MEMORANDUM OF ARGUMENT OF THE ATTORNEY-GENERAL OF NEW BRUNSWICK

I. INTRODUCTION

1. This is an application by the Attorney General of New Brunswick pursuant to Federal Court Rules 401 and 419(1)(a) and (f) whereby the Attorney General of New Brunswick seeks to have the Plaintiff's action struck on the grounds that

(a) This Court has no jurisdiction to entertain this action;

(b) The Plaintiff lacks standing;

(c) The Statement of Claim discloses no reasonable cause of action; and

(d) The Statement of Claim constitutes an abuse of the process of this Court.

II. FACTUAL AND CONSTITUTIONAL CONTEXT

2. On the 15th day of February, 1993 the Plaintiff filed a Statement of Claim in which she seeks

> A declaration pursuant to sections 17 and 18 of the **Federal Court Act** and s. 52(1) of the **Constitution Act, 1982** that the Governor General has no jurisdiction, power or authority to issue a Proclamation to amend the Constitution by adding thereto the New Brunswick amendment.

3. On the 12th day of March, 1993, the Governor General of Canada proclaimed an amendment to the Constitution of Canada in the following terms, namely:

> **16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.**
>
> **(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.**
>
> See Tab 4 above for complete proclamation

4. This amendment ("the New Brunswick amendment") was made pursuant to resolutions passed by the Legislative Assembly of New Brunswick,

the House of Commons and the Senate of Canada in accordance with s. 43 and s. 48 of the **Constitution Act, 1982.**

5. Section 43 provides:

> **43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including**
>
> **(a) any alteration to boundaries between provinces, and**
>
> **(b) any amendment to any provision that relates to the use of the English or the French language within a province,**
>
> **may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.**

6. Section 48 provides:

> **48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.**

III. NATURE OF PLAINTIFF'S ACTION

7. The basis on which the declaration sought by the Plaintiff rests is that the New Brunswick amendment is invalid because the wrong amending procedure was used:

(a) Section 43 contemplates an amendment only where a provision already exists that applies to specific provinces; and

(b) The amendment imports collective rights into a charter of individual rights and freedoms thereby affecting all Canadians.

Statement of Claim, paragraphs 21, 22; 32, 34, 35.

8. The Statement of Claim nowhere alleges that the Plaintiff has suffered injury, harm or damage or that her constitutional rights or freedoms have been infringed either because the wrong amending procedure was used or because of the content of the amendment.

9. The Plaintiff purports to be pursuing this action in the public interest.
Statement of Claim, paragraphs 1 and 2.

10. The action accordingly raises the question as to whether the Plaintiff has standing to challenge both the procedure whereby the New Brunswick amendment was made as well as its content.

11. Although the Plaintiff's case is framed in the form of a declaratory action, it is submitted that it is in substance a reference to the Court for its opinion as to the parameters of the s. 43 amending procedure: It seeks to elicit the opinion of the Court on the appropriateness of both the procedure for amending the Constitution as well as what may properly constitute the content of the amendment.

Statement of Claim, paragraphs 21-35.

IV. GROUNDS OF APPLICATION

(a) Jurisdiction

12. Section 101 of the **Constitution Act, 1867** provides:

> **101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional courts for the better Administration of the Laws of Canada.**

13. While the Attorney General of New Brunswick acknowledges the capacity of the Federal Court to determine constitutional issues, it is the interpretation of a Constitutional provision that is the sole issue before this Court. While s. 43 of the **Constitution Act, 1982** forms part of the Supreme Court of Canada, it is not part of the "laws of Canada" as intended by s. 101. Section 43 was not "enacted" by the Parliament of Canada.

Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733 at 744-745.

Kigowa v. Canada, [1990] 1 F.C. 804 at 811 (F.C.A.).

Southam Inc. v. Canada (Attorney General), [1990] 3 F.C. 465 at 483-84 (F.C.A.).

14. It is submitted, therefore, that there is no foundation on which the jurisdiction of this Court rests. There is no existing body of federal law to determine the disposition of the Plaintiff's claim or to nourish a statutory grant of jurisdiction by Parliament.

> **I.T.O. - INT. Terminal Operators Ltd. v. Miida Electronics Inc.,** [1986] 1 S.C.R. 752 at 766.
>
> **Roberts v. Canada,** [1989] 1 S.C.R. 322 at 330.
>
> **R. v. Thomas Fuller Construction Co. (1958) Ltd.,** [1980] 1 S.C.R. 695 at 707.
>
> **Quebec North Shore Paper Co. v. Canadian Pacific Ltd.,** [1977] 2 S.C.R. 1054.
>
> **McNamara Construction (Western) Ltd. et al. v. The Queen,** [1977] 2 S.C.R. 654.

15. Sections 17 and 18 of the **Federal Court Act** on which the Plaintiff relies cannot overcome the threshold constitutional requirement to enable the Court to entertain the action. The extent of the jurisdiction conferred on this Court by sections 17 and 18 depend ultimately upon the constitutional limits of s. 101 of the **Constitution Act, 1867** and essential to that consideration is whether "there be existing and applicable federal law which can be invoked to support any proceedings before [the Court]".

> **McNamara,** above, per Laskin C.J. at p. 658.

16. Where the **Federal Court Act** contemplates jurisdiction in claims in relation to Her Majesty, the reference is to claims involving the Crown as defined in s. 2 of the **Act**, namely, Her Majesty in Right of Canada. That appellation, therefore, does not include the Crown in right of a province.

> **Trainor Surveys v. New Brunswick,** [1990] 35 F.T.R. 228 (Fed. T.D.).

(b) <u>Standing</u>

17. Professor Peter Hogg characterizes the concept of "standing" as follows:

> **The question whether a person has "standing" (or locus standi) to bring legal proceedings is a question about whether the person has a sufficient stake in the outcome to involve the judicial process. The question of standing focuses on the position of the party seeking to sue, not on the issues that the law suit is intended to resolve.**
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> P. Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto: Carswell, 1992) at 56.2(a).

18. Even acknowledging a "remarkable relaxation of the Canadian law of public interest standing", it is submitted that the issue remains one for the exercise of the Court's discretion and particular criteria have been developed for the exercise of that discretion.

> **Thorson v. Attorney General of Canada**, [1975] 1 S.C.R. 138.
>
> **Nova Scotia Board of Censors v. McNeil**, [1976] 2 S.C.R. 265.
>
> **Minister of Justice of Canada v. Borowski**, [1981] 2 S.C.R. 575.
>
> **Finlay v. Minister of Finance of Canada**, [1986] 2 S.C.R. 607.

19. Further, the Supreme Court of Canada has stated that the principles for granting standing set forth by the Court in the above quartet of cases "need not and should not be expanded".

> **Canadian Council of Churches v. Canada (Minister of Employment and Immigration)**, [1992] 1 S.C.R. 236 per Cory J. at p. 252.

20. In **Canadian Council of Churches**, above, at p. 253, Justice Cory for the Court discussed the rationale for granting standing in such cases and states that when a plaintiff seeks standing on the basis of a public interest, the court must consider three things:

> **First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?**

(1) · *Has A Serious Issue As To Invalidity Been Raised?*

21. It is submitted that the Plaintiff's claim ought not to be considered as a serious matter of public interest because

(a) It prescribes too narrow and restrictive an interpretation of a constitutional provision;

(b) The s. 43 amending procedure expressly envisages amendments relating to language within a province;

(c) The New Brunswick amendment impacts on the way in which s. 23 of the **Charter** would work in the province; and

(d) The issue of collective rights is non-justiciable.

22. To contend that the s. 43 amending procedure is limited to amendments that are "in form, substance, purpose and effect" to existing provisions (that apply to one or more but not all provinces) runs counter to the traditional "large and liberal", "generous" and "living tree" approach to constitutional interpretation. The contention is reflective of "the austerity of tabulated legalism" proscribed the courts.

> **Law Society of Upper Canada v. Skapinker**, [1984] 1 S.C.R. 357 at p. 365-368.
>
> **Hunter v. Southam**, [1984] 2 S.C.R. 145, per Dickson J. at 155-158.

23. Even where a constitutional provision is based on a political compromise, the courts have made it clear that they will "breathe life" into the provision in order to maintain constitutional growth and development.

> **Re Bill 30, An Act to Amend the Education Act (Ont.)**, [1987] 1 S.C.R. 1148, per Wilson J. at p. 1176.

24. The s. 43 amending procedure provides that the subject matter of an amendment may relate to the use of the English and French language within the Province and the New Brunswick amendment clearly so relates to that matter. Language and culture cannot be separated.

> **Mahé v. Alberta**, [1990] 1 S.C.R. 342, per Chief Justice Dickson at p. 362-365.

25. It is submitted that the New Brunswick amendment is consistent with these principles and alters the government mandate of s. 23 by advancing the objectives of s. 23 in the Province of New Brunswick:

(a) By removing the connotation of minority status;

(b) By providing for distinct educational institutions regardless of the "where numbers warrant" limitation; and

(c) By providing for distinct cultural institutions where appropriate.

26. The Plaintiff's claim that the New Brunswick amendment alters the application of s. 23 of the **Charter** outside New Brunswick is patently incorrect.

Statement of Claim, paragraphs 25, 26.

27. The Plaintiff contends that the impugned amendment imports collective rights into the **Charter** when it could not have been the intent of the framers of s. 43 to do so. Accordingly, an amendment purporting to contain such rights cannot be made in accordance with the s. 43 procedure.

Statement of Claim, paragraph 32, 33, 35.

28. It is submitted, however, that while s. 43 is limited to amendments that apply to one or more but not all provinces, s. 43 is not limited as to the content of those amendments. Therefore, any contention by the Plaintiff relating to content per se is a matter of policy, is political, and therefore is non-justiciable.

Re Canada Assistance Plan, [1991] 2 S.C.R. 525 at 545.

Operational Dismantle v. The Queen, [1985] 1 S.C.R. 441 at 459, 472.

Singh v. Canada (1991), 3 O.R. (3d) 429.

29. Further, the protection of group or collective rights is no stranger to the Canadian Constitution. Sections 93 and 113 of the **Constitution Act, 1867** and s. 23 of the **Manitoba Act, 1870** reflect particular collective values or rights. Similarly, sections 16 to 23, 25, 27 and 35 of the **Constitution Act, 1982** are designed to offer protection for certain groups or collectivities.

30. Section 1 of the **Charter** underlines the principles integral to the free and democratic Canadian community, including respect for cultural and group identities.

R. v. Oakes, [1986] 1 S.C.R. 103, per Chief Justice Dickson at p. 136.

31. It is accordingly submitted that the Plaintiff's contention in relation to collective rights is argumentative, hypothetical and speculative rather than justiciable. It is not the kind of issue the courts have recognized as warranting the exercise of the discretion in granting standing.

(2) *Is The Plaintiff Directly Affected Or Genuinely Interested?*

32. The Plaintiff does not claim to be directly affected and therefore must establish a genuine interest in the validity of the constitutional amendment.

33. The general rule was stated by Chief Justice Laskin (although dissenting on its application in the particular case) in **Borowski**, above at p. 578-579:

> **[I]t is not open to a person, simply because he is a citizen and a taxpayer or is either the one or the other, to invoke the jurisdiction of a competent court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a court. Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society.**
>
> ...
>
> **Special legislative provisions for references to the courts to answer particular questions (which may be of a hypothetical nature) give that authority to governments alone and not to citizens or taxpayers. Merely because a government may refuse a citizen's or taxpayer's request to refer to the courts a question of interest to the taxpayer does not per se create a right in the citizen or taxpayer to invoke the court's process on his or her own, or by way of a class action on behalf of all citizens or taxpayers with the same interest.**
>
> **(Emphasis added)**

34. The Plaintiff's interest in the resolution of the question is stated in paragraph 2 of the Statement of Claim. It is submitted that being "deeply involved" in opposing the Meech Lake and Charlottetown Accords does not meet the test for public interest standing as defined by the courts.

Adler v. Ontario (1992), 7 C.P.C. (3d) 180 (Ont. Ct.).

35. It would appear that the Plaintiff's interest relates to a particular political philosophy rather than the question of a particular amending procedure. Both the Meech Lake and Charlottetown Accord were agreements containing amendments designed for ratification pursuant to the general amending formula, that is, s. 38 of the **Constitution Act, 1982**, and were entered into by all eleven First Ministers.

36. The Plaintiff's interest or involvement stands in stark contrast to the kinds of interest demonstrated by plaintiffs in such cases as **Borowski** and **Canadian Council of Churches**, above.

37. It is submitted that the Plaintiff has failed to meet the criteria of "interest" as defined by the Supreme Court of Canada in the leading cases on standing. By way of example, Justice Le Dain defines the term as follows:

> **The judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody is addressed by the requirements affirmed in *Borowski* that there be a serious issue raised and that a citizen have a genuine interest in the issue. I think the respondent meets both of these requirements. The issues of law raised with respect to the alleged provincial non-compliance with the conditions and undertakings to which the federal cost-sharing payments are made subject by the Plan and with respect to the statutory authority for such payments are in my opinion far from frivolous. They merit the consideration of a court. The status of the respondent as a person in need within the contemplation of the Plan who complains of having been prejudiced by the alleged provincial non-compliance shows that he is a person with a genuine interest in these issues and not a mere busybody.**
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> **Finlay**, above, at p. 633.

38. Given the particular circumstances of this case and the insubstantial interest which the Plaintiff holds in relation to the central issue, namely the amending procedure, this Court's discretion should not be exercised in favour of granting the Plaintiff standing.

> **Friends of the Island Inc. v. Minister of Public Works et al.**, at p. 45-46 (Decision of the Federal Court, Trial Division, dated March 19, 1993, not yet reported).

(3) *Immunization From Judicial Review*

39. The fundamental reason why status is granted to certain plaintiffs is to prevent the immunization of legislation or public acts from challenge. The granting of public interest standing will not be made when it can be demonstrated that the impugned measure is likely to be subject to attack by a private litigant.

> **Canadian Council of Churches**, above, at pp. 252-253.

40. If the history of litigation relating to language rights is a reliable indicator, it is readily apparent that litigants (including governments) who are directly affected will not be reluctant to challenge the validity of the New Brunswick amendment or governmental action that is perceived either to infringe the provisions of the amendment or be otherwise inconsistent with it. The following illustrate that lack of reluctance: *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; [1981] 1 S.C.R. 312; *A.G. Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *Bilodeau v. A.G. Manitoba*, [1981] 5 W.W.R. 393; *Jones v. A.G. New Brunswick*, [1975] 2 S.C.R. 182; *Reference re Education Act of Ontario and Minority Language Education Rights (1984)*, 10 D.L.R. (4th) 491; *Société des Acadiens de Nouveau Brunswick v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *Mercure v. Attorney General of Saskatchewan*, [1986] 2 W.W.R. 1; *Paquette v. R.*, [1985] 6 W.W.R. 594; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449; *Mahé v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; [1992] 1 S.C.R. 212; *Reference re Manitoba Public Schools Act (Man.)* (S.C.C., Decision dated March 4, 1993, not yet reported); *Lavoie et al. v. A.G.N.S. (2), (1989)*, 91 N.S.R. (2d) 184 (N.S.C.A.); *Whittington et al. v. Board of School Trustees*, [1987] 44 D.L.R. (4th) 128 (B.C.S.C.); *A.G. Quebec v. Quebec Association of Protestants School Boards et al.*, [1984] 2 S.C.R. 66; *A.G. Canada v. Viola*, [1991] 1 F.C. 373; *A.G. Quebec v. Brunet et al.*, [1990] 1 S.C.R. 260.

41. If the Plaintiff is correct and the collective rights aspect of the amendment infringes individual rights, s. 24 of the **Charter** provides a means by which those whose rights or freedoms have been infringed may seek an appropriate remedy and there is no basis to contend that it is unlikely that litigants would be reluctant to seek such remedies.

42. The Plaintiff contends that the New Brunswick amendment offers "a powerful precedent for future bilateral amendments such as Quebec's distinct society clause".

Statement of Claim, paragraph 31.

43. The Court can take judicial notice of the acrimony engendered by the so-called distinct society clause and a reasonable inference may be drawn as to the likelihood that such clauses are not immunized from challenge by those directly affected or genuinely interested.

Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927.

Ford v. Quebec, [1988] 2 S.C.R. 712.

44. In these circumstances, given the linguistic focus of the New Brunswick amendment and the historic response in relation to the guarantees of rights in this area, it is submitted that the very rationale for the public interest litigant disappears.

Canadian Council of Churches, above, at p. 252, 253.

45. In light of the above, it is submitted that the Plaintiff does not meet the essential criteria on which the Court may properly exercise its discretion in granting standing to pursue this action.

(c) No Reasonable Cause of Action

46. In **Operation Dismantle v. The Queen**, above, the Court considered the principles applicable to determine when a statement of claim in an action seeking declaratory relief may be struck out. Justice Wilson summarized the relevant principles (at p. 487, 488) as follows:

> **The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?" Is it plain and obvious that the plaintiffs' claim for declaratory or consequential relief cannot succeed?**

See also Dickson J. at p. 449-450.

See also **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959.

47. Applying these principles to this case, the question is: Does the Statement of Claim disclose a reasonable basis on which a court might conclude that the New Brunswick amendment violates s. 43 of the **Constitution Act, 1982** in terms of procedure and substance or content.

48. It is submitted that an examination of the Statement of Claim reveals the following:

(a) Paragraphs 3-20 inclusive consist of statements of fact relating to the New Brunswick amendment and providing no causal link to s. 43;

(b) Paragraphs 22-30 inclusive consist of argument in relation to the nature of s. 43, the New Brunswick amendment and s. 23 of the Charter;

(c) The remaining paragraphs, namely, 1, 2, 21 and 36, do not go to the proof of any material fact in the interpretation of s. 43.

49. Justice Dickson's comments in **Operation Dismantle**, above at p. 455 in relation to statements of intangible fact, speculation and argument are apposite at this point:

> **The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.**

50. In these circumstances, it is submitted that the Plaintiff's action, as revealed in the Statement of Claim, relies entirely on argument as to the meaning of the Constitutional provision.

51. Although he is discussing the threat of future breaches of s. 7 of the **Charter** if Canada allows cruise missile testing, Justice Dickson's comments in the following passage are relevant to a consideration of the Plaintiff's contention in respect of the impact of the New Brunswick amendment on the guarantees of individual rights and freedoms:

> **The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action (1971)*, at p. 5:**
>
> > **3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.**
> >
> > **4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.**
>
> **Operation Dismantle**, above, at p. 456.

52. It follows that in order for the Plaintiff to maintain a viable claim for declaratory relief she must establish a violation of s. 43 by the New Brunswick amendment. As the claim is based solely on argument, that

argument must be reasonable, not speculative or hypothetical, and accord with recognized principles of constitutional interpretation.

53. The Attorney General of New Brunswick submits that for the following reasons the Plaintiff fails to meet those criteria:

(1) An interpretation of s. 43 that proceeds in a manner contrary to the often stated approach to constitutional interpretation should not be condoned by the Court.

(2) History plays a critical, albeit non-exclusive, role in determining the content of a constitutional provision. The Plaintiff in this action focuses upon the evolution of the New Brunswick amendment and fails to consider the historical antecedents of the provision, namely s. 43, that lies at the heart of this action.

Reference re Provincial Electoral Boundaries (Sask), [1991] 2 S.C.R. 158 at 179-182.

Reference re s. 94(2) Motor Vehicle Act, [1985] 2 S.C.R. 486 at 498-500; 505-509.

(3) Section 43 should be given a purposive interpretation, one that achieves a reasonable objective sufficiently flexible to allow provinces to introduce constitutional provisions that affect them only and not, as the Plaintiff suggests, restricting those provisions to amendments that are "characterizable, in form, substance, purpose and effect, as an amendment to an existing constitutional provision that is explicitly limited in application to one or more, but not to all provinces".

Statement of Claim, paragraph 22.

(4) Sections 16 to 22 of the **Charter** were designed to allow provinces readily to opt into the scheme. If the Plaintiff's interpretation of s. 43 is correct, provinces could only opt in by way of s. 41 (the unanimity formula).

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549 at 579.

(5) Given the legislative nature of the amending process, and absent clear and unequivocal inconsistency with the amending procedures set out in part V of the **Constitution Act, 1982,** curial deference should be accorded legislatures that seek to enshrine provisions in keeping with their own vision of the free and democratic society provided such provisions are not discordant with the principles upon which the constitution is founded.

(6) The New Brunswick amendment is explicitly stated to apply to the two linguistic communities in the Province. The amendment accords with the principle of advancement in s. 16(3) and respects the constraints of s. 31 of the **Charter.** Only cogent and compelling reasons supportive of a contrary interpretation should be accepted by the Court.

(7) The New Brunswick amendment should be placed in its proper linguistic, philosophic and historical contexts, including the fact that New Brunswick is the only officially bilingual province in Canada, has accepted particular Constitutional obligations in relation to the two official languages and has statutorily advanced those obligations in order to achieve the objective of equality of the two linguistic communities. To accept the interpretation placed on the s. 43 amending procedure and the amendment itself by the Plaintiff would be contrary to this growth and development and should be avoided.

Official Languages of New Brunswick Act, R.S.N.B. 1973, c. 0-1, s. 13.

Schools Act, R.S.N.B. 1973, c. s. 5.1 - s. 15, 16.

(d) Abuse of Process

54. As described above, it is submitted that on a proper analysis of its subject matter, this action may properly be characterized as one seeking the interpretation of a particular Constitutional provision. As such, it is properly the subject matter of a reference for an advisory opinion, a procedure restricted to the Governor General in Council or to a Lieutenant Governor in Council. The Plaintiff is seeking to do indirectly what she cannot accomplish directly. When one uses a legal process to accomplish a purpose for which it is not designed, an abuse of process occurs.

Statement of Claim, paragraph 6.

Bosada v. Pinos et al., [1984] 5 D.L.R. (4th) 334 at 338 (Ont. H.C.).

Weider v. Industries Beco Ltée, [1976] 2 F.C. 739 at 742 (T.D.).

55. A reasonable inference may be drawn from the Statement of Claim that the real and true purpose of the Plaintiff's action is to vindicate a particular philosophy in relation to the place of individual and collective rights in the Constitution.

56. In the circumstances of this case, it is submitted that there being no claim of infringement of constitutional rights per se, the constitutional reference device, now considered to be "an integral part of the functioning of the Constitution", is the only possible means whereby the constitutional issues characterized in this action may be placed before the courts.

B.L. Strayer, *The Canadian Constitution and the Courts*, 2nd ed., (Toronto: Butterworths, 1983) chapter 9 at p. 278.

V **ORDER SOUGHT**

57. The Attorney General of New Brunswick requests that the action be dismissed on the grounds that:

(a) This Court has no jurisdiction to entertain this action;

(b) The Plaintiff is unable to satisfy the test for public interest standing;

(c) The Plaintiff can establish no cause of action for declaratory relief under sections 17 or 18 of the **Federal Court Act** or under s. 52(1) of the **Constitution Act, 1982**; and

(d) The action constitutes an abuse of the process of this Court.

58. Alternatively, the Attorney General of New Brunswick requests that he be granted leave to file a Statement of Defence.

All of which is respectfully submitted this 21st day of May, 1993.

Bruce Judah

Annie Richard

of Counsel on behalf of the Attorney General of New Brunswick, Defendant

LIST OF AUTHORITIES

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