Court of Appeal File No. C61116

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

TRINITY WESTERN UNIVERSITY and BAYDEN VOLKENANT

Appellants

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent

FACTUM AND AUTHORITIES OF THE PROPOSED INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION (Motion for Leave to Intervene Returnable December 11, 2015)

November 30, 2015

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FACTUM OF THE PROPOSED INTERVENER, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I - OVERVIEW

1. This is a motion brought by the Canadian Civil Liberties Association (the "**CCLA**") for leave to intervene in this appeal, the central issues of which involve the balancing of *Charter* freedom of religion rights with other equality rights of potential lawyers in Canada.

2. The proposed intervener, the CCLA, is a national, non-profit, independent, nongovernmental organization that has been protecting and promoting the rights and freedoms of Canadians for the past fifty years. The manner in which this Court addresses how the religious and equality rights are to be reconciled in the context of this appeal is of significant public interest and falls squarely within the CCLA's mandate to promote and protect civil liberties.

3. The central issue in this appeal is whether the discretionary decision of the Law Society of Upper Canada ("**LSUC**") not to accredit the proposed Trinity Western University law school ("**TWU**") and its requirement that all TWU law students "read, understand and agree" to the Community Covenant (the "**Covenant**")[1] reflected a proportionate balancing of competing Canadian *Charter* rights and whether the balance the LSUC chose was reasonable in the ambit of the *Charter*.

4. The CCLA takes the position that the decision of the LSUC was fully debated, well informed, reasonable and took into account and balanced the competing rights and interests, including the appellants' religious rights and beliefs. The balance struck by

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[1] *Trinity Western University v. Law Society of Upper Canada*, [2015] O.J. No. 3492 (Div. Ct.) ["**Divisional Court Decision**"] at para.13. The Covenant prohibits, amongst other things, "sexual intimacy that violates the sacredness of marriage between a man and a woman."

the LSUC was reasonable and should not be interfered with. The CCLA agrees that the Divisional Court was correct in finding that:

> in exercising its mandate to advance the cause of justice, to maintain the rule of law and act in the public interest, the [LSUC] was entitled to balance the applicants' rights to freedom of religion with the equality rights of future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women). It was entitled and to consider the impact on those equality rights of accrediting TWU's law schools, and thereby appear to give recognition and approval to institutional discrimination against those minorities. Condoning discrimination can be ever much as harmful as the act of discrimination itself.[2]

5. If granted leave to intervene, the CCLA intends to make brief submissions on the importance of adopting a principled, modern day approach, to the issues relating to freedom of religion and its reconciliation and balancing with competing interests, including the equality rights and privacy rights of those individuals and groups who would be adversely effected by the decision to accredit the TWU Law School with its mandatory commitment to the Covenant.

6. Made from a perspective different and unique from those of the immediate parties, and the proposed interveners and the interveners who were before the Divisional Court, the CCLA's submissions will be distinctively grounded in its mandate to promote and protect fundamental rights and liberties and its extensive experience in addressing the difficult issues that arise when those fundamental rights and liberties have to be balanced with the public interest.

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[2] Divisional Court Decision, *supra* at para.116.

PART II - ISSUE

7. The only issue raised by this motion is whether the CCLA ought to be granted leave to intervene in this appeal.

PART III - LAW AND ARGUMENT

A. The Criteria for Granting Leave to Intervene Under Rule 13.02

8. Pursuant to Rule 13.02 and 13.03 of the *Rules of Civil Procedure,* leave to intervene as a "friend of the court" may be granted to any person for the purpose of rendering assistance to the court by way of argument.[3]

9. The test for intervention is well established. In considering a motion for leave to intervene, a court will consider: the nature of the case; the issues that arise; and the likelihood of the moving party usefully contributing to the resolution of the appeal without causing prejudice or delay to the parties.[4]

10. In public interest cases, and in constitutional cases in particular, where a judgment has a significant impact on persons who are not immediate parties to the proceedings, the courts have broadly applied the test for intervention to allow for the broad perspective of properly interested interveners. As the Ontario Court of Appeal observed in *Bedford v. Canada (Attorney General),* a successful intervener in a *Charter* case has usually met "at least one of three criteria": (1) it has a real and substantial and identifiable interest in the subject matter of the proceedings; (2) it has an important

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[3] *Rules of Civil Procedure,* RRO 1990, Reg. 194, Rules 13.02-13.03, Schedule "B" hereto.
[4] *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 OR (2d) 164, 46 Admin LR 1 (CA) [***"Regional Municipality"***], **Tab 1**; *Childs v. Desormeaux* (2003), 67 OR (3d) 385, 231 DLR (4th) 311 (CA) at para. 15, **Tab 2.**

perspective distinct from the immediate parties; or (3) it is a well-recognized group with a special expertise and broadly identifiable membership base.[5]

B. The CCLA Should Be Granted Leave to Appeal

11. It is respectfully submitted that the CCLA satisfies all three criteria set out in the *Bedford* case and other relevant jurisprudence in that it: has a real and identifiable interest in the subject matter of the appeal; an important perspective distinct from the immediate parties; experience relevant to the issues before the Court; and a broadly identifiable membership base. Moreover, the nature of the case and issues raised, along with the likelihood of the CCLA being able to make a useful contribution to the resolution of the issues in the dispute without any prejudice or delay, militates in favour of granting the CCLA leave to intervene.

i) The Nature of the Case and the Issues it Raises

12. This case is of significant public interest, which engages Canadian *Charter* rights and values, including the scope of equality rights and freedom of religion and association, and raises issues as to how those rights are to be balanced between competing rights and affected groups in the public interest. As is evident from the decision under appeal, the broad public debate, the number of interveners and the issues in play, this case transcends the immediate parties and has broader implications for all Canadians and the legal profession. It is therefore precisely the type of case that will benefit by interveners with various perspectives and without a direct interest in the outcome.

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[5] *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 [**"*Bedford*"**] at para. 2, **Tab 3.**

13. By virtue of its mandate and distinct expertise in reconciling fundamental rights with competing priorities, the CCLA is well suited to assist the Court in reconciling the broader societal interests at issue in this case. The CCLA has been engaged in the issue of the permissibility of the Covenant and its impact on the broader societal interests at issue in this case since the initial debate surrounding the accreditation of TWU's proposed law school. In particular, after having studied TWU's Covenant in detail, in May 2014, the CCLA weighed into the issues before this Honourable Court, when it wrote to the President of TWU to express the CCLA's concerns about the Covenant, and in particular, the CCLA's views on the Covenant's discriminatory impact on prospective LGBTQ students, faculty and staff at TWU.[6] The CCLA's letter urged TWU to "eliminate the requirement that members of the TWU sign the Covenant as a precondition to employment or admission, and/or to remove all references to "marriage between a man and a woman" and "sexual conduct" from the Covenant's text."[7]

ii) The CCLA Has a Largely Established Track Record of Making Useful Contributions

14. Well-established non-profit public interest organizations frequently are granted intervener status in light of their ability to bring a different perspective to issues before the court and to provide assistance in deciding matters of broad public importance.[8]

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[6] Affidavit of Sukanya Pillay, sworn November 23, 2015 ("**Pillay Affidavit**") at para. 15, CCLA's Motion Record.
[7] Pillay Affidavit, *supra* at para. 15, CCLA's Motion Record.
[8] *Canadian Council of Churches v. R.*, [1992] 1 SCR 236, 88 DLR (4th) 193, **Tab 4.**

15. The following is a list of only some of the cases involving freedom of religion in which the CCLA has been granted intervener status:

- Intervention before the Court of Appeal in Ontario in *Zylberberg v. Sudbury Board of Education (Director)*, (1988), 65 OR (2d) 641, in which the issue was whether the Regulations to Ontario's *Education Act* that required prayers in school were contrary to section 2(a) of the *Charter* as they were forcing students to engage in religious practices in school;

- Intervention before the Supreme Court in *Adler v. Ontario*, [1996] 3 S.C.R. 609, which examined public funding of religious schools and the issue of whether the province of Ontario's failure to provide funding for religious schools (other than those where funding is mandated by the *Constitution)* violated the right to freedom of religion;

- Intervention before the Supreme Court in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, concerning exemptions sought by members of the religious community to the province of Alberta's requirement that photos be taken for provincial driver's licenses;

- Intervention before the Supreme Court in *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, concerning TWU's dispute with the British Columbia College of Teachers over permission to award baccalaureate degrees in education; and

- Intervention before the Supreme Court of Canada in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, which involved the balancing of freedom of religion and equality rights in the context of a public school board's resolution refusing to authorize books for a school curriculum that illustrated same-sex parented families.

16. In its prior interventions, the CCLA has advocated in favour of the observance of freedom of religion when it does not contradict the legitimate choices of a free and democratic society. A recurring theme in the CCLA's submissions to the courts and to government bodies is the need to develop principled approaches to the balancing of interests that almost inevitably occur in cases involving civil liberties. In all its work, the CCLA seeks to propose an appropriate balance on a principled basis that considers all of the interested parties' civil liberties and human rights.

17. Given the CCLA's expertise and interest in defending civil liberties, it is well suited to shed light on the important issues in this appeal.

iii) Outline of CCLA's Unique and Useful Submissions

18. If granted leave, the CCLA's submissions will be distinctively grounded in its mandate to promote and protect fundamental rights and liberties and its extensive experience and background in addressing the difficult issues that arise when those fundamental rights and liberties have to be balanced with the public interest. The CCLA's intervention will carry the weight of its experience (and its experienced staff and lawyers) in reconciling fundamental Canadian *Charter* and human rights values and its capacity to present a different and unique perspective from that of the parties, that advances the potentially affected interests of Canadian citizens more broadly.

19. Should the CCLA be granted leave to intervene, it anticipates focusing on the following submissions:

(i) the broader discriminatory effect of TWU's Covenant, which directly discriminates against members of the LGBTQ community, but also impacts and discriminates against women, persons who live in common-law relationships, and those who have other religious beliefs;

(ii) how the Covenant, as recognized by the Divisional Court, encourages members of the LGBTQ community and those who do not share in TWU's beliefs, but wish to obtain a coveted spot or employment in a law school, to effectively engage in an active

deception on their true beliefs and/or identity, and the broader ramifications of such deception;

(iii) the true discriminatory impact and effect on TWU law students, faculty and staff signing the Covenant. For instance, as held by the Divisional Court, a student signing the Covenant "runs the risk of being suspended or expelled if they subsequently fail to abide by its terms" and how those who do not believe in marriage, or LGBTQ students, must "in essence, disavow not only their beliefs but, in the case of LGBTQ individuals, their very identity" in signing the Covenant;[9]

(iv) moreover, this problem goes further. The post-graduation disclosure that a TWU law graduate had either been untruthful in affirming the Covenant, or had failed to abide by the terms of the Covenant because they are a member of the LGBTQ community and/or because the Covenant never expressed their true beliefs and/or their beliefs had changed during their time at law school, could result in similar sanctions by TWU and create a "disciplinary quandary" for the LSUC and future members of the LSUC who graduate from the TWU law school. The LSUC would be placed in an untenable and irreconcilable position of having a member or members sanctioned by their law school, the TWU,

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[9] Divisional Court Decision, *supra* at para. 106.

for conduct that is entirely lawful, acceptable and beyond government scrutiny or interference under modern Canadian law, human rights and equity principles;

(v) the broader public policy concerns and privacy implications associated with requiring disclosure of one's sexual activity, sexual orientation or beliefs through the adherence to the Covenant, and the suggestion that religious ideals articulated in the Covenant can translate into prohibitions on private conduct; and

(vi) the unacceptable discriminatory barriers to legal education and access to justice that are created by placing prohibitions on student and faculty conduct that is unrelated to academics and academic integrity.

20. Upon review of the facta and submissions of the parties and those granted intervener status at the Divisional Court, the CCLA submits that the foregoing submissions it intends to make will be useful to the Court. The CCLA is not aware of any other party or proposed intervener that is making the same submissions as set out above, including most importantly, the aforementioned disciplinary quandaries the LSUC may face, and the broader public policy and privacy implications associated with adherence to the Covenant.[10]

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[10] Pillay Affidavit, *supra* at para. 28, CCLA's Motion Record.

21. If granted leave to intervene, the CCLA will expand on these submissions. The CCLA will not seek to supplement the appeal record and will avoid overlap with the submissions of the parties and other interveners.

22. Granting the CCLA leave to intervene will not delay this appeal or prejudice any party. The CCLA will adhere to the timetable established by the Court.

C. Costs

23. The CCLA will not seek costs, and asks that it not be liable for costs to any other party of intervener.

PART IV - ORDER REQUESTED

24. The CCLA respectfully requests an order permitting CCLA to:

(a) Intervene in this appeal as a friend of the court;

(b) File a factum in this appeal not exceeding 10 pages; and

(c) Make oral submissions in this appeal not exceeding 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of November, 2015.

Alan L. W. D'Silva & Alexandra Urbanski
STIKEMAN ELLIOTT LLP

Lawyers for the Proposed Intervener,
The Canadian Civil Liberties Association

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 OR (2d) 164, 46 Admin LR 1 (CA)

2. *Childs v. Desormeaux* (2003), 67 OR (3d) 385, 231 DLR (4th) 311 (CA)

3. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669

4. *Canadian Council of Churches v. R.*, [1992] 1 SCR 236, 88 DLR (4th) 193

SCHEDULE "B"
RELEVANT STATUTES

Canadian Charter of Rights and Freedoms

Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

25. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Equality Rights

Equality Before and Under Law and Equal Protection and Benefit of Law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative Action Programs

15.(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Rules of Civil Procedure, **RRO 1990, Reg 194**

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

TAB 1

Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic & Pacific Co. of Canada Ltd., Loblaws Supermarkets Ltd., Steinberg Inc. (c.o.b. Miracle Food Mart) and Oshawa Group Ltd. Indexed as: Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (C.A.)

74 O.R. (2d) 164

[1990] O.J. No. 1378

Action No. 455/90

ONTARIO
Court of Appeal

Dubin C.J.O., in Chambers

August 3, 1990.

Civil procedure -- Parties -- Intervention -- Applicant seeking to be added as party or as friend of court in appeal of judgment that held statute unconstitutional and contrary to Canadian Charter of Rights and Freedoms -- Considerations -- Rules of Civil Procedure, O. Reg. 560/84, rules 13.01, 13.02.

The applicant was a non-profit corporation whose objects included preserving Sunday as a day of rest, monitoring all legislation bearing on Sunday labour or business and pressing for new legislation or amendment of existing law to minimize activity on Sunday. While, historically, members of the applicant were drawn from religious groups, the majority of its members now were representatives of trade unions, small retail businesses and trade associations. The applicant applied for leave to intervene as an added party or as a friend of the court in pending appeals of a judgment that held the Retail Business Holidays Act, as amended in February 1989, unconstitutional and in contravention of the Canadian Charter of Rights and Freedoms.

Held, subject to certain conditions, leave should be granted to the applicant to intervene as a friend of the court.

In determining whether an application for intervention should be granted the matters to be considered were the nature of the case, the issues which arise and the likelihood of the applicant being able

to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties. In constitutional cases, including cases under the Charter, there has been a relaxation of the rules governing applications for leave to intervene and an increase in the desirability of permitting intervention because the judgments in these cases have a great impact on others who are not immediate parties. In this case, although the applicant's argument may overlap with the argument of the Attorney General in support of the legislation the applicant represented a very large number of individuals who had a direct interest in the outcome, had special knowledge and expertise of the subject-matter and was in a position to place the issues in a slightly different perspective from that of the Attorney General. Since the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, it was not appropriate to grant leave as an added party under rule 13.01 of the Rules of Civil Procedure. Subject to certain conditions, it was appropriate to grant leave to intervene under rule 13.02 as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44 Canadian Charter of Rights and Freedoms Retail Business Holidays Act, R.S.O. 1980, c. 453

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]

APPLICATION for leave to intervene as added party or friend of the court.

David A. McKee, for People for Sunday Association of Canada, applicant for leave to intervene.

Elizabeth C. Goldberg and Hart Schwartz, for Attorney General of Ontario.

Robert S. Russell and Freya J. Kristjanson, for Loblaws Supermarkets Ltd.

Julian N. Falconer, for Great Atlantic & Pacific Co. of Canada Ltd.

John B. Laskin and Kent E. Thomson, for Oshawa Group Ltd.

Robert J. Arcand and Sharon M. Addison, for Steinberg Inc. (c.o.b. Miracle Food Mart).

Angus T. McKinnon, for Hudson's Bay Co.

DUBIN C.J.O.:-- This is an application by the People for Sunday Association of Canada for leave to intervene as an added party or as a friend of the court in the appeals now pending from the judgment [in the High Court of Justice on June 22, 1990] of Mr. Justice Southey [reported 73 O.R. (2d) 289, 90 C.L.L.C. Paragraph14,023], who held that the Retail Business Holidays Act, R.S.O. 1980, c. 453 (the Act), as amended in February 1989, is in contravention of the Canadian Charter of Rights and Freedoms and is thereby unconstitutional.

This is the first time that the constitutionality of the Retail Business Holidays Act, as amended, has come before this court, although it has twice before considered the constitutionality of its predecessor.

The applicant is a non-profit organization incorporated under the Canada Business Corporations Act, R.S.C. 1985, c. C-44. The current objects of the corporation include:

(a) To affirm Sunday as a unique weekly opportunity, for as many people as possible, to enjoy spiritual, physical, moral and cultural renewal;
(b) To cultivate the conviction of Canadian people that the preservation of Sunday as the national, weekly day of rest is necessary for the well-being of the individual, the family and the community;
(c) To monitor carefully the drafting and enactment of all legislation bearing on Sunday labour or business and to press for new legislation or amendment of existing law where deemed necessary to minimize activity on Sunday;
(d) To encourage active enforcement of laws protecting the special status of Sunday.

Historically, the membership of the Association was drawn from religious groups. While certain of such groups are still members of the Association, the majority of its members are representatives of trade unions, small retail businesses and trade associations. Included in its membership is a trade union, the majority of whose members work in the retail food sector. The membership also includes retail associations which represent small retail businesses, often owned and operated by single families.

Over the years the Association has taken an active role on issues arising under the present statute, as well as its predecessor, and, in particular, has addressed the role that municipalities play in the present Act, a core factor in the reasons for judgment of Mr. Justice Southey.

In constitutional cases, including cases under the Canadian Charter of Rights and Freedoms, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.

The Attorney General for Ontario supports this application for intervention, but it is opposed by all the other respondents. The principal submission made by those who submit that leave to intervene should not be granted is that the interests of those whom the applicant represents are now fully protected by the position being taken on the appeals by the Attorney General for Ontario and, indeed, much of the evidence relied upon by the Attorney General in the proceedings before Mr. Justice Southey was drawn from sources that the applicant represents.

However, in my opinion, that is not a sufficient reason in this case to deny leave to intervene. The role of counsel for the Attorney General for Ontario is to support the constitutionality of the province's legislation. Although the argument may overlap, the applicant represents a very large number of individuals who have a direct interest in the outcome, has a special knowledge and expertise of the subject-matter and is in a position to place the issues in a slightly different perspective than that of the Attorney General.

It was also submitted that the applicant had considered seeking the right to intervene in the proceedings before Mr. Justice Southey and declined to do so and, therefore, should not be permitted to

intervene now. However, I do not think that the failure to apply for intervention before Mr. Justice Southey should foreclose the applicant's opportunity for seeking intervention at this stage.

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

The relevant provisions of our rules of practice relating to intervention [Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]] are as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,
>
> the person may move for leave to intervene as an added party.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.
>
> 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.
>
> . . . . .
>
> 13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

It is apparent that the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, and I do not think that leave to intervene as an added party pursuant to rule 13.01 would be appropriate.

However, in my opinion, it is appropriate to grant leave to intervene under rule 13.02, as a friend of the court, for the purpose of rendering assistance to the court by way of argument.

In the result, I would grant leave to the applicant to intervene on such a basis subject to the following conditions:

(1) that the applicant takes the record as it is and will not be permitted to adduce further evidence;
(2) that it will not seek costs on the appeals, but that costs may be awarded against it;
(3) that it file its factums within seven days of having been served with the factums of the Attorney General for Ontario;
(4) that the costs of this application will be costs in the appeal.

Order accordingly.

TAB 2

Case Name:

Childs v. Desormeaux

Between
Zoe Childs, Andrew Childs, Pauline Childs, Heather Lee Childs and Jennie Khristine Childs, plaintiffs/appellants, and Desmond Desormeaux, Julie Zimmerman, The Dominion of Canada General Insurance Company and The General Accident Assurance Company of Canada and Dwight Courrier, defendants/respondents

[2003] O.J. No. 3800

67 O.R. (3d) 385

231 D.L.R. (4th) 311

44 C.P.C. (5th) 5

177 O.A.C. 183

125 A.C.W.S. (3d) 970

Docket Nos. M30222 and C38836

Ontario Court of Appeal
Toronto, Ontario

McMurtry C.J.O.
(In chambers)

Heard: September 19, 2003.
Judgment: October 1, 2003.

(18 paras.)

Practice -- Parties -- Intervenors -- On appeal -- Parties who may apply -- Interest in subject matter.

Application by Mothers Against Drunk Driving for leave to intervene as a friend of the court in the

plaintiffs' appeal. The defendant, Desormeaux, was a guest at a New Year's Eve party hosted by his friends, the defendants, Zimmerman and Courrier. Desormeaux became intoxicated to a level that was apparent to his hosts. Desormeaux left the party in his car and was involved in an accident in which Childs was permanently injured. The trial judge did not want to expand tort law liability to include the social host, and dismissed the action against Zimmerman and Courrier.

HELD: Application allowed. This private litigation included issues that engaged a consideration of public policy. MADD was allowed to make submissions on whether the liability of social hosts fell within an existing head of liability or whether such liability was new and novel. If it was novel, it could make submissions why this should be recognized as a new tort. Intervention by MADD would be useful to this case. Its involvement would not result in injustice to the defendants, as it would not be involved in the particular facts of this case.

Counsel:

Barry D. Laushway, for the appellant.
Eric R. Williams, for the respondents, Zimmerman and Courrier.
Earl A. Cherniak, Q.C. and Kirk F. Stevens, for the proposed intervenors, Mothers Against Drunk Driving Canada.

[Editor's note: A corrigendum was released by the Court October 2, 2003; the corrections have been made to the text and the corrigendum is appended to this document.]

1 **McMURTRY C.J.O.**:-- This is a motion brought by Mothers Against Drunk Driving Canada ("MADD Canada") for leave to intervene as a friend of the court in the appeal brought by the Plaintiffs from the decision of Justice Chadwick rendered on August 30th, 2002: Childs v. Desormeaux [2002] O.J. No. 3289, (2002) 217 D.L.R. (4th) 217, (2002) 13 C.C.L.T. (3d) 259, [2002] O.T.C. 628.

2 The appellants support the application while the respondents oppose the intervention of MADD Canada. I am satisfied that MADD Canada should be permitted to intervene as a friend of the court.

3 As I stated in Authorson v. The Attorney General of Canada (2001) 147 O.A.C. 355 at paragraph 8 and 9:

> Intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of the litigation, regardless of an agreement to restrict submissions.
>
> Many appeals will fall somewhere in between the constitutional and strictly

> private litigation continuum, depending on the nature of the case and the issues to be adjudicated. In my view, the burden on the moving party should be a heavier one in cases that are closer to the "private dispute" end of the spectrum.

While this litigation might, at first blush, appear to be one that is private in nature, a review of the decision reveals that the issues to be decided as described briefly below, engage a consideration of public policy.

4 On December 31st, 1998, the defendant Desormeaux was an invited guest at a New Year's Eve party hosted by his friends, the defendants Zimmerman and Courrier. According to the factual findings of the trial judge, Desormeaux became intoxicated during the evening to a level that was apparent to his hosts. As happens all to often, Desormeaux left the party in his motor vehicle and, tragically, was involved in a traffic accident with a vehicle in which the plaintiff, Zoe Childs, was a passenger. As a result of this accident, 17-year-old Zoe Childs was grievously and permanently injured. On the basis of the evidence adduced at trial, the trial judge found, at paragraph 104 of his decision, that the defendants "had a duty not to turn Desmond Desormeaux loose on the highway where he could cause injury or death to others." The defendants/respondents on appeal may well challenge both the factual and legal underpinnings of this conclusion.

5 The plaintiffs argued that the case fell within those categories of cases where a duty of care resulting in tort liability had been previously recognized. Alternatively, the plaintiffs argued that if not within the scope of other recognized duties of care, then a new duty of care ought to be established.

6 The trial judge held that the proposed duty of care did not fall within an established category of cases in which a duty of care had been previously recognized. Rather, the trial judge found that liability based on a finding of a duty of care imposed on "social hosts" in favour of third parties such as the plaintiff would be new and novel.

7 As a result he was obliged to consider whether a new duty of care should be imposed in accordance with the decision of the House of Lords in Anns v. Merchant of London Bureau Council, [1978] A.C. 728, as explained by the Supreme Court of Canada in Cooper v. Hobart (2002), 206 D.L.R. (4th) 193 (S.C.C.). At page 203 of the Cooper decision, McLachlin, C.J.C. and Major, J. on behalf of the court stated:

> "The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Counsel suggests in R. v. Yuen Kun Yeu, that such considerations will not often

> prevail. However we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of a relationship there are other policy reasons why the duty should not be imposed."

8 Ultimately, however, while the trial judge held that the plaintiffs had satisfied the first branch of the Anns test, he found "there is good policy reason not to expand tort law to include the social host. In my view it should be left to the legislature to determine a social host liability and also to properly compensate the innocent victims. As such the action is dismissed."

9 Included in the evidentiary record was the evidence of Andrew Murie, the National Executive director of MADD Canada given in support of the analysis of the policy issues to be considered at the second stage of the Anns test. That this evidence was admitted and considered by the trial judge reflects the reality that the issues in this case involve broad policy considerations.

10 As a result, while this is a dispute between individuals and in that regard private nature, the issue of whether, on the facts, a duty of care arose and if so whether such duty is or should be recognized in tort law, is one that differentiates this case from one that is solely of interest to the affected parties. Whether to recognize that social hosts owe an actionable duty of care to members of the public is an issue that transcends the dispute between the immediate parties to this litigation.

11 MADD Canada is well known as a leading advocate in the struggle to end the carnage arising from drunk driving. One of its public policy activities relates to alcohol related civil liability. MADD Canada proposes to make submissions as to the issue of whether liability of social hosts in a case such as this falls within an existing head of liability or whether such liability is new and novel. If a new head of liability, MADD Canada also proposes to make submissions as to the relevant policy considerations that should inform the decision of whether to recognize such a new tort.

12 It is not disputed that the position of MADD Canada is generally aligned with the position of the plaintiffs. It has an obvious and well known viewpoint from which it approaches the issue of civil liability arising out of alcohol related activities. Indeed, it is its very interest in the subject matter that has caused it to acquire experience and expertise in the area.

13 Today most intervenors who intervene as a friend of the court articulate a position that may generally be aligned with one or another side of the argument. The submission of the respondents that a "friend of the court" must be neutral, abstract and objective refers to a restricted notion of the amicus curiae that has long been rejected. In the United States, the author Samuel Krislov, in "The Amicus Brief: From Friendship to Advocacy" Yale Law Journal 1963 Vol. 72 at page 704, stated:

> "The Supreme Court of the United States makes no pretense of such disinterestedness on the part of "its friends". The amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented ... thus the institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy."

14 While the law of Ontario has not, perhaps, expanded the role of the friend of the court this far, David Scriven and Paul Muldoon, wrote as long ago as 1985, in their article "Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" Advocates Quarterly, Vol. 16, 1985-1986 at page 456-457:

> "While the old case law implicitly assumes that a friend of the court cannot provide "assistance" when it intends to advocate its point of view, the language of Rule 13.02 appears to deny this traditional argument. The rule states that any person may intervene as a friend of the court" for the purpose of rendering assistance to the court by way of argument. The term "argument" literally means to "persuade by giving reasons" and thus directly imports the notion of advocacy in such applications."

15 Since the publication of this article the law of this province has developed to recognize the valid and important contribution that can be made in appropriate cases by friends of the court who may be advocates for a particular interpretation of the law. As Dubin, C.J.O. succinctly stated in Peel (Regional Municipality) v. Great Atlantic and Pacific Company of Canada Limited (1990), 74 O.R. (2d) 164 at page 167:

> "Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties".

16 As articulated by Dubin, C.J.O., this is the test for intervention by public interest groups. I am satisfied that although the position of MADD Canada is generally aligned with the position of the plaintiffs, it can "make a useful contribution" to the argument of the issues before the court. Further, I am satisfied that intervention by MADD Canada will not cause injustice to the respondents. As stated by Morden, J.A. in Louie v. Lastman (2001), 152 O.A.C. 341 at page 343:

> "It is true that the intervention will expand the number of submissions to which the responding party will be obliged to reply but this, which is for the potential benefit of the court, is not an injustice. Further, having regard to the conditions I attach to the intervention order, the responding party may be compensated for any increased costs resulting from the intervention but will not be liable for costs in connection with it."

17 While the Executive Director MADD Canada testified at trial, his testimony was restricted to the policy issues in support of recognizing a new tort, and not in relation to the underlying facts of the case. MADD Canada did not otherwise participate in the trial. Counsel for MADD Canada has stated that it will neither challenge the factual findings of the judge nor take any position as to the

merits of the case as between the parties. Its participation will be limited, essentially, to whether tortious liability of social hosts does or should exist in Canadian law. In this context, I am satisfied that the fact that the Executive Director of MADD Canada was called to testify at trial is not a bar to its participation as a friend of the court on the appeal.

18 Accordingly I grant leave to MADD Canada to intervene as a friend of the court on the following conditions:

(a) that it take the record as is and will not be permitted to adduce further material;
(b) that it will not seek costs on the appeal, but that costs may be awarded against it;
(c) that it deliver its factum, not to exceed 20 pages in length, on or before October 10th, 2003;
(d) that the respondents may deliver a supplementary factum, if necessary, to respond to matters raised by the intervenor no later than October 20th, 2003;
(e) that the time allocated for its oral submissions be fixed at 20 minutes.

There will be no costs of this motion.

McMURTRY C.J.O.

* * * * *

Corrigendum
Released: October 2, 2003

Correction in counsel's name ...

TAB 3

Case Name:

Bedford v. Canada (Attorney General)

Between
Terri Jean Bedford, Amy Lebovitch and Valerie Scott,
Applicants (Respondents), and
Attorney General of Canada, Respondent (Respondent), and
Attorney General of Ontario, Intervenor (Respondent)
APPLICATION UNDER Rule 14.05(3)(g.1) of the Rules of Civil Procedure

[2009] O.J. No. 3881

2009 ONCA 669

255 O.A.C. 21

98 O.R. (3d) 792

2009 CarswellOnt 5572

181 A.C.W.S. (3d) 45

Docket: C50823

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, E.A. Cronk and G.J. Epstein JJ.A.

Heard: September 10, 2009.
Judgment: September 22, 2009.

(11 paras.)

Civil litigation -- Civil procedure -- Parties -- Intervenors -- Amicus curiae or friend of the court -- Charter litigation -- Appeal by Christian Legal Fellowship, REAL Women of Canada and Catholic Civil Rights League from dismissal of their motion for leave to intervene in pending application for declaration that certain Criminal Code provisions relating to prostitution violated Charter allowed -- Appellants had real, substantial and identifiable interest in subject matter of the application and

an important perspective different from the parties -- Appellants could have made useful contribution to application without causing injustice to immediate parties.

Appeal by the Christian Legal Fellowship, REAL Women of Canada and Catholic Civil Rights League from the dismissal of their motion for leave to intervene as friends of the court. In the pending application, Bedford and others sought a declaration that certain Criminal Code provisions relating to prostitution violated the Canadian Charter of Rights and Freedoms. The appellants intended to argue that the impugned provisions had morality as their cornerstone and were enacted to protect human dignity. The respondents opposed the motion on the basis that the appellants were not able to contribute to resolution of the issues, as moral perspectives on the sex trade did not meaningfully address the safety issues raised by their application. The motion judge held that the material filed on behalf of the appellants indicated an intention to use the proceeding to advance personal views, beliefs and policies, and the moving parties were unable to identify specific issues on which they wished to make submissions, except in general terms. He further held that the appellants did not demonstrate any expertise or special knowledge that would entitle them to advance arguments on the relevant issues, and their participation had the potential to unnecessarily lengthen and disrupt the proceedings.

HELD: Appeal allowed and motion granted. The appellants had a real substantial and identifiable interest in the subject matter of the application and an important perspective different from the parties. The motion judge erred in concluding that the appellants' proposed argument was not described clearly, making it impossible to apply the test for intervention. The appellants' position, namely, that the constitutionality of the challenged laws could be supported by the moral values of Canadian society, was clearly described. Furthermore, the respondents intended to argue that morality could not serve to support the constitutionality of the impugned legislation, thus putting that issue in play. Whether the appellants' position ultimately prevailed or not, it would provide a counterpoint to the respondents' argument that would not otherwise have been made and might have been useful to the court. The appellants did not seek to file any affidavit material, and sought only to make legal argument. This was a complete answer to the concern that their participation could disrupt the hearing or unduly lengthen the proceedings. The basis for the motion judge's decision was clearly flawed and his conclusion could not stand. The appellants could have made a useful contribution to the application without causing injustice to the immediate parties.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Criminal Code, R.S.C. 1985, c. C-46,

Ontario Rules of Civil Procedure, Rule 13.02, Rule 14.05(g) (3.1)

Appeal From:

On appeal from the order of Justice P. Theodore Matlow of the Superior Court of Justice dated July 2, 2009.

Counsel:

Derek J. Bell, Ranjan K. Agazwal and Alexie S. Landry, for the appellants Christian Legal Fellowship, REAL Women of Canada and Catholic Civil Rights League.

Ron Marzel, for the respondents, Terri Jean Bedford, Amy Lebovitch and Valerie Scott.

Roy Lee and Michael H. Morris, for the respondent Attorney General of Canada.

Christine Bartlett Hughes, for the respondent Attorney General of Ontario.

The following judgment was delivered by

1 THE COURT:-- Pursuant to Rule 13.02, the appellants unsuccessfully sought leave to intervene as a friend of the court in the application brought by the respondents Terri Jean Bedford, Amy Lebovitch and Valerie Scott. That application seeks a declaration that certain sections of the *Criminal Code* criminalizing activities related to prostitution violate the *Charter of Rights and Freedoms*.

2 The relevant jurisprudence provides considerable guidance to a court hearing such a motion. Where the intervention is in a *Charter* case, usually at least one of three criteria is met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well recognized group with a special expertise and a broadly identifiable membership base. See: *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32. Most importantly, the over-arching principle is that laid down by Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 at 167:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

3 Finally, while Rule 13.02 accords considerable deference to the court hearing the motion, that discretion is not immune from appellate scrutiny. See: *GEA Group AG v. Ventra Group Co.* 2009 ONCA 619. That discretion cannot be exercised for reasons that clearly misapprehend the record before the court.

4 In this case, the record leaves no doubt that the appellants meet several of the *Dieleman* criteria. They have a real substantial and identifiable interest in the subject matter of the application and, as acknowledged by the Attorney General of Canada, an important perspective different from the parties. The respondents do not oppose the motion on this basis.

5 The respondents' argument at first instance was that the appellants did not show that they would be in a position to make a useful contribution to the resolution of any issue that needed to be determined. In the end, the motion judge essentially agreed with this submission. However, he did so for reasons that, in our view, are clearly erroneous.

6 The motion judge concluded that the appellants' proposed argument was not described clearly, making it impossible to apply the test for intervention. We disagree. The record below and counsel's submissions clearly described the appellants' position, namely, that the constitutionality of the challenged laws can be supported by the moral values of Canadian society. Indeed, before us, counsel for the respondents not only understood that this was their position but argued vigorously that it was irrelevant.

7 The motion judge also determined that, in any event, he could not reasonably determine whether any issues of morality would properly arise in the argument of the application. That too misunderstands the material before him. The respondents were clear both below and in this court that in the application they will argue that morality cannot serve to support the constitutionality of the impugned legislation. In other words, the respondents will be putting that issue in play. The Attorney General of Canada indicated it would not be relying on Canadian moral values as a cornerstone of its defence of the legislation but made clear that there was considerable affidavit evidence in the record relating to such an argument. Whether the appellants' position ultimately prevails or not, it will provide a counterpoint to the respondents' argument that will not otherwise be made and may be useful to the court.

8 In addition, the motion judge's view that the appellants have not shown any special knowledge entitling them to advance their arguments overlooks that the appellants do not seek to file any affidavit material. They seek only to make legal argument, not to supply the court with specialized knowledge, something that also provides a complete answer to the concern that their participation could disrupt the hearing. Also, the time limited argument means that their participation would not unduly lengthen the hearing.

9 In summary, the basis for the motion judge's decision is clearly flawed and his conclusion therefore cannot stand. Rather, as we have indicated, given the issues at stake and the position the appellants propose to take, we conclude that the appellants may be able to make a useful contribution to the application without causing injustice to the immediate parties.

10 We would allow the appeal and grant the motion as asked, with the addition set out in para. 19 of the factum of the Attorney General of Canada.

11 No costs here or below.

S.T. GOUDGE J.A.
E.A. CRONK J.A.
G.J. EPSTEIN J.A.

TAB 4

Indexed as:

Canadian Council of Churches v. Canada (Minister of Employment and Immigration)

The Canadian Council of Churches, appellant;
v.
Her Majesty The Queen and The Minister of Employment and Immigration, respondents, and
The Coalition of Provincial Organizations of the Handicapped, The Quebec Multi Ethnic Association for the Integration of Handicapped People, League for Human Rights of B'Nai Brith Canada, Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC), interveners.

[1992] 1 S.C.R. 236

[1992] 1 R.C.S. 236

[1992] S.C.J. No. 5

File No.: 21946.

Supreme Court of Canada

1991: October 11 / 1992: January 23.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (45 paras.)

Standing -- Public interest group -- Immigration Act amendments making provisions with respect to determination of refugee status more stringent -- Public interest group active in work amongst refugees and immigrants -- Action commenced to challenge constitutionality of Act under the Charter -- Whether standing should be granted to challenge provisions -- Immigration Act, 1976, S.C. 1976-77, as am. by S.C. 1988, c. 35 and c. 36 -- Canadian Charter of Rights and Freedoms, s. 7.

The Canadian Council of Churches is a federal corporation which represents the interests of a broad group of member churches including the protection and resettlement of refugees. The Council had expressed its concerns about the refugee determination process in the proposed amendments to the Immigration Act, 1976 [page237] (which later came into force on January 1, 1989) to members of the government and to the parliamentary committees considering the legislation. These amendments changed the procedures for determining whether applicants came within the definition of a Convention Refugee.

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

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

Recognition of the need to grant public interest standing, whether because of the importance of public rights or the need to conform with the Constitution Act, 1982, in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. A balance must be struck between ensuring access to the courts and preserving judicial resources. The courts must not be allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases.

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

[page238]

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

Although the claim at issue made a sweeping attack on most of the many amendments to the Act, some serious issues as to the validity of the legislation were raised. Appellant had a genuine interest

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

Cases Cited

Considered: Gouriet v. Union of Post Office Workers, [1978] A.C. 435; Australian Conservation Foundation Incorporated v. Commonwealth of Australia (1980), 28 A.L.R. 257; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982); Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607; referred to: Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575; Toth v. Minister of Employment and Immigration (1988), 86 N.R. 302; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959.

[page239]

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C., 1985, App. III.
Canadian Charter of Rights and Freedoms, Preamble, s. 7.
Constitution Act, 1982, s. 52(1).
Immigration Act, 1976, S.C. 1976-77, c. 52, as am. by S.C. 1988, c. 35 and c. 36.

Authors Cited

Australia. Australian Law Reform Commission. Discussion Paper No. 4. Access to the Courts--I: Standing: Public Interest Suits. Sydney: 1977.
Canada. Auditor General. Report of the Auditor General of Canada to the House of Commons, Fiscal Year Ended 31 March 1990. Ottawa: Minister of Supply and Services Canada, 1990.
Tribe, Laurence H. American Constitutional Law, 2nd ed. Mineola, New York: Foundation Press, Inc., 1988.
United States Constitution, Article III, s. 2(1).

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 534, 36 F.T.R. 80, 68 D.L.R. (4th) 197, 106 N.R. 61, 46 C.R.R. 290, 44 Admin. L. R. 56, 10 Imm. L. R. (2d) 81, allowing an appeal from a judgement of Rouleau J., [1989] 3 F.C. 3, 27 F.T.R. 129, 41 C.R.R. 152, 38 Admin. L. R. 269, 8 Imm. L. R. (2d) 298, dismissing an application to strike out. Appeal dismissed and cross-appeal allowed.

Steven M. Barrett, Barb Jackman and Ethan Poskanzer, for the appellant.
Graham R. Garton, for the respondents.
Anne M. Molloy, for the interveners, The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration of Handicapped People.
David Matas and Marvin Kurz, for the intervener, League for Human Rights of B'Nai Brith Canada.
Mary Eberts and Dulcie McCallum, for the interveners, Women's Legal Education and Action [page240] (LEAF) and Canadian Disability Rights Council (CDRC).

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

[Editor's note: An errata was published at [2012] 1 S.C.R., Part 3, page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of the Court was delivered by

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

Factual Background

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

3 In 1988 the Parliament of Canada passed amendments to the Immigration Act, 1976, S.C. 1976-77, c. 52, by S.C. 1988, c. 35 and c. 36. The amended act came into force on January 1, 1989. It completely changed the procedures for determining whether applicants come within the definition of a Convention Refugee. While the amendments were still under consideration the Council expressed its concerns about the proposed new refugee determination process to members of the

government and to the parliamentary committees which considered the legislation. On the first business day after the amended act came into force, the Council commenced this action, seeking a declaration that many if not most of the amended provisions violated the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, R.S.C., 1985, App. III. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to [page241] bring the action and had not demonstrated a cause of action.

Proceedings in the Courts Below

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

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

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

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

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

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

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8 He granted the Council standing on the following matters raised on the statement of claim.

1. The claim in paragraph 3(c) of the statement of claim which alleges that the requirement that detainees obtain counsel within 24 hours from the making of a removal order violates s. 7 of the Charter (at p. 558);

2. The claim in paragraph 6(a) which alleges that provisions temporarily excluding claimants from having claims considered violate s. 7 of the Charter (at p. 554);
3. The claim in paragraph 10(a) which alleges that provisions allowing the removal of a claimant within 72 hours leave too short a time to consult counsel and violate s. 7 of the Charter (at p. 561);
4. The claim in paragraph 14(c) which alleges that the provisions permitting the removal of a claimant with a right to appeal within 24 hours if a notice of appeal is not filed in that time violate the Constitution (at p. 562).

9 The appellant seeks to have the order of the Federal Court of Appeal set aside. The respondents has cross-appealed to have the remaining positions of the statement of claim struck out.

Issues

10 The principal question to be resolved is whether the Federal Court of Appeal erred in holding that the Canadian Council of Churches should be denied standing to challenge many of the provisions of the Immigration Act, 1976.

11 The secondary issue is whether the Federal Court of Appeal erred in holding that certain allegations in the statement of claim failed to disclose a cause of action and others were hypothetical or premature.

[page243]

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

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

The United Kingdom

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

government has acted unconstitutionally as there is in Canada and the United States.

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

15 These exceptions were affirmed in Gouriet v. Union of Post Office Workers, [1978] A.C. 435, at p. 506. [page244] In that case the plaintiff sought standing to obtain an injunction against a postal union. It was argued that the union's announced plan that it would not process any mail for South Africa for a period of one week would violate the criminal law. The Attorney General refused to bring an action against the union. Yet, the House of Lords refused to grant standing to Gouriet. It held that he could only litigate the issue in a relator action brought by the Attorney General.

16 There are now various statutes in the United Kingdom which provide that a Court may in certain circumstances grant an applicant leave to bring an action. Recent cases have turned upon the wording of the particular statutory provisions and as a result they are of limited assistance in consideration of the issue in Canada.

Australia

17 The Australian Law Reform Commission published a paper on the question of public interest standing in 1977, (Access to the Courts -- I: Standing: Public Interest Suits (No. 4, 1977)). The report reviewed circumstances which had resulted in demand for increased access to the Courts in common law jurisdictions. It identified the first as the introduction of legal aid which permitted socially-disadvantaged citizens to assert their private legal rights. The second was the provision of legal representation for "diffuse" interest groups in areas such as consumer and environmental protection. It noted that these organizations often raise issues that are not connected with the private rights or interests in property which would provide the traditional common law basis for standing. The Commission put forward three alternative solutions to the question of when standing should be granted. They were as follows:

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

(2) United States Method. The so called United States method would enable the Courts to screen the proposed plaintiffs as a part of the determination of the particular case.
(3) Preliminary Screening. This method would institute a preliminary screening procedure which would be undertaken by the Court before the substantive issue was considered.

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

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

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

> A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not [page246] so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

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

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

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

The United States of America

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

> Section 2, Clause 1. Subjects of jurisdiction. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority,--to all Cases affecting Ambassadors, other public Ministers and Consuls,--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;-- between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and [page247] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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

(1) "he has personally suffered some actual or threatened injury" as a result of the impugned act,
(2) that the injury "fairly can be traced to the challenged action" and
(3) that the injury is "likely to be redressed by a favorable decision".

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

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25 He observed that, "This Court repeatedly has rejected claims of standing predicated "'on the right, possessed by every citizen, to require that the Government be administered according to law' ... ." He expressed his concern that the Federal Court should not overstep its traditional role by

entering into conflict with the legislative branch over claims asserted by individuals who have not suffered a "cognizable injury".

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

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

The Question of Standing in Canada

28 Courts in Canada like those in other common law jurisdictions traditionally dealt with individuals. [page249] For example, courts determine whether an individual is guilty of a crime; they determine rights as between individuals; they determine the rights of individuals in their relationships with the state in all its various manifestations. One great advantage of operating in the traditional mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not overextended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing.

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

30 The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the Charter this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases;

Thorson v. Attorney General of Canada, supra, Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, and Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575. Writing for the majority in Borowski, supra, Martland J. set forth the conditions [page250] which a plaintiff must satisfy in order to be granted standing, at p. 598:

> ... to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

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

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

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

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

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

[page251]

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

Parliament and the legislatures are thus required to act within the bounds of the constitution and in accordance with the Charter. Courts are the final arbitors as to when that duty has been breached.

As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the Charter.

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

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

> ... the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; [page252] the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in Thorson, McNeil and Borowski.

Should the Current Test for Public Interest Standing be Extended

35 The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

36 The whole purpose of granting status is to prevent the immunization of legislation or public

acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The [page253] decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

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

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

(1) Serious Issue of Invalidity

38 It was noted in Finlay, supra, that the issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge. In the case at bar the Federal Court of Appeal in its careful reasons turned its attention to the question of whether the amended statement of claim raised a reasonable cause of action. The claim makes a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the Immigration Act, 1976. Some of the allegations are so hypothetical in nature that it would be impossible for any court to make a determination with regard to them. In many ways the statement of claim more closely resembles submissions that might be made to a parliamentary committee considering the legislation than it does an attack on the validity of the provisions of the legislation. No doubt the similarity can be explained by the fact that the action was brought on the first working day following the passage of the legislation. It is perhaps unfortunate that this court is asked to fulfil the function of a motion's [page254] court judge reviewing the provisions of a statement of claim. However, I am prepared to accept that some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation.

(2) Has the Plaintiff Demonstrated a Genuine Interest?

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

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

40 It is this third issue that gives rise to the real difficulty in this case. The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them

has standing to initiate a constitutional challenge to secure his or her own rights under the Charter. The applicant Council recognizes the possibility that such actions could be brought but argues that the disadvantages which refugees face as a group preclude their effective use of access to the court. I cannot accept that submission. Since the institution of this action by the Council, a great many refugee claimants have, pursuant to the provisions of the statute, appealed administrative decisions which affected them. The respondents have advised that nearly 33,000 claims for refugee status were submitted in the first 15 months following the enactment of the legislation. In 1990, some 3,000 individuals initiated claims every month. The Federal Court of Appeal has a wide experience in this field. MacGuigan J.A., writing for the court, took judicial notice of the fact that refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis. I accept without hesitation this observation. It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear concrete [page255] factual background upon which the decision of the court could be based.

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

42 From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted [page256] as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. The Council must, therefore, be denied standing on each of the counts of the statement of claims. This is sufficient to dispose of the appeal. The respondents must also succeed on their cross-appeal to strike out what remained of the claim as the

plaintiff council does not satisfy the test for standing on any part of the statement of claim. I would simply mention two other matters.

Intervener Status

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

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

44 In light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail. Had it [page257] been necessary to do so I would have had some difficulty agreeing with all of the conclusions of the Federal Court of Appeal on this issue. Perhaps it is sufficient to set out once again the principles which should guide a court in considering whether a reasonable cause of action has been disclosed by a statement of claim. It was put in this way by Wilson J. giving the reasons of this Court in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, at p. 980:

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

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

Disposition of the Result

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

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Solicitor for the respondents: John C. Tait, Ottawa.
Solicitors for the interveners, The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration [page258] of Handicapped People: Advocacy Resource Centre for the Handicapped, Toronto.
Solicitors for the intervener, League for Human Rights of B'Nai Brith Canada: David Matas, Winnipeg, and Dale Streiman and Kurz, Brampton.
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* * * * *

Errata, published at [2012] 1 S.C.R., Part 3, page iv

[1992] 1 S.C.R. p. 252, line f 4 of the English version. Read "by well-meaning organizations" instead of "by a well-meaning organizations".

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT
Appellants

and

THE LAW SOCIETY OF UPPER CANADA
Respondent

Court of Appeal File No. C61116

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM AND AUTHORITIES OF THE PROPOSED INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

(Motion for Leave to Intervene)
(Returnable December 11, 2015)

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