

## Note

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« *Duquet Revisited* »

Julius H. Grey

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## Duquet Revisited

Julius H. GREY \*

*En 1977, l'arrêt Duquet c. Ville de Ste-Agathe-des-Monts a réduit radicalement le formalisme qui entourait jusque-là au Québec l'octroi du jugement déclaratoire sur requête. Suite à Duquet, d'autres arrêts de la Cour suprême ont contribué à accentuer ce mouvement et, certainement en droit public, le recours au jugement déclaratoire est devenu une simple option, dont l'emploi ne devrait pas pouvoir influencer le sort d'un litige.*

*Cette évolution doit être placée dans le contexte d'un abandon presque total des anciens recours qui compliquaient et rendaient pratiquement aléatoire notre droit administratif. Cependant, on doit remarquer une réticence, de la part de plusieurs juges, à accepter sans réserve les conséquences de Duquet. Le pouvoir d'annuler des lois ou des règlements fait parfois l'objet de restrictions. Les mots "intérêts immédiats", de l'article 453 du Code, reçoivent parfois une interprétation restrictive, et même l'absence d'une "difficulté réelle", dans un sens étroit et technique, peut présenter un danger. Ces tendances sont loin d'être universelles, mais elles peuvent avoir pour résultat d'engendrer chez les avocats une méfiance qui relèguerait l'article 453 à la dernière place parmi tous les recours, alors que le juge Pigeon, dans Duquet, avait souhaité qu'il soit "largement applicable".*

*Le but de cette note est de démontrer qu'il n'existe aucune raison, qu'elle soit purement juridique ou pratique, de favoriser de nouvelles restrictions à l'octroi du jugement déclaratoire : Duquet devrait être accepté dans son sens le plus large.*

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\* Professeur, Faculté de droit, Université McGill.

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## Introduction

Declaratory relief in Quebec was traditionally very difficult, at times impossible to obtain.<sup>1</sup> In 1977 a revolution occurred in the Supreme Court and the gates to declaratory relief opened.<sup>2</sup> This change was particularly evident in administrative law. Motions under Section 453 C.P.C. in administrative law were almost always rejected prior to *Duquet*. After it, some liberalization was inevitable.

The change seemed an eminently welcome one. The traditional public law remedies were bristling with complications. Some were available against the crown, some were not.<sup>3</sup> Some<sup>4</sup> were traditionally limited to reviewing "judicial" bodies<sup>5</sup>, others<sup>6</sup> applied particularly to "duties" and therefore to administrative as well as judicial functions.<sup>7</sup> Declaratory relief clearly held out the promise of a simple and accessible solution.

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1. See Grey Comment on *John Duquet v. Ville de Ste-Agathe de Monts*, [1977] 2 S.C.R. 1132 in (1978) 24 *McGill L.J.* 477; see also SARNA *Declaratory Judgments*, *infra*, fn. 121. It must be noted that the problems associated with declaratory *motions* would, on the whole, not apply to declaratory *actions* under 462 C.P.C.

2. *Duquet v. Ville de Ste-Agathe des Monts*, [1977] 2 S.C.R. 1132.

3. See DE SMITH, *Judicial Review of Administrative Action*, 4<sup>th</sup> ed., by J. Evans, London, Stevens, 1981, chapters 9, 10, 11.

4. *Esp. certiorari*.

5. *Martineau v. Matsqui Institution No 2*, (1978) 40 C.C.C. 2d 325 (F.C.A.), reversed at [1980] 1 S.C.R. 602.

6. *Esp. mandamus*.

7. *Padfield v. Minister of Agriculture Fisheries and Food*, [1968] A.C. 997, (1968) 2 W.L.R. 924, [1968] 1 All E.R. 694.

It would seem that, a decade later, it is time to assess the effects of *Duquet* and the extent to which the promise was fulfilled.

### 1. Trends in Canadian Public Law

The development of jurisprudence under Art. 453 C.P.C. cannot be understood outside the principal trends of our public law.<sup>8</sup>

Those who thought that *Duquet* was an isolated decision dealing with one form of relief must have been jolted when a year later, the Supreme Court delivered an even more far-reaching judgment in *Vachon v. A-G Quebec*<sup>9</sup>. That case set out to destroy the proceduralism that had plagued our administrative law since its inception early in the century.<sup>10</sup> Too long the question had been whether the appropriate relief had been sought and not whether justice required judicial intervention. A great number of applications fell on preliminary exceptions with the merits never considered by anyone. Mr. Justice Pigeon ended this tradition with these words:

In my view, the theory of nullity for some formal defects, elaborated in the cases on which the decisions in question are based, is contrary to the principles of the present *Code of Civil Procedure*. It is quite true that the Art. 834 prohibits evocation and certain other remedies without prior authorization, but nowhere does the Code prohibit a declaratory action or a motion for a declaratory judgment in respect of claims that may be urged by an extraordinary remedy contemplated in this article. The Code has abolished the exceptions to the form which at least involved the rule that irregularities were waived by failure to take advantage of them within very short time limits (Art. 176 of the 1896 Code). Under the cases on which the decisions now in question are based, however, any error in the choice of remedy results in a nullity which can be pleaded at any time, even on appeal. In the instant cases it does not appear that the point on which the decisions are based was in any way raised at first instance. In *Duquet v. The Town of Ste-Agathe* 13 N.R. 160; [1977] 2 S.C.R. 1132, a unanimous decision of this Court held on the question of procedure (at P. 172 N.R., p. 1142 S.C.R.) that:

(1) in order to decide whether a case can be dealt with by a motion for declaratory judgment, the Court is not required to determine if the motion is preventive or curative but merely whether it comes within the terms of Art. 453;

(2) as the distinction is not a rule of public order, any party who wished to complain that an action should have been instituted must do so when the motion is presented, and he shall be considered to have waived this objection if he files a contestation in writing.

8. While it is true that 453 C.P.C. is not limited to public law, it developed parallel to the public law remedies and the leading cases were all in the field of public law.

9. *Vachon v. A-G. Quebec*, (1979) 25 N.R. 399; [1979] 1 S.C.R. 555.

10. For this author's view of the history of administrative law, see J.H. GREY, *The Ideology of Administrative Law*, (1983) 13 *Manitoba L.J.* 35.

In my view, the same general principles must be applied when the question is whether the appropriate procedure is an ordinary action or an application for evocation. The only consequence of resorting to an action or to a motion for a declaration rather than to an application for evocation in a case coming within Art. 846 C.C.P., is that the Plaintiff does not obtain a staying order.<sup>11</sup>

Article 453 C.P.C. was thus explicitly made one of the alternative forms of judicial review.<sup>12</sup> This is admirably and succinctly expressed by the Honourable Mr. Justice Dugas in *St-Sauveur v. Jolicœur et al.*:

La requête pour jugement déclaratoire est un des moyens reconnus de faire appel à l'exercice des pouvoirs de contrôle et de surveillance de la Cour supérieure comme monsieur le juge Pratte le souligne dans l'extrait de *FARRAH* que j'ai cité page 271.<sup>13</sup>

All of these cases, including *Vachon*<sup>14</sup> appear deeply rooted in particular Quebec legislation, especially the *Code of Civil Procedure*. Yet one should not view them as manifestations of a parochial trend. Pigeon J. applied the entire line of permissive cases on matters or procedure to non-Quebec matters, in *C.U.P.E. v. University of Saskatchewan*<sup>15</sup>. Other cases from common law provinces showed the same tendency.<sup>16</sup> In *Martineau v. Matsqui Institution No 2*<sup>17</sup> the Supreme Court did for Federal Court cases exactly what it had done in *Vachon*<sup>18</sup> for Quebec ones, by opening the door to review notwithstanding the legislative draftsman's valiant efforts to prevent this.<sup>19</sup> In *Beson v. Director of Child Welfare of Newfoundland*, Madame Justice Wilson said :

11. *Vachon, supra*, f.n. 9, p. 412.

12. Along with evocation and the direct action in nullity. Presumably, relief could also be justified under 462 C.P.C.

13. *St-Sauveur v. Jolicœur et al.*, [1979] C.S. 268 p. 272. It is to be noted that Dugas J. traced the "progressive" trend beyond *Vachon* to *Farrah v. A.-G. Quebec*, [1978] S.C.R. 638. Presumably, he could also have mentioned *Three Rivers Boatman v. Canada Labour Relations Board*, [1969] S.C.R. 607. See also *Le Centre d'Accueil Notre Dame du perpétuel secours v. P.-G. Quebec*, [1978] C.S. 985 (Vallerand J.) where, with more reluctance, Vallerand J. as the then was.

14. *Vachon, supra*, fn. 9.

15. *University of Saskatchewan et al v. C.U.P.E.*, [1978] 2 S.C.R. 830.

16. See, for instance, *Juda v. Paterson*, (1982) 39 O.R. 737 (H.C.J.).

17. *Martineau No 2, supra*, fn. 5.

18. *Vachon, supra*, fn. 9.

19. The Federal Court, in many ways the most conservative court in the country resisted the changes more than most. For instance in *C.I.A.C. v. The Queen et al.*, [1984] 2 F.C. 866, the Court, by a split decision refused to declare injunction applicable to the crown. At roughly the same time in *Protestant School Board v. A.-G. Quebec*, [1985] C.S. 872. Brossard J. did the opposite in Quebec's Superior Court. It is submitted that Mr. Justice Brossard was entirely right on this point as was Mr. Justice Hugessen in dissent in the Federal Court. But see *P.-G. Quebec v. Laurendeau*, [1985] C.A. 494 for a more conservative, Quebec view of this matter.

Moreover, an application for judicial review might well have been successful on the ground of the Director's failure to treat the Besons fairly [...] The Newfoundland Court of Appeal found as a fact that they had been treated unfairly. [...] However, instead of proceeding by way of judicial review the appellant instituted habeas corpus proceedings and the Newfoundland Courts concluded, in my view wrongly, that they were without jurisdiction to deal with the matter, I have concluded that it was open to them to proceed with judicial review in exercise of their *parens patriae* jurisdiction.<sup>20</sup>

In short, the just solution must prevail over procedural niceties, not only in Quebec, because of the *Code*, but throughout Canada.<sup>21</sup>

If this is so, it must not matter that a procedure is taken under Art. 453 C.P.C. if it can succeed under any other provision. Indeed, no rule exists against cumulation of the remedies in one procedure. In *Canada Steamship Lines v. La Commission de la Santé et de la Sécurité du travail*. Gomery J. stated this as follows :

The Court is asked by Petitioner's motion to declare generally that the policy adopted by the C.S.S.T. is null and illegal. In this respect the motion includes conclusions similar to those that would be found in a motion for declaratory judgment under article 453 C.P.C. There is no procedural reason why a motion in evocation cannot include such a request, but always on conditions that the Petitioner prove that it has the necessary interest.<sup>22</sup>

An even more radical step was taken by the Supreme Court in *Jimenez-Perez v. M.E.I.*<sup>23</sup> in which the court set aside long-standing restrictions on granting declaratory relief by way of originating motions<sup>24</sup> and reaffirming its right to grant declaratory relief instead of or in addition to any other relief under Section 18 of the Federal Act.

20. *Beson v., Director of Child Welfare of Newfoundland*, (1982) 44 N.R. 602, p. 612. (S.C.C.)

21. Indeed, it could be argued that the rest of Canada was far more advanced along this road before *Vachon*, *supra*, fn. 9.

22. *Canada Steamship Lines v. La Commission de la Santé et de la Sécurité du travail*, [1985] C.S., 745 p. 751. Support for this position is found in Mr. Justice Montgomery's judgment in *École Commerciale Bluteau v. Morin et al.*, [1978] C.A. 186.

23. *Jimenez-Perez v. M.E.I.*, [1985] C.S. 13.

24. *B. v. Commission of Inquiry*, [1975] F.C. 602 (F.C.T.D). It remains to be seen whether the Federal Court views *Jimenez-Perez*, *supra*, fn. 23 as an anomaly or adopts its consequences.

In *Canadian Newspapers Co. Ltd. v. A.-G. Canada*, (1985) 49 O.R. (2d) 557, the distinction between statement of claim and motion was similarly (and properly) blurred. At page 572-73 Howland CJO said :

It is important that persons who allege that their rights under the Charter have been infringed should have an opportunity of having their legal position determined expeditiously. The appellant should not be prevented from obtaining the declaratory relief to which it was entitled because it proceeded by originating notice rather than by commencing an action.

However, that was a Charter case with all the advantages of Section 24 of the Charter.

One can conclude, then, that the *Duquet*<sup>25</sup> “revolution” has been surpassed by a total change in attitude towards remedies and procedure.<sup>26</sup>

The liberal trend is further enhanced by the expansion of the horizons of declaratory relief on the merits throughout Canada.

Declaratory relief had always been relatively flexible whenever permitted. Unlike the other remedies, it applied against the Crown.<sup>27</sup> In the last ten years, this flexibility reached its apogee in two Supreme Court cases, both from the Federal Court, *Solosky v. The Queen*<sup>28</sup> and *Kelso v. The Queen*<sup>29</sup>. Both these judgments said, in essence, that no a priori limit existed on the Courts’ power to declare. In *Solosky*, Dickson J. added:

The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in *Pharmaceutical Society of Great Britain v. Dickson* [[1970] A.C. 403 (H.L.)], a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be *ultra vires* its objects and an unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

[...]

However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the Appellant is entitled to a declaration, it is within this Court’s discretion to settle the wording of the declaration: see de Smith, *Judicial Review of Administrative Action* (3<sup>rd</sup> ed. 1973, p. 431). Further, s. 50 of the *Supreme Court Act* allows the Court to make amendments necessary to a determination of the “real issue”, without application by the parties.<sup>29a</sup>

It was no longer necessary to worry about errors in the formulation of the proposed declaration. The Court could modify it, so as to say what it felt it could legally declare.<sup>30</sup>

25. *Duquet*, *supra*, fn. 2.

26. See also *Brazeau v. Comité d’Arbitrage du Barreau*, [1981] C.S. 353 (Hugessen ACJ)

27. See *Dyson v. Attorney General*, [1911] 1 K.B. 480, *Quebec Association of Protestant School Boards v. A.-G. Quebec*, [1982] C.S. 783. Deschenes CJ affirmed [1983] C.A. and [1984] S.C.R. and *Griffin v. Commission régionale Blainville Deux Montagnes*, (1986) J.E. 87-39 (Legault J).

28. *Solosky v. The Queen*, [1980] 1 S.C.R. 821.

29. *Kelso v. The Queen*, [1981] 1 S.C.R. 199.

29a. *Supra*, note 28, p. 831 and 833.

30. Presumably, the penalty for gross error in phrasing would come in the attribution of costs.

In *Kelso*<sup>31</sup>, the argument that the declaration was pointless because the transfer of Mr. Kelso had already taken place was rejected. If such a defence were permitted, the government could ensure its eternal success by decisive action in every case. The very notion of the rule of law demanded that Mr. Kelso be held to have an interest even after the transfer.

*Jimenez-Perez*<sup>32</sup> also shows the Supreme Court's impatience with technical limits to declaratory relief. The limit, in the Court's view is discretionary. In *Solosky* Mr. Justice Dickson said:

Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.<sup>33</sup>

In Quebec, a recent Court of Appeal decision shows the constantly expanding scope of declaratory motions. The most accepted traditional truism about declarations was that they could not order the payment of a sum of money.<sup>34</sup> Now, Mr. Justice Kaufman puts the following gloss on the truism:

When asked at the hearing by what right the appeal was taken *de plano*, counsel for the Appellant pointed to the special nature of the recourse provided for in Article 453 C.P. The Court, he said (quite rightly), was asked to resolve a genuine problem arising from the law and the contract. However, where the amount in issue can be quantified — and here it can — I see no reason why this should not be done, particularly in view of Article 456 C.P., which clearly provides that a declaratory judgment “has the same effect and is subject to the same recourses as any other final judgment.”<sup>35</sup>

The broadly remedial nature of Article 453 is clear, too, from the words of Tyndale J.A. in *La Chambre des Huissiers du Québec et al v. Lussier*:

It seems to me that the parties, the public and justice would be better served by a decision on the merits; the question is of considerable consequence, and if an answer can be given, in spite of problems of procedure, interest, or capacity, it is desirable to give it.<sup>36</sup>

31. *Kelso*, *supra*, fn. 29.

32. *Jimenez-Perez*, *supra*, fn. 23.

33. *Solosky*, *supra*, fn. 28, p. 833.

34. Even *Duquet* preserved that.

35. *Gauthier v. L'Impériale-Compagnie d'Assurance-Vie*, [1985] R.D.J. 461, 463. On the issue of finality of 453 C.P.C. judgments see also *Société St-Jean Baptiste v. C.U.M.*, [1981] C.A. 168 esp. 174.

36. *La Chambre des Huissiers du Québec et al v. Lussier*, [1984] C.A. 58, p. 59. There is no doubt that all of the restrictive decisions listed below conflict with this clear prescription of the Court of Appeal. In *Laforest c. Paradis et al*, S.C. 500-05-007514-860, at page 7, Tannanbaum J. also adopted a “liberal” view based on the notion of “public interest” which required a judgment on the merits.



Once again, the trend initiated by *Duquet*<sup>37</sup> has continued over ten years and has carried us well beyond the original decision in a sensible and salutary way. Declaratory relief appears "generally available" as Pigeon J. stipulated it should be.<sup>38</sup>

Here, however, one observes a strange phenomenon. Despite the apparent availability of declaratory relief<sup>39</sup>, it is still not an entirely safe remedy to choose. Almost every attempt is greeted by a motion to dismiss.<sup>40</sup> Such motions are occasionally successful<sup>41</sup> and they are certainly a factor in discouraging the use of the remedy. It is therefore necessary to see in detail what difficulties still exist and whether they can be justified.

## 2. The Problem of "quashing" by declaration

The wording of Section 453 could suggest that the court can declare rights under a written instrument, but not annul the instrument. Often, this is a casuistic distinction. Surely, if one annuls a regulation or by-law one is declaring rights under a statute.<sup>42</sup> If one annuls a will, one is declaring rights under the *Civil Code*. The problem would thus only arise, if the rights are common law rights. The issue would still be important, however, because written decisions could be annulled for breach of the common law only to act fairly.<sup>43</sup>

If one went so far as to prevent the annulling of decisions of boards for reasons of fairness, one would be in direct violation of *Vachon*.<sup>44</sup> Such a position is not presently tenable. However, some judges have erected a barrier to the annulling of statutes, regulations or contracts by means of 453 C.P.C.

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37. *Duquet, supra*, fn. 2.

38. *Duquet, supra*, fn. 2. Of course, the Courts have a *discretion* to refuse relief at all times. This is made clear by *Solosky supra*, fn. 28 and *O'Reilly v. Mackman*, [1982] 3 W.L.R. 1096 (H of L).

39. Or, at least, a declaratory motion under Art. 453 (as contrasted with a declaratory action under Art. 462).

40. Despite the Court of Appeal's general disapproval of such motions.

41. E.g. *Association des Policiers Provinciaux du Québec v. A.-G. Québec*, J.E. 86-486 (Arsenault J).

42. The regulation can only be valid if authorized by statute *Re Chemicals Reference*, [1943] S.C.R. 1.

43. As happened in *Le Régime des Rentes des Employés du Québec v. Paquet Syndicat Inc.*, S.C. 200-05-0012520845 (Doiron J.).

44. *Vachon, supra*, fn. 9 but see *infra* discussions of certain judgments that do appear to place restrictions on judicial review under 453 C.P.C.

An important judgment applying *Vachon, supra*, fn. 9 is *La Fédération des Affaires Sociales v. Syndicat Canadien de la Fonction Publique et al*, S.C.M. 500-05-009427-855, April 16 1985 (Viau J). It, too, cannot stand together with Mr. Justice Brossard's view.

The most remarkable example of this trend is undoubtedly *The Protestant School Board of Greater Montreal v. P.-G. Quebec*.<sup>45</sup> In this decision Mr. Justice Brossard went through a large number of cases where declarations annulling such instruments were granted.

He noted that in *Duquet*<sup>46</sup> by-laws were annulled through acquiescence and that the same applied to *Quebec Association of Protestant School Boards*.<sup>47</sup>

With far more difficulty, he finds several decisions of the Court of Appeal not pertinent to the issue.<sup>48</sup> Finally, and, with respect, wrongly, he holds *Forget v. P.-G. Que.*<sup>49</sup> and *McKenna Inc. v. Office de la Langue française*<sup>50</sup> to be decided per incuriam and cites some Superior Court authorities<sup>51</sup> as authority for a restrictive view.

It is submitted that the position that one cannot annul by declaratory relief is untenable. In *Forget*<sup>52</sup> the matter was fully debated at first instance. The Court of Appeal did not discuss it, it is true, but assumed that Mr. Justice Pinard was correct on that point. The government continued to argue that 453 C.P.C. did not apply in the Court of Appeal. The decision cannot stand without that assumption.

Even more significant is the fact that in other Canadian jurisdictions declaratory relief is available to annul regulations and statutes. *Solosky*<sup>53</sup> proceeded on the assumption that this could be done.<sup>54</sup> Under Section 24 of

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45. *The Protestant School Board of Greater Montreal v. P.-G. Quebec et al.*, [1986] R.J.Q. 48 (Brossard J.) (presently under appeal).

46. *Duquet*, *supra*, fn. 2.

47. *Quebec Association of Protestant School Boards*, *supra*, fn. 19.

48. *Société St-Jean Baptiste de Montréal v. C.U.M.*, [1981] C.A. 168 and *Syndicat National de l'Amiante d'Asbestos Inc. v. Nadeau*, [1985] C.A. 62.

49. *Forget v. P.-G. Que.*, [1984] C.A. 492. See also *Chrétien v. Les Centres d'Accueil Lanaudière*, [1984] C.S. 848 where resolutions were annulled by 453 C.P.C.

One can also cite *Droit de la Famille — 153*, [1984] C.S. 684 where Marquis J. declared an agreement valid. Presumably, he could have also declared it void. Another important case is *entreprises Anicat Gauthier v. Ville de Sept-Îles*, [1983] C.S. 709 where a by-law was annulled (Richard J.) See also *Kronstrom v. P.-G. Quebec*, [1983] C.S. 795 (Larouche J.) and *Conseil Scolaire de l'Île de Montréal v. P.-G. Quebec*, J.E. 81-579. Another very liberal decision is found in *Amusecor Inc. v. 113475 Canada Inc.*, S.C. 500-05-010983-854 (Greenberg J.). See also *Hébert v. Ville d'Outremont* [1986] D.L.Q. 1 (Cutler J.).

50. *McKenna Inc. v. Office de la Langue française*, C.S. Montréal 500-05-002007-845 (Vaillancourt J.).

51. *Service Sanitaire Verdun (1980) Inc. v. A.-G. Quebec*, (1984) S.C. 500-05-005907-835; *Neider v. Gulf Canada Ltee.*, [1982] C.S. 298.

52. *Forget v. P.-G. Qué.*, *supra*, fn. 49.

53. *Solosky*, *supra*, fn. 28.

54. Ultimately, *Solosky* lost on the merits.

the *Canadian Charter of Rights and Freedoms*, it appears that a motion in nullity can lie.<sup>55</sup> Why would it be otherwise in Quebec?

It is important to remember that since two years, evocation and mandamus are no longer actions with a writ but simple motions. No one would question the power to annul on evocation.<sup>56</sup> To suggest that one type of motion (Art. 453) is more limited than another is no longer even a matter of procedure. It is pure formalism. The sole distinction in many cases becomes the name or title used in the motion.

A similar difficulty has been raised by some judges about annulling judicial or quasi-judicial decisions. If 453 C.P.C. is to be a form of judicial review then some "decisions" will have to fall under it. However in *Société d'Énergie de la Baie James v. CSN*<sup>57</sup>, Bisailon J. categorically refused to consider an attack on or indeed an interpretation of an arbitration judgment under 453 C.P.C. This view was endorsed by Riopel J. in *Lavigne v. Paquin*<sup>58</sup> and, in a cryptic sentence by Nolin J. in *Chretien*.<sup>59</sup>

In view of *Vachon*<sup>60</sup> these cases must be wrong. To allow administrative decisions to be quashed or interpreted but not quasi-judicial ones means bringing back the old distinction between functions which was supposed to end with cases like *St-Hilaire v. Begin*<sup>61</sup> and *MNR v. Coopers and Lybrand*.<sup>62</sup> At one time it was possible to argue that 846 C.P.C. applied to quasi-judicial decisions and 453 C.P.C. to administrative ones. Such reasoning makes little sense in terms of policy and has been very shaky since *Vachon*<sup>63</sup>. It is important to note that Bisailon J. did not consider *Vachon* in *Société d'Énergie*.<sup>64</sup> His view that 453 C.P.C. must be restrictively interpreted has surely been superceded.<sup>65</sup>

The most important consideration is that of utility. Procedure is not a subject of theoretical significance. What matters is that cases proceed

55. See *Griffin, supra*, fn. 27 and the quotes found in it.

56. See *Ohayon v. City of Cote St. Luc*, [1986] R.J.Q. 2731 (Reeves J.) and the jurisprudence cited there.

57. *Société d'Énergie de la Baie James v. C.S.N.*, [1979] C.S. 259.

58. *Lavigne v. Paquin*, [1981] C.S. 896.

59. *Chrétien, supra*, fn. 49.

60. *Vachon, supra*, fn. 9.

61. *St-Hilaire v. Begin*, [1982] C.A. 25.

62. *MNR v. Coopers & Lybrand*, [1979] 1 S.C.R. 495. See also *Martineau N° 2, supra*, fn. 5 and *Fraternité Interprovinciale des Ouvriers en Électricité v. O.C.Q.*, [1983] C.A. 7, esp. per Turgeon JA.

63. *Vachon, supra*, fn. 9.

64. *Société d'Énergie, supra*, fn. 57.

65. See *infra*, section VI for a consideration of the reasons for some later, seemingly restrictive interpretations.

expeditiously and fairly. It is difficult to discover any *utility* or justification to a restriction of Section 453. Why should the result of litigation depend on reasonable choices made by lawyers in difficult areas of litigation, where no prejudice whatsoever is suffered by the opposite party?

*The Protestant School Board*<sup>66</sup> case is thus compatible neither with *Vachon*<sup>67</sup> nor with the equally well-known decision *St-Hilaire v. Begin*<sup>68</sup> where it was decided that procedural errors can have nefarious effects for the Parties whose lawyers made them only if there was prejudice.

In *Voghel v. A.-G. Quebec*<sup>69</sup>, shortly after *Duquet*<sup>70</sup> the Court of Appeal expressed fear that the order of the roll and the fairness which requires every litigant to be dealt with in turn will be disturbed by the change in law. Experience now shows us that no such catastrophe occurred. One might more reasonably maintain that the quick solution to cases which lend themselves to it liberates the roll and makes it easier for other litigants to be heard.

The conclusion is that the *Protestant School Board*<sup>71</sup> judgment is incompatible with the leading jurisprudence, contrary to all trends, and not desirable as a result. It should not be followed.<sup>72</sup>

### 3. The problem of immediate interest

Mr. Justice Brossard also favours a restrictive interpretation of "immediate interest".<sup>73</sup> There is considerable jurisprudence supporting this

66. *The Protestant School Board, supra*, fn. 19.

67. *Vachon, supra*, fn. 9 where we are told that "the only consequence of resorting to an action or to... a motion for a declaration... rather than... evocation... is that the Plaintiff does not obtain a staying order."

68. *St-Hilaire v. Begin*, [1981] 2 S.C.R. 79.

69. *Voghel v. A.-G. Quebec*, [1977] C.A. 197.

70. *Duquet, supra*, fn. 2.

71. *The Protestant School Board, supra*, fn. 19. It must be admitted that some judges, other than Brossard J. have expressed similar views. See for instance *Flamer v. Bell Canada*, S.C., 500-05-001-115-862 (Forger J.), *Jolicœur v. Syndicat des Salarisés de Lainages Victor*, J.E. 86T-188 (Masson J.), *Conaco Industries Ltd. v. P.-G. Quebec*, S.C. 405-05-000042-84 (Biron J.), *De Dona v. P.-G. Quebec*, S.C., 500-05-007414-848. These cases, it is submitted, are all too restrictive and do not serve the ends of justice.

72. It must be added, (though this author does not regard this point as significant), that it is also "obiter" and therefore technically not as persuasive as if it were not. At the time of printing the Court of Appeal has rendered its judgment. Although it confirmed Brossard J's decision on *the merits*, two of the three judges appear to have rejected its position on 453 C.P.C. The matter is not, however, as clear as one may wish.

73. *The Protestant School Board, supra*, fn. 19, p. 58. See also *Dallaire v. Corporation Municipale de Point-au-Pic*, (1986), S.C. 240-05-000101-866 (De Blois J.) for a restrictive view. See also *Pimparé v. Société de Raffinage et Marketing*, [1983] C.S. 806 (Brassard J.).

view and one is forced to accept that the word "immediate" must have a purpose. However, all it may mean is that the interest should not be purely speculative or eventual. It may exclude from the aegis of 453 C.P.C. petitioners such as *Thorson*<sup>74</sup>, *McNeill*<sup>75</sup>, or *Borowski*<sup>76</sup> who are taking on a battle in which they do not have a personal interest in the strict sense. A better view would be that, once the interest exists, it need not be "personal". It is possible however, that the interest does not exist unless it is personal, save in constitutional matters.<sup>77</sup> In *Conseil du Patronat du Québec v. Commission de la Santé et de la Sécurité du travail*<sup>78</sup>, Mr. Justice Biron stated that cases like *Borowski*<sup>79</sup> would apply to 453 C.P.C. but interpreted them as having effect only if there is no other means of bringing the action<sup>80</sup>. In any case, this matter is unlikely to arise frequently since most persons raising issues in which they are not directly implicated invoke the *Charter* and can rely on Section 24 for a remedy rather than 453 C.P.C. However, one would certainly advise a "theoretical" petitioner to proceed under a different provision of law.<sup>81</sup> In short, there must be some limit to 453 created by the words "immediate interest", but that limit is not a serious barrier to the frequent use of the section.

A reasonable explanation of this issue would be to state that "interest" means the same thing it means in any other area of law and that any difficulty is associated with the word "immediate". But a good interpretation of that

74. *Thorson v. A.-G. Canada*, [1975] 1 S.C.R. 138.

75. *McNeill v. Nova Scotia Censorship Board*, [1976] 2 S.C.R. 265.

76. *Borowski v. Minister of Justice Canada*, [1981] 2 S.C.R. 575.

77. *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau Monde*, [1974] C.A. 491. In short, cases like *Thorson*, *supra*, fn 74, *McNeill*, *supra*, fn 75, and *Borowski*, *supra*, fn. 76, depend on their constitutional or *Charter* nature. But this theory is put in doubt by *Minister of Finance Canada v. Finlay*, [1986] 2 S.C.R. 607.

78. *Conseil du Patronat du Québec v. Commission de la Santé et de la Sécurité du travail*, [1984] C.S. 466. This is a more logical distinction than "constitutional nature". See *Woods v. Régie de logement*, [1984] C.S. 774.

79. *Borowski*, *supra*, fn. 64.

80. I.e., as long as no one has a "better" or more direct interest and the matter could thus never be considered. But this may not be fully compatible with *McNeil*, *supra*, fn. 75. See also *Maryland Casualty Company v. Société Asbestos Limitée*, [1986] R.J.Q. 817 where Brassard J. held that the interest must relate *directly* to the Petitioner. This would seem too rigid.

81. Although he would have to justify his interest under Section 59 C.P. whatever route he chose. But Tyndale JA's words in *La Chambre des Huissiers*, *supra*, fn. 36, go a long way to eliminating all difficulties. See also *Corporation Professionnelle de Physiothérapeutes du Québec v. Laurin*, [1982] C.S. 781 (Turmel J.) and *Quebec Association of Protestant School Boards et al v. P.-G. Canada et al*, 500-05-008865-824 (Deschênes C.J.). This is the interlocutory judgment of August 9, 1982 and not the well-known final judgment on the merits.

word is that it seeks to prevent litigants from obtaining opinions on law where these will not resolve the entire dispute. In short, this is a reenactment of the general principle that ineffective declarations will not be granted.<sup>82</sup> A declaratory motion cannot become an alternative form of the now defunct partial inscription in law by which portions of cases would be settled in advance.

#### 4. The issue of “real difficulty”

Section 453 is supposed to settle questions of “real difficulty”. In *Association des Policiers*<sup>83</sup> Mr. Justice Arsenault decided the answer was too plain and refused the declaration. This, it is submitted, is not a desirable result. What is “difficult” for one person is simple for another. What can be more frustrating than being told that the answer is obvious, when you do not find it so?

Curiously, Benoit J. came to the opposite conclusion in *Woods v. Régie du Logement et al* when he said at page 784 :

Enfin, j'aimerais ajouter qu'un jugement déclaratoire ne peut et ne doit pas être un traité de droit et en l'occurrence un traité de droit sur la compétence exclusive de l'avocat et du notaire ni un traité de ce qui constitue l'usurpation des fonctions de l'avocat. Je veux spécialement dire que la Cour ne pourrait, sans entrer dans des distinctions complexes, prononcer sur les conclusions recherchées. En effet, comment la Cour pourrait déclarer la compétence exclusive des avocats, conseillers en loi et notaires à répondre à des demandes de renseignements ?<sup>84</sup>

It is submitted that “real difficulty” referred to a real difference of opinion or dispute<sup>85</sup>, not to the degree of doubt entertained by the Judge. Both judgments are wrong and it is sufficient that the applicant have a real

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82. See *Boisjoly v. Centre d'Accueil Domrémy-Montréal et al*, [1986] R.J.Q. 539 at p. 537 (Martin J.) See especially *North Island Laurentian Teachers' Union v. Commission Scolaire de Laurenval*, [1984] R.D.J. 651 where a seemingly “restrictive” Court of Appeal decision ultimately does not do more than decide that the remedy will not be effective.

83. *Association des Policiers*, *supra*, fn. 41.

84. *Woods v. Régie du logement et al*, *supra*, fn. 78. This case is also interesting on the issue of “interest” and it came to the same conclusion as *Conseil du Patronat*, *supra*, fn. 78. It appeared to assume that regulations could be invalidated by 453 C.P.C. and on that point, this author is in agreement. On the other hand, the case has a “restrictive” tone which is regrettable.

85. See *Corporation Professionnelle des Physiothérapeutes*, *supra*, fn. 81 where Turmel J. said at page 786 “La difficulté dont parle l'article 453 C.P. peut être assimilée au terme 'différend'.”

problem. The Court should not leave him in the dark because he should have known better<sup>86</sup> or because the problem is too difficult.<sup>87</sup>

## 5. The Problem of *Zarolega*

The most serious problem with respect to 453 C.P.C. is raised by *Les Terraces Zarolega v. COJO*.<sup>88</sup> The problem is related to one concerning the quashing of laws. Can Art. 453 be used to declare a decision of an inferior tribunal void or inoperative?

Undoubtedly, in the bygone days of strict observance of procedure, the answer would be negative. In *Punton v. Ministry of Pensions*<sup>89</sup> the English courts said that one cannot create two subsisting, contradictory decisions, one by the inferior tribunal and one by the Court. Which would, in such circumstances, be susceptible of execution?

The traditional theory would have required certiorari<sup>90</sup> to quash before the Court could declare the law. It is not necessary to insist that, if this is still so, the whole view of 453 C.P.C. as an alternative procedure for judicial review, endorsed by *Vachon*<sup>91</sup> is meaningless, and all the cases granting judicial review under that article are necessarily wrong.<sup>92</sup>

Such a thought, implausible though it appears, may occur to lawyers reading *Pouliot v. C.U.M.*<sup>93</sup> where the following passage is found:

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86. Of course, as we saw in *Solosky*, *supra*, fn. 28, the Court has a discretion. The flimsiness of an argument can be evidence that no real dispute exists.

87. Subject, again, to a discretion to refer the matter to the Master of the Rolls for a full trial.

88. *Les Terraces Zarolega v. COJO*, [1981] 1 S.C.R. 94.

89. *Punton v. Ministry of Pensions*, [1964] 1 W.L.R. 226. In *Wade Administrative Law*, 5<sup>th</sup> ed., pages 529-30, the learned author wisely points out that this doctrine might exclude review of errors of law on the face of the record by means of declaratory relief. Wade goes on to say that, in modern times, this should make no difference because of the simplification of procedures and the fact that certiorari and declaratory relief should co-exist in the same procedure. The same principles would apply to Quebec. See also *Pyx Granite Estates Ltd. v. Ministry of Housing*, [1960] A.C. 260, *Slough Estates v. Slough Borough Council* (1968) 299, and *Ealing C.B.C. v. Race Relations Board*, [1972] A.C. 342. See also *Boisjoly*, *supra*, fn. 82.

90. *Vachon*, *supra*, fn. 9.

91. *Vachon*, *supra*, fn. 9.

92. In addition to the many cases cited above, one case *Moss v. Queen Elizabeth Hospital*, (1984), S.C. 500-05-008971-838 where Hannan J. held he had the power to declare a decision to reduce a doctor's time in emergency void, but declined to do so on the merits, and *Vallerand v. Le Barreau du Québec*, (1981), S.C. 500-05-013230-816 where Boisvert J. declared null a decision of the Bar with respect to a student's average grade needed to pass.

93. *Pouliot v. C.U.M.*, [1985] C.A. 633.

En droit, il y a une présomption de validité à l'égard des décisions rendues par des organismes quasi-judiciaires. Si on veut prétendre que ces organismes ont [...] excédé leur juridiction, le moyen d'attaquer leur décision est l'évocation.<sup>94</sup>

It is submitted that Mr. Justice Nichols was not returning to pre-*Vachon*<sup>95</sup> distinctions, but rather applying the doctrine of *Zarolega*.<sup>96</sup> In both *Pouliot*<sup>97</sup> and *Zarolega*<sup>98</sup>, petitioners wanted a declaration without alleging any excess of jurisdiction. In *Pouliot*<sup>99</sup>, Petitioners claimed that an *intra vires* decision should be inoperative because it contradicted another *intra vires* decision. In *Zarolega*<sup>100</sup> they wanted to avoid the legally created arbitration altogether or to tie its hands through a superior court judgment. If either had succeeded, not only would 453 C.P.C. be a means of judicial review, but it would constitute a major expansion of judicial review. A procedural provision should not have this effect. Mr. Justice Nichols had foreseen this danger in *Bonneau v. La Commission des Transports du Québec*<sup>101</sup> where he said :

Il (l'art. 453) ne crée pas un nouveau pouvoir de surveillance ou de contrôle de la Cour Supérieure différent de celui que présentent les articles 33 et 846.<sup>102</sup>

It is unlikely that he meant, in *Pouliot*<sup>103</sup>, that, if Petitioner meant to challenge the validity of the decision he had to entitle his procedure "evocation". Such a holding would at most lead to a minor amendment during the hearing. What he meant — and that is an ancient limit *all* of judicial review — is that one cannot obtain an effective appeal from *intra vires*, reasonable decisions, by applying to the Superior court and that one cannot avoid the administrative instances through the intercession of the Superior Court.<sup>104</sup>

94. *Id.*, p. 635-636.

95. *Vachon*, *supra*, fn. 9.

96. *Zarolega*, *supra*, fn. 88. It is, however, surprising that *Zarolega* is not cited.

97. *Pouliot*, *supra*, fn. 93.

98. *Zarolega*, *supra*, fn. 88.

99. *Pouliot*, *supra*, fn. 93.

100. *Zarolega*, *supra*, fn. 88.

101. *Bonneau v. La Commission des Transports du Québec*, [1981] C.S. 268.

102. *Id.*, p. 270-271.

103. *Pouliot*, *supra*, fn. 93.

104. That point is also made by *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. See also *Tessier v. Ouvriers Unis du Caoutchouc*, [1984] C.S. 1063 (Reeves J). See also *Campisi v. P.-G. Québec*, [1978] C.A. 520. (One should note, too, certain doubts of Montgomery J.A. in *Campisi* as to the majority's view on this).



It follows that nothing stops a party from asking for a declaration of nullity of a decision affecting him for any of the reasons known to administrative law, but he cannot ask for an opinion about the merits of what an administrative tribunal has decided or is to decide within its jurisdiction.

## 6. Some evidentiary difficulties

Recent reforms to the Code of Civil Procedure have provided for proof by circumstantial affidavit in the extraordinary remedies<sup>105</sup> and interlocutory injunctions.<sup>106</sup> Although a motion under 453 C.P.C. can clearly be presented in the same procedure<sup>107</sup> it does not appear, on the face of it, to be included in the circumstantial affidavit articles.

Despite the restrictive attitude of a few judges, the *Code of Procedure* seems to make it a *right* to present oral evidence in addition to the affidavits<sup>108</sup> where affidavit evidence is permitted. It is probably wise, whenever the facts are in dispute and there is serious doubt about the availability of the extraordinary recourses, to establish the basis for a declaratory judgment by oral evidence. The procedural obstacles to judicial review become less serious once that is done.<sup>109</sup>

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105. Art. 835.3: A party may make his proof by means of sufficiently detailed affidavits to establish all the facts necessary to support his pretensions. If he so elects, he must cause his affidavits to be served on the adverse party and filed as soon as possible before presentation of the motion. However, the party making the motion must cause his affidavits to be served at the same time as the motion.

In addition to proof by affidavit, any party may present oral proof, if he so wishes.

106. Art 754.1: The parties make their proof by means of affidavits sufficiently detailed to establish all the facts necessary to support their pretensions. They must file the affidavits and all the documents they intend to invoke at the proof and hearing and cause them to be served on the adverse party as soon as possible before presentation of the motion. However, the party making the motion must cause his affidavits to be served at the same time as the motion.

With leave from the court, the parties may also produce documents at the hearing.

107. *Canada Steamship Lines, supra*, fn. 22. There is no logical reason to segregate these procedures.

108. Art. 835.3 says in part:

In addition to proof by affidavit, any party may present oral proof, if he so wishes.

Art. 754.2 is to the same effect.

109. Of course, an amendment to the Code is highly desirable on this point, so as to include 453 C.P.C. among procedures in which the factual basis may be proved by affidavit evidence.

## 7. What are the consequences of incorrect use of 453 C.P.C.?

Most cases have dismissed motions under 453 C.P.C. with costs where the judge considered the remedy inappropriate.<sup>110</sup> However, that this is not a necessary consequence is clear from Art. 455 which states:

455 : The court seized of the motion may, if it thinks fit, allow a contestation in writing, or order the trial of any questions which it considers useful for the solution of the problems raised in the motion.

This was applied in a Provincial Court case, *Filion v. l'Assurance Vie Desjardins*.<sup>111</sup> There is no doubt that, if unsuccessful motions were simply sent down for ordinary trial with costs of a *motion* and not a whole case, the fear that some lawyers still feel about proceeding under 453 C.P.C. would dissipate. Given the wide powers of amendment accepted in our Courts<sup>112</sup>, even where the conclusions have to be modified substantially this should not stand in the way of appropriate modification.

It is true that in *Motel Fontaine Bleue v. Commission de Capitale Nationale* Chevalier J. said at Page 264 :

Il est également vrai que, dans l'arrêt *Ste-Agathe* précité, M. le juge Pigeon opine, comme *obiter dictum*, qu'un juge peut toujours, s'il croit que l'on abuse de cette procédure, ordonner que l'affaire soit instruite comme s'il s'agissait d'une action. Je suis cependant convaincu que cette opinion, valable s'il s'agissait d'un cas où il existe une question litigieuse mixte de droit et de faits, ne recevrait point application dans un procès, comme celui qui est devant moi, où ce qui m'est demandé consiste à entendre la preuve de part et d'autre et à décider, à sa lumière, si l'intimée a effectivement consenti une prolongation de bail.<sup>113</sup>

It is submitted that this restrictive position is not correct. No logical reason exists for refusing to convert an application under 453 C.P.C. into an action.<sup>114</sup>

Fortunately, restrictive interpretations have become less frequent with the years. Cases like *Protestant School Board*<sup>115</sup> are balanced by dicta in

110. Numerous cases cited above illustrate this.

111. *Filion v. l'Assurance Vie Desjardins*, C.P., Joliette, 705-02-006200-856.

112. See *Joyal v. La Caisse Populaire Ste-Claire*, [1986] R.J.Q. 2000 per Bernier J. as an example, *Solosky*, *supra*, fn. 28 also gives us some idea of the scope of modifications of conclusions.

113. *Motel Fontaine Bleue v. Commission de Capitale Nationale*, [1979] C.S. 261.

114. The *Motel Fontaine Bleue*, *supra*, fn. 110 case is particularly restrictive in its tone and its attempt to preserve pre-*Duquet* jurisprudence.

115. *Protestant School Board*, *supra*, fn. 19.

*Canada Steamship Lines*<sup>116</sup>, *Gauthier*<sup>117</sup> and *La Chambre des Huissiers*.<sup>118</sup>

If 453 is only an alternative procedure and not a source of substantive rights, cases should not frequently be dismissed on its account<sup>119</sup>. Moreover, where 453 is cause for dismissal of an administrative law application, if it is taken again, "due diligence" required by law should be counted from the date of the 453 application. Once again, this would ensure justice on the merits and should remove procedural fears.<sup>120</sup>

### Conclusion

Ten years have not reversed or substantially lessened the impact of *Duquet*.<sup>121</sup> The remedy under Section 453 is largely available. Procedural wrangling has become far less common, and more cases in public law are decided on their merits.

However, there is a constant undercurrent of "restrictive" judgments. Many judges and lawyers appear to have been attached to the widespread use of procedure as a way of solving disputes. Especially in administrative law, where almost every successful application for review has major policy implications, many judges and lawyers find the possibility of deciding or arguing on procedural grounds attractive. For the respondents, this possibility always represents a cheap and easy shot at every Petitioner who, is characteristically financially weaker and less able to absorb the costs of successive applications.

There seems to subsist considerable controversy about the notion of "immediate interest" and "real difficulty". It is submitted that the best way to make sense of these terms is to accept that "interest" has the same meaning as anywhere in the law, but that, in order for the relief to be granted, the Court must be convinced that the problem is a "real one" and not an invented

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116. *Canada Steamship Lines*, *supra*, fn. 22.

117. *Gauthier*, *supra*, fn. 35.

118. *La Chambre des Huissiers*, *supra*, fn. 36.

119. That 453 C.P.C. is only a question of procedure and not a source of substantive rights can be seen in *In Re l'Édifice Le St-Laurent Inc.*, [1979] C.A. 602 where Owen J.A. affirms at pages 607-608 that the article applies to proceedings in bankruptcy. If it were a substantive article, this would not be so.

120. There seems to be no caselaw on this point.

121. *Duquet*, *supra*, fn. 2. See also L. SARNA, "Declaratory Judgments: Justice in the Fast Lane", (1985) 1 *Admin. Law J.* 1.

hypothetical one<sup>122</sup> and that the relief will be effective in terminating the dispute and not simply in disposing of a portion of it.<sup>123</sup>

Despite the great progress since 1977, it would still be desirable to institute a simple and accessible “application for judicial review” with minimal procedural refinements and almost no opportunity for contestation on technical grounds. Art. 453 would remain as a remedy in private law where it should be given the boardest possible interpretation in order to provide a quick solution to appropriate cases. It is likely, however, that in private law only it would attract far less controversy.

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122. I.e., that there is a “real difficulty”. It is to be noted that in *Weitzman v. City of Westmount*, S.C. 500-05-010606-869, Benoit J. held that interest under 453 is *easier* to establish than under the rest of the law. At pages 4-5 the Court received an intervention in part for the following reasons :

L'autre motif pour lequel je suis disposé à recevoir les interventions tient aux conclusions recherchées par la requérante. Celle-ci ne se contente pas d'attaquer en nullité la décision de la Ville et de solliciter un mandamus en ce qui concerne l'approbation de son plan de subdivision, elle recherche une déclaration de droit. J'estime qu'en matière déclaratoire, par analogie avec les articles 453 et 562 C.P.C. les voisins immédiats alléguant préjudice possèdent l'intérêt requis pour intervenir. Vouloir faire déclarer que le plan proposé est conforme à toute législation valide met en jeu bien plus que l'intérêt de la Ville comme autorité municipale défendant son règlement.

It is submitted that this is just as dangerous as imposing a more onerous concept of “interest”. If 453 C.P.C. is a question of procedure, its use or the use of another procedure should not affect the substance.

123. I.e., that the interest is “immediate”. Immediacy may also imply a certain degree of “urgency”.