Is The Public Interest Falling From Standing? Two Recent Comments From The Supreme Court of Canada

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Introduction

The pursuit of the public interest flourishes in this era of the *Canadian Charter of Rights and Freedoms;* however, the liberalized standing that permits public interest groups to press their claims was the product of pre-*Charter* jurisprudence: the trilogy of *Thorson*[1], *McNeil*[2], *Borowski*[3]. *Finlay*[4], a post-*Charter* decision, extended the trilogy more tentatively to constitutional challenges of administrative decision-making as well as legislation. All these cases eschewed the traditional requirement of a direct—usually monetary—stake in the outcome that is the hallmark of status to sue.

Two recent decisions of the Supreme Court of Canada purport to apply the existing law but contain a cautionary message for public interest advocates. These cases suggest that the Court is curbing pure public interest challenges to legislation as principal vehicles for *Charter* litigation. Increased volume invites increased restraint. When the same issue may be advanced by more directly interested plaintiffs at some future time, public interest groups, while denied standing at first instance, would still have the opportunity to participate in the more discreet role of intervenor. That result, however, suggests both a different role and a different rule.

In *Conseil du Patronat du Québec* v. *Attorney-General of Quebec*,[5] the Court, reversing the Quebec Court of Appeal, gave standing to a nonprofit employers' organization to challenge the constitutionality of provincial anti-strike-breaking legislation. Yet in *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*,[6] the Court denied standing for the Council to test the constitutionality of amendments to the *Immigration Act*[7] for the determination of refugee status. The Court spoke unanimously in each case.

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I. Liberalized Standing in Constitutional Cases

The 1981 majority ruling of Justice Martland in *Borowski* consolidated the test for standing to press a constitutional claim developed in *Thorson* and *McNeil* into a threefold inquiry:

> [T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly *or* that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable affective and effective manner in which the issue may be brought before the Court.[8]

In private litigation, "[t]he term standing...means entitlement to such judicial relief apart from questions of the substantive merits and the legal capacity of the plaintiff".[9] This is in marked contrast to the primary focus of the public interest test of justiciability. At the core of the *Borowski* formulation for public interest standing is the justiciability of the constitutional challenge to a law or act of government, in Justice Martland's words, "if there is a serious issue as to its invalidity". Once across that threshold, the balance of the public interest test only assesses the relative suitability of the vehicle for resolving the question. Any number of individuals or organizations may be capable of doing the job, but if no more closely connected type of plaintiff is evident, then an essentially undifferentiated public interest in constitutionality, coupled with the role of the courts as guardians of the Constitution, operates to remove traditional barriers to standing. Thus, the stake of a particular litigant as a precondition for seeking judicial resolution of an otherwise justiciable controversy is less material. All of us have a stake in the preservation of our fundamental law against which traditional standing criteria lose both theoretical legitimacy and practical persuasiveness.[10]

Nevertheless, times change. Mr. Borowski succeeded at the threshold of standing only to be defeated years later on grounds of mootness.[11] The impression is one of pre-*Charter* liberality giving way to post-*Charter* prudence on the part of the judges. Indeed it is arguable that the Canadian courts have been sharpening several tools of judicial restraint—standing, mootness, ripeness, justiciability—in an effort to balance judicial power with executive and legislative powers that are subject to *Charter* scrutiny.[12] *Borowski* suggested that the Supreme Court of Canada had virtually shelved standing as a meaningful restraint on litigation in the face of justiciable constitutional controversies; however, in its two latest rulings on point, the Court appears to be retooling the traditional barrier.

II. Conseil du Patronat

The Superior Court of Quebec had denied standing to the Conseil at first instance, which a majority of the Court of Appeal affirmed.[13] Chief Justice

Lamer, for a unanimous Court, allowed the appeal. One paragraph of reasons in the Supreme Court decision simply agreed with the dissenting reasons of Justice Chouinard in the Court of Appeal and made them its own.[14]

Justice Chouinard purported to apply the *Borowski* test without variation. First, he had no difficulty in finding that "a fundamental right is put in issue by the 'anti-strike-breaking' law". The Conseil had sought, unsuccessfully, to have the issue resolved by alternative means; at first instance through a complaint to the Quebec Human Rights Commission and later by asking the Attorney General to refer the issue for determination to the Quebec Court of Appeal.[15] Moreover, no other litigant had come forward. Justice Chouinard noted, however, without elaboration, that the Conseil would not have standing under private law principles. Rather,

> the court's discretion must be exercised in a very different way since the interest is being weighed in relation to public law, that is, in terms of a citizen's interest in the respect of his country's constitution, which includes the freedoms protected by Charter.[16]

The Court of Appeal described the mandate of the Conseil as that of a nonprofit corporation representing the "economic, social and professional interest of 131 Quebec employers' federations and associations, as well as the interest of a large number of businesses which support it..."[17]. Its own employees, 15 in number, were not unionized. Had they been, the trial judge and the Attorney-General of Quebec were agreed that the Conseil would have had standing to challenge the anti-strike-breaking law.

For Justice Chouinard, the test of direct interest was entirely inappropriate in public law cases involving constitutional issues. Justice Chouinard emphasized the strange result of giving standing to an employer with one unionized employee, while denying it to the Conseil whose "purpose is to promote the interests of a very large number of employers or firms, a majority of whom appear to be unionized". It followed that, "surely it has just as much interest as each of its members does".[18]

Thereafter, the Chouinard opinion reviewed the guidelines for judicial discretion in *Thorson* through to *Finlay* and concluded that, as a representative of the group, the Conseil had as much of an interest as any member employer with unionized employees, at least in the public law context. Otherwise, "this amounts to requiring actual direct private law interest, not that of an ordinary citizen who wishes to prevent his fundamental rights being infringed by legislation that offends his country's constitution, even if that legislation may never affect him personally".[19] Such was the case of Mr. McNeil, who challenged Nova Scotia film censorship laws, but was not a theatre operator or film producer. Mr. Thorson was a citizen representing an essentially indivisible

public interest in testing the constitutionality of the federal *Official Languages Act*.[20] Mr. Borowski was neither a doctor, putative father, nor obviously a pregnant mother, but nevertheless provided a suitable vehicle to bring forward a justiciable constitutional issue. All three litigants championed the general public interest in testing governmental fidelity to constitutional norms. The opinion of Justice Chouinard equates the standing of the Conseil with this role.

The overruled majority of the Quebec Court of appeal panel, Justices Moisan and Mailhot, did not disagree with Justice Chouinard on the applicable principles, but the different points of emphasis are instructive.

The principal opinion of Justice Moisan began with a passage from Justice Laskin's dissenting opinion in *Borowski*, in itself a qualification of his own previously expressed views in *Thorson* and *McNeil*:

> I start with the proposition that, as a general rule, it is not open to a person, simply because he is a citizen and a taxpayer or is either the one or the other, to invoke the jurisdiction of a competent Court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a court.[21]

At the same time, Justice Moisan acknowledged the principle emphasized in Thorson that "[t]he question of the constitutionality of legislation has always been justiciable".[22]

The nature of the legislation was critical for Justice Moisan. Declaratory and directory legislation not aimed at specific persons or activities suggests that no member of the public would have more or less standing than another, whereas regulatory and penal laws do identify discrete parties with an indisputable interest in the particular enactment. This case fell into the latter category, in which the interest of the Conseil was deemed insufficient as an employer, as an interested citizen, and as an employer representative.

First, as an employer without unionized employees, the Conseil was not affected by the anti-strike-breaking law. Similarly, with the status of a citizen, the Conseil could not demonstrate an undifferentiated public interest in challenging the law where "the provisions of the Act can be challenged in a reasonable and effective manner by any one of the hundreds of employers who have unionized employees whether they are members of the Conseil or not".[23] Finally, as an employers' association, the Conseil could have no greater interest than that which it already had as an employer but Justice Moisan offered the Conseil the alternatives of either arguing the case on behalf of others without having standing itself, or permitting other employers to bring the case forward under the name of the Conseil.[24]

Justice Mailhot concurred with the reasons of Justice Moisan, adding only that he was confident that there were other "reasonable and effective means" for bringing the issue to Court through an employer bound by the legislation under attack.[25]

The treatment of the Conseil's representational status by the majority seems overly technical, but the presence of other reasonable and better-connected alternative parties to focus the litigation is much more persuasive. That is so, however, not from the point of view of the Conseil's status so much as from the nature of the legislation under attack. The anti-strike-breaking law did not inevitably suggest an undivided public interest in a constitutional ruling, rather it was an impediment to employers with direct economic consequences in the event of a strike. The focus of the legislation thus invited a direct interest test which the Court of Appeals majority, in effect, applied.

III. Canadian Council of Churches

Unlike the Conseil du Patronat, the Canadian Council of Churches was a public interest organization in the wider *public welfare* sense in which "not-for-profit" advocacy is normally viewed. Yet the Supreme Court denied standing to the Council while granting it to the Conseil, which represented the narrower commercial interest of employers. Furthermore, this is in the context of avowedly using the public interest test applicable to constitutional cases! Why is this so?

Justice Cory, speaking for the Court, concedes without reservation that the Council met the two components of the test: a serious issue of invalidity and a genuine continuing interest in the problems of refugees and immigrants.[26] The Court dismisses the Council's challenge to controversial amendments to Canadian immigration law on the third stage of the *Borowski* test, that is, more suitable litigants—refugee status claimants—were available. The Court saw a reasonable alternative means of bringing the issue before the Court.[27]

To reach this conclusion, Justice Cory engages in a comparative analysis of the doctrine of standing in the United Kingdom,[28] Australia[29] and the United States,[30] finding all three examples to be more restrictive than Canada's. Justice Cory notes the *Thorson-McNeil-Borowski* trilogy and the post-trilogy milestone of the 1982 constitutional reforms, including the enactment of the *Canadian Charter of Rights and Freedoms*, as another liberalizing trend.

> By its terms the *Charter* indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, *Charter* rights might be unenforced and *Charter* freedoms shackled. The *Constitution Act, 1982* does not of course affect the discretion courts possess to grant standing to public litigants. What is does is entrench the fundamental right of the public to government in accordance with the law.[31]

Immediately following this affirmation of constitutional accountability—always a justiciable issue—as *the* core concern, Justice Cory turns to a discussion of *Finlay*, which extended public interest standing to administrative decision-making. But, at this point, the focus of the Court's analysis shifts sharply from its original focus on access to concern for the husbanding of judicial resources. Justice Cory cites the reasons of Justice LeDain in *Finlay*, highlighting his "concern about the allocation of scarce judicial resources and the need to screen out the mere busybody".[32]

Justice Cory pays considerable lip service to the importance of vindicating public rights, in part through liberal rights of standing to press such issues. But a particular concern of the Court in the era of the *Charter* emerges clearly from the reasons of Justice Cory in almost the same breath:

> However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
>
> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded.[33]

The key question, of course, is whether the result in *Canadian Council of Churches* merely affirms or rolls back the status quo. There is a basis for the latter point of view; even though the Court professes adherence to existing norms, it is retreating from them.

The Legacy of the Charter: Too Much of a Good Thing?

The Supreme Court of Canada laid down its approach to public interest with respect to standing in pre-*Charter* case law. *Finlay*, as we noted at the outset, extended the approach to administrative decision-making in the port-*Charter* context. However, Justice LeDain also cleared possible avenues for retrenchment by reason of limited judicial resources hard-pressed by the onslaught of *Charter* litigation.

The saga of "Holy Joe" Borowski is even more instructive. His litigation began with a landmark granting of standing in the 1981 majority ruling of Justice Martland, but ended in a whimper of "mootness" in a 1989 ruling by Justice

Sopinka.[34] This was due primarily to Borowski's *lis* being overtaken by the Court's invalidation of the *Criminal Code* provisions on abortion[35] in *Morgentaler* v. *The Queen*.[36] The fact remained that the constitutional question initially raised by Mr. Borowski—whether a foetus had a Charter-protected right to life[37]—had been squarely put before the Court and was not answered in *Morgentaler*; however, Parliament did not enact a new object of attack. Nevertheless, this simple answer ousting Mr. Borowski masks increasing emphasis by the Court on considerations very different from those that allowed him in.

Elsewhere, I have argued that the *Charter* has prompted the Court to reach for, and employ, devices of judicial restraint in constitutional cases that were considered unnecessary in the comparative quietude of the pre-*Charter* era into which the standing trilogy falls.[38] Justice Sopinka's concerns for an adversarial context, judicial economy, and the proper law-making function of the courts expressed in *Borowski* (1989)[39] echo Justice LeDain's concern about too many busybodies in *Finlay* and Justice Cory's emphasis on conserving limited judicial resources in *Canadian Council of Churches*.

Mootness stands at one end of the spectrum and standing at the other. Ripeness and justiciability are in between. All these judicial doctrines are products of a philosophy of prudence.[40] This philosophy has been highlighted and debated for quite some time in American constitutional jurisprudence and reflects an abiding concern for justifying judicial review that invalidates majoritarian outcomes in legislation only on a principled basis and only in circumstances that reflect an appropriate balancing of judicial power with that of the other branches of government.

Canadian Council of Churches is a prudential decision. It expresses confidence that the serious constitutional issue presented by the Council will be brought elsewhere by one or more refugee claimants.[41] Nevertheless, it is also a decision that emanates from a very different frame of reference and spirit than that exemplified by the standing trilogy the Court professes to apply. The bottle has the same name, but the Court is filling it with new wine. In this context, the result without reasons in *Conseil du Patronat* is also a new vintage under the old label that smacks of simply deferring to a sufficiently direct *private* interest in the stakes of the *lis*.

Of course, both decisions can also be reconciled under the rubric of judicial *discretion*. In each instance, judicial rhetoric maintains consistency with precedent for public interest standing. But the *Charter* has forced a much larger and more hazardous judicial enterprise on the courts which the standing trilogy did not have to address. The Supreme Court of Canada is signalling the desirability of greater restraint on principal litigants.

The Court's message is not that the voices of declared public interests are to be excluded from the litigation process. But it does mean that public interest advocates may have to be content with the more circumscribed role of intervenor as the Court seeks to consolidate and rationalize the litigation before it. Public interest advocates thus lose influence as primary initiators of *Charter* jurisprudence.

FOOTNOTES

1. *Thorson* v. *A.-G. Can.* (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 (hereinafter, references are to [1975] 1 S.C.R.).
2. *Nova Scotia Board of Censors* v. *McNeil* (1975), [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632.
3. *Minister of Justice Canada* v. *Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588 (hereinafter, references are to [1981] 2 S.C.R.).
4. *Minister of Finance Canada* v. *Finlay*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 (hereinafter, references are to [1986] 2 S.C.R.).
5. *Conseil du Patronat du Québec Inc.* v. *Québec (Attorney-General)*, [1991] 3 S.C.R. 685, 87 D.L.R. (4th) 287 (hereinafter, references are to [1991] 3 S.C.R.).
6. *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 (hereinafter references are to [1992] 1 S.C.R.).
7. *Immigration Act, 1976*, S.C. 1976-77, c. 52, as am. by S.C. 1988, c. 35 and c. 36.
8. *Supra*, footnote 3 at 598.
9. T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada*, (Toronto, Carswell, 1986) at 7.
10. This argument is more fully developed in Fairley, "Understanding Standing", 7 *Windsor Yearbook of Access to Justice* (1987) at 257-263 (a review essay on Cromwell, *supra*, footnote 9).
11. *Borowski* v. *A.-G. Canada*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (hereinafter *Borowski* (1989) referenced to [1989] 1 S.C.R.); see discussion, *infra*, footnotes 35-37 and accompanying text.
12. See Fairley, "Deciding Not To Decide: Judicial Restraint In Charter Adjudication" in G.-A. Beaudoin, ed., *As the Charter Evolves (Proceedings of the March 1989 Colloquium of the Canadian Bar Association, Toronto)* (Quebec: Yvon Blais, 1990) 49.
13. Sub. nom. *Conseil du Patronat du Québec Inc.* v. *A.-G. Québec et al.* (1988), 55 D.L.R. (4th) 523 (per Moisan and Mailhot JJA., Chouinard J.A., dissenting), aff'g [1988] C.S. 54 (Que.).
14. *Supra*, footnote 5 at 685. Subsequent references are to the reasons of the Court of Appeal in 55 D.L.R.(4th) *supra*, footnote 13.
15. *Ibid.*, at 526.
16. *Ibid.*
17. *Ibid.*, at 527.
18. *Ibid.*, at 528.

19. *Ibid.*, at 530.
20. R.S.C. 1970, c. 0-2, now R.S.C. 1985, c. 0-3.
21. *Ibid.*, at 533-34 quoting Laskin J. in *Borowski, supra*, footnote 3 at 578-79.
22. *Ibid.*, at 534 quoting from *Thorson, supra*, footnote 1 at 150.
23. *Ibid.*, at 526.
24. *Ibid.*
25. *Ibid.*, at 531-32.
26. *Supra*, footnote 6, at 254-55.
27. *Ibid.*, at 253-54.
28. *Ibid.*, at 243-44, (discussing the role of the Attorney-General and the exceptions to the rule that only the Attorney-General can represent the interests of the public which were outlined in *Gouriet* v. *Union of Post Office Workers*, [1978] A.C. 435 at 506).
29. *Ibid.*, at 244-46, (discussing *Australian Conservation Foundation Incorporated* v. *Commonwealth of Australia* (1980), 28 A.L.R. 257 (H.C.), which rejected the Canadian approach in *Thorson, supra*, footnote 1).
30. *Ibid.*, at 246-48, (citing the leading case of *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) for the "case or controversy requirement" in Article III of the U.S. Constitution. See generally L.H. Tribe, *American Constitutional Law*, 2d ed. (New York: The Foundation Press, Inc., 1988) 107-55).
31. *Ibid.*, at 250.
32. *Ibid.*, at 251 quoting LeDain J. in *Finlay, supra*, footnote 4 at 631.
33. *Ibid.*, at 252.
34. *Supra*, footnote 11.
35. *Criminal Code*, R.S.C. 1970, c. C-34, s. 251.
36. *Morgentaler* v. *The Queen*, [1988] 1 S.C.R. 30, 33 D.L.R. (4th) 385.
37. Now laid to rest in *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 (rejecting prenatal personality of the foetus in favor of a mother's freedom of choice).
38. *Supra*, footnote 12, pp. 64-66.
39. *Supra*, footnote 11, at 538-363.
40. *Supra*, footnote 12 at 61-64, describing an approach to judicial decision-making best exemplified by the scholarship of Alexander Bickel (see A. Bickel's, "The Supreme Court, 1960 Term, Foreword: The Passive Virtues" (1961), 75 *Harv. L. Rev.* 40; *The Least Dangerous Branch* (1962); *The Supreme Court and the Idea of Progress* (1978) and *The Morality of Consent* (1975) and A. Kronman, "Alexander Bickel's Philosophy of Prudence" (1985), 94 *Yale L.J.* 1567).
41. *Supra*, footnote 6 at 254-56.