

Speaking up for Others : *Locus Standi* and Representative Bodies

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Article abstract

This article addresses the issue of whether a representative body such as a trade association would, in the ordinary course, enjoy standing to present a public law question to the court on behalf of one or more of its members where there is no more compelling demand for representative advocacy other than the interests of convenience or public relations.

The author canvasses recent case law in Canada and concludes that it tends to a marked restriction in public interest access to the courts. The success in obtaining standing would depend on a number of factors including the manner of conduct of the litigation, the political nature of the subject matter and, increasingly, the workload of the court.

Speaking up for Others: *Locus Standi* and Representative Bodies

Peter BOWAL*

Dans le présent article, l'auteur analyse le problème de la qualité pour agir d'une association, par exemple, une organisation syndicale, afin de plaider devant les tribunaux une question de droit public au nom d'un ou de plusieurs de ses membres. Après une revue de la jurisprudence canadienne sur ce sujet, l'auteur constate que l'accès aux tribunaux devient de plus en plus restrictif et que le succès d'une telle entreprise dépend d'un certain nombre de facteurs, y compris la charge de travail du tribunal saisi.

This article addresses the issue of whether a representative body such as a trade association would, in the ordinary course, enjoy standing to present a public law question to the court on behalf of one or more of its members where there is no more compelling demand for representative advocacy other than the interests of convenience or public relations.

The author canvasses recent case law in Canada and concludes that it tends to a marked restriction in public interest access to the courts. The success in obtaining standing would depend on a number of factors including the manner of conduct of the litigation, the political nature of the subject matter and, increasingly, the workload of the court.

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Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers ; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals¹.

Locus standi, or standing, is a common law construct designed, in the public interest, to regulate the flow of litigation in both the private and

1. Justice Jerome N. Frank in *Associated Industries v. Ickes*, 134 F.2d 694 at 704 (2d Cir. 1943).

public law domains². « No interest, no action » is the maxim³. It recognizes that judicial resources are limited and that certain persons are more interested in the outcome of the *lis* than other persons⁴. Canadian courts are most drawn to the model case which has a « clear, concrete, factual background upon which the decision of the court could be based⁵ ». Accordingly, these interested persons only, if anyone, should have carriage of the matter in court⁶.

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2. Mr. Justice Cory expressed the substantive and logistical strains that public law standing puts on the judicial system, in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 ; (1992) 88 D.L.R. (4th) 193 ; 132 N.R. 241 (cited to D.L.R.) (hereinafter *Canadian Council of Churches*), at 201-202 : « One great advantage of operating in the traditional [private law] mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not overextended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing. » See, generally, J. TOKAR, « Administrative Law : Locus Standi in Judicial Review Proceedings », (1985) 14 *Man. L.R.* 209 ; W. BOGART, « The Lessons of Liberalized Standing », (1989) 27 *Osgoode Hall L.J.* 195.
 3. The concept is also found in Civil Law systems. See, H. SOLUS and R. PERROT, *Droit judiciaire privé*, vol. 1, Paris, Sirey, 1961, at para. 223 : « pas d'intérêt, pas d'action ». In Quebec, the private law standard is « sufficient interest ». See, article 55 of the *Code of Civil Procedure of Quebec*, L.R.Q., c. C-25 : « 55. Whoever brings an action at law, whether for the enforcement of a right which is not recognized, jeopardized or denied, or otherwise to obtain a pronouncement upon the existence of a legal situation, must have a sufficient interest therein. » Although this article is primarily concerned with standing of representative bodies as plaintiffs or applicants, one notes that with the arrival of the new *Code civil du Québec* in 1994, « associations » may both sue and be sued in their collective capacity. The applicable provisions are Articles 2267 to 2279 of the *Code civil*. Article 2271 reads : « Art. 2271. The directors may sue and be sued to assert the rights and interests of the association. » See, also, article 60 of the *Code of Civil Procedure*.
 4. In *Thorson v. Attorney General of Canada (No. 2)*, [1975] 1 S.C.R. 138 ; [1974] 43 D.L.R. (3d) 1 (cited to D.L.R.) (hereinafter *Thorson*), where the plaintiff could show no special damage or prejudice above any other taxpayer in Canada, the trial judge explained his « floodgates » concern (22 D.L.R. (3d) 274) at p. 278 : « If every taxpayer could bring an action to test the validity of a statute that involved the expenditure of public money, it would in my view lead to grave inconvenience and public disorder [emphasis added]. »
 5. *Canadian Council of Churches*, *supra*, note 2, per Cory J. at 206.
 6. In the United States, Justice Brennan early implied that standing was given to benefit the deliberations of the court. He wrote in *Baker v. Carr*, 369 U.S. 186 (1962) at 204 : « Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions ? This is the gist of the question of standing. »

The matter of standing of private parties to take public law issues to court is more complex than the issue of private law standing, which by contrast is conceptually self-regulating⁷. By definition, administrative or constitutional law issues affect the public interest or the collective interest of a large number of persons. The conduct of an administrative tribunal or the constitutionality of legislation, moreover, are not obviously affairs which, by their nature, are readily disposed to private *inter partes* settlement or resolution.

Who is so specifically and amply interested, not to mention financially robust, to bring the question to court, since these cases are only rarely referred⁸ by governments themselves for judicial vetting? This article reviews the very generous common law⁹ indulgence of Canadian courts within the last twenty years to hear and adjudicate these cases, even when brought by individuals with little more than ideological or general commu-

7. One should not confuse the concept of public law standing with an application for the more limited intervenor status, which many representative bodies might also wish to make in appropriate circumstances. In the Supreme Court of Canada decision of *Canadian Council of Churches, supra*, note 2, Cory J. described the parallel interests in balance, at 207: « Yet the views of the public litigant who cannot obtain standing need not be lost. Public interest organizations are, as they should be, frequently granted intervenor status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained. » This passage was expressly approved in *Rudolph v. Minister of Employment and Immigration*, (1992) 139 N.R. 233 at 235, which allowed the League for Human Rights of B'nai Brith intervenor status in an immigration case.

8. Pursuant to the Judicature statutes in each jurisdiction.

9. The distinction drawn here is judge-made rules versus statutory parameters for standing. This article will analyze only the former category. With respect to the latter class, statutorily-derived standing, it is clear that legislatures are today more active in promulgating permissive criteria for standing, particularly for environmental and planning decisions. Consider, *eg.* the expansive rights of appeal for « any person *who considers himself aggrieved* » (emphasis added). Even in that case, the court will not read such standing as entirely subjective and open-ended. It will interpret the section to apply to « any person who *reasonably considers himself aggrieved* » (emphasis added): *Friends of Toronto Parkland v. Toronto (City)*, (1991) 6 O.R. (3d) 196 (Div. Ct.).

nity interest¹⁰. It is submitted that this liberal policy on public law standing was grounded on the absence of a coherent theoretical framework, a desire not to bury facially-significant public law questions in threshold technicalities of standing and a judicial acceptance, or resignation, of the role of courts to «hear and decide» such questions as they arise¹¹. However, stung by mounting backlogs, Canadian courts are closing the doors on public interest standing.

Despite the retreat, persons with common economic, social or political interests continue to assemble for power in collectives to better facilitate the vindication of their common interests. These representative bodies, often separate legal entities, charged with the responsibility of serving the various interests of their memberships, will often find themselves in a position to bring a public law issue to court on behalf of their members.

This article considers whether representative bodies constituted to protect the interests of their members in any economic or socio-political sector can *per se* assert standing where those interests of their members are affected. An example might be a case where a certain sector, such as liquor

10. Solicitor and client costs are even awarded occasionally to the representative body. See, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 2 W.W.R. 193 (S.C.C.), where La Forest J. at 250 did so «given the society's circumstances». But, *cf.* the dissent by Stevenson J. on the matter, at 256: «I see no justification for awarding the respondent society costs on a solicitor-and-client basis. The general rule in this court is that a successful party recovers costs on the usual party-and-party basis. That was the rule applied by the courts below. My colleague [La Forest J.] proposes an award of solicitor-and-client costs extending to the courts below. I see no ground for our suggesting they were in error, and I see no ground for our departing from our own general rule. Public interest groups must be prepared to abide by the same principles as apply to other litigants. Were we to produce special rules for such litigants, we would jeopardize an important principle: those undertaking litigation must be prepared to accept some responsibility for the costs. I see nothing here to justify calling upon the taxpayers to meet the solicitor-and-client costs of this party.»

11. The Honourable Madam Justice Beverley McLachlin, in «The Role of Judges in Modern Society», prepared for the 10th Commonwealth Law Conference in Nicosia, Cyprus, May, 1993, reprinted in THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA, *Administrative Law*, Vancouver, 1994, pointed to the increasingly-important role of the courts as independent arbiter between governments and governed and the task of judicial law-making within that realm. She writes at p. 1.1.03: «Resolving disputes is still the primary and most fundamental task of the judiciary. But for some time now, it has been recognized that the matter is not so simple. In the course of resolving disputes, common-law judges interpreted and inevitably, incrementally, with the aid of the doctrine of precedent or *stare decisis*, changed the law. The common-law thus came to recognize that while dispute resolution was a primary task of the judge, the judge played a secondary role of law-maker, or at least, law-developer.»

outlet licensees or expropriated landowners, are of the view that the tribunal which adjudicates their interests is biased, or that the governing legislation is unconstitutional. Each member of that group regulated by the legislation and the tribunal's authority would clearly have standing to challenge the legislation and tribunal. Nevertheless, each member may choose not to do so for a variety of reasons. These reasons include, but are not limited to, the expense, time and the unwelcome negative public relations occasioned by litigation. The last reason may be particularly germane at a practical level if that member has an ongoing relationship with the same regulators. The member's association, on the other hand, may have the resources, and indeed a private mandate of a contractual nature, to address such an issue. Moreover, as an entity, it would not be constrained by any direct relationship with the regulator or other third party.

The history of public law standing in Canada is outlined. It has been an evolution from rigid narrow rules to a broad and flexible approach and, more recently, back to restraint¹². The legal criteria for standing generally are now described with a view to formulating a proposition about the status of representative bodies to challenge public law processes. This article concludes that the present law is in transition. Standing will depend upon ripeness of the issue, the extent of factual presentation and other formalities.

1. Origins and Legal Basis of Standing

Historically, only the Attorney-General enjoyed standing to question a public right. The Attorney-General could bring an action by his or her own motion or on behalf of a citizen who expressed a concern. The Attorney-General had unfettered discretion to take up a challenge or decline to do so. The private party therefore lacked control to bring a public issue before the court. In *Ware v. Regent's Canal Co.*, Chelmsford, L.C. stated¹³:

Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General on behalf of the

12. For a review and history of standing see T.A. CROMWELL, *Locus Standi: A Commentary on the Law of Standing in Canada*, Toronto, Carswell, 1986; and the ONTARIO LAW REFORM COMMISSION, *Report on the Law of Standing*, Ontario Ministry of the Attorney General, 1989. Many scholars view these two works as the most definitive *exposés* of the subject in Canada.

13. *Ware v. Regent's Canal Co.*, (1858) 3 De G. & J. 212, at 228. See also: *St. Lawrence Rendering Co. v. Cornwall*, [1951] O.R. 669 (H.C.J.); *Cowan v. Canadian Broadcasting Corporation*, (1966) 56 D.L.R. (2d) 578 (Ont. C.A.) (hereinafter *Cowan*).

public has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislature.

In *Boyce v. Paddington Borough Council*¹⁴, an exception was quarried from the harshness of this rule. Now a plaintiff would be allowed to sue without joining the Attorney-General. Buckley J. summarized :

A plaintiff can sue without joining the Attorney General in two cases : first, where the interference with the public right is such that some private right of his is at the same time interfered with [...] and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right¹⁵.

These *Boyce* exceptions were adopted in Canada rather recently and now form the first criterion of a three step test to establish standing¹⁶. In *Cowan v. Canadian Broadcasting Corp.*¹⁷, Schroeder J.A. described this direct interest requirement in the following terms :

A plaintiff, in attempting to restrain, control or confine with proper limits, the act of a public or quasi-public body which affects the public generally, is an outsider unless he has sustained special damage or can show that he has some *special interest, private interest, or sufficient interest*¹⁸.

2. Contours of the Canadian Law of Standing

2.1 The Supreme Court of Canada Trilogy

Canadian rules of standing have their origins in a trilogy of Supreme Court of Canada cases : *Thorson v. A.-G. Canada (No. 2)*¹⁹, *Nova Scotia Board of Censors v. McNeil*²⁰ and *Minister of Justice of Canada v. Borowski*²¹. A summary of each case is necessary to understand how standing has

14. *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109 (hereinafter *Boyce*).

15. *Id.*, at 114.

16. See *Rosenberg v. Grand River Conservation Authority*, (1976) 69 D.L.R. (3d) 384 (Ont. C.A.). Leave to the Supreme Court of Canada was refused on Oct. 19, 1976.

17. *Cowan*, *supra*, note 13.

18. *Id.*, at 580 (emphasis added). See, also, *Smith v. A.-G. Ont.*, [1924] 3 D.L.R. 189, 42 C.C.C. 215, [1924] S.C.R. 331 (hereinafter *Smith*). Duff J. stated at 193-194 (D.L.R.) : « An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is *exceptionally prejudiced* by the wrongful act [emphasis added]. » See *Thorson*, *infra*, note 19, where Judson J. at 4 aptly summarized the tests in Canada : « The *ratio* of the judgments [...] is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is *specialty affected or exceptionally prejudiced* by it [emphasis added]. »

19. *Thorson*, *supra*, note 4.

20. *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 ; (1975) 55 D.L.R. (3d) 632 (cited to D.L.R.) (hereinafter *McNeil*).

21. *Minister of Justice of Canada c. Borowski*, [1981] 2 S.C.R. 575 ; 130 D.L.R. (3d) 588 (cited to D.L.R.) (hereinafter *Borowski*).

devolved from the Attorney-General to a party who can display a « genuine interest » in the substance of the public concern.

Thorson

Thorson brought an action seeking a declaration that the *Official Languages Act*²² and certain appropriation statutes providing money to implement the *Official Languages Act* were *ultra vires* the Parliament of Canada. The Attorney-General refused to act on behalf of Thorson, so he brought the action in his own name.

The Supreme Court of Canada held that the plaintiff had *locus standi*, notwithstanding that the interest claimed was nothing more than that of a mere taxpayer. While Thorson was not directly or personally affected, he was, in the Court's discretion, an interested party. Due to the declaratory nature of the Act, there was no person or class of persons who were directly affected and who could challenge its constitutionality. Laskin J., as he then was, speaking for the majority, in granting standing, noted that²³:

[...] it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

McNeil

After the film *Last Tango in Paris* was banned by the Nova Scotia Censorship Board, the editor of a newspaper sought a declaration that the *Theatres and Amusements Act*²⁴, which created the Board, was *ultra vires* the province. Citing its own rationale in *Thorson*, the Court held that the plaintiff had standing even though he was no more affected by the ban than any other member of the public. Laskin, C.J.C. concluded²⁵:

The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.

In my view, this is enough, in the light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review, to support the claim of the respondent to have the discretion of the Court exercised in his favour to give him standing.

22. *Official Languages Act*, R.S.C. 1970, c. O-2.

23. *Thorson*, *supra*, note 4 at 7. For commentary on this case, see: R. JOHNSON, « *Locus Standi* in Constitutional Cases after *Thorson* », (1975) *P.L.* 137; J. STANLEY, « *Thorson v. A.G. Canada* », (1974) 23 *U.N.B.L.J.* 102.

24. *Theatres and Amusements Act*, R.S.N.S. 1967, c. 304.

25. *McNeil*, *supra*, note 20 at 637.

The Court had, in fact, recognized that the businesses specifically regulated by the Act were more directly affected but nonetheless decided to award standing to a member of the public²⁶. Thus, this decision represented a further relaxation of standing constraints. Certain laws, in their general application to all subjects in the jurisdiction, « directly affected » them and, although the effect was not necessarily acute, standing to as conferred. Nevertheless, the complainant still had to demonstrate some nexus between his or her own freedom and the impugned government action.

Borowski

Borowski, a male person, challenged the validity of the abortion provision in the *Criminal Code of Canada*²⁷. The Supreme Court of Canada, citing both *Thorson* and *McNeil* as authorities, again granted standing. Martland J. set out the three-point standard which is now often referred to as definitive²⁸ :

I interpret these cases as deciding that to 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 and effective manner in which the issue may be brought before the Court*.

It is implicit that « personal interest » can be one constituent of a « genuine interest ». *Borowski*, however, also showed that an interest could be « genuine » (and standing would lie), even if it was not essentially « personal ». If a party can prove either of these interests exist, then a court can grant that party standing to bring forward a purely public matter²⁹.

Two other requisite criteria, namely a « serious issue as to invalidity » and « no other reasonable and effective manner in which the issue may be

26. See also: D. MULLAN, « Standing after *McNeil* », (1976) 8 *Ottawa L. Rev.* 32; K. SWARTZENBERGER, « Comment », (1982) 20 *Alta. L. Rev.* 503; D. HASKETT, « *Locus Standi* and the Public Interest », (1981) 4 *Can.-U.S. L.J.* 39.

27. *Criminal Code of Canada*, R.S.C. 1970, c. 34, s. 251 (4), (5), and (6), as am. by S.C. 1974-75-76, c. 93, s. 22.1.

28. *Borowski*, *supra*, note 21 at 606 (emphasis added).

29. For commentary generally on the *Borowski* case, see F. BOGART, « Developments in the Canadian Law of Standing », (1984) 3 *Civ. Just. Q.* 339; H. KUSHNER, « Comment », (1983) 17 *U.B.C.L. Rev.* 143; D. MULLAN, « Developments in Administrative Law-The 1981-82 Term », (1983) 5 *Sup. Ct. L. Rev.* 10. Another example of standing in one's capacity *qua* citizen is *Energy Probe v. Canada (Attorney General)*, (1989) 3 C.E.L.R. (N.S.) 262, 58 D.L.R. (4th) 515 (Ont. C.A.), leave to appeal to Supreme Court of Canada refused (1989) 102 N.R. 399n (S.C.C.), at 530-531 (D.L.R.).

brought before the Court » are thresholds to the main consideration of standing³⁰. It is still believed that in *Borowski* « no party directly affected could reasonably be expected to challenge the legislation³¹ », but Laskin, C.J.C. in his dissent pointed out several³².

2.2 Application to Administrative Decisions

These trilogy guidelines for public interest standing originated from actions where the constitutionality of legislation was at issue³³. The Court did not address whether the same approach would apply to a non-constitutional challenge to the statutory authority for administrative action.

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30. *Borowski* may be considered the « high water mark » in the Canadian law of public standing. Most other jurisdictions impose greater constraints. For example, in Australia the leading case on the issue is *Australian Conservation Foundation Inc. v. Commonwealth of Australia*, (1980) 28 A.L.R. 257 (H.C.), where Gibbs J. described the restriction on private recourse at 270 : « A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it. »
31. Per Major J. in *Hy and Zel's Inc. et al. v. Ontario (Attorney-General), and Paul Magder Furs Ltd. et al. v. Ontario (Attorney-General)*, (1994) 107 D.L.R. (4th) 634 (S.C.C.) (hereinafter *Hy and Zel's and Magder*), at 662.
32. *Borowski*, *supra*, note 21 at 596-597. As we see, Laskin C.J.C., as he then was, foresaw the retreat from the majority's expansive approach that we are now witnessing. He distinguished *Borowski* from *McNeil* and *Thorson* on the basis that the legislative enactments impugned in the latter two cases were of a « character » that warranted standing whereas the legislation in *Borowski* did not (at 595-596). See, *contra*, for an interesting analysis : M. PICKARD, « Why Joseph Borowsky Has Standing », (1986) 36 *U.T.L.J.* 19.
33. As for the United States, Justice Earl Warren stated the test in vague and confusing terms in *Flast v. Cohen*, 392 U.S. 83 (1968) at 102-103 : « The nexus demanded of federal taxpayers [in order to have standing to challenge the constitutionality of federal spending] has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked [...] Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged [...] When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. » It was not until relatively recently that the United States Supreme Court set out specific tests on public standing, derived directly from Article III of the *Constitution of the United States*. The case is *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Rehnquist J. spoke for the majority in laying down three conditions the plaintiff must show for standing : (1.) « he personally has suffered some actual or threatened injury » as a result of the impugned act ; (2.) the injury « fairly can be traced to the challenged action » ; and (3.) the injury is « likely to be redressed by a favourable decision ». Nevertheless, he added several « prudential principles » which would still permit standing in other circumstances.

It was not until 1987 that the Supreme Court of Canada was presented with facts in which a citizen challenged an administrative decision: *Minister of Finance of Canada et al. v. Finlay*³⁴. Le Dain J., speaking for the Court in the first post-*Charter*³⁵ standing case, attempted to encapsulate the facts and issue of the case in the following memorable passage:

This appeal raises the question whether a private individual has standing to sue for a declaration that certain payments out of the Consolidated Revenue Fund of Canada are illegal on the ground that they are not made in accordance with the applicable statutory authority. More specifically, the question is whether a recipient of provincial assistance to persons in need, who claims to be prejudiced by certain provisions of the provincial legislation respecting such assistance, should be recognized as having standing to seek a declaration that payments by the federal government to the provincial government of contributions to the cost of such assistance, pursuant to the *Canada Assistance Plan*, R.S.C. 1970, c. C-1 (hereinafter referred to as «the Plan»), are illegal, as being contrary to the authority conferred by the Plan, because the provincial legislative provisions complained of do not comply with the conditions and undertakings to which the federal cost-sharing payments are made subject by the Plan³⁶.

In addition to the *Borowski* criteria³⁷, Le Dain J. asked whether «the court ha[d] a discretion to recognize public interest standing in the circumstances of the present [administrative law] case³⁸?» His Lordship analyzed the applicability of the *Borowski* criteria to non-constitutional issues:

Thorson, McNeil and Borowski cannot be regarded as providing clear and direct authority for the recognition of public interest standing, as a matter of judicial

34. *Minister of Finance of Canada et al. v. Finlay*, (1987) 33 D.L.R. (4th) 321 (S.C.C.) (hereinafter *Finlay*).

35. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

36. *Finlay*, *supra*, note 34 at 323.

37. *Finlay* was found not to have a personal interest (*id.*, at 334): «I am on balance of the view that the relationship between the prejudice allegedly caused to the respondent by the provincial non-compliance [...] and the alleged illegality of the federal payments is too indirect, remote or speculative to be a sufficient causative relationship for standing under the general rule. The respondent must, therefore, in my opinion rely for standing on what is essentially a public interest in the legality of the federal cost-sharing payments, albeit that of a particular class of the public defined by the Plan as persons in need.» As for public or genuine interest, *id.*, at 335, Le Dain J. had little trouble concluding that the appellant did indeed have a genuine interest both as a member of the public and more specifically as a member of a class of persons intended to have the benefit of the Plan. The Court adopted the passage of Thurlow C.J. of the Federal Court of Appeal, (1983) 146 D.L.R. (3d) 704 at 712, who noted: «In seeking to maintain this action he is by no means a mere busybody and it seems to me that his interest in having the matter determined is at least as strong as that of the respondent in the *Borowski* case [emphasis added].»

38. *Id.*, at 326.

discretion, to bring a non-constitutional challenge by an action for a declaration to the statutory authority for public expenditure or other administrative action. It is fair to say, however, that they do not clearly exclude such recognition³⁹.

Given this latitude, the Court chose to extend public interest standing to administrative actions, embracing the logic of *Operation Dismantle Inc. v. The Queen*⁴⁰. Le Dain J. asked and answered this question :

The issue, then, as I see it, is whether the principle reflected in *Thorson, McNeil* and *Borowski* should be extended by this court to such cases [...] In my view an affirmative answer should be given to this question⁴¹.

In reaching this conclusion, the judicial concerns involved in this extension were examined. The most important consideration was the requirement of a « serious issue as to validity ». In other words, in *prima facie* cases, the benefit of the doubt should favour adjudication. The *Borowski* standards would adequately address legitimate concerns favouring restraint :

[...] the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody ; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them ; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson, McNeil* and *Borowski*⁴².

The result of this decision brings the criteria for standing within the administrative context. Any party who can meet the three-part *Borowski* test can challenge a board or tribunal's acts and decisions⁴³.

39. *Id.*, at 339.

40. *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 (hereinafter *Operation Dismantle*). That is to say, where there is an issue appropriate for judicial determination, the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government. See, *Finlay, supra*, note 34 at 340.

41. *Finlay, supra*, note 34 at 339.

42. *Id.*, at 340.

43. One should be aware that public interest standing prescriptions are far less generous in other common law jurisdictions. Cory J. in *Canadian Council of Churches, supra*, note 2 at 197-201 outlines equivalent tests elsewhere. He summarizes at 197: « The highest courts of the United Kingdom, Australia and the United States have struggled with the problem. They have all recognized the need to balance the access of public interest groups to the courts against the need to conserve scarce judicial resources [...] each of these jurisdictions has taken a more restrictive approach to granting status to parties than have the courts in Canada. »

3. Analysis of Common Law⁴⁴ Representative Standing

3.1 Representativeness

A representative organization, such as a trade association, bringing a case on behalf of its members generates concerns about commonality of interest: how representative is the organization of the membership. It, therefore, raises issues similar to the class action suit⁴⁵ where one party represents many with the same⁴⁶ interests⁴⁷.

Although the parallel is tempting⁴⁸, it should be apparent that class action rules do not directly contribute to this analysis of public law standing for representative bodies. Class actions are governed by the applicable rules of civil procedure in a jurisdiction. They operate in the context of private liability⁴⁹, not a public law determination of government action. Class action rules are concerned with private rights of those parties in-

44. The distinction is drawn here with statutory standing where certain identified interest groups derive standing directly from applicable legislation.

45. Class actions were first used over 250 years ago to join a number of interests where it was too cumbersome to have those interests heard separately. A class action is defined as an action where one or more individuals sue in a personal capacity as well as representing all others who have the same interest in the outcome of the proceeding.

46. *Naken v. General Motors Inc.*, 144 D.L.R. (3d) 385 (S.C.C.). Four owners of Firenza cars brought an action against General Motors on behalf of all Ontario purchasers for 1971 and 1972, claiming that the cars were not «durable, tough and reliable» as guaranteed by the manufacturer. After a ten year battle just to determine if a class action was appropriate, the Supreme Court Canada found that it was not and dismissed the case. There have, of course, been class action suits since *Naken*. See, e.g., *Abramovic v. Canadian Pacific Ltd.*, (1989) 69 O.R. (2d) 487 and *Air India Flight 182 Disaster Claimants v. Air India*, (1987) 44 D.L.R. (4th) 317. Nevertheless, the courts are generally reluctant to allow them. Class actions («recours collectif») has existed in the Province of Quebec since 1978: *Loi sur le recours collectif*, L.Q. 1978, c. 8. This Act introduced class actions in the *Code de procédure civile* (articles 992 to 1052). Ontario is the first common law province to make it easier to conduct a class action suit. In January 1993, the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, was passed in an effort to establish guidelines that would accommodate both parties and the judicial system.

47. The interest may be legislation. In *Chastain v. British Columbia Hydro and Power Authority*, (1973) 32 D.L.R. (3d) 100, an action was commenced by the Vancouver Community Legal Assistance Society on behalf of persons required to pay a deposit by B.C. Hydro to obtain electricity. The court found that despite the deposits being different, the plaintiff did represent a class of people with the same interests. The court could make a ruling on the legislation that allegedly allowed B.C. Hydro to demand deposits. The «same interest» was the legislation.

48. Per Laskin J. (as he then was) in *Thorson*, *supra*, note 4, at 8: «I agree with the submission of counsel for the respondents that the appellant's taxpayer class action here is realistically a class action by a member of the public [emphasis added].»

49. Even then, class actions are generally limited to cases involving mass harm or injury.

cluded and excluded and the proper identification of class members. Representativeness is a prerequisite to class actions as a means to ensure that the class action procedure itself is effective. Multiplicity of actions, civil process and other administration of justice issues are other factors which weigh prominently in application of the rules.

Representative standing here has a peculiar focus on the mischief that inheres in permitting a party once removed from a direct interest in the subject matter to merely raise and argue the issue and have it decided. It is an inquiry as to who puts the objective matter of validity of government action before a judge. Once done, the result is a public result, binding upon all to whom the law applies⁵⁰.

How, therefore, should representativeness relate to public law standing? It is submitted that representativeness is not, and should not be, a critical factor on the basis of law. The outcome of the action applies to all members of the public equally and specialized facts are not in issue. Legal accountability of the applicant representor is minimal. In other words, if a statute is found *ultra vires* the legislature, how important is it to that result that the person bringing the question to court was not the most representative of the persons « directly affected »? Even most governments, at certain points in their mandates, and members of any court would encounter problems if they had to demonstrate that their actions accurately represented the interests of their constituents.

Messrs. Thorson, McNeil, Borowski and Finlay were not found to be in any way representative of taxpayers or citizens in their respective challenges to legislation, but ostensibly represented only private idiosyncratic interests. A motivated association, likewise, should not have to establish its credentials as to representativeness. Standing for them resided in that each personified a « directly affected » member. They ostensibly represented no one else. By contrast, representative bodies derive their legitimacy *by the pre-qualification of representing others*, which is the source of their « direct » or « genuine » interest.

It would be a grievous miscalculation to devise a test where the extent of representativeness possessed by the organization is calibrated or scrutinized in each case. If some representativeness is demonstrated in order to establish « genuine interest », a court should not look further and deny standing on the basis that it could have been greater. That would be tantamount to a quantitative inquiry into the minds of Messrs. Thorson,

50. On the other hand, the rules pertaining to class actions are parallel and instructive. If one accepts the need for the presumption of statutory validity and the reality of limited public resources to pass on constitutional and administrative law questions, some measure of motivating self-interest must be built into standing, as it is with class actions.

McNeil, Borowski and Finlay to determine how resolutely they held their respective opposition to government action.

A minimum standard of representativeness would only serve to create a new ground to justify the denial of standing according to the superfluous impressions of the presiding judge. It would be a most unruly horse⁵¹. Evaluating the quality and quantity of representativeness will inexorably lead to impossible considerations about the age of the representative body⁵², its objects⁵³, and formality⁵⁴. Normative judgments about what is « representative » or « not representative » can and will issue from all sides of any factual constellation. A representativeness test is also likely to be fraught with practical difficulties of proof. In the absence of reliable qualitative evidence, the exercise may quickly reduce to a nominally quantitative one that is subject to manipulation and arbitrary standards.

There is some direction in the case law toward proof of representativeness as a condition to standing⁵⁵. These judicial detours do not serve to dispose of the issue. This trend is, one respectfully submits, an unsatisfactory development for the reasons offered above.

3.2 Serious Issue as to Validity

Whether there exists a « serious issue of invalidity⁵⁶ » is one that every party seeking standing must meet. It addresses government objections that

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51. Per Sir James Burrough in *Richardson v. Mellish*, (1824) 2 Bing. 252 : « Public policy is a very unruly horse, and when once you get astride it you will never know where it will carry you. »
 52. Compare a long-standing organization with one which has recently come into existence.
 53. For example, the reason the organization was created. Does it exist to protect in a general way the interests of its members, or is the body charged primarily with managing the public law issue specifically at hand ? Was it born of the public law concern in issue ?
 54. Is the body incorporated, adequately financed and enduring or more loosely-constituted ?
 55. An example is *Energy Probe*, *supra*, note 29. Carthy J.A. notes the eminence of individual scientists who joined the action and even one individual described as « a symbolic representative of the generally affected public » at 533 : « When I see serious individuals, such as the appellants in this case, presenting concerns that are of fundamental significance to all citizens, I have no hesitation in concluding that this is not an abuse of the public interest exception, but rather tends to serve it. » See also : *Friends of Toronto Parkland v. Toronto (City)*, (1992) 6 O.R. (3d) 196 (Div. Ct.).
 56. This element is also known as « justiciability ». Several courts mis-applied this test, by distinguishing « justiciability » from « serious issue as to invalidity » : *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* and *Reese v. Alberta* both discussed *infra*, and by deciding standing wholly outside of the additional considerations of justiciability and reasonable cause of action : *Association of Stop Construction of Rafferty Alameda Projects Inc. v. Saskatchewan (Minister of the Environment and Public Safety)*, discussed *infra*, note 97 at 244-250.

a reasonable cause of action is not raised. The court must decide if at least « some aspects⁵⁷ » of the Statement of Claim raise a serious challenge to government action. The courts have been very liberal on this point, to the extent that one might question whether it operates as an independent criterion or whether it merely serves as a ground for confusion with the other two.

If legislation, earlier found constitutionally sound, has been amended « that Act's validity [may be] no longer a foregone conclusion⁵⁸ ». Something close to a *prima facie* argument of invalidity, or at least a « triable issue⁵⁹ », would have to be made out. « Purely academic appeals or those brought artificially » will not get status even when they rely on constitutional arguments⁶⁰. Claims should not be hypothetical, sweeping, polemical or disjointed, but even these have survived this level of scrutiny⁶¹, which is minimal as judicially applied. The issues should, however, be ripe for determination⁶². Anticipatory actions may have standing denied also on the basis that there is another « reasonable and effective » means of bringing the matter to court⁶³.

Does the constitutionality of, for example, any legislation establish justiciability? One might argue that if it did in the pre-*Charter* era, that would certainly be the case today. In *Thorson*, Laskin J. (as he then was) seemed to be of this view⁶⁴:

A more telling [than the floodgates concern] consideration for me [...] is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute [...] The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

His Lordship was even more categorical later⁶⁵:

The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions

57. *Canadian Council of Churches*, *supra*, note 82 at 205.

58. *Hy and Zel's and Magder*, per Major J., *supra*, note 31 at 661.

59. This term was used by Carthy J.A. in *Energy Probe*, *supra*, note 29 at 529.

60. Per Chouinard J.A. in *Conseil du Patronat du Quebec Inc. c. Quebec (Attorney General)*, [1991] 3 S.C.R. 685, 87 D.L.R. (4th) 287 (cited to D.L.R.) (hereinafter *Conseil du Patronat*), at 526. Also, see *Paquet v. Mines SNA Inc.*, [1986] R.J.Q. 1257 (C.A.).

61. *Canadian Council of Churches*, *supra*, note 2 at 205.

62. *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*, (1993) 12 C.E.L.R. (N.S.) 1 (N.S.C.A.) (hereinafter *Coalition of Citizens*), at 11.

63. *Eg. Hy and Zel's and Magder*, *supra*, note 31.

64. *Thorson*, *supra*, note 4 at 7.

65. *Id.*, at 11 (emphasis added).

precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied [...] Should they then foreclose themselves by drawing strict lines on standing, regardless of the nature of the legislation whose validity is questioned ?

The exercise of judgment can be somewhat circular, akin to discretionary granting of leave to appeal. This is because the court must hear enough of the issue and argument to determine whether it has indeed a serious chance of success. The practice of hearing the entire case before pronouncing on standing is not widespread to date⁶⁶. However, it may become the common method of dealing with standing cases which are otherwise close to call⁶⁷. Occasionally an appeal to a superior court will be framed in terms of specific questions, the first being standing and the remainder being substantive. It is not unusual in that case for the reviewing court, especially where the lower court did so, to pass judgment on the merits of the case before specifically turning to standing⁶⁸.

The more the explicit determination of standing is postponed in a case, the more it has evaporated as a specific or dispositive issue in that case⁶⁹. Other factors such as the actual merits of the case and other judicial interest and preoccupation with it are more likely to determine the standing question than the tests for standing themselves.

3.3 Genuine Interest

A representative organization will encounter the task of showing a « genuine interest » in the subject matter of the action. It usually will not have any since it is personally removed from the subject matter. Instead, it represents a group, one presumes, of « genuinely interested » legal persons. It has an interest, if not a duty, to do that well. That is its interest : to vindicate the « genuine interests » of its membership.

66. The approach has been used in the past. See, *eg.* the comments of Duff J. in *Smith, supra*, note 18, at 194 D.L.R., 338 (S.C.R.): « we are loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure ; and, accordingly we think it right to say that in our opinion the appellant's action also fails in substance ».

67. This was the view of Laskin C.J.C. who wrote the unanimous opinion in *McNeil, supra*, note 20. He said at pp. 633-634 : « In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing. »

68. A good example is *Hi-Fi Novelty Co. et al. v. Nova Scotia (Attorney General)*, (1992) 117 N.S.R. (2d) 142, 324 A.P.R. 142 (S.C.), *aff'd* on appeal : (1994) 126 N.S.R. (2d) 70, 352 A.P.R. 70, discussed *infra*, note 126.

69. See, *Energy Probe, supra*, note 29. In this case, the Ontario Court of Appeal considered the merits of the action in some detail.

From the three-part test developed by the standing trilogy described above, it is clear that « genuine interest » is fungible⁷⁰. It need not be the most proximate personal interest. Borowski could not have suffered an abortion as a woman or a fetus. Nevertheless he was accorded standing for little more than his views on the (in)validity of the legislation : « [a] person need only to show that his is affected by it directly or that he has a genuine interest *as a citizen*⁷¹ ». In such a scenario, the simple belief in the invalidity of the public act complained of should found standing. Most associations, in their day to day protection of their members' interests, and in consultation with their members, would be capable of forming this honest belief⁷².

« Reputation » of the applicant⁷³, demonstration of « a real and continuing interest in the problems » of the affected private parties⁷⁴, and the nature of the impugned legislation itself⁷⁵ may also be indicia tending to support a finding of « genuine interest ».

This article has so far defined the « genuine interest » of the nominal applicant, the representative body, as one which is derived vicariously from its corporate objects and contractual mandate. The court can view a representative body as the voice of its members, treating the body as it would one of its members. This conceptual model for representative standing may be fashioned from simple agency principles. The representor may be seen to possess lawful agency authority to efficiently and directly represent a number of « directly affected » parties. It is, accordingly, the particular interests of the individual members which are being litigated, and not those of the representative organization itself.

70. T.A. CROMWELL, note 12 at 163, *op. cit.*, refers to a determination of the « directly affected » as « traversing a semantic wasteland similar to that encountered in deciding who has an « interest », who suffers « special injury » or who is a « person aggrieved » ».

71. *Borowski, supra*, note 21 (emphasis added).

72. *eg. in Mathias Colomb Band of Indians et al. v. Saskatchewan Power Corporation* (unreported, January 5, 1994), the Manitoba Court of Appeal found that « the Band does have status in light of their [*sic*] special and direct interest in the subject matter of the litigation ».

73. *Canadian Council of Churches, supra*, note 2 at 205.

74. *Ibid.*

75. The more it personally and coercively impacts upon the applicant as in the case of criminal or regulatory legislation with offences and penalties, compared to merely administrative or declaratory legislation, the more palpable the interest: *Thorson, supra*, note 4. This distinction is a laboured one, however, and may be falling out of favour: see, *eg.* the dictum of Laskin C.J.C. in *McNeil, supra*, note 20 at 635.

3.4 No Other Reasonable and Effective Manner to Bring the Issue to Court

This requirement can theoretically pose a special problem for representative associations. Often any member of the group would be under no substantive disability to bring the matter before the court itself.

Is this, however, a « reasonable and effective » alternative? If cost, time or estrangement of the working relationship practically rules out the individual member bringing the issue to court, giving standing to the trade association may be the only « reasonable and effective » means to adjudication. The « reasonable and effective manner » is a highly and, one might propose, deliberately vague qualification for standing, but nevertheless the one which « lies at the heart of the discretion to grant public interest standing⁷⁶ ». It may be invoked to thwart the exasperating litigious ambitions of the mere « busybody⁷⁷ ». If an applicant can demonstrate some serious approach to the issue, a substantive connection with it, and a realistic probability that no one else will pursue the matter⁷⁸, this test will likely be satisfied.

Representative bodies are usually under legal and contractual responsibility to their members. By clothing them with an economic or political interest, they should not be found in the realm of « busybody ». That they are assigned or delegated the task of bringing and sustaining the action on behalf of the members is an answer to whether there is another reasonable and effective manner of doing it.

76. *Hy and Zel's and Magder, supra*, note 31 at 662.

77. The term belongs to Thurlow C.J., *supra*, note 37, but was adopted by LeDain J. in *Finlay, supra*, note 34 at 340.

78. In *Borowski, supra*, note 21 at 596-597, Laskin C.J.C., dissenting, would have denied Borowski standing on this basis:

[...] there are persons with an interest in the operation of [*Criminal Code*] s. 251(4), (5) and (6) who might challenge it [...] I am referring to doctors and to hospitals, both having a clearer interest in the operation of s. 251(4), (4) and (6) than does the plaintiff. Husbands, who might object to their pregnant wives seeking a therapeutic abortion also have a clearer interest [...].

The willingness or refusal of a hospital board to establish a therapeutic abortion committee can create tensions, whatever the outcome. The interest of hospitals and of doctors is, in my view, a direct interest arising from the *Criminal Code* provisions under challenge here, but at worst is a more compelling and immediate interest than that asserted by the plaintiff. His interest is not connected with the administration of the legislation but with an emotional response to its operation. I see nothing in such a response which should persuade this Court to open its judicial doors to him.

On the other hand, logistical convenience such as the common use of one lawyer for all joint applicants and « an increased potential for recovery of costs » can operate to make the action « effective and reasonable »: *Energy Probe, supra*, note 69 at 531.

That there is « no other reasonable and effective manner in which the issue may be brought before a court » may be *prima facie* demonstrated if the Attorney-General is asked⁷⁹ but declines to act on behalf of the plaintiff⁸⁰.

The leading case⁸¹ in Canada on « other reasonable or effective manner » is the *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*⁸². The Canadian Council of Churches, an incorporated body representing the interests of a broad group of member churches, challenged the constitutionality of amendments to the *Immigration Act*⁸³. These amendments affected refugees directly by altering the procedures to determine whether applicants came within the definition of Convention refugee. Cory J., speaking for a unanimous Court, reduced the « no other reasonable and effective manner » criterion to a consideration of whether government action is « immunized [...] from any challenge⁸⁴ ». He concluded that the Council be denied standing.

79. Or, as in *McNeil, supra*, note 20, if the vagaries of the Canadian federal system obscure jurisdictional responsibility.

80. See, *Thorson, supra*, note 4 at 11, per Laskin J. (for the majority): « Short of a reference either to a provincial appellate Court by the Lieutenant-Governor in Council or to this Court by the Governor-General in Council, is there any other way in which the validity of a statute [...] can be determined in a judicial proceeding when the federal Attorney-General has declined to Act? » And at 15: « In those cases where the restrictive principle of requiring carriage of the suit by the Attorney-General and denying any suit if the Attorney-General refuses to act, has been cast aside, the rationale of the ratepayer's action has been explained in various ways, dependent, it seems to me, on the factual situation in the particular case. » See, also, *McNeil, supra*, note 20 at 634-35. Per Laskin C.J.C. for the court:

[McNeil] also requested the Attorney-General to refer the constitutionality of the provincial Act to the Appeal Division, but was unable to elicit any affirmative or negative response to his request. Indeed, in correspondence with the respondent's counsel, counsel for the Attorney-General took the position that the Act was *intra vires* and there appeared to be no right in the respondent to attack its validity. Thereafter, the respondent brought his application for a declaration.

In my opinion, the respondent took all steps that he could reasonably be required to take in order to make the question of his standing ripe for consideration.

81. Applied and followed recently by the Supreme Court of Canada in *Hy and Zel's and Magder*, which are discussed *infra*, note 131.

82. *Canadian Council of Churches, supra*, note 2.

83. *Immigration Act*, 1976, S.C. 1976-77, c. 52, as am. by S.C. 1988, c. 35 and c. 36.

84. *Canadian Council of Churches, supra*, note 2 at 204: « 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. »

An apparent pre-occupation of Cory J. was the problem of scarce judicial resources, which was raised numerous times in the judgment⁸⁵. Accordingly, but nevertheless curiously, he saw this case as calling for « extension » of the trilogy tests⁸⁶. Put that way, it is not surprising that he answered in the negative⁸⁷: « The principles for granting public standing set forth by this court need not and should not be expanded. »

While Cory J. seemed to advocate a restriction of the trilogy principles, and particularly the « other reasonable and effective manner » criterion, he stated the opposite⁸⁸: « None the less, when exercising the discretion the applicable [trilogy] principles should be interpreted in a liberal and generous manner. »

Cory J. found that the Council raised a serious issue of invalidity⁸⁹ and even that they had a genuine interest in refugees⁹⁰. However, he held that this challenge could most reasonably and effectively be brought by the most directly affected parties, the refugee claimants themselves⁹¹:

From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement [...] Here, there is no such immunization as plaintiff refugee claimants are challenging

85. *Id.*, a statement at p. 204 is typical: « I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by 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. »

86. *Ibid.*

87. *Ibid.*

88. *Ibid.*

89. Cory J. found so begrudgingly, *id.*, at 205: « The claim makes a wide, sweeping and somewhat disjointed attack upon most of the multitudinous amendments... Some of the allegations are so hypothetical in nature that it would be impossible for any court to make a determination with regard to them. In many ways the statement of claim more closely resembles submissions that might be made to a parliamentary committee considering the legislation than it does an attack on the validity of the legislation. »

90. *Id.*, at 205.

91. *Id.*, at 206-207.

the legislation. Thus, the very rationale for the public interest litigation party disappears⁹².

The Supreme Court of Canada thus resisted hearing an organization when directly-affected parties were actually already bringing forward the issue⁹³. There may, however, been factors, other than judicial resources, which were responsible for the denial of standing in that case. One that went unacknowledged was that the Council was primarily established to represent the interests of churches, not refugees. It had *effectively volunteered* this advocacy function on behalf of a defined group, and did not hold any specific formal mandate of representation⁹⁴. Another was the political manner in which this challenge was mounted. The Court referred twice to « the fact that the action was brought on the first working day following the passage of the legislation » by a group which had just earlier tried to influence the legislators⁹⁵.

It is clear that *Canadian Council of Churches* does not advance the position of public interest litigants⁹⁶. Its scenario is, nevertheless, distinguishable from the truly representative body composed of directly-affected parties and which organization is mandated to bring the action on their behalf, not in duplication of their efforts.

The distinction between an organization *whose purpose includes serving* directly-affected parties and one *whose membership is also composed of* them may now be decisive to the issue of public law standing. Such a distinction may have a valid claim to recognition so that, for example, the first category of representative group should never attain standing while

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92. The Court rejected the proposition that refugees, as a group, suffered disadvantages that stood in their way to effective access to court. Further, the possibility of 72-hour removal orders depriving refugee claimants of constitutional arguments was not material. The Court pointed out that, in practice, these orders would not normally be enforced with that effect. See, *dicta* of Cory J. at 205-207. It would be important to observe how many of these refugee appeals referred to actually experienced the full range of constitutional argument and appeal, which process could have a major impact on the numerous administrative appeals the Court used to justify the denial of standing.
93. H. SCOTT FAIRLEY in his comment on this case, « Is the Public Interest Falling From Standing? Two Recent Comments From the Supreme Court of Canada », *Philanthrop.* No. 4, 1993, p. 28 at 33, posits a different conclusion: « The key question, of course, is whether the result [...] 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. »
94. This should not detract from the fact that the Council, on the other hand, had directly participated in refugee resettlement and development of refugee policy and procedure in Canada and abroad for many years: *Canadian Council of Churches, supra*, note 2 at 195.
95. *Canadian Council of Churches, supra*, note 2 at 195 and 205.
96. C. MCCOOL, « Public Interest », chapter 3 of *THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA, op. cit.*, note 11, at 3.1.05.

the second might do so automatically or as a matter of judicial discretion. Alternatively, the claim could be made that the second category should always have standing while, in the case of the first category, it should depend on judicial discretion.

4. Standing for Representative Bodies in Light of Recent Case Law

In addition to the judicial decisions described above, a number of others are useful in illuminating the generally uneven application of the trilogy principles in the name of discretion.

4.1 *Rafferty Alameda v. Saskatchewan*

The courts have exhibited flexibility when granting a representative body standing, finding « genuine interest » in a variety of ways. In *Association to Stop Construction of Rafferty Alameda Project Inc. v. Saskatchewan (Minister of Environment and Public Safety) and Souris Basin Development Authority*⁹⁷, the Saskatchewan Court of Queen's Bench awarded standing to the Association which wished to challenge the proposed construction of a dam. The Court found that some of the Association's members who lived in the area where the dam was to be built were « directly affected⁹⁸ ».

4.2 *Reese v. Alberta*

The Alberta Court of Queen's Bench took a different approach to reach the same result in similar circumstances. In *Reese, Alberta Wilderness Association, Peace River Environmental Society and Sierra Club of Western Canada v. Alberta*⁹⁹, one individual and three organizations challenged a Forest Management Agreement that allowed Daishowa Canada Co. Ltd. to construct a second pulp mill and increase production in the Peace River area. McDonald J. found that the four challenging the Agreement did not have a direct or personal interest. The judge continued¹⁰⁰:

However, in my view nothing said in *Finlay* drives this court, in this case, to the conclusion that the Applicants lack « a genuine interest » as citizens in having the justiciable issue decided.

97. *Association to Stop Construction of Rafferty Alameda Project Inc. v. Saskatchewan (Minister of Environment and Public Safety) and Souris Basin Development Authority*, (1988) 68 Sask. R. 52, 3 C.E.L.R. (N.S.) 236 (cites to C.E.L.R.).

98. *Id.*, at 247.

99. *Reese Alberta Wilderness Association, Peace River Environmental Society and Sierra Club of Western Canada v. Alberta*, (1992) 7 C.E.L.R. (N.S.) 89, 11 *Admin. L. Rev.* (2d) 265 (Alta. Q.B.); additional reasons provided at (1992) 5 *Alta. L. Rev.* (3d) 40, 133 A.R. 127, 13 C.P.C. (3d) 323, 11 *Admin. L. Rev.* (2d) 265n (Q.B.).

100. *Id.*, at 10.

McDonald J. concluded¹⁰¹ :

It is clear from the decision in *Finlay* that this court, in its discretion, may recognize that a private citizen or a group of citizens or a society has « public interest standing » to bring an action for declaratory relief, even in regard to an administrative action, which is challenged on non-constitutional grounds.

4.3 *Airport Taxicab v. Canada*

The representative body in *Airport Taxicab (Malton) Association v. Canada (Minister of Transport) et al.*¹⁰² represented various taxi and limousine companies. It objected to the regulations imposed by the Minister of Transport on the flow of taxis and limousines into the Toronto International Airport. Any individual company belonging to the Association could have challenged the regulation because each was directly and personally affected by it. The Trial Division of the Federal Court of Canada, emphasizing its discretionary power, granted the Association standing using the *Borowski* principles¹⁰³ :

The second procedural item concerns the defendant's argument that the plaintiff association lacks status to commence this action. The defendant argues that although the individual shareholders and members of the plaintiff association which is an incorporated body have a direct interest in the taxicab and limousine permit system controlled by the defendant, the corporation itself, that is Airport Taxicab (Malton) Association (the plaintiff named herein), does not.

I do not deny that the defendant's argument in this respect may have more than a little merit. However, jurisprudence on the question of standing, especially the decisions of [sic] Supreme Court of Canada [...] lead me to the conclusion that when the constitutional validity of legislation is being challenged, as is this case, the according of status to commence an action for declaratory relief is largely within the discretion of the Court...

I am satisfied therefore that in the interest of justice the plaintiff should not be denied standing.

4.4 *Friends of the Island Inc. v. Canada*

The party pressing the action *Friends of the Island v. Canada (Minister of Public Works)*¹⁰⁴ was a public interest organization whose members were « farmers, fishermen, ferry workers and environmentalists resident in Prince Edward Island¹⁰⁵ ». The government had argued that the coalition

101. *Id.*, at 13.

102. *Airport Taxicab (Malton) Association v. Canada (Minister of Transport) et al.*, (1987) 7 F.T.R. 105 (F.C.C.T.D.).

103. *Id.*, at 111.

104. *Friends of the Island Inc. v. Canada (Minister of Public Works)*, (1993) 10 C.E.L.R. (N.S.) 204, [1993] 2 F.C. 229, 102 D.L.R. (4th) 696, 61 F.T.R. 4 (cited to D.L.R.).

105. *Id.*, at 735.

did « not establish the requisite interest because it filed no material to establish its corporate objects or interest. The interests of its members or shareholders cannot be taken to be the interest of the applicant¹⁰⁶. » Reed J. in the Federal Court disagreed¹⁰⁷ :

There is abundant evidence establishing their [members'] individual interests. In my view, as I read the material which has been filed, there is also evidence that the objects of the corporate applicant, include, if not solely relate to activities directed at opposing the construction of the bridge. In my view, the applicant has proven that it has sufficient interest¹⁰⁸...

While this case is under appeal¹⁰⁹, the matter of standing is not likely to radically change. The Supreme Court of Canada recently applied it¹¹⁰.

4.5 *Conseil du Patronat v. Quebec*

The most influential case of standing for representative bodies is *Conseil du Patronat du Quebec Inc. v. Quebec (Attorney-General)*¹¹¹. A non-profit corporation, the Conseil du Patronat, that represented many employers' federations and management associations. It sought to mount a *Charter* challenge of the provisions of the Quebec *Labour Code*, which prohibited the hiring of replacement workers during a strike¹¹². The Conseil employed 15 persons, none of whom were unionized. There was clearly, therefore, no direct personal interest on the part of the Conseil in the validity of the labour legislation. The Quebec Superior Court denied standing on the bases that neither « l'intérêt suffisant » nor actual and exceptional prejudice to the Conseil were demonstrated. The Quebec Court of Appeal, Chouinard J.A. dissenting, dismissed the appeal by the Conseil¹¹³.

106. *Id.*, at 734.

107. *Id.*, at 735.

108. A further argument that the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended by S.C. 1990, c. 8, s. 18.1(1), which accorded standing only to persons « directly affected by a matter in respect of which relief is sought » precluded standing, was also rejected by the trial judge.

109. Notices of Appeal were filed in the Federal Court of Appeal (consolidated Court File No. A255/93), see: (1993) 102 D.L.R. (4th) 696 note. To date, no appeal decision has been released.

110. *Quebec (Attorney General) v. Canada (National Energy Board)*, as yet unreported, S.C.C., Doc. 22705, February 24, 1994.

111. *Conseil du Patronat du Quebec Inc.*, *supra*, note 60.

112. *Labour Code*, R.S.Q. 1977, c. C-27, section 109.1.

113. *Conseil du Patronat du Quebec Inc. c. Québec*, [1988] R.J.Q. 1516, (1989) 55 D.L.R. (4th) 523 (Qué. C.A.) (cited to D.L.R.). The dissent of Chouinard J.A. is found at 1522-1526 (R.J.Q.) and 525-531 (D.L.R.) (hereinafter *Conseil du Patronat*).

The Conseil du Patronat in its application described itself as :

a non-profit corporation formed to promote the economic, social, and professional interests of 131 Quebec employers' federations and associations, as well as the interests of a large number of businesses which support it, representing about 70 % of the province's active labour force¹¹⁴.

Moisan J. (*ad hoc*), writing for the majority, concluded that the Conseil did not have sufficient interest as an employer, a corporate citizen or as an employers' association¹¹⁵. Mailhot J.A. concurred with Moisan J. but added that¹¹⁶ :

there are other reasonable and effective means of bringing the issue before a court [...] An employer bound by the *Labour Code*, as association of employers within the meaning of s. 1(c) of the *Labour Code* or an employer mentioned in a request for certification would, in my opinion, have the required interest. However, the Conseil du patronat, an employer not presently bound by the *Labour Code*, does not have the required interest [...].

Chouinard J.A. would have found the requisite Conseil interest¹¹⁷ :

With respect, I believe that requiring actual direct interest (or at the very least potential interest) for action in private law is incompatible with interest in matters of public appeal, involving the constitutionality of a statute. For example, any employer (even an employer with only one unionized employee) is deemed to have sufficient interest to challenge the constitutionality of the « anti-strike-breaking » law, but the Conseil du Patronat is denied the same right, even as an employer, although its purpose is to promote the interests of a very large number of employers or firms, a majority of whom appear to be unionized. That is not how I interpret the Supreme Court decisions [...].

Since the Conseil du Patronat speaks for its members, surely it has just as much interest as each of its members does.

Efforts by the representative body to resolve the issue before resorting to litigation will be evidence of whether another suitable means could be invoked to bring the matter to court. One of the factors Chouinard J.A. thought was germane to standing was that :

the Conseil du Patronat complained unsuccessfully to the Quebec Human Rights Commission [...] even asking the Attorney-General (on May, 1984) to take the issue before the Court of Appeal. Was this sufficient to come to the reasonable conclusion that there were no other suitable means of bringing the matter before the courts? It seems to me that the answer must be yes¹¹⁸.

Chouinard J.A. concluded that « since the Conseil du Patronat speaks for its members, it must have just as much interest as each of its members

114. *Id.*, at 527.

115. *Id.*, at 535-537.

116. *Id.*, at 532.

117. *Id.*, at 528.

118. *Id.*, at 526.

does¹¹⁹ ». The Conseil was compared to the group of corporations, businesses and organizations who collectively challenged the testing of cruise missiles in *Operation Dismantle*¹²⁰. The Supreme Court found this loose collection of organizations had sufficient interest to bring forward the issue. Chouinard J.A. would have likewise granted standing for the Conseil du Patronat¹²¹.

The Supreme Court of Canada, in a short oral judgment¹²², allowed the Conseil appeal, by « essentially¹²³ » adopting the dissenting reasons of Chouinard J.A. in the Quebec Court of Appeal¹²⁴.

4.6 *Hi-Fi Novelty v. Nova Scotia*

The Nova Scotia distributors of coin-operated gaming machines to convenience stores, taverns, arcades and hotels were members of the Nova Scotia Music and Amusement Operators Association. The provincial government had decided to regulate video gambling. These distributors, as a result, lost money. The Association challenged the provincial video gambling regulations. The application, *Nova Scotia Music and Amusement Operators Association v. Nova Scotia (Attorney General)*¹²⁵, was dismissed for lack of standing. The chambers judge found no merit in the constitutional question and accordingly, citing *Canadian Council of Churches*, saw no serious issue of invalidity presenting. He was also concerned that standing would fortify the distributors' criminal behaviour and that standing should be denied in such circumstances :

This is not a criminal prosecution nor a criminal application, however, the evidence clearly indicates that the conduct of the applicants based on a civil burden of balance of probabilities indicates criminal conduct.

The chambers judge was also convinced that the matter would sooner or later come to court again by way of a defence to a prosecution under criminal or regulatory legislation.

119. *Id.*, at 528.

120. *Operation Dismantle Inc.*, *supra*, note 40.

121. Chouinard J.A. at 530-531 of *Conseil du Patronat*, *supra*, note 113, describes it thus : « the highest court of the land granted standing to a very large number of corporations and organizations, who joined forces to bring an application, a situation similar to the case at bar thereby agreeing (at least implicitly) that the association had sufficient interest. »

122. *Conseil du Patronat*, *supra*, note 111.

123. *Ibid.*

124. For two comments on this case, see H. TRUDEAU and D. VEILLEUX, « L'intérêt à agir en droit public à la suite de l'arrêt Conseil du patronat du Québec », (1992) 52 *R. du B.* 437 and H.S. FAIRLEY, *supra*, note 93.

125. *Nova Scotia Music and Amusement Operators Association v. Nova Scotia (Attorney General)*, (1992) 113 N.S.R. (2d) 54, 309 A.P.R. 54 (S.C.).

In the Nova Scotia Court of Appeal¹²⁶, the case was approached and decided with deference to original discretion¹²⁷:

This court has said on several occasions that it will not interfere with a discretionary order, particularly an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. Simply because we may possibly have reached a decision contrary to that of the judge on the facts is not sufficient. The burden on the appellant is heavy [...] In our opinion, the appellants have failed to show that the chambers judge made any error of law or that any patent injustice arose from the decision which he has reached.

This decision exemplifies the disquieting practice of hoisting *locus standi* on its own petard. If there is any sign that the declaratory judgment is still alive in Canadian law, it is difficult to envisage how these applicants did not have standing to pursue one. To make a decision on the merits, in effect, and then to ostensibly refuse status is to denature the concept and purpose of standing.

4.7 *Coalition of Citizens v. Metropolitan Authority*

A regional authority was charged to develop a solid waste management system. It sought public input and eventually approved a plan that called for 40 per cent waste incineration. Several individuals objected to this and formed the coalition which in turn commenced an action for a declaration that this decision contravened sections 7 and 15 of the *Charter* and two related provincial statutes. In *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*¹²⁸, the Nova Scotia Court of Appeal eventually decided, in a judgment¹²⁹ released one day after the *Hi-Fi Novelty* case above, that the coalition did not have status.

The Court viewed the public environmental assessment hearings as an essential process to the ripening of this action. It found, therefore, by temporal impediment, there was not a serious justiciable issue to be tried. The outcome of the public hearings might render the action unnecessary. At the minimum, it would likely focus the issues since the original claim was in the nature of a wide-ranging attack on incineration generally.

While the Court may not have been implicitly in favour of the composition of, and approaches taken by, the Coalition, its concern expressed was about duplication and effective use of resources¹³⁰:

126. *Hi-Fi Novelty Co. et al. v. Nova Scotia (Attorney General)*, (1994) 126 N.S.R. (2d) 70 and 352 A.P.R. 70.

127. *Id.*, at 73-74, per Chipman J.A. for the Court.

128. *Coalition of Citizens, supra*, note 62.

129. Also written by Chipman J.A.

130. *Coalition of Citizens, supra*, note 62 at 13.

The voluminous material before us on this very small segment of the dispute (relating to standing) shows very clearly what a massive undertaking this litigation would become. The attitude of the parties revealed through the materials tendered, and the manner in which the case has been argued on their behalf, indicates that co-operation will be at a minimum. To one with even the slightest familiarity with the process of the courts and the time consumed in litigation, it is clear that this case shapes up as promising to be one of the most complex, expensive and time-consuming civil trials in the history of this province — if it is allowed to get off the ground. The numerous discovery proceedings, interlocutory motions with possible appeals therefrom and case management meetings can be all too easily visualized.

4.8 *Hy and Zel's and Paul Magder Furs Ltd. v. Ontario*

The Supreme Court of Canada's more technical focus on « other reasonable and effective manner », prominent in *Canadian Council of Churches*, continued in this case¹³¹. The two corporate applicants and some of their employees applied for a declaration that the Ontario *Retail Business Holidays Act*¹³², which mandated the closure of their stores on certain days of the year, was unconstitutional as violating religious and equality rights under the *Charter*. These applications were initiated in response to the Attorney-General's motion for orders requiring these stores to close on a holiday. The court was willing to assume, without deciding, that corporations can enjoy such rights, but noted that none of the appellants had alleged infringement of *their own* particular rights.

Major J. writing for the majority of the Court¹³³, disposed of the case on the basis of standing, although it would not seem to have been a formal stated issue¹³⁴ and was not addressed in the lower courts¹³⁵. After com-

131. *Hy and Zel's and Magder, supra*, note 31. The two causes emerged procedurally at the same time and were joined and decided together.

132. *Retail Business Holidays Act*, R.S.O. 1980, c. 453, as amended.

133. Lamer C.J.C., La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ. concurring.

134. See statement of the two *Charter* issues by Major J.: *Hy and Zel's and Magder, supra*, note 31 at 659.

135. *Id.*, at 662. Major J. explained this quoting Le Dain J. in *Finlay, supra*, note 34 at 328: « a court's ability to consider standing at the outset « depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. » Since the appellants' case has proceeded without trial, the situation is akin to determining standing as a preliminary point. » This rationale is clearly flawed. If standing is not raised in early court applications and decisions are rendered, even without a full trial, it must be implicitly ceded. If the court is concerned with effective utilization of judicial resources, one must question the wisdom of denying standing in a reasoned judgment at the level of the Supreme Court of Canada in favour of another more « reasonable and effective manner of bringing the issue before the court ».

menting that Magder had « worn a wide path to the courthouse over the past 10 years¹³⁶ », Major J. pointed out that the bar to standing was high for civil applicants seeking declaratory relief by alleging a *Charter* infringement¹³⁷ :

The appellants have brought civil applications for declaratory relief. A party's ability to attack a legislation's constitutional validity on Charter grounds is more difficult to establish in a civil suit than in a criminal prosecution.

He then applied the trilogy tests. A serious issue as to validity was made out by virtue of the amendments to the legislation since its constitutionality was confirmed in *R. v. Edwards Books & Art Ltd.*¹³⁸. The appellants were directly affected because they were specifically subject to prosecution under the impugned statute.

The parties failed on the inquiry as to whether « other reasonable and effective » means existed of bringing the matter to court. However, the precise reasons are not clear. Major J. suggests that it may be because « almost no original evidence in support of their claim¹³⁹ » was presented. Presumably he was motivated by judicial fondness for a clean and comprehensive prosecution file where private standing to defend on constitutional grounds would be assured.

Deficiency of evidence is a foreseeable defect of the summary procedure followed in this case. One might question the use of standing principles to kill consideration of this action's merits on that ground alone¹⁴⁰. His Lordship further found that, unlike in the circumstances of *Borowski*, the legislation in question « does not discourage challenge¹⁴¹ » which is to say that the legislation is not « immunized » from it. Nevertheless, it is difficult to conceive of a substantially more « reasonable and effective » means of bringing this issue to court once it was actually before the court, having found that the litigants are directly affected and that there is a serious issue as to validity.

In what could be the most serious blow to public law standing was the following statement of the Court¹⁴² : « Nor do the appellants have standing on the basis that their own religious rights have been violated. »

136. *Id.*, at 657.

137. *Id.*, at 660.

138. *R. v. Edwards Books & Art Ltd.*, (1986) 35 D.L.R. (4th) 1, 30 C.C.C. (3d) 385, [1986] 2 S.C.R. 713.

139. *Hy and Zel's and Magder*, *supra*, note 31 at 662.

140. By contrast, L'Heureux-Dubé J., in dissent, distinguished the issue of standing from the question of the sufficiency of evidence : *id.*, at 654-655. It is submitted that this is the correct approach.

141. *Id.*, at 663.

142. *Ibid.*

It is too early to tell whether this is a new fourth test for standing in such cases, or whether it was propounded in error or simply ambiguous terms. « Direct effect » or « genuine interest » was historically established as the threshold connection for public interest litigation. It was clearly demonstrated in this particular case. If litigants must now show a violation of *their own rights*, one might inquire what became of *Borowski*. What has become of anticipatory and declaratory actions? Most of the public interest cases have been either anticipatory (for example, *Operation Dismantle* and *Energy Probe*) or declaratory (for example, the trilogy cases) or both (for example, *Conseil du Patronat*).

This statement can be interpreted to wholly eliminate the public interest standing, since it is a concept which has its essence in the vindication of the rights of others. If the litigant must show that « their own rights have been violated » is private interest standing all that is left¹⁴³?

L'Heureux-Dubé J. dissented¹⁴⁴, finding « no principled or practical reason to refuse » standing here¹⁴⁵ and would have granted standing on the basis that these appellants suffered exceptional prejudice due to the special effect of the legislation against their interests. The affected parties were before the court, in an existing controversy and it should have been resolved to avoid a multiplicity of proceedings¹⁴⁶.

Conclusion

Public interest standing has been described, with some justification, as « one of the most criticized aspects of constitutional law¹⁴⁷ ». The various discretionary prescriptions which have evolved since *Thorson* suffer from the problem of fusing together. Judges continue to disagree on their content¹⁴⁸ and application. Judicial analyses provide little guidance to parties and courts alike. Discrete, but misleadingly simple, terms such as « specially affected », « extraordinary prejudice » and « genuine interest » may

143. The context in which this statement was made once again stressed the importance of deciding these cases in a concrete factual framework. See, *id.*, Major J. at 663 where he cites the Court in *Danson v. Ontario (Attorney-General)*, (1990) 73 D.L.R. (4th) 686, [1990] 2 S.C.R. 1086, 43 C.P.C. (2d) 165 at 691 (D.L.R.): « the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints ». It is important to remember that concrete factual backgrounds are rarely found in anticipatory and declaratory cases.

144. McLachlin J. concurring.

145. *Hy and Zel's* and *Magder*, *supra*, note 31 at 656.

146. *Id.*, at 652.

147. L.H. TRIBE, *American Constitutional Law*, 2nd ed., Mineola, New York, Foundation Press, Inc., 1988, p. 110.

148. See, *eg.* majority and minority opinions in *Hy and Zel's* and *Magder*, *supra*, note 31.

no longer dominate the analysis, but the hoary replacement, judicial discretion, is hardly an improvement.

The golden age of liberal public interest standing is plainly gone. It is difficult to imagine the courthouse gates being ever again opened as wide as they were during the apogee of *Borowski*, even though Laskin C.J.C. was already by then sounding the floodgate alarm¹⁴⁹. Even *Conseil du Patronat* and *Canadian Council of Churches* are hard to reconcile, though they were decided a scant six weeks apart¹⁵⁰. Suddenly the standing dialectic is to be decided on the minimalist grounds of whether government action is « immunized » from challenge and how overworked the judges are.

The restraint began with *Canadian Council of Churches*, which is now invariably cited to justify refusing standing. When the highest court in the land tells refugees that they must themselves litigate the constitutionality of their legal proceedings, one can hear the doors closing on public interest litigation. Starting with this case, the Supreme Court of Canada shifted the emphasis from the control of abuse of process to control of courthouse backlogs.

This has continued with tighter standing restrictions being currently defended on the additional rationale of the need for a full factual matrix upon which to frame a substantive adjudication. This is evident in the *dicta* of Major J. in *Hy and Zel's and Magder*¹⁵¹:

[...] the court's vigilance [is] in ensuring that it hears the arguments of the parties most directly affected by a matter. In the absence of facts specific to the appellants, both the court's ability to ensure that it hears from those most directly affected and that Charter issues are decided in a proper factual context are compromised¹⁵².

The lack of a concrete factual context is a circumstance which virtually always attends, and has always attended, by its very nature, public interest litigation. To turn away cases lacking a specific factual basis is

149. Until *Canadian Council of Churches*, *supra*, note 2, the courts were not as concerned with overflowing dockets. See, *Thorson*, *supra*, note 4 at 6-7.

150. December 6, 1991 (*Conseil du Patronat*) to January 23, 1992 (*Canadian Council of Churches*).

151. *Hy and Zel's and Magder*, *supra*, note 31 at 663.

152. His Lordship quoted with approval a passage from *MacKay v. Manitoba*, (1989) 61 D.L.R. (4th) 385, [1989] 2 S.C.R. 357, 43 C.R.R. 1 at 388 (D.L.R.): « Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel. »

tantamount to turning away public interest cases *because* they are public interest cases.

Temporal impediments, such as issue ripening, will always beg the standing question. A court can *always* say that the issue is not ripe. If it desires to constrain standing, the ground enjoying the greatest currency, aside from justiciability, is the « other reasonable and effective method of bringing the matter to court ». By the definition of public interest litigation, there will almost always be someone better situated to bring the action. The question is how strictly the court should apply this principle.

The Supreme Court of Canada, or at least its Chief Justice, appreciates that the traditional adversarial system is a deficient model for both raising public law questions and for analyzing them¹⁵³. Our highest courts are furthermore increasingly occupied with social policy, a role which does not land itself inherently, to factual precision. Madam Justice McLachlin recently highlighted this dilemma thus¹⁵⁴:

[...] the courts are, whether they like it or not, required to give judgments on matters of social policy [...].

Whatever the reasons, it seems clear that [...] the agenda of courts in the years to come is going to take on an increasingly social face. Gone are the days when judges could spend their days musing on the principles of contract, tort and criminal law. Their field include [*sic*] these, but much more as well.

The simple fact is that judicial decisions on such [social policy] questions matter more, and to more people [...] Decisions on social policy issues may affect thousands, if not millions, of people who may have nothing to do with the lawsuit. The result is an expectation-indeed a demand-from the public as a whole or from important interest groups within the public, that the judge has properly considered all the factors relevant to his decision and its consequences.

As society becomes even more complex and spawns more regulation, which in turn calls for more judicial review, it is clear that anticipatory and declaratory judgments will be more elusive in Canada. These kinds of judgment can economize on judicial resources, by virtue of their preven-

153. Per Lamer C.J.C. in the *Alexander Thane Lecture in Law*, Charlottetown, Prince Edward Island, March, 1993 at p. 11: « [The *Charter* has] stretched [our traditional adversary system] beyond its limits [We may find] our traditional adversary proceedings poorly designed to deal with cases where the issue is not the dispute between the parties, so much as the validity of legislation. »

154. McLACHLIN J., *supra*, note 11, pp. 1.1.04-06.

tative function. Their usefulness and availability were acknowledged in 1985 by the Supreme Court of Canada in *Operation Dismantle*¹⁵⁵.

The effective use of resources test does not advance standing analysis. It is always open to assert that the court could better spend its time on other things. If this concern was permitted to control the negotiation of what cases are heard, courts would never feel moved to grant standing in public interest cases. Certainly periodic judicial workloads cannot be the determining factor in which such cases get standing.

The conservation of judicial resources rationale in foreclosing standing may also itself be based upon a false economy. To decide standing first at the appellate level, to adjudicate on the merits and then refuse standing, to demonstrate variable degrees of respect for original discretion, to deny standing on the basis of incomplete pleadings or factual presentation, to encourage multitudes of fragmented, personally-affected parties to navigate the waters of countless administrative and constitutional cases to present the invalidity question while at the same time hurling the representative dossier out of court—these actions will not promote the most effective use of judicial resources. Public interest litigation *is* arguably among the most effective use of resources.

A cynic might suggest that the new found discretion and workload has actually played out in the selection of cases according to the political proclivities of judges. In the tone of several of the more recent judicial decisions, the configuration and *modus operandi* of the applicants may have been the determining factors as to standing. As tests are refined and formulated, it is submitted that discretion will follow impressions. Standing was refused where the litigant came close to abuse of court process (eg. *Magder*), or law-breaking (eg. *Hy and Zel's* and *Magder*), was considered, albeit not labelled, a busybody (eg. *Canadian Council of Churches*), or was in an insalubrious business such as video gambling (eg. *Hi-Fi Novelty*), or exhibited hasty and persistent behaviour (eg. *Metropolitan Authority*). Nuclear power (eg. *Operation Dismantle* and *Energy Probe*) and environmental (eg. *Rafferty Alameda*, *Reese* and *Friends of the Island*) concerns are, on the other hand, more likely to be heard. In many more cases, such

155. *Operation Dismantle*, *supra*, note 40, per Wilson J. at 490, quoting from Borchard, *Declaratory Judgments*, 2nd ed. (1941), at 27: « no « injury » or « wrong » need have been actually committed or 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, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant ».

as to affirm a provincial tax on alcohol¹⁵⁶ or the validity of the criminal sanctions against assisted-suicide¹⁵⁷, standing was not even raised as an issue.

An action launched by a truly representative body, unlike for statutory standing, intervenor status and class actions is a special transaction because it raises public law questions and because it does so for members who are interested. To see it as a party directly affected by the outcome of the action depends upon one's perspective and abiding willingness to receive the issue for adjudication¹⁵⁸. The classification of such actions distinguishing them from others has not been done to date in Canada, with the result that each case may be considered as unnecessarily crowding the docket. There is good legal principle in notions of « genuine interest » and agency to grant standing. There is also sound public policy in the forms of convenience, finality and avoiding a multiplicity of proceedings to justify standing to a representative body to raise public law questions as a matter of course. Collectivities may also be seen to have a more legitimate claim to standing as representatives of the public interest than individuals.

Public interest standing in Canada, which started with *Thorson* has truly come full cycle in 20 years with the decision of *Hy and Zel's and Magder*. Browsing the law reports today, one observes that representative bodies *are* still getting into court to have their concerns adjudicated. Many « Friends », « Associations » and « Coalitions » cases do not even encounter the issue by way of defence. The most recent appellate pronouncements may change that.

As a threshold matter, nevertheless, public interest standing needs to be clarified. As Sharpe has stated¹⁵⁹ :

Enlargement of standing is an important part of the recognition of the enhanced role of the courts brought about by the Charter with all the difficulties this entails. Liberalized standing, no longer tied to traditional legal interests, will allow de-

156. *Brew on Premise Association of Eastern Ontario v. Ontario*, unreported (Ont. Div. Ct., March 21, 1994).

157. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

158. See, *eg.* the comments of Carthy J.A. in *Energy Probe*, *supra*, note 29 at 531: « Mr. Borowski had no direct or future contingent interest in the abortion issue other than as a citizen with an interest in constitutional behaviour. Would his status have been differently considered if he had presented himself in the role of « Borowski Inc. », a non-profit organization devoted to issues related to abortion laws? I think not, and furthermore, if in this case it was decided that the individuals have status but the corporations do not, it would be a disservice to the purpose of the [public interest] exception in effectively bringing significant issues before the court, by depriving one side of the litigation of the expertise and resources needed to assure effective presentation. »

159. R.J. SHARPE, *Charter Litigation*, Toronto, Butterworths, 1986, p. 25.

veloping interests a voice of their own in the discussion about the appropriate solution to the problem at hand. Deciding which of these interests should be recognized in any particular circumstances will not be easy. What is essential is that they not be turned aside only because they appear very different in form and in substance from those long cherished by the law.

While standing is intertwined with the role of Canadian courts and the scope of judicial review, the examining of public law in its current social context has indeed become a perilously indeterminate exercise. In the words of Lamer, C.J.C.¹⁶⁰ :

I sometimes think of these sorts of cases as being somewhat like a spider's web. If you pull on one strand of the web, the entire structure moves, but not necessarily all in the same direction [...] The implications are widespread and, at times, hard to foresee.

Containment of public interest standing, as one of those strands in the web, may have considerably unintended social implications. The more daunting challenge may be to avoid getting caught in the web and consumed by the spider.

160. *Supra*, note 154.