COMMENTS
COMMENTAIRES

Blaikie and Forest: The Declaratory Action as a Remedy against Unconstitutional Legislation

Introduction

The decisions of the Supreme Court of Canada in *Le Procureur général de la Province de Québec* v. *Blaikie*[1] and *Attorney-General of Manitoba* v. *Forest*[2] mark the first occasions on which major constitutional decisions against the validity of legislation have been rendered by the Court as a result of privately initiated declaratory proceedings since the Court developed its liberalized approach to such proceedings in *Thorson* v. *Attorney-General of Canada (No. 2)*[3] and *Nova Scotia Board of Censors* v. *McNeil*.[4] Although the basis for jurisdiction in the *Blaikie* case was that the plaintiffs had shown "sufficient interest" under article 55 of the *Code de procédure civile of Quebec*,[5] and not the *McNeil* and *Thorson* precedents, it seems fair to suggest that the spirit of the *Thorson* and *McNeil*

Nota: The author had an opportunity to follow closely the course of litigation over the constitutionality of the Manitoba and Quebec official language statutes while maintaining a watching brief on this litigation (including the case of *Le Bureau métropolitain des écoles protestantes de Montréal* v. *Le Ministre de l'Education de la Province de Québec* [1976] C.S. 430, 83 D.L.R. (3d) 645, which is not discussed in this article) on behalf of the New Brunswick Department of Justice from 1975 to 1978. While it was not directly related to the preparation of this comment, the cooperation of the parties and counsel involved in that litigation provided valuable background material. In light of this, the author would like to take this opportunity to thank all of those whose assistance he received, in particular, Robert J. Stocks, Peter E. Graham, Roger Thibaudeau Q.C., Robert S. Litvack, Rodolphe Bilodeau and Raynold Langlois of the Quebec Bar, A.J.J. Hogue, R.D. Gibson and J.A. Scollin Q.C. of the Manitoba Bar, counsel for various parties, and J. Fernand Landry of the New Brunswick Bar, William G. Webster of the Manitoba Bar and Armand L.C. de Mestral of the Quebec Bar, who worked with him at various stages on the watching brief.

[1] (1979) 101 D.L.R. (3d) 394 (S.C.C.).
[2] (1979) 101 D.L.R. (3d) 385 (S.C.C.).
[3] [1975] 1 S.C.R. 138.
[4] [1976] 2 S.C.R. 265.
[5] L.R.Q., c. C-25 [hereinafter cited as *Code de procédure civile*].

rulings probably influenced the decision of Deschênes C.J.S.C. to accept jurisdiction.[6] Jurisdiction in the *Forest* case depended on the *Thorson* and *McNeil* rulings.[7] In light of this, and in view of the purely declaratory relief granted by the Supreme Court in both cases, these two decisions provide a useful case study of the efficacy of the *Thorson* and *McNeil* type of proceeding.[8]

Two features of the language law litigation in particular provide interesting subjects for such study. First, there is the significance of the procedural complications faced by Forest in getting his declaratory action before the courts. Second, there is the role of the declaratory remedy itself as an end point of major litigation. This comment will study each of these features in turn, and then make some proposals for future development of the *Thorson* and *McNeil* type of action on the basis of the *Blaikie* and *Forest* cases.

I. Procedural complications

Forest's legal battle began with a unilingual municipal parking ticket in 1976. Since Forest was a resident of the St. Boniface area of Winnipeg, he initially objected to the ticket on the basis of a provision in the *City of Winnipeg Act*[9] which required that municipal notices to residents of St. Boniface be bilingual. This objection was broadened at the initial hearing of his case to include reference to section 23 of the *Manitoba Act*,[10] which authorizes the use of both English and French in court proceedings in Manitoba. After having been convicted by the Provincial Court on the parking charge, Forest further widened his attack on unilingualism in the Manitoba legal system by filing an appeal written in French to

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[6] *Blaikie* v. *Procureur général de la Province de Québec* [1978] C.S. 37, 85 D.L.R. (3d) 252 [hereinafter cited to C.S.].

[7] *Forest* v. *Attorney-General of Manitoba* (1979) 98 D.L.R. (3d) 405 (Man. C.A.).

[8] Ultimately, the declaratory proceedings in *Thorson* and *McNeil* failed on the merits. While such proceedings can be efficacious in the sense that they resolve doubts about the validity of legislation and thus tell people who may have been uncertain whether they should obey it, for most practical purposes nothing changes as a result of a declaratory action upholding the constitutionality of a challenged statute. The statute continues to be enforced as it would have been if not challenged. Identifiable results which enable one to assess the efficacy of the declaratory action really occur only when the challenged statute is struck down. Moreover, the *Thorson* and *McNeil* cases have received relatively little academic comment in this regard. The only substantial discussion the author has found is that of Mullan, *Standing After McNeil* (1976) 8 Ott. L. Rev. 32.

[9] S.M. 1971, c. 105, s. 80(3).

[10] S.C. 1870, c. 3 (R.S.C. 1970, App. II, No. 8).

the County Court. At this stage, he was no longer relying on the *City of Winnipeg Act,* which clearly had nothing to do with judicial appeal proceedings. Thus, the constitutionality of the *Official Language Act* of Manitoba,[11] which restricted court proceedings to English, was unavoidably at issue. The County Court rejected the Crown's objections to the appeal document, ruling that the *Official Language Act* was unconstitutional because of conflict with section 23 of the *Manitoba Act.*[12]

At this point, the Government of Manitoba took the position that it would agree to proceeding in French in Forest's case without appealing this preliminary decision, but did not consider this case as a binding precedent for other litigation. Faced with this attitude, Forest broadened his own attack by seeking French copies of the statutes relevant to his parking ticket case. This brought into issue a second aspect of the conflict between section 23 of the *Manitoba Act* and the *Official Language Act* of Manitoba, namely, the language of legislation. When his request for French statutes was turned down except on condition he undertake to pay translation costs, Forest began an application to the Court of Queen's Bench for an order of *mandamus* requiring that French statutes be provided to him. He integrated his claim with his initial attack on the language of court proceedings by attempting to file his application in French. Court officials refused to accept the documents for filing, apparently on the basis that this was contrary to the Manitoba *Official Language Act.* He then tried to file in the Court of Appeal, which also had original jurisdiction over *mandamus* applications. Again, court officials refused to allow filing in view of the *Official Language Act* of Manitoba, and on the basis that to allow filing of French documents would be to prejudge the constitutionality of that Act.

Forest then initiated another preliminary proceeding by asking the Court of Appeal to order its officials to file his *mandamus* application. This effectively narrowed the immediate issue once again to the language of the courts, although the language of legislation would have been at issue in the principal proceeding if Forest had succeeded on the preliminary issue. The Court of Appeal avoided the language issue at this stage. Recognizing that, ultimately, the entire validity of the *Official Language Act* of Manitoba was at stake in the proceedings before it, the Court accepted the Attorney-General's argument that it was not a convenient forum at this stage, since there might be a need to call

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[11] R.S.M. 1970, c. 0-10.

[12] *R.* v. *Forest* (1977) 74 D.L.R. (3d) 704 (Man. Co. Ct).

evidence, particularly with respect to the language of legislation, and the Court of Queen's Bench was better equipped for that purpose. In addition, the Court indicated a preference to hear the opinion of the trial court on the substantive issues in order to ensure the fullest consideration of the case.[13]

Forest, once again, altered his legal strategy and began an action in the Court of Queen's Bench to have the *Official Language Act* of Manitoba declared *ultra vires,* basing his standing on the *Thorson* and *McNeil* decisions. At the outset, he was denied a decision on the substantive issues when the Court refused to grant standing.[14] This decision was based on the availability of other proceedings in which Forest did have standing as a mechanism for determining the issues, for example, the *mandamus* application which had not been pursued. Moreover, the Court noted that, in part, Forest was actually attempting to litigate an issue on which he already had a decision in his favour in the parking ticket proceeding.[15]

The Court of Appeal, however, granted standing under *Thorson* and *McNeil.*[16] They proceeded to hear and determine the substantive issue of the constitutionality of the *Official Language Act* of Manitoba. Beginning at this point, Forest's case proceeded expeditiously to the Supreme Court of Canada a few months later.[17]

The course of the *Blaikie* litigation stands in sharp contrast. The plaintiffs began an ordinary action for a declaration that Chapter III of the *Charte de la langue française*[18] was unconstitutional. Standing was granted on the basis that the plaintiffs had a sufficient interest to maintain the action. The case then proceeded in due course through a trial[19] and appeals to the Quebec Court of Appeal[20] and the Supreme Court of Canada.[21]

In commenting upon the procedural complications of the *Forest* case, it is necessary to note at the outset that much of the procedural difficulty which Forest experienced was more a result of his litigation strategy, than a necessary feature of a *Thorson* and *McNeil* proceeding. Forest appears to have developed his litigation

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[13] *Re Forest and Registrar of Court of Appeal of Manitoba* (1976) 77 D.L.R. (3d) 445 (Man. C.A.).

[14] *Forest* v. *Attorney-General of Manitoba* (1978) 90 D.L.R. 230 (Man. Q.B.).

[15] *Ibid.,* 234-5, 237.

[16] *Supra,* note 7.

[17] *Supra,* note 2.

[18] L.R.Q., c. C-11, arts 7-13.

[19] *Supra,* note 6.

[20] *Procureur général du Québec* v. *Blaikie* [1978] C.A. 351, 95 D.L.R. (3d) 42.

[21] *Supra,* note 1.

strategy as he went along, rather than to have planned it in advance. Many of the delays he experienced were as a result of major shifts in strategy. In particular, he became involved, at different points of time, in three completely separate proceedings — the parking ticket charges, the application for *mandamus*, and the action for a declaratory judgement. Moreover, the delays were actually encountered in proceedings in which his standing under *Thorson* and *McNeil* were not at issue. In both the parking ticket case and the application for *mandamus*, Forest had standing in the traditional sense. After he initiated his "*Thorson* and *McNeil* proceeding", the matter proceeded with relative celerity.

Forest's experience in the earlier proceedings is nonetheless relevant to the study of this case as a *Thorson* and *McNeil* action. One of the considerations in granting standing in such an action is an assessment of the prospects that the justiciable issue may be resolved in a proceeding on the initiative of someone with normal standing. While no rigid requirement is stipulated, the courts are obviously interested in whether the plaintiff in the declaratory action has explored other ways of having the issue resolved.[22] In light of *Thorson*,[23] *McNeil*[24] and *Forest*,[25] the critical requirement may simply be that the plaintiff request the Attorney-General to initiate proceedings. Since the Attorney-General traditionally has standing to raise such issues of public right, this would be a requirement grounded in plain common sense. On the other hand, it is questionable whether this formal preliminary step and a refusal by the Attorney-General to undertake the action are all that enter into the assessment of whether there is a lack of alternative proceedings to test the constitutionality of legislation. It seems more likely that the courts will consider in broad terms whether some other proceeding provides a realistic and more appropriate method to resolve the matter.

As long as it appears that the courts prefer other proceedings to *Thorson* and *McNeil* actions as a means of resolving constitutional questions, persons wishing to raise such issues are likely to attempt such proceedings, if possible, before they launch a *Thorson* and *McNeil* action. The Manitoba Court of Appeal seemed to be strongly influenced by the overall difficulties that Forest had already encountered, even though it indicated that the refusal of

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[22] See *Thorson, supra*, note 3, 161; *McNeil, supra*, note 4, 271. See also *Mullan, supra*, note 8, 39-41.

[23] *Supra*, note 3, 146.

[24] *Supra*, note 4, 268.

[25] *Supra*, note 7, 409.

the Attorney-General to initiate proceedings was controlling. Thus, the experience of Forest leaves future litigants in a quandary as to whether they should attempt alternative proceedings in which they can claim standing in the normal sense, or proceed directly to a *Thorson* and *McNeil* action. If they begin with the former, they run the risk of time and expense from tactical delays which may involve issues that are completely peripheral to their main concern. If they begin with the latter, they risk being turned down for not having tried the former approach first.

If the only real requirement to establish the appropriateness of a *Thorson* and *McNeil* action is refusal of a request that the Attorney-General refer the matter to the courts, the *Forest* and *Blaikie* cases together may suggest that such an action is procedurally quite simple. This constrasts sharply with the experiences of Thorson and McNeil, who each had to make two separate trips through the court system to resolve their cases — one on the standing question, and one on the merits of the constitutional issue.

On the other hand, since Blaikie's standing was recognized at the trial level, the possibility of having to retrace his steps at a later stage was unlikely to arise. Once a court at one level grants standing, any higher court faces two serious obstacles in reversing on this issue. First, since the grant of standing is discretionary in such a case, an appeal court is generally reluctant to interfere with the decision of a lower court. Second, if the lower court proceeds to a decision on the merits, as it is likely to do, the weight of that decision makes it impossible for the appeal court to achieve the main objective of a denial of standing, namely, that the issue be left undecided until litigated by a more appropriate party.

In the *Forest* case, the decision of the Manitoba Court of Appeal to rule on the merits, after reversing the trial court on standing, no doubt reflected in part an appreciation of the concern expressed by the Supreme Court in the *McNeil* case that all of the issues, both as to standing and as to the merits, ought to be before the court for decision at the same time.[26] On the other hand, there is obviously a conflict between the willingness of an appeal court to decide such a case on the merits after reversing a denial of standing by the trial court, and the policy expressed by the Manitoba Court of Appeal, on Forest's *mandamus* application, in favour of having the benefit of the views of a trial court before making an appellate decision. While this problem could be avoided by the trial court expressing its opinion on the merits, this would again tend

[26] *Supra,* note 4, 267.

to defeat the objective of leaving the merits undecided when standing is denied.

Two circumstances make it uncertain whether the approach of the Manitoba Court of Appeal in proceeding to a decision on the merits promises that appeal courts will proceed in this manner as a matter of course, rather than send the case back to the trial court after reversing a denial of standing by the trial court. The Manitoba Court was obviously influenced by the fact that Forest had already been subject to protracted litigation, and particularly by the fact that he had already been back to the trial court once as a result of the Appeal Court's specific instructions that it wanted a trial decision on the merits. Freedman C.J.M., speaking for the majority, suggested that refusal of standing was unreasonable and unjust,[27] noting also that standing was first raised by the Attorney-General only at this late stage in the course of the dispute. The matter might be viewed quite differently in a case where standing has been disputed from the beginning and resolution of this issue proceeds as a routine preliminary matter.

Further, by the time the Manitoba Court of Appeal rendered its decision, the *Blaikie* case was already scheduled for hearing by the Supreme Court of Canada. While differing outcomes were possible in the two cases since the *Manitoba Act* was not actually part of the *British North America Act*,[28] the decision in the *Blaikie* case was likely to determine the outcome in the *Forest* case. The Court of Appeal was surely aware of the fact that, if the Manitoba parties were to have an opportunity to be heard by the Supreme Court before its mind was made up on the issues, time was of the essence. Again, it might have opted for a more leisurely opportunity to hear a trial view of the merits in the absence of this circumstance.

II. The declaratory remedy

While the major legal significance of *Thorson* and *McNeil* revolves around standing, it must not be forgotten that such proceedings inevitably involve declaratory relief, rather than some other remedy. The standing problem is created by the minimal impact of challenged legislation upon the plaintiff. Because of such minimal impact, it is difficult to justify granting any known form of substantial relief to the plaintiffs, although a suggestion will be made later as to one direction in which the courts might move. The

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[27] *Supra*, note 13, 454.

[28] 30-31 Vict., c. 3 (U.K.) (as am.) (R.S.C. 1970, App. II, No. 5).

Forest and *Blaikie* cases also provide a useful case study of the *Thorson* and *McNeil* type of proceeding in this aspect.

Since both Manitoba and Quebec have indicated their intention to render effective the declaratory judgements of the Supreme Court of Canada in the language cases, and indeed Quebec rectified the situation with respect to the language of its statutes within twenty-four hours of the Court's decision,[29] the effectiveness of declaratory relief does not arise as a fundamental issue in these cases. There may be lingering problems, particularly in Manitoba, with respect to the implementation of official bilingualism, but such practical problems would equally have attended any other remedy in the circumstances. The *Blaikie* and *Forest* cases do, however, illustrate other aspects of the effectiveness of declaratory relief.

Since a declaratory judgement does not actually compel anyone to take any action, one might expect the practical implications of the outcome to play a relatively minor role in the court's decision. The *Forest* case illustrates the difference between an action for a declaration and an action claiming some other relief in this respect. When the Manitoba Court of Appeal refused to entertain Forest's *mandamus* application, one of the reasons given was the possible need to hear evidence as to the effect of the decision since such evidence might be a ground for postponing implementation of the order.[30] In the subsequent declaratory action, the Court of Appeal acknowledged the practical problems its decision would impose, but was able to by-pass the question of what it should do about such problems because its decision was only declaratory.[31]

The Quebec language case presented few practical problems since Quebec's pre-existing system of legal institutions capable of coping with official bilingualism was still largely in place when the *Blaikie* case came before the courts. In his trial judgement, Deschênes C.J.S.C. noted a practical consideration against the Quebec law in relation to the language of judicial decisions, pointing out that anglophone judges might not be able to express their decisions with full precision in French.[32] Nonetheless, when acknowledging that such factors could not influence the result, Mr Justice Deschênes's decision provides a reminder that declaratory judgements may not take account of realities in the way that other remedies do.

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[29] *Loi concernant un jugement rendu par la Cour suprême du Canada le 13 décembre 1979 sur la langue de la législation et de la justice au Québec*, L.Q. 1979, c. 61.

[30] *Supra*, note 13, 454-5.

[31] *Supra*, note 7, 423-4.

While judicial consideration of the impact of a declaratory judgement presents practical problems, since, by nature, the scope of the judgement's effects is ill-defined, the lack of such consideration can lead to unfortunate consequences, by eliminating appropriate recognition of the necessary relationship between rights and remedies. To the extent that the rights apparently established by a declaratory judgement may prove impossible to implement, the judgement can create a misleading impression. It is even conceivable that, in some cases, practical realities may be so incompatible with the principles recognized by a declaration as to force the courts to modify substantially, or even reverse, their decision in later proceedings where other remedies are involved.

On the other hand, in view of the conservatism of Canadian courts in developing new remedial approaches, declaratory relief may offer the best compromise between fully effective relief and no relief at all. For example, there can be no doubt that unconstitutionality of the Manitoba language law presents that province with some very serious problems. For a court to have been faced in a single proceeding with the task, not only of determining whether the law was constitutional, but also of resolving even a few of the practical consequences of a decision that it was not, might well have induced the court to deny the right for want of a remedy. At the very least, this process would have involved the judiciary in law reform in a way that our courts prefer to leave to the legislature. The simplicity of a declaratory judgement, albeit a deceptive simplicity, has the advantage of providing time for our legislative institutions to carry out appropriate reform.

The granting of a specific remedy can clarify ambiguities in a judgement. In the *Blaikie* case, for example, the Supreme Court expresses itself with some ambiguity in respect of the language of delegated legislation and quasi-judicial bodies.[33] While the Court seems to adopt the view that section 133 of the *British North America Act* is to be read as applying to delegated legislation and quasi-judicial bodies, it reasons, in the alternative, in such a way as to suggest that the relevant sections of the Quebec law are unconstitutional because they are part of several unseverable provisions, or because the Quebec legislature itself treats them as part of a unified legislative and judicial system, which system in turn is bound by section 133. If the Court had drawn up a specific order compelling compliance with section 133, this order would likely have indicated quite clearly whether delegated legislation and

[32] *Supra*, note 6, 49-50.
[33] *Supra*, note 1, 398, 402-3.

quasi-judicial bodies were subject to an affirmative obligation to conform to section 133, or were merely relieved of the contrary requirements of the Quebec language law. Moreover, by drawing attention to specifics, the necessity of formulating a remedial order might have determined whether municipal agencies in Quebec are bound by section 133, a question which has necessitated proceedings to reconsider the original decision.[34]

Although it would seem that a specific remedy, rather than a declaratory judgement, ought to be more effective, the experiences of Forest and earlier challengers to the Manitoba language law,[35] suggest that this is not necessarily so. As a result of his appeal to the County Court, Forest obtained a direction that he was entitled to proceed in French. Yet, his attempt to take advantage of that ruling in separate proceedings in the higher courts was precluded when officials of the higher courts refused to accept French documents for filing. While it is true that the terms of the remedy that Forest obtained on his preliminary motion in the County Court did not extend to proceedings other than his parking ticket appeal, one wonders at the fairness of a legal system which accords no wider effect to Forest's legal victory on an important constitutional issue than one confined to the proceeding within which that victory was achieved. In denying standing in Forest's subsequent declaratory action, Mr Justice Dewar decried Forest's attempt to litigate an issue on which he had already succeeded in the County Court,[36] but the refusal of the higher court officials to accept the County Court ruling would seem to compel such litigation.

As Freedman C.J.M. pointed out, in explanation of his instructions to the Registrar of the Court of Appeal to refuse the French documents, the County Court judgement was not binding on the higher courts.[37] On the other hand, under the rule of precedent, it is at least arguable that, unless and until overruled by a higher court, the ruling of even the lowest court constitutes the law and is entitled to respect as such. If officials are entitled to disregard the decision of a lower court because it is subject to reversal by a superior provincial court, one may argue that they can also disregard a decision of a superior court because it is subject to reversal by the Supreme Court of Canada. While, in the case at hand, acceptance of the County Court ruling would have meant disregard-

[34] On March 27, 1980, the Government of Quebec obtained leave for a rehearing concerning the language of municipal agencies after the Supreme Court's decision on the *Blaikie* case.

[35] The history of earlier challenges is reviewed by the Manitoba Court of Appeal in *Forest, supra,* note 7, 421-2.

[36] *Supra,* note 14, 235.

[37] *Supra,* note 13, 451.

ing the mandate of a statute, the import of the County Court's ruling was that the statute was unconstitutional and therefore void at law.

It must be conceded that, because of the preliminary character of the County Court ruling, there may be good reason for not treating it as a normal precedent. While the Crown had not appealed the preliminary ruling, it did retain the right to do so after a final decision had been rendered by the County Court on all of the issues. Thus, the precedent of the County Court decision had a certain tentative aspect. If the decision of the court officials, and Mr Justice Freedman's instructions to the Registrar, had been based upon considerations such as these, there might be little cause for concern. However, the possibility that a lower court decision with a *ratio decidendi* based on constitutional grounds may simply be treated as non-existent raises doubts as to the effectiveness of asserting constitutional rights through the pursuit of normal remedies in ordinary legal proceedings. Of course, if there are other litigants interested in asserting the same rights, they are likely to become aware of the precedent in question, and other lower courts are likely to follow it. But, if public officials do not feel obliged to adhere to such precedents, and occasions to litigate the issue arise only infrequently, there is the possibility of long-term infringement of constitutional rights, notwithstanding an occasional challenge to such infringement in the lower courts. The Manitoba language law is a perfect illustration of this point. Even though it was successfully challenged in the County Court in 1909, the Manitoba language law continued in full effect for another seventy years after that decision was buried among the Court's records.[38]

There are arguments against giving such full effect to lower court precedents. The constitutional issue might be quite secondary to other issues in any particular case, and may have received inadequate consideration. Settlement of the dispute or discontinuance of the litigation for totally unrelated reasons may forestall further proceedings even though the government might prefer to appeal on this issue. However, given that the government can seek the ruling of a higher court through a constitutional reference, it would seem preferable for public officials to be guided by the existing precedent, at least where no step has been taken to obtain a more authoritative ruling. Otherwise, the temptation for public officials to carry on as before only adds to the other frustrations facing the private litigant who seeks to enforce the constitution.

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[38] *Bertrand* v. *Dussault* (1909), unreported (Man. Co. Ct), quoted by Monnin J.A. in *Re Forest, supra,* note 13, 458-62.

III. Proposals for the future

Forest's experience suggests that a major drawback of the *Thorson* and *McNeil* rulings is the lack of defined criteria to which a court can address itself in deciding whether to grant standing. The rule appears to be that the courts have a discretion to grant standing, taking into account various factors such as the merits of the case and the availability of alternative means to obtain a judicial ruling. While standards may not play the decisive role in legal decision-making that the typical judicial decision purports to give them, judges and lawyers clearly feel more comfortable with them than they do without them. Moreover, standards can be influential, even if they are not always decisive.

It is submitted that the *Thorson* and *McNeil* rulings would operate more satisfactorily if they evolved in the direction of the Quebec rule on standing which is illustrated in the *Blaikie* case: that is, the courts should adopt the standard that a sufficient interest is necessary to allow standing. In weighing various factors under the discretionary rule, the courts are in effect measuring whether such interest exists. If the approach becomes one of defining and refining such a standard, rather than exercising a pure discretion, the rule will develop in a more rational and orderly fashion, if for no other reason than judges will be more comfortable with what they are doing. It must be emphasized that this does not mean the *Thorson* and *McNeil* approach to standing should be narrowed. The concept of "sufficient interest" seems broader in its own right than the common law rules of standing, and would be further broadened in light of *Thorson* and *McNeil.*

Under such an approach, the proper role for judicial discretion would be to restrain the grant of standing in cases where sufficient interest exists, but the court, for some reason of policy, concludes it is premature to make a ruling on the merits. The courts are accustomed to exercising this form of discretion, particularly in matters of public law. Thus, they should be able to work with it more effectively than with the ostensibly wide-ranging discretion which was called upon in the *Forest* case.

In order to discourage the multiplicity of litigation in which Forest became involved, the view needs to be encouraged that a *Thorson* and *McNeil* proceeding is not a special form of action to be taken separately from other attempts to obtain judicial intervention. Declaratory relief should be treated simply as one of the various forms of remedy that may be sought in a single proceeding. In any particular case, a litigant may have an arguable case for one or more specific remedies, and should feel free to claim a

declaration as an additional or alternative remedy. In the result, it may be decided that the specific remedies should be refused for want of standing or other grounds, or in exercise of judicial discretion, but the court would still be able to rule that the party has sufficient interest to obtain a declaration. The court could then make the appropriate decision on the merits. The extent to which this is procedurally possible at present depends on the rules of court in each jurisdiction, but it is submitted that this is the direction in which the courts should move.

A constant obstacle to private persons who might wish to challenge the constitutionality of particular legislation is the enormous cost of such litigation. Normally, it may be expected that the government, with the public purse behind it, will exhaust its avenues of appeal so that one must be prepared to support any challenge to the Supreme Court of Canada. In light of this, it is submitted that the courts ought to consider granting an additional remedy to the successful applicant for a declaration, namely, an award of costs on a solicitor and client basis. The risk of failure should ensure that the availability of this remedy will not induce frivolous litigation, and, in any event, such litigation can be controlled through judicial discretion. In view of the responsibility of the government to uphold the constitution, it seems entirely appropriate to award costs on this penal scale in the event that a statute is ruled unconstitutional. The government would have the option of avoiding this risk by initiating a constitutional reference, which would seem a preferable method of resolving constitutional doubts in the first place.

Conclusion

The *Blaikie* and *Forest* cases demonstrate that liberalized rules of standing and declaratory relief are viable methods of upholding constitutional rights. In comparison, the two cases suggest that the approach to such litigation under the *Code de procédure civile* is preferable to the present state of the *Thorson* and *McNeil* rule in common law jurisdictions. Evolution of the common law rule in that direction, and attention to ensuring procedural simplicity and controlling the cost of public-interest litigation to the private individual would assist in improving the efficacy of such proceedings.

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