Federal Court  Cour fédérale

Date: 20091123

Docket: T-1191-08

Citation: 2009 FC 1202

Toronto, Ontario, November 23, 2009

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

FRANK CHAUVIN O.C.

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
and THE ADVISORY COUNCIL OF THE ORDER OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

I. Introduction

[1] An appointment to the Order of Canada by the Governor General is one of Canada's most prestigious civilian honours. It is granted to Canadians who exemplify leadership and distinguished service in or to a particular community, group or field of activity.

[2] The Applicant, Mr. Frank Chauvin ("Mr. Chauvin") is a Member of the Order of Canada. He was granted this honour by virtue of his contributions to Canadian society in respect of the extensive charitable work in which he has been engaged.

[3] However, Mr. Chauvin takes great umbrage with the appointment of Dr. Henry Morgentaler ("Dr. Morgentaler") by the Governor General to the Order of Canada. Dr. Morgentaler was appointed for "his commitment to increased health care options for women, his determined efforts to influence Canadian Public Policy and his leadership in humanist and Civil Liberties Organizations".

[4] Mr. Chauvin seeks to judicially review the process by which Dr. Morgentaler was appointed and raises issues concerning the suitability of Dr. Morgentaler as a candidate for the Order of Canada given Dr. Morgentaler's lifelong commitment to promoting and making abortion available to women. The Ordinance appointing Dr. Morgentaler was signed and sealed by the Governor General on April 10, 2008 and his formal investiture ceremony was held on October 10, 2008.

[5] This application for judicial review does not attack the appointment of Dr. Morgentaler, *per se*, but rather is focused on the process by which the Advisory Council of the Order of Canada ("Advisory Council") submitted the name of Dr. Morgentaler to the Governor General.

II. Procedural History

[6] The initial notice of application was filed by Mr. Chauvin on July 31, 2008. Subsequently, Mr. Chauvin sought leave to amend. With minor changes, leave was granted. The amended notice of application makes application for, *inter alia*:

> (a) A declaration that the deliberations of the Advisory Council are subject to Judicial Review;
>
> (b) A declaration for sufficient disclosure of the deliberations in respect of appointees, including the appointment of Dr. Henry Morgentaler;
>
> (c) A declaration that the recommendation of the Advisory Council to appoint Dr. Henry Morgentaler to the Order of Canada was procedurally unfair, invalid, unlawful and should be set aside;
>
> (d) In the alternative, a declaration that the Advisory Council exceeded or ignored the stipulated criteria in their recommendation; and
>
> (e) An order that the determination of Dr. Henry Morgentaler's appointment to the Order of Canada be referred back for determination in accordance with such directions as this Honourable Court considers appropriate.

[7] Pursuant to Rule 317, Mr. Chauvin sought directions from the Court regarding the production of the record pertaining to the appointment of Dr. Morgentaler that was before the Advisory Council. The Respondent resisted the production of the record. However, before that issue could be decided the Respondent brought this motion to dismiss the application.

[8] In January 2009, the Court raised the preliminary issue of whether Dr. Morgentaler should be added as a Respondent under Rule 303 of the *Federal Courts Rules* as a person directly affected by the order sought. On January 23, 2009, after considering written and oral submissions from the parties, the Court ordered that the issue of whether Dr. Morgentaler should be added as a party respondent to the application be deferred until the final disposition of the motion to strike.

[9] The Respondent seeks an order striking Mr. Chauvin's notice of application. The Respondent asserts that it is plain and obvious that the application cannot succeed on the following grounds:

(a) the application is an attack on the exercise of the honours prerogative;

(b) the relief sought is moot;

(c) an alternative remedy is available;

(d) Mr. Chauvin is bound by previous case law;

(e) the royal prerogative of granting honours is outside the bounds of judicial review;

(f) the award of honours is not justiciable; and,

(g) Mr. Chauvin lacks standing.

[10] These various grounds are considered in detail below. In my view, for the reasons that follow, the notice of application must be struck as it plain and obvious that the application cannot succeed.

III. The Framework of the Order of Canada

[11] The Order of Canada was established in 1967, Canada's centenary year. Appointments to the Order of Canada are governed by the *Constitution of the Order of Canada* (P.C. 1967-389 and subsequent amendments, hereafter the "*Constitution*"). The *Constitution* provides for the establishment of an Advisory Council. The Advisory Council develops a list of potential appointees who have the "greatest merit" and submits the list to the Governor General. It is the Governor General who makes the appointment. Appointments are made for "distinguished service in or to a particular community, group or field of activity". Section 18 of the *Constitution* provides as follows:

> 18. Appointments of persons as Members and honorary Members shall be made for distinguished service in or to a particular community, group or field of activity.

Further, any Canadian citizen may be appointed, as set out in section 9:

> 9. (1) Any Canadian citizen may be appointed as a Companion, an Officer or a Member.
>
> (2) A person who is not a Canadian citizen may be appointed as an honorary Companion, Officer or Member.

> (3) A person is not a member of the Order by reason only of being appointed as a member of the Council.

[12] The nomination process contemplates that any person or organization may nominate a Canadian citizen by contacting the Secretary General of the Order, who compiles the list for the Advisory Council. Section 10 provides as follows:

> 10. (1) Any person or organization may submit to the Secretary General for consideration by the Council a nomination of a Canadian citizen for appointment as a Companion, Officer or Member, and of a non-Canadian citizen for appointment as an honorary Companion, Officer or Member.
>
> (2) The Governor General may appoint as honorary Companions, Officers and Members a maximum of five persons in any year.

The Advisory Council

[13] The Advisory Council is comprised of 11 prominent individuals which includes the Chief Justice of Canada (who is also the chair of the Advisory Council), the Clerk of the Privy Council, the Deputy Minister of the Department of Canadian Heritage, the Chairperson of the Canada Council, the President of the Royal Society of Canada and the Chairperson of the Board of Directors of the Association of University and Colleges of Canada and five others appointed by the Governor General.

[14] The role and mandate of the Advisory Council is to review nominations received and then compile and submit a list of nominees to the Governor General. Section 8 provides:

> 8. The Council shall
>
> (a) consider those nominations referred to in paragraph 5 (c) that the Secretary General has transmitted to it;
>
> (b) compile and submit to the Governor General a list of those nominees in the categories of Companion, Officer and Member and honorary Companion, Officer and Member who have the greatest merit; and
>
> (c) advise the Governor General on such matters as the Governor General may refer to the Council.

[15] Once the list has been submitted to the Governor General, it is the Governor General who then makes the appointment by way of an "instrument of appointment, signed by the Governor General and sealed with the Seal of the Order" (*Constitution*, s. 20 (1)).

[16] Notably, an appointment to the Order of Canada takes effect on the date on which the instrument of appointment is sealed (*Constitution*, s. 20 (2)).

Length and Termination of an Appointment

[17] Appointments to the Order of Canada are for life and are not hereditary. A person's membership ceases when she/he dies, resigns, or the Governor General makes an Ordinance terminating the person's appointment.

[18] The *Constitution* sets out a detailed mechanism whereby a person's appointment to the Order of Canada can be reviewed and revoked. The termination by Ordinance is governed by the Policy and Procedures for Termination of the Appointment to the Order in Council ("the Policy"). Under the Policy, a person's appointment shall be revoked on the recommendation of the Advisory Council made to the Governor General following an eleven stage process. That process is based on evidence submitted to the Advisory Council and is guided by the principles of fairness. The Advisory Council ascertains the relevant facts before making its determination (see section 2 of the Policy).

[19] A request to consider the termination of an appointment to the Order of Canada may be made by any person in writing to the Deputy Secretary.

[20] Termination of an appointment may be made for a number of reasons. These include conviction of a criminal offence, conduct that significantly departs from recognized standards of public behaviour, or sanctions by a professional body. Section 3 of the Policy provides as follows:

> 3. The Advisory Council shall consider the termination of a person's appointment to the Order of Canada if
>
> (a) the person has been convicted of a criminal offence; or
>
> (b) the conduct of the person
>
> (i) constitutes a significant departure from generally-recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order, or detracts from the original grounds upon which the appointment was based; or

> (ii) has been subject to official sanction, such as a fine or a reprimand, by an adjudicating body, professional association or other organization.

[21] It is against this backdrop of the appointment and termination process that this motion must be decided.

IV. The Test on a Motion to Strike

[22] The law is clear that a motion to strike should be rejected unless it is plain and obvious that the proceeding has no possibility of success and is so clearly improper as to be bereft of any possibility of success (see *Chiasson v. Canada*, 2003 FCA 155 at para. 6; *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc*., [1994] F.C.J. No. 1629). The moving party, in this case the Attorney General, must meet this standard for the matter to be struck (see *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 per Mactavish J. at para. 28).

[23] In *Amnesty International Canada v. Canada (Canadian Forces)*, Mactavish J. reviewed the law on motions to strike, as summarized by Dawson J. in *League for Human Rights of B'nai Brith Canada v. Canada*, 2008 FC 732. At para. 29 Mactavish J. discussed the reasons why the test on a motion to strike is strict. She wrote:

> 29. The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in Addison & Leyen, at para. 5.

[24] I note that in this case, the Respondent brought this motion to strike early on in the proceeding. This matter has not been set down for a hearing on the merits and there are several procedural steps which yet need to be taken before the matter could proceed to cross-examinations. These steps include addressing the issues of the production of the record before the Advisory Council and adding Dr. Morgentaler as a party. Therefore, striking the motion at this stage would not be less efficient than moving forward to a hearing on the merits and would save the Court's resources.

V. Preliminary Issues

[25] This motion raises the issues of mootness, standing, the availability of an alternative remedy, Crown prerogative and justiciability.

[26] Prior to discussing the issues of mootness, standing, alternative remedy and crown prerogative, it is important to first address the issue of the supplementary affidavit evidence filed by Mr. Chauvin on this motion and the issue of whether the dispute is justiciable. The issue of the supplementary affidavit goes to what evidence is appropriate on a motion to strike an application. The issue of justiciability should be considered at the outset - if the matter is not justiciable then the other matters need not be considered.

Affidavit Evidence on a Motion to Strike

[27] Mr. Chauvin swore an affidavit on September 23, 2008 and a supplementary affidavit on December 21, 2009. The supplementary affidavit was filed on this motion to strike. Mr. Chauvin raised *inter alia* two issues in the Supplementary affidavit. First, that the Chancellery of Honours solicited his views on a specific nominee's appointment (not Dr. Morgentaler). Second, Mr. Chauvin included references to public debate in the media that occurred after the investiture of Dr. Morgentaler. Mr. Chauvin argues that this second affidavit addresses the issue of mootness.

[28] As a general rule, no evidence may be lead on a motion to strike a notice of application. One exception to the rule is when the basis for the motion to strike is that the issue has become moot. In *Amnesty International Canada, supra*, Mactavish J. held that this exception arises when there is an intervening development in relation to the underlying facts giving rise to the application (para. 30 and paras. 126-127).

[29] Mr. Chauvin argues that in this case the intervening matter was the investiture of Dr. Morgentaler on October 10, 2008. However, as noted above, s. 20 (2) of *Constitution*, stipulates that the appointment occurs and takes effect when the instrument of appointment is signed and sealed by the Governor General. This occurred on April 10, 2008 well prior to the commencement of this application.

[30] Therefore, as the instrument of appointment was signed and sealed by the Governor General on April 10, 2008, there was no relevant intervening development relating to the underlying facts giving rise to the application. Thus, Mr. Chauvin's supplementary affidavit sworn December 21, 2008 has not been considered on this motion and is struck.

Justiciability

[31] Is the appointment of Dr. Morgentaler to the Order of Canada by the Governor General a justiciable issue? To be justiciable, an issue is required to be one that is suited to review by a Court. As stated by Barnes J. in *Friends of the Earth v. The Governor in Council*, 2008 FC 1183, the issue of justiciability is a threshold question of law that is not the proper subject of a standard of review analysis. In his discussion of justiciability, Justice Barnes observed as follows:

> [24] The parties do not disagree about the principles of justiciability but only in their application in these proceedings. They agree, for instance, that even a largely political question can be judicially reviewed if it "possesses a sufficient legal component to warrant a decision by a court": see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at para. 27, 83 D.L.R. (4th) 297. The disagreement here is whether the questions raised by these applications contain a sufficient legal component to permit judicial review. The problem, of course, is that "few share any precise sense of where the boundary between political and legal questions should be drawn": see Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at p. 133.
>
> [25] One of the guiding principles of justiciability is that all of the branches of government must be sensitive to the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into the spheres reserved to the other

branches: see *Doucett-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paras. 33 to 36 and *C.U.P.E. v. Canada (Minister of Health)*, 2004 FC 1334 at para. 39, 244 D.L.R. (4th) 175. Generally a court will not involve itself in the review of the actions or decisions of the executive or legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolved it. These concerns are well expressed in *Boundaries of Judicial Review: The Law of Justiciability in Canada*, above, at pp. 4 and 5:

> Appropriateness not only includes both normative and positive elements, but also reflects an appreciation for both the capacities and legitimacy of judicial decision-making. Tom Cromwell (now Mr. Justice Cromwell of the Nova Scotia of Appeal) summarized this approach to justiciability in the following terms:
>
> The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.
>
> While it is helpful to develop the criteria for a determination of justiciability, including factors such as institutional capacity and institutional legitimacy, it is necessary to leave the content of justiciability open-ended. We cannot state all the reasons why a matter may be non-justiciable. While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can assert with confidence is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles. As Galligan concludes, "Non-justiciability means no more and no less than that a matter is unsuitable for adjudication."
>
> [Footnotes omitted.] [Emphasis in original.]

[26] While the courts fulfill an obvious role in the interpretation and enforcement of statutory obligations, Parliament can, within the limits of the constitution, reserve to itself the sole enforcement role: see *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, [1989] S.C.J.

> No. 80 at paras. 68 to 70. Such a Parliamentary intent must be derived from an interpretation of the statutory provisions in issue – a task which may be informed, in part, by considering the appropriateness of judicial decision-making in the context of policy choices or conflicting scientific predictions.

[32] The Respondent argues that the issues raised in this application are not justiciable because there are no objective legal criteria to apply or facts to be determined to decide the question (see *Chiasson* v. *Canada*, 2003 FCA 155 at para. 8). To take the argument further, the bestowing of honours is a discretionary power of the Sovereign and therefore it is outside the bounds of judicial review. This proposition finds strong judicial support. For example, Lord Fraser of Tulleybutton, a member of the House of Lords, in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 A.C. 374 (H.L.) made the following observation:

> . . . prerogative powers are discretionary, that is to say they may be exercised at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the way in which they are exercised is not open to review by the Courts;
> . . .
> I therefore assume, without deciding, that his first proposition is correct and that all powers exercised directly under the prerogative are immune from challenge in the courts; (pp. 397 – 98)

[33] Further, in *Black v. Canada* (2001) 54 O.R. (3rd) 215, the Court of Appeal for Ontario held that the exercise of the royal prerogative regarding the receiving of a peerage in the United Kingdom was non-justiciable. In *Black*, Mr. Conrad Black sought an appointment as a peer in the United Kingdom, thereby allowing him to sit in the House of Lords. Black alleged that then Prime Minister Jean Chrétien interfered in the appointment process to try and prevent the appointment, and that but for the intervention, Black would have received his peerage. Black brought an action

against the Prime Minster for, *inter alia*, abuse of power and misfeasance in public office. The Respondent brought a motion to dismiss the action on the ground that the relief claimed was not justiciable.

[34] In his reasons, Justice Laskin provided a thorough analysis of the concept of justiciability. He noted:

> [36] Unquestionably, the granting of honours is the prerogative of the Crown. The Monarch is "the fountain, parent and distributor of honours, dignities, privileges and franchises". Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (London: Butterworths and Son, 1820) at p. 6. Because no statute in Canada governs the conferral of honours, this prerogative has not been displaced by federal law. Nor has it been limited by the common law. As Hogg and Monahan observe, *supra*, at pp. 18-19, appointments and honours is one area in which the prerogative power "remains meaningful". Their view is consistent with the opinion of Lord Roskill in the important House of Lords decision, *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374. In his speech in that case Lord Roskill said at p. 418 that the modern exercise of the prerogative includes "the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others …". [Emphasis added.]

[35] Justice Laskin then went on to further analyze the concept of justiciability as follows:

> [50] At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49; Thorne's Hardware

Limited v. The Queen, [1983] 1 S.C.R. 106. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch". Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525 at 545.

[51] Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, **if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative**.

[52] Thus, the basic question in this case is whether the Prime Minister's exercise of the honours prerogative affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. To put this question in context, I will briefly discuss prerogative powers that lie at the opposite ends of the spectrum of judicial reviewability. At one end of the spectrum lie executive decisions to sign a treaty or to declare war. These are matters of "high policy". R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett, [1989] 1 All E.R. 655 at 660, per Taylor L.J. Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations. In my view, apart from Charter claims, these decisions are not judicially reviewable.

[53] At the other end of the spectrum lie decisions like the refusal of a passport or the exercise of mercy. The power to grant or withhold a passport continues to be a prerogative power. A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.
… [emphasis added]

[36] The Court of Appeal for Ontario upheld the motions judge in striking the action on the basis that the actions of the Prime Minister were an exercise of a prerogative that was non-justiciable. However, on its facts, *Black* is distinguishable from the case at bar. In that case there was no written instrument governing or controlling the power being exercised by the Prime Minister. Here, there are clear criteria set out in sections 8, 9 and 18 of the *Constitution*: the person must have the greatest merit; have distinguished service in or to a particular community, group or field of activity, and be a Canadian Citizen. Thus, as Justice Strayer observed in *Chiasson*:

> Unlike the *Black* case where there were no written instruments controlling the power being exercised by the Prime Minister, it is certainly arguable in the present case that the Regulations, once adopted, constitute a set of rules which provide criteria for a Court to determine if the procedure prescribed therein has been followed, and if the Committee has exercised the jurisdiction assigned to it. That the Regulations themselves were promulgated under the royal prerogative does not render questions of compliance with the procedure they prescribe matters plainly beyond judicial review. (para. 8)

[37] Therefore, in applying this test to this motion to strike, it is arguable that it is not plain and obvious that the issues raised by Mr. Chauvin are not justiciable. However, that is not the end of the analysis as other grounds argued by the Respondent lead to the conclusion that it is plain and obvious that the application has no chance of success and must be struck.

VI. Mootness

[38] Having determined that the matter meets the justiciability test, we must now ask the question: given that Dr. Morgentaler's appointment has already taken effect is this application moot? The test for mootness was set out by the Supreme Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. At paras. 15 and 16, Sopinka J., for the Court, held that the principle of mootness applies when the decision of the court will have no practical effect of resolving a controversy. The test involves two steps, as described below:

> 15. 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. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> 16. The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of

> those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[39] Sopinka J. also noted that under the second step of “discretion”, the Court should consider the existence of an adversarial context, judicial economy, and a need for the Court to demonstrate an awareness of its proper function (see paras. 26-42).

[40] The Respondent takes the position that the relief sought is moot by virtue of the fact that the Governor General has already bestowed the honour on Dr. Morgentaler. They argue further that Mr. Chauvin cannot undo the recommendation of the Advisory Council without attacking the actual appointment made by the Governor General.

[41] Mr. Chauvin argues that there remains a live issue between himself and the Advisory Council. He argues that the ***lis*** of the controversy is between Mr. Chauvin in his capacity as a Member of the Order of Canada and the Advisory Council, and not with the Governor General’s appointment or the formal investiture of Dr. Morgentaler.

[42] However, Mr. Chauvin’s line of argument cannot change the reality that Dr. Morgentaler has been invested as a member of the Order of Canada. Therefore, any tangible dispute about his investiture has disappeared and there would be no practical effect to any order that the recommendation of the Advisory Council should be set aside or sent back for reconsideration. Thus, as the appointment has taken place, the matter is moot.

[43] In any event, Mr. Chauvin is not without a remedy, should he choose to pursue it, as the *Constitution* specifically provides an alternative remedy, discussed below.

VII. Alternative Remedy

[44] The Court will ordinarily not review a decision unless all other avenues of redress and appeal are exhausted. The Respondent argues that the procedure for requesting termination of membership, under section 25 of the *Constitution*, is available to Mr. Chauvin. That section provides that a person's membership in the Order of Canada ceases upon death, resignation, or the Governor General makes an Ordinance terminating the person's appointment. Pursuant to this section, a "Policy and Procedure for Termination of Appointments to the Order of Canada" (the "Termination Policy") sets out the process by which a person's membership may be terminated. Section 2 of the Termination Policy provides as follows:

> 2. The termination of a person's appointment to the Order of Canada shall be on the recommendation of the Advisory Council made to the Governor General. The recommendation of the Advisory Council shall be based on evidence and guided by the principles of fairness and shall only be made after the Council has ascertained the relevant facts relating to the case under consideration.
> …

[45] The Termination Policy is a complete code setting out in a detailed eleven stage procedure all of the steps to be followed for the termination of a person's appointment to the Order of Canada. None of these steps have been taken by Mr. Chauvin.

[46] Mr. Chauvin argues that this "alternative" is no alternative at all as "the Applicant is not asking that Dr. Morgentaler's honour be terminated. The Applicant is asking that the recommendation of the Advisory Council in this instance be reviewed … [and] the relief he asks is not available under the *Constitution of the Order of Canada*".

[47] However, two of the remedies sought by Mr. Chauvin would result in the loss or potential loss by Dr. Morgentaler of his membership in the Order. In one head of relief, Mr. Chauvin is asking that the Court set aside Dr. Morgentaler's recommendation. In another, Mr. Chauvin is asking the Court to send the recommendation back for reconsideration. In both cases, Dr. Morgentaler's appointment would be in jeopardy.

[48] The procedure in section 25 of the *Constitution* is an alternative remedy available to Mr. Chauvin to endeavour to obtain the revocation of Dr. Morgentaler's membership in the Order of Canada. Thus, this further ground supports the proposition that it is plain and obvious that the remedies sought by Mr. Chauvin have no chance of success.

VIII. Standing

[49] The Respondent also challenges Mr. Chauvin's standing to bring this application.

[50] There are two avenues by which an applicant can establish standing in a judicial review application in this Court. Subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, allows

"anyone directly affected by the matter in respect of which relief is sought" to bring such an application. Further, subsection 18.1(1) is broad enough to authorize the granting of standing whether or not Mr. Chauvin is "directly affected", where the test for public interest standing is met. This rule applies to applications for declaratory relief (see, *Finlay v. Canada (Min. of Finance)*, [1986] 2 S.C.R. 607).

[51] The Respondent argues that Mr. Chauvin lacks both a direct interest in the matter and the required public interest to give him standing and therefore, on these grounds alone, the application should be struck.

Direct Interest Standing

[52] Does Mr. Chauvin have direct interest standing? The Respondent takes the position that Mr. Chauvin's substantive rights are not directly affected and therefore he does not have direct standing. As set out in *Sanofi-Aventis Canada Inc. v. Minister of Health, et al.*, 2007 FC 1156 at para. 9, to be directly affected the matter involved must be one that affects an applicant's legal rights, imposes a legal obligation on the applicant, or prejudices them directly.

[53] Mr. Chauvin argues that awarding Dr. Morgentaler the Order of Canada, and any associated irregularities with the process, diminishes the award and the honour bestowed on him. The allegations of irregularities are vague and unsubstantiated. Notwithstanding, Mr. Chauvin's concern that the Order of Canada is diminished by the appointment of Dr. Morgentaler does not create direct

standing. He is but one of many members of the Order of Canada, some of whom may not share his view. By analogy, an action that may be perceived as disrespectful, which is akin to the argument of Mr. Chauvin, is insufficient to establish that one is suffering a direct, adverse impact such as to bring oneself within the scope of s. 18.1(1) of the *Federal Courts Act*. Rouleau J. highlighted this fact in *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)*, (2003) FCT 30; aff'd 2003 FCA 484, as follows:

> 12. Further, the applicant in his affidavit affirms that the Licence allows the respondent corporation to destroy seals and that this is "disrespectful" to his and the Tribes' culture and way of life. The fact that an activity may be "disrespectful" to one's way of life is not sufficient to establish that one is suffering a direct, adverse impact from such activity such as to bring oneself within the scope of s. 18.1(1) of the *Federal Court Act*. Many government decisions could be perceived by one group or another as being disrespectful or offensive to their culture of personal characteristics. It would be detrimental, if not devastating, to our justice system if applicants were allowed to overburden the courts as a result of the unnecessary proliferation of frivolous suits brought by individuals, however well-intentioned they are. It would also result in having non-justiciable issues brought before the courts. Clearly, this was not Parliament's intention in including the words "directly affected" in subsection 18.1(1) of the *Federal Court Act.*

[54] The investiture of Dr. Morgentaler has no direct affect on Mr. Chauvin's legal rights, either as an individual, as argued by Mr. Chauvin, nor does it result in a prejudice directly to him. In my view, therefore, he does not have direct interest standing. My conclusion on this point is reinforced by Justice Laskin's analysis in *Black, supra,* wherein he said at para. 60:

> The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake.

Similarly, the granting of an honour is far removed from Mr. Chauvin's individual interests.

Public Interest Standing

[55] If Mr. Chauvin does not have direct standing, does he have public interest standing? The Respondent argues that Mr. Chauvin cannot meet the test for public interest standing as set out by the Supreme Court of Canada in *Canadian Council of Churches v. Canada,* [1992] 1 S.C.R. 236. To meet the test, an applicant must demonstrate the following three elements:

a. raise a serious issue to be tried;

b. must have a genuine interest in the issue, and

c. there must be no other reasonable and effective means to bring the matter before the courts.

[56] In *Canadian Council of Churches v. Canada*, Justice Cory, in canvassing the role of public interest standing, recognized that public interest standing was an avenue to permit interested parties

to bring proceedings due to the increasing intervention of the state and the need to enforce the *Charter*.

[57] Standing should not be summarily decided on a motion to strike in the ordinary course. Justice Evans, in *Sierra Club of Canada v. Canada*, [1999] 2 F.C. 211 (T.D.) at 39 cautioned against determining the issue of standing on a preliminary motion. This is so because a full evidentiary record may raise matters that will support standing. However, in this case the issue can be determined on the record and there is nothing substantive that can be added to the position of Mr. Chauvin which will affect this issue at a full hearing.

[58] Standing, or more properly public interest standing, has been considered numerous times by the Federal Courts. For example, by the Federal Court of Appeal in *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144 at para. 18. Pelletier J.A. cited the work of T.A. Cromwell, now a judge of the Supreme Court of Canada at para. 12 of *Canada (Attorney General) v. Vincent Estate*, 2005 FCA 272:

> [12] In his book, *Locus Standi: A Commentary on the law of Standing in Canada* (Carswell, Toronto, 1986), T.A. Cromwell (now a judge of the Nova Scotia Court of Appeal) identifies a number of different uses of the term "standing". In some cases, the term is used to refer to the plaintiff's entitlement on the merits. In others, "standing" is a reference to the person's legal capacity to sue. More commonly, the question of standing calls for an inquiry into "the required nature and extent of the plaintiff's 'interest' in the question submitted for adjudication." (Cromwell, at p. 4). Another use of the expression "standing" is found in cases such as *Thorson v. A.G. Canada* (1974), 43 D.L.R. (3d) 1 (S.C.C.) where it is used to refer to the "suitability for judicial determination of the question

> posed by the plaintiff." (Cromwell, at p. 6). For the purposes of his analysis, Cromwell defines standing as the "entitlement to seek judicial relief apart from questions of the substantive merits and the legal capacity of the plaintiff."

[59] However, it cannot be said that all parties with any link or concern with an issue can attain public interest standing: a balance needs to be struck between ensuring access to the courts and preserving judicial resources. In *Canadian Council of Churches v. Canada,* Cory J. held that:

> 35. The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. 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 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.
>
> 36. 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. [emphasis added]

[60] Canadian Courts have recognized that standing is a device used to discourage litigation by "officious inter-meddlers" (see Pelletier J.A. in *Moresby Explorers, supra,* at para. 17). Further, in *Finlay v. Canada*, [1993] 1 S.C.R. 1080, the Supreme Court recognized the judicial concern about the allocation of scarce resources and the need to screen out the "mere busybody", finding that this issue was addressed in the first and second components of the test set out in *Canadian Council of Churches v. Canada* (at para. 32).

[61] Turning to the application of the three-prong test in *Canadian Council of Churches* to Mr. Chauvin, it cannot be concluded that all three parts of the test are met.

[62] As for the first prong of the test, raising a serious issue to be tried, it is plain and obvious that Mr. Chauvin is unable to satisfy it. The remedies sought by Mr. Chauvin fall into two categories. First are those that seek relief that is moot (seeking to set aside the appointment of Dr. Morgentaler and a direction that Dr. Morgentaler's appointment be referred back for reconsideration); second are the declarations relating to the conduct of the Advisory Council, which at this juncture serve no purpose.

[63] It is clear that declaratory judgments should serve a purpose. In *Terrasses Zarolega Inc. v. R.I.O.*, [1981] 1 S.C.R. 94 at 106, the Supreme Court of Canada stated that a declaratory judgment should not be rendered when it will serve little or no purpose. In *Terrasses Zarolega*, a party to an arbitration applied, before the arbitration committee had been created, for a declaratory judgment on

seven questions related to the arbitration. The Supreme Court of Canada held that, as for Question II, no answer should be given. They stated at 106 that:

> As the Court pointed out to counsel for the appellants at the hearing, the declaratory judgment they are seeking in the case at bar could only be of very limited usefulness in the circumstances. Question II is so formulated that the finding could only be that the word "include" in s. 27 of the Act respecting the Olympic Village does not have a limiting effect. This would leave the issue unresolved respecting each of the items individually which appellants might wish to submit to the arbitration committee, so that the declaratory proceeding might have to be begun again for each of these.

[64] It is to be noted that while a public interest applicant need not prove that the alleged illegality of an administrative decision or act caused harm, there is authority to the effect that the Court must consider the overall strength of an applicant's claim (*Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans, supra,* at paras. 16-17).

[65] In the case at bar, Mr. Chauvin argues that there is a serious issue by virtue of the importance of the honour to him and that he has the right to ensure that it adheres to its historic purpose. These are individual and not public interest standing issues. At the hearing on the motion to strike, Mr. Chauvin's counsel argued that Mr. Chauvin may be satisfied with a declaration that the Advisory Council acted improperly. While I agree that the respect and integrity of the Canadian honours system is important, I weigh this against the fact that the only remedy available to Mr. Chauvin is a declaration which cannot and will not alter the events that have taken place. I do not agree that on these facts a hearing on the issue is a constructive use of judicial resources.

[66] While Mr. Chauvin does believe that Dr. Morgentaler's appointment to the Order of Canada diminishes his award, under the rationale used in *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans, supra), vis-à-vis* direct interest standing, a dishonour is not sufficient to support the first prong of the test to grant public interest standing.

[67] The Respondent also argues that Mr. Chauvin does not meet the "genuine interest" threshold being the second prong of the test. It is the Respondent's position that Mr. Chauvin has not demonstrated any real and continuing interest in the Order of Canada but is simply expressing dissatisfaction that Dr. Morgentaler was appointed. They argue that his interest is only in the fact that he perceives his own honour is diminished. An applicant's disdain for a particular government law or action is insufficient to meet this part of the test for public interest standing. The Respondent relies upon three cases in support of this proposition: *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (S.C.J.), aff'd C.A. [2007] O.J. No. 4440; *Talbot v. Northwest Territories (Commissioner),* [1997] N.W.T.J. 78; and, *League for Human Rights of B'nai Brith Canada v. Canada,* 2008 FC 732.

[68] In *Marchand* at para. 14, the Court of Appeal for Ontario agreed that the applicant in that case was not directly affected by the legislation based on the finding that they did not meet the preconditions set out in the legislation. In *Talbot,* the Court stated that the applicant in that case could not achieve public interest standing as he had suffered no damages and there were other means to bring the matter to Court. Finally, in *League for Human Rights of B'nai Brith Canada*, Justice Dawson held that it was not appropriate, in that case, to decide the issue of public interest standing on a preliminary basis and that the issue should be left for the trial judge hearing the

application for judicial review. While these three cases can be distinguished from this case, as the Respondent argues, there is support for the general proposition that disdain for government action does not meet the public interest criterion. Thus, it cannot be demonstrated that Mr. Chauvin has a genuine interest in the sense that it is anything more than his own dissatisfaction with Dr. Morgentaler's appointment. Even on a preliminary motion such as this, Mr. Chauvin has not demonstrated enough to meet the second prong of the test.

[69] Finally, as to whether there is another reasonable and effective means to bring the matter before the Court, there is no need to consider this criterion as Mr. Chauvin fails to meet the first two prongs of the test. In any event, Mr. Chauvin can seek redress by pursuing the termination provisions set out in the Constitution.

[70] In conclusion, an applicant claiming public interest standing must satisfy the Court on a balance of probabilities that it meets each element of the test. As set out in *Sierra Club of Canada*, where an applicant's standing is challenged on a preliminary motion, it is the moving party, in this case the Respondent, that bears the burden of establishing that the applicant lacks standing (see para. 24). In my view of this case, on a balance of probabilities, the Respondent has met its burden to demonstrate that Mr. Chauvin does not have public interest standing.

IX. Status of the Advisory Council

[71] During the course of argument, the issue was raised whether the Advisory Council constitutes a federal board, commission or tribunal within the meaning of section 2 of the *Federal Courts Act*. This need not be finally decided on this motion but it is one more hurdle in the path of Mr. Chauvin in this application. Suffice it to say that the Advisory Council does what its name indicates – it submits to the Governor General a list of nominees in the prescribed categories. The *Constitution* does not contain any provision that requires the Governor General to accept nominations and the decision to appoint is Her Excellency's alone.

[72] There is authority for the proposition that a body constituted to make recommendations is not subject to have those recommendations reviewed. In *Jada Fishing Co. v. Canada*, [2002] F.C.J. No. 436 (FCA) the Federal Court of Appeal concluded that the Federal Board, commission, or tribunal in that case, insofar as it performed advisory duties, was not subject to section 18.1 judicial review. In *Jada Fishing*, a panel was constituted to provide recommendations which the Minister of Oceans and Fisheries was entitled to accept or reject (per Malone, J.A., para. 12).

[73] Other cases also support the position that judicial review should only be undertaken with respect to final administrative rulings. (see for example *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)*, [1998] F.C.J. No. 79 and *Sanofi-Aventis Canada Inc. v. Canada*, [2007] FC 1156).

[74] Here, the Advisory Council, under the provisions of the *Constitution,* is created exclusively for the purpose of providing non-binding advice. Therefore, Mr. Chauvin may not indirectly attack the work of the Advisory Council by revisiting the Governor General's decision. The Governor General's decision, pursuant to Royal Prerogative, is not subject to review. It is therefore arguable that Her Excellency's Advisory Council is not subject to review.

X. Application of *Chiasson v. Canada*

[75] Finally, Mr. Chauvin argues the Federal Court of Appeal's decision in *Chiasson v. Canada,* is on all fours with this case and is therefore determinative of this motion. While there are several aspects of the case that have similarities to this case, in my view *Chiasson* is distinguishable from the circumstances of this case.

[76] In *Chiasson,* the main issue before the Court was whether a decision of the Canadian Decorations Advisory Committee and of the Honours Directorate amounted to an exercise of the Royal Prerogative and was therefore beyond judicial review.

[77] Briefly, a son had proposed his father for a Canadian Bravery Decoration and the nomination was rejected. The rejection was based on the Committee's practice of not considering incidents which occurred more than two years prior to the proposal. The source of the authority for the Committee was letters patent issued on January 28, 1997, which declared that the award of Canadian bravery decorations was governed by the Canadian Bravery Decorations Regulations,

1996. The Reglations did not include any time limit within which nominations must be made following the act of bravery. The Respondent brought a motion to strike the proceeding. This Court denied the motion to strike and ultimately the Federal Court of Appeal concluded that the action could not be dismissed on a motion to strike on the grounds that it was not plain and obvious that the subject matters of the application were not justiciable.

[78] The issue of standing was never addressed in *Chiasson*. At first instance, before Prothonotary Aronovitch, the Crown advanced three grounds for its application to strike: that the bestowal of honours is a matter of Crown Prerogative and therefore is not justiciable; the action is moot in that the plaintiff had already obtained the remedy he sought, and that the Court had no jurisdiction to entertain an action for mandamus, which is only available on judicial review (see para. 10 of 2001 FCT 511).

[79] In the Federal Court of Appeal decision, Strayer J.A. wrote:

> However, it is my view that arguable [sic] that where a procedure has been established by one public authority, in this case by way of Regulations published in the Canada Gazette, as to how and on what basis a specific Committee, another public body, is to deal with nominations made by any citizen, then a legitimate expectation is thereby created that the prescribed procedure will be followed to screen such nominations prior to the submission of a list of nominees for the exercise by the Governor General of the royal prerogative. (para. 9)

[80] Strayer J.A. held that the Regulations took precedence over the informal rule (2 years) created and used by the Committee. Indeed, the two year rule appeared to conflict with the wider Regulations and was therefore deemed not to be plainly and obviously enforceable.

[81] In this case, the rules published in the *Constitution* state that the role of the Advisory Committee is only to consider the nominations and compile and submit a list of nominees who have the greatest merit to the Governor General. The Respondent argued that the *Constitution* does not state a procedure of how the nominations will be compiled nor how the Advisory Council should operate. That is the extent of the mandate. The Advisory Counsel may from time to time establish its own informal rules but following *Chiasson,* any informal rules created by the Advisory Committee, such as a requirement for consensus or for not considering a nominee a second time, are secondary, if not irrelevant. These informal rules, to the extent they exist, do not create any legitimate expectations, as in *Chiasson*, that the Advisory Council must act in a certain manner.

XI. Conclusion

[82] Mr. Chauvin argues that this application is novel and therefore should be allowed to proceed. However, just because an argument is novel does not mean that it trumps the test to strike out an application. On any one of the several grounds discussed above (except arguably justiciability), in my view, the application is bereft of any chance of success and is therefore struck. Mr. Chauvin has already amended his Notice of Application. Given the conclusions herein with

respect to mootness and standing Mr. Chauvin is not given leave to further amend. However, because of the novelty of aspects of the application there will be no order as to costs.

ORDER

THIS COURT ORDERS that:

1. The Respondent's motion to strike is allowed and the application is hereby struck without leave to amend.

2. There will be no award as to costs.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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