Court File No.
T-381-93

FEDERAL COURT OF CANADA
TRIAL DIVISION

B E T W E E N:

DEBORAH COYNE

Plaintiff

- and -

HER MAJESTY THE QUEEN, THE GOVERNOR GENERAL OF CANADA, THE ATTORNEY GENERAL OF CANADA, and THE ATTORNEY GENERAL OF NEW BRUNSWICK

Defendants

MEMORANDUM OF ARGUMENT

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PLAINTIFF'S MEMORANDUM OF ARGUMENT

PART I-FACTS

1. The Plaintiff admits the facts as stated in the Memorandum of Argument of the Defendant, the Attorney General of Canada, at paras. 1-5 and 7-8 and at paras. 2-6 of the New Brunswick Memorandum of Argument.

2. In addition, the Plaintiff relies on the facts stated in paras. 1-20 of her statement of claim.

PART II-QUESTIONS IN ISSUE

3. The issue in this motion is whether the Statement of Claim herein should be struck out for failing to disclose a reasonable cause of action.

Federal Court Rules, Rule 419

4. In particular, in their Memoranda of Argument in support of this motion the Defendants argue:

a) that the Plaintiff's claim cannot succeed on the merits;
b) that the Plaintiff lacks standing to challenge the procedure by

which the New Brunswick Amendment was authorized;

c) and that this Court has no jurisdiction to entertain the Plaintiff's action.

In addition, the Defendant, the Attorney General of New Brunswick, argues

d) that the action is an abuse of the process of this Court.

III-ARGUMENTS

5. In order for the Moving Parties to succeed on this motion, they must prove that it is "plain and obvious" that the Plaintiff's action cannot succeed. As Wilson J. stated in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980,

> ". . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's claim discloses no reasonable cause of action? . . . *Neither the length or complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case*. (emphasis added)

6. This standard applies to each of the grounds upon which it is argued that the statement of claim should be struck.

a) The Merits of the Claim

7. S. 52 and s. 43 of the *Constitution Act, 1982* provide that:

52 (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority of the Constitution of Canada.

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 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. (Emphasis added)

8. It is submitted that s. 43 cannot be used to enact the New Brunswick Amendment because:

1) s. 43 may only be used to make amendments to provisions of the existing Constitution that apply to one or more, but not all provinces;

2) while the New Brunswick amendment is surrounded by provisions contemplated by s. 43 it does not amend any of

these provisions; instead, the New Brunswick amendment relates to provisions that apply to all provinces and thus cannot be amended under s. 43, in particular s. 23 of the *Charter* (minority language educational rights);

3) the New Brunswick Amendment is also an amendment that affects the division of legislative powers, amendments in respect of which must be done by the general amending formula in s. 38 of the *Constitution Act, 1982;*

4) with respect to language rights at least, s. 43 has as its overriding purpose to allow provinces other than New Brunswick to opt in to the existing constitutional scheme in ss. 16-21, whereas the New Brunswick Amendment introduces new elements into this scheme and affects the structure of the Charter itself, in particular because it introduces into the Charter rights vested in collectivities or groups.

1) s. 43 may only be used to make amendments to provisions of the existing Constitution that apply to one or more, but not all provinces

9. The scope of s. 43 of the *Constitution Act, 1982* has of yet not been the subject of direct judicial determination. There is no

body of applicable jurisprudence on the basis of which it could be concluded that it is "plain and obvious" that the Plaintiff's claim concerning the scope of s. 43 cannot succeed.

10. The Plaintiff's view that s. 43 only applies to amendments to existing provisions of the Constitution that apply to one or more but not all provinces, and that the section should be given a narrow reading is consistent with the view of s. 43 taken by various constitutional authorities as well as by a parliamentary committee charged with studying the constitutional amendment procedures.

> "This is meant to be a narrow section, to apply to sections of the Constitution with limited application. . . . On its terms, the section is not available to change provisions that affect all provinces, for example the division of legislative powers in sections 91 and 92."
>
> Katherine Swinton, "Amending the Canadian Constitution: Lessons From Meech Lake", (1992), *University of Toronto Law Journal* 139, at p. 150.

P. Hogg, *Constitutional Law of Canada (Third Edition), supra,* at p. 83.

Special Joint Committee For Amending the Constitution of Canada, *The Process For Amending the Constitution of Canada, supra,* at pp. 27-28.

2) While the New Brunswick amendment is surrounded by provisions contemplated by s. 43 it does not amend any of these provisions; instead, the New Brunswick amendment relates to provisions that apply to all provinces and thus cannot be amended under s. 43, in particular s. 23 of the *Charter* (minority language educational rights)

11. Ss. 16-22 of the *Constitution Act, 1982* contain a comprehensive constitutional scheme with respect to the official languages of Canada. These sections are prefaced by the heading "*Official Languages of Canada.*" As is implicit in this heading, all of these sections relate to the right to use both of the official languages of Canada in governmental institutions such as courts and legislatures, or in communicating with governmental officials. The rights in question, which are contained in. ss. 16-21 apply with respect to the federal government and the government of New Brunswick. None of these sections deals with educational or cultural rights; they are exclusively concerned with the languages used in the executive, legislative, and judicial branches of government. While ss. 16-20 contain rights with respect to the languages of government, s. 21 and s. 22 are non-derogation clauses, stating that the rights in ss. 16-20 do not abrogate or

derogate from pre-existing language rights.

12. Minority language educational rights, which have been held by the Supreme Court to include a cultural dimension or aspect, are entrenched in s. 23 of the *Constitution Act, 1982*. Section 23, unlike ss. 16-20, applies to all provinces. S. 23 is prefaced by the heading "*Minority Language Educational Rights*", which clearly sets it off from the scheme for rights with respect to languages of government contained in ss. 16-22. Indeed, Section 23 has been described by Dickson C.J. in *Mahé v. Alberta* as a "comprehensive code for minority language educational rights: . . ." (at p. 369).

13. The New Brunswick Amendment does not relate to the subject matter which pervades all of ss. 16-20, namely the official languages of the branches of government. The Amendment purports, *inter alia*, to establish the "equality of status and equal rights and privileges" of the English and French linguistic communities in the province. This, however, cannot be taken to refer to equality of status and equal rights and privileges with respect to the languages of the branches of government, since equality of status and equal rights and privileges with respect to the languages of the branches of government in New Brunswick has *already* been entrenched in the *Constitution Act, 1982* by virtue of s. 16 (2).

14. Therefore, since the New Brunswick amendment is unconcerned

with the subject matter of ss. 16 to 20 of the *Constitution Act, 1982* it cannot be characterized as an amendment to any of these sections.

15. Instead, the New Brunswick Amendment concerns minority language educational and related cultural rights, and in fact creates a right to distinct educational institutions.

16. In para. 26 of his Memorandum of Argument, The Defendant the Attorney General of Canada himself draws attention to the identity that exists between the content of s. 23, which applies to all provinces, and the educational and cultural matters dealt with in the New Brunswick Amendment.

17. The Brunswick Amendment s. 23 of the *Constitution Act, 1982*, a provision that applies to all provinces. S. 23 has been interpreted judicially to entail a right to distinct educational institutions only in certain circumstances, in particular where numbers warrant.

Reference re Public Schools Act (Man.), unreported, S.C.C., March 4, 1993, at pp. 9-10.

18. The effect of the New Brunswick Amendment is to remove this qualification or limit on the rights guaranteed in s. 23.

19. Therefore, because s. 23 applies to all provinces, the New

Brunswick Amendment may not be proclaimed by the Governor on the basis of s. 43.

> "On its terms the section (43) is not available to change provisions that affect all provinces, . . . "
>
> Swinton, *supra*, at p. 150.

3) the New Brunswick Amendment is also an amendment that affects the division of legislative powers, amendments in respect of which must be done by the general amending formula in s. 38 of the *Constitution Act, 1982*

20. S. 38 (1) states that "An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

> a) resolutions of the Senate and the House of Commons; and
>
> b) resolutions of the legislative assemplies of at least two-thirds of the provines that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces."

21. S. 38 (1) contains the required amending procedure with respect to amendments that relate to the division of legislative powers.

> Special Joint Committee For Amending the Constitution of Canada, *The Process For Amending the*

Constitution of Canada, supra, at pp. 25-27.

Swinton, *supra*, at p. 150.

22. S. 16.1 (2) of the New Brunswick Amendment purports to create a special legislative status for that province, in that it states that "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."

23. S. 31 of the *Charter* states that "Nothing in this Charter extends the legislative powers of any body or authority." Even assuming that s. 31 is interpreted by the courts as applying to the New Brunswick Amendment and not simply to the contents of the *Charter* as they were before that Amendment, the New Brunswick Amendment will nevertheless be a factor in determining the respective limits of federal and provincial action in areas of concurrent jurisdiction or "grey areas" such as culture, which have not been allocated explicitly to either level of government. The effect will be to narrow the scope for federal action in fields where both governments have some claim to legislative authority.

24. Previous proposals and drafts for the New Brunswick Amendment were set in a context where the role of the federal government in the area of minority linguistic rights would also be constitutionally affirmed. Under those circumstances, the

affirmation of the New Brunswick legislature's role would not have tilted the balance away from the federal government. However, the New Brunswick Amendment is not accompanied by any constitutional affirmation of the federal role as previously proposed.

Report of the New Brunswick Commission on Canadian Federalism, September 1990, at pp. 27-29.

Draft Legal Text (Charlottetown Accord), 2 (d) [redacted]

25. If they had intended the New Brunswick Amendment to leave unaffected federal powers, it was open to the framers of the New Brunswick Amendment to include a non-derogation clause explicitly stating that the Amendment does not derogate from the powers, rights or privileges of Parliament or the the Government of Canada. of Parliament. Such a clause was contained in both the 1987 "Meech Lake/Langevin" Distinct Society clause and in the Canada Clause of the Charlottetown Accord.

Meech Lake Accord, 2(3).

Draft Legal Text (Charlottetown Accord), 2 (3).

4) With respect to language rights at least, s. 43 has as its overriding purpose to allow provinces other than New Brunswick to opt in to the existing constitutional scheme in ss. 16-21, whereas the New Brunswick Amendment introduces new elements into this scheme and affects the structure of the Charter itself, in particular because it introduces into the Charter rights vested in

collectivities or groups.

26. A purposive interpretation of a constitutional provision may sometimes imply a broad and sometimes a narrow or restrictive view of the provision at issue. For instance a purposive interpretation of the rights guarantees in the Charter will imply an expansive view of the scope of the rights guaranteed but a strict or rigorous reading of the requirement that limits to rights be demonstrably justifiable.

R. v. Oakes, [1986] 1 S.C.R. 103, at pp. 136-140.

27. Even, therefore, assuming purposive interpretation as a general rule of constitutional construction, it is far from "plain and obvious" that the Plaintiff's argument for a rigorous and limiting interpretation of the scope of s. 43 cannot succeed.

28. In as much as s. 43 has been the subject of judicial consideration in the course of interpreting other provisions of the Constitution, its purpose has been viewed as that of providing a means for provinces *other than New Brunswick* (or Manitoba or Quebec) to opt in to the *existing constitutional scheme* with respect to language in ss. 16-22. This is consistent with, and indeed supports, the Plaintiff's argument that s. 43 cannot be used to fundamentally alter the existing constitutional scheme itself, although it may be used to allow other provinces to sign on to that

scheme.

> "Section 43 provides for the constitutional amendment of provisions relating to some but not all provinces and requires the "resolutions of the Senate and the House of Commons and of the legislative assembly of each province to which the amendment applies." It is public knowledge that some provinces *other than New Brunswick*--and apart from Quebec and Manitoba--were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16-22 of the *Charter*, and a flexible form of constitutional amendment was provided to achieve *such* an advancement of language rights."
>
> --*Societé des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 579. Per Beetz J. (Emphasis added)

29. Even where it has determined that a right has a collective aspect in its implementation, the Supreme Court has stressed that the right "belongs" to individuals.

> "The rights provided by s. 23, it must be remembered, are granted to minority language parents individually. Their entitlement is not subject to will of the minority group

to which they belong, be it that of a majority of that group, but only to the "numbers warrant" condition."

Reference re Public Schools Act (Man.), unreported, S.C.C., March 4, 1993, at 26, per Lamer C.J.

30. Even scholars who support collective rights from a philosophic or political perspective nevertheless acknowledge that existing Charter language rights remain, as a matter of *law*, individual rights.

"Most scholars agree that the language rights in the Charter are vested in individual persons. On this point the wording is quite clear."

Roger Tassé, Gordon Robertson, and Donald G. Lenihan, "Collective Rights: Moving the Debate Forward", paper presented at the Department of Justice, Ottawa, June 9, 1993, at 2.

31. The Plaintiff acknowledges that the *Constitution Act, 1967* contains historical privileges or rights vested in groups, such as the right to denominational schooling in s. 93. However, s. 93 is not a part of the *Charter*, and should not be interpreted as

conferring rights of the kind found in the *Charter*.

> "The entrenched right of specified classes of persons in a province to enjoy publicly-sponsored denominational schools based on a fixed statutory benchmark should not be construed as a Charter human right or freedom or, to use the expression of Professor Peter Hogg, "a small bill or rights for the protection of religious minority groups." "
>
> *Protestant School Board of Greater Montreal et. al. v. Quebec (A.G.)*, [1989] S.C.R. 377, at p. 401.

32. The purpose of the *Charter* is to guarantee the rights of the individual against the state. The *Charter* has its own internal structure devised to balance balance the right of an individual against collective interests, or other individual rights, as defined through the analysis pursuant to s. 1. In the words of Dickson C.J. in *Hunter v. Southam*, [1984] 2 S.C.R. 145 at p. 155, the purpose of the *Charter* is the "unremitting protection of individual rights and liberties."

> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at p. 344, per Dickson C.J.
>
> "While some provisions in the Constitution *involve* groups, such as s. 93 of the *Constitution Act, 1867*

protecting denominational schools, and s. 25 of the *Charter* referring to *existing* aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members."

Re Public Service Employee Relations Act (Alta), [1987] S.C.R. 313, at 397. Per McIntyre J. (emphasis added)

33. As implied by McIntyre J., *ibid.*, s. 25 of the *Charter* does not entrench any rights, whether collective or individual, but instead is a non-derogation clause, which states that the *Charter* "shall not be construed so as to abrogate or derogate" from existing aboriginal rights.

34. Section 35 (1) of the *Constitution Act, 1982*, which recognizes and affirms certain collective rights of the aboriginal peoples of Canada, is viewed by the Supreme Court of Canada as only applying to rights that existed prior to the entry into force of the *Constitution Act, 1982*. This provision does not create any rights, whether collective or otherwise.

R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1091.

35. Furthermore, Section 35 (1) does not form part of the *Charter*,

so that the fundamental Charter structure whereby individual rights are balanced against collective interests or other individual rights is unaffected by it.

36. It is therefore far from "plain and obvious" that the Plaintiff cannot succeed with her argument that in *vesting* language rights in groups or collectivities the New Brunswick amendment would alter the very structure and nature of the constitutional scheme of language rights in ss. 16-21, and of the *Charter* more generally.

37. The arguments listed in para. 53 of the Memorandum of Argument of the Defendant New Brunswick represent a complex and controversial defence to the Plaintiff's claim, ranging as they do over the appropriate interpretative principles that should be applied with respect to particular sections of the Constitution, espousing a particular view of the "linguistic, philosophical and historical contexts" of the New Brunswick Amendment, and making a claim about the appropriate degree of judicial deference with respect to legislative action pursuant to the amending procedures in the Constitution which is not sustained by authority. The inventiveness, complexity and subtlety of the Defendant's own arguments suggest that it is far from "plain and obvious" that the Plaintiff cannot succeed on her claim. Furthermore, an adequate judicial resolution of these complex arguments would clearly

require a hearing on the merits and is not appropriate to a motion to strike.

b) The Plaintiff's standing

38. The Plaintiff claims public interest standing on the basis that she has raised a "serious issue" and has a "genuine interest as a citizen" in the constitutionality of the New Brunswick Amendment.

Minister of Justice v. Borowski, [1981] 2 S.C.R. 575 at 598 per Martland J. for the majority.

39. The issue of which amending procedure must be used in order to effect a particular kind of constitutional change is a question of law that permits and indeed requires judicial determination. The legal importance of the meaning of the amendment provisions in the *Constitution Act, 1982* is underlined by s. 52 (3), which states that "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."

40. The issue is serious in that how constitutional reform proceeds in the future may well depend signficantly on the legal scope that exists for bilateral amendments that do not involve a

process of building broad consensus among governments, and thus of broadly-based national political deliberation, that is entailed in following the general amending formula.

> Special Joint Committee of the Senate and the House of Commons (Hon. Gérald Beaudoin and Jim Edwards, M.P: Joint Chairmen), *The Process for Amending the Constitution of Canada*, Ottawa, June 20, 1991, at pp. 25-26.

41. The Plaintiff's sustained involvement in constitutional matters in Canada, including as a Professor of Law, as the principal constitutional adviser to a Provincial Government, and as leader of a No Committee in the recent Constitutional Referendum, show that she is not "a mere busybody" and has a serious, continuous and informed interest in the constitutional development of Canada.

42. Among the most prominent concerns of the Plaintiff throughout her public involvement in constitutional matters has been with expanding the amount and level of public debate and democratic deliberation that is necessary to enact a constitutional amendment. The Plaintiff has also stressed throughout these debates the dangers of a "patchwork quilt" effect where bilateral amendments to the Constitution are allowed to proliferate. Accordingly, the Plaintiff was highly critical of provisions in the Federal

Constitutional Proposals of 1991 and in the Charlottetown Accord which she understood to permit delegation and interdelegation of constitutional powers through bilateral agreement between provinces and the federal government.

> D. Coyne and R Howse, *No Deal: Why Canadians Should Reject the Mulroney Constitution* (Hull: Voyageur, 1992), at pp. 25-26.

43. Accordingly, the Plaintiff deems the New Brunswick Amendment to involve sufficiently serious alterations to the structure of the Charter as to merit the broader public scrutiny and greater degree of national democratic consensus attendant, in contemporary circumstances, on proceeding with a constitutional amendment on the general amendment formula.

44. The adjudication of this dispute does not require the Court to make a direct determination of the rights of New Brunswickers under the proposed Amendment. The Court is only being asked to decide whether the Amendment is of such as nature as to be enactable pursuant to s. 43 of the *Constitution Act*, or whether the general amending formula must be followed. The interest implicated in this action is an interest in integrity of the constitutional amending process, not in the application of the Amendment itself in the province of New Brunswick. The Plaintiff does not seek to

challenge the substance of the New Brunswick Amendment, and fully acknowledges that there is no constitutional obstacle to enacting an Amendment of this nature provided the proper amending procedure is followed.

45. The rights of New Brunswickers are not directly affected by whether s. 43 or the general amending procedure is used to entrench the New Brunswick Amendment. While it is true as a political matter that amending the constitution may be more difficult where assent of 7 provincial legislatures is required, no one has a right to a constitutional amendment being made in their favour. As a matter of law, New Brunswickers are no more affected than any other citizen of Canada by the disposition of the legal issue that the Plaintiff seeks to place before the Court.

46. In fact, the right or interest affected by this dispute is, to us the words of Cory J. in *Canadian Council of Churches v. Canada (M.E.I)*, the "fundamental right of the public to government in accordance with the law." (at p. 250)

47. In order to succeed in opposing a grant of public interest standing on the grounds that there is an alternative effective and reasonable way in which an issue can be brought before the Courts, as Cory J. suggests in *Canadian Council of Churches*, *supra*, at p. 252, it must be shown that, on the balance of probabilities, the measure will be subject to attack by a private litigant.

48. The Defendants have failed to show that it is "plain and obvious" that, on the balance of probabilities, the issue will be brought before the court by a private litigant. The proof that the Defendant New Brunswick advances for this proposition in para. 40 of its Memorandum of Argument is insufficient. In that paragraph, the Defendant lists a number of cases that concern language rights to show the frequency of constitutional litigation where language is at issue. However, some of these cases are not examples of matters initiated by private litigants, since they have been initiated as references. The other cases, it should be noted, have generally involved private litigants initiating actions *to assert their language rights under the Constitution*. It would seem entirely contradictory, or at least highly implausible, that a private litigant would raise the issue of the constitutionality of the New Brunswick Amendment while at the very same time attempting to assert his or her rights under that very Amendment.

49. Nor could the Amendment be effectively subject to attack on the grounds that it violates the rights of a private litigant under the existing Charter. The constitutionality of a constitutional amendment is only reviewable against the requirements in Part V of the *Constitution Act, 1982* and cannot be challenged in an action based on the *Charter*.

45 D.L.R. (4th) 108, at pp. 112-113.

Re Sibbeston and Attorney General of Canada,
(1988) 48 D.L.R. (4th) 691, at pp. 695-697.

50. As indicated by the correspondence with Attorneys-General in Appendix A of her Statement of Claim, the Plaintiff has made a reasonable effort to have this matter brought before a court by way of reference, but has not succeeded in this regard.

51. It is submitted, for all these reasons, that it is not "plain and obvious" that the Plaintiff must fail in her claim to public interest standing.

c) Jurisdiction of this Court

52. Three essential requirements must be satisfied in order to support a finding of jurisdiction in the Federal Court:

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be a "law of Canada" as the phrase is used in s. 101 of the Constitution Act, 1867.

> *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, per McIntyre J. at p. 766

53. The Defendants do not dispute that the first of these requirements is met by the Plaintiff's action. They claim, however, that there is no "law of Canada" on which the Plaintiff's action can be based.

54. The observation of Estey J. in the *Northern Telecom* case that the *Constitution Act, 1867* was not a "law of Canada" , for purposes of the second and third requirements listed above, appears to have been based on the status of the Constitution of Canada prior to Patriation.

> *Northern Telecom v. Communications Workers,* [1983] 1 S.C.R. 733, per Estey J. at p. 745.

55. Since Patriation, however, the Constitution of Canada has had the status of a "law of Canada". S. 52 (1) of the *Constitution*

Act, 1982 states that the Constitution is the "supreme law of Canada".

56. Furthermore, in *Northern Telecom*, Estey J. was careful not to foreclose the possibility that, in some circumstances, the Federal Court could have jurisdiction over an action based on the *Constitution Act* alone.

> "The inherent limitation placed by s.101, *supra*, on the jurisdiction which may be granted to the Federal Court by Parliament *might* exclude a proceeding founded on the *Constitution Act*." (emphasis added) at p. 745.

57. After *Northern Telecom*, "whether the Federal Court can determine the constitutional validity of legislation, not as a threshold question in substantive proceedings, but in proceedings for a bare declaration for invalidity *remains open*."

Federal Court Practice, 1991-1992, at 9. (emphasis added)

58. It is, therefore, not "plain and obvious" that the Federal Court is unable to make such a determination.

59. Moreover, s.101 and the jurisprudence interpreting it cannot be read in isolation from the rest of the Canadian constitution and its evolution in the post-Charter era. The preamble of the *Charter*, which states the "rule of law" as a principle upon which

Canada is founded, as well as s. 52 (1) of the *Constitution Act, 1982*, reflect the importance of providing the courts broad scope to engage in constitutional review. As stated by Cory J. in *Canadian Council of Churches v. Canada ((M.E.I)*, the *Constitution Act, 1982* entrenches "the fundamental right of the public to government in accordance with the law.", at 250.

56. While in *Kigowa v. Canada*, [1990] 1 F.C. 804 (F.C.A.), Heald J.A. observed that the provisions of the *Charter* at issue did not constitute "laws of Canada" for purposes of s. 101, this observation was based entirely upon Estey J.'s suggestion, cited above, that the constitutionally permitted jurisidiction of the Federal Court "*might* exclude a proceeding founded on the Constitution Act." (emphasis added) Since, in *Kigowa*, the Federal Court of Appeal found an alternative body of federal law on which the action was based, it was not required to consider at length the implications and possible evolution in the meaning of Estey J.'s dictum, given Canada's constitutional development since 1982.

57. The requirements for Federal Court jurisdiction imposed by judicial interpretation of s. 101 of the *Constitution Act, 1867* must also be read in light of the purposes stated in judicial pronouncements that have given birth to these requirements. These purposes go to the importance of protecting the jurisdiction of provincial courts from usurpation, particularly where provincial law or provincial jurisdiction is implicated in the matter to be

litigated.

Quebec North Shore Paper v. C.P Ltd., [1977] 2 S.C.R. 1054, at 1064-65.

62. In this action, no provincial body of law is implicated, and the Plaintiff relies upon a concurrent, not exclusive jurisdiction of the Federal Court. Since no concerns about usurpation of the realm of provincial courts are at stake in this litigation, the constitutional requirements for Federal Court jurisdiction should be applied flexibly.

63. Even if the Federal Court cannot assume jurisdiction, in these circumstances, over an action based on the Constitution alone, there is also relevant body of federal common law which nourishes this action. This is the law of the federal Crown as it relates to the office and authority of the Governor General.

64. The Plaintiff seeks to determine the limits which the Amending Procedures in the *Constitution Act, 1982* place on the power of the Governor-General to make a Proclamation on the Great Seal of Canada purporting to amend the Canadian Constitution.

65. The powers of the Governor-General, including the power to make proclamations on the Great Seal of Canada depend not only on the *Constitution Act* but also on the authority of the Queen under

English constitutional law, who has, by Letters of Patent, delegated these powers to the Governor General.

> " II. And We do hereby *authorize and empower* Our Governor General, . . . , to exercise all powers belonging to Us in respect of Canada, and for greater certainty of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust *We have reposed in him* according to the several powers and authorities granted or appointed him by virtue of the Constitution Acts 1867 to 1940."
>
> Letters Patent constituting the Office of Governor General, October 1, 1947 [R.S.C. 1985, Appendix II, No. 31), at p. 2 (emphasis added)

"Another gap in the B.N.A. Act concerns the office of Governor General. . . . The office of the Governor General has never been formalized in an amendment to the B.N.A. Act. The office is still constituted by the royal prerogative, . . ."

P.W.Hogg, *Constitutional Law of Canada (Third Edition)*, (Toronto: Carswell, 1992)

"Action by the executive or adminstrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, *as in the case of the prerogative*."

> *Retail, Wholesale, and Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573, at p. 599, per McIntyre J. for the Court. (Emphasis added)

66. For purposes of determining the constitutional requirements for Federal Court jurisdiction, English constitutional law as it pertains to Canada, including the royal prerogative, is to be considered Crown law. Where Crown law governs the Crown in right of Canada, it is federal law and a law of Canada within the meaning of s. 101 of the *Constitution Act, 1867*.

"It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in

right of Canada, just as it is provincial law in relation to the Crown in right of a Province, . . ."

Quebec North Shore Paper v. C.P. Ltd, [1977] 2 S.C.R. 1054, at p. 1063.

"It is also well to note that s. 101 does not speak of the establishment of Courts in respect of matters within federal legislative competence but of Courts "for the better administration of the laws of Canada". The word "administration" is as telling as the plural words "laws", and they carry, in my opinion, the requirement that there be applicable and existing federal law, *whether* under statute or regulation or *common law, as in the case of the Crown,* upon which the jurisdiction of the Federal Court can be exercised." (emphasis added), *Ibid,* at pp. 1065-1066.

67. This action is, therefore, not based on the Constitution alone, but rather the "reach and applicability . . . . under the Constitution", within the meaning of those words as used by Estey J. in *Northern Telecom* at p. 745, of the powers of the Governor General pursuant to federal Crown law.

68. For all these reasons, it is submitted that it is not "plain and obvious" that the Plaintiff will fail to establish the

jurisdiction of this Court over this action.

69. With respect to the Defendant New Brunswick, the Plaintiff's statement of claim does not ask for relief against this Defendant. New Brunswick was joined as a Defendant on the assumption that the New Brunswick government should be given the greatest opportunity to present its view of the Amendment at issue and its understanding of its legal effects in New Brunswick. Whether or not as a matter of law in these circumstances the Plaintiff could require New Brunswick to submit to the jurisdiction of the Federal Court, the Plaintiff does not seek to do so, and is prepared to proceed against the Federal Crown alone if the New Brunswick government does not wish to attorn to the jurisdiction of the Federal Court.

d) abuse of process

70. A central reason for the recognition of public interest standing was the view of the Supreme Court that in a system based upon the supremacy of the rule of law, governments should not be the ultimate gatekeepers of judicial interpretation of the Constitution, even in circumstances where private litigants are not available to claim an infringement of constitutional rights per se. Thus, in *Borowski,* both the majority and minority accepted that public interest standing could apply with respect to declaratory action to obtain a decision on validity.

Finlay, supra, at 627. Per Le Dain J.

71. Because the Plaintiff is asserting s. 52 (1) of the *Constitution Act, 1982* as a basis for her declaratory action, it is not necessary that she claim that constitutional rights have been infringed, but only that the Proclamation of Governor General is inconsistent with the requirements of Part V of the *Constitution Act, 1982*.

R. v. Big M Drug Mart Ltd., [1985] S.C.R. 295 at p. 313, per Dickson C.J.

72. Furthermore, the Plaintiff is not seeking an interpretation of s. 43 in the abstract but only a determination of whether it is the appropriate amending procedure with respect to the New Brunswick Amendment.

73. It is, therefore, not "plain and obvious" that the Plaintiff's claim is an abuse of the process of this Court.

V. ORDER SOUGHT

74. The Plaintiff therefore requests that this motion be dismissed

with costs, and that this action proceed to trial.

75. Alternatively, should this motion succeed, the Plaintiff requests leave to amend her Statement of Claim.

All of which is respectfully submitted this 14th day of June, 1993.

Deborah Coyne

Deborah Coyne

Plaintiff