

CANADA / JUDGMENT

Collins v. Abrams

2002 BCSC 1774

COURT

Supreme Court of British Columbia

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2002BCSC1774

Citation: Collins v. Abrams et al.

Date: 20021220
2002 BCSC 1774Docket: 991644
Registry: Victoria
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: DOUG COLLINS
PETITIONERAND: HARRY ABRAMS, BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL,
DEPUTY chief COMMISSIONER OF the BRITISH COLUMBIA
HUMAN RIGHTS COMMISSION,
AND ATTORNEY GENERAL OF BRITISH COLUMBIA
respondents

REASONS FOR JUDGMENT

OF THE

HONOURABLE madam JUSTICE lynn smith

Counsel for the Petitioner:

D.H. Christie

Counsel for the Respondent, Attorney General of British Columbia:

L. Mrozinski

Counsel for the Intervener, League for Human Rights of B'Nai Brith Canada:

M. Kurz

Place and Date of Hearing:

Victoria, BC

September 6, 2002

Written Submissions:

October 2 and 15, 2002

NATURE OF THE PROCEEDINGS:

[1] The Attorney General of British Columbia has applied for an order dismissing the petitioner's application for judicial review of an Order of the British Columbia Human Rights Tribunal dated November 30, 2001, on the grounds that the matter has become moot. The Order was made following a complaint against the petitioner under s. 7 of the Human Rights Code, R.S.B.C. 1996, c. 210 ("the Code"), which states:

7 (1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or

(b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

(2) Subsection (1) does not apply to a private communication or to a communication intended to be private.

FACTS:

[2] The essential facts in this case may be best understood if set forth in a chronology:

May, 1994: Harry Abrams filed complaints with the B.C. Council of Human Rights alleging that the North Shore News and Doug Collins had published articles that discriminated against Jewish persons and that were likely to expose those persons to hatred or contempt on the basis of their race, religion and ancestry. The four articles were entitled: "News flash! Daily press discovering free speech"; "Hollywood propaganda"; "Pondering far better than pandering folks"; and "Some value freedom of the press, some don't."

March 13, 1997: Mr. Abrams applied to have his complaint heard at the same time as another complaint against Mr. Collins and the North Shore News, brought by the Canadian Jewish Congress with respect to one of the four columns ("Hollywood propaganda"). His application was denied.

November 4, 1997: Tribunal Member Nitya Iyer gave her decision regarding the Canadian Jewish Congress complaint: *Canadian Jewish Congress v. North Shore Free Press Ltd.* (No. 7) (1997), 30 C.H.R.R. D/5 ("Canadian Jewish Congress"). She summarized her conclusions at paras. 260-62 thus:

In summary, s. 7(1)(b) of the Code is validly enacted provincial legislation. It does not intrude on federal jurisdiction over criminal law, nor does it exceed provincial jurisdiction by regulating political speech. The provision does infringe the guarantee of freedom of expression in s. 2(b) of the Charter, but is saved under s. 1 of the Charter as being demonstrably justified as a reasonable limit in a free and democratic society. Thus, the constitutional challenge to the legislation fails.

I have interpreted s. 7(1)(b), in light of the Charter, to require a two part analysis: First, does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds? Would a reasonable person understand this message as expressing hatred or contempt in the context of the expression? Second, assessed in its context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt?

In the present case, although the publication in issue is likely to make it more acceptable for others to express hatred or contempt against Jewish people because of their race, religion or ancestry, I find that it does not itself express hatred or contempt. Therefore, the complaint is not justified and, pursuant to s. 37(1) of the Code, the complaints against the Respondent Doug Collins and the Respondent North Shore News are each dismissed.

No party sought judicial review of the Canadian Jewish Congress decision.

January 14, 1998: Doug Collins served a Notice of Constitutional Question in the Abrams complaint, alleging that s. 7(1) of the Code infringes s. 2(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11.

April 2, 1998: Tribunal Member Patch allowed an application in the Abrams complaint to sever the constitutional validity issues, to be heard after the merits of the complaint.

July, 1998: Tribunal Member Patch presided over the hearing into the merits of the Abrams complaint. Mr. Collins and the North Shore News did not participate in that portion of the hearing except to introduce written submissions concerning the interpretation of s. 7 of the Code. The complainant Mr. Abrams, the Deputy Chief Commissioner of the B.C. Human Rights Commission, the Attorney General and an intervener, League for Human Rights of B'Nai Brith Canada, were represented at the hearing.

February 2, 1999: The Tribunal rendered Reasons for Decision finding that the four columns written by Mr. Collins and published by the North Shore News were likely to expose Jewish persons to hatred or contempt because of their race, religion or ancestry contrary to s. 7(1)(b) of the Code (*Abrams v. North Shore News* (No. 3) (1999), 33 C.H.R.R. D/435). Mr. Patch concluded

that the first question he should ask is whether a reasonable person, informed about the context, would understand the message as expressing hatred or contempt. He explained that, in his view, the "reasonable person" is not a purely abstract entity, but someone of this place and time, with knowledge of the past and present. Referring to the definition of "hatred" adopted by the Supreme Court of Canada in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 ("Taylor"), Tribunal Member Patch stated (at para. 72) that:

Considering the content and tone of the columns and the vulnerability of the target group, I am satisfied that a reasonable person, informed of the context of the messages, would understand the messages within them as expressing hatred and contempt, that is, that the columns collectively convey "unusually strong and deep-felt emotions of detestation, calumny and vilification."

Turning to a second question, whether the likely effect of the communication makes it more acceptable for others to manifest hatred or contempt against the person or group concerned, Mr. Patch said that factors to be considered at that stage include the credibility likely to be accorded the expression and how it is presented, as well as the vulnerability of the target group and the degree to which the expression reinforces existing stereotypes. He referred to expert evidence suggesting that the impact of columns published in a community newspaper may be significant in forming public attitudes. He stated (at para. 83):

The Jewish people remain a vulnerable group. The messages contained in the articles repeatedly reinforce existing anti-Semitic stereotypes and theories. They were published in a widely distributed community newspaper. The context in which the columns were published gives a gloss of respectability to the views they express. In my opinion, the evidence establishes that a reasonable person would conclude that these columns, considered in their historical and social context, are likely to make it more acceptable for others to manifest hatred or contempt against Jewish people.

Providing the context for his final conclusion, the Tribunal Member stated at paras. 84-86:

Individually, and taken out of context, each of the four columns at issue might not convey messages that meet the high threshold that is necessary to be considered hatred or contempt within the meaning of s. 7(1)(b) of the Code. However, collectively they do. They repeatedly reinforce some of the most virulent forms of anti-Semitism. They convey the message that Jews, individually and collectively, are selfish, greedy and manipulative; that they have conspired to control government institutions and the media; and that they use that control to perpetuate inflated figures concerning the victimization of Jews during the Holocaust and to persecute anyone who speaks out against them.

The publication of these messages in a community newspaper that is delivered to almost every home in the community is likely to increase the risk to Jewish people of being exposed to hatred or contempt because of their race, religion or ancestry. Mr. Collins expresses hatred or contempt indirectly and subtly. He does not overtly incite hateful or contemptuous expressions. However, he reinforces negative stereotypes of the Jews that have been promulgated for centuries. Further,

publication of these ideas in a credible newspaper increases the likelihood that others will manifest hateful and contemptuous views in a more directly harmful manner.

I find that the four columns, which were written by Doug Collins and published by the North Shore News, and which were the basis for this complaint, are likely to expose Jewish persons to hatred or contempt because of their race, religion or ancestry contrary to s. 7(1)(b) of the Code.

The terms of the Tribunal's Order were as follows:

1. That the Respondents Doug Collins and the North Shore News cease publishing statements that are likely to expose Jewish persons to hatred and contempt and refrain from committing the same or a similar contravention;
2. That Doug Collins and the North Shore News pay \$2,000 to the Complainant Harry Abrams as compensation for the injury they have caused to his dignity and self respect;
3. That the North Shore News publish in one of its next three editions the Summary that accompanies these reasons.

The Respondents are jointly and severally liable for the damages.

1999: Following the Tribunal's Order, the North Shore News published a summary of the decision and paid the \$2,000 ordered to Mr. Abrams. After that, it declined to participate further in the proceedings and took no part in the constitutional challenge to s. 7(1)(b) of the Code.

April 7, 1999: Mr. Collins commenced judicial review proceedings with respect to the decision and filed a further Notice of Constitutional Question. It alleges that:

- (1) the Order of the Tribunal constitutes an unreasonable limit on the freedoms guaranteed by s. 2 of the Charter and ought to be quashed pursuant to s. 24(1) of the Charter;
- (2) s. 7(1)(b) of the Code constitutes an unreasonable limit on the freedoms guaranteed by s. 2(b) of the Charter and ought to be declared of no force and effect pursuant to s. 24(1) of the Charter and s. 52 of the Constitution Act, 1982;
- (3) s. 7(1)(b) ought to be declared ultra vires the provincial legislature because it does not relate to a matter coming within the classes of subjects enumerated in s. 92 of the Constitution Act, 1867;
- (4) sections 31, 32, 34, 37 and 39 of the Code create a scheme which is unconstitutional in the light of s. 2(b) of the Charter; and
- (5) the Tribunal established under the Code is neither independent nor impartial, contrary to s. 11(d) of the Charter, and the proceedings accordingly ought to be declared void and the legislative provisions creating the scheme and Tribunal ought to be declared of no force and effect.

December 2, 1999: Madam Justice Quijano remitted to the Tribunal the constitutional validity issues and the questions of institutional bias and lack of independence in the Tribunal: *Collins v. Abrams* (1999), 19 Admin. L.R. (3d) 269 (B.C.S.C.).

February 14, 2001: The Court of Appeal upheld the Order of Madam Justice Quijano: *Collins v. Abrams* (2001), 85 B.C.L.R. (3d) 228 (C.A.).

August 9, 2001: Leave to appeal to the Supreme Court of Canada was denied: *Collins v. Abrams*, [2001] S.C.C.A. No. 109.

June 15, 2001: Tribunal Member Patch denied an application by the Attorney General that the Tribunal adopt into the record of the *Abrams* complaint the record from Canadian Jewish Congress and determine that s. 7(1)(b) of the Code is constitutionally valid based on the decision in that case. The Tribunal then received written submissions on the constitutional issues.

September 29, 2001: Doug Collins passed away. Subsequently, the Attorney General, the Deputy Chief Commissioner, the complainant and the intervener all joined in an application for an order that the matter be declared moot.

November 30, 2001: Tribunal Member Patch issued Reasons for Decision in which he found that the matter was not moot, and stated his conclusion regarding the alleged constitutional infringements: *Abrams v. Collins* (No. 5), 2001 BCHRT 43. He referred to the guidelines in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 ("Borowski") and found that there could be a practical effect flowing from a decision on the constitutionality of the legislation because if the legislation was unconstitutional then the Order would have no force or effect and the North Shore News might be entitled to the return of the \$2,000 it had paid to Mr. Abrams. Further, he stated, a decision that the legislation was unconstitutional could, in effect, clear the names of the respondents. He found that Mr. Collins had failed to establish that s. 7(1)(b) created an unconstitutional scheme, that it lacked independence or impartiality, or that it was ultra vires the province (Mr. Collins had not provided particulars, evidence or argument on those allegations). He found, as had the Tribunal in *Canadian Jewish Congress*, that s. 7(1)(b) infringes the right to freedom of expression guaranteed in s. 2(b) of the Charter but that it constitutes a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the Charter. Finally, he found that the order requiring the North Shore News to publish a summary of the decision did not affect Mr. Collins's right to free expression.

September 6, 2002: This court heard the Attorney General's application to dismiss the judicial review proceedings on the grounds that the matter has become moot. The Attorney General, the petitioner, and the intervener were represented by counsel; other parties to the proceedings did not participate. An affidavit of Betty Collins was filed, in which she deposed that she is the executrix and sole beneficiary of the estate of Doug Collins, that she considers that the Tribunal Order affects her rights to communicate freely the exact contents of the material that was the subject-matter of the complaint, that she wishes to continue to publish the writings and creative works of her late husband as and when she chooses and that she wishes to pursue the petition to challenge the constitutional validity of s. 7 of the Code.

October 2 and 15, 2002: Further written submissions from Ms. Mrozinski and Mr. Christie regarding copyright ownership in Mr. Collins's work after his decease were received by this court. Mr. Christie tendered in evidence an affidavit of Peter Speck, the former publisher of the North Shore News, deposing that the arrangement with Mr. Collins was a "gentleman's agreement" whereby Mr. Collins gave the North Shore News the right to publish his articles first and, if he chose, to publish elsewhere with (as a matter of courtesy) acknowledgement that the North Shore News had published first. Mr. Speck deposed that the North Shore News never received copyright to Mr. Collins's work and that to his knowledge Mr. Collins never gave up copyright to his work (including the columns at issue in the human rights complaint) to anyone else, but retained it himself.

THRESHOLD ISSUES:

- [3] There was no formal application for an order adding Betty Collins to these proceedings. However, it was a fundamental premise of Mr. Christie's argument that Ms. Collins could carry on the proceedings and I will consider the arguments regarding mootness and standing as if an application had been brought to grant Betty Collins standing (on the basis of private interest or public interest) as either a party or intervener.
- [4] At the hearing I asked for evidence and further submissions regarding the question of ownership of the copyright in Mr. Collins's works, specifically, in the four columns which were the subject-matter of the complaint. Counsel for the petitioner provided the affidavit of Mr. Speck referred to above. Counsel for the Attorney General argued in her supplementary written submissions that it has still not been established on the evidence that Ms. Collins holds the copyright in the four columns. Ms. Mrozinski pointed out that it is unknown whether Mr. Collins was an employee of the North Shore News such that the North Shore News would automatically have acquired copyright by virtue of s. 13(3) of the Copyright Act, R.S.C. 1985, c. C-42. However, Mr. Speck's affidavit states that the North Shore News did not obtain copyright, and there is no evidence to the contrary. I will consider the arguments regarding mootness and standing on the premise that Doug Collins retained copyright in the works and that Betty Collins has become the owner of his intellectual property in the four newspaper columns.

LAW:

- [5] In *Borowski*, *supra*, the Supreme Court of Canada held that Mr. Borowski's challenge to s. 251 of the Criminal Code, R.S.C. 1985, c. C-46 (which allowed therapeutic abortions in certain circumstances) became moot when s. 251 was struck down as unconstitutional in other proceedings. Sopinka J. for the court stated at 353:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient

must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

[6] Sopinka J. said that the first question is whether the required tangible and concrete dispute has disappeared such that the issues have become academic. The second question is whether the court should nevertheless exercise its discretion to hear the case. The court set out three rationalia underlying the practice of courts in this regard: (1) a court's competence to resolve legal disputes is rooted in the adversary system, and in the absence of an adversarial context the issues may not be well and fully argued (recognizing that an adversarial context can arise where there are collateral consequences flowing from an already completed cause of action); (2) judicial resources should be conserved for where they are needed (thus, where the court's decision will have some practical effect on the rights of the parties, where the court's decision is necessary to ensure that an important question evasive of review will be determined, or where there is an issue of public importance of which a resolution is in the public interest, the expenditure of judicial resources might be justified); and (3) courts must remain within their proper law-making function, and pronouncing judgments in the absence of disputes affecting the rights of parties may be viewed as intruding on the sphere of the legislative branch.

[7] The court specified at 363 that:

In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

[8] In Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999), the author reviews the jurisprudence regarding mootness and comments at 96:

Mootness is the doctrine of justiciability which has received the most direct and authoritative scrutiny by Canadian courts. In Canada, the rationale for declining to decide moot cases is principally justified on functional grounds. As set out in the first chapter, the function of adjudication may accord to two separate models. The first model approaches adjudication as a method of resolving disputes. The second model approaches adjudication as a method of determining and disseminating public values. Mootness would appear to offend both models. If the function of courts is to resolve live, concrete disputes in an adversarial system, mootness has the effect of removing the concreteness and the adversarial character of a dispute. If the function of courts is to articulate public values, mootness may create uncertainty as to how those values

will apply. For these reasons, the general rule at common law is that courts should decline to decide cases which have become moot. Nonetheless, both functional models also offer rationales for why it may be necessary or desirable to decide cases notwithstanding mootness, either to settle future or collateral interests of the parties, or to settle an important area of the law which may affect others in the future.

Thus, the dilemma posed by mootness is twofold: first, the lack of any live controversy undermines the functioning of the judicial process; and second, the hypothetical nature of the resulting decision may lead the Court to prejudice future parties involved in actual controversies.

POSITIONS OF THE PARTIES:

- [9] The Attorney General's position is that the death of Mr. Collins has rendered this petition for judicial review of the Tribunal Orders moot and that the petition ought to be dismissed.
- [10] Mr. Christie argues that the proceedings should continue with Betty Collins substituted as the petitioner or added as an intervener.
- [11] In support of the Attorney General's position, Ms. Mrozinski argued that the only outstanding portion of the Tribunal's February 22, 1999 Order is the cease and desist order. The cease and desist order directs Doug Collins and the North Shore News to "cease publishing statements that are likely to expose Jewish persons to hatred and contempt and refrain from committing the same or a similar contravention". Ms. Mrozinski submitted that Mr. Collins having died, and the North Shore News having ceased participation in these proceedings, the outcome of this judicial review can have no practical effect on either of the persons against whom the order was made.
- [12] Ms. Mrozinski argued that the Tribunal Member's Order would not bind Betty Collins, who was not a party to it, and would not bind future Human Rights Tribunals, which are not bound by the doctrine of stare decisis. If Ms. Collins or someone else decides to republish the columns in the future, she argued, the question whether that publication runs afoul of s. 7(1)(b) will have to be answered in the light of the specific facts in that case, including the nature and medium of the publication, its circulation, and other such factors.
- [13] Counsel for the Attorney General pointed to *Stinson Estate v. British Columbia*, (1999), 70 B.C.L.R. (3d) 233 (C.A.) ("*Stinson*"), where the estate of Alice Stinson sought to pursue a claim that Ms. Stinson's rights under s. 15 of the Charter had been infringed. The Court held that the estate could not pursue the claim, stating that the power to enforce the guarantee resides in the person whose rights have been infringed because the rights guaranteed by the Charter are personal (referring to examples involving ss. 7, 15 and 24 of the Charter). Further, the Court pointed out, the Estate Administration Act, R.S.B.C. 1996, c. 122 was of no avail to the estate's attempt to pursue a claim since s. 59(2) of that Act only authorizes the executor or administrator of a deceased person's estate to "continue or bring and maintain an action for all loss or damage to the person or property of the deceased "

- [14] The Attorney General's position is that, in general, courts should refrain from hearing matters that are moot just as they ought to refrain from hearing matters brought by persons who lack the requisite private or public interest standing. Counsel referred to *Canadian Council of Churches v. Her Majesty the Queen and the Minister of Employment and Immigration*, [1992] 1 S.C.R. 236 ("Council of Churches") at 253-55 for the principles governing standing and *Borowski*, *supra*, for the principles governing mootness.
- [15] Ms. Mrozinski submitted that generally, courts do not deal with hypothetical matters where there is no *lis* that engages their process or where they are asked to answer questions in the abstract and specifically, that the Supreme Court has been particularly careful to decline to hear moot cases where there is a constitutional challenge to legislation, citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 ("Phillips") and *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 ("Skapinker"), where Estey J. stated at 383:

The development of the Charter, as it takes place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken.

The Attorney General's position is that Betty Collins does not have standing to challenge the legislation as a private individual and would not qualify for public interest standing under the principles laid down in *Council of Churches*, *supra*.

- [16] The Attorney General's position is that the death of Doug Collins, the only respondent to the complaint who continued to have an interest, clearly made the judicial review proceedings moot. Counsel further argued that this is not an appropriate case for the court to exercise its discretion to hear the case nonetheless. I will review the arguments regarding exercise of discretion below.
- [17] Mr. Kurz, counsel for the intervener, League for Human Rights of B'Nai Brith Canada, agreed with the submissions of counsel for the Attorney General. He emphasized that context matters in the determination of whether publication violates the Code and in the determination of whether constitutional rights to freedom of expression have been infringed. In this regard, he referred to *Taylor*, *supra*, where Dickson C.J., for the majority, stated at 916:

The purpose and methodology of the s. 1 analysis have been outlined in my reasons in *Keegstra* and the comments made there are equally applicable in this appeal. What is of utmost importance is a recognition that s. 1 both guarantees and limits Charter rights and freedoms by reference to principles fundamental in a free and democratic society. This analysis requires an approach sensitive to the context of a given case, it being necessary to explore the nature and scope of constitutionally entrenched human rights in light of the facts at hand.

- [18] Mr. Kurz referred to *Re Caddedu and The Queen* (1983), 41 O.R. (2d) 481 (C.A.) ("Caddedu"). In *Caddedu*, the issue was whether the court would give judgment despite the death of Mr. Caddedu, who had applied for a writ of habeas corpus. In that case the Attorney General and counsel for the deceased both sought a determination of the issues, which involved the interpretation of s. 7 of the Charter as it applied to the revocation of parole. The court refused, having concluded that the appeal had abated and that it would be inappropriate for the court to deal with it further.
- [19] Counsel for the intervener also referred to *Payne v. Ontario (Minister of Energy, Science and Technology)*, [2002] O.J. No. 2566 (C.A.) ("Payne"), a recent case in which the Ontario Court of Appeal, despite the request of the Attorney General, declined to hear an appeal which it determined had become moot and where the court emphasized that the party seeking to have a moot appeal determined on its merits bears the onus of convincing the court to make an exception to the general rule against hearing such appeals.
- [20] Mr. Kurz agreed with the Attorney General's position that Ms. Collins would not meet the standard for either private standing or public interest standing. On the issue of private standing, he referred to *Wilson Estate v. Canada (Attorney General)*, (1996), 25 B.C.L.R. (3d) 181 (S.C.) ("Wilson"), where Shabbits J. held that the administrator of the estate of Adeline Wilson could not proceed with a claim under s. 24 of the Charter for damages for severe personal injuries allegedly suffered in police cells and flowing from an alleged breach of her rights under various sections of the Charter. Mr. Justice Shabbits held that the Estate Administration Act does not limit the rights and freedoms guaranteed by the Charter and did not bar the action. He concluded, however, that there was no remedy under s. 24 of the Charter available to the estate since it was the personal rights and freedoms of the deceased which allegedly had been infringed.
- [21] Mr. Christie submitted that the proceedings are not moot but that, even if they are, the court should exercise discretion to hear and determine the constitutional challenges to the legislation.
- [22] Mr. Christie argued that Betty Collins is in the same position as Doug Collins would be with respect to further publication of the material. He advised the court that Betty Collins wishes to communicate freely the exact contents of the material that was before the Tribunal, and to be able to publish it in any way that she sees fit. He argued that the Tribunal Order restricts her rights to publish the four columns and that she should be able to continue with the proceedings commenced by her late husband, the author of the columns. He submitted that the Order would encompass any possible publication of the four columns together, by anyone, when the Order is understood in the light of the Reasons for Decision of Tribunal Member Patch. Mr. Christie characterized the Order as an ongoing prohibition against the re-publication of the four columns, a prohibition which is not dependent on the nature of the publication, the medium in which the articles are published, or any other factors.

- [23] Thus, Betty Collins's position is that she is particularly affected by the Tribunal order and on that basis should be granted standing as a substituted petitioner or intervener (as has been done in cases such as *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, *Skapinker*, *supra*, and *R. v. Mercure*, [1988] 1 S.C.R. 234 ("*Mercure*"). Mr. Christie also suggested, although he did not argue strongly, that Ms. Collins qualifies for public interest standing. He emphasized that, in his submission, the Tribunal decision finding that the four columns offend s. 7(1)(b) of the Code would bind future tribunals.
- [24] Mr. Christie submitted that the legislation, in effect since 1993, has amazingly wide scope, goes further than any other equivalent statute in Canada in restricting freedom of expression, yet has not been tested in court. He argued that the validity of legislation restricting freedom of expression does not depend on the context of a particular publication allegedly infringing that legislation. He suggested that the Attorney General has done everything he can to avoid review of these provisions and that the continuing existence of the legislation creates a chilling effect on the expression of controversial views, a matter of importance to all citizens. Mr. Christie argued that human rights tribunals, in practice, never rule against the legitimacy of their own powers or the constitutional validity of their own enabling legislation and thus little weight should be placed on the two Tribunal decisions regarding the legislation. Leaving the matter undecided by the courts, he urged, creates social uncertainty.
- [25] As for the jurisprudence relied upon by the Attorney General and the intervener, Mr. Christie argued that it is distinguishable. He pointed out that *Stinson*, *supra*, involved a non-transferable pension, valid only for the life of the recipient; *Caddedu and Wilson*, *supra*, were criminal cases where there was no transferable asset like copyright in a work; and *Borowski and Payne*, *supra*, both involved litigation where the statute in question had been amended or struck down by the time of the hearing. In contrast, he urged, the written word does not die with its author and here Betty Collins has the right to publish these particular words but is prevented from doing so by the Tribunal's Order.
- [26] Mr. Christie submitted that, even if the case has become moot, the court should proceed to hear it because it raises important issues affecting many citizens, and those issues have proved to be evasive of review. He argued that although deference to the legislature is, in general, the appropriate stance, that is not the case when legislation is aimed directly at a Charter right such as freedom of expression, which he said is the aim of s. 7(1)(b) of the Code.
- [27] In reply on the issue of whether the court should exercise its discretion to hear and determine the judicial review application, counsel for the Attorney General submitted that although the necessary adversarial relationships might prevail, Betty Collins's interest in knowing whether or not she can republish the four columns does not constitute the kind of collateral consequence arising from a completed cause of action to which the Supreme Court of Canada referred in *Borowski*. Ms. Mrozinski argued that further publication of the four columns may or may not contravene s. 7(1)(b) of the Code, depending on the medium

of publication, nature of circulation, and other factors and that the Supreme Court of Canada has warned against hypothetical litigation in the absence of adjudicative facts providing a context. With respect to the second factor in *Borowski*, judicial economy, she submitted that a determination of the constitutional issues would have no practical effect on the rights of the parties, nor would it determine the controversy which gave rise to the challenge in the first place. She argued that this was clearly not the type of issue which is of a brief but recurring nature and elusive of judicial review; thus, the determination of constitutionality should be made where there is a live issue and the full participation of all parties. On the third factor, Ms. Mrozinski argued that not only should courts be reluctant to decide constitutional issues when it is unnecessary to do so, but also the "dialogue" between courts and legislatures reinforces this point (referring to the "dialogue theory" discussed in *R. v. Mills*, [1999] 3 S.C.R. 668.)

- [28] The intervener agreed with the Attorney General that this is not an appropriate case for the court to exercise discretion to hear a case which has become moot.

ANALYSIS:

A. Are the judicial review proceedings moot?

- [29] Are the proceedings moot in the sense that no live controversy remains affecting the rights of the parties to these proceedings?
- [30] Tribunal Member Patch concluded that the complaint proceedings were not moot due to Mr. Collins's death after the Tribunal had received submissions on the constitutional issues and before it gave its decision. I note that the judicial review proceedings before me are different from the complaint proceedings and that submissions on the merits of the petition for judicial review have not yet been made. Referring to Tribunal Member Patch's Reasons, I do not think that the possibility that the North Shore News might be entitled to the return of the \$2,000 it paid to Mr. Abrams pursuant to the Order constitutes a practical impact on the parties to these judicial review proceedings, in which neither the North Shore News nor Mr. Abrams participated. Nor do I think that the possibility of "clearing the name" of Mr. Collins can qualify as a practical impact. I say this for two reasons. First, there are many cases in which the survivors of a litigant might want the opportunity to clear the name of that litigant; however, the courts cannot be made available simply for that purpose. Second, some indication of legislative policy in this respect may be found in the Estate Administration Act, which does not allow for the continuance of litigation by the executor or administrator of a deceased person in an action claiming damages for libel or slander (s. 59(1)), suggesting that reputational interests do not in general survive the decease of the person whose reputation was affected.
- [31] I am not persuaded by Mr. Christie's argument that the Tribunal Order applies to the four newspaper columns per se and would be breached by their re-publication. The cease and desist order binds only the two parties to whom it was directed: Doug Collins and the North

Shore News. The Tribunal's finding that the publication in 1994 in the North Shore News contravened s. 7(1)(b) would not bind a future Tribunal if there were to be a fresh complaint flowing from re-publication at a different time and in a different context, whether by Ms. Collins or some other person.

- [32] In any event, the Tribunal does not operate under the principles of stare decisis. For example, in Reasons for Decision dated February 2, 1999, Tribunal Member Patch considered the proper approach to the interpretation of s. 7(1)(b) and modified in some respects the approach adopted by Tribunal Member Iyer in *Canadian Jewish Congress*. Mr. Patch referred to the importance of flexibility as well as consistency, and stated, "The starting point for a consideration of this issue is that an administrative tribunal is not bound by its prior decisions." In the end, Mr. Patch concluded that s. 7(1)(b) was infringed by the publication of the four columns, while Ms. Iyer had concluded that it was not infringed by the publication of one of those four.
- [33] The factual underpinning for the judicial review application was the alleged breach of Mr. Collins's constitutional and other rights as a result of the Tribunal proceedings and Order. Such rights are personal and do not pass by succession: *Wilson and Stinson*, supra. The comments of the Ontario Court of Appeal regarding the application for habeas corpus in *Re Caddedu*, supra, at 485 are apposite:

The fact remains that this is not a constitutional reference, in which the advice of the court is sought by one or other of the governments. It is litigation between the Crown and one of its citizens, and the citizen is now dead. Whether his parole was validly suspended and revoked in 1982 can have no practical effect so far as he is concerned.

- [34] While Ms. Collins may now have a proprietary interest in the four columns, she has not stepped into Mr. Collins's shoes in any other relevant respect. She was not a party to the complaint proceedings, nor to the judicial review proceedings prior to her husband's death; indeed, no basis was described to me on which she could have been a party.
- [35] I conclude that the death of the petitioner Doug Collins makes these proceedings moot.

B. Would Betty Collins qualify for public interest standing?

- [36] Although there was no formal application for Betty Collins to be granted public interest standing, Mr. Christie suggested that Ms. Collins would qualify for such standing. She would have to satisfy the conditions set out in *Council of Churches*, supra, where Cory J. (for the court) referred to the previous jurisprudence regarding public interest standing, and confirmed that in determining whether to grant public interest standing a court must consider three aspects: (1) is there a serious issue as to the invalidity of the legislation in question; (2) has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity; and (3) is there another reasonable and effective way to bring the issue before the court. Cory J. commented at 252:

It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations (sic) pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

The court held that the Canadian Council of Churches, an umbrella organization whose members were interested in the protection and resettlement of refugees, should not be granted status to proceed with an action challenging the validity of the amended Immigration Act, 1976, S.C. 1976-77, c.52, which came into effect January 1, 1989. The determining factor was that individual refugee claimants would have standing to initiate a constitutional challenge to alleged infringements of their own rights under the Charter.

[37] Similarly, if and when other persons are required to respond to complaints under s. 7(1)(b) of the Code, they will be in a position to challenge the constitutionality of the legislation in a context of an alleged breach of their own rights under the Charter. For that reason alone, I think that Ms. Collins would not qualify for public interest standing even if she had met the other two criteria.

C. Should the Court Exercise Discretion to Hear the Application?

[38] The next question is whether this is, although moot, one of those matters which should be heard and determined under the principles set out in *Borowski*, *supra*.

1. Adversarial Nature of the Dispute

[39] Will the matter, if it proceeds, be properly argued by parties with a stake in the outcome? Mr. Christie made it clear that he and his client very much wish the opportunity to advance the arguments and move the matter forward. However, the question is not whether there would be argument but whether that argument would occur in a truly adversarial context.

- [40] The Supreme Court stated in *Borowski*, *supra*, that one of the main reasons to consider that the adversarial relationship will remain strong is that the litigant bringing the proceeding will experience "collateral consequences" of the outcome. The clear presence of collateral consequences may be particularly important when the case becomes moot at the early stages (as here) because it may be necessary to maintain an adversarial context not only at this stage but also, possibly, through subsequent years of appeals.
- [41] Examples of collateral consequences referred to in *Borowski* are: prosecutions for municipal bylaw violations outstanding against an individual who had sold a restaurant and therefore could no longer pursue an order for mandamus for a licence (*Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58); criminal proceedings where the sentence has been served before the appeal is heard (see *Borowski* at 359); and the existence of other persons with a stake in the outcome who can be substituted as parties or interveners (*Skapinker and Mercure*, *supra*.) Other examples are referred to by the Ontario Court of Appeal in the following passage from *Payne*, *supra*, at para. 24:

Before addressing these arguments directly, we observe that none of the circumstances justifying the hearing of a moot appeal described in the cases to which we were referred, exist in this case. This is not a case, like *Vic Restaurant Inc. v. The City of Montreal*, where there are other proceedings involving these parties which could be collaterally affected by the judgment under appeal. Nor is this a case, like *M. v. H.*, [1999] 2 S.C.R. 3 or *Horsemen's Benevolent & Protective Assn. v. Ontario Racing Commission* (1997), 37 O.R. (3d) 430 (C.A.), where there are other cases, either before the court or likely to come before the courts, involving other litigants where the issue decided on this application will have to be litigated. Nor is this a case, like *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, a case heavily relied on by Ontario, where the judgment under appeal places in doubt the legality of governmental action, other than the action in issue in the specific case, engaged in by the government in reliance on the challenged statutory authority. Finally, this is not a case like *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [[1999] 3 S.C.R. 46] where the nature of the issue raised on appeal is such that it will almost always be rendered moot before the opportunity for appellate review arises.

- [42] In *Mercure*, *supra*, litigation proceeded despite the death of a party, and the case was emphasized by Mr. Christie in his submissions. Father *Mercure* had been charged with speeding and took the position that he was entitled to have a trial conducted in French and to have that trial delayed until the relevant provincial statutes were produced in French. Before he died, he had obtained leave to appeal to the Supreme Court of Canada from the decision of the Saskatchewan Court of Appeal. The Supreme Court authorized intervenor language-rights associations to continue the appeal as principal parties. It does not appear from the Supreme Court of Canada Reasons whether proceeding in this manner was a subject of controversy between the parties. However, the case raised the question whether s. 110 of the North-West Territories Act, R.S.C. 1886, c. 50, as amended, required the Province of Saskatchewan to print its laws in English and in French. It appears to have been fully argued in the Saskatchewan Court of Appeal (see (1985), 24 D.L.R. (4th) 193 (Sask. C.A.)) and

that there would have been collateral consequences for the Province of Saskatchewan such that it could have wished to see the matter resolved.

- [43] Professor Sossin suggests that there are some instances of courts continuing with proceedings even where there is an absence of "collateral consequences" for the parties, stating at 111:

Where the factual underpinning of a dispute has fallen away, the parties may still wish to proceed with the matter as a "test case" to determine the issue in question. Here too an adversarial relationship between the parties may well remain even in the absence of a live, factual dispute. An illustration of this scenario is *McCorkell v. Riverview Hospital*. This case concerned a constitutional challenge to a section of British Columbia's Mental Health Act, which authorized the involuntary confinement of the mentally ill. While the person who launched the challenge was no longer confined at the time of the hearing, Donald J. nonetheless held that "there was a full adversarial test of the issues in this case."

While an adversarial posture between the parties is an essential prerequisite for hearing a moot case, it is not in itself sufficient. If every group could resort to the courts to seek redress against an adversary, courthouses could not be constructed quickly enough to keep up with demand. A court must set limits on the types of disputes that it can and should resolve.

- [44] In *McCorkell v. Riverview Hospital* (1993), 104 D.L.R. (4th) 391 (B.C.S.C.) ("*McCorkell*") where the issue was whether to continue with judicial review proceedings and a constitutional challenge to a section of the Mental Health Act, R.S.B.C. 1979, c. 256 despite the release of the patient from the institution before the matter was heard, it is noteworthy that both the Attorney General and the organization representing the patient wished to continue the matter as a test case in order to remove uncertainty about the law, and that the court found that the constitutionality of the legislation might never have been determined without such a test case due to the time needed to get a case to court.
- [45] There is no doubt that Ms. Collins has a stake in the outcome of a constitutional challenge to s. 7(1)(b) of the Code, as does anyone who might contemplate publishing material possibly in contravention of it. A successful constitutional challenge would provide her with some direction or comfort. However, I do not think that such a stake is of the same nature as that in the examples of collateral consequences referred to in *Borowski*, *supra*.
- [46] Counsel for the Attorney General pointed to cases in which the Supreme Court of Canada has warned against proceeding with hypothetical litigation lacking the context of adjudicative facts: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; and *Taylor*, *supra*.
- [47] Though Mr. Christie argued that, as in *Mercure*, *supra*, Ms. Collins should be permitted to carry on the proceedings as an intervener, these factors militate against such permission: (1) the position of the Attorney General in these proceedings is that there is not uncertainty in the law such that a "test case" would be desirable; (2) the judicial review proceedings are a

matter of first instance so far as the courts are concerned and a record has not been built as it was in *Mercure*; and 3) there would be an absence of adjudicative facts since Ms. Collins has not published the materials (nor indicated where or how she would do so).

[48] In summary, I am not persuaded that there are "collateral consequences" here in the sense in which that term has been used in the jurisprudence, although otherwise it does appear as if the matter would be fully argued.

2. Judicial Economy

[49] Because of the considerations I have already discussed, I think that a decision in these proceedings would have no practical effect on the rights of the existing parties and limited practical effect on Betty Collins if she were added as a party.

[50] This is not a situation of recurring nature but brief duration, elusive of review, comparable to *McCorkell*, *supra* (mentally disabled persons challenging detention), *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 (woman seeking to set aside an injunction ordering her not to have an abortion), or *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, *supra* (legal aid coverage in child protection proceedings). Persons who run afoul of s. 7(1)(b), as did Mr. Collins, will be able to challenge the legislation. There is nothing inherent in proceedings under s. 7(1)(b) such that the time taken to bring the matter to court will exceed the life of the dispute.

[51] Although Mr. Christie argued that *Berscheid v. Westbank Indian Band*, (2 February 1999), Victoria Registry, 96 3585 (B.C.S.C.) shows that this legislation is elusive of review and submitted that the Attorney General has done everything possible to ensure that the constitutionality of s. 7(1)(b) of the Code remains untested, a review of that decision does not support those contentions. The complaint of a violation of s. 7(1)(b) in the *Berscheid* case was withdrawn when the complainant determined that the costs in time and money made it impossible to proceed further. The Human Rights Commission advised the court that it would not proceed to hear the complaint in the absence of the complainant. Kirkpatrick J. referred to arguments by counsel for Mr. Berscheid that the Attorney General had evaded review but did not make a finding to that effect. Instead, she stated at para. 11:

In my view, there will be clear opportunities to challenge this legislation in other situations. There is nothing to suggest that such disputes will have always disappeared before the challenge can be heard. That determination should be made in a case where there is a live issue and with the full participation of all parties affected by the decision. This is not one of those cases where there are special circumstances making it worthwhile to apply scarce judicial resources.

[52] As for the final aspect of the judicial economy consideration, Sopinka J. stated in *Borowski*, *supra* at 361:

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law

[53] Mr. Christie argued that there is a social cost in leaving the matter undecided. He submitted that the legislation has a chilling effect on free expression, that it goes further than any other legislation in the country in constraining the expression of controversial ideas, and that the absence of a judicial determination regarding its constitutionality must be rectified. The Attorney General and intervener, however, argued that the constitutionality of the legislation has been tested twice before B.C. Human Rights Tribunals and that the constitutionality of similar legislation, namely s. 13 of the Canadian Human Rights Act, R.S.C. 1985, c. H-6, was upheld in *Taylor*, supra. Section 13 provided:

13(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination. (emphasis added)

[54] In *Taylor*, supra, Dickson C.J. for the majority held that the section infringed the right to freedom of expression but constituted a reasonable limit under s. 1 of the Charter. He stated that the phrase "hatred or contempt" is sufficiently precise and narrow to limit the impact of the section to those expressive activities which are repugnant to Parliament's objective. At 939-40 he wrote:

Though it is true that the absence of an intent requirement under s. 13(1) may make the section wider in scope than the criminal provision upheld in *Keegstra*, this particular distinction is made necessary by the important objective of the Canadian Human Rights Act of eradicating systemic discrimination. Finally, by focusing upon "repeated" telephonic messages, s. 13(1) directs its attention to public, larger-scale schemes for the dissemination of hate propaganda, the very type of phone use which most threatens the admirable aim underlying the Canadian Human Rights Act.

It will be apparent from the preceding discussion that I do not view the effects of s. 13(1) upon the freedom of expression to be so deleterious as to make intolerable its existence in a free and democratic society. The section furthers a government objective of great significance and impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee. Moreover, operating in the context of the procedural and remedial provisions of the Canadian Human Rights Act, s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda. It is therefore my opinion that the degree of limitation imposed upon the freedom of expression by s.

13(1) is not unduly harsh, and that the third requirement of the Oakes proportionality approach is satisfied.

[55] Mr. Christie's position was that the Taylor case related to legislation specifically directed at repeated telephonic communication, quite different from s. 7(1)(b) of the British Columbia Code which is broadly directed.

[56] Mr. Christie is correct that the Taylor decision upheld legislation with a considerably narrower focus than that of s. 7(1)(b) of the Code. However, the discussion in Taylor, *supra*, of the remedial purpose of human rights legislation and of the wording "likely to expose a person or persons to hatred or contempt", while not determinative because of the broader sweep of s. 7(1)(b), will certainly play an important role in arguments about the constitutionality of that section.

[57] I note as well that many of the cases in which courts have agreed to hear and determine issues which have become moot are at the appellate level where considerable time and energy has already been spent arguing the matter in lower courts. (One of the notable exceptions is McCorkell, *supra*, where it was an important issue, elusive of review, and both parties asked the court to proceed despite its mootness.) Here, although considerable time has passed since the complaint was filed in 1994, the proceedings are not at so advanced a stage. Argument regarding the freedom of expression issues was made through written submissions to the Tribunal. However, it appears from the Reasons of Tribunal Member Patch dated November 30, 2001 that Mr. Christie made no submissions on any of the other constitutional questions, and there appears to be no record regarding those other questions. Further, with respect to the freedom of expression argument, it is a little difficult to know what the record would be if the matter proceeded. Ms. Collins cannot pursue the vindication of her late husband's constitutional rights; she says that her own have been affected because the Tribunal decision constrains her from re-publishing the same material. How and where she wishes to re-publish is not specified, yet the specifics of publication would form an important part of the determination whether s. 7(1)(b) has been infringed.

[58] Mr. Christie pointed to the length of time which has passed from the filing of the Abrams complaint in 1994 to the present, and expressed concern at the prospect that a judicial opinion on the validity of s. 7(1)(b) may have to await another litigant. However, taking all of the circumstances into account, I conclude that the judicial economy factor weighs against continuing with the proceedings.

3. Role of the Court

[59] Sopinka J. stated in Borowski, *supra*, at 362:

The third underlying rationale of the mootness doctrine is the need for the court to demonstrate a measure of awareness of its proper law-making function. The court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

[60] More recently, in *Phillips*, supra, Sopinka J. for the majority stated at 111-12:

This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues and the principle applies with even greater emphasis in circumstances in which the foundation upon which the proceedings were launched has ceased to exist.

The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

Later, Sopinka J. observed that the practice of refraining from unnecessary commentary on issues applies even more strongly when the substratum on which the case was based has ceased to exist, and applies even when the appeal has already been argued. At 113, he stated:

Accordingly, in *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the Court was advised, in the middle of argument, that the appellant, who was appealing an order enjoining her from having an abortion, had proceeded with an abortion. The Court felt constrained to deal with legal issues with respect to the propriety of granting an injunction in the circumstances. It did so because the nature of the issue was such that it would be difficult or impossible for another woman in the same predicament to obtain a decision of this Court in time. The Court, however, declined to deal with the issue of fetal rights under s. 7 of the Charter and stated, at pp. 571-72:

As we have indicated, the Court decided in its discretion to continue the hearing of this appeal although it was moot, in order to resolve the important legal issue raised so that the situation of women in the position in which Ms. Daigle found herself could be clarified. It would, however, be quite a different matter to explore further legal issues which need not be examined in order to achieve that objective. The jurisprudence of this Court indicates that unnecessary constitutional pronouncement should be avoided .

[61] Context is important for the Tribunal under the Code in determining whether there has been a contravention of s. 7(1)(b). It is also important for courts in determining whether legislation is unconstitutional. The risks of considering such issues in the abstract are considerable.

[62] The obligation of a court to hear and determine constitutional issues when it is necessary to do so is clear. It is equally clear that a court should refrain from doing so except when it is necessary.

[63] This third and final factor also points to an exercise of discretion against continuing to hear the proceeding.

CONCLUSION:

[64] In summary, because of the death of Doug Collins, the sole petitioner in these proceedings, there is no longer a controversy affecting the rights of the parties. Although the proceedings could continue through the procedural device of joining Betty Collins as a party or intervener, it is not appropriate to grant such an order because: the proceedings relate to alleged breaches of Mr. Collins's constitutional rights, which were personal to him; continued proceedings would lack a specific factual context; nothing prevents live disputes arising which would allow other persons to challenge s. 7(1)(b) of the Human Rights Code; the Supreme Court of Canada in *Taylor*, supra, has upheld legislation with very similar wording to that of a core element of the impugned provision; and the proceedings here, although they have stretched over many years, have not progressed beyond the initial stages of arguing the constitutional issues on their merits.

[65] The Attorney General's application is allowed. The petitioner's application for judicial review is dismissed because it is moot and does not fall within the exceptional circumstances in which a court should exercise discretion to hear and determine issues despite the absence of a concrete, live dispute between the parties.

"Lynn Smith, J."

The Honourable Madam Justice Lynn Smith

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