

DECLARATORY JUDGMENT

QUEBEC ALTERNATIVES TO
PREROGATIVE WRITS
AND OTHER PROCEDURES

Winnipeg, August 23, 1984
The Honourable Mr. Justice John R. Hannan
Superior Court of Quebec

The C.I.A.J. meeting at Montreal, November 10, 11 and 12, 1982 was dedicated to the topic of Judicial Review of Administrative Rulings. The various papers presented there are reproduced in a special edition of La Revue du Barreau, Mars-Avril 1983, Tome 43, N^o 2, in French or English, according to their language of presentation. (1)

Our colleague Hon. Jacques Dugas, then President, noted that there had appeared in Quebec in 1982 the very useful works of Garant, (2) Lemieux, (3) and Pépin & Ouellette (4). This present review of 'the declaratory judgment' owes much to all these cited sources. Note should also be taken of the monograph produced at Jasper, August 1981, by our colleague Hon. Denis Levesque (5) at the seminar held under the auspices of the Canadian Judicial Council and liberally consulted for these purposes.

In Quebec, in civil matters, the traditional common law writs of certiorari and prohibition were subsumed under the provisions of the Code of Procedure adopted in the "new" Code of Procedure in 1966, (6) under the provisions of Article 846 c.p. The "new" procedure is recognized as a writ of evocation.

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- (1) Revue du Barreau, 1 Notre-Dame Street East, Room 9.80, Montreal, Quebec, H2Y 1B6
 - (2) Patrice Garant - "Droit Administratif", 1981 (Blais)
 - (3) Denis Lemieux - "Le Contrôle Judiciaire de l'Action Gouvernementale" 1981, 1983 (Centre d'édition C.E.J. Inc. (looseleaf))
 - (4) Pépin & Ouellette - "Principes de Contentieux Administratif", 2nd ed., 1982, Blais
 - (5) "Révision Judiciaire des Tribunaux Administratifs", Jasper, August 1981
 - (6) 1965 S.Q. 1st session, a.846

The recourse to a demand for a declaratory judgment as an alternative to evocation, mandamus, quo warranto and rarely, if ever, habeas corpus in civil matters, is sought in ever widening circles.

In Quebec, generally speaking, the jurisdiction of the Superior Court to superintend and reform administrative decisions (subject to validly enacted privative clauses)⁽⁷⁾ has been recognized since the Court was established: Three Rivers Boatman Ltd. v. Conseil Canadien des Relations Ouvrières (1969) S.C.R. 607. Fauteux J. as he then was, held, for the Court at pp. 615 et seq.:

"Au jour où elle fut créée en 1849, la Cour supérieure acquit en plénitude la juridiction civile de première instance et particulièrement la juridiction de surveillance jusqu'alors exercée par la Cour du Banc du Roi . . . La Cour supérieure devenait ainsi nantie du pouvoir de surveillance, basé sur la common law qu'exerçait en Angleterre la Court of King's Bench sur laquelle la Cour du Banc du Roi fut modelée. Cette loi du contrôle judiciaire sur les tribunaux, corps politique ou corporations exerçant des pouvoirs judiciaires ou quasi judiciaires, nous vient du droit public anglais introduit au Québec lors et par suite de la cession."

It is generally accepted in Quebec that there lie within the text of the Code of Procedure, all of the necessary weapons of procedure to invoke and obtain judicial review of administrative procedures. The declaratory judgment may be sought as an alternative

(7) See page 16.

among other techniques. Prior to the amendments of 1983, L.Q. c. 28, declared in force December 1, 1983, the writs of evocation, quo warranto and mandamus, the Court accepted the allegations contained in the petition and often supported by the most laconic of affidavits, as true. This procedure was widely criticized as having the effect of deciding the law (at least until after the long-distant hearing on the merits), before being in possession of the facts.⁽⁸⁾ Since the introduction of the new articles 834 to 835.5 C.C.P. at December 1, 1983, the petition must be supported by elaborated affidavits, after their service on those adversely interested together with the documents invoked, whereupon, if the record is complete the matter is heard on the merits. If the record is incomplete the Court may make interim orders to safeguard the rights of the parties, and a time for hearing in the near future is thereupon fixed. The motion for declaratory judgment follows this process except in respect of interim orders.

It might be useful to briefly allude to the various avenues of procedure found explicitly within the Code.⁽⁹⁾

I Direct Action:

Actions for declaratory judgment or in nullity under Article 33 c.p. (superintending and reforming power) or Article 20 c.p. and 110 c.p. where no proceeding is provided for, any proceeding not inconsistent may be adopted, and every (such) proceeding commences by writ in the name of the Sovereign.

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- (8) Dugas J. - Réflexions sur les brefs de prérogative (1983) 43 Revue du Barreau, 503, 514.
- (9) See Annex "A" for texts referred to herein. For a critique of the various Quebec remedies see Dussault & Patenaude - "Le contrôle judiciaire de l'Administration: Vers une meilleure synthèse des valeurs de liberté individuelle et de justice sociale?" 1983, 43 Revue du Barreau, p. 163.

II Application by Motion:

a) Motions for declaratory judgment:

"Any person who has an interest in having determined immediately, for the solution of a genuine problem, either his status or any right, power or obligation which he have under a contract, will or any other written instrument, statute, order in council, or resolution or by law of a municipal corporation, may, by motion to the court, ask for a declaratory judgment in that regard." Art. 453 C.P.;

b) Motion for ouster in case of usurpation of office or franchise, quo warranto; Art. 838 c.p.;

c) Motion to obtain performance of a "public" duty; mandamus Art. 844 c.p.;

d) Motion for judgment in evocation before or after judgment of a matter before a court subject to the superintending and reforming power. This motion lies only where there is no appeal from the matter under scrutiny, EXCEPT where there is want or excess of jurisdiction, (Art. 846 c.p.);

e) Motion for writ of habeas corpus, Art. 851 C.P.;

f) Motion for injunction, issued with a writ, contested orally, with exceptions, but heard by the Practice Division as though a motion. Often accompanied by a motion for declaratory judgment; Art. 751 c.p.

The choice of appropriate remedy is left to the party seeking it. Considerable energy and ingenuity had been devoted in Quebec to the faintly liturgical-sounding debate of whether the declaratory judgment was "curative" or "preventive", until the judgment by the Supreme Court in Duquet v. Ville de Ste-Agathe (1977) 2 S.C.R. 1132.

The source of this debate lay in the report of the Commissioners charged with the 1966 revision of the Code of Procedure (10) whose effect was to raise doubts as to whether the "new" procedure for declaratory judgment on petition (Art. 453 c.p. supra p. 4) lay so as to provide in the words of the Court of Appeal:

"a second system for instituting and hearing cases, to a large extent parallel to the first but more expeditious; if the choice (of which) ... were left to the litigants disorder and chaos would result... and the administration ... of justice ... would suffer, for justice needs to be administered in an orderly manner. (11)
(Traduction).

(10) Garon Pratte J.A., Albert Leblanc J.C.S., George Challies J.C.S.:
Title VI - Chapter II - "This chapter is new law. The Commissioners have already explained the reason which led them to propose the declaratory action, as a means of preventive justice...".

Title III - Chapter I - "... It is therefore extremely desirable that there should be put at the disposal of the litigants a means which permits them to determine in advance in certain conditions the true nature of the juridical situation in which they find themselves. But the means required for this are declaratory procedures under which when two litigants are in disagreement as to their reciprocal rights and obligations, one of them may demand from the tribunal, a declaration as to what his rights are. This declaration will not involve any condemnation, but, having the force of chose jugée, it will compel the respect of the parties.

This declaratory procedure has existed in Scotland for two centuries; it started developing in England about 1828, and is now in use in all the English speaking countries, as well as in Germany and Austria. In France the doctrine is favorable to it, and jurisprudence admits it more and more. (Solus et Perrot, Droit judiciaire privé, t.1, n. 233, p. 211). Everywhere beneficial effects are noticed".

(11) Duquet v. Ste-Agathe (1975) C.A. 764, 765.

In the event Pigeon J. put the matter to rest when he wrote in Duquet, for the Court at p. 1142:

"On the procedural question therefore, I would say:

- 1) in order to decide whether a case can be dealt with by a motion for declaratory judgment, the Court is not required to determine if the motion is preventive or curative but merely whether it comes within the terms of Art. 453;
- 2) as the distinction is not a rule of public order, any party who wishes to complain that an action should have been instituted must do so when the motion is presented, and he shall be considered to have waived this objection if he files a contestation in writing.

I think I should add that I see no basis for fears of an abuse of the procedure by motion. Firstly, it must be noted that no order for payment of money can be sought under Article 453, however widely the article is interpreted. Furthermore, if the judge considers that this procedure is being abused, there is nothing to prevent him from ordering that the case be proceed with as if it were an action...".

This judgment is the cornerstone upon which hosts of litigants rely to demand the declaratory judgment as a recourse rather than another of the available recourses in Quebec.

In Voghel v. Procureur Général du Québec (1977) C.A. 197, the Court of Appeal per Rinfret, J.A., Bernier & Mayrand J.J.A. concurring, reluctantly adopted the solution as to procedure enunciated in Duquet. At page 201:

"Je me dois pourtant d'accepter cette décision du Tribunal supérieur; mais j'avoue le faire avec réticence vu la profonde perturbation qu'elle va sûrement causer dans l'administration de la justice."

While the use of the declaratory judgment by motion is clearly sanctified by Duquet in cases which fall equally within the text of Article 453 c.c.p., there are still a number of cases that indicate an unwillingness by our Courts to see a motion for declaratory judgment result in a successful "end-run" around other cases commenced by writ, which, because of the delays in the roll of contested cases, are called less quickly. As the hearing of contested cases speeds up, the need for fine procedural distinctions may diminish.

The reluctance to view certain cases as properly within the ambit of Art. 453 c.c.p. is bolstered by the view held by certain judges that in many instances the declaratory judgment sought will not provide the "solution" to the problem and that the application is made with the silent assent of the complainant defendant; that the normal rules of examination and cross-examination are avoided and the Court obliged to decide an artificial question; that there is connivance to avoid collateral issues such as proceedings in warranty in order to save time, and that this is all fundamentally unfair to the other litigants whose more orthodox cases await hearing on their merits.

Since Duquet, the Supreme Court has given some guidance to the Court as to restrictions on the availability of the proceeding by motion for declaratory judgment.

Countervailing this sentiment of resistance is the practical fact that once the matter has been heard on the merits, (even when there is a motion of irrecevability usually taken under advisement) the judge seized with the case is often reluctant to

dispose of the matter by finding the use of the recourse abusive, even when a complete solution to a genuine problem cannot be confidently seen to emerge. Often a decision to treat the case or discharge it can only be reached after a number of hours of troublesome reflection and a winnowing of principles from conflicting authorities. The human side of the judicial personality cries out against exercising discretionary power to abandon the effort already expended. The juridical side of the personality reasons persuasively that the parties having come this far, the nettle having been firmly grasped to avoid the sting, the judgment should be rendered.

In Les Terrasses Zarolega, Zappia et Al. v. La Régie des Installations Olympiques (1981) 1 S.C.R. 94, the Supreme Court considered a motion for declaratory judgment as to the effect of an Act and agreements relating to expropriation of the Olympic Village and the determining by an arbitration committee of sums due for it. The Court referred to Duquet and concluded that in the circumstances one question being put to it was not susceptible of being the object of a declaratory judgment.

Per Chouinard J, for the Court, at p. 105:

"The case at bar does not concern regulatory nullity nor the lack or excess of jurisdiction of the arbitration committee, all cases recognized by art. 846 C.C.P. and by judicial authority as being subject to the exercise of the supervisory and controlling power of the Superior Court.

Rather, the question is whether the Superior Court may intervene when the issue has been confided to an arbitration committee.

...the House of Lords held in Barraclough v. Brown (1897 A.C. 615) that there is no basis for a declaratory judgment when the matter has been confided to a lower court..."

and at page 106:

"Finally, a declaratory judgment will not be rendered when it will serve little or no purpose."

However, in the earlier case of Vachon v. Procureur Général de Québec et al (1979) 1 S.C.R. 555, the Court made reference to the procedural effect of applying to the Court for a declaratory judgment whether commenced by direct action, or by motion, rather than making an application for evocation. Procedural defences of nullity for formal defects were to be dismissed as inconsistent with the rules of the Code of Procedure. Thus Pigeon J. held, for the Court, at page 561:

"It is quite true that art. 834 prohibits evocation without prior authorization but nowhere does the Code prohibit a declaratory action or a motion for a declaratory judgment in respect of claims that may be urged by an extraordinary remedy contemplated in this article...

The only consequence of resorting to an action or to a motion for a declaration rather than to an application for evocation in a case coming within art. 846 C.C.P. is that the plaintiff does not obtain a staying order."

Vachon has become the authority from which the procedural limitations previously seen to exist in Art. 846 C.C.P. are breached, as it illuminated the accessory nature, however important,

of the procedural remedy. Thus in St-Hilaire v. Bégin J.E. 82-258, the Court of Appeal viewed a municipal commission as subject to the procedure of evocation, and, it is submitted, had the parties wished it so, to the procedure of a petition for declaratory judgment.

Pépin - Chroniques de Droit Administratif (1982)

42 Revue du Barreau 269, wrote in respect of St-Hilaire:

"C'est pourquoi nous souhaitons que l'arrêt St-Hilaire aille bien dans le sens que nous avons cru raisonnable de percevoir. Déjà dans le passé, les expressions "tribunal" et "jugement", utilisées à l'article 846 C.p.c., n'ont pas été interprétées littéralement, sous l'influence des règles de common law. Il est de jurisprudence bien établie que l'évocation est recevable contre une personne ou un organisme habilité par la loi à prendre des décisions quasi judiciaires. ... l'évocation soit désormais possible ... à l'encontre d'une personne ou d'un organisme habilité par la loi à prendre des décisions qui affectent les droits des individus ou des entreprises. Nous préférons d'ailleurs l'expression employée en Cour suprême par le juge Dickson: décisions qui affectent "les droits, intérêts, biens, privilèges ou liberté d'une personne"..

In the case of Her Majesty the Queen in right of Newfoundland & Hydro Quebec & Churchill Falls (Labrador) Corp. & Royal Trust Co. et al (1982) 2 S.C.R. 79, the Supreme Court considered an application by motion for a declaratory judgment, which the Superior Court had dismissed for want of jurisdiction rationae personae (the Crown Nfld.). The petitioner Hydro Quebec sought a decision as to the effect on its rights under certain contracts of a Newfoundland order in council invoking a lease between it and Churchill

ordering Churchill Falls to provide power to Newfoundland. The availability of the declaratory judgment to determine future rights is made unmistakably clear.

The Court held, per Beetz J. at p. 106:

" Further, it is not necessary for Churchill Falls to have already refused to perform the Power Contract in order for the Superior Court to rule on the rights of the parties to the contract. The value of the new declaratory action⁽¹²⁾ which Hydro-Québec is seeking to use lies precisely in the fact that it allows the litigant to protect a threatened right. As the Commissioners observed, "the interest required to institute proceedings may flow from a right which itself would only be eventual". What matters is that the interest in obtaining a solution to a genuine problem is real...".

And at page 107:

"... purely procedural considerations should not be an obstacle to the solution of a genuine problem to which art. 453 of the Code of Civil Procedure applies, and once again, that problem consists in categorizing, in light of the interpretation that must be given to the Power Contract, the difficulty in which Churchill Falls is likely to be."

This case was returned to the Superior Court for judgment on the merits. (1983) S.C. 604.

(12) Translated from the French "recours". The case arises from a demand made by "motion" and is not as such an "action" for a declaratory judgment.

In Les Propriétés Place McGregor Inc. v. Régie du Logement & Gauthier et al., J.E. 84-105, the Superior Court considering an evocation, held at p. 12 of the notes of judgment:

"En matière d'absence ou d'excès de juridiction, le pouvoir de surveillance de la Cour supérieure peut s'exercer par l'action directe en nullité, l'action ou la requête pour jugement déclaratoire et l'évocation. Le tout dépend de ce qui est recherché par le justiciable c'est-à-dire si l'on recherche ou non des ordonnances de sursis ou autres ordonnances pouvant donner ouverture, au cas de refus, à une poursuite en outrage au tribunal. (13)

In summary, from the foregoing it is possible to suggest that there are no cases where the remedy of a declaratory judgment is necessarily excluded because the subject matter of an order sought by the applicant may be more appropriately dealt with by one of the prerogative writs, contemplated by the Code of Procedure, if the subject matter otherwise falls within the four corners of art. 453 C.C.P. or would be the proper object of an action for declaratory judgment, art. 33 C.C.P.

In light of this conclusion, there is little practical importance in the distinction between the action for a declaratory judgment or the motion for a declaratory judgment, as an alternative

(13) Art. 46 C.C.P.: "The Courts and judges have all the powers necessary for the exercise of their jurisdiction. They may... pronounce orders or reprimands ... and make such orders as are appropriate to cover cases where no specific remedy is provided by law." As orders for sursis in cases of prerogative writs are specially provided for, it has not yet been held that this article can be invoked during a declaratory proceeding to suspend proceedings or further action. It may only be a matter of time 'till that occurs.

recourse to the prerogative writs of certiorari and prohibition (now evocation), quo warranto, mandamus and habeas corpus. The recourse of habeas corpus can not easily be exercised by the declaratory judgment. It is not discretionary as is the declaratory recourse (infra p. 15), and a certiorari-in-aid or evocation-in-aid, although considered available in Quebec (by Garant, p. 887) is seldom invoked according to the jurisprudence consulted. However, there appears to be no objection in principle to the motion of a declaratory recourse affirming that a detention is unlawful. The non-executory nature of the declaratory recourse might make this option less than attractive.

The consequential procedural effects of the declaratory recourse, such as interruption of ongoing procedures not automatic in any event; since December 1, 1983⁽¹⁵⁾ are weighed and considered by the litigants as their needs dictate. If the object of the parties is to obtain a relatively quick opinion, declaratory but not executory, they can avoid the risk of there being a trial of the issues⁽¹⁶⁾ by properly cast proceedings. When the declaratory recourse is properly married to proceedings for injunction, interim relief is available,⁽¹⁷⁾ even where the record of the case is incomplete for want of the required

(14) See Ferland: L'action directe en nullité et la requête pour émission du bref d'évocation: recours alternatifs ou exclusifs? (1979) 39 Revue du Barreau 325.

(15) 1983 S.Q. c. 28, a. 31 in force December 1, 1983 - The Court may grant a suspension at any time after the filing of the motion.

(16) Article 455 C.C.P.

(17) Article 752, as injunctive relief is not available to inhibit judicial or quasi-judicial proceedings 758 C.C.P. Vignola v. Keable (1980) C.A. 531; Montreal Dress Guild v. Tremblay, J.E. 83-270 (C.A.), this marriage does not always work.

detailed affidavits or supporting documents. (18)

If the distinction between the declaratory recourse on motion or by action is inconsequential for the litigant who is making his choice between them⁽¹⁹⁾ and one of the prerogative writs, it might be useful to examine the constraints which, in practice limit recourse to the declaratory judgment.

The authors cited above, Pépin & Ouellette,⁽²⁰⁾ Garant⁽²¹⁾ and Lemieux⁽²²⁾ have given illustrations of the jurisprudence arising relating to the declaratory recourse, and the limitations on its availability or appropriateness perceived to exist from time to time. That the borders of the province of the declaratory judgment are unsettled arises from the judicial fact that it is, by Art. 462 C.C.P.⁽²³⁾ granted or denied as a function of judicial discretion.

(18) Article 754.2

(19) See Pépin & Ouellette, op cit at p. 368, sub-heading "La requête et l'action déclaratoire du droit québécois", which compares the common law declaratory action and the effect on Quebec law of the adoption in 1966 of Art. 453 C.C.P. and Article 55 C.C.P. (a litigant must have a sufficient interest ... "to obtain a pronouncement upon the existence of a legal situation").

(20) Pp. 373 et seq.

(21) Pp. 888 et seq.

(22) Pp. 5-26, para. 5.06 et seq.

(23) "Art. 462 C.C.P.: No action will be dismissed merely because it is intended to obtain a declaratory judgment, but the court may, if it is of opinion that the interest of plaintiff is insufficient or that a judgment will not put an end to the uncertainty or controversy which gave rise to the action, refuse to render judgment".

To paraphrase Pépin & Ouellette, at page 377, from the moment the motion or action for declaratory judgment became a way to exercise the power of review by the superior Court of action or inaction by the public administrator, the problem of its coexistence with the other remedies arose, account being taken that it (the declaratory recourse) like the prerogative writs cannot be used as a disguised appeal. It is accepted that in these matters the Supreme Court of Canada has shown a great latitude with a view to favoring the accessibility of justice. It expressly recognized in the Duquet case the principle of coexistence of the declaratory recourse with the special recourse in nullity of a by-law, contemplated by municipal law. Thus it follows, in the same spirit that it has been held that the declaratory recourse and the direct action in nullity are alternative recourses, and that the same is true for the declaratory recourse and the recourse in evocation. So as to perhaps dissipate any doubts, it is useful to cite Pigeon J. in Vachon, at p. 561:

"... nowhere does the Code prohibit a declaratory action or a motion for a declaratory judgment in respect of claims that may be urged by an extraordinary remedy contemplated in this article".
(834 C.C.P.).

As the declaratory recourse may alternate with the prerogative writs to exercise judicial control over administrative bodies and inferior tribunals, it follows that its exercise is subjected to a variety of privative clauses.

The effects of the privative clause on the declaratory recourse is identical to its effect on the prerogative writs. The Supreme Court in Crevier v. Procureur Général du Québec (1981) 2 S.C.R. 220, declared that as to provincial matters⁽²⁴⁾ a privative clause could not have the effect of preventing the Superior Court from exercising its traditional inherent superintending and reforming power in cases of absence or excess of authority by the inferior tribunal; otherwise stated as jurisdictional error.⁽²⁵⁾ In Procureur Général du Québec v. Régie du Logement et Grondin et Atelier 7, November 3, 1983, the Supreme Court per Chouinard J. held, at p. 24:

"In the Crevier case dealing with the Professional Tribunal, in addition to the privative clause of S. 194 of the Professional Code which was to the same effect as 518 in the case at bar, there was s. 195 which excluded the superintending and reforming power of the Superior Court

(24) Gilles Pepin (1983) 43 Revue du Barreau, 353, 377.

(25) As to the operative effect of a privative clause in respect of Federal public administrative law, see Pépin "L'Administration publique et le principe de légalité" address of 23 September 1983; (1984) Revue du Barreau, 137 at p. 143:

"Reste à savoir, toutefois, si la Cour suprême étendra cette garantie constitutionnelle de contrôle à l'activité de l'administration publique fédérale, sujet dont elle n'a pas traité dans l'arrêt en question. (Crevier) On voit mal comment elle pourrait, à ce propos, reconnaître un statut particulier aux organismes administratifs fédéraux; comment expliquer que la primauté du Droit serait mieux assurée au Québec qu'au Canada? ... Mais un arrêt récent (McEvoy v. A.G. New Brunswick (1983) 148, D.L.R. 3d, 25 (S.C.C.)) ... annonce peut-être le nivellement prochain des statuts. En effet, dans un jugement consacré à l'étude de la validité d'une loi établissant une Cour de juridiction criminelle au Nouveau Brunswick, la Cour dans une opinion qui soulève en réalité plus de questions qu'elle n'en règle, a décidé que l'article 96 apportait des restrictions à la compétence du Parlement du Canada...".

under Art. 33 C.C.P. There is no similar clause in the case of the Board, and the Superior Court therefore continues to have its traditional superintending and reforming power for lack or excess of jurisdiction, which may be exercised by direct action or by a motion for a declaratory judgment. (Vachon v. A.G. Quebec (1979) 1S.C.R. 555 at 560 to 562)".

The Rules of Practice of the Superior Court, adopted with legislative effect, provide that ordinary cases are fixed for hearing on the roll of contested cases, having regard to the date when the action was instituted. (26) Current delay for hearing such cases is 26 to 28 months for a 1-2 day case.

By Rule 27:

"The following matters are inscribed on the special roll...

(19) motions for declaratory judgment when contested in writing."

Current practice in Montreal is to ensure that motions for declaratory judgment be directed to the specially designated administrative courtroom, where the current delay for hearing such cases is between 3 months and 6 months.

If the Court concludes that there ought to be contestation in writing, the case falls onto the special roll, shared by other urgent cases to be heard on the merits in approximately 6 to 8 months for a 1-2 day case. If the Court does not order the trial of special issues (27), the case is heard forthwith (which might mean 6 weeks).

(26) Rule 18; Arts. 47, 48 C.C.P.; Deschênes J, "Maîtres chez Eux" (1981) (Conseil Canadien de la Magistrature), p. 138.

(27) Art. 455 C.C.P.

The procedural advantages of the declaratory judgment on motion are at once obvious.

The tariff of costs prescribed by Regulations adopted pursuant to the Bar Act payable by the losing party (Art. 477 C.C.P.) in cases of declaratory judgments unless otherwise determined by the Court, is based upon an action in which the amount in dispute is from \$3,000. to \$10,000. (class II (b)). The fee on the action where judgment is rendered on the merits is thus \$500.00. Aside from solicitor-client costs, over which the Court has no direct control, the economic advantages of the declaratory recourse, even if denied, are obvious.

In the judicial District of Montreal, the declaratory recourse was invoked 91 times between September 1, 1983 and May 30, 1984. Of these, 23 were classified as "public law" cases.

To determine which cases of the declaratory remedy reported by the commentators, in summary form by Jurisprudence Express (28), or the case reports, might have equally arisen as a "pure" exercise of the power of a prerogative writ is not practicable. There follows however a modest survey of the more recent of the available reported cases, organized generally in accordance with the text of Article 453 C.C.P. and, where useful, other applicable Articles.

(28) Société d'information québécoise d'information juridique (SOQUIJ 276, rue St-Jacques, Suite 310) cited "JE 81 - paragraph number"

The present trend for the Superior Court is to consider and dispose of cases brought by declaratory judgment where procedure by prerogative writ might also lie, and to follow, albeit sometimes reluctantly, the clear signal of the Supreme Court that the procedure is only an accessory, once the right exists.

I "ANY PERSON WHO HAS AN INTEREST..." (Article 453 C.C.P.)
"WHOEVER BRINGS AN ACTION AT LAW ... TO OBTAIN A PRONOUNCE-
MENT UPON THE EXISTENCE OF A LEGAL SITUATION, MUST HAVE A
SUFFICIENT INTEREST THEREIN". (Article 55 C.C.P.).

a) Conseil du Patronat du Québec v. Commission de la Santé
et de la Sécurité du Travail du Québec, J.E. 84-409

The Superior Court refuses to allow the Conseil, a non profit organization representing employees, to contest the constitutional validity of sections of the C.S.S.T. Act and the inoperability of other sections by motion for declaratory judgment. The raison d'être for the Conseil, being the promotion of employers' interests, does not confer on it sufficient interest to bring these proceedings.

b) Propik Inc. v. Régie du Logement & St-Maurice (1982
C.S. 111

The petitioner, a non profit organization of owners of apartment buildings, has sufficient interest to demand a declaration of the unconstitutionality of residential tenancies legislation constituting the Régie (rental board). Thorson v. Procureur Général du Canada (1975) 1 S.C.R. 138, and McNeil v. Board of Censors (1976) 2 S.C.R. 265, followed. See also Raoul Blouin v. Le Procureur Général du Québec & Régie du Logement (1983) C.S. 213, to the same effect.

c) Boudreault v. Municipalité de Gatineau & Office des Services de garde à l'enfance (1982) C.S. 151

Any genuine difficulty as to the installation of a kindergarten exists between the Municipality and the owner

of the building in which it is to be installed. The parties before the Court, parents on the one hand and members of the Municipal Council on the other do not have the interest required to demand a declaratory judgment.

d) Forget v. Procureur Général du Québec, J.E. 82-704

A nurse, whether member of a professional corporation of nurses or not, has sufficient interest, and as a simple citizen has sufficient interest to demand a declaratory judgment as to the legality of regulations adopted under the Charter of the French Language (L.R.Q. c. C-11).

e) Quebec Association of Protestant School Boards v. Procureur Général du Québec (1982) C.S. 673; 1983 C.S. 77

A motion for declaratory judgment lies to determine rights arising under Section 24 of the Canadian Charter of Rights and Freedoms, which is held, in part, incompatible with the Charter of the French Language.

f) Chambre des Huissiers du Québec v. Lussier, J.E. 84-190 C.A.

The Chambre des huissiers, an association representing bailiffs had the necessary interest required by Art. 453 C.C.P. to demand a declaratory judgment that the prothonotary should not routinely allow service of judgments of Small Claims Court by mail rather than by bailiff. The Chamber need not show pecuniary interest.

- g) G.L. Procureur Général du Québec, J.E. 83-314 (1983)
C.S. 278

The right to commence class action proceedings for a declaratory judgment that certain medical services provided outside Canada to transsexuals were payable by the Régie de l'Assurance-Maladie is denied. Inter Alia the petitioner failed to disclose the existence of a class as required by Art. 1002 C.C.P. et seq. and (semble) therefore the interest of the petitioner was not demonstrated.

(Dismissed on a variety of other grounds relating to Art.

453 C.C.P.).

- h) Risborough (Corp. Mun. des Cantons Unis De) v. Tanguay
J.E. 82-64

Failure to serve all interested parties will be fatal to a petition for declaratory judgment. The absence of supporting documents leaving facts alleged in a confused state is also grounds to dismiss a motion for declaratory judgment which is an exceptional remedy and can only be applied for when all the necessary conditions of Art. 453 C.C.P. are met.

- i) Trust Général du Canada v. Bisson, J.E. 82-1148

No declaratory judgment lies in these circumstances to determine the rights of a corporate trustee whose fees may be increased by a favorable judgment. The interest of the petitioner to demand the judgment is not sufficiently demonstrated.

- j) La Corporation Professionnelle des Physiothérapeutes du Québec et al. v. L'Hon. Laurin & L'Office des Professions du Québec (1982) C.S. 781

The professional Corporation, constituted by statute (Code des Professions) have sufficient interest to require by declaratory judgment that the collective agreements negotiated by the Minister containing work descriptions infringe on professional titles reserved to members of the particular professional corporation. The interest required is that advantage which the party will obtain supposing the recourse is well founded (S.S.J.B.M. v. C.U.M. (1981) C.A. 168).

- k) Destine v. Monpoint, J.E. 83-1063

A declaratory judgment lies to homologate a foreign judgment. Petitioner must however establish all the conditions necessary for homologation. All parties interested were not called into the case, as required for procedures by way of declaratory judgment

- l) Me Robert Sacchitelle & Defense Lawyers Ass'n. v. Procureur Général du Québec (1983) C.S. 167

A petition for a declaratory judgment that the rules of the Court of Sessions of the Peace were not duly adopted by a court of criminal jurisdiction (Sec. 438.1 Civ. Code) must be dismissed. Quare: whether the petitioner's had "immediate interest" to obtain the solution to a genuine problem. There is a distinction between the application of Art. 462 C.C.P., referring to the direct right of action for a declaratory judgment and the petition under Art. 453 C.C.P. which is more properly described as a way of exercising a right rather than the right itself. (C.F. Banque de Nouvelle-Ecosse, J.E. 82-478,

IV (R) infra).

II ...("IMMEDIATELY ...")

a) La Corporation Professionnelle des Physiothérapeutes
supra I j.

While immediately (immédiatement) implies the motion of urgency (Neiderer v. Gulf Canada (1982) C.S. 298) the Court of Appeal in S.S.B.J.M. v. C.U.M. does not give this term such a restricted meaning. Any delay, if delay there be in exercising the recourse does not constitute renunciation of a party's rights.

b) Kronstrom v. Procureur Général du Québec (1983) C.S. 795

A legal aid lawyer is entitled to a declaratory judgment that the Bar Association by arbitration should fix the fees he is entitled to receive for appearances before the Federal Court. The tariff agreed to, as confirmed by regulation in 1974, is silent on the subject. The application is not tardy and there has been no renunciation of petitioner's rights by delay. The interest is real and actual.

II c) Commission Scolaire Kativik v. Procureur Général du Québec
J.E. 82-455

A declaratory judgment lies to determine if the Minister of Education has proceeded ultra vires the Education Act to establish a school by Order in Council. This judgment lies even if the school year of such institution will shortly expire and the practical effect of the judgment be limited thereby.

- d) Pimparé v. Société de Raffinage & Marketing B.P. Canada
(1983) C.S. 806

A declaratory judgment lies to determine obligations of a party arising from more than one contract, even if no declaration of nullity of contract lies under 453 C.C.P. "Immediate" implies a sense of urgency outside the ordinary procedure.

- e(i) Fernand Gallant & Fils v. Commission Régionale de
l'Outaouais, J.E. 83-751

A declaration that an award of contract is invalid because under the Act, the bidder was required to be licenced does not lie under Art. 453 C.C.P. The word immediately is the essential qualifying word for exercise of this recourse. Here the petitioner seeks a first judgment on the law to be used in future litigation as res judicata. As to interest, the petitioner seeks not a declaration of his interest, but a declaration that the mis-en-cause has no interest. Such judgment would solve no problem.

- e (ii) Jos. Pelletier Ltée. v. C.G.E.P. de l'Outaouais (1983)
C.S. 185

A declaratory judgment can be rendered to determine whether a low bid had been illegally accepted even in the absence of a formal contract being issued. The pre-contract relations between the parties to the case created rights and obligations even in the absence of a written instrument.

II f) Mines d'amiante Bell Ltée. v. Ulichny, J.E. 82-940

No declaratory judgment lies to provide counsel to a party to case already instituted. Thus a demand that any eventual judgment in New Jersey cannot be exemplified in Quebec is purely hypothetical and is not a genuine and immediate problem resulting from interpretation of a contract, will or law.

g) Municipality of Ste-Thérèse de Gaspé v. Municipality of Grande Rivière (1981) C.S. 1153

A petition for a declaratory judgment that there was overpayment of interest on sums due for supplying drinking water must be dismissed. The proceedings reveal that there is no threat that the supply of water will be cut off, thus there is no interest that the issue be determined "immediately". Paralell proceedings before the Municipal Commission constitute a lis pendens for these purposes.

III ... "FOR THE SOLUTION (of a genuine problem)"

a) Boulangerie Leclerc v. Municipalité St-Flavien (1981) C.S. 466

An action to have a municipal by-law based on property valuation declared null granted in part.

b) Place Dalhousie Inc. v. Hydro-Québec (1981) R.P. 88

A declaratory judgment upon motion lies to determine that high tension electricity cables are installed contrary to a city by-law. The decision would end the controversy.

III c) Bernard v. Béroué (1981) R.P. 75

A declaratory judgment upon motion lies to determine the existence of a conventional servitude; oral proof based upon a commencement of proof in writing is accepted.

d) C.E.G.E.P. Montmorency v. Paldec Inc. et al. (1981) C.A. 305

No declaratory judgment lies to extend a fixed delay within which contractually appointed arbitrators must render their decision.

e) Galarneau v. Beaupré - J.E. 81-1085

A declaratory judgment lies to declare that a widow convicted of involuntary homicide in the death of her husband is "unworthy of inheriting" in accordance with Art. 610 C.C.B.C.

f) Duffault & Associés Inc. v. Mutuelle d'Omaha - J.E. 81-661

A petition for declaratory judgment does not lie to determine entitlement to commissions on renewals of insurance policies; the contested documents and facts require a trial in the usual manner or a demand for judgment on a stated case as a decision on a question of law.

g) Laniel Québec Ltée. v. Régie des Loteries et Courses du Québec - J.E. 81-547

A declaratory judgment on petition lies to interpret regulations allowing reimbursement of 1/2 of the fees paid to the Régie upon transfer of a regulated amusement device from a vendor to an operator of such device. Vendor's licence and

operator's licence are issued to divisions of the same company. Reimbursement is declared to be allowed.

III h) Habitat Mon Pays Inc. v. Procureur Général du Québec - J.E. 81-983

A declaratory judgment on petition lies to determine the application of the provisions of the Loi sur les mines to concessions issued by letters patent in 1900 and 1901. (Maintained in appeal).

i) Masonite Canada Inc. v. Ville de Gatineau - J.E. 81-833

A declaratory judgment is granted to declare what rate of interest is applicable to tax arrears.

j) Lavigne v. Paquin (1981) C.S. 896

A declaratory judgment does not lie to interpret the provisions of a judgment granting a provisional alimentary pension in accordance with a consent filed by the parties. Such judgment does not fall squarely within the provisions of Art. 453 C.C.P. as being a contract, will or other written instrument, statute or by-law.

k) Leblanc v. Jansen - J.E. 82-753 (C.A.)

A declaratory judgment that respondent illegally occupies an immovable is reversed by the Court of Appeal, but on grounds of error in law, not error as to procedure.

III 1) Lavoie v. Lavoie - J.E. 82-97

No declaratory judgment will lie to determine the meaning of provisions of a will that provides for certain disbursements if the legatee is in urgent need ("besoin urgent"). This is the province of the executors.

m) Perrault v. Commission des Affaires Sociales - J.E. 84-243

A demand for a declaratory judgment that the C.A.S. had misinterpreted certain Orders in Council is dismissed, after a review of the procedures adopted by the C.A.S. in arriving as its decision, which was not unreasonable.

n) Mathieu v. Centre Hospitalier Universitaire de Sherbrooke - J.E. 84-260

Mixed demand for a declaration that the C.A.S. is unconstitutionally formed, being a Section "96" Court, and that in any event it had exceeded its jurisdiction by taking certain objections to evidence under reserve is dismissed after consideration of the merits.

o) Commission Scolaire de Gatineau v. Procureur Général du Québec - J.E. 84-331

A declaratory judgment lies to determine whether the Provincial Government had unduly withheld subventions, citing reduced commission revenues resulting from its taxing practices. The petition is dismissed on the merits.

- III p) Commission de la Santé et de la Sécurité du Travail v. Duranceau - J.E. 84-361

The Court of Appeal maintains a declaratory judgment holding that the C.S.S.T. could not administratively declare that payments for medical services provided away from hospital centers would not be reimbursed.

- q) Commission des Normes du Travail v. Edphy - J.E. 84-414

An action by the C.N.T. for recovery of sums due employees of defendant because of underpayment of wages fixed by regulation is converted by consent to a demand for declaratory judgment that defendant is subject to the C.N.T. Act and Regulations. Granted.

- r) Ville de Laval v. Régie des Rentés du Québec (1983) C.S. 810

The text of Art. 453 C.C.P. does not allow a declaratory judgment as to the effect on the rights, powers and obligations of petitioner of decisions of boards, commissions and inferior Tribunals. Semble, the decisions of such bodies are immune from interference by way of declaratory judgment as long as they are within the jurisdiction of such bodies. (Zarolega).

- s) Perrault v. Commission des Affaires Sociales - J.E. 83-1008

While evocation may lie against a decision of the C.A.S. denying an employment claim, that remedy is only facultative, a declaratory judgment on motion will also lie and there is no legal impediment to choosing that remedy if the circumstances fall within the ambit of Art. 453 C.C.P.

- III t) Attore Inc. v. Construction de Défense (1951) Ltée. (1982)
R.P. 118

A petition for declaratory judgment is introductive of the "instance" (suit). No declaratory judgment can be granted inside an existing case; there is lis pendens. The petition for declaratory judgment cannot be used as an interlocutory procedure to help decide an ongoing case by successive steps.

- u) 1984 Canada Ltée. v. Procureur Général du Québec & Registrar/Montreal (1982) C.S. 534

A declaratory judgment lies to solve the question of limits of jurisdiction of the Régie de Logements (rental board). Thus a judgment is granted declaring that it is not necessary to obtain authority from the Régie to register a declaration of condominium ownership where the property was previously not a dwelling. This judgment is not an exercise of the jurisdiction of the Régie, but a determination of that jurisdiction.

- v) Neiderer v. Gulf Canada Ltd. & Hamel (1982) C.S. 298

A demand for a declaration that the provisions of a non-competition agreement are unenforceable must be dismissed. The Court cannot by declaration annul such document, the only power is to interpret so as to determine the status, rights and obligations of petitioner.

III w) Lemieux-Lidbetter v. Succession Arthur Lidbetter et al.
(1982) C.S. 339

The Court grants a declaratory judgment that a donation by marriage contract has had its effect so that the disposition by will of the same benefit is a nullity. The intervening divorce between the petitioner and the testator did not affect the gift.

x) Jamieson v. Procureur Général du Québec - J.E. 82-1020

A civil declaratory judgment under Art. 453 C.C.P. does not lie in respect of the judicial act of issuing a summons under the Criminal Code, even where the constitutionality of the Criminal Identification Act (S.C.R. 1970, c. I-1) is challenged. The Court will treat the application as a petition for certiorari.

y) Institut Philippe Pinel de Montréal v. Guy Dion, le Curateur Public et le Procureur Général du Québec (1983) C.S. 438

A declaratory judgment lies to declare the right of the Institute to oblige one of its inmates to submit to certain psychiatric treatments, and to absolve it from responsibility for any negative consequences, if the rules of the art are duly followed in carrying out such treatments.

IV "(FOR THE SOLUTION) of a GENUINE problem..."

a) Sparling v. Caisse de Dépôt - J.E. 82-992

A declaratory judgment to determine the obligations of a provincial Crown Corporation, to file insider trading reports under Federal legislation, the Canada Business Corporations Act, S.C. 1974-75-76, c. 12, granted.

IV b) Lefebvre v. Commission de Protection du Territoire
Agricole du Québec - J.E. 82-1153

A declaratory judgment lies to have the limit of acquired rights determined in light of the limitations of use imposed by the Agricultural Territory Protection Act L.R.Q. c. P-41.1.

c) Procureur Général du Québec v. Commission Scolaire
Champlain (1982) C.A. 200.

An appeal is allowed against a declaratory judgment interpreting the effect of alleged derogations from certain Statutory Regulations relating to the appointment of sub-contractors and the consequent obligation of the Government to provide construction subsidies.

d) Beaulieu v. St-Patrice de Rivière-du-Loup - J.E. 84-237

A declaratory judgment lies to interpret a contract of acquisition of land for streets which had the effect of depriving the municipality of its right to impose taxes for improvements by by-law.

e) Guérin v. Ville de Ste-Catherine - J.E. 82-579

A declaratory judgment lies to determine if tax accounts are erroneous and corrections should lie; that part of the judgment seeking monetary condemnation for reimbursement of overpaid taxes will be dismissed but its inclusion is not fatal to the conclusions otherwise falling within Art. 453 C.C.P.

IV f(i) Société St-Jean-Baptiste de Montréal v. Communauté Urbaine de Montréal (1981) C.A. 168

A declaratory judgment by the Superior Court lies to determine the application of taxing by-laws to the immoveables of the S.S.J.B.M., even though the proceedings demand the modification of the valuation roll, which would not be executory under a declaratory judgment. The eventual need for further procedures is not necessarily fatal to a demand for declaratory judgment.

f(ii) Churchill Falls (Labrador) Corp. v. Hydro-Québec - J.E. 83-1093

A declaratory judgment will not lie where a petitioner seeks an executory conclusion of a monetary nature, as the declaratory judgment is not executory. As another proceeding would be required the declaratory judgment would not provide a solution to a genuine problem.

g) Tremblay v. Trans-Canada Credit Inc. - J.E. 82-698

A declaratory judgment lies to determine whether the interest claimed under a loan of money is exigible and whether the creditor is obliged to accept payment on account.

h) Brown v. Gore - J.E. 82-118

A declaratory judgment lies to declare null a sale for taxes of an immoveable. The procedure by action in nullity under the Municipal Code does not exclude the choice of a demand for declaratory judgment.

IV

- i) Banque Nationale du Canada v. Turenne - J.E. 83-175 (C.A.)

A demand for a declaration that a loan contract was void, being in violation of the Interest Act was to be allowed notwithstanding that another proceeding against the Bank based in quasi delict for damages to reputation was already pending between the parties. There was no lis pendens and a genuine problem existed between the parties, in the circumstances.

- j) Alliance Blindé v. Lloyds Underwriters - J.E. 81-856

A declaratory judgment lies to determine that a clause permitting cancellation of an all risk insurance contract, on notice of 90 days, is null and contrary to public order, seeing Art. 2567 C.C.B.C.

- k) Banque Nationale (Master Charge) v. Gilbert - J.E. 81-1122 (C.A.)

No declaratory judgment lies to determine whether the prothonotary has authority to render judgment by default under Art. 194 C.C.P. There is no genuine problem between the Bank and Respondent Gilbert, but between the Bank and the Court officer, the matter could have been inscribed for hearing before the Court.

- l) Caisse Populaire Carrefour Therrien v. Ville de Longueuil - J.E. 82-97

Exemption from municipal taxes is declared by declaratory judgment after examination of the applicable statutes.

- IV m) Groupement des Assureurs Automobiles v. Ville de Montréal (1981) C.S. 682

A petition for declaratory judgment as to the application of la Loi sur l'assurance automobile to caterpillar-tracked snowplows operated by the City is to be granted. Such vehicles are not automobiles but snowmobiles and exempt from the Act.

- n) Chincilla Nord Américain (Québec) Ltée. v. Office de la Protection du Consommateur (1981) C.S. 294

A declaratory judgment lies to determine if the Consumer Protection Act applies to sales of rabbits for breeding for commercial exploitation.

- o) Ville de Montréal v. Bureau des Examineurs Electriciens du Québec (1981) C.A. 279

A declaratory judgment lies, where there are no outstanding penal proceedings which would constitute lis pendens, to determine if a particular parking control system is an electric installation within the terms of the Loi des électriciens et installations électriques.

- p) Neveu v. La Commission de Transport de la C.U.M. (1981) R.L. 148

A declaratory judgment lies to determine if petitioner is entitled to carry his bicycle on the busses and metro trains operated by the C.U.M. (No). The dispute arises as to the interpretation of a contract: the Ticket and the Regulations adopted by the C.U.M.

IV q) Hogue v. Leduc-Mader - J.E. 82-557

A declaratory judgment lies to determine the rights of an adopted child in the ab-intestate succession of his natural grandparents.

r) Banque de Nouvelle-Ecosse v. Minister of Revenue, Québec - J.E. 82-478

The Bank is entitled to a declaratory judgment as to the application of the Sales Tax Act to its speculative sales of gold ingots. It is not obliged to await prosecution before the Provincial Court. Disagreement as to interpretation of the Act constitutes a genuine problem.

s) Bonneau v. Commission des Transports du Québec (1981) C.S. 268

A petition for declaratory judgment to the effect that carriage of live animals can only be performed by holders of permits issued by the Commission, is dismissed. The declaratory judgment is not a procedure which allows the Superior Court to usurp the jurisdiction of the Commission either before or after it has exercised it, even if it is in error in law.

t) Beaubien Balla v. Heirs of the Late Balla - J.E. 81-203

The Court will interpret a will by declaratory judgment. When the legatee was the wife of the testator but divorced from him after the will was signed, the term "my wife said damn X" is held to apply to the divorced wife.

IV u) Jutras v. Lefebvre & Tatta (1981) C.S. 1192

A declaratory judgment lies to determine the validity of title to an immovable sold by a testamentary executor (es qualité) after the expiry of his mandate.

v) Centre Local de Services Communautaires de l'Erable v. Lucie Lambert (1981) C.S. 1077

A declaratory judgment lies to establish the right of the Director of the Centre to require an employee to give him information considered by her to be confidential under certain Acts and Regulations.

w) Gilbert Galipeau v. Denis Labelle (1983) C.S. 350

A declaratory judgment lies to establish what household effects have become immovable by destination in a conjugal domicile. There is no objection in principle to determining the value of these items by declaratory judgment, seeing the parties wish to thus dispose of their differences.

x) La Corporation de la Paroisse de St-Télesphone v. La Société d'Habitation du Québec et la Corporation Episcopale Catholique Romaine du Diocèse de Montréal et als. et les Héritiers de feu Michel Claude (1983) C.S. 656

A declaratory judgment under Art. 453 C.C.P. does not lie to permit use of land other than that stipulated by a testator in 1875. (To erect a chapel). The proposed erection of a home for the retired or the poor cannot be sanctioned by such judgment.