DECLARATORY JUDGMENTS

The Honourable Mr. Justice Horace Krever and

Ms. Urszula Kaczmarczyk

A paper prepared for the Judicial Seminar on Remedies Sponsored by the Canadian Institute for the Administration of Justice and to be presented at Winnipeg on August 23, 1984.

DECLARATORY JUDGMENTS

I. INTRODUCTION

The acceptance and increasing expansion of the use of declaratory judgments has been a significant development in Canadian jurisprudence. Traditional opposition to declarations has been based on a strictly adversarial model of legal disputes, where the courts played the role of resolving conflicts between clearly defined opposing interests. The areas in which declarations have proven to be most useful, however, are those involving the public interest in legislative validity or official legality. These cases frequently do not fit within the typical adversarial concept.

This paper will examine the ways in which the courts have been able to embrace the public interest cases within the framework of the common law and within their own role as dispute resolving tribunals. It will deal specifically with the concepts of theoretical cases and standing, which figure most prominently in the courts' discretion in allowing declaratory relief.

II. HISTORY:

The development of declaratory judgments in the English common law has not been a smooth or easy one. What may be now considered by many a convenient and expeditious remedy was met with great judicial resistance during the last century.

The Court of Chancery in England may have had an inherent jurisdiction to grant declaratory judgments, but by the mid-1800's the practice of denying

declaratory relief alone where there was no other relief claimed, was well established. The Court did not perceive its role as being "nakedly to declare a right, without doing or directing anything else related to this right".[1] The Court's hostile attitude to mere declarations may have arisen out of a fear that the application would be too broad and potentially harmful, especially as no rules existed creating limits to the relief, and a fear that such relief would give rise to increased vexatious litigation. It may have been significant also that declarations appeared to be similar to advisory opinions, which the Court had firmly refused to provide. A final factor in the Court's aversion to declarations may have been the different conceptualization of legal rights:

> No less important was the failure of judges to realize that certainty and security of rights, even before their infringement, were interests worthy of legal protection.[2]

The one exception to the Court's position on mere declarations was introduced in 1830 and it allowed the equitable relief sought in a petition of right to include a declaration. (Clayton v. Attorney General (1834), 1 Coop. t. Cott 97.)

At the same time, the Court of Exchequer had developed a practice of granting decaratory relief against the Crown on bills filed by subjects. After the equitable jurisdiction of that Court was transferred to the Court of Chancery by the Court of Chancery Act 1841, the jurisdiction to grant declarations was no longer exercised. [3]

Parliament intervened in 1850 with the passing of the Court of Chancery England Act, 1850 [4] which allowed a case to be stated to the Court concerning the

construction of a written document. The Court could give its opinion without providing for any consequential relief. In 1852 the Chancery Procedure Act[5] was passed which further extended the scope of declaratory relief. That legislation stated that there would be no objection to a suit on the ground that a mere declaratory order was sought with no ancillary relief. This provision was narrowly interpreted by the Court as not having enlarged the scope for declaratory remedies. The cases in which a declaration alone would be granted were only those cases in which the plaintiff would otherwise be entitled to ancillary relief.[6]

Changes were made to the statutory provisions subsequent to the Judicature Acts of 1873 which created the High Court and which authorized the making of Rules by the Rules Committee. In 1885, Order 25, r. 5 provided that:

> No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not.

Despite this legislative direction so obviously aimed at affecting the restrictive interpretation taken of the 1852 provision, the Court remained reluctant to exercise the discretion which the rule allowed and to grant mere declarations.

The attitude of the English courts found a parallel in the courts of Upper Canada. The legislative provision of 1852 was adopted in Upper Canada in the following year and was interpreted as narrowly here as it had been in England. Order 25, r. 5 was adopted in Upper Canada in 1885 and with minor changes, it is now s. 18(2) of the Judicature Act R.S.O. 1980, c. 223.

The judicial restraint in England with relation to declarations lasted until a 1911 Court of Appeal decision expressed an unexpected approval of the declaratory judgment. The plaintiff in Dyson v. A.G., [1911] 1 K.B. 410 had sued for a declaration that tax forms and a demand for particulars issued to him by the Inland Revenue Commissioners were illegal and unauthorized by the Finance Act and that he was not obligated to comply with the notice contained in the forms. The Court had to consider whether declaratory relief alone could be granted, given that there seemed few precedents for such an order. The Court found that the form of the action was a proper one and that a declaration was the only appropriate remedy in the case. (The declarations themselves were subsequently granted: [1912] 1 Ch. 158.) In exercising the discretion found in Order XXV, r. 5, Cozens-Hardy M.R., stated that there could be many cases in which a declaration "may be highly convenient" (p. 417). Farwell L.J. considered the ab inconvenienti argument which stated that if actions for declarations were allowed there would be innumerable such actions burdening the courts. He disposed of that argument which had traditionally been used to discourage the granting of mere declaratory relief by pointing out that the Court could punish unnecessary litigation by imposing costs. Furthermore, he said that:

> ...[T]here is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to the growing tendancy to claim the right to act without regard to legal principles and without appeal to any court (p. 423).

The Court of Appeal repeated its acceptance of the declaratory judgment in even more enthusiastic terms when it upheld the actual declarations made in Dyson's case. Fletcher-Moulton L.J. found the declaratory action to be the "most convenient method" of testing the legality of the officials' actions.

> Such actions are growing more and more important and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. ... There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this (p. 168).

It is important to note that the Court rejected the suggestion that the plaintiff be forced to wait until he was actually being penalized and sued for non-compliance in order to make his invalidity argument as a defence.

The subsequent case of Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536 confirmed the judicial acceptance of declaratory relief and further expanded on the instances in which it could be granted. The plaintiff was being sued by the defendant in the U.S.A. for the recovery of money paid under a false bill of lading. In the action brought in England, the plaintiff sought a declaration that it was not bound to repay the amount and an injunction preventing the defendant from suing to recover the money in any other foreign jurisdiction. The Court allowed the action to proceed on the basis that the Court had jurisdiction to grant the declarations sought, even though there was no other cause of action than that made possible by Order XXV, r.5. To require a separate cause of action would be to negate the effect of the rule completely, as it would allow

declarations only where there existed ancillary relief. While the rule contemplated that the plaintiff could have a declaration of his rights against the defendant, the Court held that it also allowed for a declaration which did not establish rights but which provided "relief". The substance of relief was to be very broadly and liberally constructed so as to allow the Court to exercise its discretion in favour of the granting of the declaration.

The Court in Guaranty Trust dealt also with the issue of whether the rule itself was ultra vires because it purported to extend the courts' jurisdiction. The Rules Committee which had the power to pass rules had no authority to go beyond the limits of the courts' jurisdiction. The Court was of the opinion that it already had the jurisdiction to grant declarations and that the rule merely dealt with practice and procedure by allowing that jurisdiction to be exercised in different circumstances.

III. RECENT DEVELOPMENTS

The legislative provisions which affirmed the courts' jurisdiction to grant a declaration also ensured an ultimate judicial discretion. Over the decades, as categories of cases where a declaration will not be granted have been developed, the distinction between jurisdiction and discretion appear somewhat unclear. The only limit to the courts' jurisdiction, however, is that of their inherent jurisdiction; declarations may not be granted on matters which are outside of the courts' power, such as parliamentary proceedings or international diplomacy. Jurisdiction is also limited where a statute specifically excludes the granting of declaratory relief on a particular matter.

> The declaratory judgment may, accordingly, be described as follows: within the limits of general jurisdiction of the courts, and subject to privative statutory provisions, the courts may, in their discretion, make declarations upon any matter whatsoever.[7]

According to certain commentators the courts are also limited in their jurisdiction in that they cannot grant a declaration on hypothetical or theoretical issues. While it is indeed the case that courts decline to adjudicate on theoretical issues, they may be doing so as a matter of discretion and not out of a lack of jurisdiction.[8] This was the view expressed in Vic Restaurant Inc. v. City of Montreal (1959), 17 D.L.R. (2d) 81 where the Supreme Court of Canada held that the question whether a declaration could be issued with respect to an already expired licence was a matter of discretion and not a matter going to the Court's jurisdiction (p. 96). The distinction is an important one as will be seen later because it allows a court the freedom to revise its conception of what are real and what are theoretical issues, in response to changing perceptions and social conditions.

Courts have stated that they will not grant declarations where the rights which the plaintiff seeks to assert are not real, present, legal rights but contingent rights or duties. [Fries v. Fries, [1950] O.W.N. 661 (H.C.)]; [Mellstrom v. Garner, [1970] 1 W.L.R. 603]. Courts have stated that they will not exercise their discretion where there is no real dispute between the parties or where the plaintiff has not been injured or threatened. Nor will they make a declaration where the subject matter of the dispute no longer exists so that the granting of a declaration will have no effect. Prudential Trust v. Keller (1958), 26 W.W.R. 664 (Sask. Q.B.); Charleston v. McGregor (1958), 11 D.L.R. (2d) 78 (Alta. S.C.). One exception to this

position is Rule 612 of the Ontario Supreme Court Rules of Practice which allows a court on an originating notice of motion to construe a contract or agreement before there has been any breach, in order to determine the rights of parties. There is a similar provision in the Manitoba Rule of Practice (R. 537(1), (2)).

A. H. Hudson suggests that there are two overriding factors which ultimately decide whether a court will exercise its discretion in granting a declaration: the utility of the remedy and whether, if granted, it will settle the issue between the parties.[9] Hudson asserts that most of the cases in which the courts have held that no declaration was available because there was no real issue or because the issues were theoretical, can be explained by the fact that had the remedy been granted, it would have had no immediate effect on the issue between the parties.

Hudson's theory illustrates the concern of the courts with efficacy in dispute-resolution and it underlines the courts' reluctance to alter their role by veering from that concern. Laskin C.J.C. aptly described the essence of this role in Minister of Justice v. Borowski (1981), 130 D.L.R. (3d) 588, at 592:

> They are dispute-resolving tribunals, established to determine contested rights or claims between or against persons or to determine their penal or criminal liability when charged with offences prosecuted by agents of the Crown. Courts do not normally deal with purely hypothetical matters where no concrete legal issues are involved, where there is no lis that engages their processes or where they are asked to answer questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law.

Claims for declaratory judgment because they are frequently worded as theoretical or hypothetical demands, challenge the role of the court and the adversarial model upon which it is built. They often involve the courts in areas of policy and of abstract rights into which they have traditionally been reluctant to venture. The two major thresholds for declaratory relief, that there be a real dispute and that the plaintiff have standing, can be seen as controlling mechanisms by which the court can protect its dispute-resolving role and refrain from intervention in non-judicial areas. One author has labelled these concepts "inhibitory notions" which ultimately can prevent access to the courts by non-traditional, non-adversarial plaintiffs.[10] These two prerequisite conditions will be examined within the Canadian concept to determine whether changes in the notions of real issues and standing indicate changes in the judicial perception of the court's role.

A. Real Issue:

The essence of a theoretical issue (also referred to as a hypothetical, academic, fictitious or abstract issue) is defined by Zamir as being the absence of any concrete facts out of which a dispute has arisen. Even if the parties both have a substantial and practical interest in the matter, unless their interest arises within the context of a lis, the matter remains hypothetical. In reviewing the English authorities, Zamir identifies five categories of cases which can be classed as theoretical and not eligible for declaratory relief:[11]

1) where there is no dispute,

2) where the dispute is not attached to any facts,

3) where the dispute is based on hypothetical facts,

4) where the dispute is no longer of any practical significance,

5) where the declaration can be of no practical consequence.

In Vic Restaurants Inc. v. City of Montreal, [1959] S.C.R. 58 the Supreme Court of Canada dealt with the problem of a dispute which was no longer attached to any facts. A City of Montreal by-law provided that in order to obtain a restaurant and liquor permit the approval of the Director of the Police Department would be required. The petitioner who had frequently been denied the police approval, sought an order of mandamus directing the issuance of the permit and a declaration that the requirement of police approval was ultra vires the City. During the appeal, the plaintiff sold the restaurant in question and the successor purchaser applied for intervenor status. The defendant argued that as the year for which the licence had been sought had expired, and as the plaintiff no longer had an interest in acquiring a licence, there was no subject matter and the court should not hear the matter. Establishing that the issue of whether to hear the case was a question of its discretion, the court reviewed the line of cases where courts had refused to decide abstract propositions of law. If the subject matter of legislation, or the facts upon which it was based, ceased to exist at the time of the appeal, the

courts have held that the plaintiff's only interest was costs and that that a declaration would have no effect on the parties. (Archbald v. deLisle (1895), 25 S.C.R. 1, The King ex rel. Tolfree v. Clark, [1944] 1 D.L.R. 495; Coca-Cola Co. v. Mathews, [1945] 1 D.L.R. 1.)

The Court in Vic Restaurants, while following the authorities, found that the plaintiff did have a real interest beyond that of its costs. There was, first, the interest in knowing whether the by-law was invalid, and secondly, this case would determine any potential liability for prosecutions pending for breaches of the by-law. In this way it could not be said that a declaration would not have a direct and practical effect on the parties. Furthermore, a declaration would be of general public interest to municipal corporations throughout Canada. More significantly, however, the Court stated that:

> The question of law as to whether or not the portion of by-law requiring the consent of the Director of the Police Department was within the powers of City Council and as to whether the appellant was entitled in the circumstances to a permit for the year 1955 are questions upon which the appellant was entitled to have the opinion of the Courts (p. 88).

The entitlement to the Court's opinion was a right of the plaintiff and as such it was considered to be a real issue, and not a theoretical one.

Vic Restaurants was followed in the Alberta Court of Appeal decision of Re Henning and City of Calgary (1974), 51 D.L.R. (3d) 762. The City had passed a by-law which created different classes of residential property for the purposes of taxation. The plaintiff had successfully brought an application to quash the by-law

for illegality and the City was now appealling that decision.. At the time of the appeal, however, the by-law in question, while not expressly repealed, had been repealed by another taxing by-law. The plaintiff applied to have the appeal struck out on the ground that as the by-law no longer existed, the issue had become theoretical and could not be the subject of adjudication.

The Court reviewed the English and Canadian authorities standing for the proposition that the courts would not entertain applications for advice on non-existing rights, and found that they were "not easy to reconcile on this question of when a Court should exercise its discretion and give a declaratory judgment" (p. 767). The Court decided to exercise its discretion in favour of allowing the appeal to proceed on the ground that there was a real issue between the parties, not merely a theoretical one. The factors which gave the question a "reality" were:

1) the City had only repealed the offending by-law by implication and there was an intimation that it wished to re-enact it. It should not be required of the City to test the by-law's legal position by actually enacting it. "The question in substance is a real one" (p. 767).

2) the City's interest in the by-law was real as they had enacted the by-law. Also considered was the fact that other municipalities were interested in the question.

3) the plaintiff, as a landlord, had a real interest in opposing the by-law and the City's appeal.

In closing, the Court repeated that it had been the fear of inundation which had restrained courts from widely granting declarations and that should this indeed become a problem it would have to reconsider the exercise of its discertion.

A recent Supreme Court of Canada consideration of the question of declarations on theoretical issues occured in Solosky v. The Queen (1979), 105 D.L.R. (3d) 745. The plaintiff, an inmate of a federal penitentiary, applied for a declaration that correspondence clearly marked as being between himself and his solicitor was privileged and should not be opened and read by penetentiary staff. The Federal Court of Appeal had dismissed the plaintiff's appeal, stating that it could not extend the concept of solicitor/client privilege to all correspondence. Further, it could not exercise its discretion to grant a declaration as to correspondence which had not yet been written as this would be tantamount to granting relief on the basis of a hypothetical case and on future, non-existing rights.

At the outset of his judgment Dickson J. provided a definition of declarations:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined (p. 753).

The English authorities which held that only real issues can be adjudicated upon were reviewed, and in particular, reference was made to Millstrom v. Garner,

[1970] 1 W.L.R. 603. In that case, one of three partners who were bound by a partnership agreement sought a declaration as to his liability under the agreement, should the relationship end. The Court of Appeal held that it could not exercise its discretion to grant a declaration as there was no right being asserted. The question was an academic one and no purpose would be served by the declaration.

Dickson J. said that the Millstrom case was very different from the case before him as he was not dealing with future or hypothetical rights but rather with:

> [A] declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as "future rights" (p. 754).

Dickson J. is here citing A. H. Hudson's article [13] wherein the author discusses the characteristic of an "unreal" issue. If the declaration could not become immediately and effectively available to resolve the dispute between the parties, then it should not be granted because the issue is not real. When the declaration, however, determined the consequences of unrealized present rights and indicates to the parties what claims they may or may not make, then it is effectively available and properly granted. The distinction between the unrealized future rights which become determined at the time of judgment and hypothetical, contingent rights is a fine one.

The dispute between the parties in Solosky was held to be real because the declaration was a "direct and present challenge" to the defendant's censorship order which was in controversy. While a declaration may not be effective in curing past

ills, this fact "cannot of itself, deprive the remedy of its potential utility in resolving the dispute" (p. 755).

Having accepted that there is a real dispute and that he had the discretion to grant a declaration, Dickson J. turned to the only remaining issue, namely, whether the declaration would have a practical effect in the resolution of the dispute. He answered this question by stating:

> The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although admittedly, any such determination relates to correspondence not yet written (p. 755).

In the final result, the plaintiff's application was refused on the merits of the question of solicitor/client privilege.

These three cases illustrate an increased tendancy on the part of Canadian courts to grant declaratory relief where the issues do not neatly fit into the traditional framework of a litigious issue. Judicial discretion is being exercised in favour of declarations on the basis of a reinterpretation of what is a real dispute and what are non-theoretical rights. No longer are these courts rigidly insiting on a present concrete factual situation to render issues real. Although it is not an explicit rationale, reasons of public policy and public importance are changing what once may have been theoretical issues into real disputes. The accessability to the court was seen as the litigant's right in Vic Restaurants and in Henning and this, too lends reality to the dispute.

When the courts allow themselves to expand the concept of real disputes they also change the idea of what is justiciable and within the realm of their reach. Although public interest concerns may exert more influence in the discretionary granting of declarations, there must still be clearly recognizable legal rights. This limitation was illustrated in the recent, much publicized, case of The Queen v. Operation Dismantle (1983), 3 D.L.R. (4th) 193. The plaintiff, Operation Dismantle, was seeking a declaration that nuclear Cruise testing is a violation of the Charter and an injunction to restrain that testing. The Crown's application to strike out the statement of claim had been dismissed and the Crown was appealing that decision. The central issue before the Federal Court of Appeal was whether the plaintiff had raised a justiciable question. The Court did not speak in terms of hypothetical or real rights, but rather in terms of what can be judicially ascertained and determined. Ryan J. held that the government decision to test the nuclear weapon was not immune from judicial consideration merely because it was a political decision. That decision was based on numerous policy considerations and the weighing of factors, and the rightness or wrongness of this process cannot be tested in court. Ultimately the issue is that whether or not testing the Cruise will increase the chance of nuclear war is not something which can be proven in a judicial proceeding.

Le Dain J. summarized the central issue as being:

> [T]he effect of the proposed testing and availability of the cruise missile on the risk of nuclear conflict. That is manifestly a question which is not justiciable. It is not susceptible of adjudication by a court. It involves factors, considerations and imponderables, many of which are inaccessible to a court or of a nature which a court is incapable of evaluating or weighing (p. 210).

B. Standing:

The second way in which access to declarations can be controlled is through the requirement of standing. One of the first definitive statements standing in Canada was Smith v. Attorney General for Ontario, [1924] S.C.R. 331, which dealt with the application for a declaration that Part IV of the Canada Temperance Act which prohibited the importation of alcohol into Ontario was invalid in Ontario. Smith had attempted to bring in alcohol from a Quebec dealer, who had refused his order because of the statutory prohibition. Relying on the English decision in Dyson, Smith argued that he should not have to contravene the legislation and subject himself to criminal prosecution in order to challenge the validity of an Act which clearly affected him.

Smith's argument received a sympathetic hearing from the Court, but it was outweighed by the Court's concern for the inconvenience which would arise if every citizen was given standing to challenge legislation:

> ...We think, however, that to accede to the appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.
>
> We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the

> wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the government bodies of Municipalities; MacIlreith v. Hart. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended (p. 337).

It should be noted that the Court in Dyson had considered the inconvenience argument and dismissed it as not being conclusive on the question of access to declaratory relief. he Court could deal with the perceived threat by exercising its discretion and refusing relief or by imposing a penalty of costs on the plaintiff. The Court in Smith distinguished this clearly irreconcilable decision on the ground that the English case had dealt with an actual illegal official action, while Smith's facts were entirely hypothetical. Smith was thus, unaffected by the legislation and had no standing to bring his action.

Until the innovative 1974 decision of Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, Smith represented the law on standing in Canada. A private person could challenge legislation or official action on behalf of the public interest unless he or she was especially prejudiced by it, or if he or she was a ratepayer challenging municipal expenditures. Otherwise, only the Attorney General could represent the public interest, either in an action on his own initiative or in a relator action, where he consented to the use of his name on the relation of an individual bringing an action.

In 1974 another exception to a proceeding brought by a private litigant was added to that of exceptional prejudice and ratepayer's action when the Supreme

Court of Canada granted Thorson standing to bring an action challenging the constitutional validity of the Official Languages Act, R.S.C. 1970, c. 0-2. Laskin J., speaking for the majority, held that the question of the plaintiff's standing to challenge federal legislation on the basis of its constitutionality was a matter of judicial discretion, the exercise of which would be determined by 1) the justiciability of the issues raised and 2) the nature of the legislation being attacked (p. 161).

A distinction was drawn between regulatory legislation, which imposes a compulsory scheme along with concomitant penalties on certain activities or persons, and declaratory legislation which imposes neither duties nor offences. In the case of a challenge to regulatory legislation, because certain classes of persons would be particularly affected while the general public would be untouched, the plaintiff would have to establish a specific effect of the law in order to be granted standing. The declaratory legislation, however, as it creates no class of persons specifically regulated, affects everyone in the public in the same way. Thus, no one would be able to prove the requisite exceptional prejudice to establish standing and the legislation would be effectively immunized from challenge unless the Attorney General sought to protect the public interest. Where, as in the case of Thorson, however, the challenge is to federal legislation and it is a constitutional attack, the English authorities regarding the exclusive jurisdiction of the Attorney General to bring the action cannot be applicable, as such a challenge would not arise in the English unitary state. Otherwise there would be no method by which the matter could be adjudicated.

The second phase of Laskin J.'s analysis was that the constitutional challenge was a justitiable issue and:

> ...[I] t would be strange and indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication (p. 145).

Laskin J. asserted that constitutionality of legislation is an issue which has always been justiciable in Canada, and based on that he identified the right of every citizen to consitutional behaviour by Parliament.

The alarming consequences which earlier courts predicted would ensue if standing were granted to citizens challenging legislation are dismissed by Laskin J. as having already been dealt with by the court in Dyson. Declaratory actions can be controlled "through discretion, by directing a stay, and by imposing costs" (p. 145).

In granting Thorson the standing to seek his declaration, Laskin J. concluded by stating:

> The expansion of the declaratory action, now well-established, would to me be at odds with a consequent denial of its effectiveness if the law will recognize no one with standing to sue in relation to an issue which is justiciable and which strikes directly at constitutional authority (p. 162).

The new exception to the rule on standing created by Thorson was tested two years later in Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265. Laskin C.J.C, speaking for the Court, granted standing to McNeil to bring an application for a declaration that the Theatres and Amusements Act, R.S.N.S. 1967, c. 304 was ultra vires the Province in so far as it authorized the establishment of a

film censorship Board. It would appear that the legislation in question came within the category of "regulatory legislation" as it created offences and imposed penalties, so that the potential plaintiff would, according to the Thorson test, have to demonstrate exceptional prejudice in order to bring a challenge. McNeil, as an editor of a newspaper, was not especially prejudiced; he was merely a member of the public outraged by the banning of Last Tango in Paris by the Board. The distinction between declaratory and regulatory legislation, however, was held not to be a "controlling" distinction, nor were the terms "susceptible of an invariable meaning" (p. 269). Although the legislation was primarily regulatory, it also affected the public at large as it allowed the Board to determine what films the public could view. Chief Justice Laskin concluded that this impact on the public, coupled with the fact that there was no other way to challenge the legislation, was sufficient to enable the Court to exercise its discretion to grant standing to McNeil.

It is important to note the Court's concern that legislation not become immune from judicial scrutiny by the imposition of a rigid standing requirement of exceptional prejudice:

> ...[T]here could be a large number of persons with a valid desire to challenge the prohibitory aspects of the legislation who have no vehicle through which to effect their purpose unless granted standing before the Court (p. 270).

It is worth pointing out that no reference was made to the possibility that the legislation could have been challenged by those most directly affected by it -

theatre owners and distributors. But in any event it seems clear that the Court expanded its concept of how direct the prejudice and effect must be in order to allow the public interest to be tested against the legislation.

The decisions in Thorson and McNeil appeared to be a new trend in the Canadian courts, away from the rigid standing concepts and their English precedents. With the reporting of the decision of the House of Lords in Gouriet v. Union of Post Office Workers, [1977] 3 All E.R. 70, however, at least one commentator predicted a retreat by the Canadian Supreme Court from its liberalization of standing and a re-evaluation of the Court's role in public interest suits.[13]

That case arose out of a controversial resolution passed by the members of the Union of Post Office Workers not to handle any mail between England and Wales and South Africa in an attempt to apply pressure against the latter's apartheid policies. Gouriet, secretary of an organization called the National Association for Freedom, applied to the Attorney General, on that same day, for his consent to launch a relator action. When that consent was denied, Gouriet brought an action in his own name, seeking an injunction restraining the union from carrying out its resolution.

The Court of Appeal held that although it could not review the Attorney General's decision to bring a relator proceeding and although the plaintiff could not maintain an action for a permanent injunction, Gouriet did have standing to seek a declaratory judgment against the union. The decision by the Court of Appeal was

based in part on an earlier judgment of Denning M. R., in Attorney General ex. rel. McWhirter v. Independant Broadcasting Authority, [1973] 1 All E.R. 689, where it was held that if the Attorney General refused to take a case, an interested member of the public could apply in his or her own name for a declaration.

> ... I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it , in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced. But this, I would emphasise, is only in the last resort when there is no other remedy reasonably available to secure that the law is obeyed (p. 699).

These propositions by Denning M.R. were criticized by the House of Lords in Gouriet, as contrary to authority and principle (p. 85), as incorrectly stating the law (p. 95) and generally being dismissed as obiter dicta (p. 100). The House of Lords reaffirmed for England the absolute constitutional right of the Attorney General to represent the public interest and the absolute immunity from judicial scrutiny of his decision to initiate or consent to a suit. As Gouriet was asserting neither any private legal right nor was he claiming any loss or damage, he could not bring an action for a declaration. His position differed dramatically from that of the plaintiff in Dyson who was asserting private rights in the process of trying to protect himself from illegal action. (p. 94). Gouriet's action was thus dismissed.

The decision in this case is less important for its specific treatment of Gouriet's claim than it is for the general analysis of a court's role with relation to public interest litigants. Courts can exercise their discretion to grant declaratory relief only when the declaration is one of legal rights which are being claimed.

> So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event (p. 100).

The jurisdiction to declare public rights exists only at the instance of the Attorney General, the House of Lords held. It expressed "considerable doubt" that it would be in the public interest to allow private individuals to make applications in relation to an interest which they shared with the general public and where what they sought was the enforcement of public rights (p. 95). The law on the question of Gouriet's right to bring proceedings was seen as being "clear and well-established" and to attempt any change to break "the mould" would require a "massive and fundamental revision" which is beyond the proper capacity of the House of Lords (p. 114).

At least one commentator, when faced with such authoritative pronouncements, felt pessimistic about the law of standing in Canada:

> But if one must predict, the exception in Thorson and McNeil is likely to remain just that - an exception. As for the law generally with respect to locus standi, one tends to think that here, as has happened in England, the courts will take a restrictive view and the mould will be preserved.[15]

The commentator, however, could have taken some hope from the treatment of McWhirter in the Thorson judgment. Laskin J., considered whether whether the need to have the Attorney General institute proceedings had any application in a federal system, where the Attorney General was a legal officer of the Government:

> ... The situation is markedly different from that of unitary Great Britain where there is no unconstitutional legislation and the Attorney General, where he proceeds as guardian of the public interest, does so against subordinate delegated authorities (p. 146).

A more recent Supreme Court of Canada decision has shown that the philosophy developing in Thorson and McNeil has continued to be applied to widen access to the court, at least in constitutional challenges, and that the restrictive English approach has not been followed. In fact, Gouriet was not even cited in the decision. In Minister of Justice of Canada et al. v. Borowski (1981) 130 D.L.R. (3d) 588, the Court had to determine whether Borowski had the necessary standings to bring an action for a declaration that the therapeutic abortion committee provisions of the Criminal Code (s. 251(4), (5), (6)) were inoperative by reason of the Canadian Bill of Rights. The majority held that the applicant had the requisite standing, based upon the Thorson and McNeil cases, since the challenge on the basis of the Bill of Rights was in no way different from a constitutional challenge based on the British North American Act. Looking at the nature of the legislation under attack, the Court found that it was neither regulatory, nor declaratory, but rather exculpatory, providing as it did for circumstances in which otherwise criminal acts would not incur any criminal liability. This made it highly unlikely that anyone directly affected or prejudiced by the legislation would challenge it, and the issue could not come before the court unless an interested taxpayer, not specifically affected, was given standing. The test set out by Maitland J. for the majority, is as follows:

> ...[T]o 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 (p. 606).

A genuine interest coupled with a potential immunity from judicial examination is sufficient to allow a citizen to challenge legislation constitutionaly. The Court affirmed the right to bring issues before the courts and asserted its role in giving a judicial opinion on matters of public importance.

It is interesting to note that the dissent in Borowski is by Laskin C.J.C., with whom Lamer J. concurred. The Chief Justice started from the premise that there is no right for an individual to invoke the jurisdiction of a competent court on the interpretation of a statute unless that person has an interest which is not common to everyone in society. The rationale for this rule is the role of the Court as a dispute - resolving tribunal which settles contests between parties.

> ... Courts do not normally deal with purely hypothetical matters where no concrete legal issues are involved, were there is no lis that engages their processes or where they are asked to answer questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law. Special legislative provisions for references to the Courts do answer particular questions (which may be of a hypothetical nature) give that authority to Governments alone and not to citizens or taxpayers. Merely because a Government may refuse a citizen's or taxpayer's request to refer to the Courts a question of interest to the taxpayer does not per se create a right in the citizen or taxpayer to invoke the Court's process on his or her own, or by way of a class action on behalf of all citizens or taxpayers with the same interest (p. 592).

The exceptions to this rule are 1) ratepayers actions to challenge municipal expenditures, and 2) constitutional challenges of a statute which affects the entire body of society in an equal manner.

Applying this general principle to Borowski, Laskin C.J.C. held that the Thorson and McNeil exceptions had no relevance. The legislation in question does not affect everyone in the same way - there are clearly classes of persons who are affected more than others and who have special interests. These doctors, hospitals and husbands could, if they desired, challenge the legislation, thus preventing it from becoming immune from judicial review. In closing Laskin C.J.C. stated that the plaintiff did not have any judicially recognizable interest and that the Court should exercise its discretion against granting him standing because the case lacked concreteness. It would be an abstract argument with obsessive arguments on both sides by parties with no direct interest (p. 598).

It is interesting that Laskin C.J.C. did not find the right to constitutional behaviour to be a justiciable issue in Borowski as he had earlier found in Thorson, and that he relied on the possibility of doctors and hospitals bringing a challenge, when the possibility of similar action by the film distributors and theatre owners in McNeil had not been suggested. Given the emotionally charged and often hysterical public debate over abortion rights in Canada, perhaps he did not want to see the judicial forum used for the exposition of moral and political views which would not necessarily represent the interests of affected persons.

The crucial question now remaining outstanding is whether the courts will expand the concept of a legal right upon which it will grant a declaration to include

the right to challenge illegal official acts. Will the courts allow themselves to adjudicate on non-traditional, non-adversarial, public interest issues which are outside of the context of constitutional law? Three cases offer some insight into how courts will deal with an expanded concept of standing.

Rosenberg et al. v. Grand River Conservation Authority et al., (1976) 69 D.L.R. (3d) 384 concerned a motion for an interlocutory injunction in an action for a declaration that a resolution by the Authority to convey certain lands to a municipality was void and that the Authority owed a duty to oppose the land acquisition. At issue was the building of a bridge and road across the Elora Gorge. The plaintiffs were purporting to sue as public members of the Authority and on behalf of all its members i.e. the public. In denying the plaintiff's standing to sue, the Ontario Court of Appeal stressed that there was no constitutional issue, but merely a question of an interpretation of the Conservation Authorities Act. The plaintiffs had no special interest in the Act, nor had they been exceptionally prejudiced by its operation, so that the proper person to bring the suit on behalf of the public would be the Attorney General. As the Attorney General had not been requested to do so, the Court did not have to consider how it would treat the question of standing if he had refused or neglected to take the case.

Thorson was distinguished by the Court on the following four grounds:

1) the issue in Thorson was a constitutional one,

2) the Attorney General had been requested and had declined to act,

3) it was a taxpayer's action, and

4) the English position of the Attorney General as a guardian of public interest in relation to subordinate delegated authorities had been approved of in Thorson.

(The quotation which the Court selected as indicating that Thorson was a taxpayer's action, in effect, deals with the nature of declaratory legislation and its universal effect on all members of society.)

As a result of its analysis of Thorson and its identification of the plaintiffs' lack of special interest, the Court refused to exercise its discretion in favour of granting standing, holding that the principle of discretion in Thorson did not extend to the case:

> ...[T] he case does not decide that in all cases of alleged ultra vires action by a statutory corporation, the Court has a discretion to permit the continuation of an action by someone who is in the same position as the rest of the public (p. 395).

It should be noted that the Court, quoting from Smith v. Attorney General of Ontario, expressed a reluctance to give a judgment against the applicant on a procedural point alone. Accordingly, it considered the merits of the case and found that the Authority had adequately fulfilled its legislative objectives.

This issue was again raised in Re Pim and Minister of the Environment et al. (1978), 94 D.L.R. (3d) 254 which was an application by a member of Pollution Probe

for judicial review in the nature of a declaratory order that the Minister of the Environment failed to recommend certain regulations as required by the Environmental Protection Act. The regulations pertained to the regulation and prohibition of non-returnable beverage containers. In considering the question whether the applicant should be given standing, the Ontario Divisional Court pointed out that the provincial Attorney General had refused to act ex relatione. Gouriet was referred to as representing the clear law of England, which, the Court said, would be equally applicable in Ontario if not for Thorson and McNeil. Those cases involved three factors for the granting of standing (p. 258):

1) the matter had to be justiciable

2) the matter must involve the validity of a statute, and

3) the court must exercise discretion.

As the Divisional Court viewed the remedies sought as being non-justiciable, although of some importance, because no statute was being challenged, standing was denied.

In a separate opinion, Steele J. agreed that Gouriet was the basic law in Ontario, subject to the constitutional challenge exception created by Thorson and McNeil. More significant, however, is the fact that he was of the opinion that Rosenberg left open the question of standing to the courts' discretion in special cases, especially where the Attorney General's refusal to give leave in an application would "deprive members of the public of a right to adjudication" (p. 263). Thus, Thorson and McNeil were both applicable to the case before him,

despite its non-constitutional character. Steele J. would have granted standing to the applicant had she shown there to be a justiciable issue within the meaning of s. 2 of the Judicial Review Procedure Act, 1971.

> 2(1) On an application by way of originating notice, which may be styled "notice of Application for Judicial Review", the court may, notwithstanding any right of appeal by order grant any relief that the applicant would be entitled to in any one or more of the following:
>
> . . . . . .
>
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power.

As there was no evidence of a ministerial refusal to pass regulations, only of a failure to do so, there was no justiciable issue and the applicant was denied standing.

A case which decided the applicability of Thorson and McNeil in a fashion much different from that in Rosenberg and Pim was Attorney General of Nova Scotia et al. v. Bedford Service Commission (1976), 72 D.L.R. (3d) 639. The action concerned the establishment of a garbage disposal landfill which the Bedford area property owners wished to prevent. They commenced an action seeking twelve declarations all dealing with aspects of the planning and decision making surrounding the landfill.

The Nova Scotia Supreme Court - Appeal Division, held that if the declarations sought were in essence a challenge to the legal validity of the

decisions made by the authorities, there would be a justiciable issue and the area property owners could be granted standing.

> To so hold would recognize that the declaratory action as recently developed is a broad remedy which we should not unnecessarily deny to persons whose rights or interests may be affected by illegal action or ultra vires legislation by Governments, federal, provincial or municipal or their agencies. I have in mind the wide scope of the declaratory action recognized by Chief Justice Laskin in Thorson v. Attorney General Canada et al. and Nova Scotia Board of Censors v. McNeil. (p. 643).

The Court reviewed Rosenberg and concluded that it had too narrowly construed the Supreme Court of Canada decisions, as a declaratory action could be brought to challenge legislative validity if the general public was affected. There was no need to consider, however, whether Thorson and McNeil could be extended beyond constitutional cases since in the present case the plaintiffs had special interests and were specifically affected.

The discretion to grant standing involves two factors: 1) the justiciability of the issue, and 2) the effect on the plaintiff. The Court then considered what matters could not be the subject of proceedings seeking a declaration, as they were non-justiciable. These were the non-legal areas of politics, morality, legal administrative practices, and "the wisdom or fairness of governmental action" (p. 646). As an adjudicator of legal rights the Court had "no power to act as a sort of ombudsman, or general overseer of political or administrative bodies or officials, or to act as a commission of inquiry into economic, social or ecological matters" (p. 646). Applying these principles to the declarations being sought by the applicants,

the Court found them to be centrally concerned with the wisdom of political and administrative acts and not with legal or jurisdictional violations. Given the non-justiciability of the matters, the court denied standing to the plaintiffs, without considering the merits of the controversy.

The Court in Bedford did not expressly extend the Thorson principle to non-constitutional legal challenges, but it did identify those challenges as justiciable issues. This would be a factor in granting standing if the plaintiff were affected by the exercise of illegal action. It is not clear how direct and substantial that interest would have to be.

Two cases from Manitoba have extended the availability of declarations for breaches of provincial legislation. In Re McIntyre and University of Manitoba (1981), 119 D.L.R. (3d) 352 an application was made by way of originating notice of motion for a declaration that the mandatory retirement provision in the University's collective agreement was contrary to the Manitoba Human Rights Act. The Act itself provided for a complaint procedure, but the Court of Appeal held that this did not limit its jurisdiction to grant declaratory relief unless it was expressly ousted by the Act. The essence of the application concerned the interpretation of the Human Rights Act and this involved the applicant's rights. As such it was a proper case for declaratory relief.

Re Parkinson and Health Science Centre (1982), 131 D.L.R. (3d) 513 involved an application for a declaration that the Health Science Centre by-laws concerning compulsory retirement were contrary to the Human Rights Act. The Court of

Appeal followed the reasoning in McIntyre and, as it had done in McIntyre, looked to Dickson J.'s decision in Solosky as authority for the broadening scope of declaratory relief. As the dispute was a real one, and as the declaration would have an effect on resolving the dispute, the Court exercised its discretion in granting the declaration.

The courts in Rosenberg, Pim and Bedford were faced with a challenge to the legality of actions by public authorities, while the Manitoba courts in McIntyre and Parkinson dealt with a challenge to the legality of actions taken by statutory bodies. Despite the similarity of the actors whose actions were being challenged, the approaches of these courts to the exercise of their discretion is different. Because they were not exceptionally prejudiced by the legislation, Rosenberg and Pim were denied standing. There was no real examination of what constitutes a justiciable issue and whether access to the courts was an interest which should be recognized. (Note, however, Steele J.'s separate reasons in Pim.) McIntyre and Parkinson did not consider the question of standing, as their applicants were more obviously affected by the challenged actions, but based the exercise of discretion on the right of a person to have their rights judicially declared. Both cases refer to Solosky and to the considerations expressed there that the declaration be aimed at a real dispute and that it be effective at resolving the dispute. This type of analysis, concerning the efficacy of the remedy, was not considered in Rosenberg or Pim.

IV. CHARTER IMPLICATIONS

> s. 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may

> apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> s. 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 inconsitency, of no force or effect.

These two sections, and in particular s. 24 of the Canadian Charter of Rights and Freedoms, mark a significant departure from previous Canadian constitutional law by providing for wide remedial powers in the enforcement of rights guaranteed by the Charter. As the cases shows, it was the lack of any provision for remedies in the Canadian Bill of Rights which rendered that statute largely ineffectual in protecting the rights guaranteed under it. Manning has argued that given the intent of the Charter to provide for an effective enforcement mechanism, s. 24 should be read as broadly as possible to grant standing to individuals seeking declaratory or other relief. [16]

The standing test which will be imposed by courts for s. 24 applications will have to contend with the very language of the section which contemplates that the person applying will have to have had his or her rights affected. How direct the infringement must be and what rights will be recognized under this section are matters which will affect standing.

Smith J., in the Ontario High Court, hearing an application challenging the constitutionality of the federal Juvenile Delinquents Act, granted standing to the applicant newspaper publisher. (Re Southam Inc. and the Queen (No. 1) (1982), 70

C.C.C. (2d) 257). The publisher's right to freedom of expression and freedom of the press had been denied when a trial of a juvenile was held in camera.

In Edmonton Journal and Attorney General for Alberta et al. (1983), 4 C.C.C. (3d) 59 which was an identical challenge to the Juvenile Delinquents Act, the newspaper was denied standing under s. 24 by the Alberta Court of Queen's Bench on the basis that there was no protection, and hence no infringement, of a wide freedom of the press. Freedom of expression was held not to include a right of access (as Smith J. had held in Southam) which meant that the applicant had not had any rights infringed for the purpose of s. 24. The Edmonton Journal was granted standing, however, for the purposes of an application under s. 52 on the basis that it was a "concerned citizen" challenging the constitutional validity of a statute. The Court cited Borowski as the authority for this position (p. 66).

A challenge to the validity of the Plebiscite Ordinance, 1981 of the Northwest Territories was made in Re Allman et al. and Commissioner of the Northwest Territories (1983), 144 D.L.R. (3d) 467. The Ordinance, which required a three year residency period to qualify to vote in a plebiscite, was challenged by persons who did not have the three year requirement. Standing was granted by de Weerdt J. of the Northwest Territories Supreme Court to apply for a declaration that the Ordinance infringed on the fundamental right of freedom of expression on the grounds that:

1) the applicants had raised a serious issue as to the legal validity of the ordinance,

2) the applicants had a genuine interest, and

3) there, there was no other reasonable way in which the matter could be raised before the court, as the Attorney Generals had refused to bring an action.

This was the test that had been formulated in Borowski and the court consequently did not feel it was necessary to consider the scope of s. 24, as the declaratory relief would have been available even before the Charter. Section 26 of the Charter guaranteed rights as they existed before the enactment of the Charter and this was interpreted as allowing the Court to apply a pre-Charter standing test.

In Morgan v. Superintendent of Winnipeg Remand Centre et al., [1983] 3 W.W.R. 542 the applicant brought an action on his own behalf and on behalf of all persons detained awaiting trial for a declaration that their rights were being infringed. It was alleged that the inadequate services and facilities at the Centre constituted unusual treatment or punishment contrary to s. 12 of the Charter. While the plaintiff was denied the right to continue with his class action, he was granting standing to seek the declaration in his own name. Mr. Justice Kroft of the Manitoba Queen's Bench identified the case as a "systems action":

> ...I take a "systems action" to be one where a person or group with a general public interest as apposed [sic] to a strictly personal interest attacks the conduct of a governmental or similar authority on grounds that it has acted unconstitutionally, or that it has violated the principles of natural justice. The environmental actions against mosquito spraying, and the constitutional

> challenges against censorship laws, language laws, or abortion, are typical. In this kind of proceeding we have seen a growing willingless by courts to decide what might be described as test cases. That is, plaintiffs who are not by any strict definition "aggrieved persons" have been given a standing to bring declaratory actions and certiorari applications to challenge the validity of legislation and the legality of government actions (p. 554).

Mr. Justice Kroft cited Borowski as authority for this proposition and added that the "courts ought to take a liberal approach to status in matters involving alleged breaches of the Charter of Rights" (p. 554).

It may be, then that the courts will follow the more liberal test of standing in Borowski when deciding Charter cases. While s. 24 may not be interpreted broadly enough to allow an interested and concerned citizen whose personal rights have not been violated to apply for a declaration, the tests of Thorson-McNeil-Borowski will allow a challenge to legislative validity under s. 52.

Collin v. Kaplan (1982), 1 C.C.C. (3d) 309 is an example of a case where standing was denied under s. 24 because there was no direct link between the applicants and the rights violation. The applicants were present inmates of Laval Federal Training Centre who challenged the constitutional validity of the practice of "double-celling" whereby incoming inmates were temporarily required to share a cell. They were denied standing by Dube J. of the Federal Court, Trial Division on the ground that, as existing inmates, they were not affected by the practice. It is arguable that this is an appropriate case for allowing standing under the broader test for s. 52 in order to grant a declaration on the constitutional validity of the practice, but that may not have been argued because it is not referred to in the judgment.

The concepts of justiciability and standing, by which courts have traditionally screened claims for declarations have developed into wider and more flexible principles. There has been a growing recognition of the importance of declarations on matters which are non-traditional or non-adversarial and which require the courts to consider notions of public interest and public rights. Out of all of this, one can discern the nascent right of access to the courts to challenge legislation and official acts - a right which may dramatically alter the role of the courts in our society.

Contemporaneously with the increased willingness of the courts, as a matter of substantive law, to make declarations in cases involving the public interest and public rights, there have occured reforms of a procedural nature simplifying the means of invoking the declaratory jurisdiction of the courts in cases of this kind. In an earlier era the normal procedure was an action involving pleadings, discovery, and trial, a process that was expensive and time consuming. In a small number of special cases the speedier procedure of the originating notice of motion has come to replace the more traditonal and cumbersome action. Thus, for example, in Ontario, s. 2 of the Judicial Review Procedure Act, previously mentioned, allows an application by way of originating notice for a declaration "in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power". A statutory power is defined in s. 1(g) as a power or right conferred by statute to do the things outlined within the section. These include: the power to make regulations or to give any directions having a force as subordiante legislation, to exercise a statutory power or decision, to require anyone to do something or refrain from doing something, which would not otherwise be required by law, or to do anything which would otherwise be a breach of any person's legal rights.

In Ontario, the streamlined procedure, as I have said, is with respect to statutory powers, leaving the question open of the appropriate procedure for other kinds of challenge. Under the new Rules of Civil Procedure, expected to come into force in January, 1985, further streamlining will take place. The writ is abolished and there will be two kinds of civil proceedings, actions and applications (formerly called originiating notice of motion). Proceedings may be commenced by way of application under Rule 14.05(3)(h) in any case "where it is unlikely that there will be any material facts in dispute". In many of the cases in which declaratory relief may be appropriate there is no factual dispute to be resolved. In cases of that sort the simplified procedure can be resorted to. My colleague, Mr. Justice Marvin Catzman explains the coming change this way:

> The most significant expansion of application jurisdiction, however, is that found in rule 14.05(3)(h): where the relief claimed is in respect of any matter where it is unlikely there will be any material facts in dispute. This provision is designed to enable access to the expeditious application procedure rather than the longer and more costly procedure associated with actions in respect of <u>any</u> matter subject to the condition that there must be no material facts in dispute. It is appreciated that situations may well arise where the person making the application may consider it unlikely that there will be any material facts in dispute, but, by the time the application comes on for hearing, it is clear that some or all of the material facts are in fact disputed. To cover that situation, the presiding judge on the hearing of an application is empowered to order that the whole application or any issue proceed to trial : rule 38.11(1)(b), and, where a trial of the whole application is directed, the proceeding is thereafter treated as an action: rule 38.11(2). But the broad wording of rule 14.05(3)(h) is intentional and, used in proper cases, can reduce significantly the number if disputes which must be resolved by way of action.

A similar, though not identical, reform occured in England in 1981. It is described by Lord Denning in his <u>The Final Chapter</u> in the following language:

> The Law Commission made their report in March 1976 (Law Com no 73). It was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by section 31 of the Supreme Court Act 1981. It combined all the former remedies into one proceeding called Judicial Review. At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. ... (p. 121)

It may be possible to sum up the position in Ontario in the future in the language of Lord Denning:

> It must be remembered that judicial review is only the normal remedy. There may still be cases where it is appropriate for a remedy to be sought by ordinary writ and declaration, even in a public law matter, as in Air Canada v. Secretary of State for Trade, [1983] 2 WLR 494. [The Final Chapter, p. 152]

This is best illustrated by the Ontario Court of Appeal decision in Re Seaway Trust Co. et al. and The Queen in Right of Ontario et al. (1983), 146 D.L.R. (3d) 620. The Ontario Divisional Court in an earlier decision [146 D.L.R. (3d) 586] had considered an application to quash two applications for judicial review. The judicial review applications sought declarations that certain Orders in Council were invalid as offending against the Canadian Charter of Rights and Freedoms. On the motion to quash the applications it was argued that as the ultimate remedy being sought was damages, and as the Divisional Court did not have jurisdiction to award damages, the Divisional Court was not competent to hear the applications for judicial review. The majority held that the essential factor was that the Court had

the jurisdiction to grant a declaration or an injunction, and that the issue of damages was a secondary one which should not determine the question of access to the Court.

The Court of Appeal, however, allowed an appeal from the order of the Divisional Court and dismissed the applications for judicial review on the grounds that the Divisional Court had jurisdiction to deal with only part of the relief claimed, and that its structure would not enable it to make sufficient findings of fact to determine legislature validity.

I leave the final words to Lord Denning:

> In administrative law the question of locus standi is the most vexed question of all. I must confess that whenever an ordinary citizen comes to the Court of Appeal and complains that this or that government department - or this or that local authority - or this if that trade union - is abusing or misusing its power - I always like to hear what he has to say. For I remember what Mr. T. P. Curran of the Middle Temple said in the year 1790:
>
> > 'It is ever the fate of the indolent to find their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance.'
>
> The ordinary citizen who comes to the Court in this way is usually the vigilant one. Sometimes he is a mere busybody interfering with things which do not concern him. Then let him be turned down. But when he has a point which affects the rights and liberties of all the citizens, then I would hope that he would be heard: for there is no other person or body to whom he can appeal. But I am afraid that not everyone agrees with me. [The Discipline of Law p. 144]

NOTES

1. Clough v. Ratcliffe (1847), 1 De G. & S. 164, 178-9. For further cases see:

   S.A. de Smith, Judicial Review of Administrative Law, 4th ed., (1980), p. 477, note 7.

2. I. Zamir, The Declaratory Judgment (1962), p. 8.

3. de Smith, op. cit., p. 478.

4. de Smith, op. cit., p. 478

   Zamir refers to the case as The Chancery Act or The Special Case Act, op. cit., p. 9.

5. de Smith, op. cit., p. 478.

6. See cases cited in de Smith, op. cit., p. 479, note 21.

7. Zamir, op. cit., p. 32.

8. Ibid., p. 45.

   A. H. Hudson, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1976-77), 3 DAL. L.J. 706 at p. 708.

9. Hudson, op. cit., p. 708.

10. D. L. Haskett, "Locus Standi and the Public Interest" (1981), 4 Can.-U.S. L.J. 39 at p. 89.

11. Zamir, op. cit., p. 51.

12. Ibid., pp. 51-67.

13. Hudson, op. cit., pp. 709-711.

14. W. A. Bogart, Comment (1978), 56 Can. B. Rev. 331.

15. Ibid., p. 346.

16. M. Manning, Rights, Freedoms and the Courts, 1983, at p. 462.