STANDING AFTER McNEIL

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I. INTRODUCTION

On May 20, 1975, a nine man Supreme Court of Canada handed down judgment in *Nova Scotia Board of Censors v. McNeil.*[1] The brief judgment[2] of the Court was delivered by the Chief Justice, and its effect was to allow Gerard McNeil to continue with his challenge to the constitutionality of the Nova Scotia Theatres and Amusements Act[3] and some of the regulations promulgated under that Act.

At the time he commenced his action for a declaration in the Supreme Court of Nova Scotia, McNeil was editor of the *Dartmouth Free Press.* He was upset by the fact that the movie "Last Tango in Paris" had been banned in Nova Scotia by the Nova Scotia Amusements Regulation Board. After seeking legal advice, he challenged the existence of that Board on the basis that the establishment of a movie censorship regime by Nova Scotia statute law constituted an encroachment on the federal Criminal Law power under section 91(27) of the British North America Act.

To quote the trial judge, Mr. Justice Hart: "Counsel for the applicant stated in Court that the proceeding was being brought by Mr. McNeil as a member of the public claiming interference with his rights as a citizen."[4] It was this that gave rise to the Crown's principal preliminary objection to the action, namely, that McNeil had no status or *locus standi* to commence this action. In response, McNeil relied upon the very recent Supreme Court of Canada decision, *Thorson v. Attorney-General of Canada,*[5] in which the Court had granted standing to Thorson, a private citizen, to challenge the constitutional validity of the federal Official Languages Act.[6]

In both the Trial Division[7] and Appeal Division[8] of the Nova Scotia Supreme Court, it was accepted that there were sufficient analogies between McNeil's situation and that of Thorson as to justify the grant of standing

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[1] 5 N.R. 43 (Sup. Ct. 1975).

[2] Slightly over four pages in the National Reporter.

[3] N.S. REV. STAT. c. 304 (1967) *as amended by* N.S. Stat. 1972, c. 54. The Amendment changed the name of the regulatory body from "Nova Scotia Board of Censors" to "Amusements Regulation Board".

[4] MacNeil v. Nova Scotia Board of Censors, 9 N.S.2d 506, at 507-08, 46 D.L.R.3d 259, at 261 (N.S. Sup. Ct. 1974).

[5] [1975] 1 Sup. Ct. 138, 43 D.L.R.3d 1 (1974).

[6] CAN. REV. STAT. c. 0-2 (1970).

[7] *Supra* note 4.

[8] MacNeil v. Nova Scotia Board of Censors, 9 N.S.2d 483, 53 D.L.R.3d 259 (N.S. 1974).

and this result was affirmed by the Supreme Court of Canada. Nevertheless, despite the application of the *Thorson* case, *McNeil* has a significance of its own, first, because the type of legislation involved in *McNeil* was different in an important respect from that involved in *Thorson*, and, secondly, and more generally, because important questions were left unclear or unanswered in *Thorson*, some of which the Supreme Court came to grips with in *McNeil*. The end result is that the law of standing in relation to constitutional challenges is somewhat clearer after *McNeil* than it was after *Thorson*, though this is not to say that this area of the law has been settled conclusively.

In this article I identify what I perceive to be the problems left unresolved by the *Thorson* decision and discuss how these were handled by the Supreme Court in *McNeil*. I also detail those matters still unresolved and discuss generally the impact of the *Thorson* and *McNeil* decisions on constitutional litigation in Canada.

II. SMITH V. A.-G. OF ONTARIO—THE EFFECTS OF *Thorson* AND *McNeil*

Prior to *Thorson* and *McNeil*, *Smith v. Attorney-General of Ontario*[9] was the leading authority on and seemingly impenetrable barrier to private citizens launching challenges to the constitutional validity of legislation unless they were specially affected by the operation of that legislation. Here the Supreme Court of Canada had refused to accord standing to Smith, a private citizen, to challenge the validity of a resolution of the Ontario legislature which had the effect of prohibiting the importation of intoxicating liquor into Ontario. After a Montreal dealer had refused to fill an order for him because of the legislation, Smith claimed that neither he nor the dealer should have to risk prosecution in order to raise questions as to the validity of the resolution and that therefore he should be able to approach the courts for a declaration. This argument was rejected by the Court, and Mr. Justice Duff[10] in the course of his judgment concluded that the grave inconvenience to governments involved in allowing private citizens to challenge the validity of any legislation "directly affecting" them outweighed the "risk of prosecution" argument.[11] It was also asserted by Duff that there were avenues available to the provincial and federal governments for questioning the constitutional validity of legislation and that these avenues were sufficient.[12]

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[9] [1924] Sup. Ct. 331, [1924] 3 D.L.R. 189.

[10] Duff, J., delivered the judgment of himself and Maclean, J., *ad hoc*, a judgment in which Mignault, J., concurred with brief separate reasons. (Interestingly enough both Duff and Mignault, JJ., went on to deal with the merits and held that the preconditions for the resolution were satisfied). Idington, J., refused to deal with the question treating it as purely hypothetical. Davies, C.J.C., died before judgment.

[11] *Supra* note 9, at 337-38, [1924] 3 D.L.R. at 193-94.

[12] *Id.* at 336-37, [1924] 3 D.L.R. at 192-93. For significant applications of the *Smith* case, *see* Cowan v. C.B.C., [1966] Ont. 309, 56 D.L.R.2d 578; Burnham v. Attorney-General of Canada, 74 W.W.R. 427, 15 D.L.R.3d 6 (B.C. Sup. Ct. Chambers 1970); Mercer v. Attorney-General of Canada, [1972] 3 W.W.R. 701, 24 D.L.R.3d

In *Thorson*, Mr. Justice Laskin (as he then was) was for the most part quite critical of the decision in *Smith v. Attorney-General of Ontario*. He dismissed the grave inconvenience argument of Duff as a matter that could be controlled by the proper exercise of judicial discretion [13] and then posed the rhetorical question: "Why, in such a case, should Smith be disqualified as a plaintiff in a declaratory action and be compelled to violate the statute and risk prosecution in order to raise the question of its invalidity?" [14]

Nevertheless, having criticized *Smith*, he then went on to draw a distinction between the legislation in issue in *Smith* and that in issue in *Thorson*. The legislation at issue in *Smith* he described as regulatory, namely "legislation which puts certain persons, or certain activities theretofore free of restraint, under a compulsory scheme to which such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme . . . ." [15] That at issue in *Thorson* he described as "both declaratory and directory" and noted:

> The Act creates no offences and imposes no penalties; there are no duties laid upon members of the public, although the public service may be said, broadly speaking, to be affected by the promotion of bilingualism in order that members of the public may be served and may communicate in both official languages. Public officials only might be exposed to prosecution under s. 115 of the *Criminal Code*. [16]

At first blush, the drawing of this distinction might be interpreted as another example of an appellate judge restrictively distinguishing an earlier authority rather than overruling that authority, notwithstanding its obvious deficiencies. Indeed, later in the judgment, *Smith* is given some support at least as a decision on its facts: "If it is legislation of [a regulatory] kind, the Court may decide, as it did in the *Smith* case, that a member of the public, and perhaps even one like Smith, is too remotely affected to be accorded standing." [17] On closer reading, however, it seems that there may be a more satisfactory explanation for the drawing of the distinction. Laskin may be saying that, with *Smith*-type regulatory legislation, those regulated or directly affected have standing to raise constitutional questions but not

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758 (Alta.); Jamieson v. Attorney-General of British Columbia, [1971] 5 W.W.R. 600, 21 D.L.R.3d 313 (B.C. Sup. Ct.). *See also* the dissenting judgment of Fauteux, C.J.C., Abbott and Judson, JJ., (delivered by Judson, J.) in Thorson, *supra* note 5, at 140, 43 D.L.R.3d at 3. *Cowan* is commented upon by Strayer, 45 CAN. B. REV. 154 (1967) and *Jamieson* in an excellent Note by Turriff, 7 U.B.C.L. REV. 312 (1973). *See also* B. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 96-129 (1968). Apart from this, as Turriff notes (*supra* at 317, n. 34), there has been very little writing about standing in constitutional litigation in Canada. It is however pleasing to see a short section on standing in the most recently published Constitutional Law casebook: *see* J. WHYTE & W. LEDERMAN, CANADIAN CONSTITUTIONAL LAW — CASES, NOTES AND MATERIALS 211-22 (1975).

[13] *Supra* note 5, at 145, 43 D.L.R.3d at 6-7.

[14] *Id.* at 148, 43 D.L.R.3d at 9.

[15] *Id.* at 147, 43 D.L.R.3d at 8.

[16] *Id.* at 151, 43 D.L.R.3d at 11.

[17] *Id.* at 161, 43 D.L.R.3d at 18.

mere taxpayers. With *Thorson*-type declaratory and directory legislation, all citizens have standing subject to the discretion of the court. Because no one is regulated, the denial of standing to a mere citizen or taxpayer would lead possibly to a situation where no citizen would have standing to challenge the validity of the legislation, and, as Laskin stated earlier in his judgment, "it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication". [18]

Superficially, the kind of distinction has some appeal but it is not without its difficulties as demonstrated by the arguments of the Crown in *McNeil*. In *McNeil*, the statute was clearly regulatory in the Laskin sense in that penalties and sanctions were imposed and those directly regulated were the film exchanges and the theatre owners. Certainly, the public was affected by the actions of the Board but, in Mr. Justice Laskin's own terms, was McNeil "a mere taxpayer or other member of the public not *directly* [emphasis added] affected by the legislation [with] no standing to impugn" [19] this regulatory statute?

The issue then in *McNeil* may be seen in terms of *Thorson* as one of whether the plaintiff was directly affected by the legislation in question, thus calling upon the court to define with some precision what "directly affected" as used by Laskin in *Thorson* should mean. At first instance, Mr. Justice Hart really did not seem to answer this question directly:

> In any event, it is my opinion that the film exchanges and the theatre owners would not have an interest similar to that of the members of the public and there could be a large number of persons with a valid desire to challenge the prohibitory aspects of the legislation who have no vehicle through which to effect their purpose unless granted standing before the Court. [20]

What constitutes a "valid desire" is not elaborated upon, though, for the judge, it may have had something to do with the fact that those directly regulated by the legislation were not likely to raise this justiciable constitutional issue before a court.

The Appeal Division was somewhat clearer in its approach to the problem. Mr. Justice Macdonald delivered the judgment of the court and, after acknowledging that Laskin had in *Thorson* drawn a distinction between regulatory statutes and declaratory or directory statutes, [21] continued: "[B]ut as he wends his way through the various authorities the distinction between the two types of legislation for status purposes seems to become less clear." [22] He then refers to a portion of Laskin's judgment in *Thorson* in which it is

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[18] *Id.* at 145, 43 D.L.R.3d at 7.

[19] *Id.* at 148, 43 D.L.R.3d at 8.

[20] *Supra* note 4, at 514, 46 D.L.R.3d at 266.

[21] *Supra* note 8, at 499-500, 53 D.L.R.3d at 271-72.

[22] *Id.* at 500, 53 D.L.R.3d at 272. The word "wends" is particularly apt to describe Laskin, J.'s difficult and discursive judgment in *Thorson*.

stated that the nature of the legislation is a relevant (but not conclusive) factor in the court's discretion to grant standing.[23] Indeed, ulimately, Mr. Justice Macdonald's interpretation of *Thorson* is that, despite statements early in the judgment, any citizen may be able to challenge any kind of legislation for lack of constitutionality provided there is something of substance in the challenge.[24]

What therefore seemed to emerge from the lower court decisions was that the judgment of Laskin in *Thorson* was in fact somewhat obtuse and there were major problems involved in using *Thorson* to decide other cases. More particularly, if a statute was regulatory, as in *Smith* and *McNeil*, did a person have to be "directly affected" before he could be granted standing or was this merely a factor going to the exercise of discretion by the courts? In any event, in what situations was someone "directly affected" by a regulatory statute? In terms of *Thorson*, was McNeil "directly affected", for example? Finally, could it be argued that *Smith* might not be decided any differently on its facts today albeit by a different route?

Delivering the Supreme Court judgment in *McNeil*, Chief Justice Laskin indicated that Mr. Justice Macdonald of the Appeal Division of the Nova Scotia Supreme Court had been very close to the mark in his distillation of the *Thorson* judgment. First, the Chief Justice clearly rejected the contention that the distinction between regulatory and declaratory statutes was a controlling distinction as far as according standing to mere taxpayers is concerned.[25] For this he gave two reasons—first, the need for an overriding judicial discretion on the recognition of standing[26] and, secondly, the unsatisfactory nature of the distinction as a method of classifying all types of legislation.[27] Accordingly, this aspect of the nature of the legislation in issue became for Chief Justice Laskin one of the relevant factors in the exercise of discretion of the court.

Laskin then went on to discuss the relevance of the relationship of the plaintiff to the legislation in question. On the facts of *McNeil*, he found that

> members of the Nova Scotia public are directly affected [by the legislation] in what they may view in a Nova Scotia theatre, albeit there is a more direct effect on the business enterprises which are regulated by the legislation. The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.[28]

Indeed, prior to this he had already made the point that it was not only those

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[23] *Id.* at 500-01, 53 D.L.R.3d at 272-73.

[24] *Id.* at 504, 53 D.L.R.3d at 275: "If the justiciable issue is the constitutionality of legislation then I believe, as stated above, that Laskin, J., is saying in effect that regardless of the type of legislation involved, standing should be granted to anyone who has a challenge of substance to the constitutionality of such legislation."

[25] *Supra* note 1, at 46.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 48.

regulated directly (the distributors and the theatre owners) who had "a real stake" [29] in the validity of the legislation and he cited with approval Mr. Justice Hart's "valid desire" statement. [30] Nevertheless, while this finding is obviously a very strong factor in the case, nowhere is it stated that persons have to be "directly affected", even in this broad sense, before they will be given standing. Ultimately, the most that can be said is that where the legislation involved has regulatory features, the courts should pay some attention to the way in which the legislation affects private citizens before exercising their discretion in relation to the grant of standing to such a private citizen.

III. Standing as Matter of Discretion—The Other Relevant Factors

The question then becomes what other factors are relevant to the exercise of judicial discretion. Quite clearly, one of the significant features in *Thorson* was the fact that unless Thorson was given standing as a member of the public, it was highly unlikely that the validity of the legislation would ever be challenged in the courts. [31] This factor also intruded obliquely in the *McNeil* decision in that Chief Justice Laskin agreed with Mr. Justice Macdonald of the Appeal Division that the factual situation had some relevance, [32] a factual situation which in *McNeil* revealed an unwillingness on the part of those most directly affected (*i.e.*, movie distributors and the theatre owners) to challenge the constitutional validity of the regime of censorship. [33]

Strongly related to this particular factor but much more difficult to analyse is the relevance of other aspects of the legislation in issue. In *Thorson*, Laskin at one stage had said: "Central to [the exercise of] discretion is the justiciability of the issue sought to be raised . . . ." [34] And this, linked with his earlier statement that "[t]he question of the constitutionality of legislation has in this country always been a justiciable question" [35] would seem to lead to the conclusion that where a constitutional challenge is involved that is enough, and the court in exercising its discretion has no further concern with the nature of that challenge or the strength of the plaintiff's case. However, that the question is not quite that simple is revealed by the conclusion of the sentence cited above:

> Central to that discretion is the justiciability of the issue sought to be raised, a point that could be said to be involved . . . in *Anderson v. Commonwealth*

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[29] *Id.* at 46.

[30] *Id.* at 47.

[31] *Supra* note 5, at 145-47, 43 D.L.R.3d at 6-8.

[32] *Supra* note 1, at 47.

[33] See the judgment of Macdonald, J.A., *supra* note 8, at 493-96, 53 D.L.R.3d at 266-68.

[34] *Supra* note 5, at 161, 43 D.L.R.3d at 18.

[35] *Id.* at 151, 43 D.L.R.3d at 11.

> [(1932), 47 C.L.R. 50], where the High Court of Australia denied standing to a member of the public to challenge the validity of an agreement between the Commonwealth and one of the States. [36]

This would seem to indicate that there are in fact certain constitutional issues that Chief Justice Laskin does not regard as justiciable, and thus the extent of justiciability, however that is to be gauged, becomes another factor in the exercise of discretion.

This whole problem was not clarified by *McNeil*. Indeed, it was exacerbated to an extent when Laskin stated "that a serious, a substantial constitutional issue has been raised by the respondent's declaratory proceeding", [37] a statement which tends to indicate that the plaintiff's chances of success are not irrelevant to the exercise of discretion either. This is confirmed by an earlier remark to the effect that all the issues in the case, whether procedural, relating to the propriety of the action or touching the merits of the dispute, should be before the court together. [38] "A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing." [39] Even beyond this, Laskin in *McNeil* referred to the apparently unlimited power of the Nova Scotia Amusements Regulation Board to determine "what members of the public may view in theatres or other places of public entertainment", [40] a reference which suggests implicitly that the discretion to accord standing will also be contingent on the pervasiveness of the legislation that is being challenged, *e.g.*, the recognition of standing will be much more likely if the legislation affects the civil liberties of a significant portion of the population. Of course, with severe limitations on judicial time, it is quite understandable and justifiable that the courts should retain this discretion, provided it is used to avoid the trivial and the vexatious.

One further factor adverted to in *Thorson* but in no way clarified in *McNeil* is the statement of Laskin earlier referred to, that the grave inconvenience of allowing members of the public to challenge the validity of legislation can be handled by the proper use of judicial discretion. [41] One interpretation of this statement is that all the factors identified so far will act as a sufficient brake on constitutional challenges by private citizens. However, it may be taken to go further than this and lead to quantitative assessments such as "Fifteen challenges by Nova Scotia citizens in one year is simply too much for the Crown and the courts to cope with" or, alterna-

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[36] *Id.* at 161, 43 D.L.R.3d at 18. Of course, one can focus on the fact that legislation was not involved in *Anderson* but rather a federal/state agreement, and then argue that the constitutionality of legislation is always justiciable. However, there may well be dangers in relying on such an argument.

[37] *Supra* note 1, at 45.

[38] *Id.*

[39] *Id.*; for an advocacy of this type of approach as a method of controlling standing, *see* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim to Relief*, 83 YALE L.J. 425 (1974).

[40] *Supra* note 1, at 48.

[41] *Supra* note 5, at 145, 43 D.L.R.3d at 6-7.

tively, "The effects of finding this long-standing statute invalid would be so disruptive of the workings of government that standing should be denied to private citizens". If this is what the Chief Justice intended, then it raises very serious questions particularly as to the appropriateness of a court taking cases only so long as governments are not embarrassed. [43]

In contrast to this, though, one of the salient features of the *Thorson* case was the recognition given by the Supreme Court of Canada to the outmoded nature of the contention that the Attorneys-General in Canada were always satisfactory guardians of the public interest who could be relied upon to challenge the constitutionality of statutes whenever the need arose or who would at least lend their support to private citizens' challenges in relator proceedings. [44] Nevertheless, despite the statements to this effect by Laskin in *Thorson*, it was still somewhat unclear as to whether it was necessary for a private litigant to have approached unsuccessfully for support the Attorney-General of the jurisdiction which enacted the legislation before he could approach the courts in his own right.

Thorson had in fact approached the Attorney-General of Canada and been rebuffed before commencing his action for a declaration against the constitutionality of the federal Official Languages Act. Laskin's only comment on this was to note that this seemed to have been laid down as a prerequisite to a private citizen's action [45] by the English Court of Appeal in *Attorney-General v. Independent Broadcasting Authority, ex parte McWhirter*, [46] but to doubt whether this should be necessary in a federal jurisdiction "where the Attorney-General is the legal officer of a Government obliged to enforce legislation enacted by Parliament". [46] *McNeil*, of course,

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[43] Of course, the entire legal system can be put under extreme strain if long-standing statutes are declared unconstitutional. For example, in Simpson v. Attorney-General, [1955] N.Z.L.R. 271 (Sup. Ct.), the plaintiff was seeking a declaration as to the invalidity of all statutes enacted in New Zealand from 1946 to the date of the trial. Perhaps fortunately, Simpson, a private citizen, whose standing was surprisingly not questioned, did not succeed. Nevertheless, it is easy to see how the award of such a declaration could have created legal chaos. Nevertheless, that it is possible to accommodate such situations is exemplified by the American experience. See particularly the approach of the U.S. Supreme Court in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 84 L. Ed. 329 (1939).

[44] *Supra* note 5, at 146-47, 150, 43 D.L.R.3d at 7-8, 10.

[45] *Id.* at 146, 43 D.L.R.3d at 7.

[46] [1973] Q.B. 629; [1973] 1 All E.R. 689 (C.A.).

[46] *Supra* note 5, at 146, 43 D.L.R.3d at 7. Note, however, that it seems to have been fairly firmly established that there is no need to approach the Attorney-General of Canada if provincial legislation is involved or vice versa. In Thorson, *id.* at 152-53, 43 D.L.R.3d at 11, Laskin, J., could not find any authority to support the proposition that a provincial Attorney-General had standing to question a federal statute and he doubted whether, on principle, a provincial Attorney-General should have that standing where the challenge "would not result in any accretion to, or vindicate any legislative power of the Province": *id.* at 152, 43 D.L.R.3d at 12.

In *Thorson*, a declaration of invalidity of the federal Official Languages Act would not have resulted in any "accretion" to provincial legislative power. There still remained however the question of whether the position would be any different if such an accretion would result from the award of a declaration and, in *Thorson*, Laskin, J.,

involved a challenge to the validity of a provincial statute and McNeil had, like Thorson, approached the appropriate Attorney-General before commencing his action. Commenting on this and also McNeil's invocation of a statutory right of appeal, Chief Justice Laskin stated: "In my opinion, the respondent took all the steps that he could reasonably be required to take in order to make the question of his standing ripe for consideration." [47] Not only does this fail to advance the matter any further than *Thorson* but it even seems to suggest that exhaustion of other avenues, including approaching the appropriate Attorney-General, may affect the exercise of discretion to grant standing. [48]

In summary, the position seems to have been reached after *McNeil*, that when a person approaches the court for a declaration as to the constitutionality of legislation and he does not meet the normal standing requirements for a declaration, [49] the court can give him standing but only

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id. at 152-53, 43 D.L.R.3d at 11-12, referred to Australian authority supporting the status of a state Attorney-General in such a case. However, in *McNeil*, where a declaration of invalidity would vindicate the federal Criminal Law power (save any argument with respect to absence of any legislative competence over such), Laskin, C.J.C., stated: "It was suggested, albeit faintly, that he ought to have also sought the intervention of the Attorney-General of Canada by having him direct a reference to this court. This is not a suggestion which can stand in the way of a determination of the issue which is before this court": *supra* note 1, at 46.

[47] *Supra* note 1, at 46. McNeil had tried to rely on a provision in the regulations to the effect that there was a right of appeal from a decision of the Board to the Governor in Council. The Attorney-General of Nova Scotia had intervened, however, after the notice of appeal had been filed, on the basis that McNeil had no status to appeal. McNeil was similarly unsuccessful in attempting to have the Governor in Council consider referring the matter to the Nova Scotia Supreme Court under the Constitutional Questions Act, N.S. REV. STAT. c. 51 (1967). (See the judgment of Macdonald, J.A., *supra* note 8, at 495-96, 53 D.L.R.3d at 268).

[48] Of course, the availability of a declaration has always been discretionary and one of the factors taken into account by the courts in the exercise of their discretion has been the availability of avenues of appeal and the efforts of the plaintiff to utilize those avenues: *see* R. REID, ADMINISTRATIVE LAW AND PRACTICE 401-03 (1971). What may have been in Laskin, C.J.C.'s mind in *McNeil* was an assimilation of the need to approach the appropriate Attorney-General with such remedies as statutory appeal rights, at least in cases where the plaintiff did not meet the normal standing requirements for declaratory relief.

[49] The normal standing requirement for a declaration would seem to be that the plaintiff be "peculiarly affected": *see, e.g.*, Lord Nelson Hotel Ltd. v. City of Halifax, 4 N.S.2d 753, at 771, 33 D.L.R.3d 98, at 109 (1972) (Jones, J.). Of course what this open-textured term means is often a difficult problem in particular cases. It also raises questions, in the context of *Thorson* and *McNeil*, as to the difference between "directly affected" and "peculiarly affected". One suspects that there is no satisfactory answer to that question. Indeed the futility of such semantic distinctions is exemplified by the following extract from Lord Denning's judgment in Pyx Granite Co. v. Ministry of Housing & Local Gov't, [1958] 1 Q.B. 554, at 471, [1958] 1 All E.R. 625, at 632, an extract which sounds very much like Laskin, C.J.C., in *Thorson* and *McNeil*, but which was uttered in the context of an administrative law case where supposedly traditional standing requirements were being applied: "[I]f a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is a good reason for so doing."

A further possible spin-off from *McNeil* and *Thorson* stems from the fact that §

after a consideration of at least some and perhaps all of the following factors:

(1) *The legislation*
   (a) Is its constitutionality justiciable?
   (b) Where in the spectrum does it fit between regulatory legislation on one hand and declaratory or directory legislation on the other?
   (c) Is it likely to be challenged by anyone within the ordinary standing rules?
   (d) Who are affected by the legislation and are they affected in a significant way?
   (e) Is there a substantial, serious question raised by the challenge?
   (f) Will grave inconvenience result from (i) allowing this litigation to proceed, and (ii) the possible invalidity of the statute under challenge?

(2) *The plaintiff*
   (a) Is the plaintiff directly affected by the legislation, either as a member of the public or in some other capacity?
   (b) Has the plaintiff explored other avenues of having the constitutional validity of the legislation tested?

This multi-faceted inquiry is of course a far cry from the deceptively simple proposition for which *Thorson* might have been read and which was mentioned earlier: Those members of the public who are directly affected can challenge the constitutionality of regulatory legislation while all members of the public have standing to challenge declaratory or directory legislation. Insofar as *McNeil* moves away from making everything depend upon such distinctions as the difference between regulatory and declaratory legislation and the difference between those directly affected and those not, it is to be commended as a decision which prevents the establishment of another unsatisfactory legal classification game. Nevertheless, some of the factors that seem to bear on the courts' exercise of discretion are none too clear in the description, particularly those relating to the nature of the legislation and the nature of the challenge. When is constitutionality of legislation justiciable? How relevant, if at all, is the strength of the plaintiff's case? How relevant, if at all, is the pervasiveness of the statute's impact? What does grave inconvenience mean and how relevant is it as a factor? These questions coupled with the problems of how to assess the interrelationship of the

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28(2) of the Federal Court Act, Can. Stat. c. 1 (1970-71-72), allows "any party directly affected" to commence an application to review and set aside the decisions of federal statutory authorities. Can it be argued that the meaning to be attributed to the words "directly affected" in the Federal Court Act is the same as the meaning attributed to those words in *Thorson* and *McNeil*? Of course, this question is complicated by the use of the additional word "party" in § 28(2) and the failure of the Act to define either "directly affected" or "party".

identified factors in particular cases all serve notice that the last has not been heard in this area of the law. Of course, it may very well be that standing will cease to be a problem in constitutional cases. If the Chief Justice really intends the question of standing and the merits of a case to be always tried together, there are difficulties in seeing any continued relevance to problems of standing. It would after all be quite unusual to see a court finding a statute unconstitutional and then refusing a remedy on the basis of an absence of standing.

Doubtless the Chief Justice has been right in both cases not to be too dogmatic, but, perhaps with the benefit of two concrete situations, it might have been expected in *McNeil* that the judgment would have been somewhat longer and less cryptic. Indeed, it is going to be very instructive to observe how various first instance judges cope with *Thorson* and *McNeil* as authorities when the occasions arise. [50]

IV. Effect of McNeil and Thorson on the Declaration as an Administrative Law Remedy

McNeil and *Thorson* were of course constitutional challenges and the question which quite obviously arises is whether their judgments have any application to the other public law uses of the declaratory judgment, for example, as a method of challenging unlawful administrative action. On a previous occasion, I commented that Laskin in *Thorson* was quite careful to restrict many of his remarks to a constitutional law context and, because of this, expressed doubts as to whether there was too much in the case for administrative lawyers. [51] The same might be said of *McNeil*, where the only mention of administrative law was in the following ambiguous passage:

> I think it important to distinguish what I would term the administrative law features of so-called regulatory legislation and the constitutionality of

[50] An interesting exercise is to consider how the *Thorson/McNeil* Court would have decided some of the earlier decisions referred to in note 12 *supra*. Would Jamieson, the school teacher, have been given standing to challenge the B.C. Order in Council forbidding teachers to advocate in educational institutions the policies of the F.L.Q. or any form of violent revolution? Would Cowan, the Member of Parliament, have been given standing to challenge the establishment by the C.B.C. of a French language broadcasting station in Toronto? Would Mercer, the physician, have been given standing to challenge the validity of the federal medical care legislation? Would Burnham, the private citizen, have been given standing to question the validity of the proclamation of the National Flag of Canada? Even beyond this, given the ambiguity of Laskin, J.'s judgment in *Thorson*, would Smith, the frustrated whiskey drinker, have been given standing to challenge the validity of the resolution of the Ontario legislature proclaiming into force in Ontario the federal temperance legislation? In my view, with the possible exceptions of *Cowan* and *Mercer* where standing would probably be accorded, *Thorson* and *McNeil* do not assist all that much in predicting the chances of success. The discretionary elements are simply too many and too unclear at least as presently developed by the Supreme Court.

[51] *See* Mullan, *The Declaratory Judgment: Its Place as an Administrative Law Remedy in Nova Scotia*, 2 Dal. L.J. 91, at 104-08 (1975).

> such legislation. Its pith and substance, in the latter aspect, may very well disclose a purpose which would be served by its administrative features but would not be limited by them. Thus, the fact that certain persons or classes of persons, or certain activities in which persons engage may be subjected to compulsory regulation on pain of a penalty or other sanction does not always mean that the pith and the substance of the legislation is to be determined only in that context, so as to make those regulated the only persons with a real stake in the validity of the legislation.[52]

A possible interpretation of this is that the Chief Justice was asserting that there are different standing criteria involved as between administrative law challenges and challenges based on constitutional validity. However, this is perhaps going too far. Rather, all the Chief Justice might have been saying was that in *some instances* those with a "real" stake in the constitutionality of legislation may be a broader class than those with a "real stake" in the administrative aspects of the legislation and this of course is a far cry from the proposition that the *Thorson/McNeil* citizens' action will never be available in an administrative law context. Indeed, this is particularly true when the question of whether the plaintiff has a "real stake" is just one, albeit an important one, of the many factors to be taken into account by the court in the exercise of its discretion.

That the application of *Thorson* and *McNeil* in an administrative law context is not precluded as a possibility can perhaps also be seen in other parts of the *Thorson* decision.

In the Appeal Division of the Nova Scotia Supreme Court in *McNeil*, Mr. Justice Macdonald noted the way in which in *Thorson* Mr. Justice Laskin cited with approval the proposition that mere strangers have standing to seek the prerogative remedies of certiorari and prohibition[53] and drew the following conclusion from that part of the judgment:

> The reference by Laskin, J., to fortification of standing by analogy to other prerogative remedies is interesting in that it is clear that standing is not very difficult to obtain with respect to other prerogative remedies and consequently, the last quote from the decision of Laskin, J., is capable of the interpretation that he is suggesting that standing in an application such as this for declaratory relief should be obtainable on the same basis as with respect to other prerogative remedies.[54]

To this can be added another observation made by Mr. Justice Macdonald: "It should be noted that in the *Smith* Case no constitutional issue was involved . . . ."[55] It is perhaps a slight exaggeration to describe *Smith* as not

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[52] *Supra* note 1, at 46.

[53] *Supra* note 5, at 162, 43 D.L.R.3d at 18. Note, however, S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 368-69 (3d ed. Stevens 1973), where he doubts whether a court ever has or ever would grant certiorari or prohibition to a mere stranger, notwithstanding all the dicta to that effect. For two recent examples of such dicta, see *Re* International Union of Operating Eng., Local 968, 43 D.L.R.3d 602, at 614 (N.S. Sup. Ct. 1973) (Dubinsky, J.); Lord Nelson Hotel Ltd. v. City of Halifax, *supra* note 49, at 768-69, 33 D.L.R.3d at 107-08.

[54] *Supra* note 8, at 502, 53 D.L.R.3d at 273-74.

[55] *Id.*

being a constitutional case. [56] Nevertheless, insofar as it was not concerned with the division of powers under the B.N.A. Act and insofar as it was concerned with whether or not the statutory conditions precedent to the passing of a resolution by the Ontario legislature were present, it is not a typical constitutional case and definitely has administrative law aspects. From this point of view alone, therefore, it is possible to read Laskin's judgment in *Thorson*, particularly when he is so critical of *Smith*, as admitting of the possibility of a citizen's action for a declaration in an administrative law context. [57]

A final indication of the potential for applying *Thorson* and *McNeil* in an administrative law context emerges from Laskin's treatment in *Thorson* of the much earlier Supreme Court of Canada decision in *MacIlreith v. Hart*. [58] *MacIlreith v. Hart* established the right of a ratepayer in Canada to challenge the validity of municipal expenditures on the basis that each ratepayer suffered special damage from such an expenditure in the sense that it affected, however slightly, his rate liability. Mr. Justice Laskin was not only clearly of the view that ratepayers should be able to bring this class of action if the provincial Attorney-General is unwilling to become involved [59] but also asserted that such a right should not rest upon the timid basis of the token special damage caused by the expenditure, a basis which he describ-

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[56] The issue in *Smith* was whether federal temperance legislation had been validly brought into force in Ontario. As required by the federal legislation, the Ontario legislature had passed a resolution proclaiming the legislation in force in Ontario. However, the federal statute provided that as a precondition to such a proclamation there had to be provincial temperance legislation in force with certain features and the question was whether that precondition had been met.

[57] Note, however, that Macdonald, J.A., in MacNeil, *supra* note 8, at 502-03, 53 D.L.R.3d at 274, in fact uses this assertion that *Smith* was not a constitutional case, to distinguish it from the situations in *Thorson* and *McNeil*. He also interprets Laskin, J. in *Thorson* as having seen this as a way of circumventing *Smith*. The passage in Laskin, J.'s judgment to which he refers is as follows: "[T]he correctness of the decisions might be put in doubt if it be taken to hold that the amended Canada Temperance Act was immune from challenge by a declaratory action at the suit of either Smith or the Montreal firm . . .": *supra* note 5, at 148, 43 D.L.R.3d at 8-9. Certainly, it is possible to treat the statement of Laskin, J., as saying that *Smith* would be incorrect if it was a constitutional case but, in the light of other criticisms made by Laskin, J., of the *Smith* decision, such a conclusion is dangerous: *see* notes 13 and 14 *supra*, though note the other distinctions drawn by Laskin, J., between *Thorson* and *Smith*: *see* notes 15, 16 & 17 *supra*.

[58] 39 Sup. Ct. 657 (1907).

[59] *Supra* note 5, at 157-59, 43 D.L.R.3d at 14. Once again, however, it is worth noting that in approving *MacIlreith v. Hart*, Laskin, J., distinguishes *Smith*:

> For myself, I do not think it was necessary to restrict the doctrine of *MacIlreith v. Hart* in order to decide the *Smith* case as it was decided. Two entirely different situations were presented in those two cases. In the *Smith* case, a regulatory, even prohibitory, statute was in issue under which offences and penalties were prescribed; in *MacIlreith v. Hart*, there was a public right involved which had no punitive aspects for any particular ratepayer or class of ratepayers, and it would beget wonder that, in such a case, there should be no judicial means of recovering or controlling an illegal expenditure of public money: *id.* at 158, 43 D.L.R.3d at 15-16.

ed as "unreal".[60] Given such an attitude toward this particular class of administrative law challenge, it is once again not too difficult to see *Thorson* and *McNeil* being applied to administrative law situations generally as a matter of discretion in appropriate cases.[61]

V. Practical Effects of Thorson and McNeil

So far this article has been concerned almost solely with an analysis of the judgment of the *McNeil* decision or, perhaps more realistically, with an analysis of the *Thorson* decision as seen through the perspective of *McNeil*. However, the essential policy question has also to be raised: Does this opening of the door to citizens' actions really have a rational policy basis?

Of course the demand for such an opening has been present in Canada for some time now, particularly following upon the liberalization of standing requirements in the United States by the Supreme Court in such cases as *Data Processing v. Camp.*[62] Nevertheless, the answer to the question cannot rest simply on the basis that a perceived demand has been met.

Perhaps the one thing that is clear is that the fears expressed in *Smith* and elsewhere about the grave public inconvenience caused by allowing citi-

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[60] *Id.* at 162, 43 D.L.R.3d at 19.

[61] Already *Thorson* has been referred to in at least three administrative law cases to support a recognition of standing. In *Re* Vladicka, [1974] 4 W.W.R. 159, 45 D.L.R.3d 442 (Alta. Sup. Ct.), McDonald, J., referred to *Thorson*'s reaffirmation of *MacIlreith v. Hart* to support standing for a ratepayer to challenge the validity of a school board appropriation resolution. There was nothing novel in this. However, in Stein v. City of Winnipeg, [1974] 5 W.W.R. 484, 48 D.L.R.3d 223 (Man.), Matas, J.A., delivering the judgment of the Manitoba Court of Appeal, accepted Laskin, J.'s judgment in Thorson, *supra* note 5, at 162, 42 D.L.R.3d at 19, that it was "unreal" to allow ratepayers' actions on the basis of the effect of unlawful expenditures on their tax burden. He then went on to place the plaintiff's right to challenge the City's use of certain insecticides on the broader basis of citizens generally being allowed to commence actions in the public interest: [1974] 5 W.W.R. at 497, 48 D.L.R.3d at 236. He gained some comfort for this conclusion from the relevant legislation: "One of the important aspects of the legislation is an express intention to involve citizen participation in municipal government . . .": *id.* at 497-98, 48 D.L.R.3d at 236. This, of course, sees *Thorson* and *McNeil* as not restricted to constitutional situations but supportive of citizens' actions generally.

The third case is Brodie v. City of Halifax, 9 N.S.2d 390, 46 D.L.R.3d 528 (Sup. Ct. 1974). Here, Hart, J., as happened in *Vladicka*, noted the reaffirmation of *MacIlreith v. Hart* by *Thorson*, but would not allow the ratepayers' challenge to municipal approval of a redevelopment plan involving expenditure of municipal money because of delay. On this point, he was reversed by the Appeal Division: 9 N.S.2d 380, 47 D.L.R.3d 454 (1974), *leave to appeal refused*, 3 N.R. 214 (Sup. Ct. 1974). However, at the appellate level there was no discussion of this basis for citizens' actions in an administrative law context.

[62] 397 U.S. 150 (1970). There has however been some withdrawal from the "zone of interest" test proposed by the Supreme Court in *Camp*. *See, e.g.*, the U.S. Supreme Court decision in Sierra Club v. Morton, 405 U.S. 727 (1972), where the requirement of actual injury in the sense of being specially affected is reaffirmed. This "recession" is noted by Laskin, J., in Thorson, *supra* note 5, at 161, 43 D.L.R.3d at 18.

zens to launch constitutional challenges is largely unfounded at least insofar as grave inconvenience is seen as a matter of a plethora of litigation. As Mr. Justice Laskin noted in *Thorson*: "*MacIlreith v. Hart* . . . does not seem to have spawned any inordinate number of ratepayer's actions to challenge the legality of municipal expenditures." [63] That *Thorson* and *McNeil* will not do so either seems evident from a number of standpoints, particularly if they are regarded as restricted in their application to constitutional situations. [64] First it is hard to think of all that many burning constitutional validity issues in Canada where private citizens will be rushing to launch challenges. Secondly, and perhaps most significantly as far as the floodgates argument is concerned, the cost of such proceedings and the difficulty of obtaining legal aid for constitutional challenges makes a glut of such challenges highly unlikely. Certainly, Chief Justice Laskin in *McNeil* states that the preliminary question of standing and the merits of the question should be tried together, something which will lead to some lessening in the expenses of such litigation. [65] Nevertheless the almost inevitable trip to the Supreme Court of Canada [66] is going to deter all but the richest or the best-organised from commencing constitutional challenges. Indeed, it is in some ways quite a pathetic commentary on the whole system to read at the foot of a recent Halifax newspaper article on the *McNeil* case: "A censorship fund has been set up to raise money to continue the legal battle. Donations can be sent to P.O. Box 812, Dartmouth, N.S." [67] And, of course, all of this does not take account of the fact, noted earlier, that Laskin in *Thorson* spoke of the use of discretion as a method of combatting grave public inconvenience but left open exactly how far this would go and, particularly, whether the discretion would be used to prevent embarrassing challenges, as well as an embarrassing number of challenges.

Of course, the floodgates argument is not the only one against the recognition of citizens' challenges to the constitutionality of legislation. The other and more serious argument goes to the place of the courts generally and the Supreme Court of Canada in particular as constitutional arbiters or umpires in this country. Writing before the decisions in *Thorson* and *McNeil* were handed down, Paul Weiler made the following comments in his book, *In the Last Resort*:

> There is one procedural change which would help this judicial retreat and

[63] *Supra* note 5, at 145, 43 D.L.R.3d at 6-7.

[64] Even if *Thorson* and *McNeil* are wide enough to encompass administrative law situations, there may not be all that many challenges, notwithstanding the fact that *Thorson* has been utilized at least three times already. Cost is once again a deterrent. Moreover, as noted by Laskin, J., *McIlreith v. Hart* has not generated much litigation: *id.*; nor for that matter has the theoretical availability of certiorari and prohibition to mere strangers: *see* note 53 *supra.*

[65] *Supra* note 1, at 45.

[66] It is, however, worth noting that in an attempt to avoid unnecessary costs Hart, J., of the Nova Scotia Supreme Court directed that the constitutional issue in *McNeil* be tried originally at the Appellate Division level. This was after the Supreme Court of Canada decision on standing. *See* The Fourth Estate (Halifax), July 2, 1975.

[67] *Id.*

> might be politically feasible now. It involves a sharp tightening of the law of standing to challenge the constitutional validity of a statute . . . . We should simply not allow private individuals of their own motion to impeach the validity of statutes on the ground that they infringe the "exclusive" jurisdiction of another legislative body . . . . The only time that a private citizen should have a legal claim of his own right to a constitutional decision is when there are two contradictory statutes from contending jurisdictions and he is asking for the minimal judicial decision about paramountcy. [68]

To an extent this plea by Weiler is based on one of the traditional arguments against extending the benefit of standing to ordinary citizens, namely, that in constitutional litigation ordinary citizens will automatically tend to represent their own private interests and put forward arguments for invalidity on the basis of those private interests. [69] This is seen as too narrow a basis on which to fight constitutional battles because of the potential for ignoring the interests of the various governments involved and also the interests of other segments of the public. However, Weiler's argument goes further than this. He doubts the ability of the Supreme Court as presently constituted, both from the point of view of procedure and personnel, to handle the "severe pressures" [70] generated by the need to adapt a mid-nineteenth century document to late twentieth century conditions, and to handle "the kind of political and economic conflict which triggered such cases as the *Manitoba Egg Reference*". [71] Not only this, but given the movement towards the working out of many constitutional disputes at an intergovernmental level, he sees constitutional disputes being more satisfactorily handled by a labour arbitration model.

> Rather, we have a political process of adjustment of our governmental institutions to social change. The primary vehicle for such adjustment must be a continuous process of bargaining and compromise and it is the respective governments which should have the direct interest and responsibility in preserving the integrity of Canadian federalism. [72]

The traditional argument is relatively easy to counter. Albeit that private citizens will tend to represent their own narrow interests in court, whether they are litigating because they are specially affected or in the so-called public interest, the scope for allowing interventions at the Supreme Court level ensures that other legitimate interests will be represented. In *McNeil*, as well as the plaintiff and the Nova Scotia Attorney-General, the Attorneys-General of Canada, Ontario, Alberta and Saskatchewan and the

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[68] P. WEILER, IN THE LAST RESORT 180-81 (1974).

[69] *Id.* with particular reference to Commission du Salaire Minimum v. Bell Telephone Co., [1966] Sup. Ct. 767, 59 D.L.R.2d 145.

[70] P. WEILER, *supra* note 68, at 184.

[71] *Id.*; the *Manitoba Egg Reference* case refers to Attorney-General of Manitoba v. Manitoba Egg & Poultry Assoc., [1971] Sup. Ct. 689, 19 D.L.R.3d 169 (1971), a case discussed critically and at length by P. WEILER, *supra* note 68, at 155-85 in his ch. 6 entitled "The Umpire of Canadian Federalism".

[72] P. WEILER, *supra* note 68, at 184.

Canadian Civil Liberties Association were all intervenants. [73] In the recent case of *Morgentaler v. The Queen*, [74] the list was even more impressive. [75]

Of course, the argument can be made that the presence of that many intervenants raises questions about the justiciability of the issues involved. Not only this but the presence of even government intervenants does nothing to counter the argument that to allow a private citizen to commence the proceedings may upset delicate intergovernmental political negotiations which have been proceeding for some time with a view to resolution without the necessity of judicial intervention.

This comment on *McNeil* is probably not the appropriate forum for raising all the arguments and counter-arguments surrounding the Weiler thesis. Nevertheless, as John Whyte points out in his review of Weiler's book, [76] the Supreme Court in theory anyway gives support to the continued existence of a federal state. Negotiated federalism gives no such guarantees. If a federal-provincial jurisdictional dispute is not resolved under negotiated federalism, either the disputants leave the federal state or they accept by default dual regulation. Moreover, once there is dual regulation, citizens of the country must have some forum to which to go for a resolution of conflicting demands made upon them and, insofar as Weiler concedes that there may be some role for the courts at this level, he is allowing for the courts to resolve just as difficult questions as they are at present.

The answer then may not be to give up on the Supreme Court or the courts generally, but rather to ensure that they are better equipped to deal with constitutional problems and, once this role is accepted, one can perhaps go as far as allowing the courts to adjudicate in their discretion on all "serious", "substantial" constitutional issues brought to them by private citizens with a "real stake" in their resolution. After all, even at the risk of being too trite and simplistic, there is something of value, particularly in these days of massive government bureaucracies, in allowing individuals to have a role in the working out of constitutional arrangements in a forum where they will not necessarily be overwhelmed by the force of government and political accommodations between governments.

Of course, the reality is that even after the opening of the door to citizens' actions by *Thorson* and *McNeil*, the bulk of direct private interest challenges to the constitutionality of legislation is going to come from big business interests. Nevertheless, the opportunity is there for well-organised and well-motivated public interest groups and, indeed, the answer to the dilemma posed by the prevalence of big business interests in constitutional

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[73] *Supra* note 1, at 44.

[74] 20 Can. Crim. Cas.2d 449, 53 D.L.R.3d 161 (Sup. Ct. 1975).

[75] As well as the accused and the Crown, the Attorney-General of Canada was represented as were the Foundation of Women in Crisis, the Canadian Civil Liberties Association, the Alliance for Life, l'Association des médecins du Québec, le Front Commun pour le Respect de la Vie, and le Foundation pour la Vie: *id.* at 453, 53 D.L.R.3d at 165.

[76] Whyte, Book Review, 82 QUEEN'S QUARTERLY 121, at 122 (No. 1 1975).

litigation is probably not the elimination of everyone but rather greater opportunity for the representation of other interests by more extensive legal aid schemes. [77]

VI. CONCLUSION

In conclusion, to put all this in the context of *McNeil*, the issue involved in *McNeil* is scarcely one to shake the fabric of confederation to its roots. Nevertheless, censorship does raise questions that have always been regarded as highly significant from a civil liberties standpoint. In the circumstances, given the inertia of the federal government and the provincial Attorney-General, given the desire of those most obviously affected by the legislation not to rock the boat of the present regime because of the possible consequences of having to live with failure and given the difficulty of private citizens raising the question in any other way, recognition of McNeil's standing appeals as a most desirable step. Indeed, *McNeil* was in many senses an easy case on its facts. More interesting perhaps and certainly more difficult will be the case in which a private citizen, say of Newfoundland, seeks, for example, to challenge the federal government's statutory regulation of offshore mineral rights off the Newfoundland coast. Is this a justiciable constitutional dispute? Do private citizens have a "real stake" in its resolution? Would "grave inconvenience" result from the interference that such litigation would cause to ongoing inter-governmental negotiations?

[77] Interestingly enough, § 15 (*b*) of the Ontario Legal Aid Act, ONT. REV. STAT. c. 239 (1970), provides presently that a legal aid certificate shall not be given in relator actions. *Quaere*, how cases which would have had to have been relator actions before *Thorson* and *McNeil* will now be considered in that province. In Nova Scotia, by virtue of the agreement between the province and the Nova Scotia Barrister's Society, the availability of legal aid is entirely discretionary, but given the limited budget of Nova Scotia Legal Aid it is difficult to see that organization taking a constitutional case, let alone pressing it to the Supreme Court of Canada, even if the plaintiff is otherwise eligible for legal aid.