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The Limits of the Declaratory Judgment

Justice Malcolm Rowe, KC and Diane Shnier

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Article abstract

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The purpose of this article is to provide an overview of the use of the declaratory judgment. This article identifies significant outstanding issues, but suggests no resolution. It begins by setting out the history of the declaratory judgment in England and in Canada and traces traditional judicial reluctance to recognize a right without a remedy. It then explores the character of declaratory relief, its similarity with other areas of law, and the tension inherent in declaring rights without a remedy. In the second half of this article, this tension is illustrated through a discussion of recent Canadian cases, mainly at the appellate level, on five topics: declarations about contracts, Aboriginal treaties, statutes, administrative action, and constitutional rights.

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THE LIMITS OF THE DECLARATORY JUDGMENT

*The Honourable Mr. Justice Malcolm Rowe, KC and Diane Shnier**

A declaratory judgment is a determination of rights without consequential relief. Declaratory judgments can be highly useful for litigants, but they are also somewhat lacking in doctrinal clarity, raising a number of questions that go to the core of the judicial role. What does it mean to have a legal right, or to declare the existence of a legal right, if that right, while recognized, is not enforced? It has been held that a declaratory judgment is available only when there is a real dispute between the parties, but what is a real legal dispute without legal rights that can be enforced? When is it the business of courts to declare the existence of such a right?

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Les jugements déclaratoires permettent aux tribunaux de déclarer l'existence ou non d'un droit sans qu'il ne soit nécessaire d'accorder une mesure de redressement consécutive. Le jugement déclaratoire peut s'avérer particulièrement utile pour les parties à un litige, mais ses contours demeurent flous dans la doctrine. Cette situation soulève un certain nombre de questions relatives au rôle judiciaire : qu'est-ce cela signifie d'avoir un droit ou de déclarer l'existence d'un droit, si ce droit, bien que reconnu, n'est pas mise en œuvre? La jurisprudence a établi que les tribunaux peuvent rendre un jugement déclaratoire seulement si la question en cause est réelle et non simplement théorique. Néanmoins, qu'est-ce qu'une question réelle si elle n'implique pas des droits à mettre en œuvre? Dans quels contextes la déclaration de l'existence de droits devient-elle la prérogative des tribunaux?

La présente étude a pour objectif de présenter une vue d'ensemble des modalités de la demande et du prononcé du jugement déclaratoire. Nous identifions certains enjeux actuels, mais nous ne proposons pas de solution. Tout d'abord, nous retraçons la trajectoire du mécanisme du jugement déclaratoire en Angleterre et au Canada et les origines de la traditionnelle réticence judiciaire à reconnaitre un droit sans mesure de redressement consécutive. Nous analysons par la suite la nature du jugement déclaratoire, ses similarités avec d'autres domaines de droit et la tension qui résulte de la déclaration d'un droit sans mesure de redressement consécutive. Dans la deuxième partie de cette étude, nous illustrons cette tension en nous appuyant sur la jurisprudence canadienne récente, provenant principalement de tribunaux d'appel, dans cinq domaines de droits : les jugements déclaratoires concernant des droits contractuelles, des droits découlant de traités autochtones, des droits prévus par la loi, des droits résultant d'une décision administrative et des droits constitutionnels.

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Introduction: Purpose and Scope

At common law, judicial power is typically limited to what is necessary to resolve the live dispute before the court and to give effect to the legal rights of the parties. This limits judicial power to adjudication, avoids intruding on the law-making function of the legislative branch, preserves judicial resources, and ensures the common law develops incrementally in response to submissions from interested parties in a true adversarial process. There are exceptions to this general rule, such as the court's ability to hear reference questions and moot disputes, but these neither detract from the operation of the general rule, nor do they undermine its rationale.

Judges also have the discretion to grant declaratory judgments. The declaratory judgment is a somewhat recent innovation that permits a party, in certain circumstances, to seek judicial recourse before they have suffered actual damage. It is a determination of rights without consequential relief. Such a declaration by definition has no coercive enforcement mechanism. Thus, a declaration is a remedy that is "available without a cause of action and whether or not any consequential relief is available."[1] The "essence" of a declaratory judgment has been described as "the determination of rights"[2] and "a declaration, confirmation, pronouncement, recognition, witness and judicial support to the legal relationship between parties without an order of enforcement or execution."[3]

As we will explain, declaratory judgments can be highly useful for litigants, but they are also somewhat lacking in doctrinal clarity, raising a number of questions that go to the core of the judicial role. What does it mean to have a legal right, or to declare the existence of a legal right, if that right, while recognized, is not enforced? It has been held that a declaratory judgment is available only when there is a real dispute between the parties, but what is a real legal dispute without legal rights that can be enforced? When is it the business of courts to declare the existence of a right of this nature? We will suggest that rather than understanding legal right and dispute in the strict sense of the terms, the limits of the bare declaratory judgment are better understood as principled reflections of the limits of the judicial role at common law. The incremental approach of

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1 *Ewert v Canada*, 2018 SCC 30 at para 81 [*Ewert*].

2 *Telecommunication Employees Association of Manitoba Inc et al v Manitoba Telecom Services Inc et al*, 2007 MBCA 85 at para 62 [*Telecommunication*], quoting Paul Martin, "The Declaratory Judgment" (1931) 9:8 Can Bar Rev 540 at 547. See also *Canada (Minister of Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 60 [*Tennant*].

3 *Starz (Re)*, 2015 ONCA 318 at para 102 [*Starz*], quoting Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed (Toronto: Thomson Carswell, 2007) at 3.

the common law is rooted in the idea that the law is best developed in the face of full submissions, a robust record, and interested parties motivated to put the best arguments before the court. So too are the limits of the declaratory judgment. In this way, the limits on the use of the declaratory judgment to some extent parallel the limits on when a court will hear moot disputes or answer reference questions, and the doctrine of justiciability generally. We suggest that the requirement that a legal right be at stake should be understood as standing in for the restraint on judicial power that pervades the common law.

The purpose of this article is to provide an overview of the use of the declaratory judgment, highlighting what its limits can teach us about the limits of the judicial role writ large. The motivation behind this article is to better understand the contours of the judicial role through a study of a remedy that tends to push the boundaries of that role. This article identifies significant outstanding issues, but suggests no resolution. It begins by setting out the history of the declaratory judgment in England and in Canada and traces traditional judicial reluctance to recognize a right without a remedy. It then explores the character of declaratory relief, its similarity with other areas of law, and the tension inherent in declaring rights without a remedy. In the second half of this article, this tension is illustrated through a discussion of recent Canadian cases, mainly at the appellate level, on five topics: declarations about contracts, Aboriginal treaties, statutes, administrative action, and constitutional rights. These cases are examples of problem areas where courts have struggled to frame how and when to determine a right in the absence of consequential relief.

The scope of this article is limited in two ways. First, the discussion of declaratory judgments focuses on the common law provinces, and does not include declaratory judgments under Quebec civil law. This is because the type of declaratory judgment discussed in this article has its roots in the Courts of Chancery and the carrying forward of remedies particular to courts of equity by means of statutory reform in England.[4] Declaratory judgments in Quebec have a different history. Second, while we note that

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4 For a discussion of declaratory relief in Quebec, see Ghislain Massé, "L'adaptation de la justice québécoise au jugement déclaratoire" (1983) 61:2 R du B can 471; Marie Paré, *La requête en jugement déclaratoire* (Cowansville, QC: Yvon Blais, 2001); Claude Ferron, "Le jugement déclaratoire en droit québécois" (1973) 33:4 R du B 378; Jacinthe Plamandon, *L'évolution et la structuration des principes directeurs de la procédure civile du Québec, 1867-2016* (Doctoral Thesis, Université Laval, 2019) [unpublished] at 168–70; Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed (Toronto: Thomson Reuters, 2016) at 13–17 [Sarna, *Declaratory Judgments*, 4th ed]; Denis Ferland & Benoît Emery, *Précis de procédure civile du Québec*, vol 1 (Art 1-301, 321-344 Cpc), 6th ed (Montreal: Yvon Blais, 2020) at paras 1-1154 to 1-1164.

declaratory judgments can also be rendered along with consequential relief, or declare that consequential relief is owed,[5] our focus is on declaratory judgments that do not entail any consequential relief. Throughout, we refer to this type of declaratory judgment as a bare declaratory judgment.

I. The Origins of the Declaratory Judgment in Common Law Canada: Utility, but with Limits

Declarations, like many equitable remedies, have always been discretionary and provide relief where common law remedies are inadequate to meet the ends of justice. There is some academic debate about whether the declaratory judgment is an equitable recourse or a *sui generis* remedy,[6] and the Supreme Court has held that "the consensus in Canada seems to be that the remedy is *sui generis*."[7] However, it is clear that equitable principles governing the exercise of discretion apply.[8] Like other equitable remedies, declaratory judgments are flexible.

A declaratory judgment allows parties to determine their rights before the breach of an obligation, and to prevent the violation of a right by ascertaining its scope in advance. The availability of a declaratory judgment even in the absence of a traditional common law cause of action makes declaratory relief a highly useful instrument. Nonetheless, in exercising discretion to grant a declaration, courts maintain key aspects of our system of judicial decision-making, such as an adversarial process.

The historical development of the declaratory judgment in England, and subsequently in Canada, has been animated by two primary concerns: the practical utility of the declaratory judgment to the parties, and the need to preserve the adversarial nature of judicial proceedings. These concerns can come into tension. The historical development of the declaratory judgment is a story of attempts by legislatures, parties, and courts to normalize the use of the bare declaratory judgment, but at the same time to reconcile the bare declaratory judgment with traditional under-

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5 For examples of consequential relief framed as declaratory relief, see Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 55–56.

6 See *ibid* at 24–25 (according to Lazar Sarna, the origin of the declaratory judgment might be said to belong to equity given its roots in the *Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery* (UK), 1850, 13 & 14 Vict, c 35, ss 1, 14 [*Special Case Act*], and the *Act to amend the Practice and Course of Proceeding in the High Court of Chancery* (UK), 1852, 15 & 16 Vict, c 86, s 50 [*Chancery Amendment Act*]).

7 *Hongkong Bank of Canada v Wheeler Holdings Ltd*, [1993] 1 SCR 167 at 190, 100 DLR (4th) 40.

8 See *ibid* at 190–92.

standings of the limits of the judicial role. This tension continues to animate the use of the declaratory judgment in Canada today.

A. History in England

In both Canada and England, the granting of declaratory judgments is a comparatively recent practice. Traditionally, courts were reluctant to declare a right without any accompanying consequential relief or means to enforce it.[9] In *Clough v. Ratcliffe*, Vice Chancellor Knight Bruce held that "[n]akedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this Court."[10] This historical reluctance of courts to grant declaratory judgments demonstrated a profound skepticism of the remedy. This skepticism could be attributed to the novelty of the practice, the lack of any clear limits on the practice (making its use hard to control), and the possibility that bare declaratory judgments might encourage frivolous or vexatious litigation.[11] Over time, such a body of jurisprudence standing against the use of declaratory judgments had been established that, as a result, courts were reluctant to deviate from it. For example, in *Ferrand v. Wilson,* the court referred to "the want of a jurisdiction to ascertain and declare rights before a party interested has actually sustained damage" as "a defect in the jurisprudence of this country," but ultimately declined to grant a declaration.[12] The Court asked rhetorically: "If the Plaintiff [has] sustained no present injury, what case has he for asking the assistance of this Court ... ?"[13]

The eventual adoption of the declaratory judgment in England in the 1850s was inspired by its longstanding use in Scotland.[14] The advent of the declaratory judgment in England can be attributed in part to Lord Brougham, who delivered a speech in the House of Commons in 1828 urging the adoption of the Scottish practice of granting declaratory judgments, and introduced bills to this effect.[15]

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9 See Martin, *supra* note 2 at 544; *Kourtessis v MNR*, [1993] 2 SCR 5 at 85–86, 102 DLR (4th) 456 [*Kourtessis*]; Rt Hon Lord Woolf & Jeremy Woolf, *The Declaratory Judgment*, 4th ed (London, UK: Sweet & Maxwell, 2011) at 9–10.

10 (1847), 63 ER 1016 at 1023, 1 De G & Sm 164.

11 See Woolf & Woolf, *supra* note 9 at 9–10. See also *Elliotson v Knowles* (1842), 11 LJ Ch 399; *Grove v Bastard* (1848), 41 ER 1082, 2 Ph 619.

12 (1845), 71 ER 898 at 916, 2 Holt EQ 334.

13 *Ibid*. See also Woolf & Woolf, *supra* note 9 at 9–10.

14 See Martin, *supra* note 2 at 540.

15 See *ibid* at 543.

In a celebrated case decided by the House of Lords in 1846, Lord Brougham expressed his envy at the availability of declaratory relief in Scotland. He explained its benefits as follows:

> I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy under it the security and the various facilities and conveniences which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action. Here, you must wait till a party chooses to bring you into court; here, you must wait till possibly your evidence is gone; here, you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding.[16]

The initial legislative efforts to bring declaratory judgments into English law culminated in the 1852 *Act to amend the Practice and Course of Proceeding in the High Court of Chancery*, which provided that "[n]o suit ... shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."[17] This statutory reform made clear that consequential relief was not necessary to ground the granting of a declaratory judgment. However, courts interpreted it very narrowly for some time as allowing for declarations only where they would be incidental to coercive relief or where the plaintiff would have been entitled to consequential relief had the plaintiff chosen to ask for it.[18] For example, in *Bright v. Tyndall*,[19] the Court was asked to make a bare declaration about the interpretation of a will, in the event that a daughter of a beneficiary remained unmarried by the age of twenty-one. It would have been highly convenient for the daughters of the beneficiaries to know what would happen under the will in that situation in advance, so that they could decide whether or not to marry before they turned twenty-one. However, the Court declined to make the declaration, because it did not "regard that as a circumstance which renders it absolutely necessary that this question should now be decided."[20] Similarly, in

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16 See CS Potts, "The Declaratory Judgment" (1944) 28:3 J American Judicature Society 82 at 83, quoting *Earl of Mansfield v Stewart*, 5 Bell 139 at 160–61. See also Edwin Borchard, *Declaratory Judgments*, 2nd ed (Cleveland: Banks-Baldwin Law, 1941) at 215, n 30 [Borchard, *Declaratory Judgments*].

17 *Chancery Amendment Act*, *supra* note 6, s 50 [emphasis added]. In 1850, the *Special Case Act* (*supra* note 6) was the first legislative acknowledgment of the need for procedural reform with respect to declaratory judgments (see Borchard, *Declaratory Judgments*, *supra* note 16 at 216).

18 See Borchard, *Declaratory Judgments*, *supra* note 16 at 217. See also *Kourtessis*, *supra* note 9 at 85.

19 (1876), 4 Ch D 189, 25 WR 109.

20 *Ibid* at 197.

Jackson v. Turnley, the Court declined to make a bare declaration interpreting a lease agreement, reasoning that the legislature did not intend to allow "anybody who has an apprehension that some day, in the happening of some possible event, another may make a claim against him, [to] institute a suit to have it declared that there is no ground of claim."[21] The Court explained that the wording of the *Act to amend the Practice and Course of Proceeding in the High Court of Chancery* indicated that the Court must be at least capable of granting consequential relief, but "[h]ere there is not merely no consequential relief asked, but none is capable of being given."[22]

This limited uptake of the declaratory judgment by the judiciary was met with further reform. The declaratory judgment was again extended in England by the *Judicature Acts* of 1873 and 1875, which authorized the adoption of new rules of court.[23] The resulting new rules of court made the availability of declaratory judgments in the absence of consequential relief even more explicit. Order XXV, rule 5 of *The Rules of the Supreme Court 1883* provided:

> No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not.[24]

This rule was adopted in substantively identical form in Australia, Wales, various Canadian provinces, India, and Northern Ireland, and formed the basis for statutory reform in various U.S. states.[25]

However, courts continued to interpret the statutory reforms narrowly for some time. Further, this reform did not come from the legislature but from the Rule Committee, and some argued it was *ultra vires* their competence.[26] The availability of a declaration without consequential relief was not fully acknowledged in England until 1911 in *Dyson v. Attorney General* and in *Guaranty Trust Company of New York v. Hannay*.[27] These cases finally recognized that declaratory relief can be given regardless of the plaintiff's entitlement to consequential relief.

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21 (1853), 61 ER 587 at 591, 1 WR 461.

22 *Ibid*. See also *Garlick v Lawson* (1853), 68 ER 1121, 10 Hare, App 14.

23 See *Supreme Court of Judicature Act* (UK), 1873, 36 & 37 Vict, c 66, s 74; *Supreme Court of Judicature Act* (UK), 1875, 38 & 39 Vict, c 77, s 17.

24 (UK), Order XXV, r 5 [emphasis added].

25 See Borchard, *Declaratory Judgments*, *supra* note 16 at 218–19, n 45.

26 See Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 9–10; Borchard, *Declaratory Judgments*, *supra* note 16 at 219.

27 *Dyson v Attorney General*, [1911] 1 KB 410 at 413 [*Dyson*]; *Guaranty Trust Company of New York v Hannay*, [1915] 2 KB 536 [*Guaranty Trust*].

The watershed decision of *Dyson* allowed the plaintiff, Mr. Dyson, to proceed against the Crown for a declaration without proceeding by way of petition of right. Traditionally, the Crown could not be sued without its consent, which was granted through a petition of right.[28] In this case, Mr. Dyson was served with a tax notice, compliance with which would have involved considerable expense. He proceeded by ordinary suit, without a petition of right, and sought a declaration against the Attorney General that the notices were unauthorized and illegal. Among other things, the Attorney General argued that the declaration should not be granted because the declaration sought would only establish a negative—that Mr. Dyson had no obligation to comply with the tax notice—and because he had no recognized cause of action. The Court unanimously granted the declaration, firmly establishing the availability of declaratory judgment without either a right to consequential relief or a cause of action in the conventional sense.[29]

A few years later in *Guaranty Trust*, the Court of Appeal held that Order XXV, rule 5 permitted the granting of a declaratory judgment even where the plaintiff had no cause of action in the traditional sense and sought no executory order.[30] A majority also held that the rule was *intra vires*, as it dealt only with practice and procedure and merely confirmed the traditional jurisdiction of the Court of Chancery.[31] The view expressed by Lord Justice Bankes that "the rule should receive as liberal a construction as possible" has paved the way for the bare declaratory judgment in England and in Canada.[32]

B. History in Canada

This evolution of declaratory judgments in England was followed closely by similar changes in Canada. In Upper Canada (at the time, called "Canada West") in 1853, and subsequently in Ontario in 1885, rules of court and statutes were amended to match changes made in the

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28 See Madam Justice Karen Horsman & Gareth Morley, eds, *Government Liability: Law and Practice* (Toronto: Thomson Reuters, 2019) at 1.40; Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Scarborough: Thomson Carswell, 2007) at 10.3.

29 See *Dyson*, *supra* note 27; Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 98–99; Woolf & Woolf, *supra* note 9 at 16; Borchard, *Declaratory Judgments*, *supra* note 16 at 219.

30 See *Guaranty Trust*, *supra* note 27 at 572.

31 See *ibid* at 563–64, 570; Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 8–10; Woolf & Woolf, *supra* note 9 at 9–36; The Honourable EM Heenan, "History of Declaratory Relief – A Distinct Remedy beyond Equitable Affiliations" in Kanaga Dharmananda & Anthony Papamatheos, eds, *Perspectives on Declaratory Relief* (Sydney: Federation Press, 2009) 51 at 61–63.

32 *Guaranty Trust*, *supra* note 27 at 572.

corresponding English law.[33] As in England, these statutory reforms were given a limited interpretation for some time, until the *Dyson* decision was rendered in 1911, and the *Guaranty Trust* decision in 1915.[34] English courts, until then, demonstrated a reluctance to grant a declaratory judgment in the absence of consequential relief. Courts in most Canadian jurisdictions followed a similar pattern of judicial interpretation.[35]

The history of the declaratory judgment, in both England and Canada, demonstrates a slow progression toward increased utility and efficiency, tempered by restraint so as not to step too far outside the proper judicial function and the adversarial process. In 1931, Paul Martin traced the history of the declaratory judgment in Canada, characterizing utility as an organizing principle for its evolution. However, he noted that courts were reluctant to grant declaratory judgments where the issue might more conveniently be decided by some other tribunal, or where the legislature has specifically provided for some other forum.[36] As the second half of this article will describe, the tension between utility and restraint is still with us, and is reflected in modern Canadian appellate jurisprudence.

II. The Character of Declaratory Relief

There is a tension inherent in the nature of the bare declaratory judgment, and the prerequisites for imposing a declaratory judgment.

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33 See Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 11; Martin, *supra* note 2 at 545; *The Judicature Act*, RSO 1887, c 44, s 52(5); T Wardlaw Taylor, *Orders of the Court of Chancery for Upper Canada with Notes* (Toronto: Henry Boswell, 1860) at 48–49; *The Administration of Justice Act,* SO 1885, c 13, s 5.

34 See *Dyson*, *supra* note 27; *Guaranty Trust*, *supra* note 27.

35 See Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 11–12, citing *Bunnell v Gordon*, [1890] OJ No 97, 20 OR 281 (Ont Ch); *Toronto Railway Company v Toronto (City)* (1906), 13 OLR 532 at 537, 1906 CarswellOnt 377 (Ont CP), aff'g 1906 CarswellOnt 377, 13 OLR 532 (Ont Div Ct); *Stewart v Guibord* (1903), 6 OLR 262 at 264, [1903], OJ No 141 (Ont Div Ct); *Williams v Jackson*, [1904] 11 BCR 113, 1904 CarswellBC 87 (BCSC); *McCutcheon v Wardrop*, [1918] MJ No 34, 1918 CarswellMan 73 (Man KB); *Swift Current (City) v Leslie* (1916), 26 DLR 442, 9 WWR 1024 (SKCA). See also Martin, *supra* note 2 at 545–46.

36 See Martin, *supra* note 2 at 547. For more detail on the history and origins of the declaratory judgment in England and in Canada, see Potts, *supra* note 16 at 83–84; Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 8–12; Woolf & Woolf, *supra* note 9 at 9–36; Heenan, *supra* note 31 at 61–63; *Kourtessis*, *supra* note 9 at 85–90; *Canada (AG) v Law Society (British Columbia)*, [1982] 2 SCR 307, 137 DLR (3d) 1; Sir William Wade & Christopher Forsyth, *Administrative Law*, 10th ed (Oxford, UK: Oxford University Press, 2009) at 480; Edwin M Borchard, "The Declaratory Judgment—A Needed Procedural Reform" (1918) 28:1 Yale LJ 1 at 25–29 [Borchard, "A Needed Procedural Reform"]; Borchard, *Declaratory Judgments*, *supra* note 16 at 207–30; Edwin M Borchard, "The Declaratory Judgment—A Needed Procedural Reform II" (1918) 28:2 Yale LJ 105 [Borchard, "A Needed Procedural Reform II"].

Bare declaratory judgments determine rights but award no consequential relief. One of the requirements for exercising discretion to render a declaratory judgment is a real dispute between the parties where a declaration is capable of having a practical effect in resolving the issues. What does it mean to determine rights without enforceable consequential relief? How are these prerequisites to be applied? This tension is the modern instantiation of the historical discomfort with declaratory relief discussed above.

A. The Bare Declaratory Judgment

As discussed, this article is concerned with bare declaratory judgments that do not impose any enforceable, consequential relief. Various authors and cases describe a declaration that determines or recognizes legal rights without an order of enforcement or execution as "the essence" of the declaratory judgment.[37] This article is not about declaratory judgments that impose consequential relief, or declaratory relief combined with consequential relief. For example, where a litigant seeks to avoid the operation of a limitation period by seeking a "declaration" that money is payable, this is not a true or bare declaratory judgment.[38]

Bare declarations have been described in various ways by the leading texts. For example, in Canada, Lazar Sarna describes them in the following way:

> The declaratory judgment is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights. While consequential relief may be joined or appended, the court has the power to issue a pure declaration without coercive direction for its enforcement.[39]
>
> The essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness, and judicial support to the legal relationship between parties without an order of enforcement or execution.[40]

Similarly, in the United Kingdom, authors Lord Woolf and Jeremy Woolf, and Sir William Wade and Christopher Forsyth, state:

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[37] Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 6; Martin, *supra* note 2 at 547; Wade & Forsyth, *supra* note 36 at 480–81; *Starz, supra* note 3 at para 102; *Telecommunication, supra* note 2 at para 62; *Tennant*, *supra* note 2 at para 60. See also *Champagne v Sidorsky*, 2018 ABCA 394 at para 17.

[38] For examples, see Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 55–56.

[39] *Ibid* at 1.

[40] *Ibid* at 6.

> A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts ... A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant.[41]

> The essence of a declaratory judgment is that it states the rights or legal position of the parties as they stand, without changing them in any way; though it may be supplemented by other remedies in suitable cases ... A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court.[42]

Finally, in the United States, Edwin Borchard writes:

> [Declaratory judgments] do not presuppose a wrong already done, a breach of duty. They cannot be executed, as they order nothing to be done. They do not constitute operative facts creating new legal relations of a secondary or remedial character; they purport merely to declare pre-existing relations and create no secondary or remedial ones. Their distinctive characteristic lies in the fact that they constitute merely an authentic confirmation of already existing relations.[43]

> The main characteristic of the declaratory judgment, which distinguishes it from other judgments, is the fact that it conclusively declares the pre-existing rights of the litigants without the appendage of any coercive decree.[44]

The fact that a bare declaration is not capable of enforcement means that the parties are free to ignore it—failure to abide by a bare declaration cannot be subject to a charge of contempt of court. Further proceedings would be required to obtain enforceable, consequential relief.[45] As Sarna puts it, "[a]n executing officer would be at a loss for guidance if called upon to execute the declaration because no remedial course is stated in the declaration."[46] However, like any other final legal determination, a declaration is binding as between the parties as *res judicata,* and bind-

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41 Woolf & Woolf, *supra* note 9 at 1.

42 Wade & Forsyth, *supra* note 36 at 480–81.

43 Borchard, "A Needed Procedural Reform", *supra* note 36 at 5.

44 Borchard, *Declaratory Judgments*, *supra* note 16 at xiii.

45 See Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 7; *Yellowbird v Samson Cree Nation No 444*, 2006 ABQB 434 at paras 35–37, aff'd 2008 ABCA 270.

46 Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 54, cited positively in *Kyle v Atwill*, 2020 ONCA 476 at para 47.

ing on third parties via the operation of *stare decisis*.[47] Therefore, while a bare declaration is not enforceable, it is useful in the sense that courts will recognize and adhere to the declaration in any future proceedings seeking consequential relief.

While a bare declaratory judgment includes no enforceable or consequential relief, it does require a legal right capable of determination. As we will see, this is somewhat of an oxymoron, and it has given rise to difficulty.

B. When Courts Will Exercise Discretion to Grant a Declaratory Judgment

Declaratory judgments are discretionary. The Supreme Court has set out the requirements, stating that declaratory relief may be appropriate where: "(a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought."[48] In *Solosky v. The Queen*, the Supreme Court explained that two factors will govern when the court should exercise its discretion to grant a declaratory judgment: (1) the reality of the dispute, and (2) whether the declaration is capable of having any practical effect in resolving the issues in the case.[49] In *Solosky*, Justice Dickson cautioned that a declaration will normally not be granted when the dispute is over and has become academic (mootness), or where it has yet to arise and may not arise (prematurity or ripeness). He stressed that it is essential to distinguish between "future" or "hypothetical" rights on the one hand, and a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision on the other.[50]

Sarna explains that courts will not entertain an action for declaratory relief where there is no dispute between the parties, or where the questions are purely academic or hypothetical.[51] The court may also refuse to grant a declaration if another procedure is available which affords more

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47 See *Green v Canada (Attorney General)*, 2011 ONSC 4778 at para 36, quoting Lazar Sarna, *The Law of Declaratory Judgments*, 1st ed (Toronto: Carswell, 1978) at 31; *Canadian Warehousing Association v R*, [1969] SCR 176 at 178, 1 DLR (3d) 501.

48 *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at para 60; *Ewert*, *supra* note 1 at para 81. See also *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11 [*Daniels*]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46.

49 [1980] 1 SCR 821 at 832–33, 105 DLR (3d) 745 [*Solosky*].

50 *Ibid*, citing AH Hudson, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977) 3:3 Dal LJ 706 at 710.

51 See Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 37–52.

effective relief, or if it is determined that the legislature intended other procedures to be followed.[52]

C. Similarity with Other Legal Concepts

The question of when to exercise discretion to grant a declaratory judgment bears some resemblance to the question of when to exercise discretion to hear a moot dispute or answer a reference question. In *Borowksi v. Canada (Attorney General)*, the Supreme Court explained that the broad rationales underlying judicial reluctance to hear moot disputes are: (1) the court's competence is rooted in the adversary system, (2) a concern for judicial economy, and (3) sensitivity to its role as the adjudicative branch, as opposed to the legislative branch.[53] In *Reference re Same-Sex Marriage*, the Supreme Court explained that the Court may decline to answer reference questions where the question is too ambiguous to allow an accurate answer, or when the parties have not provided the Court with sufficient information.[54] In *Operation Dismantle v. The Queen*, the Supreme Court also observed some similarities between the rationale underlying the declaratory judgment and some types of injunctive relief, in that both are based on the prediction of future events.[55] Quoting Professor (later Justice) Sharpe, the Court observed:

> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet*—because he fears—and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.[56]

The Court observed that the general principle with respect to such injunctions is that there must be a high degree of probability that the harm will in fact occur in order to justify the pre-emptive intervention.[57]

The factors a court must consider in determining whether to exercise its discretion and render a declaratory judgment also bear some resemblance to the doctrine of justiciability. Justiciability has been defined as "a set of judge-made rules, norms and principles delineating the scope of

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52 See *ibid*.

53 [1989] 1 SCR 342 at 358–63, 57 DLR (4th) 231.

54 2004 SCC 79 at para 63.

55 [1985] 1 SCR 441, 18 DLR (4th) 481 [*Operation Dismantle*].

56 *Ibid* at 458, quoting Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1983) at 30–31.

57 See *Operation Dismantle*, *supra* note 55 at 457–58.

judicial intervention in social, political and economic life."[58] In determining whether a matter is justiciable, courts should consider, among other things:

> [T]hat the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute.[59]

The test for when a court should exercise its discretion to grant declaratory relief is similar because the reluctance to render bare declaratory judgments is motivated by similar concerns as to the appropriate role of courts and the proper scope of judicial authority.

Hearing moot disputes and answering reference questions are useful exceptions to the general common law rule that judicial authority is limited to what is necessary to resolve the live dispute before the court. So too is the declaratory judgment. It is an exception because while there must be a legal right and a legal dispute at stake, it is not a legal right or a legal dispute in the traditional sense of the terms, because no consequential relief is sought and no legal rights are actually exercised.

D. The Tension Inherent in the Bare Declaratory Judgment

There is a tension between settling a real dispute or determining rights on the one hand, but awarding no consequential relief on the other. What does it mean to have a right or resolve a live dispute if there is no consequential relief? What is a right if it is not enforceable? What is a legal dispute without legal rights that can be enforced? The limits courts have set out for when a declaratory judgment is appropriate can sometimes prove difficult to understand and apply in light of what a bare declaratory judgment is.

As discussed further below, the utility of the declaratory judgment lies in large part in its preventative quality—a declaration can prevent a live dispute and a breach of legal rights that may give rise to damages or some other consequential remedy, by clarifying for the parties in advance what those rights are. Justice Dickson emphasized this "preventative role" of declaratory judgments in *Operation Dismantle*, where he explained that "no 'injury' or 'wrong' need have been actually committed or

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[58] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 33 [*Highwood*], quoting Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada,* 2nd ed (Toronto: Carswell, 2012) at 7.

[59] *Highwood*, *supra* note 58 at para 34, quoting Sossin, *supra* note 58 at 294.

threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty."[60] But if the utility of a declaratory judgment lies in its ability to prevent a dispute, how can the existence of a genuine dispute also be a prerequisite?

The requirement of legal rights or a live dispute, although it is absolutely basic to the proper exercise of judicial power, is difficult to apply and understand in the context of the declaratory judgment, where there is no consequential relief.

E. Determining When a Declaratory Judgment is Appropriate in Light of This Tension

It is easy to imagine situations where a declaratory judgment is useful and appropriate. A classic situation is where it would be inefficient to require the parties to take an action that could, on a certain interpretation, breach a contract or violate a statute in order to determine whether they had the right to act as they did, and where there is no impediment to determining rights in advance of the potential breach so as to prevent the need for a potential breach at all. For example, where the issue is whether or not one party has the right to demolish a building under a contract, it is useful to know the answer, without having to demolish the building to find out.[61] Here, there is an existing contingent legal right, in the sense that *if* a party breached, *then* the other party could sue in contract. Borchard lists examples of situations where declaratory relief is clearly useful based on real cases. For example, whether a plaintiff may mine coal or whether he must refrain from disturbing the defendant's pipeline, where a defendant asserts that a plaintiff must continue to perform a contract but the plaintiff disagrees, and whether certain buildings are "temporary" within the meaning of a statute such that public officials may tear them down.[62] As Borchard puts it "[w]hat is visible in this type of case is the existence of an opposing claim which disturbs the peace and freedom of the plaintiff and, by raising doubt, insecurity, and uncertainty in his legal relations, impairs or jeopardizes his pecuniary or other interests."[63] In this sense, it may be said that the plaintiff's legal rights are at stake, even

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60 *Operation Dismantle*, *supra* note 55 at 457, citing Borchard, *Declaratory Judgments*, *supra* note 16 at 27 and referring to the reasons of Justice Wilson in her concurring opinion. See also Woolf & Woolf, *supra* note 9 at 6.

61 See e.g. Potts, *supra* note 16 at 84–85, citing *Willing v Chicago Auditorium Association* (1928), 277 US 274 and *Washington-Detroit Theatre Company v Moore* (1930), 229 NW 618.

62 Borchard, *Declaratory Judgments*, *supra* note 16 at 27–28.

63 *Ibid* at 28.

where the order the plaintiff seeks is not enforceable. Borchard explains that in such a situation it should not be necessary for either party to act on his own interpretation of the contract or statute and incur the risk of breach as a prerequisite to seeking judicial interpretation. Rather, "[t]he dispute having arisen, either party, before and without breach, should be able to summon the other party to court and obtain judgment."[64]

However, as we will see, there are also cases where the "legal rights" framework is less helpful in guiding when declaratory judgment is appropriate. It is not the business of courts to declare title or rights which are clear and disputed by none. Declarations are useful when they can prevent the need for a potential breach and future litigation, but it is not always clear cut when this will be the case.[65] As Borchard aptly puts it: "Whether a plaintiff is sufficiently affected by the facts as developed to warrant judicial protection, *i.e.*, whether his interest is sufficiently acute and personal to be called 'legal,' is not always easy to determine *a priori*; and upon that question, opinions sometimes differ."[66]

What follows is a survey of recent Canadian cases, mainly at the appellate level, in which courts have been asked to issue declaratory judgments. Some of these cases have interesting facts which yielded a relatively easy decision on the declaration. In other cases, courts have struggled to determine whether declaratory relief was appropriate, in light of the tension discussed above. These "hard cases" are instructive and raise questions about the contours of what courts see as a sufficiently concrete legal right to warrant a declaratory judgment, and, by extension, the contours of the judicial role itself. In the following sections, we consider recent cases concerning declarations of rights under contracts, treaties with Aboriginal peoples, and three areas of public law: statutory rights, administrative action, and constitutional law. While declaratory judgments arise in many areas of law—estates, trusts, and substitute decision-making to name a few—the areas discussed in this article were selected from recent appellate cases raising common themes.

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64 *Ibid*.

65 See Borchard, "A Needed Procedural Reform II", *supra* note 36 at 110.

66 Borchard, *Declaratory Judgments*, *supra* note 16 at 54. See e.g. *Tataryn v Diamond & Diamond*, 2021 ONSC 2624 at paras 45–50.

III. Declarations of Rights in Contracts and Treaties

A. Rights under Contracts

When there is a breach of contract, damages are not a necessary element, and declaratory relief and nominal damages are available.[67] The more interesting case is when there has not yet been a breach of contract or an action for breach of contract. In such a case, when can declarations be used to determine contractual rights *in advance?*

Quickie Convenience Stores Corp. v. Parkland Fuel Corporation[68] is a recent example in which a declaration in advance of a breach of contract was held to be appropriate. The appellant, Quickie Convenience Stores Corp., owned several fuel stations subject to lease agreements with the respondent fuel supply company.[69] The appellant put several fuel stations up for sale.[70] It received an offer from a prospective purchaser, but the completion of the sale depended on its ability to assign its lease agreements with the respondents.[71] These agreements provided that the respondent's consent was required for assignment, but such consent could not be unreasonably withheld.[72] The respondent refused to consent to the lease assignments.[73] The appellant sought a declaration that the respondent had refused its consent unreasonably, and the Court of Appeal for Ontario granted this declaration.[74] This is a good example of the utility of the declaratory judgment: without it, the appellant would presumably have had to attempt to assign the lease agreements without consent and then defend its right to do so in an action by the respondent, or it would have had to sue the respondent in contract for the lost profit of the lost sale in order to obtain a remedy. The declaratory judgment prevented this loss from occurring. There was no reason to wait for the loss to occur and bring an action for consequential relief when that loss could be prevented.

Where there is a remedy attached to the right, this requires clarity as to what the right is. However, when courts are asked to declare the existence of a right in the absence of any remedy, the difference between a le-

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67 See *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 67; *Mars Canada Inc v Bemco Cash & Carry Inc*, 2018 ONCA 239 at paras 32–33.

68 2020 ONCA 453.

69 See *ibid* at paras 3–5.

70 See *ibid* at para 6.

71 See *ibid* at para 9.

72 See *ibid* at para 7.

73 See *ibid* at para 10.

74 See *ibid* at paras 2, 11.

gal right and a mere fact becomes blurry. As Borchard pointed out many years ago, it is not always easy to draw a principled distinction between declaring a right and declaring a fact:

> The general principle which appears to have been adopted is that the courts will not make declarations of a fact, but only of a jural relation. Exceptions to this rule have been infrequent; yet it is difficult to conceive why the rule should impair very seriously the institution of declaratory actions, inasmuch as it would seem feasible to convert the request for the declaration of an operative fact into a request for the declaration of a jural relation.[75]

In other words, where a legal right hinges in part on a fact, the point at which declaring the fact is functionally equivalent to declaring the right can be difficult to ascertain.[76]

The issue of what constitutes a declaration of a right under a contract as opposed to only a declaration of a fact arose squarely in *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*.[77] This case concerned a coverage dispute between a trucking company and its insurer. When two containers that the trucking company was consigned to deliver to a customer were stolen, the insurance company denied coverage.[78] The trucking company sought a declaration concerning coverage, before the customer had taken any steps to make a claim for its loss to the trucking company.[79] The insurance company had stated two grounds for denying coverage: the stolen goods were not in the possession of the trucking company at the time of the theft, and the trucking company had made a misrepresentation regarding the type of cargo it transported.[80] The application judge was not prepared to declare an obligation to indemnify because there was no claim against the trucking company, but he did declare that the trucking company had made no material misrepresentation and that the theft occurred while the cargo was in the custody of the trucking company.[81] The Court of Appeal for Ontario allowed the insurance company's appeal.[82] Among other reasons, the Court held that:

> [O]nce the application judge heard the application and found that he could not make a declaration of rights because no claim existed,

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75 Borchard, "A Needed Procedural Reform II", *supra* note 36 at 115.

76 See *ibid* at 115–16.

77 2019 ONCA 753 [*Rosen*].

78 See *ibid* at para 1.

79 See *ibid* at para 2.

80 See *ibid* at para 7.

81 See *ibid* at para 16.

82 See *ibid* at para 38.

> it was an error to make factual findings in relation to the two disputed issues raised by [the insurance company]'s denial of coverage letter and to frame those findings as declaratory relief.[83]

B. Rights under Treaties

While interpreting a treaty with an Aboriginal people is not the same as interpreting a contract, it has been held that treaties are "analogous" to contracts.[84] The legal principles that govern declarations of contractual rights are similar to those that apply to declarations of Aboriginal treaty rights, but a number of unique doctrinal and practical considerations emerge in the context of the latter. In particular, courts have faced significant difficulties in determining the appropriate scope of declarations concerning treaty rights, given that the nature of a treaty right is often influenced by a complex web of factual and legal considerations, and given that the infringement of a treaty right can arise from cumulative government action rather than from any discrete statutory provision or policy. The concept of the utility of a declaration also takes on a unique tenor in the context of Aboriginal rights, in which the litigants can also be engaged in ongoing negotiations.

The distinction between declarations of fact and declarations of law received focused attention in *West Moberly First Nations v. British Columbia*, in which the Court had to decide the meaning of a provision in Treaty 8 that set the boundary of a tract of land as falling along the central range of the Rocky Mountains.[85] In this case, the parties disputed the meaning of a provision in Treaty 8 that described a tract of land with a boundary along the "central range of the Rocky Mountains."[86] In dissent, Justice Smith held that granting a declaration to determine the meaning of the land boundary was not appropriate, because it would not determine the legal effect of the boundary, and in this sense, was more akin to a finding of fact than to a declaration of right.[87] According to Justice Smith, it was not clear from the record that the substantive rights under the Treaty were intended to be exercised on all the land encompassed by the boundary clause. As a result, the declaration would not have the effect of determining the rights exercisable throughout the tract, and therefore would not have practical utility. In order to be useful, the declaration

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83 *Ibid* at para 34.

84 *R v Badger*, [1996] 1 SCR 771 at para 76, 133 DLR (4th) 324; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 7.

85 2020 BCCA 138 [*West Moberly*].

86 *Ibid* at paras 2–3; *Treaty No 8 Made June 21, 1899*, online: *Government of Canada* <rcaanc-cirnac.gc.ca> [perma.cc/U6HR-A4ZM] [*Treaty 8*].

87 See *West Moberly*, *supra* note 85 at para 84.

would have to be coupled with a subsequent judicial determination; citing *Rosen*,[88] discussed above, Justice Smith concluded that courts cannot "grant a declaration of fact on the speculation that the fact declared may later prove useful in determining the scope of a right."[89]

The majority of the Court disagreed and held that declaratory relief was appropriate and would have practical utility.[90] According to the majority, a declaration must define *some* aspect of the parties' rights, but it need not define every aspect.[91] The majority noted that the rights under the Treaty were also protected by section 35(1) of the *Constitution Act, 1982*.[92] As such, they reasoned that interpreting the boundary clause was a *legal* declaration, as opposed to a mere declaration of facts, in part for this reason:

> How could it be otherwise when [the application judge] was asked to determine the geographic extent of a treaty entered into between Canada and certain First Nations – to interpret the meaning of a critical phrase in a legal relationship that is constitutionally protected?[93]

The majority concluded that the possibility of an effect on rights stemming from the declaration is enough to give the declaration practical utility, and that an "all-or-nothing" approach to declaratory relief is unnecessarily restrictive and impractical.[94] The majority found the larger public policy context of the case relevant, reasoning that allowing parties to litigate discrete issues and gain clarity as to the meaning of a phrase in the Treaty will facilitate negotiation outside the litigation process, thus serving the interest of judicial economy.[95]

This case raises the question of when there is utility in declaring facts that form the scope of a right. In some cases, this could be seen as determining part of an inter-related set of rights, and thus permissible. In other cases, this could be seen as merely a declaration of a fact, and not a right at all, which is beyond the scope of what declaratory judgment—a determination of a right—is supposed to be. The divergent views in this case illustrate a degree of abstractness in the term "right" in the definition of a declaratory judgment. In the absence of a request for consequen-

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88 See *ibid* at paras 97–100, citing *Rosen*, *supra* note 77 at paras 25–26, 30.

89 *West Moberly*, *supra* note 85 at para 96.

90 See *ibid* at paras 292–93.

91 See *ibid* at paras 313–14, 331.

92 Being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*].

93 *West Moberly*, *supra* note 85 at paras 335–37.

94 *Ibid* at para 352.

95 See *ibid* at paras 351–55.

tial relief, it is not always clear what it means for a right to be determined or for a dispute to be settled. For the majority, there was utility in clarifying the boundary of the tract of land, even if other, related rights were left undecided, particularly where the right is constitutionally protected. For the dissenting judge, there was no practical utility in declaring the land boundary in the absence of a declaration regarding whether Treaty rights are exercisable throughout the tract of land.

In *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, the Supreme Court of British Columbia declared that the plaintiffs held Aboriginal rights that were infringed by the cumulative effects of the regulatory scheme put in place under the *Fisheries Act*.[96] The declaration stated that the cumulative effects of the law infringed a number of the plaintiffs' Aboriginal rights, but did not identify specific rights-infringing provisions.[97] The Court called on the parties to negotiate with one another with a view to reconciling the issue, and provided that either party could return to court after two years to address whether any infringements could be justified.[98] The parties later did return, and the Supreme Court of British Columbia held that some aspects of the regulatory regime unjustifiably infringed the plaintiff's Aboriginal rights.[99] To determine whether the infringements were justified, the trial judge interpreted or elaborated on the declared rights from the first stage of the trial, and undertook a detailed analysis to translate the broad declarations into specific directions in respect of the fisheries regime.[100]

On appeal, the Court of Appeal made some modifications to the trial judge's order, but ultimately held that the trial judge, in the second justification phase of the trial, was entitled to interpret the declarations rendered in the first stage of the trial in order to undertake the justification analysis.[101] While the trial judge could have simply declared whether the cumulative infringements were justified, such a declaration would have been of limited value because it could not translate into specific substantive changes to the regulatory regime. However, the Court of Appeal referred to the trial judge's attempt to translate the broad declarations made in the first phase of the trial into specific directions in respect of the

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96 2009 BCSC 1494 at paras 900–01, 909 [*Ahousaht*]; *Fisheries Act*, RSC 1985, c F-14.

97 See *Ahousaht*, supra note 96 at para 841.

98 See *ibid* at paras 901–09. Canada appealed the order, but achieved limited success (see *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2011 BCCA 237; *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2013 BCCA 300).

99 See *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633.

100 See *ibid* at para 256.

101 See *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2021 BCCA 155 at paras 111–12.

fisheries regime for each species as "herculean" and "perhaps even impossible."[102] It further stated that a lesson that could be taken from these proceedings is that "the plaintiffs' attempts to remedy all deficiencies in the regulatory regime in a single lawsuit has proven unwieldly and ultimately infeasible."[103] The Court stated that "[a]t best, a court can provide legal guidance that will assist the parties (and particularly the regulators) to craft fisheries regulations that respect the plaintiffs' rights. Specific areas of disagreement may have to be resolved in judicial review applications or in more narrowly focussed civil claims."[104] This case demonstrates the utility and limitations of attempting to declare the scope of rights in general terms.

Although *Ahousaht* was not about declaring rights under a treaty, it was recently relied on to do just that in *Yahey v. British Columbia*.[105] In this case, the Supreme Court of British Columbia considered a claim brought by the Blueberry River First Nations.[106] Blueberry River First Nations sought declarations that British Columbia had breached its obligations under Treaty 8 by virtue of the cumulative impacts of industrial development on the right to use Treaty lands. They also sought a declaration that British Columbia may not continue to authorize activities that infringe on Treaty rights.[107] The Court noted that in some cases a general declaration may suffice, but in other cases more specificity may be required to facilitate negotiation between the government and Aboriginal people. As in the *Ahousaht* case, there was no single regulatory provision or government decision at issue—rather, it was the cumulative effect of authorizations for industrial development that impacted Blueberry River First Nations' rights.[108] The Court concluded that a combination of broad declarations regarding the infringement of the Blueberry River First Nations' Treaty rights, in addition to more specific declarations regarding what is required to remedy the breaches, was appropriate, and declared that British Columbia had breached its Treaty obligations.[109] Instead of issuing injunctions, the Court stated that in many situations injunctions and declarations are functionally equivalent, and that declarations can be preferred as relief against governments because they allow governments to craft ways to satisfy the judicial declaration, thus maintaining the bal-

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102 *Ibid* at para 156.

103 *Ibid* at para 158.

104 *Ibid* at paras 154–58.

105 2021 BCSC 1287.

106 See *ibid* at paras 1–2.

107 See *ibid* at para 29.

108 See *ibid* at paras 1880–81.

109 See *ibid* at para 1875.

ance of our democratic institutions.[110] Thus, the Court also declared that British Columbia may not continue to authorize activities that breach Treaty rights, and that it must act with diligence to consult and negotiate to establish timely enforceable mechanisms to manage the cumulative impact of industrial development on Blueberry River First Nations' Treaty rights.[111]

These declarations bear some resemblance to injunctive relief. Unlike an injunction, a bare declaration is not technically enforceable. That being said, to enforce an injunction—or any enforceable court order—courts rely on the government. Courts have no ability to enforce any court order on their own. In this sense a declaration that the government must do something is functionally very similar to an injunction. Indeed, some academics have noted that declaratory judgments are especially well-suited to provide relief against the government, because government officials can be expected to voluntarily comply with the declaration.[112] While injunctive relief may technically be available as a remedy for constitutional violations, declarations are often preferable.[113] Declarations allow courts to state generally what is necessary to comply with constitutionally guaranteed treaty rights, and allow the government flexibility in how to achieve that compliance.[114] Further, declarations about a discrete issue or aspect of an agreement may facilitate negotiation outside the litigation process, which can be particularly important in the context of treaties with Aboriginal peoples. This, in conjunction with the fact that in the interpretation of treaties with Aboriginal peoples, rights protected by section 35(1) are at stake, may in some cases explain judicial willingness to grant comparatively expansive declarations of rights under Aboriginal treaties as compared to rights under contracts between private parties.

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110 See *ibid* at para 1886.

111 See *ibid* at paras 1888–95.

112 See Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thompson Reuters, 2013) at 12-2 to 12-5.

113 Injunctive relief is generally seen as a last resort for judges trying to enforce constitutional rights in Canada, but there is precedent for the use of injunctions as a remedy for constitutional violations. In *Doucet-Boudreau v Nova Scotia (Minister of Education)* a majority of the Supreme Court stated that a superior court may issue an injunction under section 24(1) of the *Charter*, and upheld an injunctive remedy from the trial judge (2003 SCC 62 at paras 70–74; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 92 [*Charter*]). See also Roach, *supra* note 112 at 13-48 to 13-52, 13-68 to 13-69.

114 See Roach, *supra* note 112 at 12-2 to 12-3. See also Borchard, *Declaratory Judgments*, *supra* note 16 at 876–77.

IV. Declarations in Public Law

A. Rights under Statutes

It is well established that declaring how a statute applies to an individual or a group can be useful and appropriate. For example, in *Daniels v. Canada (Indian Affairs and Northern Development)*, the Supreme Court declared that the term "Indians" in section 91(24) of the *Constitution Act, 1867* includes Métis and non-status Indians.[115] The Court reasoned that there was practical utility in delineating and assigning constitutional authority for these two groups: "A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute."[116] Similarly, in *Canada (Citizenship and Immigration) v. Tennant*,[117] the Federal Court of Appeal considered whether declaring Mr. Tennant to be a citizen of Canada was appropriate declaratory relief. The issue was whether this declaration was really a declaration of fact, while the *Federal Courts Rules* only allow "a binding declaration of right."[118] The Court held that status as a citizen of Canada by descent may be the subject of a declaration, as Canadian citizenship is a creature of statute, with no meaning apart from statute, and therefore it is not "solely" a declaration of fact.[119]

However, declarations of rights under statutes tend to raise procedural fairness concerns, because, unlike contracts, the meaning of terms in legislation has wide-reaching application. While in some cases it is appropriate to declare how legislation applies to individuals, given the wide-ranging implications of the meaning given to legislation, concerns about hypothetical issues and procedural fairness to interested parties who are not present can take on heightened importance.

For example, in *H Coyne & Sons Ltd. v. Whitehorse (City)*, the owner of subsurface mining rights under a property zoned for a residential subdivision applied for declarations that local bylaws prohibiting mining were invalid and that it had the right to use the surface of the lot to mine.[120] The trial judge and the Court of Appeal declined to grant these declarations, with the latter noting that there was no actual "reality" or

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115 *Daniels*, *supra* note 48 at para 19.

116 *Ibid* at paras 12, 15.

117 *Tennant*, *supra* note 2.

118 SOR/98-106, r 64.

119 *Tennant*, *supra* note 2 at paras 63, 65.

120 2018 YKCA 11.

impairment of the applicant's rights under the bylaws as they existed at that time.[121] The Court of Appeal added that the declarations sought regarding the right to mine call for the interpretation of mining legislation and regulations of general application.[122] The Government of Yukon was not served with a notice of the application for declaratory relief and was not present. The Court of Appeal held that the absence of interested parties was a compelling reason not to make determinations as to the scope and applicability of the legislative schemes in question.[123]

Similarly, in *Mosten Investments LP v. The Manufacturers Life Insurance Company (Manulife Financial)*, the Court of Appeal held that declaratory relief was inappropriate because it involved the interpretation of the *Income Tax Act* and *Income Tax Regulations,* among other reasons.[124] The Court reasoned that it was open to the appellant to raise the issue with the Canada Revenue Agency, and the agency's interpretation of the relevant tax provisions could then have been reviewed by the Tax Court of Canada and the Federal Court of Appeal. By contrast, granting the declaratory relief sought would have had significant and wide-ranging public policy effects without the Canada Revenue Agency being heard. The Court of Appeal saw no basis to interfere with the trial judge's reasoning.[125]

B. Administrative Action

Declarations about administrative action give rise to special concerns. Generally, administrative decisions are judicially reviewed on a reasonableness standard, under which the administrative decision-maker is owed a degree of deference. Courts have a residual discretion to stay an action for declaratory or other relief, where that action is functionally a veiled application for judicial review.[126] Otherwise, the posture of deference in a judicial review could be functionally bypassed. This is because although a bare declaration, by definition, does not give rise to execution or enforcement, where the declaration is *about government action,* the distinction between actually quashing an administrative decision and declaring that administrative decision to have been flawed exists more in theory than it

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121 *Ibid* at paras 50–51.

122 See *ibid* at paras 75–77.

123 See *ibid* at paras 78–79.

124 2021 SKCA 36 at paras 148–49 [*Mosten*]; *Income Tax Act*, RSC 1985, c 1 (5th Supp); *Income Tax Regulations*, CRC, c 945.

125 See *Mosten*, *supra* note 124 at paras 148–51.

126 See *Manuge v Canada*, 2010 SCC 67 at para 2; *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 78.

does in practice. Even when an administrative decision is quashed, the court relies on the government to respect that and conduct itself as though the decision is quashed. There is therefore little functional difference between how a court expects government to respect the outcome of a judicial review versus a declaration. This makes the questions of when courts should exercise their discretion to grant a declaration with respect to administrative action, in situations where judicial review is also available, a particularly difficult one.

In *Ewert v. Canada*,[127] a majority of the Supreme Court issued a declaration that some psychological and actuarial risk assessment tools used by the Correctional Service of Canada ("CSC") to assess an offender's risk of recidivism breached the CSC's obligations under section 24(1) of the *Corrections and Conditional Release Act* to "take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible."[128] In deciding that declaratory relief was appropriate, the majority reasoned that the case constituted an exceptional circumstance, as Mr. Ewert had already used the statutory grievance mechanism, which had proven ineffective. The majority noted that its declaration did not invalidate any particular decision made by the CSC.[129] Justice Rowe disagreed that a declaration was the appropriate remedy, taking the view that the proper remedy for breach of statutory duty by a public authority is judicial review for invalidity. Allowing inmates to apply for a declaration bypasses the ordinary process of judicial review, and fails to accord the deference typically shown to administrative decisions.[130] Again, this illustrates the discretionary nature of declaratory relief, noting the emphasis placed by the majority on the particular and exceptional circumstances of the case.

In *Kalo v. Winnipeg (City of)*, Mr. Kalo had sought a declaration that he was entitled to receive a clear criminal record from the Winnipeg Police Service.[131] The application judge determined that he could not overturn the decisions of the police service on declaratory relief, and that what Kalo sought was "akin to judicial review."[132] The case accordingly proceeded on this basis. However, the Court of Appeal held that the application judge did not proceed as he should have on a judicial review: he did not determine a standard of review, and it was unclear what information

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127 *Ewert*, *supra* note 1.

128 SC 1992, c 20, s 24(1) [*CCRA*].

129 See *Ewert*, *supra* note 1 at paras 84, 88.

130 See *ibid* at para 127, Rowe J, dissenting in part.

131 2019 MBCA 46.

132 *Ibid* at para 17.

the police service relied on in coming to its conclusion and whether this was the same information that was before the application judge.[133] The Court of Appeal sent the matter back for a re-hearing based on problems with the record. It declined to comment on whether it was appropriate for the application judge to convert the request for declaratory relief into a judicial review, and whether Kalo could have been successful in his request for a declaration.[134]

In *Schmidt v. Canada (Attorney General)*, the appellant sought a declaration concerning the meaning of legislative provisions that require the Minister of Justice and the Clerk of the Privy Council to examine proposed legislation to determine whether it is inconsistent with the *Charter* or the *Canadian Bill of Rights*.[135] The Federal Court of Appeal held that although this was framed as an action for declaratory relief that the Minister and the Privy Council Office have been misapplying legislation, it was in effect a judicial review and, as such, the standard of review to be applied must be as in any judicial review.[136]

These cases demonstrate divergent approaches among appellate courts on how to handle declaratory relief in the context of administrative action. In some circumstances it can be granted, but in other circumstances courts will either convert the proceeding into one for judicial review, or apply judicial review principles to the request for declaratory relief. In one case, it was held that seeking a declaration that an administrative body did not have jurisdiction to make certain orders was an abuse of process.[137] The Supreme Court noted in *Ewert* that, like other discretionary remedies, declaratory relief should normally be declined where there exists an adequate alternative mechanism to resolve the dispute and to protect the rights in question.[138] However, it can be a difficult question as to when the availability of judicial review has proven inadequate so as to warrant granting a declaration instead of conducting judicial review.[139] The Supreme Court has expressed a similar concern about

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133 See *ibid* at paras 27, 36.

134 See *ibid* at paras 27–28, 43, 47.

135 2018 FCA 55 at para 2 [*Schmidt*]; *Canadian Bill of Rights*, SC 1960, c 44.

136 See *Schmidt*, *supra* note 135 at paras 17–22. For other less recent examples of courts indirectly substituting the decision of the court for the decision of the administrative decision-maker by way of an action for a declaration instead of a judicial review, see *Kelso v The Queen*, [1981] 1 SCR 199, 120 DLR (3d) 1; *Glynos v Canada*, [1992] 3 FC 691, 96 DLR (4th) 95 .

137 See *Shuswap Lake Utilities Ltd v Mattison*, 2008 BCCA 176 at paras 44–63.

138 See *Ewert*, *supra* note 1 at para 83.

139 See *ibid.*

using declarations as a collateral procedure effectively to create an automatic right of appeal where Parliament has refused to do so.[140]

Determining rights by declaring that an administrative decision affecting rights was flawed, without the deference and procedural requirements that come with the ordinary process of judicial review, may result in a situation where administrative decisions are more easily "declared" invalid, but not actually quashed. This is especially problematic if it is accepted that there is little practical difference between a court order quashing an administrative decision and a court's declaration that a decision is invalid. While an administrative decision that has been declared to be flawed still technically stands, government can practically speaking be expected to adhere to a court's declaration just as government can be expected to adhere to a court's order that the administrative decision is quashed. Therefore, courts should carefully consider when the "right" to certain treatment by the administrative state can be divorced from the procedural hurdles typically required to have that right enforced. No simple rule guides such decisions. The exercise of discretion in this context, as in others, involves broad concepts of fairness and practicality.

V. Declarations in Constitutional Law

As discussed above, the watershed decision of *Dyson* in England established the availability of a declaratory judgment without consequential relief, even where the plaintiff had no cause of action in the traditional sense.[141] This decision demonstrated the utility of a declaration as a remedy for contesting Crown action. It has been relied on in Canada as a mechanism for determining whether laws fall within federal or provincial competence, and whether they comply with the *Charter*.[142]

The jurisdictional basis for actions seeking declaratory relief against the Crown on some constitutional matters has presented challenges for the courts. In Canada today, declaratory relief in constitutional cases is typically granted by a superior court relying on either section 52(1) or section 24(1) of the *Constitution Act, 1982*.[143] However, the source of authority to issue declarations of invalidity is not spelled out in either of these provisions. Section 52(1) states that any law that is inconsistent with the Constitution is of no force or effect, to the extent of the inconsistency, but

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[140] See *Kourtessis*, *supra* note 9 at 86–87.

[141] See *Dyson*, *supra* note 27.

[142] See *Kourtessis*, *supra* note 9 at 85–90; *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307, 137 DLR (3d) 1; Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 98–99; Woolf & Woolf, *supra* note 9 at 16.

[143] See *Constitution Act, 1982*, *supra* note 92, ss 24(1), 52(1).

it does not explicitly provide any remedial jurisdiction.[144] The Supreme Court has held that the action for a declaration rests ultimately in the inherent powers of the Court of Chancery, and that only superior courts of inherent jurisdiction or courts empowered to do so by statute may make declarations that a law is of no force and effect.[145] Similarly, section 24(1) confers remedial powers on "a court of competent jurisdiction," which seems to presume the existence of jurisdiction from a source external to the *Charter* itself, as Justice Wilson pointed out in *Singh v. Canada (Minister of Employment and Immigration)*.[146]

The relationship between section 24(1) and section 52(1) on the one hand, and the inherent jurisdiction of superior courts to grant declaratory relief contesting Crown actions recognized in *Dyson* on the other, is not entirely clear, and has been at issue in several recent appellate cases.

British Columbia Civil Liberties Association v. Canada (Attorney General) raises the issue of whether a superior court can rely on its inherent jurisdiction to declare the conduct of state actors unconstitutional, when sections 24(1) and 52(1) are not available.[147] In this case, the trial judge had found that the CSC, in giving effect to the administrative segregation provisions of the *Corrections and Conditional Release Act*, had engaged in practices that violated the constitutional rights of individual inmates (among other issues).[148] The respondents were public interest groups, and the Court of Appeal did not agree that a section 24(1) remedy could be granted to a corporate entity with public interest standing.[149] Section 52(1) was also not available, because the legislative scheme was capable of constitutional administration—the problem lay with maladministration of the legislative scheme by CSC staff.[150] The Court of Appeal noted that whether a superior court can rely on its inherent jurisdiction to declare the conduct of state actors unconstitutional has attracted "scant post-*Charter* judicial attention."[151] It then pointed to *Operation Dismantle* as providing support for the notion that declaratory relief against unconstitutional government action may be available at common law based on

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144 See *ibid*, s 52(1); *Ontario (Attorney General) v G*, 2020 SCC 38 at para 85 [*G*].

145 See *Kourtessis*, *supra* note 9 at 85–87, 113–14, Sopinka J; *R v Lloyd*, 2016 SCC 13 at para 15; Roach, *supra* note 112 at 2-26.

146 [1985] 1 SCR 177 at 222, 17 DLR (4th) 422; *Constitution Act, 1982*, *supra* note 92, s 24(1).

147 2019 BCCA 228 at paras 258, 263 [*BCCLA*].

148 See *ibid* at para 240; *CCRA*, *supra* note 128, ss 31–33, 37.

149 See *BCCLA*, *supra* note 147 at paras 241, 245.

150 See *ibid* at para 216.

151 *Ibid* at paras 261–62.

the principle from *Dyson*, independent of section 24(1).[152] The Court of Appeal indicated that a superior court's general jurisdiction to grant a declaration is not diminished by the existence of section 24(1).[153] The Court held that declaratory relief where government action is found to violate the *Charter* is an important residual remedy where section 24(1) is unavailable, and that this remedy has particular utility in light of the emergence of public interest standing in *Charter* litigation.[154] In the result, the Court declared that the CSC had breached various statutory obligations and had infringed the constitutional rights of segregated inmates denied representation at review hearings.[155] However, the Court declined to make a declaration regarding discrimination against Indigenous inmates because, in the particular circumstances of the case, such a declaration would be too vague to assist the CSC in implementing remedial measures.[156]

Although Canadian courts enjoy a general jurisdiction to grant declaratory relief against the Crown, this jurisdiction may be limited by Canada's status as a federalist state. *Fitter International Inc. v. British Columbia* raises the issue of the use of declaratory relief to bypass restrictions in provincial legislation governing Crown immunity.[157] In this case, an Alberta corporation asked the Alberta Court of Queen's Bench to declare unconstitutional certain provisions of a British Columbia statute that imposed a sales tax on residents of British Columbia who purchase goods that they bring into the province, and required vendors outside of the province to collect this sales tax. The issue was whether Crown immunity precluded this.[158] Historically, the Crown could only be sued with its own permission, which was granted through a "royal *fiat*" in response to a petition of right.[159] All provincial legislatures have introduced legislation limiting Crown immunity and permitting suits against the Crown, but only in their own courts.[160] Alberta's *Proceedings Against the Crown Act* allows superior courts in Alberta to determine claims against the Crown in right of Alberta, and British Columbia's *Crown Proceeding Act* abolishes Crown immunity for proceedings against the Crown in right of

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152 See *ibid* at para 264; *Operation Dismantle*, *supra* note 55; *Dyson*, *supra* note 27.

153 See *BCCLA*, *supra* note 147 at para 263.

154 See *ibid* at para 265.

155 See *ibid* at paras 269–71.

156 See *ibid* at para 272.

157 2021 ABCA 54 at paras 2–3 [*Fitter*].

158 See *ibid* at para 25.

159 Horsman & Morley, *supra* note 28 at 1.40; Hogg, *supra* note 28 at 10.3. See also *Canada (Attorney General) v Thouin*, 2017 SCC 46 at para 1.

160 See Horsman & Morley, *supra* note 28 at 12.10.30(2)(a–b).

British Columbia taken in British Columbia Superior Court.[161] However, the judge at first instance had ruled that the inherent jurisdiction of superior courts to grant declaratory relief from *Dyson* constituted an exception to Crown immunity, such that an Alberta court could grant declaratory relief against the Crown in right of British Columbia.[162] The Court of Appeal disagreed, noting that *Dyson* was decided in a unitary state, and there was no issue of inter-provincial immunity.[163] While the *Dyson* procedure is an exception to one aspect of Crown immunity—the historical need to proceed by petition of right—the Court of Appeal held that it had no application to the inter-provincial Crown immunity at issue in that case.[164]

Finally, while the nature of declaratory relief in constitutional cases has been clarified in recent Supreme Court decisions, nonetheless, some questions remain. Whereas the standard bare declaration merely recognizes a legal situation that has always existed, a declaration of constitutional invalidity could be conceptualized as changing the prevailing legal reality by rendering unenforceable what is facially a properly enacted law. In *R v. Ferguson*, the Supreme Court described the effect of a section 52(1) declaration of invalidity as "effectively remov[ing the law] from the statute books."[165] This raises the question of whether constitutional declarations of invalidity are bare declarations that "merely [state] the law without changing anything,"[166] or whether the remedial provisions of the *Constitution Act, 1982* (sections 24(1) and 52(1)) have the effect of altering the nature of declaratory relief.[167] Further issues arise in the context of suspended declarations of invalidity. It is well-established in Canada that the effects of declarations of constitutional invalidity can be suspended.[168] However, as Sarna points out, "[t]he logical position of a suspension is difficult to understand if we consider a judgment as a statement of legal situation that has always existed."[169] The Supreme Court has acknowledged

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161 *Proceedings Against the Crown Act*, RSA 2000, c P-25; *Crown Proceeding Act*, RSBC 1996, c 89; *Fitter*, *supra* note 157 at paras 14–16.

162 See *Fitter*, *supra* note 157 at para 25.

163 See *ibid* at para 26.

164 See *ibid* at paras 26, 40.

165 2008 SCC 6 at para 65.

166 *Kourtessis*, *supra* note 9 at 86.

167 See *Constitution Act, 1982*, *supra* note 92, ss 24(1), 52(1).

168 See *G*, *supra* note 144 at paras 117–39; *Schachter v Canada*, [1992] 2 SCR 679 at 715, 93 DLR (4th) 1.

169 Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 154. Similarly, Jeremy Birch observes "[t]he effect of a declaratory order is to authoritatively indicate the legal state of affairs as they exist at that time ... As a result, a declaratory order is non-executory; it cannot be enforced. The logical extension, from a conceptual perspective, is that there

that "the suspended declaration of invalidity is not fully consistent with the declaratory approach"[170] and that a theory of declaratory judgments under which judges merely discover the law "cannot easily be reconciled with modern constitutional law."[171] Sarna suggests that if we understand "the issuance of a declaration created by the *Charter* ... as being qualitatively different than a declaration arising from the inherent jurisdiction of the court, there is no logical inconsistency."[172] This issue is likely to be addressed in a future case, and is beyond the scope of this article.

Conclusion

With each type of declaratory judgment discussed in this article, difficulties flow from the fact that a declaration is a judgment without a remedy. What is the right? What is the dispute? In constitutional contexts, what is there to suspend? What is the Crown immune from? When the exercise of discretion is predicated on the utility of resolving a dispute or determining a right, but the right must be determined and the dispute resolved without any enforcement mechanism, this disjuncture between the right and the remedy makes the contours of what counts as a right more difficult to ascertain. As the contours of the "right" become imprecise, so too, by extension do the contours of the judicial role in declaring that "right."

Declaratory judgment may be appropriate where it is useful for the parties to determine their legal rights before breach so as to avoid breach. In some cases, it will not be practical for a party to risk breaching a right in order to find out if that right exists. In this indirect sense, legal rights are at stake, in that a declaratory judgment may be the only realistic way to realize them. We should not look for a true legal right with a corresponding remedy in the strict sense of the term, but rather we should understand the requirement that a legal right be at stake as a stand-in for the ever-present restraint on judicial power at common law: the live dispute before the court with full submissions on a complete record from interested parties. This is how the common law ensures judges arrive at the closest thing to the "true" answer the common law knows.

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can be no stay of declaratory relief" (Jeremy Birch, "Staying Declaratory Relief" in Dharmananda & Papamatheos, *supra* note 31, 163 at 163). A stay prevents the execution of an order, but with a declaratory judgment there is no execution to stay (see *ibid*).

170 *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 91.

171 *R v Albashir*, 2021 SCC 48 at para 40.

172 Sarna, *Declaratory Judgments*, 4th ed, *supra* note 4 at 154.

Although it leaves many difficult issues unresolved, this article has aimed to identify common themes and questions raised by recent case law on declaratory judgments with a view to better understanding the limits of the judicial role. Ultimately, the appropriate scope of the declaratory judgment is bound up with the broader question as to the appropriate scope of judicial power. This is an old question, and it must be answered incrementally on a case-by-case basis, as per the common law tradition.