie, tant et aussi longtemps que, dans cette poursuite, le Québec respecterait les droits des autres. Les négociations qui suivraient un tel vote porteraient sur l'acte potentiel de sécession et sur ses conditions éventuelles si elle devait effectivement être réalisée. Il n'y aurait aucune conclusion prédéterminée en droit sur quelque aspect que ce soit. Les négociations devraient traiter des intérêts des autres provinces, du gouvernement fédéral, du Québec et, en fait, des droits de tous les Canadiens à l'intérieur et à l'extérieur du Québec, et plus particulièrement des droits des minorités.

Le processus de négociation exigerait la conciliation de divers droits et obligations par voie de négociation entre deux majorités légitimes, soit la majorité de la population du Québec et celle de l'ensemble du Canada. Une majorité politique, à l'un ou l'autre niveau, qui n'agirait pas en accord avec les principes sous-jacents de la Constitution mettrait en péril la légitimité de l'exercice de ses droits et ultimement l'acceptation du résultat par la communauté internationale.

La tâche de la Cour était de clarifier le cadre juridique dans lequel des décisions politiques doivent être prises «en vertu de la Constitution», et non d'usurper les prérogatives des forces politiques qui agissent à l'intérieur de ce cadre. Les obligations dégagées par la Cour sont des obligations impératives en vertu de la Constitution. Toutefois, il reviendra aux acteurs politiques de déterminer en quoi consiste «une majorité claire en réponse à une question claire», suivant les circonstances dans lesquelles un futur référendum pourrait être tenu. De même, si un appui majoritaire était exprimé en faveur de la sécession du Québec, il incomberait aux acteurs poli-

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The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

(3) *Question 2*

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession lead-

tiques de déterminer le contenu des négociations et le processus à suivre. La conciliation des divers intérêts constitutionnels légitimes relève nécessairement du domaine politique plutôt que du domaine judiciaire, précisément parce que cette conciliation ne peut être réalisée que par le jeu des concessions réciproques qui caractérise les négociations politiques. Dans la mesure où les questions abordées au cours des négociations seraient politiques, les tribunaux, conscients du rôle qui leur revient dans le régime constitutionnel, n'auraient aucun rôle de surveillance à jouer.

(3) *Question 2*

Il est également demandé à la Cour s'il existe, en vertu du droit international, un droit de sécession unilatérale. Certains de ceux qui apportent une réponse affirmative se fondent sur le droit reconnu à l'autodétermination qui appartient à tous les «peuples». Même s'il est certain que la majeure partie de la population du Québec partage bon nombre des traits qui caractérisent un peuple, il n'est pas nécessaire de trancher la question de l'existence d'un «peuple», quelle que soit la réponse exacte à cette question dans le contexte du Québec, puisqu'un droit de sécession ne prend naissance en vertu du principe de l'autodétermination des peuples en droit international que dans le cas d'«un peuple» gouverné en tant que partie d'un empire colonial, dans le cas d'«un peuple» soumis à la subjugation, à la domination ou à l'exploitation étrangères, et aussi, peut-être, dans le cas d'«un peuple» empêché d'exercer utilement son droit à l'autodétermination à l'intérieur de l'État dont il fait partie. Dans d'autres circonstances, les peuples sont censés réaliser leur autodétermination dans le cadre de l'État existant auquel ils appartiennent. L'État dont le gouvernement représente l'ensemble du peuple ou des peuples résidant sur son territoire, dans l'égalité et sans discrimination, et qui respecte les principes de l'autodétermination dans ses arrangements internes, a droit au maintien de son intégrité territoriale en vertu du droit international et à la reconnaissance de cette intégrité territoriale par les autres États. Le Québec ne constitue pas un peuple colonisé ou opprimé, et on ne peut pas prétendre non plus que les Québécois se voient refuser un accès réel au gouvernement pour assurer leur développement politique, économique, culturel et social. Dans ces circonstances, «l'Assemblée nationale, la législature ou le gouvernement du Québec» ne possèdent pas, en vertu du droit international, le droit de procéder unilatéralement à la sécession du Québec du Canada.

Même s'il n'existe pas de droit de sécession unilatérale en vertu de la Constitution ou du droit international, cela n'écarte pas la possibilité d'une déclaration incons-

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ing to a *de facto* secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

(4) *Question 3*

In view of the answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

Cases Cited

Referred to: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re References by Governor-General in Council* (1910), 43 S.C.R. 536, aff'd [1912] A.C. 571; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054; *De Demko v. Home Secretary*, [1959] A.C. 654; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445; *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127; *Muskrat v. United States*, 219 U.S. 346 (1911); *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Education System in Island of Montreal*, [1926] S.C.R. 246; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54; *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R.

titutionnelle de sécession conduisant à une sécession *de facto*. Le succès ultime d'une telle sécession dépendrait de sa reconnaissance par la communauté internationale qui, pour décider d'accorder ou non cette reconnaissance, prendrait vraisemblablement en considération la légalité et la légitimité de la sécession eu égard, notamment, à la conduite du Québec et du Canada. Même si elle était accordée, une telle reconnaissance ne fournirait toutefois aucune justification rétroactive à l'acte de sécession, en vertu de la Constitution ou du droit international.

(4) *Question 3*

Compte tenu des réponses aux questions 1 et 2, il n'existe, entre le droit interne et le droit international, aucun conflit à examiner dans le contexte du renvoi.

Jurisprudence

Arrêts mentionnés: *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Re References by Governor-General in Council* (1910), 43 R.C.S. 536, conf. par [1912] A.C. 571; *Quebec North Shore Paper Co. c. Canadien Pacifique Ltée*, [1977] 2 R.C.S. 1054; *De Demko c. Home Secretary*, [1959] A.C. 654; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445; *Attorney-General for Ontario c. Attorney-General for Canada*, [1947] A.C. 127; *Muskrat c. United States*, 219 U.S. 346 (1911); *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] R.C.S. 208; *Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] R.C.S. 792; *Renvoi relatif au plateau continental de Terre-Neuve*, [1984] 1 R.C.S. 86; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704; *Reference re Waters and Water-Powers*, [1929] R.C.S. 200; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Reference re Education System in Island of Montreal*, [1926] R.C.S. 246; *Renvoi: Compétence du Parlement relativement à la Chambre haute*, [1980] 1 R.C.S. 54; *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Renvoi: Opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793; *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124; *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1

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Stuart J. Whitley, *Q.C.*, and *Howard L. Kushner*, for the intervener the Minister of Justice for the Government of the Yukon Territory.

Agnès Laporte and *Richard Gaudreau*, for the intervener Kitigan Zibi Anishinabeg.

Claude-Armand Sheppard, *Paul Joffe* and *Andrew Orkin*, for the intervener the Grand Council of the Crees (Eeyou Estchee).

Peter W. Hutchins and *Carol Hilling*, for the intervener the Makivik Corporation.

Michael Sherry, for the intervener the Chiefs of Ontario.

Raj Anand and *M. Kate Stephenson*, for the intervener the Minority Advocacy and Rights Council.

Mary Eberts and *Anne Bayefsky*, for the intervener the *Ad Hoc* Committee of Canadian Women on the Constitution.

Guy Bertrand and *Patrick Monahan*, for the intervener Guy Bertrand.

Stephen A. Scott, for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway.

Vincent Pouliot, on his own behalf.

The following is the judgment delivered by

THE COURT —

I. Introduction

This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. The observation we made more than a decade ago in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (*Manitoba Language Rights Reference*), at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity

Stuart J. Whitley, *c.r.*, et *Howard L. Kushner*, pour l'intervenant le ministre de la Justice pour le gouvernement du territoire du Yukon.

Agnès Laporte et *Richard Gaudreau*, pour l'intervenante Kitigan Zibi Anishinabeg.

Claude-Armand Sheppard, *Paul Joffe* et *Andrew Orkin*, pour l'intervenant le Grand Conseil des Cris (Eeyou Estchee).

Peter W. Hutchins et *Carol Hilling*, pour l'intervenante la Corporation Makivik.

Michael Sherry, pour l'intervenant Chiefs of Ontario.

Raj Anand et *M. Kate Stephenson*, pour l'intervenant le Conseil des revendications et des droits des minorités.

Mary Eberts et *Anne Bayefsky*, pour l'intervenant *Ad Hoc* Committee of Canadian Women on the Constitution.

Guy Bertrand et *Patrick Monahan*, pour l'intervenant Guy Bertrand.

Stephen A. Scott, pour les intervenants Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell et Van Hoven Petteway.

Vincent Pouliot, en personne.

Le jugement suivant a été rendu par

LA COUR —

I. Introduction

Nous sommes appelés, dans le présent renvoi, à examiner des questions d'extrême importance, qui touchent au cœur même de notre système de gouvernement constitutionnel. L'observation que nous avons faite, il y a plus de dix ans, dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, à la p. 728, s'applique tout autant au présent renvoi qui, lui aussi, «allie des questions juridiques et constitutionnelles des plus subtiles et

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Second, there is a concern that Question 2 is beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law.

This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (*Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86).

More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the *amicus curiae* himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. *Justiciability*

It is submitted that even if the Court has jurisdiction over the questions referred, the questions

Deuxièmement, on se demande si la question 2 21
échappe à la compétence de la Cour, en tant que tribunal interne, parce qu'elle l'oblige à examiner le droit international plutôt que le droit interne.

Ce doute est sans fondement. Dans le passé, la 22
Cour a dû faire appel plusieurs fois au droit international pour déterminer les droits et les obligations d'un acteur donné au sein du système juridique canadien. Par exemple, dans *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] R.C.S. 208, la Cour devait décider si, compte tenu des principes du droit international en matière d'immunité diplomatique, un conseil municipal avait le pouvoir de percevoir des taxes sur certaines propriétés appartenant à des gouvernements étrangers. Dans deux renvois ultérieurs, la Cour a encore fait appel au droit international pour déterminer si le gouvernement fédéral ou une province possédait des droits de propriété à l'égard de certaines parties de la mer territoriale et du plateau continental (*Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] R.C.S. 792; *Renvoi relatif au plateau continental de Terre-Neuve*, [1984] 1 R.C.S. 86).

En outre, ce qui est plus important, la question 2 23
du renvoi n'est pas une question abstraite de droit international «pur». Elle vise à faire déterminer les droits et obligations juridiques de l'Assemblée nationale, de la législature ou du gouvernement du Québec, institutions qui font clairement partie de l'ordre juridique canadien. Comme nous le verrons, l'*amicus curiae* a lui-même plaidé que le succès de toute démarche du Québec en vue de faire sécession de la fédération canadienne serait déterminé par le droit international. Dans ces circonstances, la prise en considération du droit international dans le contexte du présent renvoi concernant les aspects juridiques de la sécession unilatérale du Québec est non seulement permise mais inévitable.

C. *La justiciabilité*

On fait valoir que, même si la Cour a compé- 24
tence sur les questions soumises, les questions

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themselves are not justiciable. Three main arguments are raised in this regard:

(1) the questions are not justiciable because they are too "theoretical" or speculative;

(2) the questions are not justiciable because they are political in nature;

(3) the questions are not yet ripe for judicial consideration.

25 In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

26 Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. As we stated in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545:

> While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. . . . In considering its

elles-mêmes ne sont pas justiciables. Trois arguments principaux sont avancés à cet égard:

(1) les questions ne sont pas justiciables parce que trop «théoriques» ou conjecturales;

(2) les questions ne sont pas justiciables parce qu'elles sont de nature politique;

(3) les questions ne sont pas encore mûres pour faire l'objet d'un recours judiciaire.

Dans le contexte d'un renvoi, la Cour n'exerce pas sa fonction judiciaire traditionnelle, mais joue un rôle consultatif. Le fait même d'être consultée sur des questions hypothétiques dans un renvoi, par exemple la constitutionnalité d'un projet de texte législatif, entraîne la Cour dans un exercice auquel elle ne se livrerait jamais dans le contexte d'un litige. Peu importe que la procédure suivie dans un renvoi ressemble à la procédure en matières contentieuses, la Cour ne statue pas sur des droits. Pour la même raison, la Cour peut, dans un renvoi, examiner des questions qui pourraient autrement ne pas être considérées comme assez «mûres» pour faire l'objet d'un recours judiciaire.

Même si un renvoi diffère de sa fonction juridictionnelle habituelle, la Cour ne doit pas, même dans le contexte d'un renvoi, examiner des questions auxquelles il serait inapproprié de répondre. Cependant, vu la nature très différente d'un renvoi, pour décider de l'opportunité de répondre à une question, il ne faut pas s'attacher à la question de savoir si le différend a un caractère formellement contradictoire ou s'il vise à trancher des droits pouvant faire l'objet d'un recours judiciaire. Il faut plutôt se demander s'il s'agit d'un différend dont on peut à bon droit saisir une cour de justice. Comme nous l'avons affirmé dans le *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, à la p. 545:

> Quoiqu'une question puisse ne pas relever de la compétence des tribunaux pour bien des raisons, le procureur général du Canada a fait valoir, dans le présent pourvoi qu'en répondant aux questions, la Cour se laisserait entraîner dans une controverse politique et deviendrait engagée dans le processus législatif. Dans l'exercice de son pouvoir discrétionnaire de décider s'il convient de répondre à une question qui, allègue-t-on, ne relève pas de la compétence des tribunaux, la Cour

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appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis added.]

doit veiller surtout à conserver le rôle qui lui revient dans le cadre constitutionnel de notre forme démocratique de gouvernement. [. . .] En s'enquérant du rôle qu'elle doit jouer, la Cour doit décider si la question qu'on lui a soumise revêt un caractère purement politique et devrait, en conséquence, être tranchée dans une autre tribune ou si elle présente un aspect suffisamment juridique pour justifier l'intervention du pouvoir judiciaire. [Nous soulignons.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

> (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
>
> (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

Ainsi, la Cour peut refuser, pour cause de «non-justiciabilité», de répondre à une question soumise par renvoi dans les circonstances suivantes:

> (i) en répondant à la question, la Cour outrepasserait ce qu'elle estime être le rôle qui lui revient dans le cadre constitutionnel de notre forme démocratique de gouvernement, ou
>
> (ii) la Cour ne pourrait pas donner une réponse relevant de son champ d'expertise: l'interprétation du droit.

As to the "proper role" of the Court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

27 Pour ce qui est du «rôle légitime» de la Cour, il est important de souligner que, contrairement à la prétention de l'*amicus curiae*, les questions posées dans le renvoi ne demandent pas à la Cour d'usurper un pouvoir de décision démocratique que la population du Québec peut être appelée à exercer. Suivant notre interprétation des questions posées par le gouverneur en conseil, celles-ci se limitent strictement à certains aspects du cadre juridique dans lequel cette décision démocratique doit être prise. L'analogie qu'on a tenté de faire avec la doctrine américaine des «questions politiques» ne s'applique donc pas. Le cadre juridique ayant été clarifié, il appartiendra à la population du Québec de décider, par le processus politique, de chercher ou non à réaliser la sécession. Comme nous le verrons, le cadre juridique concerne les droits et obligations tant des Canadiens qui vivent à l'extérieur de la province de Québec que de ceux qui vivent au Québec.

As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present

28 Pour ce qui est de la nature «juridique» des questions posées, si la Cour est d'avis qu'une question comporte un élément important à caractère non juridique, elle peut interpréter cette question de manière à ne répondre qu'à ses aspects juridiques. Si cela n'est pas possible, la Cour peut

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Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

29 Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference" sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

30 Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer: see, e.g., *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*Provincial Judges Reference*), at para. 256. Second, where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer: see, e.g., *Reference re Education System in Island of Montreal*, [1926] S.C.R. 246; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (*Senate Reference*); *Provincial Judges Reference*, at para. 257.

31 There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference*), at pp. 875-76:

If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a

refuser de répondre à la question. Dans le présent renvoi, les questions peuvent clairement être considérées comme visant des questions juridiques et, de ce fait, la Cour est en mesure d'y répondre.

Enfin, il reste l'argument suivant lequel, même si les questions soumises sont justiciables en ce sens qu'elles peuvent faire l'objet d'un «renvoi», la Cour doit encore se demander si elle devrait exercer son pouvoir discrétionnaire et refuser d'y répondre pour des raisons d'ordre pragmatique.

De façon générale, on peut diviser en deux grandes catégories les cas où la Cour a exercé son pouvoir discrétionnaire et refusé de répondre à une question soumise par renvoi qui était par ailleurs justiciable. Premièrement, lorsque la question est trop imprécise ou ambiguë pour qu'il soit possible d'y apporter une réponse complète ou exacte: voir, par exemple, *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704; *Reference re Waters and Water-Powers*, [1929] R.C.S. 200; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (*Renvoi relatif aux juges de la Cour provinciale*), au par. 256. Deuxièmement, lorsque les parties n'ont pas fourni suffisamment d'information pour permettre à la Cour de donner des réponses complètes ou exactes: voir, par exemple, *Reference re Education System in Island of Montreal*, [1926] R.C.S. 246; *Renvoi: Compétence du Parlement relativement à la Chambre haute*, [1980] 1 R.C.S. 54 (*Renvoi relatif au Sénat*); *Renvoi relatif aux juges de la Cour provinciale*, précité, au par. 257.

Il ne fait aucun doute que les questions du renvoi soulèvent des points difficiles et sont susceptibles d'interprétations diverses. Toutefois, plutôt que de refuser complètement d'y répondre, la Cour est guidée par l'approche préconisée par la majorité à l'égard de la question touchant les «conventions» dans le *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753 (*Renvoi relatif au rapatriement*), aux pp. 875 et 876:

Si les questions paraissent ambiguës, la Cour ne devrait pas, dans un renvoi constitutionnel, être dans une

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worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or it may qualify both the question and the answer. . . .

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

III. Reference Questions

A. *Question 1*

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

As we confirmed in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806, "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference*, *supra*, at para. 92. Finally, as was said in the *Patriation Reference*, *supra*, at p. 874, the Constitution of Canada includes

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

situation pire que celle d'un témoin à un procès, et se sentir obligée de répondre par oui ou par non. Si elle estime qu'une question peut être trompeuse ou si elle veut seulement éviter de risquer un malentendu, il lui est loisible d'interpréter la question [. . .] ou de nuancer à la fois la question et la réponse . . .

Les questions du renvoi revêtent une importance fondamentale pour le public. On ne peut affirmer que les questions sont trop imprécises ou ambiguës pour qu'il soit possible d'y répondre correctement en droit. On ne peut pas dire non plus que la Cour n'a pas reçu suffisamment d'information sur le contexte actuel dans lequel les questions sont soulevées. Dans les circonstances, la Cour est donc tenue d'y répondre.

III. Les questions du renvoi

A. *Question 1*

> L'Assemblée nationale, la législature ou le gouvernement du Québec peut-il, en vertu de la Constitution du Canada, procéder unilatéralement à la sécession du Québec du Canada?

(1) Introduction

Comme nous l'avons confirmé dans le *Renvoi: Opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793, à la p. 806: «La *Loi constitutionnelle de 1982* est maintenant en vigueur. Sa légalité n'est ni contestée ni contestable.» La «Constitution du Canada» comprend certainement les textes énumérés au par. 52(2) de la *Loi constitutionnelle de 1982*. Même si ces textes jouent un rôle de premier ordre dans la détermination des règles constitutionnelles, ils ne sont pas exhaustifs. La Constitution «comprend des règles non écrites — et écrites —», comme nous l'avons souligné récemment dans le *Renvoi relatif aux juges de la Cour provinciale*, précité, au par. 92. Enfin, selon le *Renvoi relatif au rapatriement*, précité, à la p. 874, la Constitution du Canada comprend

> le système global des règles et principes qui régissent la répartition ou l'exercice des pouvoirs constitutionnels dans l'ensemble et dans chaque partie de l'État canadien.

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Indexed as:

Schwarz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)

Between
The Schwarz Hospitality Group Limited, applicant, and
The Minister of Canadian Heritage and Superintendent
Banff National Park, respondents
And between
The Schwarz Hospitality Group Limited, applicant, and
The Attorney General of Canada, respondent

[2001] F.C.J. No. 263

[2001] A.C.F. no 263

2001 FCT 112

2001 CFPI 112

201 F.T.R. 85

32 Admin. L.R. (3d) 113

37 C.E.L.R. (N.S.) 295

103 A.C.W.S. (3d) 968

Court File Nos. T-1552-98, T-34-00

Federal Court of Canada - Trial Division
Calgary, Alberta

Gibson J.

Heard: January 23 and 24, 2001.
Judgment: February 23, 2001.

(46 paras.)

Crown -- Actions by and against Crown in right of Canada -- Crown lands -- National parks -- Judicial review, mandamus -- When available -- Conditions precedent -- Existence of duty -- Judicial

review, declaratory action -- Bars -- Academic questions.

Applications by Schwarz Hospitality Group for judicial review to compel the respondent Minister of Canadian Heritage to review its redevelopment proposal. Schwarz leased a lodge in Banff National Park. He wanted to renovate the lodge and to expand it. This was to make it suitable for year-round use. It submitted a redevelopment proposal to Parks Canada in June 1997. The proposal was extensively reviewed by Parks Canada. In August 1997 Schwarz was advised that a development permit would be issued once it complied with conditions imposed by Parks Canada. Schwarz complied with these requirements by June 1998. It thought that approval of the proposal was imminent. However, on June 26, 1998 the Minister announced a one-year development moratorium for the Park. This resulted in Schwarz's first application for judicial review. It sought a declaration that the moratorium was invalid. Schwarz also alleged that the Minister created a reasonable or legitimate expectation. The expectation was that its proposal would be reviewed and a decision would be made in accordance with the development approval process and the guidelines that applied in June 1997. Negotiations continued between Schwarz and Parks Canada. Schwarz provided an environmental assessment to Parks Canada. By December 1999 Schwarz thought that the proposal would be approved. It was not advised of any deficiencies in the assessment. The second application for judicial review was filed when this expectation did not materialize. It sought mandamus to compel the Minister to approve the assessment. The evening before the hearing of the applications Parks Canada advised Schwarz that it would approve allow the lodge to be expanded to half of the area requested in the proposal.

HELD: Application allowed in part. An order of mandamus was granted regarding the first application. The Minister was required to approve the proposal in accordance with the process and guidelines that were in force in June 1997. If the proposal was rejected the Minister had to provide reasons for this decision. Regarding the second application, mandamus was granted. The Minister was directed to review the assessment. It had to provide reasons if it was rejected. The declaration about the moratorium was moot. It had expired by the time of this hearing. Parks Canada continued to encourage Schwarz to proceed with the proposal. They created the expectation that the proposal would be reviewed and decided upon. The doctrine of legitimate expectation applied. It extended to the regular practices of administrative decision-makers. It would be unfair for such decision-makers to act in contravention of their representations. Mandamus did not apply to compel a particular decision from a range of choices that were available to the decision-maker. However, Schwarz was entitled to this relief on the second application. He merely sought the decision-maker to fulfil its statutory obligations.

Statutes, Regulations and Rules Cited:

Canada National Parks Act, S.C. 2000, c. 32, ss. 46, 70(1).

Canadian Environmental Assessment Act, ss. 18, 18(1)(b), 20, 20(1)(a).

National Parks Act, R.S.C. 1985, c. N-14.

Counsel:

Judson E. Virtue, for the applicant.
Kirk N. Lambrecht, for the respondents.

GIBSON J. (Reasons for Orders):--

INTRODUCTION

1 These reasons follow the hearing at Calgary, Alberta on the 23rd and 24th of January, 2001 of two applications for judicial review in which the applicant on each application for judicial review, the Schwarz Hospitality Group Limited (the "leaseholder"), seeks the following reliefs:

> in respect of the judicial review application on file T-1552-98 (the "first application"), a declaration that a one year moratorium on development of Outlying Commercial Accommodation Areas in Banff National Park announced by the Minister of Canadian Heritage on the 26th of June, 1998, is invalid or unlawful and of no force and effect as against the applicant's Storm Mountain Lodge redevelopment proposal (the "redevelopment proposal") and an order directing the Superintendent of Banff National Park (the "Superintendent") to review and approve the redevelopment proposal in accordance with the existing development approval process and development guidelines; and
>
> in respect of the judicial review application on file T-34-00 (the "second application");
>
> - a declaration that the conditions of the Banff National Park Advisory Development Board (the "Advisory Development Board") in relation to the redevelopment proposal have been fulfilled;
> - a declaration that the environmental assessment relating to the redevelopment proposal, submitted by the leaseholder to the Superintendent on the 18th of November, 1999, (the "environmental assessment") fulfills the requirements of the Canadian Environmental Assessment Act[1];
> - a declaration that the Superintendent has no reasonable grounds to refuse, fail or neglect to prepare a screening report in respect of the environmental assessment under paragraph 18(1)(b) of the Canadian Environmental Assessment Act;
> - an order in the nature of a writ of mandamus directing the Superintendent to prepare such a screening report;
> - a declaration that the Superintendent has no reasonable ground to refuse to make a determination under section 20 of the Canadian Environmental Assessment Act and in particular, under paragraph 20 (1)(a) of that Act, that the redevelopment proposal is not likely to cause significant adverse environmental effects and an order in the nature of a writ of mandamus directing the Superintendent to make such a determination;
> - a declaration that the Superintendent has no reasonable grounds to refuse to take the course of action set forth in paragraph 20(1)(a) of the

Canadian Environmental Assessment Act and an order in the nature of a writ of mandamus requiring the Superintendent to take such a course of action; and

- a declaration that the Superintendent has statutory authority under the Canadian Environmental Assessment Act and the National Parks Act[2] and regulations made thereunder to review the redevelopment proposal and to issue all required permits and that the Minister of Canadian Heritage (the "Minister") has no residual authority or discretion to intervene in the review, approval and permit process.

2 Pursuant to an order of the Associate Chief Justice dated the 12th of September, 2000, the two applications for judicial review were heard together. At the close of the hearing, I advised counsel that I would reserve my decision and that these reasons and related orders would follow.

BACKGROUND

3 According to the affidavit of George Schwarz filed on the first application, the President of the leaseholder and a partner in the proposed redevelopment of the Storm Mountain Lodge leasehold, Storm Mountain Lodge was developed in the 1920's as one of the Canadian Pacific Railway Company's bungalow camps, accommodating travellers on the newly opened Banff-Windermere Highway, now Highway 93, in the Vermillion Pass between Banff National Park and Kootenay National Park. Storm Mountain Lodge is located on the north side of Highway 93, about 23 kilometres from each of the Banff and Lake Louise town sites, in Banff National Park.

4 Mr. Schwarz further attests that the leaseholder has owned and operated Storm Mountain Lodge since acquiring the leasehold and improvements in 1986. The existing improvements consist of a main lodge, including a restaurant, guest common area, office facilities and rest rooms, twelve (12) rental cabins, four (4) staff cabins and several service buildings. The main lodge, cabins, and service buildings, which have a total combined footprint of 325 square metres, are dispersed throughout a 2.3 hectare (23,000 square metre) leasehold site. The main lodge is classified as an historic feature of Banff National Park.

5 Mr. Schwarz further attests that Storm Mountain Lodge has not been significantly renovated since the 1920's except for the addition of electrical power and plumbing upgrades. The facilities are presently suitable for summer use only, and have been operated only on a seasonal basis. Guests travelling between Banff and the Windermere Valley typically utilize the restaurant facility on a day-basis, while overnight visitors to Banff National Park utilize the guest accommodations as a base for exploring the Vermillion Pass and the surrounding area.

6 In 1996, after initial consultations with Parks Canada representatives, the leaseholder decided to redevelop Storm Mountain Lodge with three objectives in mind:

> First, to upgrade the visitor experience by emphasizing heritage tourism and providing modernized amenities; second, to open Storm Mountain Lodge to year-round use; and third, to eliminate any negative environmental impact of the existing and renovated facilities.

In August of 1996, the leaseholder submitted to Parks Canada a redevelopment proposal. That proposal was eventually withdrawn.

7 In 1997, a Banff National Park Management Plan[3] was tabled in Parliament. In a forward to the Plan, the Minister wrote:

> The Banff-Bow Valley Task Force was formed because we needed to change the ways we did things in the park. We needed to find a new common ground on which Canadians could build a new future for the park.
>
> After more than two years of extensive research, consultation and discussion, the Banff-Bow Valley Study was released, and many of its recommendations are incorporated here in the new park management plan. The Study made a unique contribution to helping us better understand the role that science plays in making our decisions. And it also made a unique impact by getting people involved, through the Banff-Bow Valley Study Round Table, in defining what the future of Banff should be. We are going to build on those foundations.

In the introduction to the plan, the following appears:

> The National Parks Act requires each national park to have a management plan. These plans reflect the policies and legislation of the Department and are prepared in consultation with Canadians. They are reviewed every five years. This management plan will guide the overall direction of Banff National Park for the next ten to fifteen years and will serve as a framework for all planning within the Park.

[emphasis added]

8 At page 66 of the Plan, under the heading "Development Review Process", the following appears:

> Banff National Park will adopt a revised Development Review Process for all proposals outside the town of Banff. This revised process:
>
> 1) Uses the municipal development review process as a model.
> 2) Includes two stages - the development permit review and the building permit review.
> 3) Introduces opportunities for public involvement through the Advisory Development Board (ADB). This board reviews all applications publicly to ensure they are appropriate and meet the requirements of the National Parks Act, regulations and planning. The ADB submits its recommendations to the park Superintendent.
>
> ...
>
> 6) Incorporates the requirements of the Canadian Environmental Assessment Act (CEAA) and sets high standards for environmental assessment. Assessments that do not meet the standard will be returned to the proponent and will not be posted publicly.

9 Mr. Schwarz further attests in his affidavit earlier referred to that visitor services in Banff National Park are restricted to certain areas within which commercial accommodation is permitted. The two major areas for visitors are the Banff and Lake Louise town sites. However, commercial accommodations are also provided in 29 outlying commercial accommodation facilities ("OCAs"). Storm Mountain Lodge is one of the OCAs.

10 Within the framework of the Banff National Park Management Plan, redevelopment of OCAs continued to be governed by the Four Mountain Parks Outlying Commercial Accommodation Redevelopment Guidelines[4] (the "OCA Guidelines") that were promulgated in November of 1988. The preamble to the OCA Guidelines reads in part as follows:

> These guidelines apply to outlying commercial accommodation facilities (OCAs) or bungalow camps in the four mountain national parks of Banff, Jasper, Kootenay and Yoho. These are privately run, road-accessible facilities for accommodating the park visitor overnight. The guidelines are based on the direction provided in "In Trust for Tomorrow" (1986). This planning framework was announced by the Minister of the Environment in February, 1986, and sets the direction within which redevelopment for OCAs may occur.
>
> The redevelopment guidelines have been prepared for two purposes. The first is to make it clear to OCA owners that redevelopment may be permitted within well-defined parameters. Secondly, the guidelines form the framework within which Environment Canada-Parks staff will review, comment on and approve redevelopment proposals.
>
> ...
>
> The existing 29 outlying commercial accommodation facilities provide approximately 1,100 units of road-accessible commercial accommodation outside the park towns and visitor centres. Although they are privately owned, they operate on land leased from Environment Canada - Parks and are an integral part of the parks system. They must, therefore, respect all the environmental and heritage concerns that apply to the system in general.[5]

[emphasis added]

11 The leaseholder's 1996 redevelopment proposal, including a related environmental assessment, was the subject of extensive consultation. In the result, a revised redevelopment proposal was submitted to Parks Canada in June of 1997. It is this redevelopment proposal that is at the heart of these applications for judicial review. The leaseholder was advised by the Superintendent that the redesigned proposal and related environmental assessment would be reviewed pursuant to a new development review process and, in particular, would be reviewed by the newly created Advisory Development Board. Over the summer of 1997, extensive review of the revised redevelopment proposal, including the related environmental assessment, took place both within Parks Canada and more broadly. A public review and hearing by the Advisory Development Board occurred on the 28th of July, 1997. Minutes of the Advisory Development Board meeting[6] indicate that a motion to

recommend to the Superintendent that he or she accept the redevelopment proposal subject to certain conditions and amendments was carried.

12 By letter dated the 1st of August, 1997[7], the Acting Superintendent advised the leaseholder in part as follows:

> Further to [your] Development Permit application, ...I would advise that the Parks Canada Advisory Development Board, as part of a public meeting dated July 28, 1997, has put forward a recommendation to this office proposing acceptance of the application subject to conditions.
>
> Having reviewed the information and conditions attached to the ADB recommendation, I am advising of my agreement with the recommendations including all terms and conditions as put forward. I would advise you to proceed with action as may be necessary to satisfy all requirements and conditions described. Final decision and issuance of Development Permit will not be forthcoming until all conditions and requirements of development have been resolved to the satisfaction of Parks Canada. ...
>
> ...
>
> Upon satisfactory resolution of conditions and requirements, the proposal will be subject to a public review period (for issues of process or procedure only) of fourteen days. Provided there are no appeals, a Development Permit may be issued upon completion of the public appeal period.
>
> Please Note: This is not a Development Permit. Prior to issue or release of Development Permit, all terms, conditions and requirements of ADB recommendations as put forward and accepted by the Superintendent must be satisfied including obligations under the Canadian Environmental Assessment Act (CEAA).

[emphasis in original]

13 Extensive discussions involving revisions of and supplements to the redevelopment proposal followed with a view to fulfilling all of the terms, conditions and requirements of the Advisory Development Board recommendation. By mid-June, 1998, the leaseholder was under the impression that final approval of the redevelopment proposal was imminent. What Mr. Schwarz describes in his affidavit as a "final meeting" with Parks Canada was scheduled for the 10th of July, 1998.

14 On the 26th of June, 1998, the leaseholder was advised by the office of the Superintendent as follows:

> The Minister of Canadian Heritage and the Secretary of State (Parks) announced today new measures to protect the ecological integrity of Canada's national parks. Further to this announcement, a review panel will

> be established to review guidelines for the future development of Outlying Commercial Accommodations (OCA's) and Hostels.
>
> Until such time as the panel's recommendations have been considered and approved by the Minister, a moratorium on development that would result in a square footage increase for OCA's and Hostels has been put in place.[8]

[emphasis added]

The leaseholder's redevelopment proposal contemplated a substantial "square footage increase" for Storm Mountain Lodge.

15 The news release issued by the Minister and the Secretary of State (Parks) on the 26th of June, 1998, contained only one paragraph relevant to the leaseholder's redevelopment proposal. That paragraph reads as follows:

> The Minister and Secretary of State also emphasized that steps are being taken to manage commercial development in outlying areas within National Parks. To ensure the long-term ecological integrity of National Parks, a one-year development moratorium has been placed on all commercial accommodation facilities outside park communities. A panel will be set up to recommend, within one year, the principles to guide the nature, scale and rate of future development.[9]

[emphasis added]

I note here the dichotomy between the advice from the Superintendent in the letter of the 26th of June, which appears to speak of an indeterminate moratorium, and the news release, which speaks of a one-year development moratorium. In the absence of any satisfactory evidence of a rationalization of these two positions, I determine that the fixed-term moratorium contained in the public announcement governs.

16 Following confirmation that the development moratorium was interpreted to extend to the leaseholder's redevelopment proposal, the first application for judicial review followed.

17 The panel to review development in areas outside park communities in Canada's Mountain National Parks ("the OCA Panel") contemplated by the news release of the 26th of June, 1998 was established on the 21st of October, 1998. The OCA Panel invited public submissions and held public hearings. The leaseholder participated in the processes of the OCA Panel. The OCA Panel submitted its report in the summer of 1999. The report, as eventually released, contained a favourable recommendation in respect of the leaseholder's redevelopment proposal[10].

18 In the meantime, discussion continued between Parks Canada officials and the leaseholder and its advisors regarding the redevelopment proposal. On November 18, 1999, a revised and consolidated final environmental assessment report was provided to Parks Canada.[11] Mr. Schwarz, in his affidavit filed on the second application for judicial review, attests that, by early December, 1999, he

anticipated an early positive decision under section 20 of the Canadian Environmental Assessment Act to be followed by the issuance of a redevelopment permit by the Superintendent. When those expectations were not fulfilled, the second application for judicial review was filed on the 11th of January, 2000. To that date, the leaseholder had not been formally advised of any deficiencies in the final environmental assessment report submitted to Parks Canada on the 18th of November, 1999.

19 There remains only one final twist in the background to these applications for judicial review. During the hearing on the applications for judicial review, I was advised by counsel that, after the normal hour for close of business on the 22nd of January, 2001, that is to say on the evening before the hearing commenced, the leaseholder received at its place of business the following fax transmission from the Chief Executive Officer of Parks Canada:

> The report of the Outlying Commercial Accommodation (OCA) Panel, Outlying Commercial Accommodations and Hostels in the Rocky Mountain National Parks, was made public by the Honourable Sheila Copps, Minister of Canadian Heritage, in April 2000. Parks Canada officials subsequently had an opportunity to review and discuss its recommendations with you.
>
> The OCA Panel report, which has also been reviewed in light of the recommendations in the report of the Panel on the Ecological Integrity of Canada's National Parks that was released last spring, will be the basis for developing Parks Canada guidelines for OCAs and hostels. However, Parks Canada does not accept the OCA Panel recommendations with respect to Storm Mountain Lodge. The maximum total gross floor area that Parks Canada is prepared to consider for the redevelopment of the Lodge is 2,750 m2. In developing the new concept you will need to reduce the mass of the buildings from what you currently have in your proposal.
>
> Mr. Bill Fisher, Field Unit Superintendent, Banff National Park of Canada, will provide you with a copy of the common sections of the guidelines over the next few months and also answer any questions you may have. In the interim, Parks Canada officials will work with you to finalize the site-specific guidelines for Storm Mountain Lodge, based on the above. All future development at this site will be reviewed according to the requirements of the Canadian Environmental Assessment Act, the new Canada National Parks Act and Regulations made thereunder, and the appropriate development review process.
>
> OCAs and hostels are an important part of the range of accommodation available in the Rocky Mountain national parks, and I appreciate the time you have taken to contribute to this review process.

[emphasis added]

20 By agreement with counsel, I received the foregoing communication as evidence on these two applications for judicial review notwithstanding that it was not covered by an affidavit and that it substantially post-dated the filing of each of the applications for judicial review.

21 The communication of the 22nd of January, 2001, I was advised by counsel for the applicant, indicated that the maximum total gross floor area that Parks Canada was prepared to consider for the redevelopment of Storm Mountain Lodge was somewhere in the range of 50% of the total gross floor area reflected in the leaseholder's redevelopment proposal that had been before Parks Canada since June of 1997. Arguably at least, it would render any success that the leaseholder might have on the second application for judicial review a "pyrrhic victory". It further proposes to preempt any success that the applicant might have on the first application for judicial review by indicating that the whole process of review of the leaseholder's redevelopment proposal, having taken place as it has under a redevelopment review process governed by the current National Parks Act, the Banff National Park Management Plan and the Four Mountain Parks Outlying Commercial Accommodation Redevelopment Guidelines has been a waste of time, energy and resources, not only because of the new stipulation regarding maximum total gross floor area, but also because future development on the leasehold on which Storm Mountain Lodge is situated will be reviewed according to the requirements, not only of the Canadian Environmental Assessment Act, but of the new Canada National Parks Act, not yet proclaimed in force, and regulations made thereunder, whenever they might be promulgated, and "...the appropriate development review process", whatever that might be.

ANALYSIS

Preliminary matters

22 By Notice of Motion filed the 9th of September, 1998, the respondents on the first application sought to strike the notice of application as it was filed, in the submission of the respondents, out of time, did not appropriately identify the orders sought to be reviewed, was not limited to a review of a single order and named as a respondent the tribunal in respect of which the application was brought. By order dated the 19th of April, 1999, prothonotary Hargrave dismissed the application. In related reasons, he referred to a number of authorities including David Bull Laboratories (Canada) v. Pharmacia Inc.[12] where Mr. Justice Strayer noted that "...the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself." At the opening of the hearing before me, I advised counsel for the respondents that, despite the fact that the respondents' motion had been dismissed, I regarded it as open to him to argue any of the grounds for the motion as a ground on which the application should now be dismissed before me. Counsel raised only one of the grounds put forward in the respondents' earlier motion, that being the alleged late filing of the application for judicial review. Counsel for the leaseholder urged that the application for judicial review was not in fact late-filed but that if it was, he moved for an extension of time to file. Out of an abundance of caution, I took cognizance of counsel's oral motion and ordered from the Bench that the time for filing of the first application for judicial review was extended to the time of actual filing, if such an extension was required.

23 On the second application for judicial review, the respondent moved to strike out certain paragraphs or certain sentences within paragraphs of the affidavit of George Schwarz filed on the application on the ground that the impugned paragraphs or sentences contained expression of personal opinion, argument, conclusion or interpretation of law or were otherwise inadmissible by virtue of Rule 81(1) of the Federal Court Rules, 1998[13]. By order dated the 15th of June, 2000, prothonotary Hargrave adjourned the motion "...to the hearing of the judicial review on its merits. Disallowance of various affidavit evidence to be left to the judge hearing the judicial review. Costs in the course [sic]."

24 Once again at the opening of the hearing, I advised counsel that I would not strike the impugned paragraphs or sentences despite the fact that I had significant sympathy for the concerns of counsel for the respondent. I indicated that, rather than striking the impugned material, I would give to it the

weight that I considered it deserved and that weight would be very little indeed in respect of those passages in Mr. Schwarz's affidavit that I regarded as inappropriate. In the result, this application on behalf of the respondent was not further pursued.

The First Application

25 As noted earlier in these reasons, the first relief requested on the first application, that is: "a declaration that the moratorium [reflected in the news release of the Minister and the Secretary of State (Parks) dated the 26th of June, 1998 and the related letter to the leaseholder from the Superintendent dated the 26th of June, 1998] is invalid or unlawful and of no force and effect as against the Storm Mountain Lodge redevelopment proposal", is, I am satisfied, moot.

26 In Borowski v. Canada (Attorney General)[14], Mr. Justice Sopinka wrote at page 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

Mr. Justice Sopinka continues at some length on the questions of when an appeal is "moot" and on the criteria for the exercise of discretion to "address" a moot issue. Against the guidance provided by the Supreme Court of Canada, I am satisfied that the issue of whether the moratorium here in question is invalid or unlawful and of no force and effect as against the leaseholder is moot. Further, I am satisfied that against the relevant criteria identified by the Court, this is not an appropriate case to respond to the issue of the validity of the moratorium on the leaseholder's redevelopment proposal.

27 I have earlier determined that the moratorium was a one-year development moratorium on commercial accommodation facilities outside park communities. It was related to the establishment of

a panel to recommend, within the term of the moratorium, the principles to guide the nature, scale and rate of future development outside park communities. The one-year moratorium has now long since expired. The panel contemplated in the news release was indeed established and indeed reported within, or shortly after the expiration of, the one-year term of the moratorium. The report of that panel has now been made public. There is absolutely no evidence before the Court that the moratorium has been extended, or that a new moratorium has been imposed. In fact, throughout the term of the moratorium, Parks Canada officials continued to meet with the leaseholder and its advisors and to review the Storm Mountain Lodge redevelopment proposal.

28 In all of the circumstances, I conclude that there remains no "live controversy" regarding the moratorium between the parties that are before the Court. I further conclude that no purpose whatsoever would be served by examining at any length whether or not the moratorium was invalid or unlawful or of no force and effect as it purported to relate to the Storm Mountain Lodge redevelopment proposal. I conclude that the leaseholder suffered no significant prejudice by reason of the imposition of the moratorium, whatever its validity might have been. In short, I conclude that no relief in respect of the moratorium that was purportedly imposed is warranted.

29 The second relief requested on the first application is not so easily dealt with. In effect, counsel for the leaseholder urges that the Superintendent, by his or her actions and the actions of persons within the Banff National Park offices of Parks Canada created a reasonable or legitimate expectation on the part of the leaseholder that the Storm Mountain Lodge redevelopment proposal would be reviewed and a decision would be taken on it in accordance with the development approval process and development guidelines in place when the redevelopment proposal, in its substantially ultimate form save for the related environmental assessment, was presented to Parks Canada in June of 1997.

30 The parameters of the doctrine of legitimate expectation are well established in law. In Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)[15], Mr. Justice Sopinka, for the majority, wrote at pages 1203 and 1204:

> It appears, however, that at bottom the appellant's submission is that the conduct of the Committee created a legitimate expectation of consultation.
> ...
>
> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

[citations omitted]

More recently in Baker v. Canada (Minister of Citizenship and Immigration)[16], once again for the majority, Madame Justice L'Heureux-Dubé wrote at pages 839 and 840:

> ...the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given

> circumstances. Our court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights:... . As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: ... . Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
>
> [emphasis added,
> portions of the quoted paragraph and citations omitted.]

31 On the evidence before the Court in this matter, it is clear that officials of Parks Canada in Banff National Park continued to consult with the leaseholder and its representatives, throughout the development moratorium, on the leaseholder's redevelopment proposal. In fact, I am satisfied that officials continued to encourage the leaseholder to continue to invest time, energy and money in the refinement of the proposal, all as against the approval process and development guidelines then in place. The leaseholder engaged in the processes of the OCA Panel. The OCA panel reported to the Minister and, when the report of that Panel was eventually made public, its recommendation in favour of the leaseholder's redevelopment proposal also became public. From that time forward until the eve of the hearing of these applications for judicial review, Parks Canada officials continued to consult with the leaseholder and to encourage it to refine its redevelopment proposal. By reference to the words of Madame Justice L'Heureux-Dubé quoted above, I am satisfied that the doctrine of legitimate expectations, as applied in Canada, affecting as it does procedural fairness, takes into account the "regular practices of administrative decision-makers". In the result, once again on the evidence in this matter, I am satisfied that it would be unfair for those administrative decision-markers to act in contravention of the representations, implicit in their continuation of consultations and encouragement, to, as reflected in the fax received by the leaseholder on the eve of the hearing of these applications, "backtrack" on those representations.

32 In sum, I am satisfied that the actions of persons within the Banff National Park offices of Parks Canada created a legitimate or reasonable expectation on the part of the leaseholder that the Storm Mountain Lodge redevelopment proposal would be reviewed and a decision would be taken on it in accordance with the development approval process and development guidelines in place when the redevelopment proposal, in its substantially ultimate form, save for the related environmental assessment, was presented to Parks Canada in June of 1997. In the result, relief in favour of the leaseholder will issue on the first application. For reasons elaborated later in these reasons on the limitation of the scope of mandamus, that relief will not extend to requiring a particular decision, namely approval, in respect of the redevelopment proposal.

The second application

33 During the hearing of these applications, counsel for the leaseholder conceded that, while mandamus may lie to compel a decision where a decision-maker has a range of choices open to him

or her, it does not lie to compel a particular decision from among the range that might be available to the decision-maker. That this is the case is abundantly clear in the following quotation from Brown and Evans in Judicial Review of Administrative Action in Canada[17]:

> The presence of a discretion to act or not, or to act in one of a number of ways, will preclude the issue of mandamus since there will be no specific duty to act in a particular way. In other words, where a public official has a discretion, mandamus will not issue to compel its exercise in the manner sought by the applicant.

[footnote omitted]

34 The foregoing is not to say that mandamus does not lie in circumstances where a decision-maker has a range of optional decisions open to him or her. It is merely to say that mandamus does not lie to require the decision-maker to make a particular decision from among that range of choices. In Kahlon v. Canada (Minister of Employment and Immigration)[18], Mr. Justice Mahoney put the principle very succinctly at page 387:

> Mandamus will issue to require performance of duty; it cannot, however, dictate the result to be reached.

The foregoing is affirmed in Brown and Evans[19] at page 1-44 where the learned authors write:

> On the other hand, when a decision must be made, mandamus will lie even if there is a discretion as to what the decision can be.

[citations omitted]

35 Against the foregoing, I am satisfied that many of the declaratory reliefs sought on the second application as described earlier in these reasons, and some of the related relief in the way of mandamus, fall away. In essence, what the leaseholder is left seeking is closure to the review of the final environmental assessment delivered to Parks Canada on the 18th of November, 1999.

36 The review process provided for in the Canadian Environmental Assessment Act is, when reduced to its simplest terms, not a complex process. But given the myriad of situations to which it must apply, and the various forms of assessment that are open, its description in the Act is quite complex. It is admirably summed up in the reasons of Mr. Justice Linden in Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)[20]. Mr. Justice Linden wrote at paragraphs 17 to 19;

> Environmental assessment is a tool used to help achieve the goal of sustainable development by providing "an effective means of integrating environmental factors into planning and decision-making processes." According to Parks Canada, environmental assessment is "a comprehensive and systematic process designed to identify, analyse and evaluate the environmental effects of proposed projects." The Supreme Court of Canada commented that an environmental assessment had become "a planning tool

> that is now generally regarded as an integral component of sound decision-making."
>
> There are three types of environmental assessments: screening, comprehensive study, and panel review. Screening and comprehensive study account for the vast majority [of] projects assessed under the Act.
>
> The basic framework for an environmental assessment is as follows. First, the responsible authority must decide whether the Act applies to the project and if it does, which type of environmental assessment applies. The next step is the conduct of the assessment itself. Following the assessment, the responsible authority makes a decision as to whether or not to allow the project to proceed. The final step is the post-decision activity which includes ensuring that mitigation measures are being implemented and giving public notice concerning the responsible authority's course of action.

[citations omitted]

37 It was not in dispute before me that the responsible authority in relation to the leaseholder's redevelopment proposal is the Superintendent. The Superintendent, or his delegate, took the decision that the Canadian Environmental Assessment Act applies to the project and determined that the lowest level of environmental assessment, that is to say screening, was applicable. The leaseholder, in consultation with Parks Canada and through the agency of appropriate contractors, conducted the assessment which resulted in the final report submitted to Parks Canada on the 18th of November, 1999. Between that date and the date when the second application was commenced, the responsible authority, that is to say the Superintendent, neither ensured that a screening report was prepared (paragraph 18(1)(b) of the Act), nor took one of the courses of action, more generally described as a decision, open to him or her under section 20 of the Act. Indeed, on the evidence that was before the Court, neither of these steps had been completed at the time of the hearing of these applications. If both had been completed, I am satisfied that the second application would have been moot, regardless of what the final decision taken under section 20 by the responsible authority might have been. In the final analysis, it is the fulfilment of his or her statutory obligations by the responsible authority that the applicant seeks to compel by mandamus.[21]

38 In Apotex Inc. v. Merck & Co. and Merck Frosst Canada Inc.[22], at paragraph [45], Mr. Justice Robertson enumerated several "principle requirements" that must be satisfied before mandamus will issue. They are the following:

> (1) There must be a public legal duty to act;
> (2) The duty must be owed to the applicant;
> (3) There is be a clear right to performance of that duty, ...
> (4) Where the duty sought to be enforced is discretionary, [certain] rules apply; ...
> (5) No other adequate remedy is available to the applicant;
> (6) The order sought will be of some practical value or effect;
> (7) The court in the exercise of its discretion finds no equitable bar to the relief sought;

(8) On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

Mr. Justice Robertson cites substantial authority for each of the foregoing principles. He elaborates principles (3) and (4) in a degree that I find unnecessary to repeat here.

39 Briefly, against the foregoing principles, I reach the following conclusions on the evidence that is before the Court:

- first, the Canadian Environmental Assessment Act places on the responsible authority, here the Superintendent, a public legal duty to act;
- second, the duty is owed to the leaseholder;
- third, given the conduct of the Superintendent and his or her delegates since the redevelopment proposal was filed, the leaseholder has a clear right to performance of that duty. I am satisfied that the leaseholder had, at the time the second application for judicial review was filed, satisfied all conditions precedent then made known to it giving rise to the duty, and that there was a prior demand for performance of the duty. If not between the time the environmental assessment report was provided and the time the second application for judicial review was filed, then certainly between the time the environmental assessment report was provided and the time of hearing of the second application, a reasonable time to comply was provided. There was no outright refusal or rejection of the environmental assessment up to the time of the hearing before me. There has been an implied refusal since the second application was filed, through unreasonable delay. I am not prepared to interpret the communication received on the eve of the hearing before me as either an outright or implied rejection of the environmental assessment. It bears no relation to the environmental assessment per se;
- fourth, the duty sought to be enforced is not discretionary, it is mandatory although the ultimate decision need not be favourable to the leaseholder;
- fifth, no other adequate remedy is available to the leaseholder;
- sixth, the order sought will be of some practical value or effect, and I will return to this point briefly below;
- seventh, there is no equitable bar to relief by way of mandamus; and
- eight and finally, on a "balance of convenience" mandamus should issue.

40 I return to the sixth principle, whether or not mandamus, if issued, would be of some practical value or effect. It would appear to the Court that, if the Parks Canada letter delivered by fax to the leaseholder on the eve of the hearing of this matter stands as a decision and not merely a notice, completion of the environmental assessment process based upon the redevelopment proposal submitted in 1997 might be considered to be of no practical value or effect; it would, in effect, be moot. That being said, I am not prepared to reach a conclusion that the position adopted by Parks Canada in the fax stands as a decision that will bind the leaseholder. That is a matter not before me.

41 As noted earlier, the fax delivered on the eve of the hearing of these applications was not before me under cover of an affidavit and substantially post-dated the perfection by both parties of the second application. The issue of mootness was not addressed in memoranda of argument and was not argued before me on behalf of the leaseholder. I could not reasonably have expected it to be argued. Under the circumstances, I am not prepared to reject all of the reliefs sought on the second application on the basis of mootness. It is worth noting here that the leaseholder is not simply seeking an order directing the respondent to make a decision per se. As noted earlier, when the two applications are read together, relief is sought to require the Superintendent to make a decision under the regulatory scheme and process consistent with the leaseholder's legitimate expectations. To fail to grant relief on the second application would completely frustrate the relief I have already determined to grant on the first application. I am not prepared to conclude that the fax forecloses the justiciability of these applications that are quite properly before the Court. Thus, I am prepared to conclude that I should proceed on the basis that mandamus was, at the date of the hearing before me, and is, as of the date of my decision herein, of some practical value or effect.

42 Counsel for the respondent urged that there was here no unreasonable delay that would justify the issue of mandamus. He noted that legislative policy regarding the National Parks was in flux throughout the period of time when the leaseholder's redevelopment proposal was before Parks Canada and, indeed, continues to be in flux. That concern is reflected in the fax received by the leaseholder on the eve of trial. This issue was addressed by Mr. Justice Robertson in Apotex.[23] At paragraph [86], he wrote:

> Returning to the facts before us, in my view it cannot be said that in the exercise of his statutory power under the FDA Regulations the Minister was entitled to have regard to the provisions of Bill C-91 after they were enacted but before they were proclaimed into effect. In the circumstances of this case, pending legislative policy is not a relevant consideration which can be unilaterally invoked by the Minister.

[emphasis added]

I am satisfied that the same might be said here. In the absence of clear statutory authority to the contrary, that is in force and not merely pending, pending legislative policy in the form of the new Canada National Parks Act, with all of the ramifications that might flow from it, cannot be unilaterally invoked by the Superintendent to delay or avoid fulfilment of the statutory duties imposed on him or her as a responsible authority under the Canadian Environmental Assessment Act. If he or she were able to do so, finality in dealings with Government officials in matters such as that here before the Court would be nothing more than a chimera.

Standard of Review

43 Counsel for the leaseholder urged that on both the first and second applications for judicial review, the standard of review that I should apply in determining whether or not to grant relief is "correctness". By contrast, counsel for the respondents urged that the appropriate standard of review on both applications for judicial review is "reasonableness". I determine that I am not obliged to address this issue. Whichever might be the appropriate standard of review, I am satisfied that the result would be the same.

CONCLUSIONS

44 In the result, on the first application, an order in the nature of mandamus will go directing the respondents to review the leaseholder's redevelopment proposal with respect to Storm Mountain Lodge that is before him in accordance with the development approval process and development guidelines that were in force in June of 1997 as modified only by the addition of a role for the Advisory Development Board and to issue to the leaseholder a redevelopment permit with respect to that proposal or, alternatively, to reject the redevelopment proposal. If the redevelopment proposal is rejected, the respondents shall provide to the leaseholder reasons for the rejection as against the development approval process and development guidelines referred to in this paragraph.

45 In respect of the second application for judicial review, an order in the nature of mandamus will go directing the responsible authority to fulfil his or her obligations under sections 18 and 20 of the Canadian Environmental Assessment Act in relation to the environmental assessment submitted by the leaseholder in relation to its redevelopment proposal for Storm Mountain Lodge which environmental assessment was submitted to Parks Canada on or about the 18th of November, 1999. If the responsible authority rejects the environmental assessment pursuant to section 20 of the Act, he or she will be required to provide to the leaseholder reasons justifying such rejection.

COSTS

46 I regard the leaseholder as having been substantially successful on these two applications for judicial review. In the result, in respect of each application for judicial review, an order of costs will go in favour of the leaseholder and against, in the case of the first application, the Minister of Canadian Heritage, and in the case of the second application, the Attorney General of Canada, such costs, if not agreed upon, to be assessed in accordance with Column III of the table to Tariff B to the Federal Court Rules, 1998.

GIBSON J.

* * * * *

ANNEX
(Footnote 21)

18. (1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

(a) a screening of the project is conducted; and
(b) a screening report is prepared.

(2) Any available information may be used in conducting the screening of a project, but where a responsible authority is of the opinion that the information available is not adequate to enable it to take a course of action pursuant to subsection 20(1), it shall ensure that any studies and information that it considers necessary for that purpose are undertaken or collected.

3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been

filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.

...

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out and shall ensure that any mitigation measures that the responsible authority considers appropriate are implemented;

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or

(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

(2) Where a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, notwithstanding any other Act of Parliament, in the exercise of its powers or the performance of its duties or functions under that other Act or any regulation made thereunder or in any other manner that the responsible authority considers necessary, ensure that any mitigation measures referred to in that paragraph in respect of the project are implemented.

(3) Where the responsible authority takes a course of action pursuant to paragraph (1)(b) in relation to a project,

(a)

the responsible authority shall file a notice of that course of action in the public registry established in respect of the project pursuant to section 55; and

(b) notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made thereunder shall be exercised or performed that would permit that project to be carried out in whole or in part.

* * *

18. (1) Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion, l'autorité responsable veille :

a) à ce qu'en soit effectué l'examen préalable;
b) à ce que soit établi un rapport d'examen préalable.

(2) Dans le cadre de l'examen préalable qu'elle effectue, l'autorité responsable peut utiliser tous les renseignements disponibles; toutefois, si elle est d'avis qu'il n'existe pas suffisamment de renseignements pour lui permettre de prendre une décision en vertu du paragraphe 20(1), elle fait procéder aux études et à la collecte de renseignements nécessaires à cette fin.

(3) Avant de prendre sa décision aux termes de l'article 20, l'autorité responsable, dans les cas où elle estime que la participation du public à l'examen préalable est indiquée ou dans le cas où les règlements l'exigent, avise celui-ci et lui donne la possibilité d'examiner le rapport d'examen préalable et les documents consignés au registre public établi aux termes de l'article 55 et de faire ses observations à leur égard.

...

20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) :

a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en oeuvre du projet et veiller à l'application de ces mesures d'atténuation;
b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants qui ne peuvent être justifiés dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient lui permettre la mise en oeuvre du projet en tout ou en partie;
c) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29 :

(i)

s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,

(iii) si les préoccupations du public le justifient.

(2) L'autorité responsable qui prend la décision visée à l'alinéa (1)a) veille, malgré toute autre loi fédérale, lors de l'exercice des attributions qui lui sont conférées sous le régime de cette loi ou de ses règlements ou selon les autres modalités qu'elle estime indiquées, à l'application des mesures d'atténuation visées à cet alinéa.

(3) L'autorité responsable qui prend la décision visée à l'alinéa (1)b) à l'égard d'un projet fait consigner un avis de sa décision au registre public tenu aux termes de l'article 55 pour le projet, et, malgré toute autre disposition d'une loi fédérale, aucune attribution conférée sous le régime de cette loi ou de ses règlements ne peut être exercée de façon qui pourrait permettre la mise en oeuvre du projet en tout ou en partie.

1 S. C. 1992, c. 37.

2 R.S.C. 1985, c. N-14. The Canada National Parks Act was enacted by Parliament as Chapter 32 of the Statutes of Canada, 2000, assented to on the 20th of October, 2000. By section 46 of that Act, the National Parks Act is repealed. Subject to limited exceptions not relevant here, subsection 70(1) of that Act provides that its provisions will come into force on a day to be fixed by order of the Governor in Council. As at the dates of hearing of these applications for judicial review, the Canadian National Parks Act had not been proclaimed in force and the National Parks Act had not been repealed.

3 Applicant's application record on the first application, volume 1, tab 2(c).

4 Applicant's application record on the first application, volume 1, tab 2(d).

5 Between the times the OCA Guidelines and the Banff National Park Management Plan were published, the "Responsible Minister" in relation to national parks was changed from the Minister of the Environment to the Minister of Canadian Heritage.

6 Applicant's application record on the first application, volume 1, tab 2(j).

7 Applicant's application record on the first application, tab 2(k).

8 Applicant's application record on the first application, tab 2(v).

9 Respondent's application record on the first application, tab A2.

10 Applicant's application record on the second application, volume III, tab 3A, page 26.

11 Respondent's application record on the first application, volume 2, tab B4.

12 [1995] 1 F.C. 588 at 596-597.

13 SOR/98-106.

14 [1989] 1 S.C.R. 342.

15 [1990] 3 S.C.R. 1170.

16 [1999] 2 S.C.R. 817.

17 Toronto: Canvasback Publishing, 1998 at 1-42. In support of their opinion, Brown and Evans cite Apotex Inc. v. Canada (Minister of National Health Welfare), (1999), 252 N.R. 72 (F.C.A.) and Rocky Mountain Ecosystem Coalition v. Canada (National Energy Board), (1999), 174 F.T.R. 17.

18 [1986] 3 F.C. 386 at 387 (C.A.).

19 Supra, note 17.

20 [2001] F.C.J. No. 18 (C.A.).

21 For ease of reference, sections 18 and 20 of the Canadian Environmental Assessment Act are set out in an annex to these reasons.

22 (1993), 162 N.R. 177 (F.C.A.).

23 Supra, note 22.