Canadian Council of Churches v. The Queen PUBLIC INTEREST STANDING TAKES A BACK SEAT

June Ross

In *Canadian Council of Churches* v. *The Queen*,[1] the Supreme Court of Canada altered its previous course of expanding the scope of public interest standing to sue. While the Court did not overrule its previous decisions, its application of the test of public interest standing is restrictive and discouraging to the public interest litigant. Despite the ever increasing importance of *Charter* litigation in the development of social policy, for the first time in this series of decisions, the Court denied standing to the public interest litigant.

THE PREVIOUS STANDING DECISIONS

Before considering the case in detail, a brief summary of the Supreme Court's prior rulings may be of assistance. Traditionally litigants obtained standing only if involved in a suit to protect personal or property rights immediately threatened. This requirement was largely done away with in the constitutional context by the "trilogy" which established the parameters for a discretionary grant of public interest standing.[2] Subsequently the same approach was applied in the administrative law context in *Minister of Finance of Canada* v. *Finlay*.[3]

The first of the trilogy was *Thorson* v. *Canada (Attorney General)*.[4] Thorson, as a taxpayer suing in a class action, challenged the constitutionality of the *Official Languages Act* and the expenditure of funds to implement it. Public interest standing was granted because the claim raised a justiciable issue that would not otherwise be subject to judicial review, as the statute was declaratory rather than regulatory and the Attorney General had declined to commence or agree to proceedings. *Thorson* also dealt with the rationale offered in support of the requirement of standing, that "grave inconvenience", in other words a flood of lawsuits, would accompany a relaxation of this requirement. Laskin J. (as he then was), for the majority, doubted that such a flood would occur and indicated that the courts possess adequate tools to deal with any problems by staying proceedings or imposing costs.

In the second case, *Nova Scotia Board of Censors* v. *McNeil*,[5] a newspaper editor concerned about the wide powers of the Nova Scotia Board of Censors, and particularly about its decision to prohibit the exhibition of the film "Last Tango in Paris", launched a constitutional challenge of the *Theatres and Amusements Act*. While this was a regulatory statute, the regulated theatre owners had had not seen fit to challenge it, and the statute also affected members of the public in that it limited the films they might view. The only way to bring this interest before the courts was through a grant of public interest standing.

The third case in the trilogy was *Minister of Justice of Canada* v. *Borowski*,[6] a challenge under the *Canadian Bill of Rights* to the abortion provisions of the *Criminal Code of Canada* . Martland J. for the majority held that Borowski, a well-known "right to life" advocate with a history of involvement in the issue, had standing to enforce the alleged rights of foetuses under the *Bill of Rights*. The provisions of the *Code* challenged in the action were exculpatory and thus unlikely to be directly raised in criminal proceedings pertaining to those directly regulated (doctors, hospitals, pregnant women). Others directly affected (foetuses or, arguably, husbands) could not challenge the legislation given practical or time constraints. Summarizing the requirements of public interest standing which he found to have been met, Martland J. held that a plaintiff must demonstrate:

1. "a serious issue";
2. "that he is affected by it directly or that he has a genuine interest as a citizen" in the issue; and
3. "that there is no other reasonable and effective manner in which the issue may be brought before the Court."[7]

Laskin C.J.C., dissenting in this case, wrote a judgment that forecast the approach of the Supreme Court in *Canadian Council of Churches* v. *Canada*. He described an additional rationale for the requirement of standing: a desire to confine the courts, generally speaking, to a dispute-resolving role, and to avoid dealing with questions that are not sufficiently precise for judicial determination. He would have denied standing on the ground the legislation generally was likely to be challenged in criminal proceedings, and the exculpatory provisions specifically could be challenged by persons directly affected. Even if such proceedings were not to be completed prior to abortion or birth, the existence of directly affected persons would nonetheless give "concreteness" to the case.[8]

The discretionary approach to public interest standing was applied in an administrative law context in *Minister of Finance of Canada* v. *Finlay*.[9] This was a challenge by a recipient of provincial social assistance to the legality of federal transfers to Manitoba under the *Canada Assistance Plan*. It was argued that the Manitoba *Social*

Allowances Act did not comply with conditions of federal cost-sharing payments provided by the *Plan*.

Le Dain J. for the Court held that the policy considerations which justify the discretionary grant of public interest standing to challenge the constitutional limits of legislative authority, also apply to challenges relating to the statutory limits of administrative authority. He summarized concerns underlying the expansion of public interest standing and linked them to specific requirements of public interest standing which operated to meet the particular concerns. Two concerns were "the allocation of scarce judicial resources and the need to screen out the mere busybody."[10] These were linked to the first two requirements, referred to in *Borowski*, of a serious issue and a genuine interest in the issue. Another concern was that "in the determination of issues the courts should have the benefit of the contending points of view of the persons most directly affected by them."[11] This was met by the third requirement that there be no other reasonable and effective manner in which the issue might be litigated.

THE LOWER COURT DECISIONS

This brings us to *The Canadian Council of Churches* v. *The Queen*. The Canadian Council of Churches (the "Council") is a federal corporation that represents the interests of a group of member churches. It coordinates church work relating to the protection and resettlement of refugees, and comments on the development of refugee policy and procedures.

A large number of amendments to the *Immigration Act, 1976*[12] dealing with the processing of refugee claims came into effect on January 1, 1989. The Council commenced the subject action immediately, challenging 81 provisions of the amended *Act*.

Rouleau J. in the Federal Court, Trial Division[13] first heard the motion of the Attorney General of Canada to strike out the statement of claim on the grounds that the Council lacked standing and that there was no reasonable cause of action. Rouleau J. found that the Council met the established criteria for public interest standing. There was a serious and justiciable interest in the constitutionality of the amendments. The Council had a genuine interest in the issue as demonstrated by virtue of its involvement in the refugee process, and because its members assisting refugees may subject themselves to criminal sanctions under some of the challenged amendments. There was no reasonable or practical way for refugees to raise the constitutional issues because the new provisions made them subject to a 72 hour removal order. An injunction against the removal order could not be considered by the court in this time, and might not even be commenced because a claimant might not have time to retain counsel.

In the Federal Court of Appeal,[14] MacGuigan J.A. for the Court held that the serious issue requirement was generally met, except with respect to some aspects of the claim that did not raise a reasonable cause of action. The genuine interest requirement was also met. The fact that the Council was a corporation did not disentitle it from seeking public interest standing, and it had demonstrated a public interest motivation.

Regarding the third criterion, the Court of Appeal noted that it stipulated a "very limited" test.[15] Public interest standing should be allowed only where there is no directly affected group which could itself challenge the legislation or where, although a group exists, no member is likely to do so. In this case both refugee claimants and those liable to prosecution were directly affected by the amendments. The amendments were certain to produce real cases. The Court took judicial notice of the fact that such were actually coming forward for judicial review. Standing should be granted only pertaining to those aspects of the claim that could not otherwise reasonably be expected to be litigated.

To determine which aspects of the claim met this requirement, the Court of Appeal engaged in a detailed examination of each of the allegations in the statement of claim. It held that the parts of the claim concerning criminal sanctions in relation to humanitarian assistance to refugees raised issues which would be brought forward in criminal prosecutions, so that public interest standing should not be granted. Of the remaining parts of the claim, many would be dealt with in judicial review applications by refugee claimants, and public interest standing again should not be granted. However, for the issues raised in the statement of claim relating to time limits (72 hour removal orders and 24 hour appeal periods), it would be difficult for refugee claimants to obtain counsel and mount challenges, particularly to the time periods themselves. For those claims, public interest standing was accordingly appropriate.

THE SUPREME COURT DECISION

In the Supreme Court of Canada, the judgment of the Court was written by Cory J. He commenced his consideration of standing with a survey of approaches in other common law jurisdictions regarding the granting of status to bring an action. He concluded that the approaches of the United Kingdom, Australia and the United States were all more restrictive than Canada. Further, in Canada as in these other jurisdictions, the traditional mode of proceeding dealt with individuals. Not only is this the traditional mode, implicitly it is the preferred mode, as "one great advantage of operating in

the traditional mode is that the courts can reach their decisions based on facts that have been clearly established." The role of the courts operating in the traditional mode is an important one and, to ensure that it continues to be fulfilled, the courts must ensure judicial resources are not overextended.

This concern for the court's traditional role must be balanced against the importance of access to the court in its role as protector of public rights. This balance was addressed prior to the passage of the *Charter of Rights and Freedoms* in the trilogy, and the subsequent entrenchment of the *Charter* indicates a continued need for a generous and liberal approach to standing to ensure that *Charter* rights and freedoms are enforced.

How is the concern for the proper allocation of judicial resources to be met? "This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation." Cory J. referred to *Finlay* in support of this statement, but in *Finlay* this concern was said to be met by the serious issue and genuine interest factors. In *Finlay*, the consideration of whether there is another reasonable and effective way to bring the matter before the court was said to address the concern of hearing the contending views of the persons most directly affected.

Why would the court wish to hear the persons directly affected? Perhaps it is believed that they would be motivated to provide the best advocacy. If advocacy is the underlying concern, then the expertise and commitment of a public interest advocate may allay any fears.[16] Alternatively, the desire to hear from affected parties may reflect a concern with prejudice to their rights.[17] There was a real potential for prejudice to third parties as a result of the *Canadian Council of Churches* action. A single action challenging 81 provisions of the *Immigration Act* might not offer the same perspective, or the same care or detail, as would occur in a judicial review proceeding focused on a single provision.

But the Supreme Court did not address advocacy or third party rights. Rather, it considered the potential for private litigation as a means to allocate scarce judicial resources. It emphasized a concern with an onslaught of public interest litigation, stating that "it would disastrous if courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations." To avoid this, public interest standing should not be granted if "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 interest standing...need not and should not be expanded." The Court's preference for the traditional form of litigation was thus made even more clear.[18]

The change in attitude is striking. The strong focus on protection of judicial resources against an unworthy flood of public interest litigation reflects a fear dismissed as unrealistic in *Thorson*. Review of the seriousness of an issue and the genuineness of a plaintiff is no longer an adequate guarantee that scarce judicial resources are appropriately used, as was suggested in *Finlay*. Rather, the allocation of judicial resources is to be determined by the potentially much more limiting requirement that there be no reasonable prospect for private litigation on the issue.

The Supreme Court then proceeded to apply each of three parts of the test for public interest standing. First, a serious issue of invalidity was demonstrated by the Court of Appeal's review of the reasonableness of the various causes of action alleged. While there were problems with certain allegations, the Supreme Court was prepared to accept that "some aspects" of the statement of claim raised a serious issue. The serious issue requirement is thus met by the showing of a reasonable cause of action of a type, constitutional or administrative, for which public interest standing is available. In the context of constitutional litigation, this criterion does not appear to have any distinctive content but simply requires the showing of a reasonable cause of action, as would be required of any litigant.

Second, a genuine interest was clear as "[t]he Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of refugees and immigrants." This makes clear that public interest standing is available to corporations, at least those with a history of involvement with an issue or interest group. Public interest corporations sufficiently involved to finance constitutional litigation likely would pass this aspect of the test.

This brings us to the last aspect, and the only one, at least in the constitutional context, that presents any significant barrier to public interest standing. Is there another reasonable and effective way to bring the issue before the court?

The Supreme Court found that this requirement was not met in the case as the *Immigration Act* is regulatory and directly affects all refugee claimants, each of whom would have private standing to challenge the constitutionality of pertinent amendments. The Court rejected the argument that the disadvantaged position of refugees would preclude their effective use of access to the court, accepting the judicial notice taken by the Federal Court of Appeal that "refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis."

The Court also rejected the argument that the imposition of a 72 hour removal order would undermine

a refugee claimant's ability to litigate these issues, for two reasons:

> 1. the Federal Court can grant injunctive relief against a removal order;
>
> 2. information provided by the government indicated that refugee claimants were in no danger of speedy removal. The report of the Auditor General indicated that as of March 31, 1990 it required an average of 5 months to consider a claim at the initial "credible basis" hearing stage. This would give claimants adequate time to prepare for the possibility of rejection. Further, when claims were rejected the majority of removal orders were not carried out.[19]

As a result, the Supreme Court held, there were other reasonable methods to bring these matters to court, and public interest groups could convey their own perspectives through obtaining intervenor status in private proceedings.

Again, the change in approach from earlier decisions is striking. Rather than seeking out differences in perspective between this lawsuit and those likely to be commenced by private litigators, as in *Borowski*, such differences were ignored. The position of the Federal Court of Appeal that private judicial review is unlikely with respect to the effect of time limits themselves seems unanswerable. The only private litigants who commence proceedings will be those who, by definition, were not precluded from access to counsel or the court by such time limits. Their interest in challenging the limits will be minimal or non-existent. The argument that the average claimant, or that most claimants, will not be affected by the time limits is of little comfort to unusual claimants who may, by the terms of the legislation, be so affected. Relying on the Auditor General's report of problems in the prompt administration of the Act as demonstrating that no real harm is done, when the report itself calls for greater efficiency, also seems highly suspect.[20]

A point referred to by the courts below, but not by the Supreme Court, was the Council's interest by virtue of the potential subjection of its members to criminal prosecution. The Federal Court of Appeal held that the constitutionality of the provisions imposing criminal sanctions could be dealt with in criminal prosecutions, but did not indicate any awareness of any ongoing prosecutions. Surely the court should consider whether or not it is reasonable to await such prosecutions. If there are ongoing prosecutions, it would seem to be *prima facie* reasonable that constitutional issues be dealt with in that context.[21] If there are none, one should consider the nature of the regulated activity and class of persons. In some situations, the mere potential for prosecution may impose a significant chill on constitutionally-protected activities, and the regulated class may be unwilling to risk prosecution,[22] so that it may be unreasonable to await actual prosecutions to determine the constitutional issues. Conceivably, Council members are deterred from providing constitutionally-protected assistance to refugees, because they are unwilling to risk criminal sanctions. It is also conceivable the Council may have difficulty attracting volunteer workers, for the same reason.

One underlying theme in the case seems to be a concern with the abstract nature of the challenge, and a desire to ensure that the issues are considered against "concrete factual backgrounds". This reflects a concern of Laskin C.J.C. in his dissent in *Borowski*, and likewise a concern that has been raised independently in recent *Charter* cases.[23] While this is certainly legitimate, it seems an unfortunate reason to take a restrictive approach to public interest standing. It is a concern that may apply equally to the litigant whose private rights are affected. Further, it can be dealt with as an independent issue, by requiring parties to produce appropriate evidence.[24]

CONCLUSION

Canadian Council of Churches v. *The Queen* has the potential to seriously restrict public interest litigation. While the Supreme Court of Canada continues to acknowledge the need for access to the courts for the resolution of public rights, public interest litigation is treated as a secondary task. The traditional form of private litigation is seen as the courts' primary occupation. Does this signal a trend? Less than two months before the *Council of Churches* decision the Supreme Court delivered its judgement in *Conseil Du Patronat Inc.* v. *Quebec (Attorney General)*.[25] In that case it summarily allowed an appeal and upheld the public interest standing of a corporation, formed to represent the interests of Quebec employers, to challenge anti-strike-breaking legislation. The apparent irreconcilability of these two decisions may mean that the Court is still struggling to define its attitude towards public interest litigation.

JUNE ROSS, Faculty of Law, University of Alberta.

1. (1992), 132 N.R. 241 (S.C.C.).
2. *Thorson* v. *Canada (Attorney General)* (1974), 43 D.L.R. (3d) 1 (S.C.C.); *Nova Scotia Board of Censors* v. *McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.); *Canada (Minister of Justice)* v. *Borowski* (1981), 130 D.L.R. (3d) 588 (S.C.C.) ("*Borowski #1*).
3. (1986) 33 D.L.R. (4th) 321 (S.C.C.).
4. *Supra*, note 2.
5. *Ibid.*
6. *Ibid.*
7. *Ibid.* at 606.

(Notes continued on page 106)

probable that the two majorities would be identical in the partisan sense. Either way, a popular mandate, no matter how indistinct, is likely to differ from that of the Commons, again jeopardizing the operation of the Westminster model. Diversity between the two chambers may also be furthered by the proposal that Senators be elected for a fixed term.

Beaudoin-Dobbie suggests that all non-fiscal legislation be treated equally in Senate review, but that Commons have the power to override. The Committee is protective of Commons legislation and favours a limit of 180 days for its disposition by the Senate. That this may prove to be the saving of the Westminster model operation is felt by the Committee's Liberal members, who for this reason dissented from the proposed dispatch. Regarding supply bills, the Committee denies any role to the Senate, turning the role of defining supply bills over to the Speaker of the House of Commons.

On the ratification of federal appointments, Beaudoin-Dobbie does not differ from the Clark report.

There is, in conclusion, no definitive answer to my initial question. Constitutional reformers may or may not be mindful of the Westminster model. It seems, in any case, that they feel their reforms would not jeopardize our parliamentary system any more than past modifications, in Ottawa or London.

In 1986, I wrote that only regional representation *short of* direct election was compatible with the Westminster model, and that those favouring an elective Senate should consider abandoning the model altogether.[7] I, for one, have not changed my mind. Lest I be accused of engaging in constitutional niceties, let me become quite practical and close with an argument based on our federal system.

Friends and foes of an elective Senate would, I believe, agree that the Westminster model makes for effective decision-making. Nobody I know of suggests that the provinces give up their version of the model which gives full decision-making powers to the premiers and their governments. An abandoning or jeopardizing of the Westminster model for Ottawa would tend to give us strongly governed provinces and a weaker federal government, regardless of the division of powers. Unless this is what we want, let us be a bit more solicitous about maintaining and protecting the Westminster model at the federal level.

FREDERICK C. ENGELMANN, Professor Emeritus of Political Science, University of Alberta.

1. In a recent conversation, Kenneth D. McRae persuaded me to emphasize this modification in this context.
2. *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 12.
3. *Ibid.*
4. *Ibid.*, p. 16.
5. *Ibid.*, p. 21.
6. *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (1992) at 43.
7. Frederick C. Engelmann, "A Prologue to Structural Reform of the Government of Canada," *Canadian Journal of Political Science*, Vol. 19, no. 4 (1986), pp. 667-678.

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8. *Ibid.* at 598.
9. *Supra*, note 3.
10. *Ibid.* at 340.
11. *Ibid.*
12. S.C.1976-77, c.52, as amended by S.C.1988, c.35 and c.36.
13. [1989] 3 F.C. 3.
14. [1990] 2 F.C. 534.
15. *Ibid.* at 550.
16. *Canadian Civil Liberties Association* v. *Canada (Attorney General)* (1990), 74 O.R. (2d) 609 (H.C.) took this approach. The Ontario Law Reform Commission, *Report on the Law of Standing* (1989) at 58 ("*Ontario Report*"), and T. A. Cromwell, *Locus Standi* (Toronto: Carswell, 1986) at 173 both take the position that the absence of a traditional legal interest does not mean a plaintiff will present a case with less competence or zeal.
17. *Ontario Report, ibid.* at 60, and W.A. Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay" (1988) 10 Sup. Ct. L.R. 377 at 392 discuss this concern.
18. *Ontario Report, ibid.* at 47 notes that the "floodgates" argument assumes that the types of claims now advanced in the courts are to be preferred to the "new" claims that constitute the threatened flood, and suggests that it is not self-evident that present consumers of court services deserve access to the courts any more than person with claims that the law does not now recognize.
19. *Report of the Auditor General of Canada to the House of Commons*, (1990) at 352-353, 383-384.
20. *Ibid.*
21. *Canadian Abortion Rights Action League Inc. (C.A.R.A.L.)* v. *Nova Scotia (Attorney General)* (1990), 69 D.L.R. (4th) 241 (N.S.S.C., A.D.); leave to appeal to denied (1990), 127 N.R. 158 (S.C.C.) denied standing to C.A.R.A.L. on the basis that precisely the same issues were being raised in an ongoing prosecution of Dr. Morgentaler.
22. In *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, McLachlin J. justified the choice of remedy in the case (striking down a regulation prohibiting dentists' advertising, rather than addressing only its application in the case) on the basis that the continuing existence of the regulation would "chill" the freedom of expression of dentists, who as professionals would be unwilling to challenge their governing bodies.
23. *McKay* v. *Manitoba* (1989), 61 D.L.R. (4th) 385 (S.C.C.); *R.* v. *Danson* (1990), 73 D.L.R. (4th) 686 (S.C.C.).
24. *R.* v. *Danson, ibid.*; *Ontario Report, supra*, note 16 at 57-58, and Cromwell, *supra*, note 16 at 173.
25. (1991), 87 D.L.R. (4th) 287 (S.C.C.); rev'g (1988) 55 D.L.R. (4th) 523 (Que. C.A.). The Court allowed the appeal expressing essential agreement with the dissenting decision of Chouinard J.A.