Update

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SECTION 15 AT THE TRIAL LEVEL - PRESENTING THE *SEIU 204 CHARTER* CHALLENGE

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1. INTRODUCTION

This paper addresses a number of the strategic, legal and practical issues involved in framing and litigating a section 15 *Charter* challenge at the trial level. The case of *SEIU Local 204 v. Attorney General of Ontario* (*"SEIU 204"*)[1] in which the authors were counsel, is used as the framework for this discussion.

As the issues in *Charter* litigation involved are numerous and complex, this paper will focus on the following key issues:

1. Identifying the Appropriate Remedy
2. Choosing the Appropriate Forum
3. Identifying the Appropriate Applying and Responding Parties
4. Marshalling the Evidence under both Section 15 and Section 1
5. Legal Costs

First, however, to give the proper context, this paper starts with a short summary of the *SEIU 204* decision.

2. *SEIU LOCAL 204 ATTORNEY GENERAL OF ONTARIO*

A. Challenge to *Schedule J of Savings and Restructuring Act, 1995*

In the *SEIU Local 204* case, the Ontario Court of Justice struck down *Schedule J* of *The Savings and Restructuring Act, 1995* as violating section 15(1) of the *Canadian Charter of Rights and Freedoms. Schedule J* had repealed the pay equity rights of over 100,000 women under Ontario's *Pay Equity Act.* These women had worked in predominantly female workplaces such as nursing homes, daycare centres, social service and community agencies and had used the proxy comparison method to identify their compensation discrimination.

The Ontario Government did not appeal the Court of Justice's decision.

This application was brought by SEIU Local 204, a union which represented approximately 5,000 women, and by two individual SEIU members whose pay equity rights had been affected, Kara Valian and Carlene Chambers. The applicants argued that *Schedule J* of the *Savings and Restructuring Act, 1995* violated the rights of SEIU Local 204 members who perform undervalued "women's work".

Schedule J repealed certain 1993 amendments to the *Pay Equity Act* which provided for the use of the proxy method of comparison to determine whether pay equity exists at an employer's workplace.The proxy comparison method provided a tool to remedy the systemic sex discrimination in compensation experienced by women in broader public sector workplaces with predominantly female workforces. The Court stated:

> The 1993 Amendments had been introduced so that certain women working in the broader public sector, that is to say, for employers supported in large part by government funds, could achieve pay equity even though so few men worked for their employers as to make a pay comparison with male co-workers impossible.[2]

On introducing *Schedule J,* the Government stated that the measure was a necessary financial tool to "help municipalities, hospitals, colleges, universities, schools and the provincial government to meet the new financial targets." [3]They also argued that it was necessary to restore pay equity to its true principles since it maintained that the proxy method was flawed and did not properly identify sex discrimination in compensation.

B. Impact of *Schedule J* on Women

Schedule J

a. capped an employer's obligation to honour pay equity adjustments ordered in the proxy pay equity plan. Under *Schedule J*, the employer was only required to devote an amount equal to 3% of its 1993 payroll towards closing the wage gap identified in the proxy pay equity plans.

b. released employers from the obligation to make pay equity adjustments retroactive to January 1, 1994;

c. authorized employers not to honour the schedule of compensation adjustments for achieving pay equity set out in the plan or any other document (such as a collective agreement) rendering negotiated pay equity agreements legally unenforceable; and

d. abolished the proxy method of comparison as of January 1, 1997.

As a result of *Schedule J*, the 100,000 women who were scheduled to receive pay equity adjustments to rectify identified gender bias in the valuation of their work were denied access to these payments except to the extent that they could be met within the 3 per cent cap based on the employer's 1993 payroll. The 3 per cent cap represented a very small portion of the identified wage gap.

Based on the government's current estimates, the annual wage bill in all proxy workplaces in the broader public sector would need to be increased at the maturity of all the proxy pay equity plans by $484 million annually to fully eradicate discriminatory wages in all Ontario proxy workplaces. By the government's own estimate, the 3 per cent cap payment is $418 million per year less than the amount all the proxy recipients in the sector would have received at maturity date if *Schedule J* had not been enacted.

C. Court Reasons

Mr. Justice O'Leary in ruling that *Schedule J* violated s. 15(1) of the *Charter*, summarized his reasons as follows:

> It is a matter of choice for government as to whether or not it legislates to remove inequity. When, however, government decides to legislate and identifies the disadvantaged group the legislation is intended to benefit, then it must, subject to s. 1 of the *Charter*, make the legislation apply fairly and equally to all within the group or government itself is guilty of discriminating. This is especially so where government itself picks up the cost of removing the inequality that is the focus of the legislation. Where legislation discriminates against a portion of the group the legislation is designed to help, the legislation contravenes s. 15(1) of the *Charter* and so is *ultra vires* unless the discrimination is demonstrably justified under s. 1 of the *Charter*.
>
> The *Pay Equity Act*, because of the 1996 Schedule J amendment, discriminates against proxy sector women by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the Act grants to other women working in the broader public sector.
>
> The discrimination has not been justified under s. 1 of the *Charter*, in that the stated objective of the Schedule J amendment does not warrant overriding the constitutional right of equal benefit of the law. Indeed, the stated objective - the restoring of the Pay Equity Act to true pay equity principles - I find to be mistaken. Proxy method was and is an appropriate pay equity tool in keeping with the intent of the Pay Equity Act to relieve women, including those working in female-segregated workplaces in the broader public sector, from systemic gender-based wage discrimination.

The Court accepted the applicants' evidence that the Government had moved to cap proxy pay equity adjustments at 3%of payroll and eliminated the proxy method "essentially for fiscal reasons."[4] The Court stated:

> By the government's own estimate, the 3 per cent cap payment is $418 million per year less than the amount all the proxy recipients in the sector would have received at maturity date if Schedule J had not been enacted. [5]

Further, the Court accepted the applicant's evidence concerning the discrimination faced by the women affected by *Schedule J.*

> Women who work in predominantly female workplaces are particularly vulnerable to sex-based discrimination in compensation because they perform work which is most stereotypically identified as being "women's work" and which, accordingly, if most undervalued in comparison with the work performed by men. That portion of the wage gap that is attributable to systemic sex discrimination is widest in predominantly female workplaces and the women who work in these workplaces

> are among the most disadvantaged by sex-based discrimination in compensation, both as compared with men and as compared with other working women.[6]

Mr. Justice O'Leary rejected the Government 's justification that the proxy method violated true pay equity principles and did not identify discrimination.

> the *Schedule J* amendment cannot be justified on the basis that to restore the Act's integrity it was necessary to remove the proxy method, a flawed tool that did not quantify gender-based wage inequity. I have found that basis is false. The respondent's entire justification of the amendment is grounded on the proposition I have just found faulty.[7]

Mr. Justice O'Leary concluded:

> The Government of Ontario has not satisfied me that the proxy method fails to identify the undervaluation of women's work in the proxy sector. Rather, I am satisfied that it is an appropriate method of quantifying the extent of gender-based systemic wage discrimination in that sector.[8]

Further O'Leary accepted the expert evidence of Dr. Pat Armstrong that the proxy method was an appropriate method of identification of gender-based compensation discrimination women

> The proxy comparison method was legislated and implemented in a manner which followed the same principles as the original Act. The addition of proxy was simply an extension of the sequence, established in the 1987 Act, of looking first to the closest comparator and then continuing the search until an appropriate comparator is found. Proxy was limited to the public sector where jobs and employers are similar; required an order from the Commission to ensure that the proper sequence had been followed; and was restricted to comparisons with similar organizations in the geographic region. Proxy was therefore consistent with both the original principles of the Act and with other pay practices.[9]

The Court rejected the evidence of the Government's expert, Dr. Nadine Winter. Contrary to the view of the Government's expert, Nadine Winter, the Court stated:

> Contrary to the view of Ms. Winter, Dr. Armstrong says that each of the job-to-job, proportional value and proxy methods has its own associated benefits and limitations. None of these methods are a perfect instrument for achieving equality. All of these methods, however, are still effective measures for reducing the wage gap caused by the discriminatory undervaluation of women's work.[10]

In rejecting the Government's expert, Mr. Justice O'Leary accepted the following opinion of Dr. Armstrong:

> In my opinion, the manner in which proxy was legislated and implemented ensured that the proxy comparison method followed the same principles as the original Act

> and properly identified systemic discrimination in the health and social services sector.[11]

D. Costs

The applicants were awarded their costs which were subsequently fixed on consent at $140,000.00.

3. IDENTIFYING THE REQUIRED RESULT OR REMEDY

A. *SEIU Local 204* Court Ordered Remedy:

Mr. Justice O'Leary issued a declaratory remedy:

> Since it was the 1996 Schedule J amendment that created the discrimination, I declare that Schedule J of the Savings and Restructuring Act, 1996, amending the Pay Equity Act, R.S.O. 1990, c. P.7, is unconstitutional and of no force and effect.[12]

This was the precise remedy requested by the applicants. It had the effect of restoring fully all the pay equity adjustments in the proxy pay equity plans in the province, including those which had been negotiated by SEIU Local 204.

The Union spent the next year negotiating with its employers the precise consequences of the re-implementation of the plans retroactively. The Government did not pay out the funding to the employers for these retroactive adjustments until late Spring of 1999 and even then the Government only transferred to the employers the funds needed to implement the *SEIU 204* decision from 1995 up to the January 1, 1998 adjustment. It is estimated that the cost of these retroactive adjustments Ontario-wide was $230 million. The Government is currently refusing to fund the pay equity adjustments which are required at 1% per year from January 1, 1998 onwards and this may lead to a further *Charter* challenge on the refusal to fund.

B. Importance of Remedy Identification

Defining the required remedy is critical to framing a section 15 *Charter* challenge. What result does the client seek and can it be obtained through the *Charter* litigation?

In other words, to begin properly, you need to begin at the end. You need to clarify what result you want the judge to reach and define what remedy you are seeking. This gives focus to the preparation. It is also of primary important because

- the remedy you seek may determine which forum must adjudicate the complaint, i.e. is the tribunal competent to award the remedy?;

- the remedy may determine who are the appropriate applicants, i.e. do the applicants have standing to seek the remedy? This is particularly important if the remedy is one under s. 24(1) of the *Charter* rather than s. 52.

- the remedy may determine what kind of evidence you need to marshal. Again this is important if you are seeking a remedy under s. 24(1). In that case, you need to lay an evidentiary foundation in order to show that the remedy you seek is "just and appropriate in the circumstances";

- identifying the remedy may affect how you decide to characterize the breach of the *Charter* right.

C. Declaratory Remedy of Invalidity under Section 52(1)

In the *SEIU 204* case, the remedy the applicants needed was the reinstatement of the rights of SEIU Local 204 and its members to the proxy pay equity adjustments contained in the pay equity plans which were voided by *Schedule J.* This remedy could be achieved by a declaration that the provisions of *Schedule J* were unconstitutional and of no force and effect under section 52(1) of the *Constitution Act, 1982* which provides as follows:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

A declaration of invalidity is the usual remedy granted by the courts.[13] An application for a declaration of invalidity, which could involve striking down the law or variations such as severance, is available under both s. 52 of the *Constitution Act, 1982*[14] and s. 24(1) of the *Charter*.[15] Section 24(1) is not needed to provide a remedy where a declaration of invalidity is all that the applicant is seeking:[16] Where an applicant is seeking a remedy under s. 52, it is not necessary that she have suffered individual financial damage in order to seek a remedy.

In dealing with a request for a declaration of invalidity, issues with respect to severance and suspension of the remedy need to be considered.

...Severance...

The manner in which the legislation has failed the section 1 test is critical to the choice of the appropriate remedy. If the purpose of the legislation is not pressing and substantial[17] or the legislation failed the rational connection test,[18] the law will be struck down. However, if the legislation fails only the minimal impairment test, the Court has more flexibility and will consider whether the constitutional part of the law can be severed from the unconstitutional part of the law. The question is whether "the legislature would have passed the constitutionally sound part of the scheme without the unsound part".[19]

In the *SEIU 204* case, the objective was to strike down the entire *Schedule J* as the applicant argued that there was no part of *Schedule J* which was constitutional. As *Schedule J* was a separate law which amended the *Pay Equity Act* it was easier for the Court to strike it down entirely without having to consider its impact on the rest of the *Pay Equity Act* which remained in force.

...Suspension of Remedy...

When a declaration of invalidity will affect legislative objectives and budgets, as the *SEIU 204* case did, a court may temporarily delay the declaration of invalidity to allow the legislation to bring the law into compliance with the *Charter*:[20] Thus, it is necessary to be prepared to argue that the court should not allow an unconstitutional state of affairs to exist, even for a temporary period of time[21] and that this state of affairs would unduly harm the affected employees:[22] In any event, it should be argued that the court should place a strict time limit on the suspension of invalidity, if ordered, as the Supreme Court of Canada did in *Reference Re: Language Rights under the Manitoba Act, 1870.*[23]

D. Section 24 *Charter* Remedies

It is necessary to consider whether any of the distinctive remedies available under s.24(1) of the *Charter* are required, such as an injunction or damages. Section 24(1) provides as follows:

> Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

A section 24 remedy requires that the individuals complaining have suffered an infringement of their individual right. In *SEIU 204,* it was decided none of these remedies were necessary to achieve the clients' goals.

One possible remedy considered was a mandatory order requiring that the employees be paid the amount owing under the pay equity plans which had been voided by *Schedule J*:[24] However, as the effect of a declaration of invalidity was thought to accomplish this objective, no such request was made.[25] As well, there is a practice that court *Charter* declarations are almost invariably obeyed by Canadian governments without the necessity of any further directory orders:[26] In any event,

mandatory orders are rarely used in Canada, and may even be precluded due to traditional Crown immunity from mandatory relief: [27]

Another section 24(1) remedy is monetary compensation or damages. In light of the wording of *Schedule J*, it was decided that striking down the offensive *Schedule J* was all that was required as monetary compensation as would follow from reinstating the proxy pay equity plans. Accordingly, in the application, no request was made under section 24(1) for a personal remedy.

4. CHOOSING THE APPROPRIATE FORUM

The next issue to be considered is what legal procedure or route should be used to bring the *Charter* violation to adjudication. A *Charter* challenge can be commenced in three different ways.

1. It can be raised for the first time before an administrative tribunal in an adjudication of rights under the disputed law.

2. Where the administrative tribunal does not have jurisdiction or competence to address *Charter* issues, or where there is a challenge to the exercise of a statutory power of decision, the *Charter* challenge can be raised for the first time in the context of a judicial review of the tribunal's decision.

3. It can be raised for the first time in an application before the Ontario Superior Court under Rule 14.05(3) of the Rules of Civil Procedure.

A. Administrative Tribunal Proceedings

In the *SEIU 204* case, the option of bringing the *Charter* challenge at the administrative level under the *Pay Equity Act* was considered and rejected. Under the *Pay Equity Act,* a complaint of non-compliance with the pay equity plan would be brought first by way of a complaint to a Review Officer under section 22(1) of the *Act* and then any decision of the Review Officer would be contested by way of an application to the Pay Equity Hearings Tribunal under section 24 and 25 of the *Act.*

In assessing whether to proceed before an administrative tribunal, it is necessary to consider whether the tribunal is a court of competent jurisdiction. In *Cuddy Chicks Ltd. v. Ontario Labour Relations Board*[28] the Court held that in order to have the jurisdiction to consider the constitutionality of its enabling statute, a tribunal must expressly or impliedly have this jurisdiction conferred upon it by its enabling statute or otherwise.[29] A tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, the subject-matter of the *Charter* challenge and the remedy sought. As a *Charter* issue constitutes a question of law, the tribunal must have statutory authority to interpret laws. In the *SEIU 204* case, it appeared that the Pay Equity Hearings Tribunal was a court of competent jurisdiction applying the above test.

....Advantages...

- A specialized administrative tribunal is more familiar with the substantive issues although less familiar with the application of *Charter* principles. The Pay Equity Hearings Tribunal would understand without a lengthy training process the background and history of pay equity and the need for and implementation of proxy pay equity. The Tribunal at that time was considered to be more likely to rule in SEIU Local 204's favour than a court which was unfamiliar with pay equity issues.

....Disadvantages...

- It is costly and cumbersome to have to start at the administrative level and still also proceed later at the Court level since any *Charter* challenge won at the administrative tribunal level will likely be appealed.

- More than 50 employers were not complying with the proxy pay equity plans negotiated with SEIU 204 because *Schedule J* authorized them to ignore the proxy pay equity plans. SEIU 204 did not want to have to litigate against each of these employers when the real problem was with the Ontario Government and the law itself. The administrative tribunal process would have been costly. Even a test case using one such employer would have been costly and would have taken a very long time since the process of bringing the matter up through the Review Officer stage to the Tribunal and then on to the Divisional Court and the Court of Appeal would take several years.

- Before an administrative tribunal, the evidence is heard by way of oral evidence which may require many days of hearing over a lengthy period of time.

B. Judicial Review Application

As noted above, where the administrative tribunal does not have jurisdiction or competence to address *Charter* issues, or where there is a challenge to a statutory power of decision, the challenge can be raised for the first time in the context of a judicial review of the tribunal decision.[30]

In the *SEIU 204* case, it was decided, for the reasons set out further below that the application should not be brought by way of judicial review but rather under Rule 14.05.

If there had been a decision to start the constitutional challenge before the Pay Equity Hearings Tribunal, then on a judicial review of a Tribunal decision, it would be argued that the Tribunal improperly exercised its statutory power of decision when it failed to enforce the proxy pay equity plan and failed to decline to apply *Schedule J*. This exercise of the statutory power would be argued to be invalid because the authorizing statute, *Schedule J*, was unconstitutional. A declaration would be sought pursuant to s. 52 of the *Constitution Act, 1982*. The Divisional Court could either make the declaration of unconstitutionality or in lieu of making such a declaration, could simply set aside the Tribunal's decision under s. 2(4) of the *JRPA*.

There are a number of issues to consider with respect to raising a constitutional challenge in the context of a judicial review application.

....Authority to bring a constitutional challenge on judicial review...

The provisions of Ontario's *Judicial Review Procedure Act* are sufficiently broad to allow a constitutional challenge to be addressed in the context of an application for judicial review. The relevant provisions are as follows:

> 2. (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one ore more of the following:
>
> 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari;
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.
>
> 2. (4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision.

In pursuing a constitutional challenge, an applicant would be seeking a declaration in relation to the exercise of a statutory power as required in s. 2(1) of the *JRPA* and would be arguing that in light of the unconstitutional nature of the enabling statute, the Tribunal's decision was "otherwise invalid" as contemplated in s. 2(4) of the *JRPA*.

Two cases which have dealt with a constitutional challenge in the course of an application for judicial review are *Falkiner v. Ontario*[31] and *SEIU Local 204 v. Broadway Manor Nursing Home.*[32] While the Court refused to consider the constitutional challenge in the *Falkiner* case for the reasons set out further below, the Court expressly distinguished the case from the situation

> .....where the court is asked to declare that legislation *per se* limits rights and freedoms guaranteed by the *Charter*, and is consequently of no force or effect by virtue of the supremacy clause of s. 52 of the *Constitution Act, 1982* ... a proceeding which is not dependent on the infringement of the rights of an individual, or class of individuals, and which does not require, in that respect, a finding of fact.[33]

In *Broadway Manor*, the Ontario Court of Appeal ruled that the applicant OPSEU could not bring a judicial review application to challenge the constitutionality of the *Inflation Restraint Act, 1982* ("*IRA*") where OPSEU was not involved in a tribunal proceeding relating to that issue. [34]

> ....for a 'proposed' exercise of a statutory power, there must be a matter pending before the body which has been given the power together with clear evidence of an intention on the part of the body to exercise the power....What OPSEU was doing in its application for judicial review was attacking the constitutional validity of statutory powers conferred upon the board, not the proposed or purported exercise of those powers. In our opinion, therefore, the Divisional Court had no jurisdiction to hear such an application in these circumstances.[35]

The *Falkiner* case illustrates the importance of choosing the correct forum. In *Falkiner*, in an application for judicial review, the applicants argued that regulations under the *Family Benefits Act* were unconstitutional, being in violation of sections 7 and 15 of the *Charter*. The applicants, who had been denied benefits as a result of the impugned regulations, sought personal remedies under s. 24(1) of the *Charter*. The majority of the Divisional Court held that the application was premature because they had not pursued the appeal process before the Social Assistance Review Board provided under the *Family Benefits Act*. Any remedy under s. 24(1) had to be in response to an actual finding that the applicants' *Charter* rights had been violated, but in the absence of a Social Assistance Review Board ruling, no such finding of fact had been made. Therefore, it was premature for the court to consider the application before the statutory appeal process had been completed.

The *Falkiner* applicants went back to SARB which eventually ruled in their favour on the *Charter* question. The government applied to judicially review the decision and the case was heard before the Divisional Court in October 1999.

C. Rule 14.05(3) Application

In *SEIU 204* a decision was made to bring the application under Rule 14.05(3) which was considered to be the most expeditious, least costly and most effective method of bringing the s. 15 *Charter* challenge. Rule 14.05(3) provides as follows:

> A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
>
> (d) the determination of rights that depend on the interpretation of a deed, will, contractor other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> (g.1) for a remedy under the *Canadian Charter of Rights and Freedoms; or*
>
> (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.[36]

...Advantages....

- The Court has the power to strike down the law so that a systemic Ontario-wide remedy can be obtained. SEIU 204 wished a remedy which would cover not only all its members but which would assist all women affected by the legislation--women working in over 4300 separate workplaces all across the province.

- By contrast, an administrative tribunal has much more limited powers. Even if it finds a *Charter* violation, a tribunal only has the power to decline to apply the offending statutory provision in the particular case before it (see *Cuddy Chicks*)

- Under Ontario law, a party has an appeal as of right from a Rule 14.05(3) determination directly to the Court of Appeal. If the matter had been addressed first by the Pay Equity Hearings Tribunal and had been lost at that level, the Tribunal decision would have to be first taken by way of an application for judicial review to Ontario's Divisional Court. If there was a further loss at that level, then an appeal to the Court of Appeal could only be taken with leave.

- In a Rule 14.03 application, the evidence is generally taken only by way of the filing of affidavits and cross-examination on those affidavits.

- A Rule 14.03 application can be heard and decided in 9 - 12 months. The *SEIU 204* application was filed in December 1996, cross-examinations took place in February-March 1997 and argument took place over 5 days in early April 1997 with the decision being released on September 5, 1997.

....Disadvantages...

- the case is heard by a single judge rather than the three Judge panel in the Divisional Court which hears judicial review applications. With a three judge panel, there is a greater likelihood that a judge on the panel will have an understanding of *Charter* or human rights issues.

5. IDENTIFYING THE APPROPRIATE APPLYING AND RESPONDING PARTIES

In the *SEIU 204* case, the applicants were the Union, SEIU Local 204, and two individual applicants, Kara Valian and Carlene Chambers. Valian and Chambers were SEIU Local 204 health care aides employed by the Red Cross and a nursing home respectively. They were denied the pay equity adjustments which had been negotiated for them as a result of the passage of *Schedule J,* by SEIU Local 204.

The respondent was the Attorney General of Ontario. No one intervened in the proceeding.

A. Who Should The Applicant(s) Be?

... Introduction...

It is essential that the proper applicants bring the *Charter* challenge. If not, the respondents can challenge the standing of the applicants to raise the *Charter* issue. This may prove fatal to an application. The challenge could be dismissed without a ruling on the merits.

....Standing of SEIU Local 204...

There were a number of legal barriers to overcome in naming SEIU Local 204 as an applicant in the proceeding. The first issue is that technically an association does not itself have individual section 15(1) *Charter* rights which can be breached. As well, as an unincorporated association, *SEIU 204* technically does not have a legal personality at common law:[37]

While SEIU 204 does have a legal personality for a proceeding under the *Labour Relations Act*, ss.107-109 of that *Act*,[38] specifically defines the purposes for which status is given: prosecution of offences under the *Act* and suits for the enforcement of board or arbitral orders: see M. MacNeil et al., *Trade Union Law in Canada*.[39] Section 3(2) of the *Rights of Labour Act,*[40] prohibits the naming of a union as a party to an action beyond that context:[41]

> [a] trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of this Act or of the *Labour Relations Act*."

Section 3(2) has also been interpreted to act as a complete bar to the naming of a union as a plaintiff in a claim for damages for defamation.[42]

Despite the above technical arguments against standing, there were a number of persuasive legal arguments favouring naming the union as an applicant. These included the Union's role as the exclusive bargaining agent for employees affected by *Schedule J*, its obligation to negotiate pay equity plans with employers under the *Pay Equity Act*, its status as a party to the pay equity plans, and its right to bring a dispute to the Pay Equity Commission.

The Pay Equity Hearings Tribunal in *Ontario Nurses Assn. (ONA) v. Women's Christian Assn. of London (Parkwood Hospital)*[43] considered whether ONA, as an unincorporated association, had the legal capacity to challenge the constitutionality of the appropriate comparator provisions of the *Pay Equity Act*. The Tribunal decided that ONA did, in fact, have "standing", loosely defined, as the bargaining agent of the employees, whose ability to exercise their rights had been displaced by the *Pay Equity Act's* requirement that the Union act on their behalf in negotiating a pay equity plan. The Tribunal also held that an individual employee would not have had the right to bring the main question of the appropriate comparator before the Tribunal; thus, it would have been inappropriate for an individual employee to have raised the *Charter* challenge as a separate issue.

In addressing the argument that a union does not have legal personality, the *Parkwood* Tribunal drew a distinction between situations in which a union as a distinct entity challenges the constitutionality of a law and situations in which a union challenges the constitutionality of law "directly within the scope of its statutory obligation to represent employees." When a union is acting

within its representative capacity, it has the legal status to bring a *Charter* challenge, at least before the Tribunal.

The SEIU in bringing this *Charter* challenge was acting within the scope of its statutory obligation to represent employees affected by *Schedule J*. Although the SEIU's representative role is clearer when it is before an arbitrator or the Pay Equity Tribunal, the court is simply an alternative forum for an issue which could have been brought, arguably only by the SEIU and not bargaining unit employees, before the Pay Equity Commission and then before the Tribunal. The *Charter* challenge is part of the broader argument on the main question of enforcement of pay equity payments to the SEIU's bargaining unit employees.

In the *SEIU 204* case, to minimize the risk of challenges to the Union's standing, two individual applicants were added to the application. They did not seek a personal remedy under s. 24(1) but rather pursued the same s. 52 remedy as the union. In its responding materials, the Government challenged the Union's legal standing, but in the end did not pursue the argument because the individual applicants were also named,.

....Private Interest Standing....

In the context of a civil action challenging legislation under the *Charter*, traditional standing as of right exists under s.52(1) of the *Constitution Act, 1982* if a person is directly affected by the legislation in a way that is distinct from the effect on other members of the public, and if the person is relying on her own *Charter* rights. The cases indicate that a court would find a person to be directly affected if she suffered "special effects, distinct from other members of the public"[44] A person also has standing as of right under s. 24(1) of the *Charter* if her own rights have been infringed.

A restriction in private standing, however, is that in civil actions, applicants are not permitted to rely on the *Charter* rights of others. Thus, s.24(1) applies, even if the applicant seeks relief under s.52(1): *Irwin Toy Ltd.* v. *Quebec (Attorney General)*[45] Thus, an applicant is required to show not only special prejudice, but also that her *Charter* rights are affected.

One of SEIU's bargaining unit employees affected by *Schedule J* would meet both requirements. She could show special prejudice, being an employee who would have been entitled to proxy pay equity before *Schedule J*. As well, it is her *Charter* rights that she would be relying on in her challenge to the constitutionality of *Schedule J*.

....Public Interest Standing Under s.52(1)...

Even apart from SEIU 204's standing as the bargaining agent of those with individual rights, the Courts also has the discretion to grant public interest standing to allow an applicant to rely on the *Charter* rights of others in order to challenge the constitutionality of legislation.[46]The rules of standing were expanded to encompass public interest plaintiffs in a trilogy of Supreme Court of Canada decisions:[47] The requirements for public interest standing were set out in the *Borowski* decision:

(1) Is there a serious issue as to the invalidity of the impugned legislation?

(2) Does the party have a genuine interest as a citizen in the validity of the legislation?

(3) Is there no other reasonable and effective manner in which the issue may be brought before the Court?[48]

i. Is there a serious issue as to the invalidity of the impugned legislation?

SEIU 204's affidavit evidence and notice of application clearly established this requirement.

ii. Does the party have a genuine interest as a citizen in the validity of the legislation?

The concern of the courts under this requirement seems to be about "the allocation of scarce judicial resources and the need to screen out the mere busybody": *Canada (Minister of Finance)* v. *Finlay.*[49] The test, however, does not appear to be difficult to meet. The Court in *Canadian Civil Liberties Assn. v. Canada (Attorney General)*[50] characterized a serious issue as one of "general public importance". The Supreme Court of Canada stated in *Canadian Council of Churches v. Canada*[51] that an issue is serious as long as "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation".

In *SEIU 204*, a court was unlikely to find that the SEIU was a "mere busybody". First, the SEIU Local 204 was the bargaining agent for a significant number of bargaining units that had employed the proxy comparison method under the *Pay Equity Act*. Second, the *Pay Equity Act* required that pay equity plans be negotiated with the bargaining agent. Third, the *Pay Equity Act* gave bargaining agents the right to bring a dispute arising out of those negotiations to the Pay Equity Commission. Fourth, SEIU Local 204's standing would also economize judicial resources in effectively consolidating a multitude of claims into one suit.

Another concern under this criterion is that the applicant adequately represent the interests of the people whom the legislation affects. In *Canadian Civil Liberties Assn*, the Court found that the applicant association did possess a genuine interest given that "the applicant has a long history of involvement in the public debate over the constitutional validity of the CSIS legislation".[52] Similarly, in *Canadian Council of Churches*[53], the Court observed that the plaintiff organization had "demonstrated a real and continuing interest in the problems of the refugees and immigrants".[54]

Given the SEIU Local 204's position as bargaining agent for female employees affected by this legislation; its extensive experience in negotiating with employers over pay equity and proxy comparisons; and its resources as compared to the resources of individual SEIU members, there was no concern that the SEIU 204 would not adequately present the facts and issues before the court.

iii. Is there no other reasonable and effective manner in which the issue may be brought before the Court?

This branch of the test functions as the "gate" to discretionary public interest standing [55] and addresses the need for adversarial presentation and a desire to prevent immunization from review:[56] The approach of the courts appears at the moment to be split. The split turns on whether public interest standing should be granted to an applicant when there exist individuals who are more directly affected by the impugned legislation and who could potentially bring their own challenge.[57] The split is represented by the cases of *Canadian Council of Churches* and *Conseil du Patronat du Quebec Inc.* v. *Quebec (Procureur General)*[58]

In *Canadian Council of Churches* the Supreme Court of Canada denied standing to a public interest organization to challenge procedures for refugee determinations on the ground that applicants for refugee status, who were more directly affected, were in a position to challenge the Act.[59] In *Conseil du Patronat*, decided shortly before *Canadian Council of Churches*, the Supreme Court of Canada ruled that the fact that there were others who were more directly affected by the impugned legislation and who could have brought the challenge did not decide the issue of standing: [60]

Since the issue is whether to grant discretionary public interest standing, the test cannot be whether the applicant is the person most directly affected by the issue:[61] Rather, the concern must relate to having full and complete adversarial presentation of the issue:[62] Standing has indeed been granted where it was found that it was not practical to expect those directly affected by the legislation to challenge it.[63]

Even if it were practical to expect a person directly affected by the legislation to challenge it, there is no guarantee that she would be able to fully and vigorously litigate a matter. In fact, a public interest plaintiff may be more resistant to settlement pressures and have more resources:[64]

In the *Benoit* case, the Federal Court (Trial Division) consented to the request of corporations representing 5,000 Native people to be joined as plaintiffs in an action already commenced by individual Native people. The Court stated that not only did the corporations have standing, but:

> their presence before the court is essential to this action. The litigation here involves aboriginal and treaty rights. As such, it will raise issues of immense complexity and will require the examination of much historical evidence...The task of assembling, preparing and presenting the range of evidence necessary in a case of this nature is, in my view, beyond the scope of any single plaintiff or any small group of plaintiffs without the participation of native representative bodies. Should the applicants not be joined as parties, there is a genuine risk that all the evidence necessary for the court to adequately decide these issues will not be before it, and the determination of any rights under Treaty No.8 will be hindered.[65]

Thus, on the reasoning in *Conseil du Patronat*, the fact that female employees denied pay equity because of *Schedule J* were more directly affected and were available to challenge the legislation would not be fatal to SEIU's request for public interest standing. Not only does the SEIU represent

many female employees affected by *Schedule J*, but SEIU is their exclusive bargaining agent and is empowered to negotiate pay equity plans with employers under the *Pay Equity Act*. Certainly, then, the SEIU had just as much interest as each of its members. Furthermore, unlike the members of the applicant in *Canadian Council of Churches*, the members of SEIU were directly affected by the impugned legislation.

Additionally, there was a strong argument that it is not practical to expect female employees denied pay equity by *Schedule J* to challenge it. Even factually simple cases are expensive to litigate. This case involve substantially complex facts as well as numerous employers, union locals and individuals affected by the legislation. It is a fair assumption that individual employees directly affected by this legislation would not have either the expertise or the resources to mount a challenge.[66]

B. Who should the Respondents Be?

In the SEIU 204 case, it was clear that the Attorney General of Ontario should be the respondent.

One other issue which considered was whether it was necessary to add as a party the employers of the two individually named applicants. It was decided it was not necessary to so and that those employers could seek leave to intervene if they wanted to. The Government did file affidavits from those employers in support of its response to the application.

6. MARSHALLING THE REQUIRED EVIDENCE

A. *SEIU 204* Evidence

To be successful, it is essential that the court have before it the most persuasive evidence on the issues which must be decided. Many *Charter* cases are won or lost on the facts and their presentation.

The evidence in the *SEIU 204* case was put in initially through an affidavit by a Union official, Robert Buchanan who had bargained the pay equity plans and through a very detailed affidavit by sociologist Dr. Pat Armstrong. Dr. Armstrong is a Canadian and international expert in the field of work, women's work, compensation, pay equity and health care. This material was very extensive. The preparation of the affidavit materials took approximately 6 months with Dr. Armstrong conducting original research in support of her affidavit statements. Much care was taken with the organization and presentation of the affidavit material in order to make a very complex subject understandable to the judge hearing the application.

The Attorney General responded with two affidavits, one by the Assistant Deputy Minister of the Ministry of Finance, Anne Evans, detailing the decision to legislate *Schedule J* and an affidavit from a pay equity consultant, Nadine Winter, alleging that proxy equity was not consistent with true pay equity principles.

In reply, the applicants filed two further affidavits. One was a responding affidavit by Dr. Armstrong contesting the evidence of Ms. Winter. The second was an affidavit of Dr. Caroline Leigh Anderson, an Associate Professor at the School of Public Administration at Ottawa's Carleton University, an economist by training and an expert in the field of public sector economics. Dr. Anderson's affidavit contested the Government's economic evidence by showing that the money saved by repealing *Schedule J* could have been saved by not providing a tax cut to those taxpayers earning in excess of $240,000.00 annually.

After the evidence was filed, there were extensive cross-examinations of all these affidavits which took place over a period of a month. As well, during the course of those examinations, the parties made many requests for documents. The Government and the Union subsequently submitted responses to the undertakings which were made. The Government refused to or inadequately answered a number of the questions but the applicants ultimately decided not to pursue the issue through a motion. Further, the Government argued that a number of the Union's requests for information could not be met because they argued the documents were covered by Cabinet privilege.

The time taken in the preparation of these initial materials was rewarded in that Mr. Justice O'Leary essentially accepted the main evidentiary points made by the applicants' witnesses.

B. Material Facts in Dispute

In a Rule 14.05 (3) application, where there are arguably material facts in dispute, the court may find that an issue or the whole application would more appropriately be dealt with by way of a trial (Rule 38.10(1)(b)). In *Charter* challenges in particular there may be considerable facts in dispute relating to the question of whether the infringement is saved by s.1 of the *Charter*:[67] There are a number of cases which have forced an applicant to proceed by way of trial.[68]

However, there are cases which support the proposition that even where the facts are contested, these matters should proceed expeditiously and that conflicting evidence can be dealt with by way of affidavits and cross-examinations.[69] For example, in *Re Hussey and A.-G. for Ontario*[70], the Divisional Court permitted a *Charter* challenge to conditions of confinement to proceed by way of application for judicial review. The Court suggested that issues such as overcrowding, sanitation and proper treatment of inmates could be established by affidavits. The Court in *Canadian Newspapers Co. v. Canada (A.G.)*[71] recognized the importance of having alleged infringements of rights dealt with expeditiously. This less restrictive approach to applications is supported by Ontario's Rule 14.05(3)(g.1).

In the *SEIU 204* case, while there were extensive cross-examinations and there were facts in dispute, the Government made no motion to convert the case into a trial rather than an application. Instead, the cross-examinations were filed with the Court.

There are a number of non-constitutional cases which discuss the implications of disputed facts: In *McKay Estate v. Love*[72], the Court stated that even if there are material facts in dispute, a court has the power to hear an application. In *Niagara Air Bus v. Camerman*[73], the Court found that the simple existence of a dispute concerning material facts does not necessarily disentitle an applicant to a remedy under 14.05(3)(a-g).

Thus, every effort should be made to ensure that the affidavit evidence sufficiently sets out all of the relevant facts and that factual disputes are substantially resolved before the hearing. As well, if there continue to exist material factual disputes or issues of credibility, it is also possible if appropriate to ask the court for leave to adduce viva voce evidence at the hearing (see discussion below under "Types of Evidence").

C. Filing of Affidavits and Cross-Examination on Affidavits

Given the complexity involved in *Charter* litigation, Ontario's Rule 38 may present problems if enforced strictly. The notice of application must be supported by documentary evidence, usually in the form of affidavits, to be served on the respondent at least three days before the hearing (rule 38.09(1)). The respondent is not required to serve and file its affidavits until 2:00 p.m. on the day before the hearing (rule 38.09(3)). The applicant then does not have much time to cross-examine the deponents before the start of the hearing unless an adjournment is requested, resulting in increased delay and cost.

In practice, in Ontario a case management judge is assigned to the parties on the filing of a *Charter* challenge and this usually leads to an agreement on the appropriate procedure."[74]. In preparation for the hearings of *Lavigne* v. *O.P.S.E.U.*[75], counsel agreed on time periods for the delivery of all affidavits and for examinations and cross-examinations on the affidavits; on the number of viva voce witnesses to be called; not to move to quash or direct for trial the issues identified; and that no party would object if the other moved to call viva voce evidence after the moving party met certain conditions, such as providing the names of witness a certain number of days before the hearing, delivery witnesses' affidavits according to certain conditions, and limiting the number of witnesses from each side:[76]

Thus, in order to avoid unnecessary adjournments and costs, as well as to avoid the court directing the trial of an issue or even of the whole application, efforts should be made to reach an agreement with respondent counsel on procedural matters.

In the *SEIU 204* case, the parties agreed to a schedule for the holding of cross-examinations as well as the expediting of transcripts and the setting aside of a week of court time.

D. Types of Evidence

Evidence in an application may be given by affidavit (Rule 39.01(1)). Proceedings by application lack some of the procedural benefits of an action, such as production and discovery (see Rule 30, 31). However, Rule 39.03 provides that a witness may be examined and cross-examined before the hearing, or, with leave, a person may be examined at the hearing of an application in the same manner as in a trial, and Rule 39.02 permits a party to cross-examine the deponent of an affidavit served by a party who is adverse in interest.

The following non-constitutional cases discuss potential problems encountered with affidavit evidence:

- *Hrivnak v. Steel Art Co.*[77]: The court is not bound to accept uncontradicted affidavit evidence where that evidence is not persuasive or consistent with other evidence and the inference that may be drawn from the absence of other evidence.

- *Unilease Inc. v. Lee-Mar Developments Ltd.*[78]: The court held that paragraphs in an affidavit filed on a motion, which depended for their probative value on documents which were not sworn to as exhibits and were thus inadmissible, should be disregarded.

- *Crysdale v. Carter-Baron Drilling Services Partnership*[79]: A party who referred to privileged communications in an affidavit was held to have waived the privilege and was compelled to answer questions relating to the details of the communications.

- *James v. Maloney*,[80]: A document which is referred to in the affidavit and forms one of the bases for the motion or application may be required to be produced if requested on cross-examination, notwithstanding any privilege.

In light of the above cases, in the *SEIU 204* case, documents necessary for the probative value of affidavit evidence were sworn to as exhibits.

E. Nature of the Evidence

Evidence in *Charter* cases may differ from the type of evidence traditionally presented in civil litigation:

- *Ontario (A.G.) v. Dieleman*[81]: In *Charter* cases, the parties should be encouraged to provide a complete and wide-ranging evidentiary basis for their positions.

- *Ontario (A.G.) v. Dieleman*[82]: An order compelling the examination of the Attorney General was granted since the objectives of the Attorney General were relevant to the *Charter* defences.

- *Re Ontario English Catholic Teachers Ass'n and Essex County Roman Catholic School Board*[83]: Scholarly articles attached as exhibits to an affidavit on an application for judicial review are relevant to the applicability of s.1 of the *Charter*.

The table of contents for the two expert affidavits filed by SEIU 204 for Dr. Pat Armstrong and Dr. Caroline Leigh Anderson are set out in Appendix "A" to this paper to provide an idea of the range and complexity of the evidence filed in the SEIU 204 case.

7. LEGAL COSTS

As *Charter* challenges are always difficult to win and costly to prepare and present, the issue of legal and expert costs is always a difficult one. Although there are no costs awarded usually at an administrative tribunal level, costs can be awarded against an unsuccessful applicant under a Rule 14.03 application or in a judicial review application. Similarly it is possible for an applicant to be awarded costs in court proceedings.

In the *SEIU 204* case, the costs of preparing and presenting the case were very high. In the end, the Court awarded the payment of costs on a party and party basis and the parties agreed to fix those costs at $140,000.00. As a practical matter it is important to ensure detailed records are kept of time spent on the case in order to provide proper evidence of costs incurred if an award is made. Individual applicants also need to be properly advised of their potential liability if an award of costs is made against them.

APPENDIX "A"

TABLE OF CONTENTS FROM SEIU 204 EXPERT AFFIDAVITS

AFFIDAVIT OF DR. PAT ARMSTRONG

AFFIDAVIT OF DR. CAROLINE LEIGH ANDERSON

ENDNOTES

1. *SEIU, Local 204 v. Attorney General of Ontario* (*"SEIU 204"*) (1997) 35 O.R. (3d) 508 (Gen. Div.)
2. above, at p.510.
3. above, at p. 520.
4. above, at p. 521.
5. above, at p. 521.
6. above, at p. 522
7. above, at p. 535.
8. above, at p. 532.
9. above, at p. 533
10. above, at p. 534
11. above, at p. 534.
12. above, at p. 536
13. K. Roach, *Constitutional Remedies in Canada* (Aurora, Ontario, Canada Law Book: 1995, updated) at 12-1 and 12-2
14. *Schachter* v. *Canada* (1992) 93 D.L.R. (4th) 1 (S.C.C.)
15. P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto, Carswell, 1992) at 37-3 - 37-4
16. Hogg at 37-14
17. *R. v. Big M Drug Mart* (1985) 18 D.L.R. (4th) 321
18. *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.)
19. *Schachter* at 12
20. e.g. *Haig v. Canada* (1991), 5 O.R. (3d) 245 (Gen.Div.), var'd O.A.C. 272 (C.A.). See also Roach at 14-64.3 - 14-79
21. *Miron v. Trudel* (1995), 124 D.L.R. (4th) 693 at 757-58
22. Roach, above at 14-72; 14-78 - 14-79
23. (1985), 19 D.L.R. (4th) 1 at 36.
24. *Finlay, above* at 342
25. *Hogg, above* at 37-4
26. *Hogg, above* at 37-20
27. *Roach, above* at 12-1 - 12-2, 13-1 - 13-7
28. (1991), 81 D.L.R. (4th) 121 (S.C.C.)
29. *above* at 127-128
30. *above* at pp. 130-131

31. (1996), 140 D.L.R. (4th) 115 (Ont. Gen. Div.)

32. (1984), 48 O.R. (2d) 225 (C.A.).

33. at p. 122

34. at p. 231

35. at p. 233

36. *Rules of Civil Procedure,* enacted under the *Courts of Justice Act.*

37. *Nipissing Hotel Ltd. v. Hotel & Restaurant Employees & Bartenders International Union et al* (1963), 2 O.R. 169 (H.C.) at 170-172.

38. 1995, S.O. 1995, c.1, Sch.A

39. (Aurora: Canada Law Book, 1995, updated to Oct., 1995) at 7-6.

40. R.S.O. 1990, c.R.33

41. at 172, 176

42. *Seafarers' International Union of Canada et al. v. Lawrence*(1978) 21 O.R. (2d) 819 (Div.Ct.) at 827, (1979) 24 O.R. (2d) 257 (Ont.C.A)

43. [1991] O.P.E.D. No. 129 (Q.L.)

44. Roach at 5-16; *Smith* v. *A.G. Ontario* [1924] 3 D.L.R. 189 (S.C.C.) at 193, *Cowan v. Canadian Broadcasting Corp.*, [1966] 2 O.R. 309 (C.A.) at 311, leave to appeal to S.C.C. refused [1966] S.C.R. vii applied in *Finlay* at 330*; Hy and Zel's* at 663

45. (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 632. See also Ross at 178-80

46. *above* at 5-2

47. *Thorson* v. *Attorney General of Canada (No.2)* (1974), 43 D.L.R. (3d) 1 (S.C.C.); *Nova Scotia Board of Censors* v. *McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.); *Canada (Minister of Justice)* v. *Borowski* (1981), 130 D.L.R. (3d) 588 (S.C.C.).

48. *Borowski*, above at 606

49. (1986), 33 D.L.R. (4th) 321 (S.C.C.) per Le Dain J. at 341.

50. (1990), 74 O.R. (2d) 609 (H.C.J.) at 619

51. (1992), 88 D.L.R. (4th) 193 at 205

52. *Canadian Civil Liberties Association,* above, at p.617

53. at 205

54. See also *Benoit* v. *Canada*, (1994), 81 F.T.R. 100 (T.D.) at 103 and *Mathias Columb Band of Indians* v. *Saskatchewan Power Corp.* (1994), 111 D.L.R. (4th) 83 (Man.C.A.) at 90, leave to appeal to S.C.C. refused 111 D.L.R. (4th) vii.

55. P. Bowal and M. Cramwell "Case Comment: *Persona Non Grata*: The Supreme Court of Canada Further Constrains Public Interest Standing".(1994) 33 Alta. L. Rev. 192 at 197

56. Roach at 5-9 - 5-14.

57. at 205-207

58. (1991), 87 D.L.R. (4th) 287n (S.C.C.), rev'g (1988), 55 D.L.R. (4th) 523 at 529-30 (Que.C.A.).

59. It is not clear from the decision whether public interest standing would be denied if a private litigant is simply available to challenge the legislation, or only if private litigants were actually challenging the legislation. The decision in *Hy and Zel's Inc.* v. *Ontario (Attorney General)* seems to support the former. In *Hy and Zel's*, the Court stated at 662 that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use."

60. [s]ince the Conseil du Patronat speaks for its members, surely it has just as much interest as each of its members does. at 528-30. See also D.F. Bur & J.K. Kehoe, "Developments in Constitutional Law: The 1991-92 Term" (1993) 4 Supreme Court L.R. (2d) 49 at 64.This case was followed in *Canadian Bar Assn.* v. *British Columbia (Attorney General)* in which the Court granted an association of lawyers standing to challenge the constitutionality of a tax imposed on legal services. The Court suggested that *Conseil du Patronat* could be distinguished from *Canadian Council of Churches* in that the Conseil's members were directly affected by the impugned legislation, whereas the Council of Churches' members were churches, none of which were directly affected by the impugned legislation in that case: Drawing on that distinction, the Court found that the function of the Bar Association and the Law Society, like the Conseil, was to represent the interests of their members: This representative function also applies by law to bargaining agents. (1993), 101 D.L.R. (4th) 410 (B.C.S.C.) at 419

61. Roach, *above* at 5-12

62. Roach, *above* at 5-12

63. *Canadian Civil Liberties Association* at 620; *Unishare Investments Ltd. v. Canada* (1994), 18 O.R. (3d) 603 (Gen. Div.) at 607; and *Grant* v. *Canada* (1994), 94 C.L.L.C. 14,055 at , aff'd on other grounds (1995) 125 D.L.R. (4th) 556 (F.C.A.)

64. See W.A. Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay"(1988), 10 Supreme Court Law Rev. 377 at 395-96

65. at 102-3

66. Roach, *above* at 5-2.

67. See Lepofsky, "Civil Procedure in *Charter* Litigation," in J. Cowan & M. Lepofsky, *Public Law: Reference Materials* (Law Society of Upper Canada Bar Admission Course Materials, Oct. 1995) c.9 at 9-10 - 9-11.

68. In the following cases, it was held that applications were inappropriate:

- *Re Seaway Trust Co. et al. and The Queen in Right of Ontario et al.*: An application under the *Charter* for judicial review was dismissed because the issues required an extensive review of evidence, and findings of credibility and fact were more appropriately made on the trial of an action.
- *Assn francaise des conseils scolaires de l'Ontario v. Ontario*: The Court order the trial of constitutional issues where the issues were complex and additional evidence was needed to resolve them.
- *Energy Probe v. Canada (A.G.)*: A *Charter* challenge commenced by application was to be treated as an action on consent by the parties. The issue could be more conveniently dealt with at trial since there were factual matters in dispute. Furthermore, if s.1 of the *Charter* was raised, the trial court would be much better

to balance the evidence.

- *Everingham v. Ontario*: A motion was dismissed because the Crown required access to specific information in order to justify the program attached as contrary to the *Charter*.

69. Roach, *above* at 5-26

70. (1984), 46 O.R. (2d) 554 at 566

71. (1985), 49 O.R. (2d) 557 (Ont. C.A.) at 572-73, rev'd 52 D.L.R. (4th) 690

72. (1991), 6 O.R. (3d) (Gen. Div.) 511 at 514, affd 6 O.R. (3d) 511 (C.A.) at 519, additional reasons 14 C.P.C. (3d) 371 (C.A.)

73. (1989), 69 O.R. (2d) 717 (H.C.) at 725

74. L. Ma, "The *Lavigne* and *McKinney* Express: Some Innovative Developments in the *Charter* Litigation Process (1991) 1 N.J.C.L. 361

75. (1986), 55 O.R. (2d) 449, add'l reasons at (1987), 60 O.R. (2d)486 (H.C.), rev'd (1989) 67 O.R. (2d) 536 (C.A.), aff'd (1991), 126 N.R. 161 (S.C.C.) and *McKinney v. University of Guelph* (1986), 57 O.R. (2d) 1 (H.C.), aff'd (1987), 63 O.R. (2d) 1 (C.A.), aff'd 2 O.R. (3d) 319n (S.C.C.)

76. *above*, at 372-74

77. (1989), 34 C.P.C. (2d) 34 (Ont. Master)

78. (1987), 23 C.P.C. (2d) 46 (Ont. Master)

79. (1987), 61 O.R. (2d) 663 (Master) at 666-67, rev'd on other grounds 62 O.R. (2d) 693 (H.C.), leave to appeal to Divisional Court refused 62 O.R. (2d) 693 at 696

80. [1973] 1 O.R. 656 (H.C.) at 657-58

81. (1993), 14 O.R. (3d) 697 (Gen. Div.) at 701-2

82. (1993), 16 O.R. (3d) 39 (Gen. Div.) at 45 , leave to appeal refused *loc. cit.* D.L.R. at p.349 (Gen. Div.)

83. (1987), 58 O.R. (2d) 545 (Div.Ct.) at 553-54 per Craig J., dissenting in part