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PUBLIC INTEREST GROUPS AND THE JUDICIAL PROCESS

IN CANADA

THE NEED FOR AND DEVELOPMENT OF A MORE REALISTIC

JURISPRUDENCE

by

James V. West

A thesis submitted to the Faculty of
Graduate Studies in partial fulfillment
of the requirements for the degree of
Master of Arts

Department of Political Science

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Ottawa, Ontario

1978

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the Faculty of Graduate Studies
acceptance of the thesis

"Public Interest Groups and the Judicial Process in Canada:
The Need for and Development of a More Realistic Jurisprudence"

submitted by James Victor West, B.A.,
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Abstract

The thesis is concerned with assessing the effectiveness of recent interest group performance before the Supreme Court of Canada. Through an examination of three recent cases that produced extensive group participation in litigation, it is argued that the receptiveness of the Bench to group concerns and submissions has certainly been less than satisfactory. Intervening interests have consistently met with rigid legalistic answers to complex social and political questions. Ad hoc opinions have not provided sufficient guidance for future litigation, leaving intervening interest groups to ponder the exponential risks of legal action under the influence of these uncertain conditions.

In the first instance, these unfavourable conditions are simply the result of the often unpredictable constraints lying in the multiplicity of rules, customs and traditions that make up the legal process. It is emphasized, however, that in the Canadian context interest groups must also contend with inhibitive features built into the very fabric of the constitutional system itself. The doctrine of parliamentary supremacy and the absence of an entrenched Bill of Rights have served to unduly restrict the Supreme Court's interpretive role. It is argued, therefore, that a critical reappraisal of prevailing constitutional arrangements is needed before interest groups can hope to find in the Supreme Court a climate conducive to the full and equal consideration of their demands.

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PREFACE

Throughout its short tenure as Canada's final appellate tribunal, the Supreme Court has worked in relative obscurity. Reaction to the early work of the Court did not produce the foundations upon which to build a rich and diverse legal-philosophical debate. Its important constitutional pronouncements of the fifties and sixties often went by with little significant public comment. The select group of academic commentators who chose to recognise the import of the Court's pronouncements, largely confined their attention to technical, legalistic analyses of specific decisions. The political and social implications of these decisions were often ignored. The adjudicative style employed by the Supreme Court was barely touched upon.

The 1970's may represent a shift in the opposite direction. The decade has so far produced dramatic changes in personnel, selected procedures and perhaps most important, in the type of cases the Court is being asked to deliberate upon. In 1973 the federal government broke with past practice by appointing former professor of law Bora Laskin to the Chief Justiceship. The following year the Court modified in a liberal direction entrenched principles relating to standing in constitutional cases. The same year produced an amendment to the Supreme Court rules which granted the judges greater control

over the issues they could choose to hear. These procedural changes, combined with the general implications of increased government activity, have served to produce a significant change in the composition of the caseload annually before the Supreme Court. Increasingly of late, the Court is confronted with the complex and often controversial issues brought forward in important public law cases. This shift in subject matter has been directly responsible for the increased interest shown by organised groups in the judicial process. The cumulative effect of these recent developments has been to make the Supreme Court a more visible element within the Canadian decision and policy-making processes. It is a central theme of the thesis that to truly understand the judicial branch, its apolitical myth must be disregarded and the socially significant import of its decisions fully recognised.

The thesis is concerned with assessing the effectiveness of recent interest group performance before the Supreme Court of Canada. Through an examination of three cases that produced extensive group participation in litigation, it is argued that the receptiveness of the bench to group concerns and submissions has certainly been less than satisfactory. The analysis of group performance provokes fundamental questions concerning the nature of judicial behaviour in general and the adjudicative style of the Supreme Court in particular. Has the Court pursued an active or a restrictive approach to

the issues raised before it? Have unpopular or controversial causes received the same treatment or attention as entrenched rights or principles? Have social science findings been regularly admitted to judicial proceedings and, perhaps more important, has judicial reception been one of open-mindedness or qualified uneasiness? Have judicial opinions sufficiently clarified controversial matters or has their ambiguous nature merely added more fuel to the fires of discontent? In all these areas, what factors have influenced the judges' desire to proceed in one direction rather than in another? In concentrating upon these important issues, the thesis calls for a basic change in the Supreme Court's prevailing relationships to other actors in the political order with a view to enhancing its role as an arbitor between competing social, economic and political interests.

I wish to acknowledge the assistance of a number of individuals. Professor Harold Angell of Sir George Williams University who encouraged my interest in the judicial process. Professors P.L. Rosen and K.Z. Paltiel of Carleton University who provided many helpful comments throughout the preparation of my first and final drafts. I also wish to acknowledge the receptiveness of the interest groups and their legal counsel. The Registrar of the Supreme Court was also most generous with his time. Finally, I want to thank my mom and dad, and my aunt and uncle who provided much appreciated encouragement.

October, 1978

James V. West

INTRODUCTION

The importance of judicial review in the American political system and the attention paid to litigation dealing with large issues of public law have made legal activity a significant form of interest group behaviour in the United States. Third party intervention in constitutional cases was first employed on a regular basis after 1820 to permit government representatives to make clear their position through the submission of relevant arguments. The practice was extended to private interests in the early 1900's. The National Consumers League led this early politicisation of the judicial process and in many respects established the pattern for subsequent interest group participation in litigation. The League was directed by two distinguished jurists, Louis Brandeis and Felix Frankfurter, who were later appointed to the Supreme Court bench.¹ By the 1930's, whether appearing as amicus curiae to present arguments on their own behalf or in support of individual litigants in whose name so-called test cases were brought, private organisations joined in a wide variety of legal proceedings. Throughout the fifties and sixties private interest groups, led by the NAACP, were responsible for introducing social science information into constitutional proceedings. In the process, they expanded

the applicable provisions of the Bill of Rights to a wider circle of individual and group concerns.² In the 1970's, private organisations have spearheaded the fight against environmental pollution through court actions of one form or another.³

This extensive group participation in litigation developed and flourished for several reasons. In the United States the judiciary is regarded as a co-equal partner in the political system and the process of judicial review is based on the limitations imposed by a written constitution. The courts are constitutionally charged with the responsibility of interpreting and applying these limitations to the practical situations of political life. As such, the judiciary is empowered to pass judgement on the validity of government legislation and in the process give effect to the constitutional claims of private interests. The courts have evolved selected procedures to help them fulfill this constitutional duty. Generous rules governing interventions and the filing of written briefs have been further liberalised through judicial interpretation. The amicus curiae procedure permits an interested group to appear on its own behalf or in support of general principles that may arise during the course of litigation. In this capacity, a group incurs no court fees for filing motions or even for actual appearance. As a true "friend of the court", a group does not have to pay exorbitant court costs when siding with the losing party to a dispute. Not to be overlooked is the receptive attitude from the bench itself. The courts have

encouraged amicus curiae briefs and have developed other practices to prevent the extreme consequences that might otherwise follow from the adversary nature of the judicial process.⁴

The term "interested party" has generally received a broad interpretation. The concept of "friend of the court" has been consistently conserved and legitimised to permit intervening parties to raise controversial points and novel arguments without the fear of inhibiting the cause of the principle litigant they may be supporting. The U.S. courts have recognised that modern public law raises complex issues that often extend beyond the immediate parties to a dispute and thus they have welcomed the expertise that public interest groups have to offer. As Justice Black made clear:

Most of the cases before this Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs.⁵

Whether measured in terms of applicable rules, judicial practice or the general receptiveness of the bench to group concerns, organised interests have found in the United States legal process a conducive climate within which to state their claims and have specific demands satisfied.

In Canada the history of third party intervention does not present such a favourable picture. As in the United States, government officials from federal and provincial levels have always been granted status to intervene in cases touching upon constitutional matters. Their influence in this capacity

has been and continues to be significant. In constitutional cases dealing with major jurisdictional questions, it is not unusual to see all ten provinces and the federal government making representations.⁶ The role of private organisations has been nowhere near as important. The majority of interest groups who have appeared before the Supreme Court of Canada have done so in the capacity of principal litigants. Until recent years, third party intervention has been an underdeveloped feature of Canadian jurisprudence.⁷ In the few post-1949 Supreme Court cases where groups achieved the status of intervening interested parties, their submissions dwelt almost exclusively upon strict legal considerations with little and often no attention paid to social or extra-legal facts.⁸ Unlike the United States, major legal disputes in Canada have rarely achieved the distinctive flavour of group combat.

In the first instance, this relative absence of third-party intervention can be accounted for by the state of Canadian rules and procedures. The Supreme Court rules permit an interested party to intervene on such terms, conditions, rights and privileges as the Court determines.⁹ However, at no time has the term "interested party" been clearly defined and, more important, the concept of "friend of the court" has not been accepted. In Canada, an intervenant is identified as being a full party to a dispute who aligns with one side or the other and thereby accepts the full consequences of legal defeat. Moreover, Canadian intervenants are generally obliged to argue

in both oral and written form. Unlike its American counterpart, the Canadian factum is subordinate in importance to oral advocacy. Although recent intervenants have attempted to employ the Brandeis Brief format, the Canadian factum traditionally represents a summation of the major legal points to be expanded upon in oral argument.¹⁰ The use of the written factum to introduce novel issues, sociological or non-legal considerations has been openly discouraged.¹¹

Canadian rules and procedures on intervention have actually served to inhibit the practice they were meant to control. With no amicus curiae format, intervening litigants are liable for a share of all final court costs. Unless special arrangements are made, only the richest or most legally confident groups can risk frequent resort to the court system on these terms. Furthermore, lengthy oral hearings increase the costs of litigation. Without a true amicus procedure, intervening interest groups are inhibited by the wishes of the immediate record parties. Knowing that their submissions are going to bear directly upon the cause of the immediate litigants, Canadian interest groups are not as free as their American counterparts to present novel arguments or controversial claims. Just as important, original litigants themselves, are unlikely to welcome outside support if their chances for success will be more difficult and more expensive by having to overcome third party arguments on the opposite side of the dispute. For most potential intervenants, these procedural

hurdles preclude the use of the legal arena as a viable alternative to more traditional channels of influence.

The Canadian rules on intervention are loaded against the cause of widespread interest group participation in litigation. The problem, however, runs much deeper than this. In three recent cases, namely, *The Attorney General of Canada v. Lavell*,¹² *Morgentaler v. The Queen*¹³ and *The Anti-Inflation Act* reference,¹⁴ the Supreme Court of Canada has permitted significant third party intervention. In these cases, the inhibitive procedures detailed above were not relevant considerations. The issue of court costs did not have to be determined.¹⁵ In both *Lavell* and *Morgentaler*, the intervening groups were fortunate to encounter immediate record parties who were receptive to their arguments.¹⁶ In all cases, the Court permitted the parties to file Brandeis-style briefs containing a good measure of social science and extra-legal considerations. However, the Supreme Court's approach to the matters raised indicates that interest groups wishing to pursue their demands through legal channels in Canada are confronted by inhibitive features built into the very fabric of the constitutional system itself.

In all judicial systems, interest group participation in litigation is subject to the often unpredictable constraints lying in the multiplicity of rules, customs and traditions that make up the legal process. As will be indicated in Chapter I, precedent, the legal or constitutional issue in dispute,

the customs of statutory interpretation, the rules of the law of evidence, even the type of legal proceeding itself can all serve to either narrow or broaden a court's viewpoint and thereby aid or inhibit an interest group's demands. These basic features inherent in the judicial process are applicable to the Canadian situation and to the Supreme Court of Canada in particular. However, augmenting and often supporting these obstacles are a number of inhibitive features arising out of the nature of the Canadian constitutional system. Operating within the Canadian variant of the parliamentary system, the Supreme Court of Canada does not feel itself to be as free to substitute its own interpretation of a particular social situation or piece of government legislation as does its counterpart in the United States. Thus, organised interests challenging the validity of government legislation frequently encounter a Supreme Court that does not appear willing, even on the basis of strong supporting evidence or favourable social conditions, to challenge the wisdom of Parliament or provincial legislatures and give effect to the claims of opposing interests. Moreover, in the absence of an entrenched Bill of Rights, the Supreme Court of Canada has consistently displayed a similar unwillingness to give practical effect to or place broad interpretations upon the provisions of the so-termed Diefenbaker Charter. Undoubtedly wary of the interpretative latitude that a mere statutory instrument affords, the Court has yet to adopt the quasi-legislative role needed to give effect

and meaning to general protective provisions and clauses such as "due process" and "the right of the individual to life; liberty, security of the person and enjoyment of property". Interest groups pursuing demands in the area of civil liberties have often been frustrated in their efforts by meeting a Supreme Court that either applies literal and therefore restrictive interpretations to the Bill of Rights or merely defers to the wisdom and judgement of Parliament.

Under the leadership of Chief Justice Bora Laskin, the Supreme Court of Canada has broken away from many inhibitive British traditions in deciding to expand the standing principle in constitutional adjudication,¹⁷ to admit social science data for consideration and indeed to allow for wider third party intervention. This may represent a new trend. However, while some of the entrenched barriers in the way of a more realistic jurisprudence appear to have fallen, recent decisions indicate that the Court as a whole has not yet overcome important institutional constraints that inhibit its general interpretative role. In the Lavell case, the Morgentaler decision and the Anti-Inflation Act reference, the intervening interest groups met with rigid, legalistic answers to complex social and political questions. In stressing the need to show deference to the wisdom and judgement of Parliament, the Court failed to elaborate fully upon why group submissions did not gain weight in the Court's eyes and perhaps more important, why those of their opponents did. In failing to comment on the

the fundamental issues underlying its final determination, the Court served to confuse even further already unclear matters. To be sure, Canadian interest groups, like their American counterparts, have quickly and ably adjusted to the process of complex constitutional and civil liberties litigation. The Supreme Court itself, however, has not and to this point at least does not appear ready to take similar steps. As a result, interest groups have not yet found in the Court a general climate conducive to the full and equal consideration of their demands. If Canadian interest groups are to assume a position in the judicial process comparable to the one achieved by their counterparts in the United States, a critical reassessment and reappraisal of both prevailing procedures and institutional arrangements will be needed.

NOTES

1. See generally, C. Vose, "The National Consumers League and the Brandeis Brief" Mid-West Journal of Political Science, Vol. I, (1957).
2. See generally, S. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" Yale Law Journal, Vol. 72, (1963), and E. Angell, "The Amicus Curiae: American Development of English Institutions", International and Comparative Law Quarterly, Vol. 16, (1967).
3. For a comprehensive review of significant environmental litigation in the United States see, Environmental Law Review, published quarterly.
4. L.K. Garrison, The Legal Process (San Francisco: The Chandler Publishing Company, 1961), pp. 228-235.
5. Objection appended to the Order Adopting the Revised Rules of the Supreme Court, (1954) 346 U.S. 947.
6. J.A.C. Grant, "Judicial Review in Canada: Procedural Aspects", Canadian Bar Review, Vol. 42 (1964), p. 195.
7. In ordinary litigation since 1949, only three cases, excluding those considered here, produced significant public interest group intervention. In *Winner v. STM Eastern Ltd.* (1951) SCR 887, two limited trucking companies intervened in support of New Brunswick legislation controlling highways. In *Western Minerals Ltd. v. Goumant* (1953) SCR 345, the unincorporated Farmer's Union of Alberta intervened. In the case of *Robertson and Rosentanni v. The Queen* (1963) SCR 651, the Lord's Day Alliance of Canada intervened to support Sunday observance legislation. It should be noted that the groups did not offer extensive arguments or factual considerations. Even in reference procedures where the rules on intervention are much more relaxed, few organised groups have taken advantage of them to any great extent. In the *Wartime Leasehold* reference (1950) DLR 1, The Federation of Property Owners, The Canadian Congress of Labour and the Canadian Legion all intervened to support federal rent control legislation. In the *Farm Products Marketing* reference (1957) 7 DLR 257, the Canadian Federation of Agriculture intervened to support the impugned marketing act. The *Manitoba Egg* reference (1971) SCR 689, saw a variety of farmers' organisations intervening on the matter.

8. In the Winner case, for example, the largest factum totalled 36 pages. Of the 13 factums submitted by the various parties, none offered extra-legal arguments or factual data. References have followed a similar pattern. Prior to the Anti-Inflation case, it was only in the Wartime Leasehold reference that social science data were offered for consideration. There, Eugene Forsey, acting for the CCL, prepared an elaborate economic analysis detailing the extensive shortage in housing following the war.
9. Supreme Court Rule 60 "on intervention reads as follows:
Any person interested in an appeal between other parties may, by leave of the Court or Judge, intervene therein upon such terms and conditions and with such rights and privileges as the Court or Judge may determine.
2. The costs of such intervention shall be paid by such party or parties as the Supreme Court shall order.
10. Rules 29 and 30 set out what the proper contents of a factum are in the Court's view, specifically, that it is "A brief of the argument setting out the points of law or fact to be discussed". In its application, it generally has the effect of limiting the scope of factums; large factums with broad sociological content are usually frowned upon..
11. See generally the comments of Justice Kerwin in *Saumur v. The Attorney General for Quebec*, (1953) 4 DLR 641 at 666.
12. (1974) 38 DLR 481.
13. (1975) 53 DLR 161.
14. (1976) 2 SCR 373.
15. The Lavell case did not have to determine the issue of costs since the Federal Court of Appeal made it a condition of granting the Attorney General leave to appeal to the Supreme Court that he should pay the respondent solicitor and client costs of the appeal. The Supreme Court considered that no further order needed to be made. In *Morgentaler*, the case began as a public prosecution and developed into a prosecutor's appeal. Public funds were thus available to pay most costs. In references, specific rules provide that all expenses will be met by the federal treasury. Over and above solicitors' fees, intervening groups really only have to worry about the printing costs of their factums.

16. In effect, the reference procedure does provide an amicus curiae intervention format similar to the U.S. practice. Groups are viewed as intervening on their own behalf and they are thus free to submit, within judicial discretion, any arguments or materials they wish to have noticed.
17. See, Thorson v. The Attorney General for Canada, (1975) SCR 138.

Chapter I

INTEREST GROUP PARTICIPATION IN LITIGATION: ESTABLISHING THE PROPER FRAMEWORK OF ANALYSIS

Aside from the fact that interest groups spend less time in the courts than they do in pursuing their demands in other channels of potential influence, it is often assumed that there is little or even no difference between group participation in legal activity and the larger role of political lobbying. The ultimate goal is the same no matter where groups perform, namely, to influence the content of policy decisions by getting the proper information to the right place at the most opportune time. It is often asserted, therefore, that the guidelines employed in the analysis of interest group participation in the political arena may be utilised to arrive at an accurate picture of group behaviour before the courts. The matter, however, is neither so straightforward nor that simple. The judiciary represents a special actor within the political process and, as such, its unique methods of operation bear directly upon the form and content of interest group performance in litigation.

In many respects, the judicial branch presents similar attractions and rewards as do other channels of potential influence. The ability to implement policies favourable to specific interests stands as an overriding consideration in both the

political and legal arenas. However, the judiciary often represents the final point at which pressure is applied; the channel turned to after lobbying attempts in other areas have failed. While legislative action or inaction is likely to give rise to new groups, it is the judiciary that often serves to provide these groups with legitimacy. The traditionally slow methods of court adjustment, moreover, frequently make the legal arena the most suitable channel in which fading interests can fight a last stand defensive battle against encroaching political trends.

Access to judicial channels differs markedly from access to political or administrative bodies. Although the demands involved in the role behaviour of judges largely parallel those guiding legislators or administrative officials, it is clear that the expectations concerning proper judicial behaviour are "more exacting and their limitations upon access more severe".¹ Discretion plays a part in judicial decisions just as it does in those of administrative or political actors. However, discretion in the judicial arena is more formalised and therefore less likely to be grounded exclusively upon partisan political interests. Moreover, judicial decisions are generally less secure and more unpredictable than purely political adjustments simply because "...institutional weaknesses, such as lack of enforcement powers and formalised decision-making processes, limit the amount of significant change that can be anticipated from any court action".²

The goals behind strategic and tactical planning are similar in both political and legal channels. No matter where groups perform, their aim is to influence the content of policy decisions that vitally affect their interests. The special nature of the judicial process, however, renders the traditional tactics of group lobbying inapplicable. As Greenwald states, "The written word substitutes for direct or grass roots lobbying; time, money and leadership skills become more important than campaign contributions or vote power".³

The relations between interest groups and the courts are not identical with their relations to other institutions or actors in the political order. Whether the difference is one of kind or as Truman more correctly maintains "one of degree",⁴ there is no doubt that litigation represents a special form of interest group activity. While the general guidelines of interest group analysis may be applied, they must be adapted to meet the peculiarities and obvious differences encountered in the legal arena. This chapter represents an attempt to establish this necessarily different framework of analysis.

Factors Influencing Interest Group Participation in Litigation

It is not possible to outline one theory applicable in all situations that explains why interest groups may choose to pursue the alternative of litigation. Different groups will be influenced to enter legal channels by a variety of different factors. For some, failure to have their demands satisfied in

other areas of the political system may force them, when such an alternative is available, to take their cause to the courts. For other groups, the very issues with which they are primarily concerned may dictate that litigation will have to constitute a major aspect of their overall strategy. At times an interest group may enter litigation not so much with the expectation of having specific demands satisfied, but rather, with the intention of merely presenting its position in what it correctly recognises to be a highly visible and respected forum that is likely to provide the group with a measure of public attention and respectability. In the final analysis therefore, it is only possible to list the most common factors influencing interest group participation in the legal arena, factors that clearly differ from situation to situation and from group to group.

The pivotal position that the courts often occupy within the overall governmental system is itself an important influencing factor. As Vose points out, "There is a logical relationship between organisational interest in litigation and the importance of courts in forming public policy."⁵ The judiciary is empowered to make choices that directly influence the lives and expectations of both individuals and groups. In their decisions, courts can confer benefits on or enhance the position of some groups while impeding the aspirations and hurting the position of others.⁶ Whether it be at the level of the Supreme Court where broad issues affecting civil rights or the division of powers

between different levels of government are frequently decided, or at the level of lower trial courts where the issues are often not as broad but certainly of no less concern to specific groups within society, the judiciary makes choices and decides matters that are every bit as important and influential as decisions made in administrative or legislative levels of government. Indeed, with the general power to review and overrule governmental actions, the judiciary possesses a power that frequently makes it more important than the legislature or the bureaucracy from an interest group's point of view. To the group representing ethnic or racial minorities who are faced with the problem of discrimination, a problem that is generally perpetuated by prevailing legislation or mere governmental inaction, the power of judicial review frequently represents the most important means of at least legally removing the spectre of prejudice and unequal opportunity. To the labour union faced with government legislation restricting its ability to bargain freely or to strike, the courts are an institution with the ability to declare such legislation ultra vires and thereby re-assert more equitable industrial relations. To the business interest that is adversely affected by governmentally imposed marketing plans, the courts represent a potential ally who may restore more favourable economic conditions. In short, with the ability to review governmental actions and thus to exercise wide discretionary powers in passing upon what are frequently policy or political matters, it is clear

that in any society "the judiciary reflects the play of interests and few organised groups can afford to be indifferent to its activities."

While the judiciary's recognised ability to decide important public issues represents perhaps an obvious factor, there remain less general and more practical reasons why interest groups may choose to pursue their demands through the courts. The most common factor influencing the choice to pursue litigation results from a lack of success in political channels. When lobbying with bureaucratic or political officials has proved frustrating or when access to these traditional channels has been closed completely, interest groups may be forced to direct their efforts to the legal arena.⁸ In Quebec during the 1950's for example, the Jehovah Witnesses were forced into litigation to protect their rights to associate and distribute their literature simply because it was the Quebec government that was infringing and indeed abrogating these rights through legislation. In Quebec there was no outlet to which the Sect could realistically appeal but the courts. Throughout the twenties and thirties, the NAACP ran into similar political roadblocks in the United States. In Congress the group consistently failed to gain legislation making lynching a federal crime. A number of bills purporting to prohibit poll taxes were similarly defeated. Chances of success were even more remote in the Senate. Here the size of the Southern delegation, the nature of the committee system and the

pervading influence of seniority all worked against Negro efforts.⁹ Again the judiciary was left as the only viable alternative.

For many groups, merely being admitted to political channels represents a major problem in its own right. Emerging movements or groups that represent controversial interests are rarely granted immediate status as legitimate policy participants. The Jehovah Witnesses in the United States, for example, due mainly to their strong literature, questionable patriotism and aggressive missionary methods, went unrepresented in the political arena for many years.¹⁰ Court protection or assistance for such groups often serves to publicise and thereby gradually legitimise their position. In this way, the judiciary provides a means of breaking down the barriers to other channels of potential influence. As Greenwald states, "While others choose the courts as the arena for a particular policy round, these groups use the courts as entry into the system itself".¹¹

An interest group's central concern may dictate that it will have to devote a large part of its attention and resources to litigation. Environmental organisations such as Pollution Probe and the Canadian Environmental Law Association provide good examples in this regard. The major issue that they are concerned with, namely the protection of the environment from all forms of pollution, necessitates that they make wide use of the tactic of litigation for a number of reasons. Primarily, both the federal

and provincial governments have enacted a variety of anti-pollution laws that require either individual or group initiative to be effective. Secondly, these groups can and must utilise other features of the law such as the Criminal Code to realise their goal of pollution control. Those sections of the Code dealing with "public nuisance", "causing a disturbance", and "public mischief", must be employed on a consistent and continuing basis to halt temporarily isolated pollution problems.¹² Finally, for these groups litigation represents an essential educative and pressure technique. Through constant litigation, publicity is generated, the general public becomes aware of the problem and the government is thus forced into taking strong action against the offending party in many instances. Indeed, the embarrassment of constant litigation may even force a polluter to discipline himself.¹³

The judicial process, as briefly indicated above, may provide interest groups with a variety of "selective inducements" to participate in litigation. Litigation offers groups the opportunity to make public their position on a specific issue. In doing so, the courts may permit groups to gather greater support for their cause. Indeed, an unsuccessful challenge on a controversial issue may very well serve to stimulate opinion and raise the level of public discontent. When a government achieves a favourable ruling, it may nevertheless be forced to apply in practice the exact opposite of what the decision permitted due to strong public opposition to the court's determination.¹⁴

In short, courts may be effectively used as a pressure device. Again it is environmental groups that are most successful in this regard. For example, an unsuccessful challenge by a group representing a large number of citizens opposed to the building of a factory in their community, may ultimately result in the government responsible for that jurisdiction making a more favourable political decision to alleviate the discontent that the adverse legal ruling gave rise to.

The courts may also be utilized to create legitimacy for a set of concepts that may or may not already be written into law. As Greenwald states, "...many groups do use the court system to initiate or implement policy goals precisely because the judicial myth can give legitimacy to new ideas".¹⁵ In the formative years of trade union development in the United States, for example, the courts were employed to protect and give weight to the right to organise along with the right of union members to dissent.

An interest group itself may benefit from publicity garnered through participation in litigation. Groups who gain access to cases dealing with large public issues will likely be guaranteed coverage of their efforts not merely by the media, but also in reputable journals or periodicals. Such coverage may serve to enhance the group's public image and thereby augment its claim to legitimacy. In conferring legitimacy, the courts may directly contribute to membership growth and resource

development. In addition, widespread public recognition of its efforts affords an interest group an opportunity to show its members that it is carrying forward its struggle on a specific issue wherever the opportunity presents itself. It thus allows a group to claim that it is "doing its job"; that it is representing its membership or those it supposedly speaks for to the best of its ability. When it is considered that a group must consistently legitimise its mandate to those it represents as well as to those it attempts to influence, the importance of such symbolic benefits can not be easily overlooked.

Less tangible benefits may also be derived from litigation. An unsuccessful challenge may serve to open a group's eyes to exactly where it stands in society. In pre-trial hearings as well as throughout actual legal proceedings, a group may come to recognise more clearly its friends and supporters as well as its enemies. It may thus emerge from litigation with a heightened sense of solidarity and a strong, collective will to fight even harder for its demands.¹⁶ The early but unsuccessful attempts by the NAACP to have the restrictive covenant clauses declared unconstitutional provides the classic example in this regard. The legal defeats of the 1920's and 1930's served to revitalise and even expand its membership, brought support from a variety of other groups including the federal government, and generally prepared the way for its successful challenges in the late forties and early fifties. In a similar vein, subsequent civil

rights cases contributed to the development of new groups such as CORE, SCLC and SNCC, groups that became active and effective at both the political and community levels.

It must finally be considered that a judicial decision does not necessarily bring to an end the fight over a specific issue or piece of government legislation.¹⁷ In fact, a court ruling may only serve to redefine or even heighten a conflict between competing interests. Groups need not enter the legal arena therefore, with the fear that they may be making their final stand against the matter in dispute. As Gable has commented in reference to the Supreme Court's position in the decision-making process in the United States:

The impression that the decisions of the Supreme Court are final and binding is no longer accurate. The Supreme Court is properly viewed as one more level, not necessarily the final one, of official compromise and decision in the never-ending interplay between interest groups, the legislature, the executive, the administrative agencies and political parties.¹⁸

A legal ruling, therefore, usually redefines the issues and turns them back to the political arena where further pressure may be exerted to influence their actual application. Interest groups can attempt to influence those charged with the responsibility of implementing the law to take a different view of a piece of legislation that was upheld by a court. In such actions, groups may actually succeed in informally reversing the legal effect of a court's decision.¹⁹ The history of jurisdictional

rulings in Canada provides a clear example. Following the Off-shore Mineral Rights Reference of 1967, provincial pressures eventually forced the federal government to make several political concessions that served to weaken the strongly pro-federal nature of the Supreme Court's ruling. One might expect that a similar fate awaits the recent cable television ruling. Moreover, one specific judicial ruling does not mean that a matter has been finally settled in a legal sense either. Most visibly, the court that gave the initial ruling may alter its reasoning at a later date and overturn the decision itself. Lower courts who are often charged with the responsibility of interpreting and applying high court rulings, may provide concerned groups with a series of favourable decisions that serve to significantly modify the original determination.²⁰ Legal decisions dealing with complex and involved subjects, invariably leave open a variety of unanswered legal questions that provide groups with an opportunity to have some of their demands met through further litigation if they so choose. In both a political and a legal sense, therefore, "...policy making is sometimes cyclical in nature, passing successively through legislative, administrative, and judicial stages, only to return to the starting point and pass again through one or more of the same three stages."²¹

It should be mentioned at this point however that the "cyclical nature" of the policy making process often serves to create as many disadvantages for interest groups as it does advantages.²² The fact that most judicial pronouncements

require legislative support in order to be made effective, frequently translates into another obstacle placed in the way of group success. There is often "a wide distance to be travelled between winning symbolic court language and its actual implementation in the real world".²³ Groups lacking the necessary backing or power are not likely to proceed effectively in the implementation stage. The aftermath of the recent busing decisions in the United States provides a clear example in this regard. Inaction on the part of both the Nixon and Ford administrations due mainly to the absence of effective pressure, largely denied the rulings any positive practical effect. It should be further noted that political opposition to certain policies may be enough to dissuade the judiciary itself from pursuing an active line. Sensing that political circles will not accept judicial change, the courts may very well go along with the status quo. In such cases, interest groups may be defeated before they even start.

In summary, it is the situation, the issues and the groups involved that serve to determine the choice to pursue the alternative of litigation. On some issues, a group may go to court with the exclusive intention of having its demands met through a favourable judicial ruling. In other situations and on other matters, litigation may be pursued for less direct and obvious benefits. Publicity, the creation of a favourable image, the possibility of pressuring government into action as well as

the opportunity to educate and thereby elevate public awareness about an issue, are just some of the "selective inducements" that litigation may offer to organised interests. Regardless of what their intention in pursuing legal activity is, when entering the judicial process interest groups are committing themselves to an institution that operates within clearly defined limits set by formal rules and procedures as well as traditions and customs. In the sections to follow, the influence of these inherent features of the legal process upon the form and effectiveness of group participation in litigation is the subject to be discussed.

Conflict Within Carefully Defined Limits

Interest group activity in the judicial process, as Maslow has pointed out,²⁴ represents conflict under carefully defined rules. In order to pursue litigation or merely gain access to an ongoing dispute, a group must primarily meet the requisite criteria of standing set out in clearly prescribed rules of the court. If a group can show sufficient "interest" and thereby does succeed in meeting these requisite criteria, its actual participation in court is subject to and defined by additional rules, customs and principles of the legal process. First and foremost, rules of evidence clearly and sometimes not so clearly set out what materials or facts a group may offer in support of its position. Even where these rules permit a group to admit for consideration the evidence it wishes to have noticed,

whether it will be afforded weight in court rests upon the influence exerted by a variety of other frequently interrelated factors. Precedent, the legal or constitutional issue in dispute, established judicial customs of statutory interpretation as well as practical, extra-legal considerations related to the matter in question, can all serve to either narrow or broaden a court's viewpoint and thereby aid or inhibit an interest group's demands in the legal arena.

To be sure, these rules, principles and customs can often be made to work in favour of the demands that interest groups wish to have satisfied through litigation. The general principles of "equality before the law" and "no one is above the law" may themselves aid the cause of specific groups with specific claims. The legal arena frequently permits, for example, concerned citizens and organisations who otherwise and under normal conditions might not wield sufficient influence to meet with and challenge on an equal footing more powerful groups or interests.²⁵ Brought out of political channels where factors such as wealth, status and potential voting power invariably aid their cause, strong and politically influential groups are forced to argue their case in a forum that is recognised to be, as the late Justice Rand maintained, "the special guardian of the freedoms of unpopular causes, of minority groups and interests, of the individual against the mass, of the weak against the powerful, of the unique, of the non-conformist".²⁶ In this special role, the

courts frequently protect interests that might otherwise go unnoticed and they often uphold claims that might otherwise be merely pushed further back on some politician's or administrator's docket. Not having to worry about the next election as do all politicians, judges may be freer to champion the cause of controversial theories or values. As Greenwald makes clear, recognition in the court system is won more by "diligence and intelligence rather than votes". The judges world she maintains:

... is the small world of lawyer elites who know each other and respect each other for the value of their work. Groups unable to command the resources for Congressional access such as money, membership status and/or socially acceptable programs, but which have leadership resources and group cohesion may find that the court system provides a perfect setting for maximising the effect of the resources they do have while developing those attributes that earn legislative attention.²⁷

The courts, moreover, and the court of highest appeal in any country in particular, are charged with the constitutionally unwritten responsibility of overseeing the development and progression of the law. It is often through the continuing process of judicial review that legal principles and constitutional provisions are adapted to meet changed social, economic and political circumstances. As Benjamin Cardozo has put it, "statutes are to be viewed, not in isolation or in vacuo, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and framework of present-day conditions".²⁸ Oliver Wendell Holmes was even more explicit

in commenting:

The truth is, that law hitherto has been, and it would seem by the necessity of its being is always, approaching and never reaching consistency. It is forever adopting new principles from life at one end and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.²⁹

Organised interests stand to benefit from this adaptive role of the courts. In "keeping the law abreast of the times", the judiciary is often responding to the demands made by groups within society who are adversely affected by prevailing precedents that may represent no more than the legally entrenched traditions and prejudices of earlier generations or times. It should be mentioned at this point however; that in conferring benefits on one group in this manner, the courts may very well be subtracting from the interests of others. To provide the most clear example, in overturning legislation that upheld segregation in employment, the courts would be aiding the employment opportunities of one group while ending the privileged opportunities of others.

The very wording of statutes or pieces of government legislation can also aid interest groups in having their demands met through litigation. Frequently set out in ambiguous terms or language that fails to cover all matters, government legislation "may leave to the judiciary a broad freedom to interpret the statute in the light of detailed facts".³⁰ Where the meaning

is not on the surface straightforward or where the possibility of several interpretations prevails, organised interests may exert substantial influence on a court's final determination through their factual and legal arguments. Indeed, where the broad or ambiguous nature of a law may have worked to their disadvantage in the political arena, the legal form often offers interest groups the opportunity to have applied a more direct or favourable interpretation. What constitutes an indirect tax or what are the limits of the trade and commerce power, are questions that have been answered by the courts in Canada with the aid of arguments presented by both organised groups and governments seeking either broad or restricted interpretations of these matters in specific situations that vitally affected their interests.

These potential advantages offered by litigation can frequently be counteracted however by a variety of other features inherent in the legal process. The judiciary itself must be regarded as an interest group of sorts seeking to protect its established position of integrity and independence within the overall political framework. As Rosen points out, "Judicial authority and the Court's mandate to write law in bold letters is uncertain and will be measured carefully each time it is used."³² Groups whose demands are framed in broad or sweeping terms, therefore, will often encounter a variety of legal roadblocks set up by a selfconscious judiciary aware of its

own limitations. A court will often refuse to take an activist stance where its decision would bring about major changes affecting a broad range of entrenched policies and institutions or where the problem presented is so complex that it would be better handled by political bodies with the proper resources and necessary expertise. In the area of motor vehicle accidents for example, the courts may be substantively convinced after hearing thousands of cases each year, that justice would generally be better served under a doctrine of strict liability as opposed to the common law of fault-based tort liability. However, such an innovation would directly affect a broad range of economic and political interests and require for its implementation a coordinated effort by legislators, citizens and business representatives. No court would be willing, and perhaps even justified, in extending the principle of judicial initiative to such lengths.³³

Even more important from an interest group's point of view, the judiciary will frequently avoid adopting a legal position that it perceives to be overtly controversial or attention drawing. As Rosen makes clear once again, "The Court must always contemplate unfavourable or even hostile reactions to its decisions because in reviewing the constitutionality of legislation, among other matters, it will sometimes pass judgement on legislative policy."³⁴ To avoid the trenchant criticism that invariably surrounds a heated moral or social debate, a court will seek a

variety of so-termed legal technicalities or procedural loopholes that will allow it to either make the safest decision possible or to refrain from having to definitively pass on the substantive issue involved.³⁵ When politically "hot" issues such as obscenity, abortion or minority rights reach the judicial docket in the form of legal or constitutional arguments, for example, litigants often encounter a court that claims lack of jurisdiction, an absence of a truly justiciable issue or simply adopts a strict, literalistic approach not likely to produce any substantive results. In its early attempts to have the restrictive covenant clauses declared unconstitutional, the NAACP met with a Supreme Court that sought refuge from having to pass on this controversial and potentially volatile matter by declaring it did not have proper jurisdiction to decide.

The judiciary is certainly a political body steeped in tradition as well as an institutionalised way of doing things. The expectations regarding judicial behaviour are more exacting and clear-cut than those relative to other institutions within the political system. As Truman states "More than any other segment of the governmental institution, the courts are looked upon as the guardians of the rules of the game."³⁶ This institutionalised way of doing things was well expressed by Haines:

Though the justices are influenced by the beliefs and feelings of the time, they are more likely to be guided by the professional habits and ways of thinking of the groups with which they normally associate. Furthermore, they are more likely to

be interested in the logic and symmetry of the law than in the objects and policies to be attained through the law.³⁷

There is thus a strong institutionalised form of pressure placed upon judges to follow the entrenched methods of adjustment even where such behaviour may serve to produce seemingly "unfair" or "unjust" results in practical terms. The judiciary must resolve disputes in its own way, obliging "the legal principles that are the fundamental rationale of its existence".³⁸ The second Saumur case decided by the Supreme Court of Canada provides a good example in this regard. In the case, the Jehovah Witnesses challenged the validity of the amended Freedom of Worship Act as soon as it was passed by the Quebec government, seeking to "nip in the bud" by this immediate action any chance that they might fall victim to its restrictive provisions. Although clearly aimed at limiting the activities of this Sect and with the first Saumur case to refer to, the Court nonetheless refused to pass judgement on the issue for procedural reasons, declaring that the appellant did not possess, according to the civil code of Quebec, sufficient legal grounds to challenge the impugned legislation.^{38a}

These entrenched patterns of judicial decision-making often build a status quo approach right into a court's methods of operation. The judiciary is generally slower to institute or recognise change than are other political institutions in society.³⁹ It should be noted, however, that this basic judicial

characteristic may provide groups who have lost ground in elected arenas with a final defensive ground on which to protect their interests. Business interests in the United States throughout the 1920's, for example, were successful in utilizing the built-in status quo approach of the courts to maintain politically unpopular laissez-faire practices. Moreover, the judiciary's entrenched traditions often serve to make it wary of social science evidence. Unlike law, social science is less exact and indeed as a discipline is less concerned with society's need for political and social order. Although social facts may represent the main weapon in an interest group's arsenal and although they may point to a clear abuse of the law, the judiciary may nevertheless choose to ignore such facts "in order to decide a case on some other or more narrow ground. Perhaps the court may not want to decide the case at all."⁴⁰

Judges must not be viewed as legal robots or computers who merely hear and apply the law, but rather, as acting human beings with interests and prejudices of their own. Traditionally conservative, from upper social and economic backgrounds, judges certainly identify with the entrenched way of doing things. Most importantly, they consciously or unconsciously allow these personal identifications to colour and influence their legal activities in many instances. The judge who was trained in corporate law and who worked for many years in that environment, will often identify with corporate interests that reach his

docket. Groups who attempt to challenge corporate concerns in his courtroom will likely be placed in a disadvantaged position from the start. When challenging large industries, environmental groups frequently encounter a hostile attitude in court perpetuated by judges who openly discourage their activities by consistently placing greater weight upon economic rather than ecological considerations. In the Sandbanks Provincial Parks Case for example, Lerner J. of the Ontario Supreme Court dismissed the Canadian Environmental Law Association's claim⁴¹ that sand excavations in the park by the Lake Ontario Cement Company were in contravention of the Ontario Provincial Parks Act. He wrote:

That the towering sand Dunes constitute a unique ecological, geographical and recreational resource is clearly a statement of opinion as much as a comment that a particular objet d'art is good or bad esthetically.⁴²

and further:

No one can be critical of resort to the courts to remedy social wrongs or injustices by way of interpretation of law: either statutory or by precedent. This is desirable in our rapidly changing society and preferable to the lawless or anarchical way of seeking rectification of real as well as unreal injustices, inequities and abuses. Nevertheless, if resort to the courts is to be had, care must be taken that such steps are from a sound base in law, otherwise ill-founded actions for the sake of using the courts as a vehicle for expounding philosophy are to be discouraged.⁴³

To be sure, "the rules of the game" are safeguarded in the legal arena by more than strict attention to procedural or legal guidelines. Indeed, these procedures and guidelines often only permit

judges to couch personal choices between conflicting sets of policy in legal terms.

The type of proceeding itself often serves to establish both the form and effectiveness of group participation in litigation. In many instances, the proceeding sets out exactly what a group may offer as supporting evidence and in doing so, it determines how broad an outlook a court may be willing to take with regard to matters that are raised before it.⁴⁴ Similar limitations may be placed upon the activities of groups by the legal or constitutional issue that is raised in specific disputes.⁴⁵ Legal questions and offences are defined by strict criteria that call for definite means of proof. Courts will refuse to recognise arguments that extend beyond these predetermined limits, no matter how practically relevant or convincing they are. Organisations, for example, seeking to protect the rights of working women both in Canada and the United States, often met with little success in the courts simply because specific forms of sexual discrimination were not recognised in law. Environmental groups encounter difficulty in court due to predetermined means employed to set the acceptable legal limits of specific kinds of pollution. Although frequently inaccurate, these established criteria are nonetheless the sole criteria assessed by a court to determine the existence of a pollution problem that infringes upon the law. Municipal air pollution by-laws, for example, are based upon standards specified in terms of the notoriously inaccurate Ringlemann Chart, a fact which raises problems of proof and makes convictions

difficult to obtain. Even in constitutional cases dealing with broad jurisdictional questions that clearly involve a wide variety of influencing factors, specific tests are set and thus represent the limits within which opposing interests must argue.

As the preceding discussion indicates, perhaps the most important consideration for interest groups involved in litigation is whether or not there is admissible evidence available to support their applications for judicial relief. The complex and involved rules of the law of evidence represent the one factor that often determines whether or not group demands can be successfully met in court. With access to the necessary resources and expertise, there is little doubt that most organized groups can assemble an impressive, comprehensive and convincing array of factual data to support their case. Whether or not such potentially valuable evidence will be considered admissible in a court of law, however, depends upon its meeting a wide variety of accepted rules and customs of the legal process. In addition to the judiciary's often built-in uncertainties regarding social science evidence, group presentations must also contend with clearly defined rules and precedents. Evidence proffered by parties to a dispute must be both material and relevant. That is to say, it must refer specifically to the act or issue being judged and it must be logically connected with the points in issue between the disputants. On top of these general principles are a host of other considerations such as reliability, hearsay rules,

and best evidence rules, that also serve to determine what will or will not be accorded weight in court. Moreover, the rules of evidence are not always applied uniformly. Conflicting principles from past cases create confusion and ambiguity, leaving to the judiciary a wide discretion to admit or not to admit specific materials for consideration. The rules of evidence also determine what side in a dispute is charged with the burden of proof and what constitutes sufficient proof. In most instances it is the plaintiff who must prove his contentions beyond a reasonable doubt. To interest groups who are generally challenging rather than being challenged in court, and who are often relying on a good measure of factual argument, these features certainly represent the most telling obstacles in litigation.

As indicated in the few situations described throughout this section, the judiciary must fulfill two seemingly contradictory roles. As an adjudicator of individual, concrete disputes, the courts are charged with the responsibility of arriving at a settlement by applying an established legal regime to facts presented in evidence or argument during the adversary process. In this role, the stress is upon maintaining continuity in the law. Innovation proceeds interstitially and within carefully defined limits. At other times, the courts are viewed as arbiters between conflicting interests within society. In this role, the judiciary is charged with the responsibility of maintaining a balance between these diverse and competing interests and thus with assessing diverse and competing choices of public

policy. In fulfilling the requirements of this policy-making function, the courts must recognise that certain disputes affect more than the immediate parties and that considerations other than purely legal rules may have to be assessed.⁴⁶ These conflicting roles make clear that an interest group's chances of success in litigation ultimately depend upon the general theory of law that a court chooses to adhere to in specific situations. That is to say, whether the judges presiding view themselves primarily as "guardians of the rules of the game" or, as Bentley puts it, "as a functioning part of this government, responsive to the group pressures within it, representative of all sorts of pressures and using their representative judgement to bring these pressures to balance".⁴⁷

While the courts do fulfill this second and more dynamic function in their activities, it is the adjudicative role that dominates their overall behaviour. This fact would seem to suggest that in general interest groups stand to be most successful in the legal arena when two conditions are present. First and foremost, group demands will likely meet with consistently positive results in cases where questions of law dominate over questions of fact.⁴⁸ That is to say, in cases where factual evidence is needed merely to support established legal principles rather than in cases where a group must hope to sway a court largely upon the basis of extra-legal or factual considerations. Where a specific form of racial prejudice is explicitly forbidden in law, for example, a group only has to

make clear to the court that the recognised discrimination has taken place. Where a specific type of discrimination has not been formally recognised in law, however, a group must hope to convince a court to see the problem through the presentation of relevant factual evidence. In the first case, a group is only asking a court to apply existing law to specific factual situations. In the latter case a group is encouraging a court to establish a new legal principle out of existing factual situations. It follows that factual or extra legal arguments will likely meet with the most effective results in cases where precedent is not firmly established or has failed to develop at all.⁴⁹ It is in such cases where a group's arguments are not only put on a clear, equal footing with those opposed to them, but most important, it is in such cases where a court is given the greatest leeway to choose between competing alternatives and positions.

Selected Strategies and Tactics

The strategies and tactics employed by interest groups during litigation are certainly determined more often by the nature of the judicial process than they are by group initiative or resourcefulness. Most often, group initiative and resourcefulness must conform to the clearly defined limits of the legal arena. In other words, "The status of the courts and the persistence of community values in defence of judicial isolation from the political process, make it impossible for the normal group tactics to be employed."⁵⁰ Most clearly, groups cannot attempt to influence judges through direct and

overt solicitation. Thus, familiar features of group activity in the political arena such as letter campaigns or sending personal delegations to meet with administrators or political figures, will likely serve to discredit rather than aid their cause before the courts. In litigation, influence must always be indirect in nature, whether it involves activities prior to or during actual proceedings. While there is nothing indirect about oral advocacy or the presentation of extrinsic, factual evidence for that matter, it is to be remembered that the form that these tactics assume is set by the limits and procedures of the legal process. The courts control the rules of the legal game which in turn determine the nature of group strategy and tactics.

The attempt to mold public opinion that judges respect and turn to for guidance often represents the most fruitful indirect means relied on by interest groups. One way of doing this is to have articles published in law journals or relevant periodicals that reflect a group's position or views.⁵¹ Such articles can fulfill a number of functions in a wide variety of legal situations. Where precedent in a case is not firmly established or where it runs counter to a group's major goals, articles written by respected members of the legal or academic communities can serve to create the framework and climate in which new precedents may develop. In some situations, scholarly articles may provide a solid legal theory to back up factual considerations or merely serve to give a group's

arguments some form of learned status.⁵² In short, such inclusions may provide a persuasive and legitimate body of opinion that a group may rely on to support its position in court. Groups wishing to take advantage of this potentially valuable support are well advised, however, to include articles they want noticed in their factums rather than merely listing them as citations. As Holmes stated in *Quong Wing v. Kirkendall*, "There are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps and if they deliberately omit them we do not feel called upon to institute inquiries on our own."⁵³ Inclusion in the record therefore usually means that there is a greater likelihood that articles will actually be read by a court.⁵⁴

At times, interest groups may attempt to influence the outcome of court decisions through a variety of so-called "public relations tactics". No matter what form they assume, such tactics are invariably aimed at raising the general public's awareness either prior to, during, or after actual litigation, with "the hope that the nurturing of a wider public sympathy will enhance the possibility of success".⁵⁵ When merely used as an educational device to publicise and thereby attract attention to a specific decision, such tactics are often a necessary and useful part of interest group strategy.⁵⁶ However, when primarily aimed at attempting to pressure the judges themselves, public relations activity is invariably

doomed to failure. While perhaps useful in the political arena in some situations, public picketing and related activities rarely, if ever, exert substantial influence upon the courts simply because the conditions which make such tactics potentially valuable in the former arena are not often relevant considerations in the latter. Politically independent and charged with the responsibility of impartially applying the law, judges need not be as concerned with public pressures as must their counterparts in the legislative or administrative levels of government. Indeed, groups that consistently attempt to pressure judges through the creation of massive public support for their legal demands more often than not will draw their wrath rather than their sympathies. In reflecting upon the Communist Party's picketing of the United States Supreme Court during the Willie McGee case, Vose emphatically states, "The picket line, the telegraph campaign or other crude devices of publicity would not do".⁵⁷ This is not to say that the courts can completely disregard public opinion or prevailing social attitudes. It is only to make clear that judicial attention to these matters is motivated by different considerations and is thus much more selective.

While the attempt to pressure the courts in any form is clearly a tactic to be avoided, the use of litigation itself as a potent pressure device is frequently an important and necessary feature of interest group strategy.⁵⁸ As briefly alluded to in section one, the threat of litigation may often

serve to influence both public and private bodies to recognise and respond to group demands. It would appear, however, that to be successful at least some of the following criteria must be met. The group employing this tactic must be influential in its own right or at least be able to garner the support of other influential interests in society. The issue it is threatening to deal with through litigation must be one that could be embarrassing to the interests it is attempting to persuade if accorded broad publicity by a court decision. Most obviously, a group will likely achieve its demands in this manner when it is able to present a solid, legal argument in support of its position that would make opposing interests think twice about carrying the conflict to court. The actions of the Middlesex County Law Association provide a good example. Faced with overcrowded courtroom facilities and an Ontario government that was not responsive to its demands for an expansion of these facilities, the Association successfully employed litigation in 1968 to pressure the Attorney General to alter his initial stand on the matter. Working in its favour were two of the above criteria. In applying for relief the Association was supported by the Ontario Defence Counsel Association, several provincial court justices, a large part of the membership of the Law Society of Upper Canada as well as various citizens' groups concerned with the overcrowded facilities. If brought to wide public attention, the issue itself would certainly have caused the Ontario Government much embarrassment. The overcrowded facilities had forced many car crash

victims to go on welfare pending determination of their back-logged suits, lawyers to meet with their clients in corridors rather than in proper waiting rooms and judges to share the same elevators with prisoners that they would be passing judgement on in court. In the face of these influencing factors, the government settled the matter before it even had a chance to reach the Ontario Supreme Court.⁵⁹

An important strategic consideration for interest groups concerned with pursuing litigation is the matter of timing. To be able to choose the time to institute or join in litigation assures that a group will be able to sufficiently prepare for a dispute. When operating on its own time-table, a group can not only solicit necessary witnesses who otherwise may not be able to appear on short notice, but in addition, it can generally consult with a variety of sources to make sure its legal and factual arguments are complete. By being able to set a dispute in motion on its own, a group can choose the most conducive opportunity. It can thereby avoid having to enter litigation at a time when prevailing conditions may serve to make a court reluctant to decide in its favour. In this manner, a group can escape having a number of inhibiting legal precedents built against its position through a series of adverse rulings.⁶⁰

Even in situations where this strategic consideration is not working in its favour, an interest group may still be able to overcome damaging consequences by developing proper

organisational strategies. For groups actively concerned with litigation on a more or less regular basis, effective organisation primarily means having a full-time staff of either paid or volunteer legal counsel as well as ready access to experts in fields other than law who may serve to supply factual data and information to back up or round out legal arguments. These various lawyers and experts are often required to aid in activities outside actual litigation but nevertheless closely related to legal matters. As indicated in section one, groups invariably attempt to alter adverse legal rulings by influencing those charged with the responsibility of implementing court decisions. In order to present a plausible and convincing argument to political officials, it is necessary to deal effectively with both the legal and practical implications of a group's proposed interpretation. This essential function is most successfully handled by having advisors fully aware of a group's interests and ongoing goals "on staff". Such knowledgeable and readily accessible experts are also invaluable when groups wish to present briefs to government committees or commissions examining matters that may be related to their major legal concerns. It is only on this well-organised basis that groups consistently concerned with legal activity can hope to stay on top of developing situations relevant to their legal goals.⁶¹

Struggles through the courts, particularly when directed against an entrenched line of prevailing policy, are "slow"

whittling processes". Continuity as a strategy in litigation, therefore, is often demanded by the nature of the judicial process itself. Courts frequently choose to decide cases on narrow or ambiguous grounds thereby affording legislators or individuals with opportunities to avoid direct compliance. Continued litigation on the issue is thus necessary to close up potential loopholes or clarify unsettled points. As the NAACP found out in attempting to defeat segregation through the courts, "Renewed work and further expenditure is necessary to invalidate discriminatory practice under each newer and cleverer disguise until it is recognised in all its forms as illegal."⁶² On large public issues, it is usually imperative that groups make multiple use of the court system. Litigation that represents an ad hoc side trip to court, therefore, is not likely to be as successful or carry as much weight and permanence as litigation that is part of an integrated lobbying strategy. On a purely ad hoc basis, groups are unable to develop the necessary expertise for the complexities of the legal world. More important, ad hoc litigants are unable to structure their arguments with a view towards building a favourable record in future cases.⁶³ This is not to say that ad hoc litigants cannot be successful. However, they are generally placing all their eggs in one basket so to speak and this definitely makes the odds in favour of success more severe.

There are a variety of organisational tactics that certain groups or groups concerned with specific types of disputes must attempt to employ if they hope to meet with optimum results. At times, the proceeding or issue itself determines the pre-trial strategy that should be followed. In many cases, for example, it is common that a number of different groups share a similar position on the major issue in dispute. Working in isolation, these groups will produce factums that duplicate both legal and factual information, serving to present a weak position overall. To aid their common cause, groups must make every effort to take advantage of their collective strengths. This means that they should coordinate their pre-trial efforts and thus aim towards the presentation of diverse factums that stress different points of law or list new angles to the matters in dispute.⁶⁴ For groups dealing with broad issues affecting many geographical areas in different ways, thereby giving rise to equally diverse legal problems, organisation must be of a decentralised nature.⁶⁵ As Vose states, "...it is essential that when the issues are national in character but local in origin that able lawyers be on the job regularly in widely scattered places".⁶⁶ Pollution groups, for example, must attempt to establish offices in a variety of regions if they hope to stay on top of local matters and be able to respond quickly to potential litigation. Even these localised units must decentralise their structures to successfully fulfill this task. This necessitates providing suitable means to allow private citizens who are often closer

still to developing problems that may require legal attention, to raise complaints and thereby provide the group with relevant information that might otherwise go unnoticed. In order that these various units are able to take advantage of their collective experiences and activities, it is necessary that they establish an efficient means of passing on information to each other and to their members. This requirement is usually fulfilled through the establishment of a monthly or bi-monthly publication that provides ongoing information about general organisational and legal activities. The Environmental News published by the Canadian Environmental Law Association, for example, rapidly reports the decisions of government boards, provides summaries of amended laws and, most important, offers detailed case comments on environmental litigation across Canada. More generally, it is a basic prerequisite for success that a group's lawyers maintain constant contact with one another. The delicacies of coordination, moreover, require that these lawyers be similarly motivated, compatible, and in basic agreement on overall objectives and procedures.⁶⁷

It must finally be considered that an interest group need not always directly participate in a legal proceeding to be able to draw benefits from it.⁶⁸ Often, an important tactic employed by groups is to offer indirect support to individuals, other groups or even governments who are involved in legal activity that may affect their interests. Such support may be of a financial nature, especially in cases where it is a

private litigant that is pursuing an issue relevant to a group's concerns. In other situations, a group may offer its resources or expertise to aid an actual party to a dispute build a solid and convincing argument. This indirect support tactic, it should be noted, is likely a particularly important group strategy in Canada where the lack of a fully developed amicus curiae procedure severely limits the opportunities for direct interest group participation in litigation.

Although largely determined by the nature of the judicial process itself, the strategies and tactics required for litigation fully test the traditionally adaptive qualities of organised interest groups. In some situations, groups must be prepared to enter litigation on very short notice, gearing their time schedule to suit that of opposing interests. They must also be prepared to meet certain legal issues or specific types of proceedings with definite tactics or techniques, many of which must be developed on an ad hoc basis. While preparing strategy for specific legal disputes, moreover, groups must develop a variety of contingency plans to be able to immediately carry on conflict in the political arena in the event of an unfavourable ruling. It is only through proper organisation that groups will be able to mobilise quickly, present convincing arguments, and, in general, be fully prepared for the dynamic and often complex nature of legal activity. As Vose points out, in summarizing the NAACP's success in the restrictive covenant cases:

Groups with antagonistic interests appeared before the Supreme Court, just as they do before Congress or other institutions. Because of organisation, the lawyers for the Negroes were much better prepared to do battle through the courts. Without this continuity, money and talent, they would not have freed themselves from the limiting effects of racial restrictive covenants, notwithstanding the presence of favourable social theories, political circumstances and Supreme Court justices.⁶⁹

Strong organisational foundations and strategies, therefore, can often serve to turn a relatively weak case into a strong one. In their absence, a strong position will likely deteriorate and thereby be wasted. In the final analysis, the establishment of correct structures and tactics can mean the difference between consistent success and consistent failure in litigation.⁷⁰

Summary

In the brief space available I have attempted to establish a general framework within which to analyse interest group participation in the legal arena. In summarising, perhaps it would be propitious to review key features of this framework and also make clear additional matters that may be examined during the course of such an analysis.

Litigation must not be seen as an end in itself, but rather as part of a larger process. Legal disputes do not develop in a vacuum, unrelated to political, economic and social conditions. To understand why groups enter the legal arena, therefore, it is necessary to view this aspect of their behaviour in a broader societal context. Did a group choose legal action because its demands met with frustration

in political channels? Did a specific government action or policy serve to trigger legal activity? These are important questions in any analysis of interest group participation in litigation. They can only be answered by taking a view of the judicial process that extends beyond the limits of the actual legal proceeding itself. As Vose states, "The interest group approach follows the tradition of legal realism and emphasizes the political impulses behind litigation and the political results of judicial decisions."⁷¹ Consequently, analysis must not end with the legal determination handed down by a court. In most situations, the real conflict over an issue only begins after a specific legal ruling has been given. Whether this extended conflict is carried on through further litigation or by groups attempting to influence the actual application of a decision in the political arena, a complete picture and a total analysis must take these post-decision developments into account.

Discussion in the chapter concentrated upon the benefits that litigation may offer to organised interests. It should be made clear, however, that it is also important to consider the various advantages that accrue to the legal process by allowing for extensive interest group participation in litigation. An interest group with a variety of inputs can generally mobilise resources for litigation more quickly and thoroughly than an ordinary private litigant. As a result, groups can

offer the courts, even on short notice, a variety of matters to consider, a fact which may serve to make sure the issue in dispute is given thorough consideration both legally and factually. With the increasingly complex and technical matters that must often be considered during the course of litigation, the expertise that interest groups possess may supply the courts with invaluable information. In doing so, groups may allow the courts to avoid making decisions in vacuo and thereby in conflict with prevailing social trends. Perhaps most important, a group's close contact with areas of the law that directly affect its interests often allows it to point out to the courts inequities or anomalies that might otherwise go unnoticed. In this way, groups often aid in keeping the law abreast of changed social and economic conditions. Overall, it is often organised interest groups that provide the courts with the opportunity to make policy or comment upon large public issues. Many important legal issues would certainly go unnoticed if self-conscious groups did not choose to appeal to the courts. The relationship between interest groups and the judiciary therefore, is often of a symbiotic nature. In aiding themselves through litigation, interest groups are frequently aiding the overall cause of justice.

It must be finally noted that an analysis of interest group participation in litigation affords an excellent opportunity to **assess** basic characteristics and features of judicial behaviour. Have the courts pursued an active or restrictive

approach to the issues raised before them over a period of years? Have unpopular and controversial causes received the same treatment or attention as entrenched rights or principles? Have social science findings been regularly admitted to judicial proceedings and perhaps more important, has the judiciary's reception been one of open-mindedness or qualified uneasiness? Have judicial opinions sufficiently clarified controversial matters or have their ambiguous nature merely added more fuel to the fires of discontent? In many ways, interest group claims and presentations often provide an accurate bellwether by which to judge judicial performance. Interest group performance in litigation also provides an opportunity to assess, as Manwaring puts it, "the relations of the court with its public".⁷² How are judicial rulings perceived by the community at large? What is the reaction of editorial and scholarly comment to important pronouncements? In short, an analysis of interest group behaviour before the courts serves to unmask the myth of complete independence and allows one to see the judiciary as an important actor in the larger social and political system.

NOTES

1. D.B. Truman, The Governmental Process (New York: A.A. Knopf Inc., 1951), p. 486.
2. C.S. Greenwald, Group Power: Lobbying and Public Policy (New York: Praeger Publishers, 1977), p. 292.
3. Ibid., p. 293.
4. D.B. Truman, op cit., p. 479.
5. C. Vose, "Litigation As a Form of Pressure Group Activity" The Annals, Volume 319. (1958), p. 31.
6. H. Zeigler, Interest Groups in American Society (New York: Prentice Hall Inc., 1964), p. 302.
7. D.B. Truman, op cit., p. 479.
8. S. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" Yale Law Journal, Volume 72. (1963), p. 707.
9. See generally, C. Vose, Caucasians Only (Berkeley: University of California Press, 1959), p. 36.
10. See generally, D. Manwaring, Render Unto Caesar (Chicago: University of Chicago Press, 1962), p. 33.
11. C.S. Greenwald, op cit., pp. 282-283.
12. D. Estrin, ed., Environment on Trial (CELRF Publication, 1974), pp. 21-22.
13. A.R. Lucas, "Legal Techniques for Pollution Control: The Role of the Public" UBC Law Journal, Volume 6 (1971), p. 181.
14. W. Maslow, "The Uses of the Law in the Struggle for Equality" Social Research Volume 22 (1955), p. 308.
15. C.S. Greenwald, op cit., pp. 270 and 279.
16. W. Maslow, op cit., p. 304.

17. A Supreme Court decision can certainly produce a variety of results. In some cases, a decision may lead to a battle for legislation to properly implement it. Similarly, a decision may produce a plethora of new laws, some directly related to it, others bearing only remote attachment. At times, a decision may have no practical effect at all. On this issue see generally, D. King, ed., Legal Aspects of the Civil Rights Movement (Detroit: Wayne State University Press, 1965), p. 199.
18. R.W. Gable, "Political Interest Groups As Policy Shapers" The Annals Volume 319 (1958) p. 91.
19. H. Zeigler, op cit., p. 327.
20. Ibid., p. 327.
21. D.C. Blaisdell, American Democracy Under Pressure (New York: Ronald Press Company, 1957), p. 261.
22. See generally, M. Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change", Law and Society Review Volume 9 (1974), p. 138.
23. C.S. Greenwald, op cit., p. 290.
24. W. Maslow, op cit., p. 308.
25. H. Zeigler, op cit., p. 316.
26. I. Rand, "The Role of an Independent Judiciary in Preserving Freedom", University of Toronto Law Journal Volume 9 (1951-52), p. 13.
27. C.S. Greenwald, op cit., p. 280.
28. B. Cardozo, The Nature of the Judicial Process (Yale University Press, 1921), p. 81.
29. O.W. Holmes, "Common Carriers and the Common Law" American Law Review Volume 13 (1879), pp. 630-31.
30. D.B. Truman, op cit., p. 480.
31. A.F. Bentley, The Process of Government (Harvard University Press, 1967 Edition), p. 398.
32. P. Rosen, "Social Science and Judicial Policy Making" in, C. Weiss, ed., Using Social Research in Public Policy Making (Lexington, Mass.: 1977), p. 117.

33. For a good discussion of the process of judicial initiative in the Canadian context see, P. Weiler, In the Last Resort (Toronto: Carswell Publishing Comp., 1974), Chapter three, and, J. Deschenes, "The Judge As Lawmaker", in, A.M. Linden, ed., The Canadian Judiciary (Toronto: Osgoode Hall Law School Press, 1976), p.56.
34. P. Rosen, The Supreme Court and Social Science (Chicago: University of Illinois Press, 1972), p. 3.
35. For a good discussion of some of the hostile reactions that Supreme Court decisions in the United States have evoked see generally L. Pollock, "The Supreme Court Under Fire" Journal of Public Law Volume 6 (1957).
36. D.B. Truman, op cit., p. 486.
37. G.G. Haines, "Judicial Review of Acts of Congress and the Need for Constitutional Reform" Yale Law Journal Volume 46 (1936) p. 842.
38. P. Rosen in, C. Weiss op cit., p.118.
- 38a. (1964) SCR 252.
39. C.S. Greenwald, op cit., p. 273.
40. P. Rosen in, C. Weiss op cit., p. 118.
41. For a full discussion of the particulars of the case see, The Canadian Environmental Law News (Volume II) p. 170.
42. (1973) O.R. 401.
43. Ibid., p. 408.
44. C. Vose, "Litigation As a Form of Pressure Group Activity" op cit., p. 22.
45. Ibid., p. 22.
46. D.B. Truman, op cit., p. 488.
47. A.F. Bentley, op cit., p. 393.
48. W. Maslow, op cit., p. 307.
49. H. Zeigler, op cit., p. 303.
50. Ibid., p. 308.
51. A. Holtzman, Interest Groups and Lobbying (New York: MacMillan Company, 1966), p. 138.

52. H. Zeigler, op cit., p. 321.
53. (1921) 223 U.S. 59, at 64.
54. C. Vose, Caucasians Only op cit., p. 159.
55. H. Zeigler, op cit., p. 159.
56. See generally, "Private Attorney's General: Group Action in the Fight for Civil Liberties" Yale Law Journal Volume 58 (1949), p. 597.
57. C. Vose, Caucasians Only, op cit., p. 48
58. W. Maslow, op cit., p. 310.
59. Ottawa Journal, October 26, 1977. p. 1.
60. H. Zeigler, op cit., p. 318.
61. See especially, C. Vose, "NAACP Strategy in the Restrictive Covenant Cases" Western Reserve Law Review Volume 6 (1955), p. 6.
62. "Private Attorney's General: Group Action in the Fight for Civil Liberties" op cit., at p. 585.
63. See generally, M. Galanter, op cit., p. 98.
64. C. Vose, Caucasians Only, op cit., pp. 163-165.
65. J.A. Robinson, "Organizations Promoting Civil Rights and Liberties" The Annals Volume 275 (1951) pp. 24-27.
66. C. Vose, Caucasians Only op cit., p. 45.
67. Ibid., p. 45.
68. D.B. Truman, op cit., p. 494.
69. C. Vose, Caucasians Only op cit., p. 252.
70. See also, C. Vose, "The National Consumers League and the Brandeis Brief" Mid-West Journal of Political Science Volume 1 (1957) p. 290.
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Chapter 2

THE CANADIAN LABOUR CONGRESS'S
PARTICIPATION IN THE ANTI-INFLATION REFERENCEPre-Trial Political Developments

The Canadian Labour Congress's participation in the Anti-Inflation Act reference cannot be fully understood if viewed as an isolated event. Not only must the reference be seen in terms of the political developments that preceded it, but just as important, the ultimate legal battle must be fitted in with Congress's overall campaign against wage and price controls. What effect did unsuccessful consultations with the federal government have upon the CLC's willingness to pursue its demands through the courts? Can Congress's participation in the reference be viewed as part of a concerted effort to further its vision of a new economic order? Could a Supreme Court ruling aid in the CLC's stated desire to alter to its advantage prevailing relations with fellow affiliates? Was legal action part of an overall plan to improve labour's image in the eyes of the Canadian public? These questions make clear the need to see the reference in a larger political context.

In the early months of 1975, the federal government sought the opinions of organised labour and other members of the Canadian economic order in what it termed a "consensus approach" to

curbing inflation. The most significant of these informal discussions from labour's point of view took place in the first two weeks of May. At this time Finance Minister John Turner presented the government's working paper proposals on the issue of controls. The most important feature contained in the working paper was the government's clearly stated desire to place a 12% limitation on wage increases during the first year of any wage and price control scheme.¹ The powerful United Steelworkers of America declared their opposition to controls "of any form" even before the government proposals were announced. The CLC, however, chose to hear the government's side and then meet with its affiliates before making public a formal response.

A CLC executive meeting of May 6 produced an alternative policy paper that put the onus for solving the nation's economic troubles back on the federal government. Congress rejected the government plan as one that "indicates in no uncertain terms that the government is unwilling or incapable of bridging the gap between their concept of equity and ours".² Finding holes in Turner's proposals was not difficult. For the most part the federal scheme was ill-prepared and loaded against the interests of organised labour. However, the CLC went beyond merely pointing to gaps in Turner's working paper, utilising the opportunity to put forward proposals and goals of its own. Labelled Congress's "Nine Point Program on Inflation", the CLC urged the government to take steps to improve the supply of housing,

regulate rents, curb land speculation, control oil and gas prices, create a negative income tax, increase old age pensions, control professional fees and guarantee that corporate tax concessions would result in more jobs.³ Congress concluded with the ultimatum that it would be prepared to continue talks with the federal government only if the nine point program was included upon future agendas. At this point, the ball was back in the government's court. In a predictable reaction, Turner made clear that the time frame he had in mind for a full consensus was the end of May. After asking for clarification of the CLC's proposals and stating his desire to hold further meetings with labour representatives, Turner bluntly concluded that business and labour must be prepared to support some form of consensus plan in the coming weeks or the government would be forced to act on its own.⁴

The three day meetings were clearly an "exercise in gamesmanship". Both sides were playing their trump cards in an effort to see who could best escape the blame for prevailing economic maladies. The government proposals were intended to give the impression that it was doing something about mounting problems. They were above all designed to ease adverse public reaction by shifting attention away from exorbitant spending practices. The CLC's adamant stand on wage restraints was dictated by the fact that an acceptance of controls would have caused a revolt among affiliates. Its reaction was thus consistent with the organisation's past positions on this matter.

For the most part, Congress's alternative proposals were intended to give the impression that labour not only criticised and opposed but offered constructive suggestions at the same time. Although discussion may have been well meaning, therefore, both sides were more interested in protecting their own interests and images than in achieving agreement. As Wilfred List described it:

Mr. Turner and CLC executives appear to have been working at cross purposes from the beginning. The union leaders wanted and still insist on sweeping social and economic changes; Mr. Turner wanted acquiescence in a program that included wage guidelines. They were on different wavelengths.⁵

Given the total failure of these early attempts at consensus, CLC President Joe Morris spoke the inevitable in his Labour Day message.⁶ After spending considerable time stressing Congress's official position that labour had become "the victims of inflation", Morris went on to make clear that the government has been "unwilling to take the steps we have proposed to solve the basic problems facing Canadian society today". The CLC's proposed regulation of oil and gas prices, he noted, was met with a further increase of ten cents a gallon. Rent controls and curbs on land speculation Morris continued "have been largely ignored". The government "has shown a similar lack of interest" he made clear in Congress's tax credit proposals and its call to improve the supply of housing. Moreover, the CLC was "still waiting for an increase in old age

pensions...as well as for positive evidence that professional fees will be controlled". The speech emphasised the government's total neglect of the CLC's suggestions and taken as a whole, served to make clear the widening gap that was quickly developing between organised labour and the Liberal government of Pierre Trudeau.

The widening gap soon became a chasm when in October, 1975 the government recognised that "...inflation in Canada at current levels is contrary to the interests of all Canadians and the containment and reduction of inflation has become a matter of serious national concern..."⁷ The Liberals unilaterally chose to meet these problems by introducing the Anti-Inflation Act which provided for the supervision, control and regulation of prices, profits, wages, salaries, fees and dividends by monitoring and limiting increases. The Act confronted the interests of organised labour in a direct and frontal manner. The process of collective bargaining was to be rigidly controlled. The terms of the proposed legislation were ambiguous and thus foreshadowed the likelihood of unfair and arbitrary decisions. Through its 8% ceiling on wage increases, the Act hampered union organizing by removing a major incentive to join and/or continue paying monthly dues. Most important, the experience with controls in the United States pointed to the fact that wages are invariably better controlled than prices.⁸

Put in concrete terms the effect of the Act was to place in immediate jeopardy the bargaining positions of a large segment of the country's work force. The last three months of 1975 were by far the heaviest bargaining period for the year. Between October and December 236 collective agreements governing such groups as railway workers, teachers, civil servants and pulp and paper workers were up for renewal. Over 500,000 men and women were caught in mid-negotiation. Moreover, 1976 was also slated as a major bargaining year. Important groups such as construction and auto industry workers were among a total of some 300 agreements due to expire.⁹ The pressure upon the CLC to continue and indeed intensify its campaign against wage and price controls was thus tremendous. Before the Trudeau announcement was even made, C.S. Jackson, President of The United Electrical Workers, called on the CLC to form a common front to fight the program. Affiliate reaction was immediate following the Act's introduction in Parliament. In a letter to President Joe Morris, Mike Rygus, Vice President of The International Association of Machinists, called on the CLC to institute a legal challenge "in a concerted, coordinated, all out battle against the government's program". Rygus made clear that if the CLC did not take the necessary steps, the IAM would retain a constitutional lawyer on its own and seek help from other unions to help pay the costs.¹⁰

The CLC wasted little time in preparing a formal statement. Approved by the executive committee on October 24, and endorsed by affiliates October 30, Congress rejected the government's plan in biting terms. Its basic position is best summarised in the following excerpt:

...the epitome of dishonesties and ironies on the part of government policy is that it does not place a significant part of the blame for the domestic cause of inflation on the economic policies it has been pursuing for the past few years. It touches on this subject very lightly and prefers instead to focus attention in its propaganda blasts on the sins of the private sectors and primarily on average wage and salary earners. It proceeds from there to draw up a schedule of permissible increases which smack of the grossest inequities and which can only lead to a widening of income disparities in this country.¹¹

The CLC also made certain to re-emphasise the government's failure to take account of Congress's proposals.¹² In the Anti-Inflation Guidelines the statement pointed out that the government's established policies ran in direct contradiction to CLC concerns such as oil prices and unemployment. The affiliates' main concerns were not forgotten either. In assessing the program's likely effects, the CLC emphasised that it was "an easy job to police the controls on wages. They are set out in black and white in collective agreements... conducted in the glare of the public spotlight". Price increases, Congress continued, "take place behind the closed doors of the corporate boardrooms."¹² The CLC concluded that it could not ask affiliates to voluntarily conform to the inequities and uncertainties that the guidelines represented.

At the same time that its condemnatory denunciation of wage and price controls was released, the CLC began to organise in earnest for the inevitably protracted battle against the federal policy. Concerned with the image of labour developed by both the government and the press, Congress primarily laid the foundations for a nationwide publicity and educational campaign. Traditional public relations tactics were to complement seminars held at the local union level aimed at correcting distorted beliefs about labour's role in inflation related problems.¹³ While getting the multi-million dollar PR campaign rolling, the CLC also began to prepare for eventual appeals to the Anti-Inflation Board. Towards the end of October, Congress announced the establishment of a special fund to aid affiliates in their efforts to fight imposed wage ceilings. A counsel of legal and legislative experts was set up to allow affiliates to take advantage of all potential loopholes in the guidelines' admittedly solid armour.¹⁴

The CLC's next significant confrontation with the federal government took place before the Standing Committee on Finance, Trade, and Economic Affairs. The general atmosphere of the meeting was extremely tense; at times bitter. Shirley Carr led off the CLC presentation with a general attack on the government's program and a reiteration of Congress's proposals. In commenting upon the likely effect of the controls she asserted:

...we remain unconvinced that Bill-73 will come to grips with inflation...There is no country to our knowledge that has successfully implemented a wage and price control program. Those that have, have found them to be discriminatory to working people and the defenceless in the community; they have created bottlenecks in the economy; they have not stemmed the psychology of inflation; and they have left the fundamental economic, social and political causes of inflation untouched.¹⁵

She concluded by making clear that the government had introduced the plan in full knowledge that labour was adamantly opposed. Therefore, Carr stated, the CLC "was not prepared to accept Bill C-73 either in principle or in practice." More important, it was during the Committee Proceedings that Congress made public its intention to resort to the court system if necessary to pursue its opposition to the Anti-Inflation program. In a heated exchange Neil (P.C. Moose Jaw) charged that the CLC appeared ready to openly disobey the law. CLC representative Bill Mahoney shot back:

...we adopt laws here but we do not engrave them in marble and we do not give up our right to use the courts to challenge a law that the Liberal party may be stupid enough to put on the books... we intend to use every legal avenue we have to see that bad legislation is thwarted."¹⁶

In response to further prodding on this matter by Joyal (L. Maison-neuve-Rosemount), Carr intimated the CLC's willingness to accept a constitutional reference¹⁷ and then turned the floor over to CLC legislative director Ron Lang. His comments were extremely important and thus are quoted here at some length:

We, too, have done our consultations on this question of the constitutionality of Bill C-73. Indeed, I think it would be fair to say to you now that we are preparing our case and have received two opinions from constitutional lawyers in this country. We think the government is not acting under peace, order and good government...You have to look at the bill because it divides it up really into four sections. It divides it up into the federal public service; it divides it up into the private sector under the federal sector; it divides it up into the private sector within the provinces; and it divides it up within the public sector within the provinces. So there are these four aspects under which a constitutionality test could come. We believe and are prepared to go through with it to test this case under the private provincial sector because we think that it is clearly the best chance to prove this bill unconstitutional.¹⁸

Clearly, the CLC had been considering the legal alternative for some time, a matter to be dealt with more fully in the next section.

If the committee hearings could be described as tense, then Congress's annual memorandum to the federal government represented a clear declaration of open conflict. Concentrating exclusively upon the issues of inflation and unemployment, the CLC utilised the platform to attack not only the government's program but the honesty and integrity of the Trudeau administration itself. In scathing language, Congress made its point that "the name of the game is not compassion, fairness or equity, it is the pursuit of political power no matter who is hurt".¹⁹ In a matter of days following the memorandum's release, the CLC announced its withdrawal from the Canadian Labour Relations Council and the Economic Council of Canada. Citing the government's total usurpation of collective bargaining rights and the fact that economic planning

was not available as a viable outlet, Congress felt there was no incentive to stay on.²⁰

It was on this divisive note that the CLC somewhat ironically called for the establishment of a tripartite body consisting of representatives from labour, business and government to deal with future economic and social planning. Released at the eleventh bi-annual CLC convention under the rubric Labour's Manifesto for Canada, Congress announced that "a new stage of history was declared on October 13, a new stage in which organised labour will need the power of its solidarity more than ever before, a new stage in which the opportunities for progressive change are greater than ever before".²¹ Basically, the Manifesto proclaimed controls as an opportunity for labour to seize its rightful position in the decision-making process. To achieve this goal the CLC concluded, "...organised labour needs to develop national bargaining power to deal with national economy managers and a national social and economic program".²²

The weeks immediately preceding the Anti-Inflation reference were marked, therefore, by labour's desire to achieve a cooperative bargaining position with the very forces it would soon be fighting in court. The twelve months leading up to the legal dispute were characterised by protracted and ultimately unsuccessful negotiations followed by intense and at times bitter quarreling between the CLC and the federal government. How is one to make sense of these disjointed and

apparently contradictory developments? More important, in what way can they be said to have influenced the CLC's desire to carry the political conflict to court?

Congress consistently failed to have its position recognised during a wide variety of meetings with the federal government. As Joe Morris put it, "...one of the things that has been wrong in this whole exercise from the start is that we've never been part of the planning process. Yes we've been invited into discussions...but when the decisions were being made we were not a part of that decision making process".²³ Confronted by a brick wall in the political arena, the CLC may have come to view participation in a legal proceeding as an attractive alternative means of having its demands considered and possibly met. Affiliate pressure urging Congress to move in the direction of legal action was an important influencing factor in its own right. For the affiliates, the Anti-Inflation program was not a voluntary scheme providing the alternative of either opting in or opting out. A successful legal challenge could possibly prevent the need to "opt in" altogether or at least serve to achieve important concessions that would allow affiliates to opt in on ground rules more to their liking. Clarification of the issue was also a major concern of CLC affiliates. A legal ruling, whether successful or not, would at least allow them to know more thoroughly exactly how the program was to apply to them as well as to other actors in the economic order.

Legitimacy represents a major concern of most public interest groups.²⁴ A good performance before the Supreme Court of Canada, could only augment the already positive effects of the CLC wage control campaign in this regard. It must finally be considered where the controversial tripartite proposals fit in. A successful court challenge by the CLC would likely provide the issue of tripartism with significant force, if for no other reason than by providing Congress with a powerful bargaining weapon to use against the federal government as well as its own affiliates. Congress's early intimation of its desire to pursue the issue of tripartism could also be viewed as a means of preparing for the worst. In the event of an adverse legal ruling, the tripartite proposal represented an extremely flexible trump card with which Congress could easily carry on its campaign in the political arena. As will be indicated, however, the CLC certainly entered the Anti-Inflation reference extremely well prepared and with every intention of attempting to emerge with a favourable judicial resolution.

The CLC's Preparations for the Reference

In an effort to avoid a long court battle over its controls program, the federal government referred the Anti-Inflation Act to the Supreme Court of Canada on March 11, 1976.²⁵ As was partially indicated in Ron Lang's presentation to the Standing Committee on Finance, Trade, and Economic Affairs, the CLC began extensive preparations for legal action well in advance

of this date. After receiving Mike Rygus's letter urging Congress to pursue legal alternatives, the CLC retained the services of Maurice Wright, Q.C. In conjunction with the legislative department, Wright was to be responsible for any form of legal activity related to Congress's campaign against the Anti-Inflation Act.

Preparation for possible legal action began in earnest in mid-November, 1975. At this time, the CLC consulted at some length with two leading constitutional lawyers, P.W. Hogg of the Osgoode Hall Law School and Dale Gibson of the Faculty of Law at the University of Manitoba.²⁶ Both agreed to submit to Congress opinions on the constitutional validity of the Anti-Inflation Act. By the end of November, Wright had received lengthy replies from both lawyers. He subsequently submitted his opinion of Congress's legal chances to President Joe Morris. Wright maintained that a strong constitutional case could be waged but he felt bound to add that in his personal view:

...the courts would probably uphold the Anti-Inflation Act..The courts do not exist in a legal vacuum separate from society at large. I believe that the temper of the times and the seriousness of the overall economic situation might well persuade the court that the legislation is justified by reason of POGG in that the court might not want to substitute its opinion for that of the federal government in deciding whether or not the economic situation had reached such dimensions that it can only be dealt with effectively on a national basis.²⁷

At a later juncture, Wright also felt compelled to indicate that the issue of timing was extremely important. As he stated:

The time frame is obviously relevant. It would obviously take no less than a year to take an appeal on through to the Supreme Court, particularly if it originated in a provincial court. In this respect, if a proper fact situation could be developed, the approach to the Federal Court of Appeal under s.28 of the Federal Court Act would probably take much less time. This will undoubtedly be one of the more important considerations that ought to be borne in mind.²⁸

By the end of November, therefore, the CLC was aware that a constitutional reference represented its best opportunity for a quick legal test and perhaps more important, that its eventual position in such a reference would not be all that strong.

Nevertheless, Congress continued legal preparations at full steam. Throughout the fall of 1975, Wright held meetings with a wide variety of non-government economists from across the country; conducting interviews with the Chairmen of the Departments of Economics at McGill University, Université de Montreal, Queen's, McMaster and the University of Western Ontario. Although clearly representing economists of differing political stripes, these individuals reached a unanimous consensus concerning prevailing economic conditions. All volunteered to testify in support of the CLC and to back up such testimony with scholarly research if necessary.²⁹ By the end of 1975, the CLC was well prepared to enter the legal fray at any time.

Congress did make several attempts to initiate legal activity prior to the Anti-Inflation reference. In addition to making several informal requests to have the matter referred

directly to the Supreme Court, Congress seriously considered the alternative of private litigation. In February, 1976, the Anti-Inflation Board imposed a heavy fine on Irving Pulp and Paper Ltd. for payment of excess wages. After assessing the factual situation, the CLC concluded that:

The constitutionality of the AIB legislation and the farcical nature of its appeals procedures is very much drawn into question by this unwarranted and arbitrary interference in the peaceful settlement of labour negotiations. We intend to challenge the legality of the government's heavy handed approach, in particular the Tansley ruling, because it sets a dangerous precedent that will be misused in every set of negotiations from coast to coast.³⁰

Congress was forced to renege on this opportunity, however, as the local union involved wanted the matter settled through a quick appeal to cabinet. Around the same time, the CLC contemplated intervening on behalf of a CUPE local representing library workers at the University of Toronto. During this union's negotiations with an arbitration board, the constitutionality of the Ontario Anti-Inflation agreement with the federal government was severely questioned by a majority of the board members themselves.³¹ Providing a clearly favourable factual situation, the CLC was nevertheless forced to abandon hopes when it was learned that the local union was only interested in contesting the validity of the Ontario agreement and not the Anti-Inflation Act as a whole. For a while, the CLC made an effort to intervene on behalf of the Renfrew Branch of The Ontario Secondary School Federation³² but before concrete

steps could be taken, the federal government chose to refer the issue directly to the Supreme Court.

Once the Anti-Inflation Act was formally referred, CLC preparations went into high gear. P.W. Hogg was retained as full time legal advisor on constitutional matters. A meeting to lay the foundations for Congress's position was held on March 13. In attendance were Lang and Hogg, along with a number of leading Canadian economists. The results of this meeting were related to Wright by Hogg.³³ It should be noted at this point that in all its dealings with economic experts the CLC encountered no more than minor difficulties. Often, initial choices could not attend proposed meetings and alternatives had to be quickly substituted. All in all, however, the economists' reception to the CLC cause was extremely good. The factual information they generously supplied was extensive and the expertise they made available for constructive criticism was crucial in adding to the strength of Congress's final position. It may be fairly stated that many participants went out of their way to aid the CLC's efforts.³⁴

As the discussion to this point indicates, factual data were going to constitute a major part of Congress's eventual case. On the issue of admissibility of extrinsic evidence before the Supreme Court, the CLC was actually put on trial before the reference even began, having to fight tooth and nail for the right to submit the economic evidence it wished to have considered. As Wright commented to Lang in the midst

of negotiations on this matter:

"There has now been a realisation on the part of everyone connected with the case, and it was so articulated in the Chief Justice's chambers today, that the issue of admissibility of evidence will now become possibly even more important than the question of the validity of the Anti-Inflation Act.³⁵

The struggle between the Department of Justice and CLC lawyers throughout the pre-trial evidence negotiations can only be described as intense.

The basis of the conflict may be summarised as follows.³⁶ Wright had made the effort to solicit the support of leading economists so that he could rely upon their expert testimony in eventual legal proceedings. In negotiations, he made clear that he wanted such testimony delivered viva voce in open court, a practice not well entrenched in Canada. Encountering the barrier of legal tradition, Wright offered to include the evidence in transcript form. Again he ran into stiff opposition from Ontario, the federal government, and from members of the court itself. Opposition became even stronger when it was indicated that the evidence Wright wished to include in this manner would take anywhere from seven to ten days to present: meaning that there would be a total confrontation. At this point the federal government urged that the matter take the form of a formal notice to the full Court. After much bickering between the parties as to the merits of this proposal, Chief Justice Laskin made clear that a formal motion would split the

bench. Although both Wright and the government were prepared to go that far, the likely effect of a split upon the Court's image quickly laid the proposal to rest.

A week passed and as Wright put it, "...a lot of jockeying has been in progress".³⁷ In subsequent meetings, Wright was confronted by judicial doubts concerning what basis they could possibly refer to in order to assess the merits of diverse economic presentations. Obviously wary of its own lack of expertise in the area, the Court approached the matter of extrinsic evidence on its tip toes throughout these negotiations. Ultimately, Wright was forced to accept a compromise position. Viva voce testimony would not be allowed but all parties would be permitted to file evidence of an economic nature, whereupon all other parties would be free to respond.

With the extrinsic evidence battle over, the CLG still faced the challenge of preparing an adequate economic analysis. The short time frame laid down by the court was clearly a cause for concern. As Wright put it:

There are many problems on the horizon at the moment not the least of which is that there appears to be a determination on the part of the Department of Justice and the Court itself to bring the matter on as quickly as possible and I am having problems with my academics who find themselves caught in conflicting commitments at this time of year.³⁸

The CLC chose to work closely with Jack Weldon of McGill and Richard Lipsey of Queen's. Lipsey was ultimately charged with the responsibility of drafting the CLC's economic factum. Both Weldon and Lipsey indicated at one of many meetings held

throughout the month of April, that they would attempt to enrol the support of a broad spectrum of Canadian economists for Congress's final position. Wright was clearly pleased with this development. As he stated:

...I hope that we would come to the Court with a factum on the economics which will indicate that our position has the support of the overwhelming number of non-government economists. I should think that this would have to be very impressive.³⁹

This show of support, as will be discussed subsequently, was ultimately submitted to the Court in the form of telegrams.

By the end of April, a first draft of the CLC's legal factum had been prepared by P.W. Hogg. Lipsey's economic analysis was nearly complete. Several meetings between the two were held throughout these final preparations to make sure that the legal factum dovetailed with the economic position. A meeting "of as many economists as we can gather" was held in late April to review and criticise Lipsey's final product. At the same time, Wright and Hogg spent many hours going over and putting together the final aspects of the legal factum.⁴⁰ After revisions were made, the final drafts of both were completed by the first week in May and submitted to the Supreme Court by the filing date of May 10. The pre-trial work had come to an end. The CLC cause now rested with nine Supreme Court justices.

The Supreme Court Judgement

In the process of litigation, a court is primarily concerned with assessing and applying adjudicative facts, that is, facts that pertain to the actions and activities of the immediate parties. In most cases, the applicable law and policy are already established. It is only a question of applying these principles to the relevant facts of the specific case. In constitutional cases, however, a court must often take note of so-termed legislative facts in order to settle the issue or issues raised for consideration. When a court is asked to question the validity of an impugned statute, it is performing in effect a legislative function. Its determination not only is likely to affect the public at large but, just as important, it will likely involve an assessment of policy alternatives. As a result, a court must go beyond given findings of pre-existing law and fact to consider evidence of a general character concerning the social or economic milieu which gave rise to the immediate litigation.⁴¹ For a number of reasons, legislative facts are often called into question during constitutional litigation. Ambiguous statutory language will make resort to extrinsic materials necessary if a clear and precise meaning is to be applied. How is a court to determine what constitutes "local trade in eggs" without assessing existing or potential market arrangements? An issue under consideration may affect a broad range of social interests that must be fully assessed to arrive at an equitable

or just result. Do segregated educational facilities detrimentally affect the educational opportunities of the segregated group? In short, constitutional litigation often demands that a court exercise its own discretion in determining the content of law or policy. To aid a court in such an exercise of discretion, resort to legislative or social science facts is not merely important but often imperative. As Bikle states:

While one class of constitutional cases may be decided or adjudicated by a mere comparison of the impugned statutes provisions with the applicable constitution, another important class of constitutional cases requires that the court must first be informed as to the truth of some question of fact which the statute postulates or with reference to which it is to be applied; and the validity of the legislation depends on the conclusions reached by the court with reference to this question of fact.⁴²

Cases which turn in large measure upon a consideration of extrinsic factual evidence, should place organized interest groups in an advantageous position.⁴³ Where a statute is framed in ambiguous language and must be considered in the light of detailed facts or where a piece of legislation seems to run counter to prevailing social trends and thereby presents a court with an opportunity to keep the law abreast of the times, interest groups would appear to have a very good chance to exert substantial influence upon the eventual decision. With access to the proper resources, such cases would seem to provide groups with an opportunity to meet and challenge on an equal footing more powerful or politically influential interests.

When challenging the validity of a government statute, however, an interest group is rarely placed upon an equal footing with those it is opposing, whether the opposing interests be the enacting legislature itself or simply other groups lending their support to the impugned legislative enactment. Working against an interest group in such situations are a number of inherent features of the judicial process, not the least of which is the overriding doctrine of presumption in favour of constitutionality that generally operates so as to severely restrict judicial notice of extrinsic factual evidence.⁴⁴ From the standpoint of judicial policy, two major reasons explain the absence of a vigorous examination of factual considerations in cases where a legislative enactment is challenged. The courts have consistently urged that an extensive use of judicial notice would serve to create instability in the law. Where a law can be fitted in with an already existing legal pattern, therefore, the courts will be loath to overturn it even where extrinsic evidence may show the prevailing precedent to be clearly out of date. As one commentator put it, "Although the judge himself may be convinced that the existing rule is incompatible with the social facts, if a decision consistent with the established rule would be reasonable, he should not overturn it."⁴⁵ Perhaps more important, it is established judicial custom that the courts are most often willing to accord a legislative body a presumption of validity even in cases where precedent may not be an overriding consideration, on grounds that the legisla-

ture's judgement on matters of social fact and therefore social policy must be afforded great respect. In other words, it is generally maintained that an enacting legislature is in as good or more likely a better position to assess the merit of conflicting facts and interests than are the courts. As stated in the judgement of Block v. Hirsh:

"No doubt it may be true that a legislative declaration of facts that are material only as a ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts...But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect."⁴⁶

It must finally be considered that a presumption in favour of constitutionality can serve judicial interests as often as it does the interests of sound policy-making. The ability to cite deference to legislative judgement ~~relieves~~ a court from having to place its own interpretation upon a potentially controversial social or political situation. In some cases, therefore, the judiciary's willingness to readily apply the doctrine may be very much the result of a self-conscious desire to avoid hostile reaction from the public at large.

Whatever the basis or motive upon which a presumption of constitutionality is founded, it is a principle strictly adhered to by the courts which places the burden of proof and indeed a very high standard of proof squarely upon the opponents of a piece of legislation.⁴⁷ This operating principle of constitutional adjudication has several clear implications for

interest groups concerned with challenging government actions in court. Most prominently, groups will not be entering such litigation as equals but rather as definite subordinate parties to the dispute. Consequently, their opportunities to exert influence through factual presentations will be severely limited. More importantly, however, a court may often raise the doctrine of presumption of constitutionality to the level of a practically irrebuttable principle of judicial interpretation thereby serving to make even fewer the number of cases where social facts presented by interest groups may be deemed relevant. This latter form of presumption would be more likely to appear in parliamentary systems where the overriding principle of parliamentary supremacy itself generally acts as a powerful restraining force upon "too much" judicial activism. In this regard, it should be noted that a court, viewed as an interest group of sorts in its own right, seeking to avoid undue criticism and thus maintain its established position of independence and integrity within the overall political framework, may more easily fulfill these "goals" in a parliamentary system by being able to rely upon the recognised deference due Parliament in order to justify a less activist judicial role than might otherwise be possible under different political arrangements.

The Canadian Labour Congress's participation in the Anti-Inflation Act reference,⁴⁸ provides an excellent opportunity to assess the applicability of these general principles to interest group litigation before the Supreme Court of Canada.

The reference not only raised the major constitutional question of whether Parliament had validly exercised its power to legislate in response to a national emergency by passing the Anti-Inflation Act, but a number of related factual considerations as well. Can co-existing high inflation and high unemployment be said to constitute an emergency situation? What type of economic phenomenon does inflation really represent? Is the subject matter of inflation sufficiently distinct to constitute by itself the subject matter of legislation within the ambit of section 91 of the BNA Act? What are the implications in terms of both labour and commercial contracts with which it would clearly interfere? No matter what constitutional standard or test the Court ultimately adopted to interpret the issue, it was clear that a final determination could not realistically be made without an assessment of the magnitude, effect and reasons for the underlying economic conditions that precipitated the court test. In considering the admissibility of extrinsic evidence proffered by those granted status to the reference Chief Justice Laskin made clear that factual considerations were of paramount importance by stating:

I am of the opinion that extrinsic material, bearing on the circumstances in which the legislation was passed, may be considered by this Court in determining whether the legislation rests on a valid constitutional base. There is no issue in this case as to the meaning of the terms of the legislation nor, in my opinion, is there any issue as to the object of the legislation. As will appear from what follows, the arguments of the proponents and opponents... turn substantially on whether the social and economic

circumstances upon which Parliament can be said to have proceeded in passing the Act were such as to provide support for the Act in the power of Parliament to legislate for the POGG of Canada.⁴⁹

In proceeding to consider the weight and relevancy of the evidence proffered in the reference, however, Laskin made clear that the materials need not be susceptible of proof in the ordinary sense, intimating that evidence brought forward in support of an emergency need not be as stringent as evidence brought forward to oppose its existence. As stated, in perhaps the clearest enunciation of a presumption of constitutionality doctrine in the Canadian legal context to that point:

In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact...The matter concerns social and economic policy and hence governmental and legislative judgement. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity.⁵⁰ (Emphasis added.)

In a concurring opinion, Justice Ritchie proceeded upon very similar grounds by invoking the more traditional "very clear evidence test". In their overall effect, these tests of rationality or clear evidence can certainly be said to have placed the CLC in a disadvantaged position from the very start of the proceedings. Whether or not they can be said to

have constituted practically irrebuttable presumptions in favour of Parliament's judgement in this instance, must be decided upon an examination of the materials presented and the Court's eventual assessment of them.

It is first necessary to indicate the relevant materials upon which the Court ultimately based its final decision. Both the Attorney General for Quebec and the Attorney General for Saskatchewan contended that the Act could only be supported on an emergency basis. However, in their factums, neither offered an opinion as to whether such a basis was actually shown to exist. Both the Attorney General for British Columbia and the Attorney General for Alberta contended that the Act was an unconstitutional interference with the provincial public and private sectors, although conceding that Parliament could enact such legislation in an emergency situation. Both felt that the existence and persistence of inflation did not constitute evidence of an emergency but they did not offer any supporting data to oppose the federal government's claim. The various intervenants,⁵¹ apart from the CLC, similarly disclaimed the existence of an emergency but failed to offer supporting factual evidence in their factums. The extrinsic materials that the Court ultimately had to weigh, therefore, consisted of the CLC factum and appendix in opposition to the Act's validity and the factums and additional materials offered in support of the Act's validity by the Attorney General for Canada and the Attorney General for Ontario. It is appropriate

therefore, to confine the discussion to these materials.

The Case, prepared and filed by the Attorney General for Canada, contains as stated, "...all the materials considered relevant to the hearing and consideration of the questions in the order of reference".⁵² In his factum, the Attorney General made clear that the government felt that the Court need not attempt to test Parliament's expressed view of the matter, specifically that, "As to what the interests of Canada are and how they are to be protected; Parliament has considerable freedom to judge".⁵³ Further, and arguing along similar lines, the Attorney General made clear that the government felt "...it is both erroneous and unnecessary to go behind Parliament's clearly stated premise for the legislation unless it is demonstrated that it is colourable legislation or that there is no rational basis whatsoever for Parliament's action".⁵⁴ Accordingly, the Attorney General asserted that double digit inflation and its grave implications was a matter of which the Court may simply take judicial notice. As to Parliament's intent of acting in response to an emergency situation, the government relied upon three submissions set out in the Case. Primarily, the preamble to the Anti-Inflation Bill C-73, the relevant aspect of which stated:

Whereas the Parliament of Canada recognises that inflation in Canada at current levels is contrary to the interests of all Canadians and that containment and reduction of inflation has become a matter of serious national concern...

Secondly, the government's policy statement, Attack on Inflation, tabled in the House of Commons on October 14, 1975 by then Finance Minister Donald Macdonald, the relevant portion of which is to be found in the introduction:

Canada is in the grip of serious inflation. If this inflation continues or gets worse there is a grave danger that economic recovery will be stifled, unemployment increased and the nation subjected to mounting stresses and strains. It has thus become absolutely essential to undertake a concerted national effort to bring inflation under control.

Thirdly, the government included the consumer price index figures for a one year period, September 1974 to September 1975, as tabulated by Statistics Canada.

In the factum presented by the Attorney General for Ontario, no attempt was made to advance arguments or data in support of the existence of exceptional circumstances. Indeed, the Attorney General merely submitted that, "...it is common knowledge that inflationary conditions exist throughout Canada and reliance need not therefore be placed on the statements in the preamble to the Anti-Inflation Act".⁵⁵ In short, the factum accepted the requisite conditions to be so evident that they may be judicially noticed, only arguing that the matter of inflation is one "necessarily and inherently of national concern". In their initial submissions, therefore, neither the Attorney General for Canada nor the Attorney General for Ontario presented factual arguments as such, in support of the existence of an emergency situation.

Among the preliminary materials offered to the Court for consideration, it was only the CLC brief and the economic study included therein that attempted to present factual arguments on the existence or non-existence of exceptional circumstances. The economic study attempted largely through a comparative form of analysis to answer the question "...could an economist say that the Canadian economy faced an economic crisis or was in a critical situation in October 1975?".⁵⁶ A major portion of this comparative analysis dealt specifically with Canadian inflationary history. Here, Lipsey attempted to indicate the absence of an emergency in October 1975 by comparing the period with others in Canadian history, most prominent among these being the years 1929-1933. He concluded from this initial survey that:

The data in the table are consistent with what virtually all economists would accept, that the real effects--as measured by virtually every indicator one might select--of the recession of the 1930's were vastly greater than the inflation of the 1970's.⁵⁷

Lipsey continued his comparative analysis on the international level, contrasting Canadian inflationary experience in the 1970's and earlier years with inflationary experience in leading countries such as the United States, Britain, France and Japan over the same periods. He concluded from this analysis that over a twenty-five year period, Canada would rank seventh out of ten countries in terms of unfavourable inflation rates. As stated:

The data in tables 5 and 7 strongly suggest that neither in the 1970's nor in earlier periods, was Canadian inflationary experience unusual by international standards.⁵⁸

Overall Lipsey basically concluded that, "...no matter how seriously we view the present situation, it is of a completely different magnitude from the problems that have faced the country in the past",⁵⁹ that specifically, in October 1975, "...there was no crisis nor was the patient even approaching a critical situation".⁶⁰

The Lipsey study also dealt with the important issue of hyperinflation in assessing whether Canadian inflation in 1975 had reached that admittedly serious and potentially disastrous level.⁶¹ Lipsey answered no for three reasons. First, he asserted, the inflation rate had stabilised by 1974 and the overall rate for 1975 was virtually the same as 1974. Second, world inflation, which Lipsey points out profoundly affects Canadian inflation, had begun a definite downturn by 1975. Finally, Lipsey maintained, many countries have successfully survived sustained inflation rates vastly in excess of the 1974-75 Canadian rates. As examples, Lipsey detailed the experiences of Brazil and Argentina.

The economic factum then turned to the popular notion that there was evidence of a wage explosion in Canada that threatened to accelerate inflation levels far beyond what was recorded in 1975.⁶² In a detailed analysis, the study pointed

to the general problems posed by this theory. Lipsey first noted that wage settlements in Canada were quickly decelerating by the third quarter of 1975. The high wage settlements of 1974, moreover, represented an attempt by labour to catch up with their share of the national income and as such they were only a temporary phenomenon. Finally, Lipsey made the point that direct comparisons of U.S. and Canadian wage rates are misleading due to the prevalence of COLA clauses in U.S. settlements. To arrive at a more realistic picture Lipsey maintained comparisons must be made on the basis of unit labour costs. Using this base he shows that between 1974 and 1975 the increased change in Canadian costs was 2% lower than those in the United States.

To counter the charge that industrial output was falling during the 1974-75 recession, Lipsey put forward several convincing arguments.⁶³ The brief concluded that world recession affected Canadian outputs, but not drastically. Indeed, as Lipsey indicated, Canadian industrial output was moderately less depressed in comparison with production rates in other leading countries. As to whether Canadian inflation was pricing Canadian exports out of foreign markets, Lipsey made clear that the deficit was not without precedent by historical standards. More important, he illustrated other significant factors other than inflation that contributed greatly if not more conclusively to the overall trend.⁶⁴

The Lipsey analysis admitted that the 1970's produced an economic problem that was different in kind to previous conditions, namely, the co-existence of high inflation and high unemployment. Lipsey maintained, however, that it was not necessary to employ "extraordinary" remedial methods to attack these problems. The brief made clear that ordinary fiscal and monetary policies represented the only methods that will work successfully in the long run. Such policies, the analysis emphasised, were not given serious consideration by the federal government.⁶⁵ Drawing upon the experiences of other countries in similar situations, Lipsey indicated specific policy alternatives that could be used in place of and likely with more success than wage and price controls.⁶⁶ In concluding and reiterating his basic position, Lipsey asserted that the economic problems that Canada faced in 1975 were not:

...unique by historical standards and none were unique by current international standards...Each decade has its own characteristic serious economic problem. It seems hard to believe that the inflation-unemployment problem is unique in its degree of seriousness among these problems. If it is held that this problem constitutes an economic crisis, then it is hard to avoid the conclusion that economies are nearly always in states of economic crisis. If this kind of economic crisis justifies the use of extraordinary measures, then extraordinary measures may be nearly always justified.⁶⁷

In response to the Lipsey study, both the Attorney General for Canada and the Attorney General for Ontario filed additional materials. The Government of Canada submissions consisted of

a speech delivered by the Governor of the Bank of Canada, Mr. G.K. Bouey, in which he announced the Bank's new policy of allowing interest rates to move from 8½% to 9% in order to maintain control over money supply. In the speech Mr. Bouey discussed the economic situation in general terms, offering no opposition to the Lipsey analysis and indeed frequently making statements that could actually be read as supportive of it. For example, at one point he noted that "...there is accumulating evidence that the worst of the recession may now be behind us and that production is beginning to recover", and further, "...that the current rate of unemployment in Canada is a full percentage point below that in the United States".⁶⁸

The submission made by the Attorney General for Ontario was more substantial but, overall, not in outright opposition to the Lipsey analysis. It was in two sections; the first consisting of general comments upon the economic environment in 1975, the second consisting of a summary and analysis of the Lipsey study. The Ontario submission did not provide a critique of Lipsey's economics, but merely "the emphasis given to certain aspects of economic theory and not to others and to his general interpretation of the historical context in which the Anti-Inflation Program was constituted".⁶⁹ Proceeding on this basis, Ontario stressed four major positions:

1. It is not for an economist to decide what constitutes a crisis, for "a crisis is defined by the electorate at

- a specific moment in time;
2. The period under consideration was historically unique, due mainly to the oil embargo and oil price increase;
 3. Lipsey's evidence on the relation between unit cost increases in the United States and Canada is not clear, specifically that it places too much stress on the manufacturing sector and fails to note that the higher U.S. rates were due to a depreciation in the Canadian dollar;
 4. All Lipsey's statistics show the actual rate of inflation and unit labour cost increases in 1975 whereas the appropriate numbers should be the predicted rates as of October 1975.⁷⁰

Finally, in a comparative analysis with the United States, Ontario asserted that Canada was definitely in a poorer position on the competitive international market, and that while the United States had appeared to be "over the hump through 1975", inflation in Canada continued at annual rates above ten percent.

The additional materials did not openly attack or severely question the credibility of the evidence proffered by the CLC. The Bouey speech was delivered almost a full year earlier, September 22, 1975 and presents not so much factual considerations, but merely the concern of a prominent

member of the economic community with the then prevailing economic circumstances. Ontario placed great emphasis and concern upon declining economic growth along with the public's overall uncertain mood and concluded, "...considering the debate on this process and the potential costs of both hyperinflation and prolonged restraint, policy decisions might justifiably err on the side of protecting against the worst".⁷¹ Thus, the court was asked to consider and weigh a detailed albeit disputable economic analysis of the situation against submissions that urged that the existence of an economic crisis was justifiably noticeable and that Parliament's judgement in this matter should be afforded great weight. The following review of the Court's assessment of this material will indicate that interest groups challenging the validity of government legislation do not often enter litigation on equal grounds with those they are opposing nor are their factual submissions often afforded equal value in the Court's eyes. It is submitted that these problems are even more acute in Canada due to the overriding doctrine of parliamentary supremacy and all that it implies.

The Court's philosophy of approach to the evidence put forward for consideration is best summed up in a comment made by Chief Justice Laskin while reviewing a judgement delivered by Justice Duff in the Board of Commerce case:

...the apprehension of Duff J. posed a recurring question, one ultimately for this Court as the guardian of constitutional integrity, of reconciling federal-provincial legislative authority

without at the same time seeking to control legislative policy which under a doctrine of parliamentary supremacy within the limits of legislative power is a matter solely for Parliament or the Legislature of the provinces.⁷²
(Emphasis added.)

Proceeding upon this general guideline, the Chief Justice isolated what he considered to be the major issues facing the Court, among the most important being:

1. Is the federal contention assisted by the preamble?
2. Does the extrinsic evidence and other matters of which the Court may take judicial notice show that there is a rational basis for the Act as a crisis measure?
3. Is it tenable that an exceptional character could be lent to the legislation because Parliament could reasonably take the view that it was a necessary measure to fortify other admittedly related areas of federal authority such as monetary policy?⁷³

Laskin concluded that the rational character and general urgency of the program are discernible merely from the nature and wording of the Act and its guidelines, in effect, from the extent and nature of its coverage. As stated:

The preamble in the present case is sufficiently indicative that Parliament was introducing a far-reaching programme prompted by what in its view was a serious national condition...⁷⁴

The "gravity of circumstances", as indicated by Laskin's reasoning, could be deduced the Court concluded solely from the data and materials offered by the Attorney General for

Canada from Statistics Canada. In reviewing these statistics, the Chief Justice made clear that the Lipsey study did not refute or challenge their credibility. As stated:

These are figures from the consumer price index monitored by Statistics Canada and I note that Professor Lipsey in his study states that the measure of inflation that is of most direct relevance to the person in the street is the rate of inflation of the CPI, And further,

What the CPI shows, and Professor Lipsey himself relies on its figures, is that for the first time in many years, Canada had a double digit inflation rate for successive years. ie; in 1974 and 1975, the index rising 10.9% in 1974 above its reading for 1973 and being 10.8% higher in 1975 than it was in 1974.⁷⁵

Laskin augments these figures as forming a rational basis "for the judgement so exercised by Parliament", by holding that the government, having exclusive control over monetary policy and given the circumstances then prevailing, was entitled to act as it did "from the springboard of its jurisdiction over monetary policy".

In response to the extensive comparative analysis offered by the Lipsey study, the Court concluded that it extended beyond the strictly legal issue or question presented by the emergency test. It was on these grounds that the Court refused to give weight to the backbone of the CLC's arguments against the existence of an emergency situation. The Court maintained in effect, that the comparative arguments failed to address themselves directly to the major question posed by the emergency test, namely, was there a serious inflationary situation

in Canada during October 1975 to which Parliament directed itself by passing the Anti-Inflation Act. In the Court's view, the question deals with one period and it is only in arguments directed at that period that one determines if a serious situation exists or not. As Laskin put it, "That there may have been other periods of crisis in which no similar action was taken is beside the point".⁷⁶ This aspect of the Court's argument reveals that the constitutional issue itself can often serve to place insurmountable restrictions upon the ability of interest groups to present and have considered what they feel to be relevant factual information.

In addition to the Court's strict adherence to the "rational basis criteria", a number of other considerations may be advanced to round out an explanation of the CLC's overall lack of success. The type of proceeding is often a foremost factor in determining interest group success in litigation. It frequently establishes just how broad an outlook a court may be willing to take with regard to extra-legal considerations offered in argument or evidence by organised interests. The reference procedure,⁷⁷ due to the lack of a formal trial, the consequent inability of the parties to rigorously cross-examine arguments offered by their opponents, and the fact that the court is merely asked to provide a specific legal opinion on the questions referred, invariably serves to narrow a court's viewpoint with regard to such

matters. In a reference, a court is not likely to take into account and give weight to factors that might otherwise and under normal proceedings be considered to determine the "pith and substance" of a piece of legislation.⁷⁸

The Anti-Inflation Reference certainly falls into this pattern. Influenced by the strong adjudicative principle to decide references on the shortest possible grounds and with the most specific legal answer available, the majority failed to even consider Congress's strong legal position on the national dimensions arguments advanced by the Act's supporters. As Laskin put quite clearly in his reason for proceeding upon emergency grounds, looking first to the Act's validity under this test might preclude the necessity of "considering the broader ground advanced in its support".⁷⁹ One may speculate that the majority's overall silence on whether inflation was a matter of exclusive permanent federal jurisdiction, particularly when read against Justice Beetz' strong dissenting opinion, could be interpreted as a victory of sorts for the CLC. However, the legal reality remains that the Court's overall silence on the issue failed to provide any firm precedent one way or the other.

These restrictive adjudicative guidelines adhered to in reference proceedings rendered irrelevant all of Congress's important extra-legal considerations with regard to the effect, purpose and likely success of the Anti-Inflation program.

In answer to the CLC's questioning of the timing of the program's implementation, its suggestion that Parliament had failed to act when the problems first appeared or even after they had persisted for some while, as well as Lipsey's contention that the rate of inflation in 1975 when Parliament did act was not as high as it was in previous years; the Court responded in this fashion:

Its judgement as to the appropriate time for intervening as it did may be open to political or economic contestation, but I cannot agree that by waiting for some time before acting, the Government and Parliament can be said by the Court to have disintitiled themselves to rely upon the power to legislate as Parliament did for the POGG of Canada.

As briefly indicated while reviewing the factual materials before the Court, the CLC dealt with the likely effect of the program when practically applied to the problem of inflation. Congress attempted to persuade the Court by showing that "wage and price controls address themselves to the symptoms rather than the causes of inflation, they tend to postpone rather than reduce inflation".⁸¹ Lipsey maintained that wage control programs tend to "redistribute income from wage earners to profit earners" rather than restrain inflation.⁸² In refusing to give weight to these considerations, the Court followed the general legal principle, a principle strictly adhered to in reference cases, of not considering the merit or practical effect of impugned legislation but only the question of its constitutionality as it is to be determined by the legal test that is being applied. As stated:

Here it is not for the Court to say in this case that because the means adopted to realise a desirable end, ie; the containment and reduction of inflation in Canada, may not be effectual, those means are beyond the legislative power of Parliament.⁸³

The restrictive blinkers that the type of proceeding and the constitutional issue represented in this instance can also be said to have accounted for the Court's cavalier treatment of the telegrams that the CLC submitted to support its position. As already indicated, Congress spent much effort in attempting to solicit this support largely to augment the authority and prestige of its overall presentation. CLC counsel Maurice Wright, however, was looking to more practical considerations as well. Expecting that someone on the bench would question whether Lipsey's point of view was representative of the general opinion of academics from across the country, Wright came well prepared, having solicited support with great care and with considerable objectivity to avoid charges of being selective. Indeed, the final 38 telegrams presented to the Court could certainly be said to have represented economists of every political stripe. Wright was clearly disappointed therefore when in oral argument the Chief Justice dismissed these submissions as simply "a bunch of Telegrams".⁸⁴

The five-day oral hearings and their likely inhibitive effect upon the CLC position should not be overlooked either. Unlike United States practice, oral argument in Canada assumes a more central position in the overall process of adjudication

with no time limits on what is to be raised and discussed. Under judicial direction, there is a greater likelihood that oral proceedings in Canada may be manipulated in an adverse manner against one of the parties to a dispute. This clearly appears to have transpired in the Anti-Inflation reference.⁸⁵ After oral argument, Wright expressed his feelings in the following manner:

For the first two or three days of hearings there was a feeling of futility, which appeared to be justified by the attitude of the bench...⁸⁶

The response from the bench often reflected outright contempt for CLC positions. On numerous occasions, the judges utilised their positions of authority as Ron Lang put it, "to harass, browbeat, and deliberately mis-interpret and badger throughout the CLC's and the Alberta government's presentations".⁸⁷ It was only in the final two days that the Court shifted its stance somewhat. By this time, however, argument was concentrated upon the Ontario agreement, with the more important issue of the Act's constitutionality having been settled. To say the least, the CLC's overall reception throughout the oral hearings was not good.

The possibly detrimental influence exerted by the presentations from other intervenants cannot be overlooked. Although offering additional support to the CLC's position as well as evidence of concrete situations showing how the Act drastically affected the normal process of free collective

bargaining, it must be noted that none of the supporting unions offered additional factual data to counter emergency arguments offered by the Act's supporters. Just as important, a number of participating unions offered arguments and adopted positions in conflict with key CLC arguments and positions. The Renfrew County and Ontario Secondary School Teachers Federation, for example, made it clear in their statement of orders sought that they would be prepared to forego having the entire Act declared ultra vires in exchange "for the second question referred being answered in the negative".⁸⁸ In outright contradiction to one of the CLC's major extra-legal arguments, the factum of the United Steelworkers of America asserted that the Act "is not subject to the scrutiny of the Court for its wisdom or propriety".⁸⁹ Rather than taking the hardest line possible, the Ontario Teachers Federation, in a poorly organised brief, openly conceded that the Act was intra vires the federal Parliament as it applied to the federal public sector and to those portions of the private sector under federal jurisdiction.⁹⁰ It was only in the CUPE factum that a strong, well-ordered argument closely coordinated with that of the CLC was put forward.⁹¹ The inhibitive influence ultimately exerted by this lack of cooperation and coordination would be difficult to assess. To an already skeptical Court, it could not have helped.

In the final analysis, however, it was the majority's unyielding presumption in favour of constitutionality that was decisive of Congress's overall lack of success. The

Supreme Court, faced with an eight month old major federal government program, a program that had almost unanimous provincial approval, chose the apparently least disrupting course of action in granting deference to Parliament's judgment in this matter. If objections were going to be raised, and modifications perhaps implemented, the Court made clear that it was in the political arena where the opponents would have to make their case. While it may not be appropriate to enter into a debate upon the merits of the Court's determination itself, it does seem justifiable in summing up to question and assess the practical effects that too strict an adherence to the "rational basis" philosophy appears to produce. For it is not the specific merits of one side or another that are ultimately important in this case but rather the underlying principles that guided the Court's assessment of them and the implications that they hold for interest group participation in litigation of this nature.

A strict presumption in favour of constitutionality, as the Anti-Inflation Reference makes clear, is an adjudicative principle open to several dangers that bear directly upon the cause of interest groups challenging the validity of government legislation. A court proceeding upon such a basis may find it unnecessary, in its final opinion, to fully assess the arguments presented on both sides of the matter. It may thus neglect to fully explain why the opponents failed to

convince the judges and perhaps, more importantly, why the proponents did. In either case, those on the losing side will likely emerge from the dispute uncertain about the results and perhaps doubtful about whether they actually attained a "fair hearing". In merely reciting the CPI figures in conjunction with the rational basis test, in failing to even comment upon the materials proffered by the Attorney General for Ontario, and in not elaborating fully upon the nature of its disagreement with the CLC submissions, it is not unlikely that the Supreme Court served to create such feelings of uncertainty and discontent in this instance. Secondly, in laying too much stress upon Parliament's judgement, a court may forget its privilege under judicial notice, to assemble facts and figures on its own to supplement or clarify its final position, whatever that might be.

In light of these problems, there would appear to be two major guidelines that should be followed by a court. Primarily, it should attempt to follow the advice found in the CLC's own arguments on the presumption of constitutionality issue to the effect that the rational basis test should not be applied rigidly and in the same fashion in all circumstances.⁹² While a strong presumption in favour of constitutionality and hence Parliament's judgement, may be justified in exceptional circumstances such as war or national disaster, it should not be maintained at such a high level in other instances. Secondly,

and indeed in line with this general philosophy, a Court should always attempt to pursue the vigorous approach exemplified in the dissenting opinion of Justice Beetz. Putting aside for the moment the merits of his actual conclusions, there can be no doubt left after reading his opinion as to why he assumed the position he did. In his answer, Beetz dealt with both the national dimensions and emergency arguments. In rejecting the arguments advanced by the government, he made detailed and critical reference to the Act's provisions, scholarly articles, past cases as well as the record of legislative and committee debates in the House of Commons.⁹³ In short, his approach reflects the view that a court must assume its responsibility as a functioning part of the governmental process, prepared to fully and equally consider all interests, whether large or small, public or private, weak or powerful.

Post-Decision Reactions

CLC reactions ranged from disappointment and anger to a general feeling of somehow having been cheated in the face of its thorough presentations. In an official response, President Joe Morris made clear that he was not satisfied that Lipsey's analysis was given adequate consideration by the judges, commenting that the decision "not only avoids the question of whether there was a crisis in 1975 which could have justified the Anti-Inflation Act, but it also gives the government carte blanche to declare any situation an emergency".⁹⁴ Individuals

closer to the legal battle were generally more explicit in their criticisms, at times expressing doubt about the truly objective nature of the judicial hearings. Ron Lang indicated that he felt the decision reflected political, as well, as legal considerations. He commented that the CLC had not received adequate treatment at the hands of the Court, a matter he explained in the following terms:

...the fact that it was organised labour which was responsible for what is acknowledged as the finest factum presented at the hearings created some uneasiness with the Court. Had it been from the professions or corporations or some other 'more legitimate part of the community', the Court, in my opinion, would have reacted more positively. Perhaps I am too sensitive to this aspect but it is something I both felt and sensed during the hearings.⁹⁵

P.W. Hogg was not surprised by the final determination but he did not expect the grounds ultimately employed to uphold the Anti-Inflation Act. He felt the Lipsey analysis made an emergency decision "factually indefensible" and thus expected that the judges would utilise the "more intellectually preferable" basis of national dimensions. He was generally disappointed that the Court could decide the case "on such insupportable grounds".⁹⁶

Reaction from the press was diverse,⁹⁷ with an almost equal split between those openly critical and those who basically supported the final decision. Interestingly but not surprisingly, the response of the press closely reflected the regional, ethnic and linguistic particularisms that make up the Canadian federal scene. A number of editorials reacted exclusively upon the basis of what the decision meant either to regional autonomy or linguis-

tic rights. More than any other official forum, press reaction dwelt heavily upon the political and social implications of the Supreme Court's judgement.

The Globe and Mail came out in mild support of the decision, stressing that an opposite ruling would have "plunged the country into a national disaster".⁹⁸ In a subsequent editorial, however, the paper made clear that the basis for the decision was somewhat shaky. It also commented that the lack of a full explanation on the matter of national dimensions left the future of Canadian federalism uncertain and indeed open to the possibility of federal government abuse. As stated:

The implications in law could be serious, as Canadians are left without any clear definition of either an emergency or of the federal action that can be justified in an emergency. Ottawa is free to make a mess of things. Indeed, the Court says it is.⁹⁹

The Globe's counterpart, the conservative Toronto Star, predictably supported the Court's emergency basis, indicating that inflation was a threat that no province or group of provinces could begin to cope with by themselves. The Star felt the decision served to legitimise the federal program and it thus concluded:

Opponents of the program can no longer question the legality of controls. The controls are real, they're legal and they're here until inflation is beaten back. The only course now is for all Canadians to work toward that end.¹⁰⁰

In Ottawa, The Citizen expressed similar sentiments, indicating that the judgement confirmed the federal government's right to act

"not only in the current situation, but in future economic crises as well".¹⁰¹

Western reaction was mixed. Both the Vancouver Sun and the Winnipeg Free Press came out in open support of the decision. The Sun commended the Court's reasoning, stating that it served to remove doubts hanging over the Anti-Inflation program. The editorial urged all Canadians to rally behind controls and make them work, a suggestion that was directed most clearly at organised labour. As stated:

The CLC would do well to abandon its plans for a general strike. Had the Court decided against controls, the CLC leaders would have been the first to demand that Prime Minister Trudeau obey the law as the Court defined it. The Court having rejected the CLC's arguments and accepted the Prime Minister's, Canadians have every right to demand CLC obedience.¹⁰²

The Free Press echoed these views, commenting that the Supreme Court decision also served to avoid throwing the country into economic chaos.¹⁰³ The Edmonton Journal, however, came out strongly against the implications of the Court's ruling. In a stinging editorial, the Journal asserted that Alberta stood to lose as a result of the necessary shift of power to the centre that the judgement implies. The issue of local autonomy was put in simple terms, "Ottawa can now usurp provincial powers when a matter of deep national concern arises. There are plenty of matters like that around so there are many reasons to feel threatened."¹⁰⁴

The most detailed reaction came from the Montreal Daily, Le Devoir. In two editorials, Claude Ryan closely analysed the emergency and national dimensions doctrines as enunciated by the Supreme Court. Ryan commended the Court as a whole for refusing to be swayed by political or extra-legal considerations. He also praised the majority's decision to proceed upon rational basis criteria as well as Justice Beetz' dissenting opinion for clearly expressing the need for Parliament to make clear its intention to invoke emergency measures.¹⁰⁵ Ryan treated the national dimensions aspect of the decision somewhat less mildly, coming down against Laskin's implied desire to place a broad interpretation upon this test. Appropriately, he supported Laskin's decision to proceed upon the narrow grounds of emergency, citing the politically disastrous implications of an opposite approach. He reserved the most favourable comments for Beetz' "unified subject" arguments. Overall, Ryan approached the decision from the point of view of what it held for the future of Canadian federalism. He intimated in no uncertain terms that a liberal interpretation of national dimensions represents an approach "extremement dangereuse pour l'equilibre constitutionnel des pouvoirs au Canada". He concluded by congratulating the Court's serious attempt to face these important issues, an approach he claims is too often absent in the federal political arena.¹⁰⁶

A far more condemnatory attack of the decision was delivered by Ryan's colleague, Rodrigue Tremblay. Proceeding

upon the basis of what the decision meant for Quebec's future aspirations, Tremblay denounced the judgement as making it too easy to suspend the constitution on emergency grounds. He described the reasoning of the Court as vague and circular, intimating that the decision once again makes clear how powerful a weapon the Supreme Court can be in the federal government's desire to centralise. In concluding, he called on all francophones and their leaders to denounce the "melting pot attitude" given official sanction by the highest Court in the land.¹⁰⁷

Reaction from the academic community was extensive, although it is important to note that by far the majority of articles appeared in Bar Reviews and not political journals. This fact suggests the shocking lack of attention devoted to judicial activity by Canadian political scientists. Out of a total of ten articles to be reported on here,¹⁰⁸ only one could be described as mildly supportive of the Court's determination, five assumed a more or less non-partisan stance, while four were extremely critical of the final result.

Coming out in mild support of the Court's decision was A.S. Abel in the University of Toronto Law Journal.¹⁰⁹ As he explained his acceptance of the result:

I think the judgement gave the right answer. With decent deference to the expert opinion of professional economists, but also with a layman's pocket-book awareness of current price increases and a layman's recollection of the consequences of historic inflations, I could not fault legislators with the same sort of semi-sophistication for concluding

that inflation constituted an emergency or a fortiori, since it involved system breakdown not just sporadic dislocation, that it was of national concern...¹¹⁰

However Abel was critical of the emergency basis employed to uphold the Act, clearly preferring a more restrictive reading of national dimensions, a doctrine that he felt would have served to remove much of the ambiguity that the emergency test necessarily created. In this regard, he made certain to indicate that the referring government was as much at fault for the uncertain decision simply because it failed to ask the Court to deal with the more specific matter of the Anti-Inflation Guidelines and thus left the issue of the Act as applied largely unsettled. As stated, "The question of substance, is the program constitutional, was not asked or answered and may never be".¹¹¹

P.H. Russell was the only political scientist to respond to the decision. In an article prepared for the Canadian Public Administration,¹¹² Russell provided an interpretative analysis of the reference, taking account of pre- and post-trial political developments and results. He was also one of only a few commentators who devoted significant attention to the matter of interest group participation in the litigation. Although largely neutral in his approach to the subject, Russell made several incisive comments relative to the decision's overall implications. Most important, he made clear that the extrinsic evidence posed "a severe challenge" to the Supreme Court's jurisprudential style, noting that the use of this material

"became one of the most significant features of the case". He basically commended the CLC's presentations, characterising Lipsey's comparative arguments as "impressive" but finding his attempt to question the program's efficacy "a serious tactical mistake that made it easier for the Judges to discount the Lipsey brief".¹¹³ Viewing the Supreme Court as a "dispute processing rather than dispute settlement body", Russell found the political implications of the decision not that monumental. Both the provincial governments and the unions he pointed out were not seriously handicapped in future negotiations by the Court's ruling. Although generally supportive of the wide participation that the reference evoked, Russell approached this matter cautiously, concluding that:

For provincial governments, and even more for private interest groups, constitutional litigation is just one weapon that can be used to fight a larger campaign...as labour's approach to the Anti-Inflation case indicated, when these pressure groups litigate constitutional issues, they may be inclined to let the constitutional chips fall where they may for the sake of pursuing some short run advantage on an immediate policy issue.¹¹⁴

The 1977 issue of the Ottawa Law Review carried two short but interesting comments.¹¹⁵ In an article assessing the possible implications of the decision for the federal POGG power, J.A. MacKenzie concluded that the only novel feature of the Anti-Inflation ruling was the potential enlargement of "the circumstances justifying the temporary transfer of jurisdiction" to

Parliament under POGG. As stated, "What once took an emergency now takes a crisis and it would appear that little evidence is needed to establish the existence of a crisis".¹¹⁶ In a different type of assessment, N. Lyon viewed the judgements of Laskin and Beetz as representing "two distinct approaches to POGG" and "two distinct approaches to Canadian federalism". Laskin, he concluded, represents the more pragmatic view of the federal bargain, a view that takes its colours from the circumstances of the day. Beetz presents the classic French Canadian view that forces one to see that federalism "comes at a price", a view that offers, Lyon claims, the "first clear statement in a judicial decision of an alternative to the centralist concurrency model".¹¹⁷

A comprehensive treatment of the matter of extrinsic evidence in the reference was supplied by E.G. Hudon in the Canadian Bar Review.¹¹⁸ After presenting an in depth review of the materials that were put before the Court along with the majority's and minority's approach to them, Hudon concluded that the case supports the ever growing trend of breaking away from the British tradition of statutory interpretation and drawing closer to the United States model of using a broad range of materials in the construction and interpretation of statutes. In the same issue,¹¹⁹ French Canadian constitutional experts Herbert Marx and François Chevrete arrived at the surprising albeit qualified conclusion, that overall the decision represented

a decentralised ruling. As stated:

It has this effect insofar as the Court dismissed a very centralised orientated doctrine in favour of one that is less so oriented. Is this however, an illusion to be followed by disillusion?¹²⁰

The authors went on to make several significant comments, perhaps the most important of which was in raising the question of how one could actually go about challenging a matter such as double digit inflation. In concluding, they caution that the Court must be prepared to vigorously examine the issue of emergency at all times and not blindly accept the opinion of Parliament.

It was around this issue of blind acceptance of Parliament's warning or advice that the four critical articles to be assessed centered the majority of their arguments. In a well researched article,¹²¹ C. Tenenhouse examined the emergency test as enunciated in the reference. She concluded that Laskin's test "has little if any basis in Canadian Caselaw", making clear that in non-wartime conditions the level and onus of proof shifts considerably. As stated:

A rational basis was not sufficient criteria when unemployment was over thirty percent or when the country stood on the brink of a crippling strike. Why should it be adopted now? Proof of the existence of an emergency is but a small price to ask of Parliament. Failure to do so, like failure to leave the lid sealed on Pandora's Box, leaves only hope to the provinces.¹²²

In a very critical review in the Osgoode Hall Law Journal,¹²³ E.P. Belabola expressed similar sentiments. He submitted that the

imposition of "rational basis hurdles in the context of a vigorously contested crisis perception" rests upon a precarious constitutional foundation. On this basis, Belabola indicates what he considers to be the proper signal to be given in emergency situations as well as the suitable scope of judicial review to be employed by the courts. With regard to the need for a clear signal, Belabola comments that it is the "elected members of Parliament and not the Courts" who should assume the political responsibility of advising Canadians that the government intends to invoke special measures to attack a national emergency. He finds the rational basis test to be not only an overly restrictive view of judicial self-restraint but a test that has no place in a federal-provincial jurisdictional dispute. As stated:

...this could become a means by which the judiciary could slide into a total abdication of their responsibility as constitutional umpires and worse, would render the division of powers in our constitutional structure a dead letter...in the instant reference there was mention of the Supreme Court of Canada as the guardian of constitutional integrity. Perhaps on another occasion this ideal will be realised.¹²⁴

In the same journal,¹²⁵ a novel approach closely related to that of N. Lyon was taken by French Canadian critic P. Patenaude. As he framed the basis of his argument:

Two diametrically opposed views of Canadian federalism and the national dimensions doctrine underlined the two principle judgements of the case; Chief Justice Laskin's judgement reflected a centralist political philosophy combined with a common law lawyers empiricism and lack of limpidity, while Justice Beetz classical federalist philosophy, more akin to the

efforts of the Judicial Committee of the Privy Council to protect local states autonomy and to R.C. Wheare's ideal of a pure federal state, was expressed with an effort at rationalisation characteristic of one trained in the civil law system.¹²⁶

3 On this basis, Patenaude characterised the majority decision as one that ignores the essential two nations view of confederation as well as the two hundred year battle of French Canadians to gain control of their fields of jurisdiction. To be sure, political reactions were not exclusively confined to the press.

In one of the most perceptive comments on the decision, P.W. Hogg presented an in depth legal analysis of the Court's reasoning with particular attention paid to the matter of factual proof in constitutional cases.¹²⁷ Characterising the reference as a text book example of a case where legislative facts were relevant, Hogg asserts that it does not seem sufficient for a Court to merely "cite verbal tests without also making clear the manner in which the tests are applied, beyond legal jargon". He finds it difficult to conclude that a general concern about inflation supported by figures from Statistics Canada can of themselves form the framework of a rational basis. Hogg maintained that even if they could be viewed in this manner, it would seem appropriate for the Court to deal with Lipsey's analysis of them. Without taking the CLC study into account he asserts, one can only conclude that in the Court's eyes "a virtually irrebuttable presumption that facts necessary to justify the validity of federal emergency legislation do exist".¹²⁸

Taken as a whole, the reactions of the press, the academic community and the participants themselves make clear that the issues presented by the Anti-Inflation reference were not as clear as the federal government would have had everyone believe. Whether approaching the issue from a strictly legal or broader political point of view, doubt and uncertainty pervaded most post-decision comments. Perhaps more important, the comments indicate that the Supreme Court of Canada is viewed as more than a mere legal tribunal that impartially applies abstract legal answers to abstract legal questions. To most commentators, the Court assumes a position, if not at the centre of our political system, at least in certain circumstances one very close to it. In this way, post decision comments inadvertantly point to the need for the judiciary to recognise this role and assume the burdensome responsibilities that it necessarily implies.

Continued Pressure

The Anti-Inflation decision, rather than ending debate over the issue of wage and price controls, merely served to redefine both the political and legal nature of the struggle. In declaring the Act intra vires, the Supreme Court forced organised labour to focus its attention upon attempting to modify the application of its provisions. It was largely the CLC that took up the ongoing political conflict. Its tripartite proposals of early May, as already indicated, provided Congress with a ready made issue upon which to proceed in this regard. Indeed, the very day

that the Court decision was announced, the CLC was presenting a discussion paper outlining its view of tripartism to the federal government. In the months following this formal presentation, Congress met with federal representatives on several occasions to discuss an expanded economic decision-making role for organised labour.

It should be noted, however, that the issue of tripartism quickly became a dead letter in the ongoing wage control campaign due to the influence exerted by several important factors. The general implication of the Supreme Court's decision itself was to render a clear definition of the federal government's non-emergency economic decision-making powers and responsibilities impossible. As a CLC economist noted:

We might have hoped that in losing on the question of the Anti-Inflation Act's validity, the Court would give support to a general increase in the economic decision-making authority of the federal government. This would simplify getting certain parts of the Manifesto accepted. Unfortunately, the Court has not provided any sanction for a non-emergency expansion of the federal power...129

Without a clear statement, and, most important, without a definite sanction expanding federal authority, continuing talks between the government and the CLC proceeded in the dark on largely uncharted waters. Also important in the demise of the CLC's hope for a greater voice in the country's economic affairs was the hostile reaction that the tripartite proposals evoked from most affiliates. Realising that any form of tripartism meant an inevitable reduction in local decision-making authority, CLC affiliates were not

prepared to hand over to their representative organisation a free mandate to move in this area.

In anticipation of legal defeat, however, Congress made certain to develop more than one alternative course of action. At the same May convention where tripartism was made an issue for further study, the CLC was granted a broad mandate to organise and stage a protest strike on the issue of wage and price controls, a mandate ultimately interpreted as the right to hold a one day work stoppage across the country. Throughout the summer and early fall of 1976, the "general strike" issue served as an effective publicity device drawing attention to the CLC cause. On October 14, Congress made good on its promise and staged a moderately successful one day protest in recognition of the first anniversary of wage and price controls.

On a more positive note, the CLC announced in late 1976 the introduction of "Phase Three" of its continuing pressure campaign. On March 31, 1977 most of the initial agreements made between the provinces and the federal government on the matter of controls were due to expire. With this date in mind, the CLC began a vigorous pressure lobby at the federal, provincial, and municipal levels in an attempt to convince "individual members of Parliament, members of provincial legislatures and municipal politicians...of the necessity of scrapping the Anti-Inflation Board".¹³⁰ Its ultimate success is difficult to assess; it being impossible to relate provincial decisions to opt out

with specific CLC pressure tactics. One can only list the dissenting provinces which included Quebec's withdrawal on January 14, Prince Edward Island's opting out on March 30, and Saskatchewan's refusal to continue controls after September, 1977.

While it was the CLC who was mainly responsible for spearheading the ongoing political fight, further legal battles were instituted exclusively by local unions adversely affected by specific AIB rulings. Most significant among several additional court tests, was that begun by the employees of the Manitoba Liquor Commission who, on appeal to the Supreme Court of Canada,¹³¹ succeeded in having declared ultra vires the agreement made between the government of Manitoba and the government of Canada which purported to give the Manitoba government authority to impose federal wage guidelines on its public employees. The Court's decision to uphold the Union's claim on the ground that the Manitoba agreement contained no specific clause stating its retroactive application to the wage settlements of public employees, produced several immediate benefits. Most clearly, it overruled an AIB ruling that rolled back the Union's wage increases. More broadly, the decision placed in limbo the status of Manitoba's relation to the federal program, a development which no doubt lent support to the CLC Phase Three campaign. This latter benefit was to be short lived, however, as the newly elected government of Stirling Lyon announced that one of its top priorities

would be to introduce legislation to counteract the Supreme Court's decision on rollbacks concerning public employees.

Two less successful court tests were instituted before the Federal Court of Canada by the Professional Institute of the Public Service of Canada.¹³² In the tests, the applicant was seeking writs of mandamus and injunction; the first to force Treasury Board to enforce a wage settlement made in its favour; the second to restrain the AIB itself from requesting an administrative tribunal from acting on arbitral awards rendered by the Public Service Staff Relations Board. The applicant basically claimed that the Anti-Inflation Act did not apply to an arbitrator's award made in compliance with the Public Service Staff Relations Act. In both cases, the Federal Court sent the issues back to the political arena on legal technicalities, declaring it had no jurisdiction or authority to grant the remedies sought in this instance.

Several unions attempted to utilise the threat of legal action to aid their cause in political channels. The Canadian Union of Public Employees and the Ontario English Catholic Teachers Association both stated their intention to study legal remedies in their continuing battle against Ontario's retroactive legislation introduced to replace its initial agreement with the federal government.¹³³ Upon consultation with legal counsel, however, they were informed that no discernible loopholes appeared available for a court test. The issue was subsequently dropped. More successful were the actions of two major

Newfoundland car dealerships. Both announced in mid-August of 1976 that they would stop at nothing short of a Supreme Court ruling to protest and undo an adverse AIB ruling ordering the rollback of pay increases accompanied by a fine of \$50,000.¹³⁴ With this solid legal threat behind them, the dealers then appealed to the Review Board where the matter was finally settled in their favour.

To be sure, one of the most appealing aspects of legal action is the fact that a court ruling rarely ends the entire debate over a specific issue. Interest groups can thus appeal to the legal arena without feeling that they may be making their final stand against the matter in dispute. Although it met with an adverse ruling from the Supreme Court of Canada, the CLC was not inhibited to any great extent in its ongoing campaign against wage and price controls. Indeed, from the standpoint of improving labour's image as a legitimate participant in the political process, the Supreme Court ruling inadvertantly aided a major feature of Congress's ongoing cause. It must be remembered, however, that these various benefits merely represent what was described earlier as "selective inducements". In most instances they are no substitute for a favourable reception in the judicial arena. The willingness to give a full hearing to both sides in a dispute and to make clear the reasons for judgement are the factors that truly serve to make the legal arena an attractive, viable alternative to public interest groups on a continuing basis. In this regard, the CLC's treatment by the Supreme Court of Canada was certainly less than satisfactory. The effects upon Congress's future desire to pursue some of its demands through legal channels remains to be seen.

NOTES

1. The Globe and Mail, May 6, 1975, p.1
2. The Globe and Mail, May 8, 1975, p.1
3. See generally, Canadian Labour, Volume 20 (December, 1975), p.26
4. The Globe and Mail, May 9, 1975, p.8
5. The Globe and Mail, May 9, 1975, p.B-1
6. Canadian Labour, Volume 20 (September, 1975), p.1
7. Bill C-73, The Anti-Inflation Act, Preamble
8. See generally, J.C. Nelson, "The Anti-Inflation Act: A Golden Opportunity for Labour" Osgoode Hall Law Journal, Volume 14 (1976) pp.730-32
9. The Globe and Mail, October 14, 1975, p.1
10. The Globe and Mail, October 16, 1975, p.13
11. Canadian Labour, Volume 20 (December, 1975), p.25
12. Ibid., p.27
13. The Labour Gazette, (November, 1975), pp.794-97
14. The Globe and Mail, October 24, 1975, p.1
15. Proceedings: The House of Commons Standing Committee on Finance, Trade and Economic Affairs, November 18, 1975, pp. 70:30-70:32.
16. Ibid., p.70:39
17. Ibid., p.70:44. At this point, a note on the reference procedure seems in order. Unlike the United States where definite provision is made in article three of the constitution confining Federal Courts to matters that involve either a case or controversy, the Canadian judiciary has never been limited by such restrictions. Both the federal Parliament and provincial legislatures can refer questions of law to the judiciary for the purpose of attaining an advisory opinion. The procedure has been used almost exclusively to

settle constitutional questions of the jurisdictional variety. In theory, the judgements rendered in this fashion are only advisory but in practice, they are treated with the respect due to ordinary decisions. However, it is the advisory nature of the reference procedure that marks its distinctive flavour. Unlike ordinary litigation, references do not constitute so-called "concrete cases at law." In a reference, there is no specific actual fact situation nor are there rival litigants in the true sense of the term. These features stand behind the most common criticism levelled at the process, namely, its abstractness. It is asserted that a court cannot properly decide on the validity of legislation unless it is conversant with the factual context in which it operates. The problem of abstractness can be overcome, however. The referring government must be careful to precisely define the issues presented, while counsel representing interested parties in oral hearings must make every effort to present all relevant factual material. Unfortunately, these criteria have been rarely met in the Canadian context. On this issue see generally, B.L. Strayer, Judicial Review of Legislation in Canada (Toronto: University of Toronto Press, 1968), pp.182-205.

18. Proceedings, Op cit. p.70:49
19. The Globe and Mail, March 20, 1976, p.1
20. The Globe and Mail, March 24, 1976, p.1
21. Canadian Labour, Volume 21 (June, 1976), p.3
22. Ibid., p.6
23. The Globe and Mail, March 23, 1976, p.1
24. See generally, D. Kwavnick, Organised Labour and Pressure Politics. (Montreal: McGill-Queen's University Press, 1972), Chapters 3-5
25. It has been generally conceded that the persistence of private interests in attempting to challenge the constitutional validity of the Anti-Inflation Act through normal litigation stood in back of the federal government's decision to refer the matter to the Supreme Court. As CLC legislative director Ron Lang pointed out in personal correspondence,

"I know there was concern in government circles that the program was gradually being undermined because of arbitrator's awards, particularly in the major industrial province. To buoy up the Anti-Inflation program which had become a nightmare of administrative bungling and to restore public confidence in the federal initiative, the constitutional issue had to be resolved. Had there been no speedy resolution, there would have been a long legal battle in the lower courts. In all probability, trade unions would have successfully breached the compensation guidelines while the courts were seized with the question."

26. Unless specific citations are given, the information in this section was garnered through personal correspondence with Maurice Wright Q.C., and CLC employees.
27. Letter, Maurice Wright to Joe Morris, November 28, 1975, p.10
28. Ibid., p.15
29. Maurice Wright, personal correspondence with the author
30. Canadian Labour Comment, (February 27, 1976) p.1
31. Factum of The Canadian Union of Public Employees, pp.2-3
32. Factum of The Renfrew County Division, District 25 Ontario Secondary School Teachers Federation, pp.4-10
33. Internal Memorandum, Ron Lang to Joe Morris, March 8, 1976
34. Université de Montréal economist Rodrigue Tremblay; one of those who attended all pre-trial economic meetings, indicated that he would attempt to write an article on the issue of economic emergencies "which should be of some interest to the Supreme Court should it accept Mr. Wright's proposition to consider economic data and testimonies." Letter, Rodrigue Tremblay to Ron Lang, March 18, 1976.
35. Letter, Maurice Wright to Ron Lang, April 5, 1976
36. The information on the extrinsic evidence issue was obtained from Maurice Wright in personal correspondence with the author.
37. Letter, Maurice Wright to Ron Lang, April 7, 1976

38. Letter, Maurice Wright to Ron Lang, March 25, 1976
39. Letter, Maurice Wright to Ron Lang, April 7, 1976
40. Letter, Maurice Wright to Ron Lang, April 22, 1976
41. See generally, "Social and Economic Facts: Appraisal of Suggested Techniques for Presenting them to the Courts" Harvard Law Review, Volume 62 (1948) and P.W. Hogg, "Proof of Facts in Constitutional Cases" University of Toronto Law Journal, Volume 26 (1976)
42. H.W. Bikle, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action" Harvard Law Review, Volume 38 (1924), p.6
43. Supra, see pp. 28-29.
44. See generally, L. Jaffe, "Questions of Fact" Harvard Law Review, Volume 69 (1956), J.M. Barnett, "External Evidence of the Constitutionality of Statutes" American Law Review, Volume 58 (1924), W. Denman, "Comment on Trials of Fact in Constitutional Cases" American Bar Association Journal, Volume 21 (1935), "Consideration of Facts in Due Process Cases" Columbia Law Review, Volume 30 (1930), "The Presumption of Constitutionality Re-Considered" Columbia Law Review, Volume 36 (1936) and K.L. Karst, "Legislative Facts in Constitutional Litigation" in, P. Kurland, ed., The Supreme Court Review (Chicago: University of Chicago Press, 1960).
45. "Social and Economic Facts: Appraisal of Suggested Techniques for Presenting them to the Courts" op cit., p.694
46. (1921) 256 U.S. 135, 154
47. P.W. Hogg, op cit., p.405
48. (1976) 2 SCR 373
49. Ibid., 391
50. Ibid., 423
51. Also granted status in the reference were:

The Ontario School Teachers Federation
 The Ontario Secondary School Teachers Federation
 The Ontario Public Service Employees Union

The Canadian Union of Public Employees
The United Steel Workers of America
Canadian Union of Public Employees, Local 1230
The Renfrew County Division District 25.

52. Factum of the Attorney General for Canada, p.2
53. Ibid., p.5
54. Ibid., p.5
55. Factum of the Attorney General for Ontario, p.9
56. Appendix to Factum of the Canadian Labour Congress, p.16
57. Ibid., p.17
58. Ibid., p.20
59. Ibid., p.36
60. Ibid., p.34
61. Ibid., pp.21-22
62. Ibid., pp.22-27
63. Ibid., pp.27-28
64. Ibid., pp.28-30
65. Ibid., pp.30-39
66. Ibid., pp.39-60
67. Ibid., pp.62-63
68. Additional Materials, Attorney General for Canada, p.26
69. Additional Materials, Attorney General for Ontario, p.5
70. Ibid., pp.8-9
71. Ibid., p.4
72. (1976) SCR 405
73. Ibid., 420
74. Ibid., 422
75. Ibid., 423-424

76. Ibid., 426

77. Two additional difficulties posed by the reference procedure may be noted. The executive alone determines when questions should be referred to the courts. This gears the time-table to suit the government's interests. In the Anti-Inflation reference, the federal government was able to delay litigation by way of the reference until its program had gained provincial support, a fact that no doubt strengthened its "national concern" argument. Moreover, references proceed within a tight time frame. In the Anti-Inflation reference, the questions were referred to the Court in mid-March and final submissions had to be filed by May 21. That the CLC was able to respond as fully and as competently as it did, attests to the advantages that well-organised interest groups can offer to the judicial process in Canada.
78. The question of admissibility of extrinsic evidence in constitutional references does not have an impressive history. At no time has the full Supreme Court been unanimous in approval of the liberalisation of the practice. Thus, one must distinguish between theory and practice when analysing this issue. In theory, the Court is not barred by any rules prohibiting extrinsic evidence in references. It is free to accept materials at its own discretion. In practice, however, the Supreme Court has taken a restrictive view. Only in the Eskimo reference, (1939) S.C.R. 104, did the Court take a liberal view toward extrinsic evidence. In that case, however, there was no specific dispute between federal and provincial legislation. In the Wartime Leasehold reference (1950) 2 D.L.R. 1, the Court allowed an economic analysis of the rental problem in Canada to be filed. However, no judge specifically referred to it in order to support the final position. Rinfret J, in fact, took the occasion to express his view that in a reference the Court should only look to the materials presented in the government's order. Moreover, the Court has been reluctant to ask for evidence in instances where little or none has been presented. The Farm Products reference, (1957) 7 D.L.R. 2d 257, provides a clear example in this regard. In the Manitoba Egg reference (1971) S.C.R. 689, although Laskin J admonished the parties for failing to provide relevant factual data, he did not insist that they should do so. He was the only member of the Court, it should be further noted, who

addressed the problem in this instance. On this issue see generally, F.E. Labrie, "Constitutional Interpretation and Legislative Review" University of Toronto Law Journal, Volume 8 (1950), pp.347-50 and B.L. Strayer, Judicial Review of Legislation in Canada (Toronto: University of Toronto Press, 1968), pp.177-80.

79. (1976) SCR 419
80. Ibid., 426
81. Factum of the Canadian Labour Congress, p.20
82. Appendix to Factum of the Canadian Labour Congress, p.50
83. (1976) SCR 425
84. Maurice Wright in personal correspondence with the author
85. No record of the oral hearings was kept. I base my assumption on reports of those who were present either as principle participants or merely as observers. Daily coverage of the hearings by the press was also helpful in this regard.
86. Letter, Maurice Wright to Ron Lang, June 4, 1976
87. Letter, Ron Lang to Maurice Wright, June 9, 1976
88. Factum of the Renfrew County Division, p.49
89. Factum of the United Steel Workers of America, p.19
90. Factum of the Ontario Teachers Federation, p.14
91. Factum of the Canadian Union of Public Employees, see especially, pp. 8, 21, 31-32 and 47-49
92. Factum of the Canadian Labour Congress, pp.30-32
93. (1976) SCR 468-472
94. The Globe and Mail, July 13, 1976, p.9
95. Letter, Ron Lang to Maurice Wright, June 9, 1976
96. Letter, P.W. Hogg to H. Soloway, July 21, 1976
97. I have attempted to be selective in my choice of editorials, assessing those that offered interesting

comments while attempting to give an indication of press reaction in different parts of the country.

98. The Globe and Mail, July 12, 1976
99. Ibid., July 14, 1976, p.6
100. The Toronto Star, July 13, 1976, p.B-4
101. The Citizen, July 13, 1976
102. The Vancouver Sun, July 13, 1976
103. The Winnipeg Free Press, July 13, 1976
104. The Edmonton Journal, July 13, 1976
105. Le Devoir, July 14, 1976
106. Ibid., July 15, 1976
107. Ibid., July 30, 1976, p.5
108. Again I have been selective, choosing articles that offered interesting comments and leaving out several that repeated similar positions to those already cited or merely provided in depth, legalistic interpretations. Among the articles not reported here are: P.N. MacDonald, "POGG: The Laskin Court in the Anti-Inflation Act Reference" McGill Law Journal, Volume 23 (1977) and R.B. Buglass, "The Use of Extrinsic Evidence in the Anti-Inflation Act Reference" Ottawa Law Review, Volume 9 (1977).
109. A.S. Abel, "The Anti-Inflation Judgement: Right Answer to the Wrong Question" University of Toronto Law Journal, Volume 26 (1976)
110. Ibid., p.-45
111. Ibid., P.450
112. P.H. Russell, "The Anti-Inflation Case: Anatomy of a Constitutional Decision" Canadian Public Administration, Volume 20 (1977)
113. Ibid., p.648
114. Ibid., pp.663-4

115. J.A. MacKenzie, "The Anti-Inflation Act and Peace, Order and Good Government" and N. Lyon, "The Anti-Inflation Act Reference: Two Models of Canadian Federalism" Ottawa Law Review, Volume 9 (1977)
116. Ibid., p.174
117. Ibid., p.182
118. E.G. Hudon, "Case Comment" Canadian Bar Review, Volume 54 (1976)
119. H. Marx and F. Chevrette, "Case Comment" Canadian Bar Review, Volume 54 (1976)
120. Ibid., p.738
121. C. Tennehouse, "The Emergency Doctrine and the Anti-Inflation Case: Prying Pandora's Box" Manitoba Law Journal, Volume 8 (1977)
122. Ibid., p.456
123. E.P. Belabola, "Disputed Emergencies and the Scope of Judicial Review: Yet Another Implication of the Anti-Inflation Act Reference" Osgoode Hall Law Journal, Volume 15 (1977)
124. Ibid., p.417
125. P. Patenaude, "The Anti-Inflation Case: The Shutters Are Closed but the Back Door is Wide Open" Osgoode Hall Law Journal, Volume 15 (1977)
126. Ibid., p.397
127. P.W. Hogg, "Proof of Facts in Constitutional Cases" University of Toronto Law Journal, Volume 26 (1976)
128. Ibid., p.406
129. Internal Memorandum, Baldwin to Morris, July 13, 1976
130. Canadian Labour Comment (January 28, 1977)
131. (1978) 79 DLR 1
132. (1977) 1 FCR 304 and (1977) 1 FCR 442
133. The Citizen, July 17, 1976
134. The Globe and Mail, August 19, 1976

Chapter 3

THE CANADIAN CIVIL LIBERTIES ASSOCIATION
AND THE FOUNDATION FOR WOMEN IN CRISIS'
PARTICIPATION IN MORGENTALER v. THE QUEEN

Pre-Trial Political Developments

In the United States, major social issues almost invariably find their way into the legal arena. Modern industrial relations, desegregation, pornography, abortion and environmental pollution are among the more prominent issues that have, at one time or another, tested the wisdom and judgement of the United States Supreme Court. In most instances, it has been the ordinary, individual litigant, primarily concerned with winning his own case and thereby furthering his own individual interests, who has permitted the courts and public interest groups to assess and comment upon these important public law questions. Only recently, for example, Allam Bakke provided the United States Supreme Court with an opportunity to rule on the constitutionality of so-termed affirmative action programs.¹

Although Canadian courts have not been as heavily burdened with the responsibility of deciding major social questions as have their American counterparts, the process by which such

issues have reached the judicial docket in Canada largely parallels the United States' experience. To provide the most notable example, it was a Montreal restaurateur who provided the Supreme Court with an opportunity to rule on the permissible scope of political discretion under the overriding doctrine of the rule of law.² In the case, the Premier of Quebec, Maurice Duplessis, used his political position to irrevocably cancel restaurateur Roncarelli's liquor licence simply because he had put up bail for members of the Jehovah Witnesses Sect. In upholding the plaintiff's action for damages, the Supreme Court majority expressed utter revulsion at this callous and unwarranted display of political power, making clear in natural law terms that all citizens must operate under and according to law. More recently, it was another Montrealer, this time a reputable and well known physician, who provided the Canadian judiciary with an opportunity to consider yet another major social question. The individual litigant was Dr. Henry Morgentaler. The issue he brought to the legal arena was Canadian abortion law and practice.

The overall sequence of events that collectively make up the "Morgentaler affair" are too involved and complex to allow for comprehensive treatment here.³ An attempt will be made, however, to briefly summarise the most significant legal features. Throughout the 1960's, Henry Morgentaler was an ardent advocate of and campaigner for liberalised abortion laws. As

President of the pro-abortion Canadian Humanist Federation, he persistently presented the pro-abortion cause to the federal government. With the establishment of his Montreal abortion clinic in 1968, Morgentaler's challenge to Canadian abortion laws took a more direct form. The clinic was neither approved nor accredited as required by s.251 of the criminal code. Morgentaler held a very liberal, personal view of the prevailing law, readily performing abortions for both medical and social reasons. In short, under conscientious compulsions he directly and consistently confronted the apparent meaning of the words of the law.

In opening his own abortion clinic, Morgentaler clearly took an abrasive political stand. Not surprisingly, he evoked a political response from the Quebec government. Following an unsuccessful attempt to convict Morgentaler of conspiracy to commit abortion in 1970, the government embarked upon more concerted and planned action in 1973. On August 15, seventeen Quebec policemen entered his clinic while an operation was in progress. His equipment and files were seized. Morgentaler, eleven patients and three assistants were arrested. Only Morgentaler was subsequently charged. On August 29, the Attorney General for Quebec, Jérôme Choquette, proceeded by means of preferred indictment to lay twelve charges of performing an illegal abortion against the Montreal doctor. An arraignment on six charges was held before Associate Chief Justice Hugesson on October 3. October 18 was set as the date for trial by judge and jury.

Morgentaler's defence proceeded from two main grounds: the traditional common law defence of necessity and the more novel "good Samaritan" defence embodied in section 45 of the criminal code. He basically argued that the operation was performed because he felt that his patient would have been placed in urgent actual danger had he neglected or refused to treat her. The essential facts as presented at trial may be summarised as follows. The patient was a twenty-six year old, black graduate student from Sierra Leone. She became pregnant while attending university in Montreal. She was described in court as having socio-economic problems, health problems and nervous anxieties. These were emphasised by the fact that she was unmarried and friendless in a strange city. She applied at various therapeutic hospitals in Montreal but was unable to find one to help her. In any event, she was unable to pay their exorbitant fees. In short, the patient's case was a textbook example of the problems that plague women under the ambiguous and restrictive abortion provisions of the criminal code. Several hospital employees referred her to Dr. Morgentaler. It was on the basis of the above facts that he decided to perform the abortion for a fee of eighty dollars. Trial judge Hugesson accepted the facts as grounds for invoking the defences advanced and he referred the matter to the jury as such. After a total of ten hours deliberation the jury returned a verdict of acquittal.⁴

At this point, however, the Morgentaler saga was only just beginning. The Attorney General wasted little time in announcing his intention to appeal the verdict. On November 17 he filed for appeal on fifteen points of law, arguing essentially that the trial judge erred in referring to the jury the two defences advanced by the defendant on the basis of the facts presented at trial. The Quebec Court of Appeal unanimously reversed the jury verdict of acquittal. It concluded that a properly directed jury would have found that Morgentaler's conduct, in not conforming to s.251(4) of the criminal code, did not meet the test of necessity allowed under the common law.⁵ Stripped of its legal verbiage, the decision amounts to an Appeal Court substituting its own view of the facts for that taken by a properly constituted jury. It should be emphasised that the reversal of a jury verdict of acquittal by an Appeal Court, while permissible in law at that time,⁶ was a procedure rarely employed in over one hundred years of reported cases. The Appeal Court also ordered trial judge Hugesson to impose sentence. Following Hugesson's initial refusal to comply with the order as well as an unsuccessful attempt by the defendant to have the order quashed, sentence was pronounced on July 25, 1974. Morgentaler was sentenced to eighteen months in prison to be followed by a three-year probationary period during which he was to be restricted to performing abortions in accredited or approved hospitals.

It was this shocking decision that resulted in the matter being appealed to the Supreme Court. Morgentaler presented the same basic defences along with a number of constitutional and civil libertarian arguments initially advanced at the first appeal. On the broader constitutional points, he was supported by the Canadian Civil Liberties Association (CCLA) and the Foundation for Women in Crisis (FWC), both of whom were permitted to intervene by the Chief Justice who clearly recognised that the appeal involved far more than the immediate interests of a Montreal abortionist. Indeed, the case raised a variety of important issues that had potentially far-reaching implications. If Morgentaler were unsuccessful in pleading necessity on the basis of evidence presented at trial, what would this mean for doctors and their patients in similar situations in the future? What would become of the traditional sanctity afforded a jury verdict of acquittal if the Appeal Court's decision were upheld? What was the operative effect of the Canadian Bill of Rights on Canada's prevailing abortion law? The case offered the Court a golden opportunity to assess and comment upon the unequal and unsatisfactory operation of that law. Overall, the appeal provided a direct opportunity to perhaps settle or at least clarify a controversial social and legal issue that had been the centre of a stormy debate in Canada for nearly two decades.

A brief recounting of this debate is in order to make clear the social and political climate in the years leading up

to the Supreme Court test. In 1953, Parliament revised Canada's abortion law for the first time since 1927.⁷ To say the least, the new law was extremely vague. It made no distinction between fetal viability and non-viability and it failed to define in a clear manner the requisite mental element. The individual doctor was solely responsible for deciding whether or not to perform an abortion. Most important, the new law denied practitioners accused of performing an illegal abortion the previously available defence offered by the child destruction clause of the criminal code. Under these circumstances, Canadian doctors were forced to interpret the law in a literal and therefore restrictive manner. The obstacles placed in the way of Canadian women seeking a legal abortion were overwhelming.

The new law stimulated a wide public debate on the issue. In 1959, Chatelaine Magazine spearheaded the pro-abortion cause by publishing the first Canadian article calling for an extensive liberalisation of abortion practice. At the same time, The University of Toronto Medical Journal conducted a symposium at which a number of distinguished physicians called for a more enlightened approach to the abortion issue. In the early sixties, the liberalisation of abortion laws position received the sympathetic attention of such respected bodies as the Canadian Medical Association and the Canadian Bar Association. Both the Toronto Globe and Mail and the United Church

Observer expressed their open support for the cause. By 1965 a variety of public interest groups had developed, in response to the politicisation of the abortion issue, and as De Valk points out:

By the end of 1966 a number of national organisations had indicated support for the amendment of the abortion clauses in the criminal code. These groups included the principal representative bodies of the legal and medical professions as well as the largest Protestant Church, the United Church of Canada. Their motives and solutions differed in details but their overall thrust was identical; they agreed on the need to prevent the evil effects of illegal abortions and on permitting abortions for the sake of the mother's health.⁸

Throughout these early debates, the federal government showed little active interest in the matter. The Pearson Liberals, in a minority situation and drawing largely upon the electoral base of Roman Catholic and anti-abortion Quebec, could not politically afford to take a definite stand of any kind.

Pressure continued, however, and eventually the government could no longer avoid entering the debate. In line with its general policy of reducing prohibitions in private and consensual sexual matters, the Pearson Liberals began preparing for reform of the abortion law in 1967. The official start of this legislative phase was marked by a series of hearings conducted by the House of Commons Standing Committee on Health and Welfare. Over a six-month period, the Committee was to consider three private members' bills as well as submissions from interested parties

who had either been invited to attend or had requested permission to submit briefs. In spite of this show of interest in public opinion, it became clear as the hearings progressed that the government had approached the issue with its mind already made up. The clearest indication of this fact came in December of 1967 when, in the midst of the Committee hearings themselves, the government introduced an omnibus bill detailing a list of proposed changes to the criminal code. The matter of abortion law reform headed this list of sweeping amendments. Although the hearings continued and eventually produced different recommendations from those contained in the so-termed "Trudeau package", it was the latter proposals that the government wanted and ultimately got accepted.

The proposed amendments were included in the criminal code as s.251.⁹ The performance of an abortion remained illegal except under special conditions. A legal abortion had to be performed by a qualified medical practitioner in good faith in an approved or accredited hospital. The practitioner had to receive the prior written consent of that hospital's therapeutic abortion committee who certified that continuation of pregnancy would or would be likely to endanger the woman's life or health. The new law contained a number of inherent problems and contradictions. In making it optional rather than mandatory for hospitals to establish therapeutic abortion committees, the law failed to ensure that a sufficient

number of badly needed facilities were going to be made available. In strictly defining the composition and basic operating procedures of abortion committees, the new law ensured that gaining access to legal abortions would be difficult and in some cases impossible. Most important, in neglecting to clearly define significant words and phrases such as "danger to life or health", the abortion law ensured a virtual plethora of varying and contradictory interpretations from those charged with applying its terms. In general, the amended law's ambiguous wording coupled with the administrative encumbrance of the therapeutic abortion committee made certain that its practical effect would be to severely restrict access to legal abortion services throughout Canada.

Predictably, the new law produced immediate dissatisfaction. Fearing for their own welfare, doctors and nurses quickly became divided and upset over the matter. Many refused to perform abortions simply because there were not clear on how far they could legally go in this area. This pervading lack of clarity also served to confuse many hospital boards and provided a ready-made weapon to be used in the incessant moral debate surrounding the abortion issue. In time, this debate pitted public hospitals against private hospitals, Roman Catholic doctors against those whose faith

did not interfere with their medical practices, pro-abortion groups against anti-abortion groups and the Catholic Church against most other denominations. In the process, the interests and needs of individual patients were consistently neglected.

The ongoing polemic was not confined to political and social issues. At its annual meeting in 1970, the Canadian Psychiatric Association passed a motion urging that abortion be removed from the criminal code and made a matter to be decided between a woman and her physician.¹⁰ In the same year, the Canadian Medical Association Journal published an editorial that stressed that "doctors should not assume the function of gatekeepers to decide which unwanted children should be allowed into this overpopulated world and which ones should not." In addressing itself to the prevailing abortion law and its operation, the editorial commented:

Very few, if any, of the applicants for termination of pregnancy are seen by the committees. If this procedure is subsumed under the practice of medicine, doctors have allowed society to force them into a position violating one of the most treasured principles in medicine, namely, that one does not make medical decisions without at least seeing the patient.

and further:

If the hospital abortion committee is really a judicial tribunal, society should be made aware that it is made up of people who have no training in using the law to see that justice is done. Further, the woman on whose fate the tribunal is deliberating has none of the legal rights and safeguards she would have if she were on trial in a court of law, namely, the right of counsel and the right of appeal from the decision.¹¹

The Association followed up this public statement by recommending at its annual convention in 1971, that abortion committees be abolished. Although not urging total repeal of the law, the CMA did stress that the provisions should only be applied to persons other than qualified or licensed physicians and facilities other than approved hospitals. The Association also made clear that it supported many non-medical reasons for termination of pregnancy.¹²

Critical academic and professional reaction appeared in a number of respected journals. In the Criminal Law Quarterly, Smith and Wineberg pointed up the very illegal nature of therapeutic abortion committees in the following manner, "Freed from the constraints of legal standards, committee members were able to base their decisions on all manner of personal biases."¹³ It should be noted that the article was

based on a survey of a wide variety of hospital committees conducted by the authors themselves. In the Canadian Family Physician, S.L. Smith characterised the law as making "a bizarre travesty of the doctor-patient relationship...by setting up boards to make decisions about patients they do not know."¹⁴ In the Canadian Hospital, Edward Wilson concluded that the "only practical solution is to eliminate the administrative encumbrance imposed on medical staffs and hospital administration by removal of s.231 (now 251) from the criminal code deleting the necessity of therapeutic abortion committees."¹⁵ In one of a number of articles written by medical professionals stressing the safety of current practices and procedures, Dr. Morgentaler detailed his personal observations in the Canadian Medical Association Journal.¹⁶ In addition to providing an account of exactly how his own vacuum suction method operates, Morgentaler summed up his experience in the following manner:

The complication rate of 0.48% based on 5641 reported cases is very low; there were no deaths, two cases of uterine perforation, 14 of incomplete abortion, 20 of infection, 1 of depression, no cervical lacerations, 27 patients were hospitalized. The advantages of this method are safety, simplicity, minimal blood loss and immediate recovery. It is preferable to the usual dilation and curettage, does not require general anaesthesia and can be used in small clinics or in hospitals on an ambulatory basis.

Open suggestions for reform of the prevailing law were by no means confined to the medical arena. In 1970, the United Church of Canada established a Joint Committee to study the issue. In its final recommendations, the Committee concluded that:

...the present sections of the criminal code, which require a hospital abortion committee to authorize the therapeutic abortion, are unjust. Our basic objection is that we question the right of any committee to intervene between a woman's careful decision and her right to act accordingly. 17

The government's own Royal Commission on The Status of Women in Canada conducted an indepth study of the many inadequacies of the abortion law. The Commission also looked to more liberalised abortion practices in Sweden and Great Britain. Ultimately concluding that "a law which has more bad effects than good ones is a bad law," the Commission recommended that:

...the criminal code be amended to permit abortion by a qualified medical practitioner on the sole request of any woman who has been pregnant for twelve weeks or less. We recommend that the criminal code be amended to permit abortion by a qualified medical practitioner at the request of a woman pregnant for more than twelve weeks if the doctor is convinced that the continuation of the pregnancy would endanger the physical or mental health of the woman or if there is a substantial risk that if the child were born, it would be greatly handicapped, either mentally or physically. 18

From a different perspective, P.C. Picher commented upon the constitutionality of s.251 in an article that appeared in the Criminal Reports, New Series. In a detailed analysis, utilising both Canadian and American legal and extra-legal sources, the author suggested that the prevailing abortion law could be found invalid on the grounds that it falls under provincial jurisdiction over hospitals as enunciated by s.92(7) of the BNA Act and under the "due process" protections offered by s.1(a) of the Canadian Bill of Rights. 19

In spite of this public outcry and clear expressions of sympathy for reform in both the academic and professional communities, the issue of abortion remained a taboo subject in official political circles. In 1973, for example, Dr. Morgentaler, only after writing countless letters to individual MPs, the Minister of Justice, the Minister of Health and Welfare, leaders of opposition parties, and the Prime Minister himself, approached pro-reformer Grace MacInnis (NDP Vancouver) to inquire about the possibility of changing the prevailing law. She responded pessimistically, indicating that the only way she could re-introduce the matter for discussion in Parliament was if "something newsworthy happened" such as a pregnant woman dying under horrible conditions.²⁰ One of the major factors behind this "hands off" attitude was the negative influence exerted upon the issue by the Minister of Justice himself. A staunch anti-abortionist, Otto Lang openly supported a restrictive reading of the law by all therapeutic abortion committees. As Watters makes clear:

In many public statements he attempted to impose his view of health on Canadian hospitals and physicians, rejecting what he called the social reasons for abortion and insisting that the law was interpreted too liberally in some centers of the country.²¹

In his own constituency in Saskatoon for example, Lang took a partisan stance against attempts to liberalise abortion committees, at one point attempting to use his influence to stop

federal funds allocated by Secretary of State Hugh Faulkner to a local pro-abortion group, the Saskatoon Women's Center. In light of these developments, it must be generally considered that perhaps the issue of abortion law reform is not one particularly well-suited to a viable solution in political channels. Individual MPs are more likely to react on the basis of personal prejudices in this area, ignoring the real problems that the law creates. If personal convictions don't blind them to the facts, local constituency attitudes would likely fill the void.

Social and political developments could be described as favourable at the time the abortion issue reached the Supreme Court in the form of Dr. Henry Morgentaler's appeal. Although the loud and continuous debate between pro and anti-abortion forces was a controversy the Court would wish to avoid, it must be remembered that other developments made clear that the issue of abortion law reform was not simply a political, emotion laden subject. Academic and professional comment was clearly leaning toward a liberalised view of prevailing laws. The government's own Royal Commission On The Status of Women had also recommended sweeping changes. The experience of the United States was still fresh. There the Supreme Court had invalidated several restrictive state abortion laws, declaring it a woman's prerogative in the first trimester of pregnancy to decide whether or not she wishes to terminate her

pregnancy. On the Canadian scene, the issue had been brewing in political channels for over a decade. Amendments to the criminal code in 1969 only served to confuse the issue even more, raising the level of public discontent to new levels in the process. The "post-sixty-nine" period in government circles was characterised by a "hands off" attitude. The department responsible for the law's operation was headed by a crusading anti-abortionist in Otto Lang.

The disastrous consequences of the law's practical day to day operation were widely publicised and well known. Indeed, in delivering his judgement in the first Morgentaler acquittal, Justice Hugesson of the Quebec Court of Queen's Bench intimated that the courts could serve as a badly needed impetus to reform in this area simply by making pointed comments on the matter. Following his own advice, Hugesson pointed out that "in most geographical areas" therapeutic abortions are not available due to the absence or lack of committees. In continuing, the Justice indicated that "many hospitals refuse to establish committees," that most require that the applicant be a resident in the area served by the hospital and that there is "a wide disparity" between the application of the law by different committees. In concluding, Hugesson emphasised that a well to do person applying through a private doctor is more likely to obtain an abortion in useful time than "a poor person applying to a hospital clinic." ²² These issues were brought to the Supreme

Court in able hands. Although preparations and organisation in no way matched the efforts of pro-abortion groups in the United States,²³ the CCLA, FWC and the appellant himself adequately presented the necessary facts for a receptive bench. The parties were represented by some of the more highly recognised criminal and civil liberties lawyers in the country.²⁴ Overall, the appeal followed upon a host of favourable circumstances and developments. Nevertheless, without a constitutionally entrenched Bill of Rights to rely on and with the consequent presumption in favour of constitutionality very much operative, the best that pro-abortion forces could realistically hope for was a measure of publicity for their cause. A favourable ruling was almost certainly out of the question.

The Supreme Court Decision:

In the United States, it has been suggested that in cases where a statute tends to infringe upon personal rights, the traditional presumption in favour of constitutionality does not often operate.²⁵ More specifically, in cases raising questions concerning civil liberties or basic rights, the assailant of a piece of legislation is said to enter litigation on equal terms with the countervailing infringing interests that he is opposing. By extension, an interest group which enters litigation of this nature, whether as

amicus curiae or by aiding individuals in whose name so-termed test cases may be initiated, is afforded similar treatment. This general principle and its important implications was clearly put by Justice Rutledge in the case of Thomas v. Collins. As stated:

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment...That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions...And it is the character of the right, not the limitation, which determines what standard governs the choice... Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly...Where the line shall be placed in a particular application...rests on the concrete clash of particular interests and the community's relative evaluation of both of them and of how the one will be affected by the specific restriction, the other by its absence. The judgement in the first instance is for the legislative body. But in our system where the line can be constitutionally placed presents a question this Court cannot escape answering independently, whatever the legislative judgement in the light of our constitutional tradition.²⁶

The overall effect of the above and similar pronouncements was to provide the Supreme Court in the United States with the special role of guardian of individual rights and freedoms, a role that in practical operation serves to permit concerned

citizens and organisations, who might not wield much influence in the normal political process, to meet with and challenge on an equal footing more powerful groups and interests.²⁷

The Supreme Court in the United States has a clear legislative role as final interpreter of the provisions of the Bill of Rights. As Justice Dickson of the Canadian Supreme Court emphasised, "The United States Supreme Court's task is to defend that constitution and interpret it. It is not a case of deciding whether they are going to be creative; that is their undoubted right and duty."²⁸ Thus, the U.S. Court is recognised as having considerable latitude when assessing and weighing conflicting interests in the light of detailed facts in order "to arrive at an answer for which interest is better founded in reason and more worthy of protection."²⁹ "In cases deciding questions of basic civil liberties, the United States Court possesses the authority to challenge the wisdom or judgement of legislative bodies by placing a different interpretation upon a particular situation. This legislative role is often enhanced in civil rights cases due to the frequency with which novel issues present themselves for consideration. Indeed, some cases leave the judges with considerable freedom to choose between competing choices of public policy without recourse to precedent. In these circumstances, interest groups are

clearly placed in a favourable position to influence or persuade the Court to see their point of view.

Due to the lack of a comprehensive constitutionally entrenched Bill of Rights, these general conclusions about interest group participation in civil liberties litigation have been and continue to be largely inapplicable to the Canadian situation. Rather than offering a forum where groups can meet and challenge government on equal terms, civil liberties disputes in Canada have frequently placed similar obstacles in the way of successful group participation in legal activity as are encountered in other forms of litigation. In the absence of a comprehensive Bill of Rights, the Canadian Supreme Court has been forced to develop a variety of alternative methods, mainly of the jurisdictional variety, to uphold basic rights and freedoms. These methods have generally proved satisfactory in a purely protective capacity but unsatisfactory in serving to delineate areas beyond the scope of governmental interference. Employing jurisdictional arguments, the Court may strike down a particular law but in doing so, it will often offer a variety of reasons for its action, a fact which makes the finding of a clear, binding conclusion about the final outcome somewhat difficult to say the least.³⁰ Accordingly, interest groups which are concerned with attaining clear and unambiguous decisions in civil rights litigation, are frequently frustrated in their efforts.

Even in areas where the Bill of Rights does operate, that is in relation to federal laws and institutions, the Canadian Supreme Court has been slow to adopt the active stance practiced by its counterpart in the United States. Doubtful about the exact scope of the "legislative role" that the Canadian Charter offers or permits, the Court has exhibited a similar deference to the judgement of Parliament in interpreting its provisions against impugned legislation. The greater latitude generally afforded courts when determining questions of basic rights or freedoms has failed to emerge as a fundamental operating principle in the Canadian context. The consequent effect upon the cause of interest groups concerned with achieving broad declarations from the Court regarding areas beyond the reach of governmental interference has been most severe.

The recent case of Morgentaler v. The Queen³¹ provides an opportunity to assess some of these features of the judicial process in Canada as they bear upon interest group performance in litigation involving civil liberties. In addition, the case provides an opportunity to point out the various benefits that accrue from a well-coordinated effort on the part of several interest groups concerned with supporting a similar legal position. The materials offered by both the Canadian Civil Liberties Association (CCLA) and The Foundation for Women in Crisis (FWC), rather than merely repeating

similar positions, advanced a wide range of arguments and factual data, which served to complement one another as well as the position put forward by the appellant himself. These presentations not only strengthened the position of the groups but provided the Court with a diverse range of arguments and information from which to make its final determination.

The analysis in this section is confined to one aspect of the Supreme Court's judgement. As indicated above, in various proceedings before both trial and appellate courts in Quebec, the appellant, in addition to arguing on his own behalf through the basic statutory defences offered by the criminal code, raised for consideration the broader issue of the operative effect of s.251 in light of the Canadian Bill of Rights.³² This issue was re-argued before the Supreme Court of Canada and on the matter the Court permitted intervention by a variety of non-parties.³³ After hearing submissions made by counsel for the appellant and counsel representing the CCLA and FWC, the Court announced after a mere five minute recess, that it did not need to hear the respondent Crown or other intervenants because in its opinion no case was made on the constitutional issues that required an answer. Chief Justice Laskin concluded, however, that it was important "to state why the attack on the validity and operation of Section 251 was rejected."³⁴ On all arguments put forward by the opponents, the Court adopted an excessively narrow and literalistic interpretation of the Bill of Rights a stance totally different from the broad interpretation offered

by the Supreme Court in the United States in deciding similar contentions in the abortion cases of Roe v. Wade and Doe V. Bolton,³⁵ 1973. I will first consider arguments offered by the appellant himself before proceeding to consider supporting contentions put forward by the intervening pro-abortion groups.

The appellant offered two arguments not dealt with by either the CCLA or the FWC. In a novel but admittedly weak primary argument, he urged that in enacting s.1(a) of the Canadian Bill of Rights, Parliament not only borrowed the actual text from the fifth and fourteenth amendments of the United States constitution, but the jurisprudence attached to the U.S. amendments as well. As stated, "Parliament chose to use the exact language...It was undoubtedly also aware of the whole area surrounding the due process clause."³⁶ In his factum, the appellant pointed to extensive statements and citations from the actual debates in the House of Commons and its committees at the time that the Bill of rights was being considered to the effect that the Supreme Court was expected to refer to the U.S. jurisprudence as "strong guides or illustrations for action."³⁷ In effect the appellant attempted to argue that United States' interpretations under the fifth and fourteenth amendments should carry significant weight in Canadian jurisprudence, with specific regard to the recent U.S. application of due process to the right of a woman to procure an abortion during the

first trimester of pregnancy.³⁸ In rejecting the submission, the Court made clear that while it:

...has found such decisions to be helpful in the past and remains receptive to their citation, they do not carry any authority beyond persuasiveness according to their relevance in the light of context, with due regard to the obvious differences that exist between the statutory Bill of Rights and the guarantees of the constitution of the United States.³⁹

In his second submission, the appellant argued that while abortion may have been viewed in the past as an evil from which women had to be protected due to the likely dangers it exposed them to, such dangers had now abated as a result of the introduction of new techniques such as the surgical suction method practiced by Dr. Morgentaler.⁴⁰ On this issue, the FWC submitted as an appendix to its factum, a study prepared by Professor Cyril Means entitled The Phoenix of Abortional Freedom. The arguments raised therein expressed the view that anti-abortion legislation could no longer be supported as being for the protection of a pregnant woman's health which was the initial intent of legislatures in both the United Kingdom and the United States. It should be noted that this was the view adopted by the majority of the U.S. Supreme Court. In answer, the Canadian Court argued that the

health viewpoint was much too restrictive of what must have been Parliament's actual intent in enacting s. 251, that specifically, Parliament must have viewed abortion as "socially undesirable conduct subject to punishment." As stated:

That was a judgement open to Parliament in the exercise of its criminal law power, and the fact that there may be safe means of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. 41

Although the appellant raised additional points on the Bill of Rights issue,⁴² they were generally dealt with more fully in the supporting arguments offered in the factum presented by the CCLA. The Association submitted that s.251 was rendered inoperative by virtue of s.1(a), 1(b) and 2(e) of the Canadian Bill of Rights because its practical application subjected women to various forms of unequal and thus unfair treatment. The judge's overall assessment of the contentions raised and the evidence proffered in their support, reflects the view of a Court inhibited by the limitation, albeit in part self-imposed, of not being able to rest its interpretative authority upon the basis of a constitutionally entrenched Bill of Rights.

The CCLA insisted, in perhaps its most important submission, that the exemption provided for under sub-section 4 of 251 operates so as to create a denial of equality before

the law and protection under the law in contravention of s.1(b) of the Bill of Rights. It argued that making it permissive rather than mandatory that hospitals establish therapeutic abortion committees and in stipulating the minimum size of such committees, the sub-section operates unequally in rural areas, in areas where no committees have been established and in relation to the economic status of individual women.⁴³ The CCLA further submitted that in enunciating an ambiguous standard subject to unavoidable variances in interpretation by different committees, the sub-section operates in such a way as to:

...deny to women who reside in one area in which the therapeutic abortion committee uses one interpretation, while making available to other women who reside in another area in which the therapeutic abortion committee uses another interpretation, the opportunity to bring themselves within the exemption in s.251.⁴⁴

Overall, the brief asserted that a scheme which provides exemption from criminal sanction, "must nationally establish uniform standards and procedures that would enable all Canadians to equally avail themselves of its provisions in order that its construction be consonant with the Bill of Rights."

In support of its legal contentions, the CCLA proffered a variety of factual data to indicate "the lack of access to the scheme in various parts of the country" and to make clear that the scheme is indeed interpreted differently by different

hospital committees. The Association indicated (making certain to point out that Hugessen J. had taken note of similar facts in the first trial), that:

1. No "approved" hospitals exist in Quebec;
2. Of 210 hospitals in Quebec, only 23 have "accredited" committees;
3. Almost all of these are located in Montreal;
4. Even in those established, there is a wide variance in the practice and application of the law;
5. Most of the hospitals require that the applicant be a resident of the area served by the hospital;
6. A well-to-do person using the services of a doctor in private practice is more likely to obtain an abortion by an approved committee than is a poor person applying through a hospital clinic;
7. As between provinces there is a wide variance in the number of abortions practised;
8. Out of 903 general hospitals in Canada only 261 have established approved committees.⁴⁵

The CCLA also brought new evidence to bear upon the issue by presenting data collected in a survey conducted specifically for the litigation, as well as from information gathered by the Association from the Assistant Deputy Minister of Health for Newfoundland, the Minister of Social Affairs for Quebec, the Minister of Health and Social Development for Alberta and the Department of National Health and Welfare. The results of the CCLA survey underlined the varying interpretations placed upon s. 251(4) across the country and indicated specifically that opinions differ on the following issues: , when

pregnancy could not be terminated; the "proper" interpretation to be given the key phrase "danger to life and health"; the actual procedures employed in committee formation and deliberation; specific policies regarding teenagers; special conditions that women must agree to if they wish to have an abortion performed; and the fact that certain hospitals have adopted restrictive practices due to local public or political pressure.⁴⁶ It should be noted that the FWC brief, based on information gathered over several years, supplemented CCLA data by providing new evidence on factors affecting the availability of abortion in Canada.⁴⁷

In answer to these submissions, Chief Justice Laskin maintained that the CCLA was asking the Court to arrive at a conclusion about what would constitute an equal distribution of services across Canada "so as to constitute equality before the law," a conclusion that would necessarily require the court to assume a legislative role or to strike down s. 251 in its entirety. He made clear that this "reach for equality" is grounded upon "judicially unmanageable standards." As stated:

I do not regard s.1(b) of the Canadian Bill of Rights as charging the courts with supervising the administrative efficiency of legislation or with evaluating the regional or national organisation of its administration...⁴⁸

The Court's unwillingness to enter its own interpretation of the section is made clear in Laskin's concluding remarks on these submissions:

Both the prohibition in s.251 and its relieving terms are general in their application; and in qualifying the prohibition against the intentional procurement of a miscarriage by a requirement of certification of likely danger to life and health by a medical practitioner and interposing the safeguards of a medical screening committee and performance of abortion in an accredited or approved hospital, Parliament has made a judgement which does not admit of any interference by the courts... Any unevenness in the administration of the relieving provisions is for Parliament to correct and not for the Courts to monitor as being a denial of equality before the law and protection of the law.⁴⁹ (emphasis added)

The CCLA submitted a variety of contentions under the so-termed "due process" protections offered by the Bill of Rights; sections 1(a) and 2(e). The Association contended that there was a denial of due process in the failure of Therapeutic Abortion Committees to provide adequate procedural safeguards whereby an applicant may appear with counsel to plead her case and in the failure of s.251(4) "to ensure that an applicant may obtain reasons for the tribunal's decision." In general, the CCLA argued that since there was a right to obtain an abortion under certain circumstances without risking penalty, there was a corollary right "to a fair hearing in accordance with the principles of fundamental justice..."⁵⁰ The Court dealt quickly with these submissions in this fashion:

The short answer to them is that dispensations afforded by compliance with s.251(4) and (5) do not involve any issue of deprivation of a right which may require an opportunity to be heard with or without counsel. Nothing is being taken away under s.251(4) and (5), they simply permit the person to make lawful conduct which would otherwise be unlawful.⁵¹

Departing from the due process arguments for the moment, it is important to consider a novel although clearly debatable issue raised exclusively by the FWC under s.2(b), if for no other reason than to demonstrate the diverse array of contentions that a variety of interest groups might advance during the course of litigation. The Foundation claimed s.251 "abrogates, abridges and infringes the Canadian Bill of Rights by imposing and authorising the imposition of cruel and unusual punishment" due to the fact that it prevents a woman from having and a physician from performing an abortion and thus compels a woman by law to accept involuntary pregnancy."⁵² Laskin had little trouble in disposing of this submission. As stated:

...it ignores the contextual importance of the words impose and imposition. I am unable to agree that the mere prohibition of abortions save as permitted by s.251(4) and (5) involves any imposition of treatment, nor can it be said that a physician or other person who run afoul of the abortion law is subjected to cruel and unusual punishment if he is sentenced to a term of imprisonment for his criminal conduct. Council's submission here inverts s.2(b) of the Canadian Bill of Rights into a presumption against making conduct criminal. It is quite untenable.⁵³

To return to the CCLA's due process submissions, the Association offered two substantial contentions under s.1(a). It maintained that under the Bill of Rights, all individuals have an unqualified right to privacy and that legislation

with respect to abortion directly "touches upon security of the person."⁵⁴ Further, the CCLA asserted that this fundamental right to security was specifically infringed by s.251(4) because it puts forward a standard, "would or would likely endanger her life or health," one so vague "that men of common intelligence must necessarily speculate its meaning and differ as to its applicability," and which moreover "necessitates a subjective judgement dependent upon the training and insight of a particular physician..."⁵⁵ In support of this submission the Association detailed instances of this type of issue being resolved in favour of the individual in a number of U.S. cases, notably that of the People v. Barksdale decided by the Supreme Court of California in 1971.

Setting aside the issue of whether these specific contentions should or should not have held merit in this instance, the Court's answer to them is nevertheless of crucial importance for it strikes at the heart of the cause of interest groups making broad claims before the Supreme Court on matters directly related to civil liberties. As Laskin observed, the arguments raised the fundamental issue of whether or not the Canadian Bill of Rights can be read as inviting the Court to pass on the substantive quality of legislation and of the adequacy of procedural safeguards for protecting the individual's right to life, liberty, security of the person and enjoyment of property. In passing upon these vital issues

Laskin clearly summarised the strong institutional limitations placed upon the Court, limitations that could effectively serve to paralyse the efforts and aspirations of interest groups concerned with pursuing the protection of individual rights through judicial channels by invoking the provisions of the Canadian Bill of Rights. As stated:

This Court indicated in the *Curr* case how foreign to our constitutional traditions, to our constitutional law, and to our conceptions of judicial review was any interference by a court with the substantive content of legislation. No doubt, substantive content had to be measured on an issue of *ultra vires* even prior to the enactment of the Canadian Bill of Rights, and necessary interpretative considerations also had and have a bearing on substantive terms. Of course, the Bill of Rights introduced a new dimension in respect of the operation and application of federal law, as the judgements of this Court have attested. Yet it cannot be forgotten that it is a statutory instrument, illustrative of Parliament's primacy within the limits of its assigned legislative authority, and this is a relevant consideration in determining how the language of the Bill of Rights should be taken in assessing the quality of federal enactments which are challenged under section 1(a). There is as much temptation here as there is on the question of *ultra vires* to consider the wisdom of the legislation, and I think it is our duty to resist it in the former connection as in the latter. (emphasis added)

and further:

In a situation such as exists in Canada, where there is an exclusive national criminal law power and no constitutionally entrenched Bill of Rights, I am unable to agree that we would be warranted dividing the normal gestation period into zones of interest, one or more to be protected against state interference and another or others not... 56

It should be mentioned that in obiter dictum, Laskin ~~made~~ certain to point out that the Court did not intend to totally

restrict the overall applicable limits of s.1(a) by virtue of this specific decision. As stated:

I am not, however, prepared to say in this early period of the elaboration of the Canadian Bill of Rights upon federal legislation, that the prescriptions of s.1(a) must be rigidly confined to procedural matters. There is often an interaction of means and ends, and it may be that there can be a proper invocation of due process of law in respect of federal legislation as improperly abridging a person's right to life, liberty, security and enjoyment of property.⁵⁷

However, the extent to which this statement could be genuinely re-assuring to interest groups particularly concerned with civil liberties litigation is doubtful. One must consider whether this obiter was intended first and foremost to leave the door open to interest groups or individuals making similar claims in future litigation, or whether it merely represents the Court's own selfconscious desire to maintain its independence vis à vis Parliament. The two most certainly do not amount to the same thing. More important, one must also consider whether Laskin is speaking for himself in this obiter or for the Court as a whole.

Other factors served to inhibit the chances of the opponents of the prevailing abortion law in this case. One was certainly the general "cause celebre" atmosphere that surrounded the Morgentaler affair itself. An open advocate of civil disobedience, the appellant's individual case did not proceed as an ordinary prosecution. Morgentaler had been an ardent

campaigner for liberalised abortion laws since the early sixties. He publicly admitted to performing nearly 6000 abortions in the five years preceding his first trial. He had appeared on the nationally broadcast television show W5 to explain his position and draw attention to the abortion cause. Indeed, his campaign was often the meeting point for the ongoing and heated debate over the issue of abortion in the predominantly Roman Catholic Province of Quebec. No doubt, the Court was not prepared to place itself in the middle of this moral, political and social debate surrounding the individual cause or crusade of Dr. Morgentaler. As Justice Dickson put quite clearly in his opening remarks for the majority:

It seems to me to be of importance, at the outset, to indicate what the Court is called upon to decide in this appeal and, equally important, what it has not been called upon to decide. It has not been called upon to decide or even enter, the loud and continuous debate on abortion in this country between, at two extremes; those who would have abortion regarded in law as an act purely personal and private, of concern only to the woman and her physician, in which the state has no legitimate right to interfere, and, those who speak in terms of moral absolutes, and for religious or other reasons, who regard an induced abortion and destruction of the foetus, viable or not, as destruction of human life and tantamount to murder.⁵⁸

Proceeding on this basis, the Court's pervasive uneasiness was clearly displayed throughout the oral hearings on the constitutional issues in dispute; often in a hostile and reactionary

manner. Lawyers for the appellant as well as those representing the intervening interest groups met with an extremely negative reaction from the Court. Sheppard had his "knuckles rapped on many occasions" for referring to U.S. jurisprudence rather than Canadian or British common law,⁵⁹ while Flam was consistently reminded by Pigeon throughout his presentations on the constitutional points that it is Parliament's right to determine what is and what is not evil. At the conclusion of his argument, Laskin characterised Flam's points as "pushing unnecessarily" while Pigeon brashly commented that some remarks "were an insult to us."⁶⁰ The CCLA, stressing the issues of equality before the law, varying procedures and the lack of uniform rules, and the FWC who emphasised the matter of cruel and unusual punishment and the equal treatment issue as well, both had their opportunity to try and convince the Court on October 4. As the Globe reported, Greenspan's points "met with little enthusiasm from the bench and he was interrupted by questions from the judges 23 times during his 55 minute argument."⁶¹ At one point his inequitable application argument clearly raised Martland's temper and adverse questioning forced him to retreat and attack from a different angle.⁶² On the issue of equality before the law, Greenspan was asked if women should have the right to hire lawyers to appear before therapeutic abortion committees. He responded that he only wished to establish the right to appear. To this Dickson remarked that perhaps the "foetus

should have a right to be represented by a lawyer."⁶³ On the cruel and unusual punishment grounds, FWC counsel Clayton Ruby did not fare much better. In raising the matter of "compulsory pregnancy" in this regard, Martland roared "Whoever heard of compulsory pregnancy?", quickly adding that it was not unusual for women to bear children.⁶⁴ Treatment at the hands of the Court was neither congenial nor responsive.⁶⁵

Before proceeding to consider post-trial reactions and political developments, it should be noted that the Court was equally unresponsive to the defences put forward in Morgentaler's own behalf. In a 6-3 decision, the Supreme Court upheld the Appeal Court's verdict of guilty. The majority opinion, while indicating in a vague manner its acceptance of the necessity defence in principle, concluded that in the Morgentaler case itself there was a total lack of evidence showing exceptional circumstances. Only a minority of the Court made up of Laskin, Spence and Judson was prepared to fully accept the defence of necessity on the basis of the evidence submitted at trial. Overall, the decision added yet another ambiguous chapter to an already unclear subject matter. In practical terms, it could only serve to make Canadian doctors even more wary when confronted with the decision of whether or not to perform a technically unlawful abortion on a woman coming to them in obvious distress.

Judicial restraint is an essential feature of the legal process. As Frankfurter states, "a court has no greater duty than the duty not to decide, or not to decide beyond its circumscribed authority."⁶⁶ It is generally conceded that a court should

refrain from active adjudication where an issue presents itself enmeshed in larger public issues beyond the reach of judicial remedy or investigation. However, the principle of restraint, when followed too closely, can often exert a harmful influence in its own right. In no area is this more true than that of civil liberties. Here, it is often the courts who hold the cause of liberty or justice in their hands, to withhold or dispense. Justice would appear to necessitate a relaxation of the principle of judicial restraint in this area to allow a court to distinguish situations as they arise on the facts in concert with the relevant legal terms provided by either statute or constitution.

In Canada, due to the lack of a constitutionally entrenched Bill of Rights, the Supreme Court has been reluctant to relax this traditional principle of judicial restraint. Wary of the interpretive latitude offered by a mere statutory charter, the Court has chosen, in most instances, to apply its provisions literally and thus restrictively. The detrimental effects upon interest groups concerned with achieving broad claims through the courts, as indicated by the Morgentaler decision and as will be subsequently indicated by the Lavell case, have been overwhelming. Even in presenting solid legal arguments backed by a wealth of diverse and relevant factual information, public conscious interest groups are invariably met with strict legal answers and the consistent theme that it is Parliament's plenary right to act as it did. A stronger case for an entrenched Bill of Rights would be difficult to offer.

Post-Decision Reactions and Political Developments

The immediate participants reacted to the Court's handling of the constitutional arguments with predictable disappointment. Sheppard, who had entered the legal battle with grave doubts about the possibilities of success, expressed his total frustration in the following terms:

I have never hesitated to take advantage of whatever was favourable, in doing my best to change public opinion whenever I could. To do my best to change judicial atmosphere, to use legal proceedings to change the society in which I live. I'm impressed by the American use of the judicial system to bring about social change. Our courts may be too reactionary to consider a move in that direction. The whole tradition in Canada is the British tradition, a totally technical dehumanised, anti-social tradition, to resolve technical problems in a technical way. Typically, we're perpetually told by the courts that the law is not just, that a situation they are called to deal with is a scandal, that the decision is not going to be fair, but that that's not their function, that it's all up to the legislator. In other words, they will look for almost any excuse to avoid making a socially oriented decision.⁶⁷

Henry Morgentaler, who had approached the hearings with optimism, voiced his despair and disillusionment quite bluntly:

The contrast between my expectations and the reality of the Supreme Court, with all the old judges, some who barely listened and the others who peppered the lawyers with impolite and downright hostile questions, was depressing...I felt that the judges had little concept of reality, that they were conservative, some hostile or biased and I found it difficult to believe that I could get justice from them.⁶⁸

In spite of the Court's unwillingness to deal directly with the social and political issues presented, reaction from the press to this aspect of the decision was still strong.⁶⁹ Leading the continuing debate in these areas was the avowed pro-abortionist Toronto Globe and Mail. In an editorial written prior to the Court's

Justice for permitting both the CCLA and the FWC to intervene on the matter of the law's constitutionality. As stated:

Allowing an intervention is an unusual step for the Supreme Court but it was thoroughly justified in this case and Mr. Justice Laskin demonstrated admirable perception. The Chief Justice obviously recognises that what is at stake is not just a fascinating legal issue but a broadly based and deeply felt social issue.⁷⁰

In a post decision editorial, the Globe was careful not to comment directly upon the Court's failure to deal with the group's submissions, but it did react strongly to the lack of attention paid to the previous jury verdict of acquittal. In line with past policy, the paper reserved its harshest criticism for the prevailing abortion law itself, commenting in biting language:

It is a poor law which permits the reversal of a jury's verdict; how often will this precedent be used? It is a poor law which allows right which are not provided in most hospitals in the country. It is a poor law that is so imprecise that six Supreme Court judges can totally interpret it one way and three totally the opposite way. Parliament should clean up the abortion law by taking it right out of the criminal code.⁷¹

The Globe found a surprising ally in its conservative counterpart the Toronto Star. Declaring that the Supreme Court decision "only demonstrates once again that Canada's abortion law is unfair and unworkable, in a word, unjust," the Star advocated that:

The Morgentaler case demands at least that the government change the present law immediately so that all Canadian hospitals, so largely supported as they are by public money, are required to establish abortion committees that operate effectively and fairly.⁷²

Also devoting extensive editorial coverage to the Court's decision was the Montreal Star. In its first

editorial on the matter, the Star detailed the many inadequacies in the prevailing law as they were highlighted throughout the Supreme Court hearings, concluding that "a law which invites criminality of that nature and potential death defies a rational defence."⁷³ In spite of its clear support for liberalised changes, the paper found the Court's unwillingness to assume an active stance "quite proper," declaring in no uncertain terms that "the duty to remedy clear inadequacies rests with Parliament." Somewhat in contradiction to this initial show of support for judicial restraint, however, the Star went on to commend Laskin's minority judgement as one that "offers hopeful evidence that his influence is leading to a wider and more humane approach to the law." As stated:

That opinion falls a good deal short of the practice of the United States Supreme Court of virtually creating new law to take account of changing social conditions. But it does reflect a willingness to look beyond the narrow meaning of the words in law books and to allow the country's highest court to take account of the social realities which exist outside its walls.⁷⁴

One of Montreal's leading French dailies, Le Devoir, took a diametrically opposite approach. Editorialist Claude Ryan not only came out in favour of the Court's decision to uphold the conviction against Morgentaler himself, but in addition, he vigorously supported its non-activist stance on the matter of the law's constitutionality. As stated:

"Les tribunaux existent, rappelait mercredi Me Claude Armand Sheppard, pour dire la loi non pour le faire.

C'est exactement ce qui vient de faire la cour supreme du Canada dans l'affaire Morgentaler. La cour supreme n'etait pas appelee a porter un jugement moral ou politique sur la valeur des lois actuelles en matiere d'avortement ou sur les ameliorations souhaitables. Elle devait seulement juger une cause particuliere a la lumiere des exigences tres claires de la loi qu'elle a voulue l'autorite souveraine du Parlement."⁷⁵

A number of papers provided less extensive coverage. The Vancouver Sun expressed fears that the decision would serve to deliver many unwillingly pregnant women into the hands of back street abortionists. It characterised the process of legal reform as one that "ended when John Turner left the justice ministry."⁷⁶ The Calgary Herald displayed some uneasiness with the Court's easy dismissal of the constitutional points, stating "that there is no question of the Court's right to act as it did; there is a question of legality being put above morality and the will of legal experts prevailing over that of the public."⁷⁷ The Ottawa Citizen also expressed critical comments about the Court's final determination on the Morgentaler conviction in particular and the abortion issue in general. It concluded:

"...the law is administered unjustly. There are cases where a pregnant woman whose health would be endangered by a birth has no ready access to a hospital committee. She is at a great disadvantage to other women who have. A law that operates so unevenly is unworkable. The practical solution is to remove abortion from the criminal code and make it available on demand with the usual safeguards regarding the women's health."⁷⁸

Reaction from the academic community was disappointingly sparse. In an article in the Osgoode Hall Law Journal, Bernard M. Dickens provided a detailed analysis of the sequence of events that made up the so-termed Morgentaler affair. In briefly commenting upon the CCLA's and FWC's presentations and their treatment by the Court, Dickens expressed chagrin:

"Chief Justice Laskin's vision of the Supreme Court's creative social role illuminates the potential of which the Court fell short in the Morgentaler case by taking an excessively narrow view of the issues raised, the relevant law and the role of the jury in determining the case." 79

A different view was taken by W. McHale in the Ottawa Law Review. In the only other article to comment upon the political or social ramifications of the Court's decision, she expressed support for the judge's non-activist stance, stating "that as a result of this decision, the abortion issue has been placed in the hands of the legislature where it rightfully belongs." 80

The most extensive academic reaction appeared in two books 81 dealing with the general subject of the abortion debate itself. Eleanor Pelrine, an active and long time supporter of the pro-abortion cause as well as Dr. Morgentaler's personal crusade, expressed predictable disappointment and bitterness over the Supreme Court's handling of the matter. Calling the judgement "a cruel blow to the forces working for the repeal of restrictive abortion law in Canada," she concluded:

How many more trials must there be? How many more juries must speak before the political and judicial establishments of Quebec and Canada realise that real people with real problems are more in touch with the realities of human need than are the black-robed dispensers of technological justice? 82

Wendall W. Watters expressed similar sentiments overall, but approached the final decision from a very different perspective. Characterising opposition to liberalised abortion laws as a phenomenon directly related to demographic fears in many low birthrate provinces, Watters summarised the Supreme Court's "hands off" ruling in the following terms:

It can be asked how the anxieties of Quebec explain the actions of the Supreme Court. The answer is simply that demographic anxiety knows no political, geographic, racial, linguistic or religious boundaries. The three judges who dissented from the majority decision and ruled in favour of acquittal all come from the demographically strong Province of Ontario; five of the six judges who upheld the ruling of the Quebec Court of Appeal come from demographically weak provinces, where the rate of abortion is very low when compared with the national average and where the atmosphere is generally anti-abortion. This is not to say that any individual judge said to himself; the population of my province is not going ahead as fast as the country itself and I'd better come down pretty hard on this fellow Morgentaler. After all Supreme Court justices are dedicated to interpreting the law and not establishing population policy for Canada. But if demographic political factors influence the implementation of anti-abortion laws, cannot these same factors also enter into the judicial interpretation of these laws? 83

Appropriately, Watters concludes that the question remains unanswered and concedes that it "is probably unanswerable."

Putting aside the unfavourable ruling, if the Morgentaler decision is viewed in a broader political context, one that takes account of its positive effect in serving to re-stimulate debate over the abortion issue itself, then the case cannot be described as a total failure. Indeed, if the participating group's primary intention in entering the litigation was to draw public attention to the prevailing law, then their decision must be described as an astute tactical manoeuvre. The Court's adverse ruling and the CCLA's and FWC's ability to point up the law's inadequacies during the hearings, certainly contributed to a re-vitalisation of existing abortion groups and even served to give rise to a host of new supporters. Most notable in this regard was the nationally based Canadian Association for Repeal of the Abortion Law. Established in November of 1974, the Association's affiliate membership grew rapidly in all parts of Canada in the months following the Supreme Court decision. Another major group to emerge out of the circumstances surrounding the Morgentaler appeal was the Doctors for Repeal of the Abortion Law.

Perhaps more important was the response that the Supreme Court test elicited from the federal government. In the fall following the Court's spring ruling, the government announced the formation of a special committee under the direction of Robin Badgely whose mandate was broadly described as determining whether or not "the abortion law is working equitably

across Canada." The Committee's terms of reference read like a page out of the CCLA's factum. The government made it responsible for assessing the availability of therapeutic abortion committees, the rules that govern such committees, the timeliness with which the committee system makes an abortion available, to what extent personal views affect the ultimate decision to grant or refuse an abortion, whether danger to health is being interpreted too broadly or too restrictively and in general, what types of women are successful or unsuccessful in obtaining legal abortions.⁸⁴ The Badgely Committee was initially slated to release its findings in the fall of 1976. Delays set this date back considerably. Its final report was ultimately handed down in the early weeks of February 1977.

The Committee's 474 page report, produced at a cost of over \$680,000, revealed predictable findings, indeed findings that the CCLA made clear in its own modest survey conducted for the Supreme Court hearings over two years earlier.⁸⁵ Although making no direct critical statements regarding the 1969 abortion provisions, the Badgely Report findings and recommendations indirectly served to draw the law's already shaky credibility into further disrepute. Stating bluntly that for many women "the procedure provided in the criminal code for obtaining therapeutic abortions is in practice illusory," the Report detailed the well-known inadequacies

of the prevailing practice. From the perspective of the patient it noted:

...it is often a matter of chance whether the physician who is initially contacted tries to facilitate her request for an abortion, or whether the step taken by a physician serves to delay an application made on her behalf to a hospital's therapeutic abortion committee. In this situation, many patients get the medical merry-go-round treatment. This sequence of events is costly to the public purse, heightens the level of stress among patients and extends the length of their pregnancies for many women.⁸⁶

The Report indicated that complications occur at twice the rate in small hospitals than in large ones, that there is an average two month delay between a woman's first visit to her doctor and the time she ultimately receives her abortion and that one out of every five Canadian women have their abortions performed in the United States. Although it noted that the public at large wanted abortion retained in the criminal code in some form, the Committee revealed that by far the majority of physicians it interviewed favoured total removal. The Report was openly critical of the lack of review of committee procedures by provincial health authorities and in concluding, recommended that therapeutic abortions would be better handled in specially organised regional centres than in the present hospital system.

Further pressure for change came from the Law Reform Commission of Canada. In its March 1976 report on the Principles of Criminal Law,⁸⁷ the Commission made clear that one

of the main problems plaguing Canada's criminal system was the phenomenon of "overkill;" the belief that "every problem can be solved by having a law against it." Proceeding upon a general philosophy of restraint, it pointed out that the business of criminal law "is not the enforcement of morality. Though wrong behaviour is its target, its wrongfulness or immorality is only a necessary condition not a sufficient one... The state has no place in some activities of the nation. Its place concerns activities harmful to other individuals and to society itself."⁸⁸ Commenting that many prevailing laws are "wedded to a Victorian philosophy," the Commission strongly recommended that offences "whose wrongfulness or seriousness today is controversial should be carefully considered."⁸⁹ Atop a list of matters that the Report felt warranted such review, was the federal law on abortion.

To say the least, the response from government channels to these reports was not overwhelming. Justice Minister Ron Basford evaded the clear implications of the Badgely Report by pointing out that it stressed current inequities and shortcomings of implementation and not the overall wrongness of the law itself.⁹⁰ Asserting that the government would not be proposing legislative changes, Basford went on to comment that instead he would push for co-operation with the provinces in order to shore up inequities that he felt resulted largely from a lack of provincial review of hospital

boards and committees. On the issue of establishing regional centres, Basford replied that federal initiative in this clear area of provincial jurisdiction would not be proper. In a subsequent government announcement, Minister of Health and Welfare Marc Lalonde reiterated the government's desire to achieve co-operation from the provinces in place of forcing improvements or changes through federal law.⁹¹ The Law Reform Commission's recommendations also received a predictable short shrift from the government. Indeed, in 1978, a bill was brought forward proposing the establishment of various new offences in the area of sexual matters. The abortion issue was not dealt with.

The debate over Canada's abortion law has continued at full pace since 1969. Apparently the government has not been listening. Throughout the early seventies, it paid little attention to a wide variety of groups who called for necessary changes and improvements in the newly established system. In the wake of a Supreme Court decision, the Federal Law Reform Commission reacted by providing the necessary philosophy for change while the Badgely Report supplied the requisite proof to justify putting this philosophy into action. The government reacted cautiously, indeed evasively, employing the age old delaying doctrine of "attempting to seek provincial co-operation on the matter." In the meantime the debate continues. Dr. Morgentaler is still petitioning the same Prime Minister.⁹² In most centres across the

country, pro-lifers and pro-abortionists are conducting electoral style campaigns in attempts to stock hospital boards with members favourable to their cause.⁹³ In the process, the plight of individual women in distress often goes unnoticed and most certainly uncared for. These continuing political developments only serve to make clear the important responsibility thrust upon the judicial branch when the possibilities for genuine change and thus improvement are not likely to be forthcoming from the political arena.

NOTES

1. Regents of The University of California v. Bakke (1978) 437 U.S. 57.
2. Roncarelli v. Duplessis, (1959) 16 DLR 689.
3. For a comprehensive treatment of the Morgentaler affair and its implications see, B.M. Dickens, "The Morgentaler Case: Criminal Process and Abortion Law" Osgoode Hall Law Journal V. 14 (1976) p. 229.
4. (1973) 42 DLR 455.
5. R. v. Morgentaler (No.5) (1974) 47 DLR 455.
6. Under s. 613 (4) (b) of the criminal code an Appeal Court was granted the authority to reverse a jury verdict. The use of this section in the Morgentaler case sparked a wide public debate on the matter with most commentators coming down hard on the Appeal Court's decision. Under increasing pressure following the Supreme Court's sanctioning of the jury reversal, the government was forced to remove the section from the code.
7. 1953 (2&3 Elizabeth II) C.51, s.209.
8. A. De Valk, Morality and Law in Canadian Politics (Montreal: Palm Publishers, 1974) pp.33-34.
9. Criminal Code, Revised Statutes of Canada 1970, C. c-34 Section 251.
10. W.W. Watters, Compulsory Parenthood (Toronto: McClelland and Stewart, 1976) p.128.
11. Editorial, "Abortion In Canada" Canadian Medical Association Journal (August 1, 1970) pp.298-299.
12. W.W. Watters, op cit., p.129.
13. K.D. Smith, H.S. Wineberg, "A Survey of Therapeutic Abortion Committees" The Criminal Law Quarterly v. 12 (1970) p. 306.
14. S.L. Smith, "Canadian Doctors: Victims of the Abortion Law" Canadian Family Physician V. 16 (1970) p.58.

15. E. Wilson, "The Organisation and Function of Therapeutic Abortion Committees" Canadian Hospital V.68 (1971) p.38.
16. Dr. H. Morgentaler, "Comment" The Canadian Medical Association Journal V. CIX (1973) p.1202.
17. "Abortion: A Study by the United Church of Canada" (Toronto: The Board of Evangelism and Social Service and The Board of Women of the Division of Congregational Life and Work of The United Church of Canada, 1971), p.35.
18. Report of the Royal Commission on the Status of Women in Canada (Ottawa: Crown Copyrights, 1970) pp.286-288.
19. P.C. Picher, "The Invalidity of Canada's Abortion Law" Criminal Reports, New Series (1974), p.1.
20. E. Pelrine, Morgentaler: The Doctor Who Couldn't Turn Away (Toronto: Gage Publishing Ltd., 1975) p.82.
21. W.W. Watters, op cit., p.128.
22. R.V. Morgentaler No. 1, 14 CCC 435, at 441.
23. For an indication of the extent of pre-trial preparations in the United States see, R.E. Hall, ed. Abortion in a Changing World, Two Volumes (Columbia University Press, 1970).
24. The appellant was represented by Claude Armand Sheppard and Charles Flam. The intervenant, Foundation for Women in Crisis, was represented by Clayton C. Ruby, while the Civil Liberties Association case was handled by Edward Greenspan.
25. R.E. Cushman, "Civil Liberties" American Political Science Review Volume 42 (1948), p.148.
26. (1944) 323 U.S. 529-530.
27. H. Zeigler, Interest Groups in American Society (New York: Prentice Hall, Inc., 1964) p.316.
28. R.G.B. Dickson, Comment in, A.M. Linden, ed., The Canadian Judiciary (Toronto: Osgoode Hall Law School Press, 1976), p.84.
29. B. Cardozo, The Nature of the Judicial Process (Yale University Press, 1921), p.74.

30. See generally, B. Laskin, "Our Civil Liberties: The Role of the Supreme Court" Queen's Quarterly Volume 61 (1954), p. 455.
31. (1975) 53 DLR 161.
32. The relevant provisions of the Bill of Rights include:
 - "1. It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
 - (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
 - (b) the right of the individual to equality before the law and the protection of the law;
 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as to abrogate, abridge or infringe or to authorise the abrogation, abridgement or infringement of any of the rights or freedoms herein recognised and declared, and in particular, no law of Canada shall be construed or applied so as to...
 - (b) impose or authorise the imposition of cruel and unusual treatment or punishment;...
 - (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."
33. Other parties granted status were, the Attorney General for Canada, the Alliance for Life, Le Foundation de la Vie, Le Front Commun pour le Respect de la Vie, L'Association des Mediciens du Quebec pour le Respect de la Vie.
34. (1975) DLR 167.
35. (1973) 93 S. Ct. 705. (1973) 93 S. Ct. 739.

36. Appellant's Factum, p.57.
37. Ibid., pp.58-59.
38. Supra note 35.
39. (1975) DLR 171.
40. Appellant's Factum, pp.37-38.
41. (1975) DLR 169
42. See Appellant's Factum, pp.56-71.
43. Factum of the Canadian Civil Liberties Association, pp.6-7.
44. Ibid., p. 7
45. Ibid., pp. 7-9.
46. Ibid., pp.12-15, 35-26.
47. Factum of the Foundation for Women in Crisis, pp.2-5.
48. (1975) DLR 175.
49. Ibid., p.176.
50. Factum of the Canadian Civil Liberties Association, pp. 21-23.
51. (1975) DLR 172-173.
52. Factum of the Foundation for Women in Crisis, pp.7-10.
53. (1975) DLR 1972.
54. Factum of the Canadian Civil Liberties Association, p.16.
55. Ibid., pp.16-18.
56. (1975) DLR 173-174.
57. Ibid., 174.
58. Ibid., 203.
59. E. Pelrine, op cit., p.145.
60. The Globe and Mail, October 4, 1974, p.13.

61. Ibid., October 5, 1974, p.15.
62. E. Pelrin, op cit., p.145.
63. The Montreal Star, October 4, 1974, p.2.
64. See both The Montreal Star, October 4, 1974 and E. Pelrine, op cit., p.145.
65. It should be noted that prior to the proceedings a group of 100 Toronto lawyers and law students sent the Court a telegram demanding that it repeal the law and uphold Morgentaler's acquittal. To a Court that above all else approached the case with the desire of maintaining a non-partisan image, this may very well have been the straw that broke the camel's back.
66. F. Frankfurter, Law and Politics, (New York: Capricorn Books, 1962), p.120.
67. E. Pelrine, op cit., p.75.
68. Ibid., p.144.
69. In selecting editorials to consider, I have confined myself to those dealing with the general political or social implications of the Court's decision.
70. The Globe and Mail, September 5, 1974.
71. Ibid., March 29, 1975.
72. The Toronto Star, March 27, 1975.
73. The Montreal Star, March 26, 1975.
74. Ibid., March 27, 1975.
75. Le Devoir, March 29, 1975.
76. The Vancouver Sun, April 3, 1975.
77. The Calgary Herald, April 15, 1975.
78. The Citizen, March 28, 1975.
79. B.M. Dickens, "The Morgentaler Case: Criminal Process and Abortion Law" Osgoode Hall Law Journal Volume 14 (1976), p.245.
80. W. McHale, "Case Comment" Ottawa Law Review Volume 8 (1976) p.59.

81. E. Pelrine, Morgentaler: The Doctor Who Couldn't Turn Away and W.W. Watters, Compulsory Parenthood.
82. E. Pelrine, op cit., p. 210.
83. W.W. Watters, op cit., pp.152-153.
84. Report of the Committee on the Operation of the Abortion Law, (January 1977) Ottawa, Canada, pp.27-39.
85. For a concise review of the Committee's findings see, The Globe and Mail, February 10, 1977. p.F-3.
86. Report of the Committee on the Operation of the Abortion Law, op cit., p.19.
87. "Our Criminal Law" Report of the Federal Law Reform Commission, (March, 1976).
88. Ibid., p.16.
89. Ibid., pp.34-35.
90. The Globe and Mail, February 10, 1977, p.F-3.
91. The Globe and Mail, February 11, 1977, p.11.
92. The Citizen, May 28, 1978, p.12.
93. The Globe and Mail, July 22, 1978, p.8.

Chapter 4

THE LAVELL CASE: INTEREST GROUP COMBAT THROUGH LITIGATION

Pre-Trial Political Developments

On December 7, 1970 Jeanette Lavell was informed by Indian Registrar H. Chapman that her name had been removed from the list of her band. An Ojibwaw Indian, Lavell had chosen to marry outside her racial group, a situation that under section 12(1)(b) of the Indian Act results in the immediate loss of Indian status for Indian women. Buoyed by the 1969 Supreme Court decision in *Drybones*¹ as well as the recommendations of the Royal Commission on the Status of Women in Canada,² she decided to pursue her cause through legal channels. After unsuccessfully contesting the issue before Justice Grossberg of the Ontario Superior Court, Lavell carried her case to the Federal Court of Appeal. Before a three judge panel, she was successful in having the status provision declared inoperative under the Canadian Bill of Rights. This set the stage for a Supreme Court hearing that produced in effect the only true Canadian example of interest group combat through litigation. While the potential for interest group combat in litigation was present in *Morgentaler*, the Court's decision not to hear anti-abortion arguments precluded this eventuality. In the Anti-Inflation Reference, organised labour

was opposing the federal government. No other private interest groups, such as business, intervened to challenge its claims. In Lavell, however, Indian women's organisations, status Indian groups, several women's associations and the federal government all intervened in a case that evolved into a power struggle between competing social perspectives.³ To appreciate the nature of and reasons for this widespread interest group participation in the Supreme Court appeal, it is necessary, as always, to assess the litigation in a broader political context.

In 1968, the federal government began a consultative process with Canada's Indians. Aimed at improving their position and status within the Canadian social system, these preliminary discussions made clear two important points. The Indians and the government were not only miles apart in their respective notions of a "just solution" to prevailing problems but, more important, the native representatives emphasised that they would not consider any discussion of changes to the Indian Act until treaty rights and aboriginal claims had been settled. The Prime Minister responded by scoffing at the very concept of aboriginal claims; introducing in June 1969 the government's unilateral plan to disband the Department of Indian Affairs and thereby phase out over a five year period the special status afforded by the provisions of the Indian Act.⁴ Declaring that "Canada cannot seek the just society and keep discriminatory legislation on its statute books", the federal White Paper

outlined the government's intention to make Canada's native people, full citizens. Treaty rights, the protection of band identity and reserve lands would all be gradually eliminated. The Minister of Indian Affairs, Jean Chretien, explained the proposed action in the following terms:

After a year of intensive consultation and review of past policies, it became clear that the existing framework under which Indian people were governed, was wrong. It was wrong because it discriminated against people on the basis of race and set them apart ...The present system of governing a group of people on the basis of race involves a system of head-counting. One of the hardest problems to solve is defining who is and who is not an Indian. Many heads have been left out in the process. The fault, of course, lies not in the heads but in the process... Canadians do not have to have a special status to have a different identity and to have pride in their own particular culture and traditions.⁵

In direct opposition to Indian demands, the government was attempting, good intentions notwithstanding, to impose its own solution on a unique and very delicate situation.

Indian reaction to the government's proposal was immediate and strong even if somewhat confused and divided in the first months following the June announcement. Although a number of leaders openly applauded the good intentions in back of the White Paper, most approached the matter with feelings that ranged between skepticism and surprise to open hostility. Many leaders opposed the government's intention to terminate the Department of Indian Affairs and turn the matter of administration over to

provincial authorities. A clear majority, while not opposing the goal of achieving full citizenship, indicated that the government had to respect the rights and privileges of native people in the process.⁶ These inarticulate and divided reactions were soon replaced by a united Indian opposition led primarily by The Indian Association of Alberta. The Association's President, Harold Cardinal, characterised the government's plan in the following terms:

In attempting to remove all constitutional protection for Indians, the government is attempting to eliminate unilaterally, once and for all, its obligations under the treaties as understood by the Indians. Its clever and diabolical reference to discrimination constitutes an attempt by the government to sneak through the thoroughly illegal and immoral abrogation of Indian rights. Canadians who are not aware of the legal and moral implications of the government's policy are put in the difficult position of appearing to argue for discrimination if they oppose the government position...We do not want the Indian Act retained because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government as it should be. No just society and no society with even pretensions to being just, can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights.⁷

These general charges formed the basis of an official Indian counter-proposal the following year.

The Indian "Red Paper", presented to cabinet in early June, 1970, totally rejected the government's plan to terminate the Indian Act and grant unqualified "equality". Declaring that the "legal definition of registered Indians must remain", the

the Indian proposal stressed the importance of special status in the following manner:

Special circumstances require special programs or benefits...Every group gets special treatment, concessions, even special status. We need and are entitled to special considerations, at the very least we expect that the promises made us when we signed the treaties ceding our lands will be honoured.⁸

Advocating local initiative and self-government backed by private funding as a more viable and timely solution to prevailing problems, the Red Paper urged the federal government to re-open negotiations on the Indian Act, "respecting and accepting the Indian viewpoint on treaties". The government's response was more than the Indians had anticipated or hoped for.⁹ Asserting that "we won't force any solution on you", Prime Minister Trudeau maintained that the government's proposals were well-placed and sincere if somewhat "naive, short-sighted and mis-guided". Trudeau reneged on the government's plan to set a time limit for arriving at a final solution by agreeing to make certain that such a solution was the result of input from both sides. Jean Chretien made this initial promise a definite government policy while addressing the NIB Congress in 1972. The Minister stated his desire to work with Indian people to ensure that "all changes to existing policies are in harmony with Indian culture and values".¹⁰

In the early 1970's, therefore, Canada's status Indians declared their unanimous support for a policy of special status

through retention of the Indian Act. In doing so, they successfully turned back an attack on their unique constitutional position from the executive branch and indeed, appeared to elicit the government's unqualified assurance that there would be native input in any further negotiations. As J.D. Whyte points out, however, the Indians "still could not rest". The Lavell victory in Federal Court presented a new threat, this time from the judicial branch "flying the banner of equality".¹¹ The landmark Drybones case had revealed the vulnerability of the Indian Act to the egalitarian concepts expressed in the provisions of the Canadian Bill of Rights. The Lavell case, founded as it was upon a more blatant form of discrimination and thus evoking widespread public support, appeared to present an even greater threat to the special status guaranteed by the Indian Act. Harold Cardinal framed the status argument succinctly:

We were terribly concerned over what effect such a decision would have on the reserves as the collective home of the Indian people. We did not follow, nor did we want, a system of private ownership because we felt this would rip apart our reserve communities in short order...if the Bill of Rights knocked out the legal basis of the Indian Act, it would at the same time knock out all legal basis for the special status of Indians.¹²

It was this basic threat, real or imagined, valid or overblown for political purposes, that lay in back of the status Indian's desire to contest the claims of Jeanette Lavell before the Supreme Court of Canada.

The Indian organisations were not unanimous in their initial desire to pursue the matter through legal channels. It was the Association of Iroquois and Allied Indians who first requested the Attorney General to appeal the Federal Court ruling, declaring that they would not "accept equality and are determined to discriminate in favour of Indians in every way possible".¹³ The NIB was not so quick to take a stand. At the organisation's annual Congress in 1972, the issue of possible intervention in the Lavell case was raised by the Indian Association of Alberta. Both the B.C. and Manitoba representatives were openly opposed to such a move. Maintaining that Lavell had a legitimate point of concern, the dissenting members expressed fear over the potential political reaction if Indians were seen as intervening against Indians. The Congress adjourned on this divided note. In the aftermath, Alberta soon supported by both Quebec and Saskatchewan, decided to proceed on its own. A few months and several meetings later, the NIB managed to enlist full affiliate support and thus the status Indians offered a unanimous voice in the eventual Supreme Court hearings.¹⁴

NIB preparations for legal activity were well-organised and directed at making the legal proceeding part of its ongoing pressure campaign. Although unanimous affiliate approval was not attained until November 1972, the NIB began preparing for eventual litigation long before that date. In addition to

receiving the views of legal counsel contacted by the Alberta and Quebec Associations, the central body made certain to solicit legal advice on its own. It is important to note that legal counsel made clear the precarious nature of NIB chances for success. As lawyer James O'Reilly maintained in one letter:

...in law the Court of Appeal decision in the Lavell case is likely well-founded...In view of the Drybones case moreover, and the provisions of the Bill of Rights, it is likely that an appeal to the Supreme Court of Canada from the decision in the Lavell case would be dismissed.¹⁵

Just as important, the NIB was aware that its factual and extra-legal arguments, in effect the backbone of its defence of s.12(1)(b), might very well be declared irrelevant by the judges. As O'Reilly pointed out in a subsequent letter:

Doug Sanders in particular has mentioned the argument that the question of membership could be considered to be a political question...However, it is likely that the Supreme Court of Canada would base its decision on a rather strict reading of the provisions of the Indian Act and the Bill of Rights without taking into consideration the consequences of the entire question of who can be considered to be an Indian under the Indian Act.¹⁶

Despite these seeming problems, the NIB was also aware that the issue was going to be decided with or without Indian participation and that it had the full support of the federal government in the appeal.¹⁷ The most difficult matter facing the Brotherhood, therefore, was not making the choice to intervene or not, but rather maintaining harmony among its affiliates

so that pre-trial preparations could proceed effectively.

With federal support guaranteed, the NIB could approach its legal preparations somewhat more openly than if it was left to defend the status provision on its own. Knowing that the government was covering the technical, legalistic side of the matter, the Brotherhood was able to devote most of its attention to formulating the factual and philosophical arguments against removal of the protective provisions of the Indian Act. In many meetings and through the cooperative work of legal counsel representing all affiliates and potential intervenants, it was generally conceded that NIB opposition should be founded upon two grounds; the male was properly head of the family unit and the Indian Act represented part of a long history of special legislation in the area of native affairs. As NIB legal advisor Doug Sanders made clear, the organisation realised that these general points were not irrefutable, particularly in a court of law:

The weakness of the first argument was that the Court was being asked to discover the rationale for a set of sections, which were not in total, conceptually consistent. The weakness of the second argument was that while the legal and constitutional history might justify special legislation which discriminated on the basis of race, it did not follow that it justified special legislation that discriminated on the basis of sex.¹⁸

Astutely following the advice of legal counsel,¹⁹ NIB preparations for legal activity were undertaken with a view to

post-decision political developments. Aware of the need to maintain a strong Indian voice no matter what the Supreme Court result, the Indian Association of Alberta took on the responsibility of attempting to create the basis for continued NIB-government interaction. Utilising the legal and factual research conducted for the court test, the Association presented a brief to the federal cabinet in February 1973. Stressing the issues of special status and self-determination, the brief basically demanded two things. It asked the federal government to amend the Bill of Rights through the inclusion of a non obstante clause declaring its inapplicability to the Indian Act. More important, the Association indicated it had established a research team that could, with the proper resources, draw up a suitable alternative to the Indian Act.²⁰ With this definite proposal, the Association ensured that the government could not simply wash its hands of the whole affair following the Court's determination in the Lavell case.

The NIB entered litigation solidly prepared for a variety of potential results, not merely from the judges themselves, but from officials in the Department of Indian Affairs as well. The groups supporting Jeanette Lavell were not so comprehensively organised. A number of factors prevented the anti-status provision intervenants from approaching the hearings with a view to prevailing or potential political developments. Her two main supporters, Anishnaubekwek of Ontario and The Alberta

Committee for Indian Rights for Indian Women, were hastily organised groups "brought into being because of the lack of understanding and support from other native organisations both provincially and nationally during the Lavell case".²¹ Immediately preceding the hearings, each claimed an active membership of between 100 and 200. Their growth into national representatives of non-status Indian women occurred only after the Lavell case had been decided. In many respects, the two groups bore many of the characteristics of so-termed "issue-oriented" interest groups in the months leading up to the Supreme Court test. The issue was the legal proceeding and effective preparation for legal battle was their sole objective. The realisation of more concerted, long-term planning had to wait until legal victory was no longer a possibility. The intervenant women's associations were not much help in this regard either.²² They viewed the case solely in terms of women's rights and had intervened because they were concerned that it was the Attorney General who appealed the issue.²³ They regarded the Supreme Court hearings as an opportunity to draw attention to the cause of women's rights in general. They possessed neither the resources nor the desire to take up the special cause of Indian women either before or after the judges chose to deliberate. Only the Native Council of Canada offered the Indian women a hope for continuity. Although newly founded itself, the Council had nevertheless established ties with the

federal government; securing office space and funding in the process. Its professed claim of representing all non-status Indians was not an accurate assessment of reality in the few years preceding the Lavell appeal. However, the group did move closer to this goal in the decision's aftermath. The Council not only promised to intervene in support of the native women's legal cause but also guaranteed continued assistance in their further efforts to achieve "an intelligent policy for all native peoples at the federal level".²⁴ Intimately involved with the issue of land claims, however, even the NCC's backing was of a temporary nature.

Although pre-trial political strategies were lacking, the Indian women did manage to successfully meet their prime objective of effective preparation for the case itself. Securing the services of excellent legal counsel, the groups were able to coordinate their legal and factual presentations astutely, offering a wide variety of detailed and diverse arguments. The appellant put forward the main legal arguments, effectively meeting those presented by the federal government. Anishnaubekwek expanded upon the legal concepts of discrimination and equality before the law, lending informed arguments on the matter of "suspect classification" and its relation to the Lavell appeal. IRIW took the NIB's main arguments to task, while NCC supplied significant factual documentation to the same end. For the complexities of legal battle, anyway, s.12(1)(b)'s opponents were ready.

Pre-trial political developments and preparations indicate that something more than one Indian's civil rights were ultimately involved in the Supreme Court test. The issues extended, in many respects, beyond the interests of the immediate participants. The civil liberties dispute drew the applicable limits of the Canadian Bill of Rights into question once again, providing the Supreme Court with a golden opportunity to hand down an authoritative and principled decision in this area. The case presented matters that had potentially far-reaching implications for the nature of the one hundred year old relationship between Indians and Canadian society. Crystallised in the Supreme Court test was a general concern over the relationship of the egalitarian principles of the Bill of Rights to the provisions of the Indian Act. These issues alone were clearly the stuff of which landmark decisions are made. The Lavell decision was to achieve this notoriety but unfortunately for all the wrong reasons.

The Lavell Decision

If a government is going to achieve collective goals such as public order and morality, fair dealing and a more equitable distribution of wealth, then it is often obliged to enact classificatory laws that either have the effect of limiting personal freedoms or granting special status to certain groups.²⁵ Income tax laws apply to different income groups in different ways to protect those in low income brackets who cannot afford to make

large contributions and ensure that those in higher brackets pay their necessary share. Positive or benign discrimination laws, such as those guaranteeing employment to specific minority groups, are often needed to counteract the detrimental effects of many years of discriminatory employment practices. In the United States, legislative classifications such as these have frequently been the subject matter in constitutional cases decided on the basis of substantive due process. To resolve the often contradictory demands of legislative specialisation and constitutional generalisation so posed, the Supreme Court in the United States evolved the constitutional test of reasonable classification.²⁶

The classification test places the judiciary in the centre of the power struggle, forcing it to look at the "reasonableness" of legislative policies or programs. In most instances, the test involves a balancing of competing interests or objectives in an effort to decide which are better founded and therefore more worthy of protection. Does the objective of stricter income tax laws, namely, the realisation of a more equitable distribution of wealth and services, warrant the restrictions placed upon an individual's freedom to acquire private property? Do benign discrimination provisions aimed at improving a minority's social status warrant the restrictions that are placed on the activities of the majority who are not so similarly favoured? These are the questions posed by the

reasonable classification test, questions that entail an enquiry into legislative motivations and judgement. As in other cases, therefore, the process rests not so much upon the mechanical application of a perfect formula, but rather, upon the effective employment of judicial statesmanship and informed creativity. This is not to say that the Court necessarily and in all situations assumes the position of lawmaker, arbitrarily substituting its own preferences for those of elected officials. As briefly alluded to in previous chapters, the United States Court realised that a balance had to be struck and so developed the "two-tiered approach" in the application of due process protections.²⁷

Classificatory legislation that affects no fundamental interests in a direct manner is assessed according to a minimum rationality standard. In areas of economic regulation, tax and public utilities cases, the Court respects legislative expertise and thus affords a fair and at times an admittedly overbearing measure of deference to legislative bodies. In cases where legislation directly conflicts with matters guaranteed by the constitution, however, the so-termed suspect classification approach is employed. Where classificatory legislation affects alienage, national origin or "discrete and insular minorities", the level of judicial scrutiny and therefore judicial discretion is very high. No matter where and how applied, the entrenched U.S. doctrine of reasonable classification has the effect of ordering the nature of a judicial proceeding and lending to a court's final determination a certain rationality and clarity.

The Lavell case provides a classic example of where a Canadian counterpart to the U.S. classification test could have been developed and applied. The impugned section of the Indian Act imposed discriminatory consequences upon Indian women who married non-Indian men ostensibly to fulfill "the rational and legitimate" legislative goal of protecting Indian reserves, lands and customs. The basic question of balance posed by the case was whether the discriminatory classification imposed upon Indian women was justified by the legislative goal of protecting Indians as a whole. Ancillary and related questions were also brought into focus. Was the status provision in question truly related to this admittedly desirable objective? Is discrimination on the basis of race or sex a suspect classification not admitting of a rational defence? All parties to the dispute recognised these issues and structured their arguments accordingly. In hinting at the American test but ultimately proceeding upon ad hoc legalistic interpretations that did little to clarify the issue or provide guidelines for future adjudication, the majority judgement failed to address the major points raised and overall produced unfavourable results for both sides.

Supporting the validity of section 12(1)(b) in the most strongly argued factum put forward on either side of the issue, were the provincial affiliates of the National

Indian Brotherhood. Declaring that the Indian Act and its provisions represent a "rational and reasonable system serving legitimate legislative purposes,"³⁰ the joint factum succinctly summed up the NIB's consistent public policy stand on the matter in the following terms:

...the Indian Act is special legislation protecting their historic rights and giving a necessary legal structure to the Indian reserve communities. As such, it should not be dismantled or substantially changed by legislation such as the Canadian Bill of Rights. 31

In advance of providing a detailed defence of the status provision, the Brotherhood made certain to emphasise that it was not opposed to necessary changes being performed on an admittedly unsatisfactory system. It only stipulated that changes be made in the political arena where "the Indian people can participate as members of the Canadian public."

With its major policy interest in retaining prevailing provisions clearly stated, the NIB went on to offer a variety of factual and philosophical arguments in their defence. Asserting that the overall intent of the Indian Act and its status provisions is "to maintain a viable reserve system and neither to deplete the Indian population nor to expand it unduly," the Brotherhood examined several options frequently recommended to deal with the matter of inter-marriage. The NIB listed four major alternatives: A system where both Indian spouses would be granted Indian status and the right to live on the reserve; a scheme where

Indian status is lost but where the right to live on reserves is retained; a third plan where all status Indians retain their rights but their non-Indian spouses gain nothing, and finally, the prevailing system where all family members are granted status in some marriages and in other marriages no family members retain or gain such status.³²

The first three options should be rejected, the Brotherhood claimed, because they would substantially distort prevailing reserve populations, their day to day administration would be unwieldy and just as important, they would likely place severe strains upon family members either directly or indirectly affected. The final position must be retained because it represents an effective means to "reasonably control reserve populations" and to prevent an undue strain being placed upon the "fixed land base of the reserve system." Not to be overlooked as a strong factor in favour of retention, the brief argued, was the prevailing law's ability "to focus the concern of Indian legislation on the family unit by ensuring that all members of any nuclear family unit had the same status and the same rights of residency on a reserve." The need to maintain such a select status law, the NIB claimed, was due to the fact that reserves represent unique social and economic communities and as such, "legal distinctions between those residing in the community are undesirable."³³

In anticipation of arguments contesting the choice of

patriarchal descent to determine the status of the family unit, the NIB made certain to offer arguments in favour of what it termed a "reasonable and defensible" basis. The Brotherhood claimed that whether one wishes to admit to or even support existing social relations, in Canada it is customary for women to reside with and be economically dependent upon their husbands. The NIB thus concluded that the traditional social and economic roles assigned to men and women mean that the entry into a reserve community of non-Indian men can reasonably be expected to have a greater impact than the entry of non-Indian women.³⁴ Arguing along similar extra-legal lines, the Brotherhood placed substantial stress upon the matter of historical tradition. Arguing that the establishment of Canadian Indians as a charter group "reflects a special series of historical decisions tied into pre-confederation policies," the NIB maintained that the Court should not be willing to alter these long-standing patterns through a simple declaratory statute such as the Canadian Bill of Rights. Indeed, the Indian organisations effectively submitted that the uniqueness of the Indian situation, including the special nature of their relationship to the federal government, should make any court reluctant to impose its own interpretation no matter what the basis used.³⁵

With these unique considerations working in its favour, the NIB devoted significant attention to arguments traditionally

regarded as "off limits" in Canadian jurisprudential channels, detailing the likely consequences of holding s.12(1)(b) inoperative while making comparative references to the "hands off" attitude of the American judiciary to matters even remotely related to Indian affairs. On the issue of potential consequences, the NIB claimed that finding prevailing status laws in relation to inter-marriage inoperative, would likely necessitate a re-consideration of other sections related to status in the Indian Act. Would ruling s.12(1)(b) inoperative mean that the non-Indian spouse of a status Indian would lose or at least have her legal regime significantly altered? What would be the effect on the status of children of mixed marriages? These and other important questions, the Brotherhood asserted, would follow upon a change in present provisions. Proceeding to more general considerations, the factum detailed the administrative problems that such a ruling would produce. No matter what formula was ultimately adopted as a replacement, a change in the status provision would result in a drastic increase in the number of status Indians on present reserves. Where does one draw the cutoff, 1960, 1867? What of the rights of residency? A judicial determination in favour of declaring the present system inoperative the factum concluded, would not admit of an easy solution.³⁶ Turning to the treatment of Indian related affairs by U.S. courts, the NIB listed a variety of authorities and cases to indicate that the Indian

regime and status represent matters not subject to the Bill of Rights and apparently, not even subject to the controlling provisions of the recently enacted Indian Bill of Rights.³⁷ On all issues presented, the factum maintained the constant reminder that Indians represent a special group subject to special laws. Consistently pointing to the reasonable nature of prevailing legislation and the consequent need to distinguish between negative and positive forms of discrimination, the Indian organisations concluded that the removal of s.12(1)(b) from an Act that represents a preferred policy directed at a unique situation, would have long range damaging consequences for all Canadian Indians.

The Indian organisations were fully supported in a less detailed but effective factum presented by the Attorney General for Canada. Arguing that Canadian Indians "are subject to a legal regime peculiar to them, but apparently deemed necessary and desirable having regard to the historical development and circumstances of this special group of persons,"³⁸ the Attorney General proceeded in the first part of his factum to present reasonable classification arguments similar to those found in the joint Indian brief. In a response that effectively provoked the various women's organisations to seek status in the proceeding, the government expressed its support for the prevailing status provision in the following terms:

...in the ordinary course of events when a woman marries she lives with her husband in the marital home, she has a family, and she and her family become economically dependent upon her husband. In the case of an Indian woman marrying a person who is not an Indian, this will generally involve a transition from dependence upon the Indian community and its special position under our law to dependence upon her husband in the ordinary circumstances of the larger community....The position of the Indian male is, on the other hand, quite different. His marriage to a person who is not an Indian will not generally involve withdrawal of dependence upon the Indian community and its special position and thus the legislation retains him within its purview. 39

The Attorney General summed up his reasonableness arguments by indicating that a wide variety of sections in the Indian Act can be labelled as discriminatory or disadvantageous. Provisions declaring that common funds are held by the government, that allow an Indian's will to be voided, that limit testamentary capacity, that enable the governor in council to enforce rules on reserves that could never be applied to other citizens, among others, were cited as examples in this regard. These classifications, the Attorney General was careful to point out, are regarded as part of a comprehensive legislative program aimed at the protection of Indian identity and for that reason, it is not possible for a court to determine what is a disadvantage and what is not.⁴⁰

Perhaps more keenly aware of the Supreme Court's penchant for deciding civil liberties cases on narrow legalistic

grounds and certainly conscious of the Court's general willingness to afford considerable deference to Parliament's judgement, the Attorney General supplemented the NIB's position with two significant arguments. The government countered the potential implications of the Drybone's decision by declaring it to be inapplicable to the case under consideration. Unlike the liquor provision in Drybones the Attorney General maintained, the status section of the Indian Act does not create an offence nor result in the imposition of a penalty at law. On these grounds the government asserted, the two cases are distinguishable and thus equality before the law as applied in Drybones cannot be said to apply in Lavell.⁴¹ With this distinction made, the Attorney General proceeded to examine the concept of equality before the law itself, offering an interpretation narrowed extensively, indeed absurdly, by the overriding doctrine of parliamentary supremacy. The government argued that a uniformity of rights could not have been intended by s.1(b) since any society must operate according to selected disparities in the area of individual and group rights. More significantly, it characterised such disparities as matters of legislative policy "which Parliament determines in the circumstances of each case, and the wisdom of Parliament's decision in this respect is not something this Court will question."⁴² For the government, the concept of reasonableness appears to represent an irrefutable

assertion. Accordingly, the Attorney General viewed equality before the law as meaning no more than "the equal subjection of individuals to the sanctions and remedies imposed by the courts of the land."⁴³ Surprisingly, the government's approach in this area did not provoke the strong reaction that it deserved from both the Court and the public. It is one thing for an individual litigant to attempt to persuade the Court to see his restrictive view of the Bill of Rights. It is quite another for the federal government, supposedly devoted to the protection of civil rights and thereby bound to set an example in that regard, to proceed along similar lines. In any event, the government's submissions provided the NIB with a measure of support that no amount of reasonable classification arguments could hope to match for overall effectiveness and strength.

In a final submission lending support to the status provision,⁴⁴ the Treaty Voice of Alberta submitted that long standing customs of the Indian people in the area of band membership are "exactly the provisions set out in the Indian Act. As stated:

An Indian maiden who married a brave from another band left her band for that of her husband. An Indian who took a wife brought her to his band where she was accepted as a member. An Indian girl who married a non-Indian left her band and lived with her husband. If the marriage failed, the Indian woman expected to be and usually was accepted back into her band. ⁴⁵

Arguing in more general terms, the Treaty Voice maintained that as soon as a right is not the right of every person in

Canada, "you no longer are speaking of human rights or fundamental freedoms." On this basis, the intervenant characterised the membership sections as unique and thus not susceptible to the broader guarantees offered by the Canadian Bill of Rights.⁴⁶

The opponents of the impugned status section adequately met these countervailing arguments with diverse and informed presentations.⁴⁷ The respondent, recognising the strength of the Indian organisation's reasonableness arguments grounded as they were upon the special status afforded Canada's native people, approached the matter with caution. Indicating on several occasions that the factum is "definitely not urging upon the Court" the use of American jurisprudential standards or tests to decide the issue in dispute, Lavell dealt almost exclusively with the nature of the discrimination created by s.12(1)(b), leaving the detailed and difficult task of contesting the overall reasonableness of the policy to her supporters.

To effectively present her discrimination arguments, the respondent was primarily obliged to counter the NIB's charge that the Canadian Bill of Rights is not applicable to the provisions contained in the Indian Act. Conceding that Parliament could not function without classifying citizens, Lavell countered that nevertheless "the words of s.1(b) are clear and unambiguous: That equality before the law and equal protection of the law refers to all laws of Canada without

exception.⁴⁸ While the Indian Act "is particularly a law for the protection of Canada's Indians" she argued, the Bill of Rights must still be invoked where and when necessary to make these protections apply without discrimination. In response to the government's contentions on the effect of the Drybones case, Lavell meticulously listed the various hardships that Indian women were bound to endure if they chose to marry a non-Indian, concluding that the status provision does in fact result in a penalty "far more serious than the fine imposed upon Joseph Drybones because he chose to get drunk."⁴⁹ The Indian Act, she maintained, is a law which fundamentally affects the dignity and worth of the human person simply because its general purpose is the preservation of the dignity and worth of the Indian peoples. A classification scheme founded upon race, sex and national origin is inconsistent with the preservation of such dignity and thus, even a restrictive reading of the Bill of Rights cannot deny its applicability in this instance.

On the basis of these general contentions, Lavell claimed that the deletion of her name from the band list solely because of her marriage to a non-Indian, denied her the right to equality before the law as guaranteed by the Bill of Rights on grounds of both race and sex.⁵⁰ Racially the respondent made clear, it was only Indian women who suffered discrimination on the basis of the race of their spouse. Asserting that the

tendency of such race related discrimination "can only be to create and deepen divisions between racial groups," the factum indicated expressions of open opposition to racial discrimination in all its forms as found in the Universal Declaration of Human Rights, the public policy as stated in the Royal Commission Report on the Status of Women and the Canadian Bill of Rights itself.⁵¹ In an equally short and to the point argument, the respondent argued that sexual discrimination between Indians, as opposed perhaps to discrimination on the basis of education, marital status or residence, is not permissible. This is a fact, she maintained, not merely forbidden by the provisions of the Bill of Rights, but one that has long been recognised as forbidden in Canadian, British and American case law.⁵²

Proceeding to augment her main argument, Lavell contended that although viable alternatives based on residency or close connection with band activities could be advanced, she was of the opinion that reasonableness and counter-reasonableness arguments should not be needed or even permitted in the instant case. There is the matter of how to go about securing adequate proof. Unlike the United States, she pointed out, Canada does not have and there appears "no clear authority for the development of" extensive oral testimony or Brandeis brief type submissions. Even if sufficient data could be amassed, she continued, the fact remains that classifications based on race or sex would still require the strictest justi-

fication on the part of their supporters. Equating the status provision with the entrenched U.S. doctrine of suspect classification, the respondent concluded that if reasonableness arguments were permitted, the Court must ensure that they not only show "a compelling interest to justify the law but also that the particular distinctions drawn by the law are necessary for its purpose."⁵³

These points were reiterated in greater detail in a supporting factum presented by Anishnaubekwek of Ontario. It primarily noted that the provision creates a host of disabling inequalities and handicaps. Most clearly, it imposes economic and social burdens on Indian women not shared by Indian men. More generally, Anishnaubekwek argued, s.12(1)(b) "imposes a fetter on an Indian woman's freedom to marry whomsoever she wishes" and as such, clearly discourages the practice of formal marriage in many instances.⁵⁴ In the remainder of its factum, the group provided detailed analysis of the American jurisprudential concept of suspect classification, pointing out that matters subsumed under this rubric "embody a general illsuitedness to the advancement of any proper legislative objective, a high degree of adaptation to uses which are oppressive, and a power to injure or stigmatise..." The factum argued that the five prohibited forms of discrimination found in the Canadian Bill of Rights provide the basis for the development of a Canadian counterpart to this American doctrine. Overall, Anishnaubekwek claimed that the host of

detrimental consequences that the status provision creates, make it impossible to reasonably relate it to the general goal of maintaining a separate Indian identity.⁵⁵

A number of NIB and federal government contentions were ably taken to task in a joint factum presented by the Alberta Committee for Indian Rights for Indian Women. To the largely unsupported claim that the Indian Act's patriarchal status provision merely reflects Indian customs and traditions, the Committee answered:

...it did not reflect a general custom of Indian peoples but imposed common law concepts, as they existed in 1869, upon Indian women. In fact, the Iroquois and Huron societies were matriarchal and women figured prominently in the constitution of the Iroquois of Six Nations.⁵⁶

The factum also challenged the NIB's major assertion that although discrimination resulted from the application of the status provision, it is discrimination confined exclusively to Indians for the purposes of furthering their own well-being. Such logic, the Committee asserted, is tantamount to arguing that discrimination exclusively between whites or exclusively between blacks would also be permissible if some general purpose could be attached thereto.⁵⁷ Emphasising that Drybones provided the substantive precedent required in the instant case, the Committee concluded that if the word sex is substituted for the word race, the Court should have little trouble in finding the status provision inoperative.⁵⁸

In a final supporting submission, the Native Council of Canada indicated that the impugned section not only discriminates against Indian women but also against their children who may be denied the benefit of experiencing their own culture.⁵⁹ In a further contention, the Council made clear that "it is not an acceptable proposition to argue, as does the appellant Attorney General, that an Indian woman has a free choice to be released from the provisions of the Indian Act... It would only be a free choice if she could of her own free will, choose either result without her marriage having anything to do with it, as can an Indian male."⁶⁰ Overall, however, the factum was important for its extensive codification of past governmental-Indian decisions, relevant statutes, agreements, treaties and basic Indian customs that indicate native rights being grounded and successfully maintained upon racial and cultural origins rather than the discriminatory provisions of the Indian Act.⁶¹

The complex issues surrounding the status provision of the Indian Act, despite the fact that none of the factums could be termed Brandeis brief type submissions, were comprehensively presented to the Supreme Court. Both sides argued almost exclusively upon the grounds of broad social considerations. The Indian organisations consistently maintained that the status provision was part of a reasonable legislative scheme serving the legitimate purpose of protecting Indian lands and customs. Their opponents not only drew

the reasonable nature of the section into question through pointed arguments and relevant factual information, but in addition, raised the vital issue of whether sex or race based classifications, no matter what their purpose, are inherently suspect and thereby hardly amenable to a rational defence. It was only the factum presented by the federal government that dwelt heavily upon technical, legalistic considerations. To a receptive Court prepared to thrash out these countervailing positions in oral advocacy, the submissions provided a clear opportunity to arrive at a rational, socially conscious decision within the general framework of a classification test. Characteristically, the majority failed to take up the sword.

In his majority judgement, Justice Ritchie appeared to hint that he was prepared to recognise the central arguments raised by the intervening groups and decide the matter accordingly. Declaring the fundamental point at issue to be "whether the Bill of Rights is to be construed as rendering inoperative one of the conditions imposed by Parliament for the use and occupation of crown lands reserved for Indians," the Justice seemed ready to embark upon a test of the law's reasonableness in stating:

...the question to be determined in these appeals is confined to deciding whether the Parliament of Canada in defining the prerequisites of Indian status so as not to include women of Indian birth who have chosen to marry non-Indians, enacted a law which cannot be sensibly construed

and applied without abrogating, abridging and infringing the rights of such women to equality before the law.⁶²

In point of fact, however, Ritchie went no further along reasonable classification lines than his vague enunciation of the bare elements of the test indicates. In effect, he merely assumed the status section to be reasonably related to the legislative goal as posited by the NIB, failing to justify this major assumption through a comparative weighing of the countervailing arguments and issues on both sides of the matter. In short order, the opinion reverted to irrelevant legalistic analysis that failed to do justice to the many complex submissions outlining relevant considerations intrinsically related to the status provision under examination.

Justice Ritchie was strongly influenced by the position assumed in the factum of the Attorney General, a fact borne out by his two major assertions on the matter under review. Showing absolute deference to the authority and judgement of Parliament, the Justice indicated that the status provision was enacted under the federal government's exclusive authority to legislate with regard to Canada's Indians. Clearly regarding the Bill of Rights to be subordinate to federal legislation so enacted, Ritchie concluded:

There cannot, in my view, be any doubt that whatever may have been achieved by the Bill of Rights, it is not effective to amend or in any way alter the terms of the BNA Act, 1867, and it

is clear from the third recital in the preamble that the Bill was intended to reflect the respect of Parliament for its constitutional authority... so that whenever any question arises as to the effect of any provisions of the Bill, it is to be resolved within the framework of the BNA Act, 1867.⁶³

Resting his judgement exclusively upon the stated fears of the Indian organisations while ignoring the true intent of the respondent and her supporters, Ritchie ended his primary argument on the following grounds:

To suggest that the provisions of the Bill of Rights have the effect of making the whole Indian Act inoperative as discriminatory is to assert that the Bill has rendered Parliament powerless to exercise the authority entrusted to it under the constitution of enacting legislation which treats Indians living on reserves differently from other Canadians in relation to property and civil rights.⁶⁴

In his second major argument, Justice Ritchie proceeded to consider the meaning of the applicable phrase "equality before the law" as expressed within the context of the Canadian Bill of Rights. Imposing a new and certainly ad hoc interpretation if read against selected features of past case law, the Justice declared that the language of the Bill of Rights must derive its meaning from the law existing in Canada when enacted in 1960. On this limited basis, Ritchie finds the provision as not being effective "to invoke the egalitarian concept exemplified by the 14th amendment of the U.S. constitution as interpreted by the Courts of that country."⁶⁵ Rather, he maintains, the phrase is to be read

as being part of the "rule of law" as enunciated primarily by Dicey, thus implying in Canadian terms "equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land."⁶⁶ On this restrictive reading, Ritchie concluded by dismissing the clear implications of his earlier Drybones decision in a legalistic misinterpretation that would have done justice to some of the puzzling constitutional decisions rendered in the formative years of the Judicial Committee of the Privy Council's interpretation of the BNA Act. Invoking almost verbatim the federal government's contentions on the matter, the Justice distinguished Drybones from Lavell on the spurious contention that the former case involved the regulation of Indian activities carried on off reserves while the latter situation applied to the internal regulation of reserve societies. As stated:

...the impugned section in the latter case (Drybones) could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s.12(1)(b).⁶⁷

Founded solely upon these grounds, the decision represents an incredibly short-sighted reaction to the basic civil liberties issue raised not to mention the more general matters concerning Indian identity and traditions.

A more realistic and satisfying approach was offered in

the dissenting opinion of Justice Laskin. Proceeding upon a general philosophy more in line with the entrenched U.S. doctrine of suspect classification, Laskin dismissed the appellant's contentions in stating quite simply that:

...the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect; and moreover, I doubt whether discrimination on account of sex could be sustained as a reasonable classification even if direction against it were not as explicit as it is in the Canadian Bill of Rights. ⁶⁸

Directing himself to the Indian organisation's appeals on grounds of historical tradition and special status, the Justice found them to be far below the compelling test of rationality that his approach to the matter necessarily implied. After detailing the legal consequences and social hardships that Indian women must endure if they choose to marry a non-Indian, Laskin maintained that a clear historical basis for such discrimination could not be deduced, a fact he points out, that was generally conceded during oral argument on the matter. In oral hearings, Justice Laskin foreshadowed his reaction to the appeals of history and past custom in the following terms:

...the appeal to history as you have found it, is not really an appeal in respect of the construction of the Indian Act but an appeal in respect of the history in relation to the Canadian Bill of Rights, which is entirely a different proposition. I do not see how history in relation to the Bill of Rights which was passed in 1960 can have the effect that your argument suggests it should have. ⁶⁹

Having dealt with the major issues on a form of suspect classification basis, Justice Laskin proceeded to devote considerable attention to refuting what he perceived to be detrimental claims offered in the majority opinion. Finding it impossible to dismiss the clear implications of Drybones for the present appeal, the Justice echoed the words of the Alberta Committee for Indian Rights for Indian Women in stating:

If for the words on account of race there are substituted the words on account of sex the result must be surely the same where a federal enactment imposes disabilities or prescribes disqualifications for members of the female sex which are not imposed upon members of the male sex in the same circumstances.⁷⁰

and further

It appears to me that the contention that a differentiation on the basis of sex is not offensive to the Canadian Bill of Rights where that differentiation operates only among Indians under the Indian Act is one that compounds racial inequality even beyond the point that the Drybones case found unacceptable.⁷¹

Tackling Parliament's contended supremacy in the area of Indian affairs, Laskin characterised it as an oblique appeal for an overruling of Drybones, maintaining that exclusive legislative authority does not provide an ancillary right to discriminate on the basis of race, colour or sex.⁷² In direct opposition to the view expressed by Ritchie, but ironically grounding his assertion on that Justice's opinion on Drybones, Justice Laskin concluded that s.1(b) must be read in its broadest form so that it may serve to fully guarantee the substantive right to

equality before the law without discrimination on the basis of "race, national origin, colour, religion or sex".

Overall, the Supreme Court's handling of the Lavell case created a number of problems. The majority's failure to proceed upon the basis of a classification test, left unanswered a host of vital questions. Are all Indians deemed exempt from the applicable provisions of the Bill of Rights? Is the status provision rationally related to the legitimate legislative goal of protecting Indian lands or customs? If so, then how is one to square its disabling and contradictory results with this supposedly rational basis? A majority judgement that appears to indicate deference to the special status of Canada's native people but fails to offer explicit statements in this regard is bound to create anxieties and give rise to hostilities between rival Indian organisations and their representatives. Dealing extensively with the concept of suspect classification but failing to fully expand upon his dismissal of the Indian organisation's reasonableness claims, Justice Laskin's minority opinion provided only partial relief in this regard. In short, the major issue raised, is the status provision a reasonable means to achieve the protection of native rights, was not fully dealt with and probably never will be.

The decision also produced more basic problems. Arguing at cross purposes throughout, the majority and minority opinions only confused the matter of civil liberties and their protection under the Canadian Bill of Rights. Justice Ritchie's reliance

upon legalistic interpretations to "settle" the issues brought forward on the basis of the Bill's provisions, left uncertain the future applicable limits of general protective clauses such as due process and equal protection. Justice Laskin's willingness to challenge these legalistic principles of adjudication and proceed upon broader social considerations, while no doubt an encouraging development, nevertheless served to leave public interest groups in a holding pattern. With part of the Court recognising that the Bill of Rights "has substantially affected the doctrine of the Supremacy of Parliament"⁷³ but a clear majority holding to the belief that the Bill of Rights itself indicates that its provisions "reflect the respect of Parliament for its constitutional authority",⁷⁴ potential intervenants in civil liberties cases are left to ponder whether legal action really represents their most viable alternative. It is an outcome not to be expected nor welcomed in the area of civil liberties litigation.

Press and Academic Reaction

Although having to compete for space on editorial pages with a crippling nation-wide rail strike, not to mention an economy that had taken a severe turn for the worse, the Lavell decision more than held its own.⁷⁵ Press coverage of the case differed markedly from past Canadian traditions. Many newspapers provided daily reports of the Supreme Court hearings. Through extensive coverage of the issues on both sides of the dispute, a number of papers attempted to view the litigation in

its proper legal, political and social context. Leading the way in this regard was the Toronto Globe and Mail.⁷⁶ Characterising it as a mistake to simplify the decision "to the single issue of female rights", The Globe devoted considerable attention to the important claims and fears of the status Indians. In detailing the pragmatic as well as the philosophic reasons for their stand, the paper posed the recurring question of whether the white majority has "the right to impose upon native peoples a facet of a culture which is incompatible with the Indian culture". The editorial maintained that unfortunately the decision served to add more fuel to an already smouldering political issue. Declaring that the Supreme Court "placed an astonishingly narrow interpretation upon a key section of the Canadian Bill of Rights", the paper summarised Justice Ritchie's majority opinion in the following terms:

A fair interpretation of this stand seems to be that the Supreme Court is saying Parliament can pass a law discriminating against Indians or women if it wants to and the law cannot be struck down under the Bill of Rights. All that the Bill of Rights will ensure is that the law will be enforced so that all Indians or all women will be treated with equal discrimination.

Clearly stating that the decision provided "a sterile, jesuitical hair-splitting" answer to a basic civil liberties question, The Globe appropriately concluded:

It is too close a decision to be satisfactory, especially with the Drybones case sitting there as a precedent, at least in lay eyes. The people do have to understand their Court's judgements if the judgements are to have meaning...

At opposite extremes were The Montreal Star, The Calgary Herald and The Citizen.⁷⁷ Both The Star and The Herald showed sympathetic understanding for the complex matter that the Supreme Court was asked to decide. Openly denouncing the "glib liberalism" that it felt characterised "most fashionable comment" on the matter, The Star came to the defence of the majority judgement in the following manner:

Don't blame the Supreme Court of Canada for upholding the discrimination against women in the Indian Act. The judges were faced with a decision on a delicate point of law. Their ruling was a close one and there is no evidence that the opinion of the majority was based on misogyny.

The Herald also upheld the validity of the Supreme Court's ruling in the face of what it termed the "nonsense that has been spoken so far." Responding to charges of sexual bias enunciated by several women's groups, the paper asserted:

...some groups have accused the Supreme Court directly of being sexist. That simply isn't fair. The Court wasn't asked to pass upon human equality, it was asked to rule on Parliament's right to do something, even something wrong if it comes to that. It ruled merely that Parliament had the authority to do what it did. It didn't say that Parliament was right...

The Citizen shared no similar compassion. It characterised the decision as being both disappointing and disconcerting:

Disconcerting because the Supreme Court decision as brought down by a majority of one, has thrown into uncertainty the reach of the Canadian Bill of Rights.... Disconcerting because the majority judgement, in

logic that can only be called contorted, manages to draw a distinction between discrimination on the basis of race and discrimination on the basis of sex.

Claiming that even those who opposed the Indian woman "must now be convinced of the great injustice that the law imposes," the editorial concluded by demanding legislative action to amend "the present faulty law."

The Toronto Star, the Edmonton Journal and The Gazette⁷⁸ reserved their harshest criticism, not for the Supreme Court decision itself, but rather for the law that the judges were asked to consider. As The Star framed its argument, "When the law of the land excommunicates a woman and disinherits her children, the law should be changed." The Journal interpreted the decision as a challenge to those interested in obtaining equal rights for women. The paper called on Parliament to take the initial step in this regard by amending the discriminatory provision of the Indian Act. As stated:

If the Bill of Rights cannot eliminate this from the Act then Parliament must do it through amending legislation. All the government needs is sufficient prodding from those determined to establish equal rights for all Canadians. That is the challenge of the Supreme Court ruling.

The Gazette echoed similar thoughts, declaring that "if Parliament is allowed to discriminate, it is equally allowed to protect against discrimination." Maintaining that in 1973 the use of its powers to protect against discrimination would

be much more appropriate, the paper called on Parliament to "get busy" either by amending the BNA Act, the Bill of Rights or the Indian Act itself.

Academic reaction to the Supreme Court ruling, particularly when compared with past Canadian standards, was extensive.⁷⁹ Although a number of academic commentators came to the Supreme Court's defence, a clear majority were critical of its final determination. For the most part, critical reviews shared two important points. There was a general consensus that the decision did little to clarify the applicable limits of the Bill of Rights. As R.W. Kerr maintained in a common response:

...judicial interpretation of the right to equality before the law under the Canadian Bill of Rights at the present time is not merely in a state of uncertainty, which is likely to be a perpetual condition in view of the inherent vagueness of the concept, but indeed in a state of profound confusion. 80

Moreover, the Supreme Court's critics agreed that this pervasive lack of clarity stemmed from the nature of the Court's approach to civil liberties disputes. As W.S. Tarnopolsky framed the standard argument:

One does not object so much to the actual decisions in the cases concerned, as to the process by which the conclusions are reached... They should, at the same time, provide guidance to all citizens and especially lawyers, judges and public officials through exposition of the issues at stake and elaboration of the principles being applied. 81

Academic reaction to the Lavell case marked the first concerted effort by a host of Canadian legal commentators to come to grips with the Supreme Court's general theory of law. This development may very well turn out to be the most significant and profitable feature to emerge from the entire affair. It not only set an important trend for the future but in doing so, offers a potentially strong impetus for needed change.

Critics of the Court's jurisprudential style demanded that it assume a more realistic approach to Bill of Rights cases. In the interests of a more informed justice, they encouraged the judges to enter the power struggle, prepared to question legislative policy and thereby go about the business of balancing society's many competing interests. As L.C. Green framed the argument:

...any court faced with anti-discrimination legislation, including such measures as the Bill of Rights, must, despite the views of the Supreme Court in Lavell, if it is to give proper effect to the purpose of the legislation, concern itself with the reality of equality rather than the more forms and appearances thereof. In seeking such true equality, a court may find itself faced with the competing claims of different groups in society or with a conflict between one group and society at large.⁸²

The adoption of a reasonable classification test represented the unanimous suggestion of those commentators concerned with effecting a change in the Court's prevailing adjudicative style. Leading this call was I.F. Kelly of Queen's University.⁸³

Unlike other commentators, however, Kelly felt the majority decision came "to the brink of making a major breakthrough in Canadian jurisprudence in the adoption of a reasonableness test, only to lack the courage or insight to make the relationship clear." He applauded Ritchie's recognition of the applicability of the test for the issues presented by Lavell but condemned his restrictive reading of equality before the law, a reading that makes the test unworkable in future adjudication "unless severely modified or overruled." Kelly presented his proposal in the following terms:

...the courts must be prepared to inquire into the intention of Parliament and into the relevant social facts underlying such intention. Otherwise, it would always be open to Parliament to legislate facts into existence by setting them out in the preamble to the statute... there would be no recourse against the most flagrant and unjust discrimination if the courts defer to the legislative determination of fact. Thus, if a full and substantive effect is to be given to the guarantees contained in the Canadian Bill of Rights, it will be necessary for the courts to analyse existing social conditions in order to determine if the ascertained purpose is legitimate. If the facts do not support the existence of a legitimate legislative objective, the measure will be struck down as involving arbitrary discrimination and denying equality before the law. In the task of judicial fact-finding, such devices as the Brandeis brief will be of great necessity and importance. 84

Coming out in support of the same general position were P.W. Hogg and W.S. Tarnopolsky.⁸⁵ Both writers were careful to detail, however, the strong institutional restrictions work-

ing against the full adoption of such an activist jurisprudential philosophy. Indicating that a reasonableness test will necessarily require the Court to leave the safe confines of the law and enter the more unpredictable area of policy making, Hogg points out that not only is it doubtful whether the Court possesses the necessary tools to tackle the policy questions as framed by the reasonableness test but more significantly, it is doubtful whether the judges will welcome the public controversy and criticism that surrounds "the making of social policy." In spite of these inhibiting factors, Hogg maintained his initial position, concluding that a more rational approach is necessary to replace an excessively legalistic jurisprudence that "no amount of repetition will make convincing."⁸⁶ Citing the overriding doctrine of parliamentary supremacy, Tarnopolsky assumes a more restrictive viewpoint, severely modifying the traditional U.S. concept of reasonable classification in the process. Ignoring the concept of suspect classification, he maintains that as applied in the Canadian context, a reasonableness test should always place the burden of proof upon those contesting the inequality of government legislation. Finding Laskin's approach to be "too absolute and disabling," Tarnopolsky concluded that "in cases of any doubt, the judges must resolve the issue in favour of upholding the law."⁸⁷ However, Tarnopolsky's hope for an improvement upon prevailing conditions through the adoption of his "reasonableness

test" must be regarded as being both tautological and unrealistic. Given the Court's entrenched unwillingness to challenge legislative judgement under a doctrine of parliamentary supremacy, one must question whether Tarnopolsky's test would do anything to alleviate the already overbearing obstacles placed in the way of litigants wishing to challenge government enactments. Surely a more balanced standard of proof is exactly what is needed to arrive at more equitable and satisfactory results.

Both supporters and opponents of the Court's decision were careful to recognise the special nature of the laws relating to Canada's native people, acknowledging the difficult problems they posed for the judges. As critic of the decision J.N. Lyon pointed out:

Judicial awareness of this inherent conflict has led the Supreme Court to treat Indian cases in terms of equality before the law, thus permitting the Court to avoid the question of racial discrimination by giving a narrow interpretation to equality before the law. 88

David Matas, a lawyer long involved in the study and defence of native rights, predictably supported the majority's basic determination, declaring it ironic that the Bill of Rights "intended as a shield for minority groups such as Indians, was almost used as a club to victimise them."⁸⁹ Significantly, even this staunch supporter of the Court's tacit recognition of "special status" came down hard on the method employed to uphold the status provision. He commented upon Justice Ritchie's equality arguments in the

following terms:

The doctrine as enunciated provides an easy way for Parliament to circumvent the Bill. It can legislate inequality and provided that inequality is enforced in the first instance by administrative officials and not the courts or law enforcement authorities, the inequality is not inoperative. The courts, if they accept this doctrine, will be hiding their heads in the sand. Inequality in the law will be tolerated as long as they do not see it, as long as it does not come before them. ⁹⁰

Reaction from practicing legal counsel was quite extensive. Regarding the Supreme Court's approach to equality with sympathetic understanding was lawyer R. McLaughlin.⁹¹ Viewing the Court's interpretative record in an historical context, McLaughlin felt the Lavell case was not the right time to impose on the notion of equality "a mechanical method of determining its application." He notes that the Supreme Court has had little experience in the use and application of the concept of discrimination, concluding that its apparent choice to proceed upon an ad hoc case by case approach, if viewed as part of a trend toward more general interpretative standards, is one that has "an honourable history in common law jurisdictions."⁹² Assessing the significance of Lavell for defence counsel in future criminal and civil liberties cases was E. Ratushing.⁹³ Analysing the decision from a "lawyer's point of view," his comments may be regarded as largely impartial. Ratushing notes the pervading lack of guidance offered on many important questions. "Is there some distinction to be drawn between

a racial group and certain women as a group," he asks. "What is the significance of the words administrative application and enforcement of the law; are they to be distinguished from the actual substantive provisions of the law?"⁹⁴ He pessimistically concludes that "there is little reason to expect that the Supreme Court will deviate from its course in applying the Bill....," prophetically adding that one might even expect it "to narrow somewhat the subject area of that power."⁹⁵

At two extremes in post-decision comments were P.N. MacDonald and B.J. McCourt.⁹⁶ Grounding his support for the Supreme Court ruling on the basis of selected features of U.S. jurisprudential history, MacDonald characterised the impugned status section as a matter "which in American jurisprudence would be called an under-inclusive classification." On these terms he summarises the Court's approach as follows:

The Court was able to say, quite properly, I think, that the legislation was a valid exercise of the power under s.91(24), notwithstanding that the persons who might have been included as Indians were excluded by the particular legislative classification. The persons included in the classification were constitutionally distinct. Having reached that conclusion, it followed necessarily that the class was rationally distinct.⁹⁷

It is important to note that MacDonald neglected to indicate that the Supreme Court failed to address itself to the most significant consideration raised by an under-inclusive classification,

namely, is it justified as a result of its relation to a necessary and legitimate legislative goal or is it maintained more in answer to political pressures? Failure to qualify his contentions in favour of the Court's ruling on these terms renders MacDonald's arguments less convincing to say the least. McCourt labelled the decision a "severe blow to the authority of the Bill of Rights," a decision that effectively "set-up new barricades to the development of statutory protection of civil rights in Canada."⁹⁸ Condemning the Court's failure to deal directly with the important social issues underlying the Lavell case, McCourt maintained that the clear implication of this failure must be that "the majority believed the subject was so highly politically sensitive that it was wiser to overlook the discrimination than to declare the provision inoperative."⁹⁹

J.D. Whyte offered the most scathing indictment of the Court's conclusion in an article providing in depth analysis of the factors that provoked widespread interest group participation in the case.¹⁰⁰ Whyte found the overall implications of the decision to be unsatisfactory for both sides. The Indian women were the most clear losers but given the nature of the Supreme Court's reasoning, he maintained, it would be difficult to say whether the Indian organisations themselves were the real winners. Not only did the Court fail to answer their major submissions, Whyte points out, but in doing so, it left open the possibility that Indians may not be regarded as

possible benefactors of the Bill's protective provisions under any circumstances. For a minority group this is not the type of outcome they "could find comforting."¹⁰¹ The Court's narrow reasoning on the matter of equality before the law, Whyte makes clear, should be enough to cause all Canadians "to reassess our assumptions about the place of egalitarian values in the Canadian constitutional system." He finds Justice Ritchie's legalistic point of view to be "analytically untenable," an approach that "confuses substance and procedure and treats the existence of a separate offence for Indians as, in effect, a matter of procedural irregularity." Nor does the author applaud Laskin's "rigid approach." In declaring reasonable classifications touching upon race and sex to be always suspect, Whyte maintains, Laskin precludes valid Indian claims for immunity from unwanted or harmful Bill of Rights values.¹⁰² He concludes with the following rebuke:

The reason why these disputes are put to the judicial branch rather than the legislature is that there are significant constitutional principles at stake and it is the judiciary which, under our system, provides the ultimate exposition on the constitution. It is unfortunate that the exposition flowing from Lavell should cast doubt on the Court's adequacy to perform this duty. ¹⁰³

As was the case in both the Anti-Inflation reference and the Morgentaler appeal, reactions to the Lavell ruling shared a number of unsettling characteristics. Many Lavell,

commentators expressed doubts about whether the Supreme Court could provide a clear judgement through an adequate consideration of the issues on both sides of a dispute. A majority questioned the Court's willingness to show an active concern for civil liberties cases brought forward upon the basis of the Bill of Rights. Words such as "bias," "unfair or inadequate treatment" and "indifference" crept into many articles and editorials. These are certainly disturbing results. Whether specific charges are in fact true or even provable is not really important. The image of a court is at least partially determined by the reactions of its public. Overall support for the judicial process, moreover, rises or falls in direct relation to that projected image. Significantly, both critics and supporters alike offered constructive suggestions for improvement. A number advocated a radically different approach to civil liberties cases. More significantly, it appears from subsequent decisions such as *Morgentaler*, that overall the Supreme Court has not been listening.

Continued Activity in the Political Arena

For several reasons, the *Lavell* case did not end debate over the status provision. Most simply, it left unchanged the plight of non-status Indian women, forcing them to attempt to achieve their demands in political circles. The majority decision contributed substantially to the confusion that had always existed between the legal, ethnic and biological

distinctions in the Indian Act. Perhaps most important, in creating a united Indian-government front on the untouchable nature of the Indian Act, the case served to confirm the basis of continued government/status Indian interaction.¹⁰⁴ In any event, post-decision developments quickly made clear that the relative weakness of the Indian women's groups in comparison with the NIB, while not a significant factor in the legal arena, proved to be the greatest impediment to success in their early efforts to convince the government of the validity of their claims.

The events leading up to and indeed the group's actual preparations for the Supreme Court test, contributed greatly to the nature of post-decision political developments. The NIB, as indicated previously, forced the federal government to withdraw its white paper proposals in 1969.¹⁰⁵ This initial victory, while serving to give birth to an awakened NIB and make its position on changes to the Indian Act abundantly clear, did not grant the organisation immediate status as a legitimate participant in the policy-making process. It was the Lavell case that provided this necessary lever. In an astute manoeuvre, the Brotherhood was able to make its intervention in the appeal an integral part of an already established pressure campaign. Achieving federal assurance in 1972 that further changes to the Indian Act would not be made without prior consultation with Indian representatives, the NIB laid the initial foundation upon which to build future discussions.

This foundation was solidified through close collaboration with the Attorney General as well as its offer to provide "draft proposals" for reform while the case was in progress. Quite clearly, the NIB established political links prior to the Supreme Court hearings and ensured, both through its arguments in Court and simultaneous political manoeuvring, that they would be maintained in the post-decision period. The Indian women showed no similar concerted effort or planning. As already alluded to, the intervening organisations were hastily established to provide Indian women with a voice in the Supreme Court hearings.¹⁰⁶ There was no attempt to make the court test part of an ongoing pressure campaign simply because no such campaign had been undertaken in the few months preceding the Lavell appeal. With the need to organise themselves and get on with preparations for legal activity, the groups were left with little time to develop post-decision strategies. Basically, the intervention of the Indian women's groups represented an ad hoc reaction to prevailing political developments.

The NIB's pre-trial strategies resulted in the establishment of a close working relationship with the federal government almost immediately following the Supreme Court judgement. By the end of October 1974, the Brotherhood made its draft proposal for a new Indian Act known to the Department of Indian Affairs. Initially the government reacted coolly. In a preliminary meeting with the federal cabinet, a consensus was reached that amendments were indeed necessary. At a second

meeting held in February 1975, the government made clear that it preferred a step-by-step revision of various sections as opposed to one immediate overhaul. The NIB agreed to this proposal and received assurance that:

...no changes to the Indian Act would be introduced in Parliament by the Department of Indian Affairs, without first having such changes cleared through a joint meeting of the NIB executive council and the Cabinet committee especially set up to meet with the Brotherhood council. 107

The long and protracted consultative process by way of a joint NIB/Cabinet committee began. At the Brotherhood's insistence, treaty concerns and land claims were made "top priority" subjects, overshadowing the more delicate issue of band membership and status. Two sub-committees and several research teams were established to look into the matter of land claims. Substantial funds were provided to enable the NIB to conduct independent research. Band membership was delayed as a topic for discussion until December, 1977. Thus controlling the agenda and the government's pocketbook, the NIB effectively shelved the status issue in political circles in the years immediately following the Lavell decision.

Post-decision developments were clearly not favourable for the groups representing the interests of native women. The adverse Supreme Court judgement and the resultant calls for legislative action that it evoked from nearly all quarters, did not improve their bargaining position one iota. Lacking

access to government channels and necessary funding, their continuing campaign against section 12(1)(b) was severely restricted in its initial stages. The Advisory Council on the Status of Women provided the women's groups with their only direct link to the policy making process. Its recommendations; however, like those of the federal Law Reform Commission, are traditionally known to carry very little weight in political circles. Other groups and organisations, such as the Native Council of Canada, offered a source of indirect access. In its annual presentations to the federal government, the Council made certain to emphasise the needs of native women, consistently calling for amendment of the Indian Act in line with their demands.¹⁰⁸ This support was necessarily sporadic, lacking the effectiveness and continuity that only direct access to political channels can provide. For the Indian women's groups, however, this outlet was blocked by the nature of the NIB/Cabinet relationship. Nevertheless, as IRIW President Margaret Thompson made clear, the Lavell case and subsequent developments served "to unite Indian women and awaken us to the injustices suffered needlessly over the last century; a struggle that will continue until native women are given their rightful place in Indian and Canadian society."¹⁰⁹

Continued pressure, the added support provided from new groups¹¹⁰ and perhaps just as important, the growing embarrassment associated with constantly ignoring their claims, forced

a change in the ongoing debate in early 1976. So long neglected in political circles,¹¹¹ IRIW and several other native women's groups were invited to appear before the Standing Committee on Indian Affairs and Northern Development.¹¹² The group's representatives wasted little time in voicing their frustrations and making their demands known. Emphasising that non-status Indian women had already suffered enough, NWA President Margaret Thompson bluntly asserted, "...we see no reason for Indian women to be denied their Indian status on their marriage to a non-Indian. We are not willing to debate this point."¹¹³ The speakers were careful to point out the need for proper funding if they were to carry out their work. In concluding, the women made several demands. Most important, they asked for commitment from the government to look into the matter and to allow Indian women input into the making of proper changes to the Indian Act. As an interim proposal, the women suggested that the prevailing system be suspended while current negotiations were in progress.¹¹⁴ Although several requests were either openly rejected or temporarily neglected, this initial meeting between Indian women and the federal government was to have significant ramifications.

In the months following the meeting, the native women's greatest support ironically came from the NIB itself. Adamant in its stand on Indian Act revisions, the Brotherhood was quickly testing the patience of a federal government under increasing pressure to alleviate the discrimination caused

by section 12(1)(b).¹¹⁵ Before the standing committee considering new human rights legislation for example, Justice Minister Ron Basford bluntly warned the NIB that the government was not going to tolerate "for too long" the discrimination against women in the Indian Act.¹¹⁶ Previous NIB actions and decisions contributed greatly to the growing uneasiness of the ongoing relationship. In September 1977, the Brotherhood unanimously rejected a request from both NWA and IRIW for representation on its executive council.¹¹⁷ Similar requests were turned down in December. In October, the NIB announced its official position on band membership. In complete opposition to both the government's mellowed stance and the views of Indian women, the Brotherhood advocated that individual bands be given the right to determine their own membership rules. As stated:

Any move for reform today must necessarily aim at restoring Indian autonomy or self-determination while replacing the protective element with another which will accomplish the same purposes with less repugnant means... local determination of membership is a minimum ingredient of self-determination. 118

This stand was only qualified with the request that all bands make their rules public and that borderline cases be appealable to the Federal Court. The NIB is very much bound by the decisions of its affiliates; a fact indicated not merely by this official policy stand but by subsequent developments as well. In March 1978, for example, the powerful Alberta

Association refused to renege on the issue of status, taking a majority of affiliates with it. Despite indications from NIB President Noel Starblanket that he was under increasing pressure, "particularly from the government of Canada, to come up with an agreement," the membership refused to budge. In further negotiations, the central bodies' hands were effectively tied.¹¹⁹

With no room to manoeuvre, the NIB was forced to unilaterally break off the consultative process with the government in April.¹²⁰ While the NIB-government relationship was hitting rock bottom, a closer working association between federal representatives and the various Indian women's groups was emerging. With funds allocated to ACSW, the Indian women solicited Kathlene Jamieson to undertake a study of the history of Indian women under the Indian Act. In February of 1978, the Secretary of State made available between \$50-75,000 for research projects of their own. With these grants secured and the Jamieson study set for release in early spring, the Indian women's organisations met in April to come up with "preferable alternatives to the status provision." By June, the women had formulated a proposal based closely upon the entrenched U.S. practice. They advocated that Indian status be determined, following either the father's or the mother's line, on the basis of one quarter Indian blood. Local band tribunals, the recommendation urged, should be established to evaluate all applications subject to an independent appeal process.

With both sides making their positions clear amidst renewed debate in the House of Commons following the NIB decision to break off the consultative process, the stage was set for a government response. After extensive consultation with both sides, newly appointed Indian Affairs Minister Hugh Faulkner announced the government's position in mid-June.¹²¹ Asserting that he would ask Parliament to eliminate discrimination against Indian women even if he did not have the consent of most of the Indian community, Faulkner explained his approach to the Brotherhood in the following manner:

It should be emphasised...that the government is responsible for amending the Act and it seeks through the various consultations, to achieve a broad consensus, not necessarily agreement, on what it proposes to proceed with.¹²²

Maintaining that s.12(1)(b) represented "one of the principle areas for revision," the Minister offered a variety of potential alternatives that basically lay somewhere between the NIB's and Indian women's proposals.¹²³ With Faulkner intent upon introducing an amendment in the fall, a compromise is presently being sought. It is to be hoped that the federal government, unlike the Supreme Court, finally approaches the matter with an ear open to both sides and thus produces a realistic solution that neither avoids the main issues nor bows to the influences of political pressure.

NOTES

1. The Drybones decision marked the first and to date the only instance of a federal law being invalidated under the Bill of Rights. The case dealt with the compatibility of the provisions of the Indian Act restricting the drinking rights of Indians with the egalitarian provisions of the Bill of Rights. The Supreme Court made clear that the Diefenbaker Charter represented more than a mere interpretation Act, indicating that Canadians cannot have their rights limited by federal law solely on the basis of race. In short, the decision broke new ground, indicating that even though the federal government may pass legislation which is completely within its jurisdiction, it shall not stand under judicial scrutiny if it creates discrimination or inequality before the law. (1970) SCR 282.
2. The Royal Commission recommended that the Indian Act be amended to allow an Indian woman to retain her Indian status and be able to transmit such status to her children upon marriage to a non-Indian. RCSW pp.237-238.
3. The record of motions to intervene indicates that the Supreme Court refused status to a number of organisations and individuals: The Manitoba Action Committee on the Status of Women, The Edmonton Business and Professional Women's Club, The Canadian Federation of University Women, Miss G. Black, Mrs. J. Menzies and Miss M. Cook.
4. The Globe and Mail, June 26, 1969, pp.1 and 3
5. The Globe and Mail, July 8, 1969, p.7
6. The Globe and Mail, June 26, 1969, p.3
7. H. Cardinal, The Unjust Society (Edmonton: Mel Hurtig Publishing Company, 1970), pp.136 and 140
8. "Citizens Plus" The Indian Red Paper (Presented to the federal cabinet June, 1970) pp.5-6
9. The Globe and Mail, June 5, 1970, p.1
10. The Globe and Mail, August 9, 1972, p.4
11. J.D. Whyte, "The Lavell Case and Equality in Canada" Queen's Quarterly Volume 81 (1974), p.33
12. H. Cardinal, The Rebirth of Canada's Indians (Edmonton: Mel Hurtig Publishing Company, 1977), pp.109-110.

13. The Globe and Mail, October 25, 1971, p.13
14. The official NIB resolution on the matter read as follows: "The Indian organisations intervened in the Lavell and Bedard cases because they were concerned that the Indian Act, as a whole, was threatened and that the ability of the Canadian Parliament to legislate about Indians and Indian reserve communities was endangered..."
15. Letter, Legal Counsel to NIB, December 9, 1971, p.8
16. Letter, Legal Counsel to NIB, August 3, 1972, p.2
17. The Globe and Mail, November 29, 1971, p.8
18. D. Sanders, "The Indian Act: Status of Indian Women on Marriage to Person without Indian Status" Saskatchewan Law Review, Volume 38 (1974), p.246
19. Letters, Legal Counsel to NIB, December 9, 1971 and January 5, 1972
20. Indian Association of Alberta Brief to the Federal Government (February, 1973), pp.11-12
21. House of Commons: Standing Committee on Indian Affairs and Northern Development, Proceedings, May 25, 1976, p.53:8
22. The intervening women's groups included: The University Women's Club of Toronto, University Women Graduates Ltd., and The North Toronto Business and Professional Women's Club Inc.
23. Affidavits signed by intervening groups.
24. The group pledged this support at the Indian Rights for Indian Women Conference, December 6-8, 1972
25. P.W. Hogg, (Canadian Constitutional Law) (Toronto: McClelland Pub. Ltd., 1976), pp.417-418
26. See generally, J. Tussman and J. Tenbroek, "The Equal Protection of the Laws" California Law Review, Volume 37 (1948-49) and for a more recent assessment, "Legislative Purpose, Rationality and Equal Protection" Yale Law Journal, Volume 82 (1972)
27. See generally, R.M. Kwasnick, "A Question of Balance: Statutory Classifications Under the Equal Protection Clause" Stanford Law Review (1973)

28. (1974) 38 DLR 481
29. Section 12(1)(b) reads as follows:

The following persons are not entitled to be registered, namely, a woman who married a person who is not an Indian...
30. Joint Factum, Indian organisations, p.3
31. Ibid., p.2
32. Ibid., p.6
33. Ibid., p.7
34. Ibid., pp.8-9
35. Ibid., pp. 5 and 17
36. Ibid., pp.10-12
37. Ibid., p.16
38. Factum, Attorney General for Canada, p.4
39. Ibid., p.6
40. Ibid., pp.8-11
41. Ibid., p.11
42. Ibid., p.13
43. Ibid., pp.17-20
44. A concurring brief was submitted by The Six Nations Indians of the County of Brant. It offered no additional arguments.
45. Factum, Treaty Voice of Alberta, pp.2-3
46. Ibid., pp.6-8
47. Like the Indian organisations, the various supporters of Jeanette Lavell pooled their resources and submitted a joint factum. The Native Council of Canada and Anishnaubekwek of Ontario filed separately.
48. Respondent's Factum, p.5

49. Ibid., p.6
50. Ibid., p.3
51. Ibid., p.4
52. Ibid., pp.3,7 and 8
53. Ibid., p.10
54. Factum, Anishnaubekwek of Ontario, pp.7-8
55. Ibid., pp.9-13
56. Joint Factum, p.8
57. Ibid., p.10
58. Ibid., pp.10-11
59. Factum, Native Council of Canada, p.4
60. Ibid., p.10
61. Ibid., pp.4-7 and Appendix A, pp.11-39
62. (1974) DLR 494
63. Ibid., 489
64. Ibid., 490
65. Ibid., 494
66. Ibid., 495
67. Ibid., 499
68. Ibid., 510
69. Transcript of Oral Hearing, February 27, 1973, p.10
70. (1974) DLR 507
71. Ibid., 508
72. Ibid., 511-512
73. Ibid., 484
74. Ibid., 489

75. Space does not permit a comprehensive review of all editorial comment. As in past chapters, therefore, I have attempted to select interesting and representative comments from a number of major papers from across the country.
76. The Globe and Mail, September 3 and 6, 1973
77. The Montreal Star, August 30, 1973: The Calgary Herald, September 24, 1973: The Citizen, August 29, 1973
78. The Toronto Star, August 29, 1973: The Edmonton Journal, August 28, 1973: The Gazette, August 30, 1973
79. In addition to the articles reviewed here, academic comment also included: E.A. Driedger, "The Canadian Bill of Rights and The Lavell Case: A Possible Solution" Ottawa Law Review, Volume 6 (1974), L. Katz: "The Indian Act and Equality Before the Law" Ottawa Law Review, Volume 6 (1974): D. Sanders, "Indian Act: The Status of Indian Women on Marriage to Persons Without Indian Status" Saskatchewan Law Review, Volume 38 (1974): J. Diefenbaker, "Diefenbaker on the Bill of Rights" Chitty's Law Journal, Volume 22.
80. R.W. Kerr, "The Canadian Bill of Rights and Sex-based Differentials in Canadian Law" Osgoode Hall Law Journal, Volume 12 (1974) p.357
81. W.S. Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" Canadian Bar Review, Volume 53 (1975) p.673
82. L.C. Green, "Tribal Rights and Equal Rights" Chitty's Law Journal, Volume 22, p.100
83. I.F. Kelly, "The Bill of Rights, The Indian Act, and Equality Before the Law: The Need for and Development of a Reasonableness Test" Queen's Law Journal, Volume 2 (1974)
84. Ibid., p.179
85. P.W. Hogg, "The Canadian Bill of Rights - Equality Before the Law - Attorney General for Canada v. Lavell" Canadian Bar Review, Volume 54 (1974) and W.S. Tarnopolsky, "The Canadian Bill of Rights and The Supreme Court Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey" Ottawa Law Review, Volume 7 (1975)

86. P.W. Hogg, Ibid., pp.279-280
87. W.S. Tarnopolsky, Ibid., see pp. 22, 23 and 33
88. J.N. Lyon, "A Progress Report on the Canadian Bill of Rights" Dalhousie Law Journal, Volume 3 (1976) p.57
89. D. Matas, "Indian Women's Rights" Manitoba Law Journal, Volume 6 (1974) p.209
90. Ibid., p.202
91. R. McLaughlin, "Attorney General for Canada v. Lavell and Equality Before the Law" Chitty's Law Journal, Volume 22
92. Ibid., p.286
93. E. Ratushing, "Defence Counsel and the Canadian Bill of Rights: Comment on Attorney General for Canada v. Lavell: Criminal Reports, New Series (1973)
94. Ibid., p.268
95. Ibid., p.269
96. P.N. MacDonald, "Equality Before the Law and the Indian Act: In Defence of the Supreme Court: Dalhousie Law Journal, Volume 3 (1977) and B.J. McCourt, "Case Comment re Lavell" Ottawa Law Review, Volume 6 (1974)
97. P.N. MacDonald, Ibid., p.747
98. B.J. McCourt, Ibid., p.636
99. Ibid., p.638
100. J.D. Whyte, "The Lavell Case and Equality in Canada" Queen's Quarterly, Volume 81 (1974)
101. Ibid., pp.37-39
102. Ibid., pp.40-41
103. Ibid., p.41
104. K. Jamieson, Indian Women and the Law in Canada: Citizens Minus. (ACSW Publication, 1978), p.3

105. Supra, p. 188.
106. Supra, pp. 193-4.
107. H. Cardinal, The Rebirth of Canada's Indians
(Edmonton: Mel Hurtig Publishing Company, 1977)
p.115
108. NCC brief to the federal government (1974) pp.10-11
109. House of Commons: Standing Committee on Indian and Northern Affairs, Proceedings, May 25, 1976, p.53:5
110. Three groups to emerge in the decision's aftermath were: The Indian Homemakers Association, Equal Rights for Indian Women and The Native Women's Association of Canada.
111. As Jeanette Lavell stated before the Commons Standing Committee: "This case started in 1970 and here we are in 1976. It has taken us six years to get to the committee that is responsible for looking at the Indian Act, which I gather is now involved in changes to the Act." p.53:9.
112. Presentations were made by: M. Thompson (NWA), P. Ross (IRIW), J. Lavell (Ont. NWA), M. Early (IRIW) and B. Broek (NCC).
113. Proceedings, p.53:5
114. Ibid., see generally pp.53:6, 19 and 21
115. The government was under increasing pressure from a number of sources. In addition to the Indian women's groups, editorial and academic comment continued to favour repeal of the status provision. Opposition members maintained debate on the matter in the Commons. Gordon Fairweather was a consistent supporter of the Indian women's cause. Pressure also came from within the Liberal caucus most notably from Ron Basford, Marc Lalonde and Simma Holt.
116. The Globe and Mail, May 26, 1977, p.10
117. Summarised minutes of NIB executive council meeting, September 13, 1977, pp.15-16
118. Ibid., October 6-7, 1977, p.27. See also NIB official policy statement on changes to section 12(1)(b) p.4.

119. The Edmonton Journal, March 25, 1978
 120. A number of factors lay in back of this decision to break off continued talks. To be sure, the NIB and government were miles apart on a number of issues from land claims to special tax concessions for reserve lands. Disagreement over section 12(1)(b), however, appeared to represent the main influencing factor.
 121. The Globe and Mail, June 10, 1978, p.14
 122. Draft discussion paper on revisions to the Indian Act: Prepared by J.H. Faulkner for a meeting with N. Starblanket (NIB) June 16, 1978, p.1
 123. Ibid., pp.16-19
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CONCLUSION

Public interest groups have not found in the Supreme Court of Canada a very hospitable arena for the presentation of their claims. The three cases examined indicate that the obstacles placed in the way of successful group participation in litigation derive from a number of sources. The Supreme Court can certainly be viewed as an interest group of sorts in its own right. Operating within clearly defined limits and according to an entrenched way of doing things, the basic features of judicial practice were found to be in frequent conflict with the broad claims put forward by most intervening third parties. The Anti-Inflation reference for example, illustrated that the type of proceeding can combine with the legal or constitutional issue in dispute to restrict a court's viewpoint of extrinsic evidence offered by organised interests. Morgentaler showed the disadvantages placed in the way of group demands when much of their argument revolves around factual rather than purely legal issues, that is, where factual considerations constitute the backbone of a group's position rather than merely being supportive of their legal arguments. Lavell indicated the problems that result when a legalistic perspective confronts the broad social questions enmeshed in a legal issue under review. Indeed, all three cases revealed the difficulties presented by a court's desire to return what it considers to be the

least objectionable or controversial legal answer to pressing political or moral issues.

Over and above these general inhibitive factors resulting from the judiciary's seemingly instinctive desire to protect and maintain its well established position of independence and integrity, it was shown that Canadian interest groups are confronted by more fundamental problems. The Supreme Court rules on intervention are loaded against effective group participation in litigation. Restrictive and ambiguous to begin with, their overall applicable limits have been made less clear through a lack of informed judicial interpretation. The failure to develop a true amicus curiae procedure has no doubt served to inhibit many public interest groups from resorting to the judicial process as a viable alternative to other traditional channels of influence. With no amicus curiae format, interest groups are forced to approach legal activity on an ad hoc basis, intervening when circumstances dictate and not according to their own wishes or desires. It is important to note the lack of success that the CLC encountered in attempting to find agreeable litigants before the matter was finally referred to the Supreme Court. Even legal action on an issue such as abortion represented a temporary diversion from a larger political campaign. No attempt was made, as was the case in the United States, to center the battle

for repeal or relaxation of abortion provisions exclusively or at least primarily around legal action. To a group such as the Canadian Civil Liberties Association, concerned as it is with expanding the area of personal freedoms and thus almost dictating that extensive use of the legal arena be adopted as a principle operating strategy, these inhibitive influences are crippling.¹ Difficulties are also created by the lack of judicial recognition for Brandeis brief type submissions. Forced to argue largely through oral advocacy, groups may be prevented from offering facts vital to their case. Even when permitted to submit sociological data, as both the CLC and the status Indians discovered, organised interests are likely to be singularly unsuccessful in convincing the judges to acknowledge its relevancy.

The most disturbing problems that interest groups confront however, result from the very nature of the constitutional system itself. The CLC's unsuccessful participation in the Anti-Inflation reference illustrates the strong influence exerted upon the judicial branch by the overriding principle of parliamentary supremacy. It is a principle that inhibits the Supreme Court from challenging the wisdom or judgement of an enacting legislature by substituting its own interpretation of a particular situation or piece of legislation. It is a principle that

places an overbearing standard proof upon opponents of government legislation, a standard that is even maintained in the area of civil liberties litigation. Both Morgentaler and Lavell indicate the problems presented by the absence of an entrenched Bill of Rights, making clear that the existing statutory charter, at least in the Supreme Court's eyes, does not offer sufficient basis to justify judicial activism on questions of civil liberties in most instances. Lavell in particular points to the Court's failure to develop adequate interpretative standards, such as some form of reasonableness test, that would enable it to deal effectively with the increasing number of legislative classifications being brought before the judicial docket. The cumulative effect of these constitutional constraints upon interest group performance has been severe. Organised interests have consistently met with rigid, legalistic answers to complex social and political issues. The Court has failed to elaborate upon why group submissions were not deemed relevant and more important, why those of their opponents were. Ad hoc opinions have not provided sufficient guidance for future litigation, leaving interest groups to ponder the exponential risks of legal action under the influence of these uncertain conditions. Above all else, concerned interest groups seeking authoritative decisions on important matters of public policy, are consistently

presented with the totally unsatisfactory answer of the need to show deference to the wisdom and judgement of Parliament.

More recent litigation easily confirms that these basic features of the Canadian constitutional system are continuing to have severe and far-reaching implications for interest groups concerned with pursuing their demands in the legal arena. Indeed, the decision in *Re Nova Scotia Board of Censors*² reveals even more disturbing developments. The case involved the constitutional validity of the Nova Scotia Theatres and Amusements Act. The Act created a censorship board with wide powers to prohibit the use or exhibition, in the province of Nova Scotia, of all or part of any film or theatrical performance. The censor board established its own operating principles and was not obliged to make its decisions public. It had powers to cancel licences, confiscate films and impose monetary penalties. Thus, not only did the Act encroach severely upon the federal criminal law power but more important, it raised the fundamental issue of freedom of expression supposedly guaranteed by the democratic process.

The majority of the Supreme Court did not see the matter in these terms. Justice Ritchie bluntly asserted at the outset of his opinion upholding the Act's validity that, "...any question as to the validity of provincial

legislation is to be approached on the assumption that it was validly enacted".³ (emphasis added). Proceeding upon this basis, the Justice refused to consider the clear political dangers that the legislation presented, only noting that the ambit of its operation is confined to provincial boundaries and that its overall purpose, namely, the imposition of local standards of morality, is valid. Clearly bowing to provincial pressures urging local control over matters related to culture, Ritchie dismissed the need to assess the civil liberties issue raised in the following terms:

...having regard to the presumption of constitutional validity to which I have already referred, it appears to me that this does not afford justification for concluding that the purpose of the Act was directed at the infringement of one or more of these rights...this conclusion appears to me to involve speculation as to the intention of the legislature and a placing of a construction on the statute which is nowhere made manifest by the language employed in enacting it.⁴

Just as disturbing was the presentation made by the intervenant Canadian Civil Liberties Association. In an extremely short factum, the Association argued almost exclusively upon legalistic grounds, declaring that the Act conflicts with matters already covered either explicitly or tacitly by the federal criminal law power.⁵ In a clear supplementary position, the brief added that the Court should consider

legislation of this nature to be beyond the competence of both levels of government.⁶ CCLA Counsel Edward Ratushing briefly attempted to bring up the matter of political implications in oral argument, urging the Court to recognise that the legislation could enable the censor board to ban materials on purely political or religious grounds? Under extreme judicial pressure he quickly retreated.

These results do not augur well for the immediate future. The majority decision indicates in explicit terms the Supreme Court's willingness to show absolute deference to legislative judgement even in cases involving clear issues of civil liberties. The minority opinion, while declaring the Act ultra vires on jurisdictional grounds, makes clear the present Court's general unwillingness to decide such cases on broader, civil libertarian principles. Perhaps most important, the case appears to show that the Court's restrictive approach may even be forcing public conscious interest groups to comply with the prevailing rules of the game. Uncharacteristically, the CCLA argued almost exclusively upon narrow, jurisdictional lines, paying only lip service to more general principles that should, in effect, represent the fundamental *raison d'etre* behind its desire to intervene in important civil liberties litigation⁸. Whether the Court's approach lay in back of its final stand or concern for the cause of the individual

respondent, it is to be hoped that it represents only a temporary aberration in the Association's continuing fight for greater recognition of civil rights in Canada.⁹

It was noted in the analysis of post-trial political developments, that interest groups do not necessarily emerge from litigation empty-handed. Though failing to convince a court to accept their main point of view, intervening groups may still draw a number of indirect or less obvious benefits through participation in litigation. The Supreme Court provides public interest groups with a prestigious and very visible forum from which to voice their opinions on important public law questions. The CLC utilised this forum to promote its image as a legitimate representative of organised labour in Canada and to solidify its ongoing campaign against wage and price controls. CCLA and FWC participation in the Morgentaler appeal served to stimulate debate on the issue of abortion, a fact which no doubt had a public educational value and perhaps served to pressure the federal government into establishing a special committee to study the abortion law. In Lavell, the NIB used the Supreme Court hearings to gain admittance to the policy-making process while the Indian women emerged from the proceedings with a heightened sense of solidarity, more aware of their enemies and supporters and thus, determined to fight even harder for their cause. In both Morgentaler

and Lavell, the Court's decision served to re-vitalise existing groups and give rise to a host of new supporters. In and of themselves however, such indirect benefits are not likely to provide sufficient impetus for interest groups to pursue their demands through litigation, whether it be on a continuing or even an ad hoc basis. Most groups do enter legal channels with the intention of emerging with a favourable judicial determination. It is this ultimate goal which justifies the sacrifice of financial resources and the attempt to challenge the risks inherent in legal activity.¹⁰ Unless they feel and are given warrant to feel that they stand a reasonable chance of achieving direct success therefore, they will weigh very carefully their ultimate decision to take matters to court.

In the immediate future, Canadian interest groups will likely be making greater impact before administrative tribunals rather than in the courts.¹¹ Tribunals such as the Canadian Transport Commission, the Canadian Radio and Television Commission and the National Energy Board are proliferating in Canada, constantly acquiring greater powers of review. Public funds are now being made available in some instances to groups concerned with presenting their positions before these tribunals. Perhaps most important, a tribunal's method of operation is more in line with the demands made by organised interests. Whether acting in the

capacity of regulator, administrator or quasi-judicial body, tribunals are primarily concerned with policy matters. What constitutes proper content in television programming? In what areas should airlines be allowed to operate? What is the most suitable route upon which to build an oil and gas pipeline? To decide such matters, tribunals must of necessity be flexible in their deliberations, prepared to admit a wide variety of extrinsic evidence and hear arguments on all sides. Their discretion is considerable. Final decisions are often grounded more upon expediency rather than formalised standards. The recognised expertise that tribunals possess in specific areas grants them the authority to make the type of policy decision that is not likely to be forthcoming from a court of law.

Despite these positive attributes, administrative tribunals are not to be viewed as the ultimate panacea. Their statutory regulations often severely restrict the type of groups or corporate entities that they may deal with. Their quasi-judicial decisions generally lack the finality or overriding authority of official judicial pronouncements. Administrative rulings only bind the immediate parties concerned and thus do not serve to create general principles applicable in all situations. Perhaps most important, achieving judicial remedy for adverse administrative pronouncements is a difficult task. Courts usually show deference to the expertise in back of administrative decisions. The

burden of proof is extremely high and traditional legal grounds such as "inadequate or lack of proper evidence" are not available.¹² Unless a clear, incontestable abuse of authority can be shown, the ordinary courts will invariably uphold administrative rulings as being within the realm of policy, directed toward the common good and thus beyond the scope of judicial remedy.¹³

Performance before administrative tribunals and the "selective inducements" that may accompany participation in litigation can only partially offset the problems that public interest groups encounter in the judicial process. By no means are they satisfactory replacements for truly effective participation in the legal arena. The issue still remains therefore, the need to create in the Supreme Court a climate conducive to the full and equal consideration of group demands. If Canadian interest groups are going to assume a position in the judicial process comparable to the one achieved by their counterparts in the United States, then procedural reforms and changes in prevailing judicial attitudes will have to be forthcoming. The development of a full *amicus curiae* format represents an essential starting point. Groups must be permitted to intervene in judicial proceedings as true "friends of the court", not liable for exorbitant court costs and free to express, within judicial

discretion, the views they wish to have noticed. New practices in the awarding of costs will have to be worked out, getting away from the British tradition in civil litigation of ordering an unsuccessful litigant to pay the costs properly incurred by the victor.¹⁴ Just as important, the present no limit on oral argument must be cut down, forcing parties to a dispute to submit thorough, well-argued briefs.¹⁵ In this way, the practice of filing sociological briefs would be encouraged where the issues in dispute warrant it.

Procedural reform is essential but it will only take place and be effective if the Court itself significantly alters its current jurisprudential style. The Supreme Court will have to recognise the political import of many of the issues it is asked to decide and accept the political role of intervening public interest groups. The judges will have to adopt a more active approach to adjudication, prepared to question legislative judgement and on the basis of informed submissions, place their own interpretation upon social situations. In cases where fundamental freedoms are at stake, the Court will have to assume the position of guardian of individual rights, regarding as immediately suspect legislative enactments that encroach upon these areas. In short, the Supreme Court will have to re-assess its position and role within the Canadian political system.

An active judiciary would necessarily produce a

fundamental re-definition of the theory of parliamentary supremacy, a re-definition, however, not far removed from the practice of parliamentary supremacy in the modern federal state. Today more than ever before, the House of Commons exercises very little control over the executive and bureaucratic levels of government. The decline in the importance of Parliament under the Trudeau administration is well-recognised and thoroughly documented.¹⁶ The distinction between policy formation and policy implementation has become blurred. Decisions are made and sanctioned in high-level meetings between senior public servants and cabinet ministers. Parliament only acts in most instances, as an official rubberstamp. A supreme and powerful Parliament, acting as a final bulwark against arbitrary authority, is no longer an accurate picture of reality. The rules of the parliamentary game have changed under the influence of modern government. Judicial procedures and behaviour must adapt as well if they are to adequately meet these altered conditions.

In many respects, the features of parliamentary democracy highlight the need for an independent guardian of civil liberties. Unlike the United States, the institutional framework in Canada severely restricts interest group access to channels of potential influence. Voting along party lines leaves little room for policy input from

individual backbenchers or opposition MP's. Cabinet ministers are handicapped in their individual efforts by the need to abide the overriding principle of cabinet solidarity. The constraints placed upon new or less important cabinet personnel are often more severe than the limitations imposed upon young or up-start American political figures. Parliamentary committees possess no independent investigatory powers nor are they likely to produce major modifications in government policy. Groups making controversial claims or groups representing discrete or insular minorities, often have no place to turn to in the Canadian political arena. With delaying tactics such as Royal Commissions and White Paper reports at its fingertips, Parliament is often as slow to react to specific claims as is the traditionally behindhand judicial branch. The matter of non-status Indian women's rights for example, was not an issue likely to affect the outcome of a general election. The government was thus able to stall debate on the matter for over six years. The reform of prevailing abortion provisions represents an example of a controversial issue being effectively put to rest as a subject suitable for parliamentary consideration. In these circumstances, the Supreme Court may represent the only arena where public interest groups can raise let alone achieve redress for specific problems.

Similar difficulties result from the nature of the modern policy-making process itself. The so-termed "rationalist approach" now in vogue effectively creates a small circle of important decision makers who are concerned with establishing supra-policies designed to meet pre-determined needs and expectations. Decisions are made and plans instituted either without prior consultation with interested parties or with little attention being paid to their concerns. The CLC was frustrated in political negotiations by the government's already established ideas on what represented the best method to control inflation. The native groups were surprised by a government White Paper that bore no resemblance to matters discussed in preceding "consultative" meetings. The 1969 abortion law was enacted over and above the recommendations of a parliamentary committee supposedly established to come up with a viable solution. Again prevailing political circumstances leave public interest groups with no viable input into the making of public policy. Again the role of the Supreme Court as an independent arbiter between competing interests is brought into focus.

Public interest groups have much to offer to the judicial branch in Canada. In recent years, the process of adjudication has become more complex and difficult.

As Justice Dickson of the Supreme Court remarked:

There has been a great change in the nature of cases which have come before many of the courts within the last twenty years. Twenty years ago, a greater percentage of cases dealt with property rights, they dealt with contract rights, they dealt with matters of that nature. Increasingly of late, the concern has been with people and personal rights and liberties and interests rather than with property rights.¹⁷

The cases reviewed certainly confirm this overall pattern. The issues raised were not straight-forward, cut and dried but rather, complex, controversial, admitting of no easy legal solution. Organised interests can ease the burden imposed by such cases and in doing so, they may serve to promote the cause of justice itself. Unlike ordinary, private litigants, groups can mobilise vast resources in a very short period of time and thereby offer the courts a multiplicity of factual and legal arguments to consider. The CLC's economic study, for example, served to alleviate the unrealistic vacuum in which constitutional references are often argued and decided. The CCLA's hospital survey and the Indian group's presentations on cultural heritage are indications of the type of information that only organised groups who are on top of situations relevant to their interests can offer during the course of litigation. It was pointed out that through a pooling of financial resources, organised interests can often solicit the most

capable legal counsel available and secure access to reputable academic experts. Either way, they often ensure that the issues in dispute are properly presented and effectively argued. Just as important, public interest groups are uniquely equipped to carry on the often mandatory political struggle once a court of law has handed down its decision. In this way, organised interests can make up for the limited resources that the courts themselves possess to see that their pronouncements are enforced. No matter what might be their contribution in individual cases, public interest groups possess the necessary attributes demanded by the process of modern adjudication.

The need for and direction in which change must proceed are apparent. The factors favouring such change are certainly not insignificant. It remains to consider, therefore, where the necessary impetus may come from. The federal government represents a potential but not very likely candidate. The cases reviewed indicate that its opinions carry significant weight in the Supreme Court's eyes. An acceptance of a broader, sociological jurisprudence either in its future presentations to the Court or in its proposed Charter of Human Rights would constitute important influencing factors. The cases reviewed also make clear, however, that federal authorities have a clear vested interest in maintaining the prevailing judicial status quo.

A narrow, legalistic jurisprudence always provides those who enact the laws with a distinct advantage. To date, the government has fully exploited that advantage, consistently arguing upon the basis of parliamentary supremacy and the need to show deference to legislative judgement. Its constitutional proposals reflect a similar self-centered philosophy. In them, the government is not prepared to clearly and unequivocally admit that an entrenched constitutional charter merely represents a means of transferring certain policy-making powers from the legislative arena to the courts.

More positive sources of influence are the academic community and most likely, the presentations offered by future intervening interest groups themselves. Academic reaction to the cases reviewed marked the start of a new trend in Canadian legal circles. Up to the early 1970's, academic interest in the Supreme Court's work was confined almost exclusively to jurisdictional disputes. Commentators engaged in highly technical, legal analysis of the relative merits of a centralist as opposed to a decentralist reading of the BNA Act. Few writers concerned themselves with broader matters of public policy and political or legal philosophy.¹⁸ Recent reaction not only indicates a broader scope of interest but just as important, an almost singular concern with the Supreme Court's adjudicative style.¹⁹ It

remains to be seen how long the Justices can ignore the constructive and informed criticisms of their fellow legal scholars made in the glare of the public spotlight. Future intervening interest groups may represent an even more important influencing factor. Their presentations and demands have so far been in advance of the Supreme Court's jurisprudential philosophy. Economic data and sociological considerations have brought the outside world into the usually secluded atmosphere of the legal arena. Interest group participation before the American Supreme Court effectively forced that institution to reconsider its long held opposition to social science or extra-legal considerations. Again it remains to be seen whether its Canadian counterpart can continue to ignore the arguments presented by organised interests who have showed themselves to be important participants in complex constitutional and civil liberties litigation.

In the final analysis, it is the Supreme Court that shoulders the ultimate responsibility. Only the Court can choose to interpret the rules governing intervention broadly or alternatively use its rule making authority to establish more open procedures.²⁰ Only the Judges can decide to recognise the import of sociological or extra-legal considerations during the course of litigation. Most important, it

is the Court alone which can effectively re-define its prevailing relations with other institutions and actors in the political order. Major changes or trends in the legal arena however, always proceed slowly. Dramatic, short-term developments are not the way of judicial innovation. In the United States for example, full acceptance of group participation and social science facts emerged gradually over nearly half a century. Perhaps the Canadian Court is proceeding along similar lines. Recent decisions to permit widespread interest group participation in some cases and the filing of Braderis style briefs in others are encouraging signs. Articulate, well-reasoned dissenting opinions may be establishing the foundations for a more realistic jurisprudence in future adjudication. Only recently have the Court's decisions become an accepted subject for popular debate. In 1974, the standing principle was expanded and procedural reform gave the Judges more control over the composition of the Court's annual caseload. Basically, a conducive climate in which more fundamental changes may be made has only just begun to evolve. In the interests of better and more informed justice, it is to be hoped that the Supreme Court does not forsake or retreat from the important opportunity that these favourable developments present.

NOTES

1. It should be noted that environmental groups such as the Canadian Environmental Law Association are also hard hit by the restrictive Canadian rules on intervention.
2. 84 DLR 1.
3. Ibid., 20.
4. Ibid., 29.
5. Factum, Canadian Civil Liberties Association. pp.5-6
6. Ibid. p. 7.
7. The Globe and Mail. May 26, 1977. p.10.
8. In the United States for example, the American Civil Liberties Union only intervenes in cases at the appellate level, that is, once a basic civil rights issue has been established and the dispute has attracted public attention. The NAACP has been even more discriminating in its choice of cases. The Association recognises its primary function to be the establishment of broad civil liberties principles and thus, it actively seeks to intervene in the most important cases, the cases that raise novel civil liberties questions. The Association is not interested in merely providing legal aid.
9. The respondent's cause was no doubt a strong influencing factor. Mr. McNeil carried the legal load on his own up until the Supreme Court level, incurring exorbitant lawyers fees in the process. The possibility of incurring further expenses if he were found on the losing side perhaps dictated the "conservative" nature of the CCLA's arguments. Moreover, the eventual decision was clearly going to be a close one. With this in mind, the Act's opponents were probably extra careful not to include arguments likely to upset a majority of the Supreme Court.
10. Preparation for complex constitutional or civil liberties litigation can be very expensive. In the Anti-Inflation reference, for example, the CLC spent a total of \$55,876 dollars while CUPE's final expenditure was in excess of 42,000 dollars.

11. For a good examination of the role played by administrative tribunals in Canada see generally, J. Hendry, "Some Observations On The Canadian Regulatory Agency" Dalhousie Law Journal Volume 3 (1976) p.3.
 12. See generally, J. E. Kersell, "Statutory and Judicial Control of Administrative Behaviour" Canadian Public Administration. Volume 19 (1976) p.295.
 13. This general operating principle was clearly expressed in the recent cases of, Re Cloverdale Shopping Center Ltd. and Township of Etobicoke (1966) 2 OR 439 and, Re Attorney General of Manitoba and The National Energy Board (1974) 48 DLR 73.
 14. See B. M. Dickens, "A Canadian Development: Non-Party Intervention" Modern Law Review Volume 39 (1977) p.669.
 15. See B. Laskin, "The Institutional Character of The Judge" Israel Law Review Volume 7 (1972) p.333.
 16. See generally, T. A. Hockin, Apex of Power (Toronto: Prentice-Hall of Canada Ltd., 1971)
 17. R. G. B. Dickson, quoted in, The Canadian Judiciary. A. M. Linden, ed., (Toronto, Osgoode Hall Law School, 1976) at p. 28.
 18. Three notable exceptions include Bora Laskin, Edward McWhinney and Barry Strayer.
 19. The period under review produced the first book to look seriously at the Supreme Court's jurisprudential style, In the Last Resort by Paul Weiler.
 20. Rule 103, Supreme Court Rules.
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BIBLIOGRAPHY

Due to the variety of materials used in the thesis, I have divided the bibliography into five separate headings: Books, Articles, Table of Cases, Newspapers and Public Documents. Where necessary, individual sections will provide information concerning their contents. Hopefully, this will facilitate the reader's task.

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