

STANDING IN *CHARTER* DECLARATORY ACTIONS[©]

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Standing rules applicable to *Charter* declaratory actions are examined. It is argued that, in *Charter* cases, the Supreme Court has taken a restrictive approach to public interest standing that is inconsistent with prior case law and does not forward the purposes of standing law. Alternative forms of standing are also examined. The use of the traditional form of private standing has been severely and, it is suggested, unnecessarily restricted in *Charter* actions. However, there is a potential for a new form of private standing in the “section 24” plaintiff. The implications of both of these developments are considered.

L'article examine les règles en matière de qualité pour agir qui s'appliquent aux parties qui demandent des jugements déclaratoires fondés sur la *Charte*. L'argument est que la Cour suprême du Canada a adopté une approche restrictive en ce qui concerne la qualité pour agir dans l'intérêt public et que cette position ne s'accorde pas avec la jurisprudence et ne fait pas avancer les objectifs du droit relatifs à la qualité pour agir. Des formes alternatives de qualité pour agir sont aussi examinées. L'usage de la forme traditionnelle de qualité pour agir dans une action a été restreint avec sévérité et sans nécessité. Toutefois, il existe, à l'article 24 de la *Charte*, la possibilité d'une nouvelle forme de qualité pour agir dans une action. Les implications de ces deux développements sont considérées.

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I. INTRODUCTION

In the first few years of dealing with the *Canadian Charter of Rights and Freedoms* the courts asserted that while the subjects of judicial review had expanded, its nature had not really changed.² For a while this meant a denial, consistent with the traditional stance of the courts under division of powers review, that "political" or policy-based decisions were required by the courts. This stance has changed dramatically.³ Justices of the Supreme Court of Canada now express their difficulties with the task of judicial review, because of the policy-based decisions required in *Charter* cases.⁴ This concern is played

¹ Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

² *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979* [1985] 2 S.C.R. 486.

³ For a discussion of this change, see: D. Gibson, "The Deferential Trojan Horse: A Decade of Charter Decisions" (1993) 72 Can. Bar Rev. 417 at 446, where the author reviews the court's changing approach to the *Charter*, from the "initial fervour" to the apparent "judicial ennui" at 446; R. Elliot, "Developments in Constitutional Law: The 1989-90 Term" (1991), 2 S.C.L.R. (2d) 83 at 94ff, where the author discusses the "demise of the checking function under the Charter;" and D. Stratas, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* 1 (Aurora, Ont.: Canada Law Book, 1990), paras. 1:02 [1](a), (b), and (c).

⁴ B. Wilson, "Constitutional Advocacy" (1992) 24 Ottawa L. Rev. 265; and G. La Forest, "The Balancing of Interest under the *Charter*" (1992) 2 N.J.C.L. 133.

out in the ongoing development of the section 1 test⁵ and in other contexts, such as the interpretation of fundamental justice under section 7 of the *Charter*.⁶ Solutions to the conundrum of reconciling the task of judicial review with an appropriate degree of deference to democratic decisions remain elusive.

The courts' initial reaction to the impact of the *Charter* on procedural issues was similar. It seemed that, although there would be some expansion of remedial powers, basic procedures would go unchanged.⁷ This was certainly the case with regard to the rules of standing. Section 24 of the *Charter* contains a test of standing, providing that anyone "whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied" might seek an appropriate and just remedy. This was initially treated as over-restrictive and narrower than the tests of standing that had developed before the *Charter*. The courts' early reaction to section 24 was that it was supplementary only. It did not change the basic tests of standing. Thus, when the standing of a corporation to rely on the freedom of religion was challenged in *Big M*⁸—on the basis that it did not possess any freedom of religion, or that its freedom of religion had not been infringed or denied—the court responded that Big M Drug Mart had private standing by virtue of being subjected to criminal proceedings under the *Lord's Day Act*,⁹ and that it was therefore entitled to raise issues relating to the constitutionality of the law under which it was charged. The court also indicated that public interest standing rules would apply to *Charter* challenges.

Since this generous introduction, significant restrictions on standing have developed in *Charter* jurisprudence. In *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*¹⁰ the

⁵ The process of introducing "flexibility" or legislative deference into the section 1 test was stipulated in *R. v. Oakes*, [1986] 1 S.C.R. 103, commenced with *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [hereinafter *Edwards Books*], and continued with *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*], and in *McKinney v. University of Guelph* [1990] 3 S.C.R. 229. See the commentary in P.W. Hogg, "Section 1 Revisited" (1991) 1 N.J.C.L. 1 at 18-23; Elliot, *supra* note 3 at 145-50; and Stratas, *supra* note 3, para. 6:05.

⁶ *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 S.C.R. 1123, per Lamer J. (as he then was); and *Rodriguez v. British Columbia (A.G.)* [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*] per Sopinka J. See also Elliot, *ibid.* at 105-09, regarding the interpretation of section 7, where the author makes the same point regarding other *Charter* rights and freedoms.

⁷ *Mills v. R.*, [1986] 1 S.C.R. 863; and *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 [hereinafter *Big M*].

⁸ *Ibid.*

⁹ R.S.C. 1970, c. L-13.

¹⁰ [1992] 1 S.C.R. 236 [hereinafter *Canadian Council of Churches*].

Supreme Court of Canada indicated that it would not expand the principles governing public interest standing. In the same case, and in *Hy and Zel's Inc. v. Ontario (A.G.)*,¹¹ the court adopted a narrow approach to the application of those principles. In *Irwin Toy*, corporate parties were not permitted to argue that the *Charter* rights of individuals had been violated. This was not initially described as a restriction on standing, although it had a similar effect. But in *Hy and Zel's* the *Irwin Toy* rule became a rule of standing, with application to individuals as well as corporations. Parties whose own *Charter* rights were not affected were denied standing to challenge a Sunday closing law, even though they were threatened with prosecution under the law. These decisions stand in contrast to *Big M*, and show how far the court has retreated from that case.

I will contend that the Supreme Court of Canada, in its now cautious approach to the *Charter*, has overcompensated for its original generosity. Its new approach to standing does not respond to the purposes underlying standing rules. These purposes fall into two categories: the efficient use of scarce judicial resources, and the adversarial process.¹² The new standing jurisprudence does not clearly address nor forward these purposes. The result is an appearance, at least, of an evasion of the merits in these cases.

In this article, I will examine the standing rules applicable to *Charter* litigation, focusing on actions or applications for a declaration of total or partial invalidity of legislation.¹³ I will commence with a survey of the rationales for standing rules. An examination of the jurisprudence of the Supreme Court of Canada regarding public interest standing, both pre- and post-*Charter*, will demonstrate that the court's post-*Charter* approach is neither consistent with the prior case law, nor does it forward the purposes of standing law. I will then consider alternative forms of standing for *Charter* declaratory applications. The use of the traditional form of private standing as established in *Smith v.*

¹¹ This case was consolidated with *Paul Magder Furs Ltd. v. Ontario (A.G.)* [1993] 3 S.C.R. 675 [hereinafter *Hy and Zel's*].

¹² Another concern, that of the nature of issues suitable for judicial determination, is a matter of justiciability, not standing; see *infra* note 15 and accompanying text. The purposes of standing rules are considered below under Part II.

¹³ The remedy could involve striking down the law or variations upon that, all of which are available under section 52 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, such as severance, reading down, or reading up legislation: *Schachter v. Canada*, [1992] 2 S.C.R. 679 [hereinafter *Schachter*].

*Ontario (A.G.)*¹⁴ has been severely and, I will suggest, unnecessarily restricted. However, there is a potential for a new form of private standing applicable to *Charter* declaratory applications, in the “section 24” plaintiff. The implications of both of these developments will be considered.

II. RATIONALES FOR STANDING RULES

The underlying concerns or rationales for the doctrine of standing can be placed in three general categories: the economical use of scarce judicial resources, the requirements of the adversarial process, and the proper role of the court (*i.e.*, the justiciability or appropriateness for legal determination of issues). Although justiciability issues have been dealt with in a number of standing cases, they relate to the question posed, rather than the party posing it, and are generally dealt with separately from standing issues.¹⁵ I will be focusing on the limitation of access to certain parties and will therefore examine standing jurisprudence in terms of the first two categories of concerns.¹⁶

¹⁴ [1924] S.C.R. 331 [hereinafter *Smith*].

¹⁵ This is consistent with the public interest standing jurisprudence discussed below, under “Part III. Public Interest Standing.” While justiciability was considered in a number of these decisions, it was not directly incorporated into the public interest standing test stated in *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575 [hereinafter *Borowski #1*], discussed *infra* at notes 37-39 and accompanying text (although it is related to the “serious questions” aspect of the test). *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607 [hereinafter *Finlay*] at 632, indicated that the “concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability,” and that while “justiciability is always a matter of concern for the courts ... it is a matter of particular concern in the recognition of public interest standing.” The validity of a law or government act under the *Charter* is almost always a justiciable issue (*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441); however, in the context of *Charter* challenges, in addition to raising issues distinct from standing, justiciability is unlikely to create a bar to litigation: see *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319. See also K. Roach, *Constitutional Remedies In Canada* (Aurora, Ont.: Canada Law Book, 1994), para. 5.90. See also Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989) at 56-57 [hereinafter Ontario Law Reform Commission]; and Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* LRC 47 (Vancouver: Ministry of the Attorney General, 1980) at 61 [hereinafter Law Reform Commission of British Columbia], taking the position that justiciability should be considered independently of standing.

¹⁶ Commentators and case law have also referred to the exclusion of “busybodies” as a rationale for standing requirements. Just who is a busybody is not clear: Law Reform Commission of British Columbia, *ibid.* at 61; Ontario Law Reform Commission, *ibid.* at 59. This “rationale” has been referred to both in the context of access concerns (*Finlay, ibid.* at 631, referring to the need to screen out busybodies in the allocation of scarce judicial resources) and concerns relating to the requirements of the adversarial system (Ontario Law Reform Commission, *ibid.* at 60, referring to

The first collection of concerns relates to the efficiency or economy of ensuring that appropriate use is made of scarce judicial resources. One aspect of these concerns is the fear that a failure to control access may result in a “flood” of unnecessary and inappropriate litigation. No such flood has ever been pointed to by the courts, and the potential for a flood has been often doubted. Private costs of litigation form “an initial screening barrier of considerable height,” with the result that

[w]hen the “floodgates” of litigation are opened to some new class of controversy ... it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff ... must feel strongly enough about the issue in question to pay the bills. ... The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom.¹⁷

Nonetheless, there is in overall terms a greater demand on court resources than can be comfortably met,¹⁸ which is reflected in a continuing concern with their economical and efficient use.¹⁹ One could preserve scarce judicial resources by applying them only to actual disputes between personally affected parties, but countervailing considerations prevent such an absolutist approach.²⁰ Sometimes judicial economy is served by hearing cases that do not technically

busybodies in the context of concerns about adequate advocacy or representation of legal interests that may be incidentally affected by a decision; and *Hy and Zel's, supra* note 11 at 702, *per L'Heureux-Dubé J.*, describing one of the traditional justifications for standing rules as the prevention of suits by “busybodies” in order to “ensure that issues are fully canvassed by promoting the use of the judicial process to decide live disputes between parties as opposed to hypothetical ones”), but does not appear to have any content that distinguishes itself from one or the other of these categories.

¹⁷ K.E. Scott, “Standing in the Supreme Court—A Functional Analysis” (1973) 86 *Harv. L. Rev.* 645 at 673-74. See also Ontario Law Reform Commission, *ibid.* at 45-48; Law Reform Commission of British Columbia, *ibid.* at 59; *Thorson v. Canada (A.G.)*, [1975] 1 S.C.R. 138 [hereinafter *Thorson*], as discussed *infra* note 30 and accompanying text; and L'Heureux-Dubé J., dissenting in *Hy and Zel's, ibid.* at 712. B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* 3d ed. (Toronto: Butterworths, 1988) at 189, argues that a flood is hypothetically possible, and that although exaggerated fears should not constitute a reason for a blanket denial of standing, if excessive demands materialized, this would justify a denial of standing.

¹⁸ Scott, *ibid.* at 671-72 points out that supply and demand rules do not adequately control the demand because of the subsidized nature of service.

¹⁹ *Finlay, supra* note 15 at 631, as discussed *infra* notes 46-48 and accompanying text; T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 191; and *Canadian Council of Churches, supra* note 10, as discussed *infra* note 55 and accompanying text.

²⁰ As discussed in the jurisprudence dealt with below under Part III. See particularly, *Hy and Zel's, supra* note 11, *per L'Heureux-Dubé J.*, in dissent, at 702-06. See also P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1263.

present a live dispute.²¹ Further, the court's function of ensuring government compliance with the law, and particularly with the constitution, means that access to the court even solely for this purpose may be an appropriate use of scarce judicial resources.

The second category of concerns relates to the requirements of the adversarial process. Among these are the definition of the issue to be determined and the way in which it is presented to the court. A justiciable issue that is presented in an abstract way, without a concrete factual context, may not be as usefully dealt with by the courts as would be a live dispute.²² The definition and presentation of issues are legitimate concerns, but may be linked to an inappropriate degree to the question of private or public standing. Private declaratory actions may also present issues in an overly abstract way, or may fail to provide an adequate factual context. Conversely, actions commenced by public interest plaintiffs may present precise issues in a complete factual context.²³ Further, where concerns are raised as to the constitutionality of a law, "the primary focus is on the law itself, not the position of the parties,"²⁴ and a specific factual context may be irrelevant.²⁵ While standing may be pertinent, it cannot substitute for direct consideration

²¹ Roach, *supra* note 15, para 5.230, discussing *Canadian Council of Churches*, *supra* note 10. See the discussion *infra* note 64 and accompanying text. See also *Hy and Zel's*, *ibid.*, *per* L'Heureux-Dubé J. in dissent, at 711, 717-20. *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342 [hereinafter *Borowski #2*], made a similar point with regard to the consideration of moot issues.

²² *Borowski #1*, *supra* note 15, as discussed *infra* notes 41-42 and accompanying text; *Canadian Council of Churches* *ibid.*, as discussed *infra* in the text following note 64. Strayer, *supra* note 17 at 190, argues that concerns about general or abstract questions can usually be addressed through tests of justiciability. However, he also acknowledges the implicit value of standing rules in ensuring that a plaintiff will be able to point to a specific application of the law, enabling the court to see the effect of the law. For this reason he suggests that standing should be denied where the plaintiff's lack of a special interest would result in an excessively general or abstract issue. Restricting standing on this basis should produce a "more realistic jurisprudence devoted to the assessment of actual, not imagined, effects of impugned legislation."

²³ See, generally, the discussion of abstract questions in R.J. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 327 at 335-40. Cromwell, *supra* note 19 at 173, and Ontario Law Reform Commission, *supra* note 15 at 57-58, relying on the imperfection of the relationship between standing and the definition of an issue or the concreteness of a factual picture, argue that this concern should be addressed directly by the court and that this does not justify limiting standing to directly affected persons. See also the discussion of this issue, *infra* notes 66-67 and accompanying text.

²⁴ *Hy and Zel's*, *supra* note 11 at 710, *per* L'Heureux-Dubé J., dissenting.

²⁵ *R. v. DeSousa*, [1992] 2 S.C.R. 944 at 955, approving a pre-trial ruling on a *Charter* application of "[a]n apparently meritorious *Charter* challenge of the law under which the accused is charged which is not dependent on facts to be elicited during the trial." See the discussion *infra* notes 67-69 and accompanying text.

of the definition of an issue or the adequacy of a factual context. If standing is to be denied for these reasons, this should be done only after a purposive analysis, where the court is satisfied that the party's standing is associated with such problems in the circumstances of the case.

Another issue relating to the requirements of the adversarial system that may be associated with standing is the need for an appropriate advocate. Plaintiffs with traditional private interests at stake have been assumed to be appropriate representatives of the interest they possess. They are presumed to be motivated to provide full and competent advocacy. The verity of these assumptions, and even more so, the lack of application of these assumptions to public interest plaintiffs, are very questionable.²⁶ Public interest plaintiffs sufficiently "interested" to incur the cost and inconvenience of litigation are obviously motivated adversaries. A privately interested party has not been selected as a representative and will not necessarily portray the perspective of others with similar interests. In any event, if particular perspectives are not adequately represented in a suit, this deficiency can be overcome by the use of intervenors.²⁷

These rationales for standing have been considered in the jurisprudence discussed below. Developing judicial recognition of these purposes has recently been followed by their lack of application or misapplication. It will be argued that the Supreme Court's recent standing decisions are no longer achieving, or perhaps even pursuing, these purposes.

III. PUBLIC INTEREST STANDING

I will commence with an examination of the jurisprudence of the Supreme Court of Canada that established the requirements for a

²⁶ Ontario Law Reform Commission, *supra* note 15 at 58; Law Reform Commission of British Columbia, *supra* note 15 at 61; Cromwell, *supra* note 19 at 173; W.A. Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay" (1988) 10 S.C.L.R. 377 at 395; and Roach, *supra* note 15, para 5.220, all take the position that the absence of a traditional legal interest does not mean that a plaintiff will present a case with less competence or zeal.

²⁷ See Ontario Law Reform Commission, *ibid.* at 60; and Bogart, *ibid.* at 392 and 395-96. In *Borowski #1*, *supra* note 15 at 358-59, in discussing the requirement for a motivated adversary in the context of a moot case, the Supreme Court of Canada suggested that private parties who had lost their legal interest in an issue might still be motivated by practical consequences. Further, if a private party was no longer motivated to pursue the suit, an intervenor might provide suitable advocacy.

discretionary grant of public interest standing.²⁸ In two more recent decisions,²⁹ the court took a more restrictive approach to public interest standing. I will first consider these decisions in terms of their contributions to the law relating to public interest standing. Subsequently, I will consider their effect on the requirements of private standing.

A. *The Origin and Expansion of Public Interest Standing*

The first grant of public interest standing occurred in *Thorson*.³⁰ Thorson, as a taxpayer suing in a class action, challenged the constitutionality of official bilingualism legislation and the expenditure of funds to implement it. The statute was declaratory only; it did not subject the public or any sector of the public to regulation. The Attorney General had declined to commence or agree to proceedings to challenge the validity of the statute. The court exercised its discretion to grant Thorson public interest standing because he raised a justiciable issue that would not otherwise be subject to judicial review. Ensuring government compliance with the constitution was seen as more important than procedural concerns relating to a lack of private standing.

In reaching this conclusion Laskin J. (as he then was), for the majority, expressed doubt that any inordinate number of lawsuits would follow an expansion of standing rules. In any event he was satisfied that the courts possessed adequate tools to control declaratory actions through their discretion in granting or refusing declarations, or by staying proceedings or imposing costs.

In *McNeil*,³¹ a newspaper editor concerned about the wide powers of the Nova Scotia Board of Censors, and particularly about its decision to prohibit the exhibition of the film *Last Tango in Paris*, brought a constitutional challenge to the censorship legislation. This was a regulatory statute, but the regulated theatre owners most directly affected by the statute had not seen fit to challenge it.³² Further,

²⁸ *Thorson*, *supra* note 17; *Nova Scotia Board of Censors v. McNeil* (1975), [1976] 2 S.C.R. 265 [hereinafter *McNeil*]; *Borowski #2*, *supra* note 21; and *Finlay*, *supra* note 15.

²⁹ *Canadian Council of Churches*, *supra* note 10; and *Hy and Zel's*, *supra* note 11.

³⁰ *Supra* note 17.

³¹ *Supra* note 28.

³² Whether theatre owners would be entitled to bring declaratory applications or would have to await actual or threatened prosecution was not addressed by the court.

members of the public were also directly affected because of limits upon the films they might view. Public interest standing was granted, in part, so that this interest or “real stake” in the issue could be brought before the court. McNeil’s interest was a factor when the court considered whether there were other reasonable and effective means to challenge the law. The court discounted potential litigation by theatre owners as a reasonable way to bring the challenge, partly because they might hesitate to challenge the administrative scheme under which they did business, and partly because they would not represent the public interest represented by McNeil.

The third case was *Borowski #1*,³³ a challenge under the *Canadian Bill of Rights*³⁴ to the abortion provisions of the *Criminal Code*³⁵ of Canada. Martland J. for the majority held that Borowski, a well-known “right to life” advocate with a history of involvement in the issue, had standing to enforce the alleged rights of foetuses under the *Bill of Rights*. The provisions of the *Code* challenged in the action were exculpatory and thus unlikely to be raised in criminal proceedings. Prospective fathers, although directly affected, could not reasonably be expected to challenge the legislation in court because of time constraints.³⁶ Summarizing the requirements of public interest standing which he found to have been met, Martland J. held that Borowski had met the three requirements to establish public interest standing. He had demonstrated:

1. “a serious issue;”³⁷

³³ *Supra* note 15.

³⁴ S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

³⁵ R.S.C. 1985, c. C-46.

³⁶ The subsequent case of *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, in which a prospective father asserted the alleged right of a foetus, demonstrates that while time constraints may not prevent such litigation, they have a definite adverse effect. The matter proceeded with extreme haste, with the Supreme Court of Canada calling an emergency summer session to deal with it. A week before the Supreme Court hearing which resulted in the vacating of the injunction prohibiting Ms. Daigle from having an abortion, Ms. Daigle risked contempt sanctions and obtained an abortion. She was eighteen weeks pregnant when the proceedings commenced and was close to twenty-two weeks pregnant when she obtained the abortion. See M. Shaffer, “Foetal Rights and Regulation of Abortion” (1994) 39 McGill L.J. 58.

³⁷ This part of the public interest standing test applies, to the public interest plaintiff, essentially the same requirement that may be applied in the case of a plaintiff with private standing in an application to strike out a claim on the basis that it presents no reasonable cause of action: *Canadian Council of Churches*, *supra* note 10 at 253-54. While the serious issue test is expressed as a part of the test of public interest standing, it, like justiciability, is addressed to what issues may be litigated rather than who may litigate them. Decisions based on this part of the standing test are generally not addressed to the concerns that are the focus of this article.

2. “that he is affected by it directly or that he has a genuine interest as a citizen” in the issue;³⁸ and
3. “that there is no other reasonable and effective manner in which the issue may be brought before the Court.”³⁹

³⁸ Clearly Borowski was not directly affected in any way, and passed this test by virtue of having a genuine interest as a citizen in the legal issues raised. Cromwell, *supra* note 19 at 87, commenting on *Borowski #1*, suggests that this requirement is so broad that it may have no real restraining effect on the grant of standing. However, it may be that a plaintiff may strengthen a case for standing by providing evidence of commitment to the issue.

The case law does seem to present very few examples where lack of genuine interest has been relied on to support a denial of standing, and a somewhat greater number where evidence of commitment to an issue has been commented upon favourably in a decision to grant standing. In *Inshore Fishermen's Bonafide Defense Fund Ass'n. Canada (A.G.)* (1994), 130 N.S.R. (2d) 121 (S.C.) at 127, *aff'd* on other grounds (1994), 132 N.S.R. 370 (C.A.), the court denied public interest standing to a “new organization just getting off its feet, [which] represents only a small minority of the total number of inshore fishermen.” This was, however, only one of a number of grounds for denying public interest standing. The court’s most significant concern was that the action included a claim for damages and would be procedurally very complex as a result. In *Nova Scotia Music and Amusement Operators Ass'n. Nova Scotia (A.G.)* (1992), 113 N.S.R. (2d) 54 (S.C.) [hereinafter *Nova Scotia Music*], an association of twelve amusement machine distributors was denied public interest standing to challenge gambling machine regulations. The court held that the association, as opposed to its members, was not directly affected by the regulations, and that its interest was not “genuine” because it was public and humanitarian, but just a reflection of the financial interests of its members. Predictably, a second action was brought by members of the association directly: *HI-FI Novelty Co. v. Nova Scotia (A.G.)* (1992), 121 N.S.R. (2d) 63 (S.C.), *aff'd* (1993), 126 N.S.R. (2d) 70 (C.A.) [hereinafter *HI-FI Novelty*]. On this occasion, the court found that the members were either directly affected by or genuinely interested in the issues, because of the economic losses they stood to suffer.

The plaintiff’s previous involvement in the issues before the court was commented on favourably in *Canadian Council of Churches supra* note 10 at 254, and in *Canadian Civil Liberties Ass'n v. Canada (A.G.)* (1990), 74 O.R. (2d) 609 (H.C.J.) at 617 [hereinafter *Canadian Civil Liberties*]. In *Grant v. Canada (A.G.)*, [1995] 1 F.C. 158 at 195-96 (T.D.), the court granted public interest standing to former R.C.M.P. officers and their relatives to challenge an R.C.M.P. policy permitting the wearing of the Sikh turban with the R.C.M.P. uniform. The court commented that the plaintiffs’ interest was “at least equal” to that demonstrated in the Supreme Court of Canada public interest standing cases and added that “the plaintiffs have also, to the extent that it is a relevant consideration, involved themselves in the subject matter of the litigation.”

³⁹ *Borowski #1*, *supra* note 15 at 597. Martland J.’s summary did not set these out as three issues, but subsequent commentary and case law have done so. See, for example, Cromwell, *supra* note 19 at 86; and *Hy and Zel's supra* note 11 at 690-92. Some commentators have divided the issues differently, suggesting that persons who are directly affected need not show that there is no other reasonable and effective manner to bring the issue to court. See H. Kushner, Case Comment on *Minister of Justice et al. Borowski* (1983) 17 U.B.C. L. Rev. 143 at 152; and D.J. Mullan & A.J. Roman, “*Minister of Justice of Canada v. Borowski*: The Extent of the Citizen’s Right to Litigate the Lawfulness of Government Action” (1984) Windsor Y.B. Access Just. 303 at 351, dividing the issues as follows: (a) serious issue of potential invalidity of legislation; (b) direct effect; or (c)(i) genuine interest as citizens in the validity of the legislation, and (ii) no other reasonable and effective manner in which the issue may be brought before the court. This division of the issues, however, ignores the difference between direct effect relevant to the grant of discretionary public interest standing and exceptional prejudice sufficient to obtain private standing as of right. See the

Laskin C.J.C., dissenting in this case, wrote a judgment that forecast the approach of the Supreme Court in *Canadian Council of Churches*. He emphasized that public interest standing was exceptional, and that generally persons could not attack legislation in the courts unless they were “directly affected” or “threatened with sanctions for an alleged violation.”⁴⁰ A plaintiff must show some “special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society.”⁴¹ He cited as the rationale for this policy a desire to confine the courts, generally speaking, to a dispute-resolving role and to prevent dealing with questions that are not sufficiently precise for judicial determination. Laskin C.J.C.’s major concern appeared to be with controlling the way in which issues are presented to the court, rather than limiting access. This would accord with his position in *Thorson*.

Laskin C.J.C. would have denied standing because the exculpatory provisions could be challenged by persons directly affected. This class of potential plaintiffs included doctors and hospitals not performing abortions or performing them under public pressure, who wished to challenge the exculpatory aspects of the legislation. Laskin C.J.C. characterized their interest in the legislation as “more compelling and immediate” and more worthy of judicial attention than Borowski’s “emotional response.”⁴² But he did not demonstrate that any such litigation would be commenced, nor that it would result in the issue before the court being any better defined or better presented.

The majority judgment also considered the possibility of litigation by doctors or hospitals who did not perform abortions and held that an attack by them would be *no different* than one by any other concerned citizen. To replace Borowski with such a plaintiff would not change the definition and factual context of the issues before the court.⁴³

discussion, *infra* notes 96-97 and accompanying text regarding *McNeil*, *supra* note 28. It is also inconsistent with the approach subsequently taken in *Finlay*, *supra* note 15; and in *Hy and Zel’s*, *supra* note 11.

⁴⁰ *Borowski #1*, *supra* note 15.

⁴¹ *Ibid.* at 578.

⁴² *Ibid.* at 585.

⁴³ A concern with the definition and factual context of the legal issues followed Borowski’s litigation and eventually resulted in the decision of the Supreme Court of Canada that his case became moot. By the time the case had been dealt with on the merits before the lower courts and had returned to the Supreme Court of Canada, the *Criminal Code* provisions that Borowski challenged had been struck down in *R. v. Morgentaler* [1988] 1 S.C.R. 30 [hereinafter *Morgentaler #1*]. In *Borowski #2*, *supra* note 21, the Supreme Court of Canada held that the case had become moot.

The purposes underlying the mootness doctrine are similar to those underlying the standing

Therefore this would not be a *more* reasonable and effective form of litigation than that already before the court. When one adds the uncertainty as to whether such litigation would even be commenced, the majority decision in favour of Borowski's standing seems well-founded.

The discretionary approach to public interest standing was applied in an administrative law context in *Finlay*.⁴⁴ In *Finlay*, a recipient of provincial social assistance challenged the legality of federal payments to Manitoba under the *Canada Assistance Plan*,⁴⁵ argued that Manitoba had not complied with conditions of federal cost-sharing payments as provided by the Plan. The applicant sought standing on either a private or public interest basis. Le Dain J., writing for the court, first concluded that *Finlay* lacked private standing. Public interest standing was considered as an alternative.

The court referred to policy considerations underlying standing and identified aspects of the public interest standing test which met the underlying concerns. Concerns relating to "the allocation of scarce judicial resources and the need to screen out the mere busybody"⁴⁶ were answered when a serious issue and the plaintiff's genuine interest in the issue were demonstrated. In other words, where there is a case to be made that government action is unconstitutional or illegal, and where it is brought by a plaintiff who is either privately interested or motivated by a public concern about the legal issue, this is an appropriate use of scarce judicial resources. 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"⁴⁷ was resolved when it appeared that there was no other reasonable and effective manner in which the issue might be litigated. This concern relates to the requirements of the

doctrine. The court is concerned with the efficient use of judicial resources, with the requirements of the adversarial process, and with the justiciability and appropriateness for legal decision of the issues before it. In *Borowski #2* the court engaged in a purposive interpretation and application of the mootness doctrine. Moot cases should be heard by the court provided the objectives of mootness doctrine are met.

The most important factor in the court's finding that the issue in *Borowski #2* had become moot was the lack of definition of the issue. Formerly, the question of the constitutionality of the *Criminal Code* provisions had offered a concrete issue, but with the disappearance of those provisions, Borowski's argument became a general and unfocused one. The loss of the statutory contest meant that the issue was no longer adequately specific to be suitable for judicial determination. But *Borowski #2* did not detract from the decision implicit in *Borowski #1*, *ibid.*, that the constitutionality of a statutory provision may have adequate specificity for judicial resolution, without any added factual context.

⁴⁴ *Supra* note 15.

⁴⁵ R.S.C. 1970, c. C-1.

⁴⁶ *Finlay*, *supra* note 15 at 631.

⁴⁷ *Ibid.*

adversarial process. The court assumed that there were advantages to having directly affected parties as adversaries, although these advantages are questionable.⁴⁸ But these advantages were dispensable, in favour of ensuring judicial review of the legality of government actions.

Finlay met each of the requirements of public interest standing. He had a genuine interest in the issue as shown by his status as a person in need who complained of having been prejudiced. This personal interest, although insufficiently causally connected to the challenged federal payments to give Finlay private standing, was nonetheless relevant to demonstrate that he was “not a mere busybody.”⁴⁹ There was also no other more effective way to bring the issue to court. The consideration of this issue also returned to Finlay’s interest. There was no one with a more direct interest than his and therefore no one who could have better presented the issue.

B. *The Contraction of Public Interest Standing*

1. *Canadian Council of Churches*

The contraction of the public interest standing test began with *Canadian Council of Churches*⁵⁰ The Council, a public interest organization, commenced an action challenging 81 provisions of the amended *Immigration Act*⁵¹ as violating the *Charter*, and claimed public interest standing to bring the suit. That the previously established principles should govern public interest standing for declaratory actions under the *Charter* was accepted without question. In the Supreme Court of Canada, Cory J., writing for a unanimous court, noted that the increasing recognition of the importance of public rights and the provisions of the *Constitution Act, 1982* confirmed the need for public interest standing.

However, the court also expressed a preference for the traditional mode of proceeding dealing with individuals. Cory J. indicated that the “[o]ne great advantage of operating in the traditional mode” is that “the courts can reach their decisions based on facts that

⁴⁸ See the discussion *supra* note 27 and accompanying text, as to the “representativeness” of privately interested parties.

⁴⁹ *Supra* note 15 at 633.

⁵⁰ *Supra* note 10.

⁵¹ R.S.C. 1985, c. I-2.

have been clearly established.”⁵² One purpose of standing requirements, that of providing a concrete factual context for the issues before the court, was thus identified and aligned with traditional private standing. However, the court did not go on to examine the application of standing requirements in the case in view of that purpose. Rather, the court asserted a general rule that traditional private litigation should have preferential status as compared with that commenced by public interest plaintiffs.

The control of access to scarce judicial resources was also heavily emphasized. The need to devote judicial resources to traditional litigation was relied on as a justification for limiting grants of public interest standing. The court’s role as an adjudicator of private disputes was described as “an important role in our society.”⁵³ To fulfil this, the court must “ensure that judicial resources are not overextended.”⁵⁴ “It would be disastrous if the courts were allowed to become helplessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations.”⁵⁵

The lack of availability of traditional litigation was established as the signal test for the granting of public interest standing. The purpose of public interest standing was “to prevent the immunization of legislation or public acts from any challenge.”⁵⁶ Granting standing was therefore not necessary and should not be granted when, “on a balance of probabilities, it [could] be shown that the measure [would] be subject to attack by a private litigant.”⁵⁷ The granting of public interest status was, instead, limited to situations where “no directly affected individual might be expected to initiate litigation.”⁵⁸

The change in attitude is striking. The strong focus on protection of judicial resources against an unworthy flood of public interest litigation reflects a fear that was dismissed in *Thorson* as

⁵² *Supra* note 10 at 249.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 252.

⁵⁶ *Ibid.* While this reflects a basic rationale of *Thorson*, *supra* note 17, it does not account for the more expansive approaches of *McNeil*, *supra* note 28, and *Borowski #1*, *supra* note 15, where the court accepted reasonable and effective presentation of serious issues in the absence of demonstrably better forms of litigation, but did not demand that the public interest plaintiff demonstrate that there would otherwise be immunity from review.

⁵⁷ *Canadian Council of Churches*, *ibid.*

⁵⁸ *Ibid.* at 251.

unrealistic. The restriction of public standing in order to preserve judicial resources for private plaintiffs amounts to an abandonment of the perspective of *Finlay*, i.e., that the consideration of serious constitutional or other public law issues presented by motivated litigants is a proper use of court resources.

In attempting to understand the change in attitude in *Canadian Council of Churches*, one is left to speculate whether the presence of an organized public interest plaintiff, specifically noted by the court, could be responsible for the rebirth of the fear of an onslaught of public interest litigation. In assessing the requirements for public interest standing, the court did find that the Canadian Council of Churches had a genuine interest in the issues raised in the lawsuit. It had “the highest possible reputation and ha[d] demonstrated a real and continuing interest in the problems of the refugees and immigrants.”⁵⁹ So there was no theoretical obstacle to the grant of public interest standing to a public interest organization. The negative implications are more subtle. The court implied that through its expansion of the role of the public interest intervenor, it had adequately accommodated the interests of public interest groups, and that it should not be expected to permit further intrusions by such groups.⁶⁰ Although the role of intervenor is an important one for public interest groups, it is an inherently limited one. Intervenors can only address the issues raised by the parties to a private lawsuit and may not introduce new issues.⁶¹

The court denied public interest standing to the Council because there were other reasonable and effective means to bring the issues to court. The *Immigration Act* was regulatory; it directly affected refugee claimants, who had private standing to challenge the constitutionality of the amendments, and who “were bringing forward claims akin to those brought by the Council on a daily basis.”⁶² The case is distinguishable from previous public interest standing cases because of this feature of the existence of other litigation. If it were, however, limited to these circumstances it would not constitute a significant drawback in public interest standing doctrine.⁶³ But the court’s language suggests that the

⁵⁹ *Ibid.* at 254.

⁶⁰ *Ibid.* at 256. Public interest groups could contribute to the court process and convey their own perspectives by obtaining intervenor status in private proceedings.

⁶¹ *R. v. Morgentaler* [1993] 1 S.C.R. 462 [hereinafter *Morgentaler #1*].

⁶² *Supra* note 10 at 254.

⁶³ To similar effect, see *Canadian Abortion Rights Action League Inc. (A.R.A.L.) v. Nova Scotia (A.G.)* (1990), 96 N.S.R. (2d) 284 at 293-95 (C.A.), leave to appeal to S.C.C. denied (1990), 127 N.R. 158. See also *R. v. Morgentaler* [1993] 3 S.C.R. 463 at 470, wherein the court noted the

mere existence of directly affected persons, even if they had not commenced litigation, would be sufficient to bar public interest standing.

2. A Purposive Inquiry

Was the decision in *Canadian Council of Churches* justified by the underlying purposes of standing? The court did not suggest that any flood of inappropriate public rights litigation was actually occurring and did not explain why it resurrected this fear, or why any flood could not be controlled by less extreme methods than a barring of access to public interest plaintiffs. Apart from the control of a hypothetical flood, concerns about the economical use of judicial resources more likely favour the use of a single reference-type procedure as commenced by the Council, rather than a multitude of individual lawsuits.⁶⁴

The court referred to its concern to ensure that legal issues are determined in an adequate factual context. The result in *Canadian Council of Churches* was consistent with the achievement of this objective, but this was due to the significant difference in the public and private litigation involved. The choice available to the court in the case was between one action challenging in general terms 81 statutory provisions, and many individual applications of specific provisions. The distinction between these two forms of litigation was not just between parties bringing the actions, but between vastly different ways of presenting the questions: a generalized, reference-type procedure as against specific contextualized disputes. The latter form of litigation can clarify and bring into perspective the questions before the court.

The provision of an adequate factual context is a legitimate concern, but it is not limited to actions commenced by public interest plaintiffs. It is a concern that may equally apply in litigation involving private rights. Declaratory actions can be brought by individuals with private standing, as well as public interest plaintiffs, and, especially in a *Charter* context, may not present a pertinent “concrete factual background.” Whether they do depends on the nature of the *Charter* right or freedom relied on, the nature of the challenged law or other government action, and/or on how the case is presented.

dismissal of C.A.R.A.L.’s claim for lack of standing “primarily because the same issues would be determined in the present case.”

⁶⁴ Roach, *supra* note 15, para. 5.230.

The existence of a plaintiff with private standing did not guarantee a concrete factual background in *Danson v. Ontario (A.G.)*.⁶⁵ A lawyer sought a declaration that a court rule relating to the imposition of costs against solicitors violated the *Charter*. The application was brought without any factual context. The ensuing problems, which resulted in dismissal of the application, were not related by the court to the status of the applicant, but to the manner in which he chose to present the issue. On the other hand, a plaintiff with public interest standing may present a very specific and contextualized issue, as in *Cardozo v. Canada*,⁶⁶ in which public interest plaintiffs were permitted to challenge a customs decision permitting the importation of racist pins.

Further, a concrete factual background is not always necessary. In *Edmonton Journal v. Alberta (A.G.)*,⁶⁷ a newspaper publisher challenged the constitutionality of legislative provisions prohibiting the media from publishing material in court documents. The publisher brought a declaration application. There was no actual or threatened prosecution, nor evidence of specific instances in which publication of particular material was prohibited. The Supreme Court of Canada considered the problems clear and significant on the face of the statute, and the declaration issued.

Where there is a clear violation on the face of the statute, as the court found in *Edmonton Journal*, it may be that no evidence of effect, whether by way of specific applications or otherwise, is required.⁶⁸ Where evidence of effect is required, as it was in *MacKay v. Manitoba*,⁶⁹ the most appropriate form of evidence may not be specific applications, but statistical or other generally descriptive evidence. In that case, general evidence about the effect of election legislation funding formulas on new or fringe parties was required. The standing of the plaintiff was not dealt with in *MacKay*. But even if the plaintiff were an affected political party, this would give it an advantage only in presenting evidence of one application of the statute. The presentation of evidence about the general effect of a law obviously does not depend on the status of the plaintiff. In a practical sense, it may be more likely that an organized public plaintiff with expertise about the issue would have

⁶⁵ [1990] 2 S.C.R. 1086 [hereinafter *Danson*]. The treatment of *Danson's* standing by the court is discussed *infra* note 135.

⁶⁶ (1993), 62 F.T.R. 55 [hereinafter *Cardozo*].

⁶⁷ [1989] 2 S.C.R. 1326 [hereinafter *Edmonton Journal*].

⁶⁸ See also *Danson*, *supra* note 65 at 1100-01.

⁶⁹ [1989] 2 S.C.R. 357 [hereinafter *MacKay*].

better access to such evidence. This supports the position that a lack of evidence should be addressed directly, rather than through the use of standing rules.⁷⁰

The preference in *Canadian Council of Churches* for private litigation should not be applied where there is a choice between a public interest plaintiff and a private plaintiff bringing an action that does not present a pertinent concrete factual background. In such circumstances there is no advantage to “private” litigation. It is not a more effective way to bring the issue to court.⁷¹ If the public interest plaintiff has some form of expertise that the private plaintiff does not, the litigation might even be less effective.

This distinction was drawn in a decision of the Alberta Queen’s Bench: *Board of Trustees of St. Paul Public School Dist. v. Alberta (Minister of Education)*⁷² Public interest standing was claimed by a number of public school districts which claimed that the educational funding system discriminated against taxpayers and students in rural,

⁷⁰ As was done in *MacKay, ibid.*, and *Danson, supra* note 65; and as was advocated by Ontario Law Reform Commission, *supra* note 15 at 57-58, and Cromwell, *supra* note 19 at 173.

⁷¹ This approach is consistent with that adopted in *Borowski #1, supra* note 15, as discussed *supra* note 43 and accompanying text. It is arguably also supported by *Conseil du Patronat du Québec Inc. v. Québec (A.G.)*, [1991] 3 S.C.R. 685, rev’g (1988), 55 D.L.R. (4th) 523 (Que. C.A.) [hereinafter *Conseil du Patronat*]. In this decision, delivered less than two months before the *Canadian Council of Churches, supra* note 10, the Supreme Court of Canada expressed agreement with the dissenting decision of Chouinard J.A., who had granted public interest standing to an association of Quebec employers formed to represent their interest by challenging anti-strike-breaking legislation under the *Charter*. The majority of the Quebec Court of Appeal had held that the association, because it did not itself have unionized employees, should be denied public interest standing as actions could be brought by employers of unionized employees who were directly interested in the law, either in declaratory proceedings or in regulatory proceedings arising from a strike. Chouinard J.A., in the judgment adopted by the Supreme Court of Canada, held that the association should be treated as having the same interests as its members, and that, in any event, a direct interest was not a requirement of public interest standing. Further, the possibility of actions by such employers did not operate to deny standing to the association. Although the decision is inconsistent with the doctrine as described in *Canadian Council of Churches* the case can be distinguished. Firstly, no regulatory actions had been commenced. Secondly, given the time constraints and pressures involved where a strike is ongoing, regulatory proceedings might not be a very satisfactory means of access to the court for consideration of the constitutional issue. (The problems would be somewhat analogous to those considered in *Borowski #1* regarding an action by a potential father: see *supra* note 36 and accompanying text.) The available means of access to the court would thus be declaratory applications brought by either the association or affected employers, and there was nothing to suggest that the latter would be any more reasonable or effective than the former. For a discussion and contrasting of the approaches in the *Conseil du Patronat* and *Canadian Council of Churches* decisions, see also D.F. Bur & J.K. Kehoe, “Developments in Constitutional Law: The 1991-92 Term” (1993) 4 Supreme Court L.R. (2d) 49 at 62-71.

⁷² (3 February 1993), Calgary 9201-03921 (Alta. Q.B.).

“poorer” school districts. The court found that the test for public interest standing was not met because no reasonable cause of action was alleged. Nonetheless, the court went on to deal with the remaining parts of the public interest standing test. With regard to the third part of the test, it was argued that taxpayers and students would have direct interests and could sue. These individuals presumably would bring declaratory actions. Students were not directly regulated by the funding provisions so they could not do otherwise. Taxpayers could resist assessment, but even this would not increase the “concrete factual background” because there would be nothing individual about the application of the law or their complaint. The complaint made in the action was general in nature, relating to the overall impact of the system of funding. Justice McMahon held that the *Canadian Council of Churches* test required not simply that other affected persons could sue, but that such suits should be “a reasonable and *effectivemanner* to bring the issue forward.”⁷³ In this case, he held, suits by students and taxpayers “raising this constitutional challenge to a funding scheme to which they are mere intended beneficiaries and not parties; about which they would know little; and which they neither administer nor operate within”⁷⁴ would not be an effective form of litigation.⁷⁵

⁷³ *Ibid.* at 25 [emphasis in original].

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* No such consideration of the comparative effectiveness of various forms of action was undertaken in *Nova Scotia Music*, *supra* note 38, or in its successor litigation, *HI-FI Novelty*, *supra* note 38. The first action was brought by an association of twelve amusement machine distributors challenging the constitutionality of provincial gambling regulations applicable to licensed premises. The Nova Scotia Supreme Court denied the association public interest standing on the basis that the association was not directly affected by the regulations, although its members might be, and added that its interest was not “genuine” because it was not public and humanitarian, but instead a reflection of the financial interests of its members. Predictably, the second action was brought by members of the association directly. Again public interest standing was denied. One ground was that the requirement of a serious issue was not met. However, the court also held that it would be more reasonable and effective to have the action brought by the proprietors of licensed premises who were directly regulated by the legislation. The chambers judgment did not indicate whether a declaratory action or regulatory proceeding was contemplated, although the Court of Appeal, in upholding the judgment, contemplated a regulatory proceeding. Even if a regulatory proceeding were involved, it is unlikely that this would provide a factual picture in any way pertinent to the issue of provincial jurisdiction to regulate gambling. The interests of the adversarial system would not be better served in a regulatory proceeding. It is also submitted that the interests of judicial economy were not well served by the successive decision addressed to standing. Dealing with the seriousness of the issue or with the merits resolves the matter conclusively and is, therefore, a more efficient use of court resources.

3. *Hy and Zel's*

A restrictive approach to public interest standing was continued in *Hy and Zel's*⁷⁶ Two corporations, against whom penal proceedings under Sunday closing legislation had been commenced, sought public interest standing in civil applications for declarations that the law violated sections 2(a) and 15 of the *Charter*. These corporations clearly possessed private standing in the traditional sense.⁷⁷ They sought public interest standing because of the development in *Irwin Toy*⁷⁸ of a rule that denied private litigants in civil proceedings the right to rely on the *Charter* rights of others. The result is ironic: while the court indicated in *Canadian Council of Churches* that private actions are the preferred route for *Charter* challenges, the *Irwin Toy* rule imposed significant restrictions on the nature of *Charter* arguments that can be made by private applicants. These restrictions do not apply to the public interest applicant. This gives the distinction between private and public interest standing additional importance, and compels persons with private standing to seek public interest standing.⁷⁹

⁷⁶ *Supra* note 11.

⁷⁷ *Smith, supra* note 14, discussed below in Part IV(A).

⁷⁸ *Supra* note 5, discussed *infra* notes 101-03 and accompanying text.

⁷⁹ The majority in *Hy and Zel's, supra* note 11 at 690, commented that the parties did not present evidence pertaining to private standing and indicated that the public interest standing test must be met "where, as in the present case, the party does not claim a breach of its own rights under the *Charter* but those of others."

In lower court decisions prior to *Hy and Zel's*, corporate parties with private standing had successfully sought public interest standing in order to be permitted to rely on the *Charter* rights of others. In *Canadian Bar Ass'n v. British Columbia (A.G.)* (1993), 101 D.L.R. (4th) 410 (B.C.S.C.), the private standing of the Bar Association and the Law Society as plaintiffs had been admitted on the basis that they would become liable to pay a challenged tax to their own counsel in the subject proceeding. It was also conceded that they could raise division of powers arguments, but not an argument under section 7 of the *Charter* because of their corporate status. The petitioners rejected the conceded basis for standing and claimed that they satisfied the requirements for public interest standing. The court held that they did satisfy those requirements and that, because they had public interest standing, they were not limited to their own constitutional rights.

In *Antrim Yards Ltd. v. Canada*, [1991] 3 F.C. 459 at 477 (T.D.) [hereinafter *Antrim Yard*], a corporation, which suffered financial loss arising from a law which it sought to challenge under section 15 of the *Charter*, was granted public interest standing. Strayer J. indicated that the only other means of bringing the issue to court would be through enforcement of taxes due or prosecution for failure to pay, and that he did "not understand the jurisprudence on standing to seek declarations of invalidity to require plaintiffs to wait until they [were] sued or prosecuted to impugn the statute under which such charges might be laid."

Morgentaler v. Prince Edward Island (Minister of Health and Social Services) (1994), 117 Nfld. & P.E.I.R. 181 (P.E.I. T.D.), was decided after *Hy and Zel's* but does not refer to it. Dr. Morgentaler,

In the lower court decisions in *Hy and Zel's*⁸⁰ the declaration applications were dismissed on the merits.⁸¹ In the Supreme Court of Canada a majority of the court, in a judgment written by Major J., held that neither the corporations nor their employees (who had joined the applications as applicants) had standing to bring the declaration applications.⁸² The court was prepared to assume that a serious issue was raised, and held that the liability to prosecution of both retailers and their employees meant that they were directly affected by the legislation. But public interest standing was denied because there were other reasonable means of bringing the constitutional issues before the court. What were the other means? In *Canadian Council of Churches* the court complained of the plaintiff's lack of a private interest. A private interest was plainly in existence in *Hy and Zel's*. But the court still found that there were other preferable ways to litigate.

In previous public interest standing cases, the other means of access to the courts involved other persons. In *Hy and Zel's* the other means of access included criminal enforcement proceedings against the same parties. The interest that caused the parties to be directly affected did not support their claim for standing, as had occurred in *McNeil and Finlay*, rather it created an alternative means of access to the courts and so operated to deny them public interest standing.⁸³ Criminal

to bring a challenge to P.E.I. policy regarding payment for abortions. The challenge was, however, based on administrative law grounds, not on the *Charter*.

⁸⁰ The lower court decisions were unreported, but are described in the Supreme Court of Canada decision. The previous proceedings in *Hy and Zel's* companion case, *Paul Magder Furs* *supra* note 11, are complicated by issues relating to contempt of court arising from violations of interim orders, and are also reviewed by L'Heureux-Dubé J. at 695-96, and Major J. at 684-87.

⁸¹ The courts held that the constitutional issues had been determined in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1991), 2 O.R. (3d) 65 (C.A.) [hereinafter *Peel*]. *Peel* was appealed to the Supreme Court of Canada, but had not been heard prior to the hearing in *Hy and Zel's*, *supra* note 11, and was discontinued prior to the judgment in *Hy and Zel's*: leave to appeal granted *sub nom. Oshawa Group Ltd. v. Ontario (A.G.)*, [1991] 3 S.C.R. x; notice of discontinuance of appeal filed 31 August 1993, S.C.C. Bulletin at 1493.

⁸² Lamer C.J., La Forest, Sopinka, Gonthier, Cory, and Iacobucci JJ. concurring. L'Heureux-Dubé J. wrote the dissenting judgment, with McLachlin J. concurring.

⁸³ This aspect of the decision is not really concerned with the entitlement to bring a proceeding, but with the form of action. The use of a civil declaratory action as an alternative to criminal proceedings was considered in *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 [hereinafter *Kourtessis*]. To some extent the court demonstrated the virtue of consistency in that one test applied to determine the availability of a civil action was stated to be whether other reasonable means of access to the court existed. Generally, a declaratory action should not be used as a substitute for a trial ruling in a criminal case. But in *Hy and Zel's*, *supra* note 11, no procedural issues, such as appeal rights or the fragmentation of trials, arose as a result of the declaratory action. The nature of the constitutional challenge presented in the criminal and civil proceedings was identical. The declaratory action possessed an advantage in that it also invoked the interests of employees who,

proceedings would not present the constitutional issues in any different way. They would not add any pertinent factual background or have other procedural advantages. Why they should be characterized as a more reasonable and effective means to litigate the issue is not apparent and was not explained by the court.

Another means of bringing the *Charter* issue to court, referred to by the majority, was a constitutional challenge by parties claiming that their own religious rights were violated. Thus the court's preference was not just for parties who were directly affected, but parties who were directly affected by the constitutional rights raised in the case. Any direct effect, certainly the potential imposition of fines or other penalties, should be sufficient to provide a motivated adversary. But parties whose constitutional rights are directly affected offer further advantages. A constitutional challenge by such parties provides some assurance that the *Charter* interests are represented in the hearing.⁸⁴ Further, such a challenge may provide a concrete factual background pertinent to the *Charter* issues involved. Where it is available, this type of challenge may well provide the ideal presentation of a constitutional issue. However, the likelihood of such an ideal presentation actually occurring must also be considered. In this case, unlike *Canadian Council of Churches*, there was no reference to any such litigation actually commenced. Practical obstacles to such litigation were not addressed. For example, while the *Charter* rights of employees may be affected by Sunday closing laws, the employees are unlikely to have the political or financial resources to bring their concerns to court.⁸⁵

The majority also expressed a concern with the paucity of the factual record in the case. The facts pertaining to the parties' interests were clear, however, and the court had in previous cases considered the issue of other reasonable means of access by reviewing the terms of the challenged laws. The lack of evidence would appear to be relevant to the merits of the case. One would expect, on this basis, that the case would be lost on the merits, or dismissed because of inadequate evidence as occurred in *Danson* and *MacKay*, and not because of a denial of standing.

while subject to being charged, had not been charged. Further, the action had already proceeded to the Supreme Court of Canada. In these circumstances it seemed unreasonable to deny the parties their chosen procedure.

⁸⁴ Subject to *caveats* that mirror those relating to the "representativeness" of parties with traditional private interests, see *supra* note 27 and accompanying text. The individuals involved are not selected for their representative abilities. Further, the lack of representation of an interest may be remedied by way of a grant of intervenor status to an appropriate representative.

⁸⁵ As discussed by L'Heureux-Dubé J., dissenting in *Hy and Zel's*, *supra* note 11 at 722.

L'Heureux-Dubé J., dissenting, held that the appellants had private standing. This, however, would have been a barren form of standing, if the *Irwin Toy* principle denied them the ability to rely on section 2(a) or section 15 of the *Charter*. She resolved this issue by departing from the rule in *Irwin Toy* and by finding that the test for public interest standing, applied flexibly and purposively, was met. She considered the traditional justifications for limiting standing and demonstrated that they were not served by a denial of standing. In fact, judicial economy would have been better served, and a multiplicity of proceedings avoided, by granting standing, as it was clear that the penal proceedings against the corporations would continue and the *Charter* issues would eventually have to be dealt with by the court.

4. Conclusion

The *Hy and Zel's* decision did not further the objectives underlying standing rules in any explicable way. The application of the public interest standing test in the majority judgment was done without reference to those purposes. The denial of standing simply because the constitutional challenge could have been brought in a different format or conceivably might be brought by someone else in the future, without a demonstration of the advancement of these objectives, is an unproductive use of the doctrine of public interest standing. The marked lack of concern for the apparently serious issue presented in the case contributes to the appearance that the court was evading the merits.

The restrictive approach to public interest standing in *Canadian Council of Churches* and *Hy and Zel's* leads to a dismal forecast regarding the importance of public interest standing in future *Charter* litigation. The mere existence of persons whose rights and freedoms may be affected by a challenged law, without a demonstration that litigation has been or is sure to be commenced by such individuals, or that such litigation would more effectively present the constitutional issue, operates to bar public interest standing. If the Supreme Court of Canada continues with this approach, it seems that public interest standing law will return to its pre-*McNeil* stage of development and will be available to challenge declaratory legislation only. Regulatory legislation may be subject to challenge only by those regulated, and only if their own *Charter* rights and freedoms have been infringed.

IV. PRIVATE STANDING

A. *Origin of the Traditional Rule*

The test for private standing to challenge the violation of a public right dates back to *Smith*.⁸⁶ Smith, an Ontario resident, ordered liquor from a Montreal dealer. The dealer refused to fill his order because of the implementation in Ontario of the *Canada Temperance Act*.⁸⁷ Smith brought a declaratory action, arguing that the order in council bringing into force the federal legislation was invalid. The court held that he lacked status to sue.⁸⁸ The difficulties posed by the denial of standing were admirably stated by Duff J. (as he then was), but were ignored because of “grave inconvenience” that could flow from a grant of standing:

Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think however, that to accede to appellant’s contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action. ... We think the recognition of such a principle would lead to grave inconvenience ...⁸⁹

In order to avoid this grave inconvenience the court adopted the test of private standing found in public nuisance cases. The *Smith* case has been taken to establish that plaintiffs in declaratory actions, challenging laws on constitutional grounds, must show exceptional prejudice arising from, or a special interest in, the challenged law.⁹⁰ The major rationale for this standing requirement, offered in the public nuisance cases, was that the role of safeguarding public rights was entrusted to the Attorney General, not to private citizens. Transferring

⁸⁶ *Supra* note 14.

⁸⁷ S.C. 1920, c. 8.

⁸⁸ *Supra* note 14. Duff J., with Maclean J. concurring, and Mignault J. indicated that Smith lacked status to sue, but nonetheless went on to deal with the merits of the case because of some doubt on this point and because of the importance of the issue. Idington J. dismissed the case as raising a hypothetical question: see the discussion, *infra* note 93 and accompanying text, and see the commentary *infra* note 163.

⁸⁹ *Ibid.* at 337.

⁹⁰ *Ibid.* These terms were employed respectively by Duff J. at 337, and Mignault J. at 347. They derive from the requirement for standing in cases of public nuisance; see, generally, Cromwell, *supra* note 19 at 24-27. On the characterization of *Smith* in the case law, see Cromwell at 74-75.

this rationale to the constitutional context is questionable, as the role of the Attorney General focuses on enforcing duly enacted legislation, not challenging its constitutionality.⁹¹ Despite this and other criticisms, *Smith's* authority was unchallenged until *Thorson*, and at least until the *Hy and Zel's* decision, it was regarded as an authoritative statement of the requirements of private standing.⁹²

The reasoning in *Smith*, however, relied as much on the hypothetical or speculative nature of the case, as on the nature of Smith's interest in the subject of the suit. Smith was not permitted to seek a declaration because no claims had been made against him nor had prosecution been commenced or threatened.⁹³ According to this approach, it was more a matter of Smith's timing, rather than his interest, that was of concern.

The *Smith* decision reflected both of the basic concerns of standing rules. There was a desire to protect court resources, and a concern to ensure that issues had crystallized adequately so as to be appropriate for legal determination. But these concerns were not properly explored. The fear of a flood of public rights litigation was not a reasonable one. There was no other analysis relating to whether the case would utilize court resources efficiently (for example, by determining an issue that might arise in multiple penal proceedings). A consideration of the issue raised, and of the factual context presented by Smith, indicates that the issue had crystallized and that it would not be better defined or presented by awaiting prosecution.

B. *Indications For and Against Liberalization of the Rule*

The public interest standing cases of the Supreme Court of Canada also considered the requirements of private standing. In *Thorson*, Laskin J. (as he then was), in the majority decision, indicated that the correctness of *Smith*

⁹¹ *Thorson*, *supra* note 17 at 146-47; Cromwell, *ibid.* at 77; and Hogg, *supra* note 20 at 1265-66.

⁹² Hogg, *ibid.* at 1265; and Roach, *supra* note 15, paras. 5.310-5.320.

⁹³ *Supra* note 14. See the judgment of Idington J. at 333 and Duff J. at 336, distinguishing *Dyson v. A.G.*, [1911] 1 K.B. 410 on this basis. See also Cromwell, *supra* note 19 at 72. This aspect of the decision is also subject to criticism, as discussed *infra* notes 162-163 and accompanying text.

might be put in doubt if it be taken to hold that the amended Canada Temperance Act was immune from challenge by a declaratory action at the suit of either Smith or the Montreal firm which refused, because of the amended legislation, to fill Smith's liquor order and hence brought to a halt a proposed business relationship.⁹⁴

He repeated the question raised in *Smith*, wondering why a plaintiff should not be qualified in a declaratory action, but be compelled to violate the statute and risk prosecution. He did not overrule *Smith*, but seemed to be criticizing *Smith's* overly restrictive interpretation of "exceptional prejudice." Thomas Cromwell suggested, accordingly, that the halting of a proposed business relationship may be a sufficient basis for private standing.⁹⁵

McNeil also raised questions about the authority of *Smith*. The case was treated by the court as a case of public interest standing. The court considered other factors, such as the means to bring the issue to court in granting discretionary public interest standing, rather than finding that the *Smith* test for private standing had been met. The direct effect or real stake of *McNeil* supported the court's exercise of its discretion to grant public interest standing, but apparently was not sufficient to give him private standing as of right. This creates a distinction between the exceptional prejudice necessary for private standing and the direct effect which supports a discretionary grant of public interest standing. It seems unlikely that such a fine distinction can be satisfactorily drawn, given the vagueness of the concepts involved.⁹⁶ Thomas Cromwell has suggested that it would be more satisfactory to say that *McNeil* met the *Smith* test for private standing.⁹⁷ Post-*Charter*, if *McNeil* based his action on his constitutional right to view films, Strayer has suggested that his case for private standing would seem to be stronger.⁹⁸

While *Thorson* and *McNeil* provided some support for a more expansive approach to private standing, Laskin C.J.C., dissenting in *Borowski #1* and referring to a statement accepted by the majority in *Finlay*, supported a more restrictive approach. Laskin C.J.C. emphasized that public interest standing was exceptional, and that generally persons could not attack legislation in the courts unless they

⁹⁴ *Supra* note 17 at 148.

⁹⁵ *Supra* note 19 at 81.

⁹⁶ See D. Mullan, "Standing After *McNeil*" (1976) 8 *Ottawa L. Rev.* 32 at 41-42.

⁹⁷ *Supra* note 19 at 82.

⁹⁸ *Supra* note 17 at 156.

were “directly affected” or “threatened with sanctions for an alleged violation.”⁹⁹ A plaintiff must show some

special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society. This is especially true of the criminal law. For example, however passionately a person may believe that it is wrong to provide for compulsory breathalyzer tests or wrong to make mere possession of marijuana an offence ... the courts are not open to such a believer, not himself or herself charged or even threatened with a charge, to seek a declaration against the enforcement of such criminal laws.¹⁰⁰ [emphasis added]

The exact boundaries of private standing remain unclear. This is in part because, in difficult cases such as *Finlay*, the courts have relied in the alternative on public interest standing. Further, in the *Charter* context, traditional private standing was rendered barren by the *Irwin Toy* rule, which will be discussed below.

C. *A New Restriction on Standing*

1. *Irwin Toy*

A very significant restriction on private standing developed in another line of cases. Initially, this was not described as a restriction on standing, but as a restriction on the *Charter* rights or freedoms that might be relied upon by a party. The resulting threshold rule operated in essentially the same way as a standing rule. It depended on the relationship of the party to the issues sought to be litigated, and meant that the court would not consider the merits of those issues.

The argument that reliance on the *Charter* rights of others should be prohibited first arose in *Big M*.¹⁰¹ In this penal proceeding against a

⁹⁹ *Borowski #1*, *supra* note 15 at 578.

¹⁰⁰ *Ibid.* at 578-79, Laskin C.J.C. dissenting. The emphasized portion was quoted without exception by Le Dain J. for the court in *Finlay*, *supra* note 15 at 621, in his discussion of the requirements for private standing. The judgment also referred to a number of other statements of the nature of the required private right or special damage, without adopting any specific formula. *Finlay* did not have private standing because of a lack of a nexus or causal connection between the prejudice he suffered and the federal payments he was challenging. In adopting from American law, this elaboration on the nature of the required private right or special damage, and especially in finding on a preliminary application that a nexus could not be established, the court was taking quite a restrictive approach to private standing: see J.M. Evans, “Developments in Administrative Law: The 1986-87 Term” (1988) 10 *Supreme Court L.R.* 1 at 17; and Bogart, *supra* note 26 at 386.

¹⁰¹ *Supra* note 7.

corporate accused under the *Lords Day Act*¹⁰² an objection was raised that the corporation should not be able to rely on section 2(a) of the *Charter* as it itself had no religion. The Supreme Court of Canada responded that an accused could raise any constitutional defect in a law under which it was charged—that the constitutionality of the law, not the particular rights of the accused, was the more important concern. The import of the decision was that established standing law would apply to cases seeking to hold legislation invalid because of conflict with the *Charter*. In these cases, section 24 of the *Charter* was superfluous. The court relied upon the traditional power of judicial review now reflected in section 52 of the *Constitution Act, 1982*. The more restrictive standing rule referred to in section 24 did not supplant established procedure.

The *Big M* principle is still followed, but it has been limited to penal proceedings only. In civil actions, whether declaratory or for other forms of relief, the court has determined that applicants or plaintiffs with private standing are not permitted to rely on the *Charter* rights of others. In effect, the section 24 rule applies, even if the plaintiff or applicant seeks only section 52 relief. The rule applicable to civil proceedings was first established in *Irwin Toy*.¹⁰³ This was a declaratory action by a corporation which was permitted to argue the violation of its own freedom of expression and a division of powers issue. However, the corporation was not permitted to rely upon the *Charter* rights of others found in section 7. The *Big M* principle was held to be inapplicable, as no penal proceedings were pending in the case and the principle did not apply to a civil declaratory action.¹⁰⁴

2. *Hy and Zel's*

The majority decision in *Hy and Zel's* purported not to deal with private standing,¹⁰⁵ but in fact adopted the *Irwin Toy* rule as a rule of standing for a *Charter* declaratory application. Unless discretionary

¹⁰² *Supra* note 9.

¹⁰³ *Supra* note 5.

¹⁰⁴ *Ibid.* at 1004. In *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705 [hereinafter *Dywidag Systems*], a civil action for damages in which the constitutionality of the *Federal Court Act* R.S.C. 1970 (2nd Supp.), c. 10, ss. 17(1) and (2), was in issue, the Supreme Court again refused to allow a corporation to rely on section 7 rights, again holding that *Big M* did not apply to the civil action.

¹⁰⁵ Major J. for the majority stated that it was “not the proper case for deciding the extent to which *Smith* survives in view of the more liberal views relating to public interest standing:” *supra* note 11 at 694.

public interest standing is granted, an applicant now needs to show not only special prejudice, but that his or her *Charter* rights are affected. This rule was applied to individuals as well as corporations. The failure of the employee appellants in *Hy and Zel's* to provide evidence of effects on their own religious freedom or equality meant that they, too, were denied standing. Further, public interest standing will usually not be available as a means to circumvent the restrictive standing rule. Plaintiffs who are subject to prosecution must raise their constitutional objections in the criminal proceeding. If private rights are affected in a civil context, this option is not available,¹⁰⁶ but public interest standing could still be denied on the basis that plaintiffs whose *Charter* rights are directly involved might come forward.

Peter Hogg has argued,¹⁰⁷ and the dissenting judges in *Hy and Zel's*¹⁰⁸ agreed, that the *Irwin Toy* rule is irrational. Just as federalism issues can be argued by private plaintiffs, so should all *Charter* issues, regardless of personal application.¹⁰⁹ In some cases, a refusal to consider the constitutional rights of others may support the underlying principle that *Charter* cases should be decided against concrete factual backgrounds. But unthinking application of the prohibition against raising the *Charter* rights of others can also frustrate the underlying concern with concrete factual backgrounds, and can result in unnecessary bars to access to the court, that waste, rather than preserve

¹⁰⁶ *Dywidag Systems* *supra* note 104.

¹⁰⁷ *Supra* note 20 at 1269-74.

¹⁰⁸ *Supra* note 11 at 713-16 *per* L'Heureux-Dubé J.

¹⁰⁹ See also W.A. Bogart, "Standing and the Charter: Rights and Identity" in Sharpe, ed., *supra* note 23, 1 at 23, arguing that concerns about corporate *Charter* actions should not be dealt with by strict standing rules. Roach, *supra* note 15, paras. 5.350-5.360, argues that the *Irwin Toy* approach is preferable, and that the *Big M* rule should not be expanded. Rather, he suggests that parties seeking to rely on the *Charter* rights of others should satisfy the requirements for a discretionary grant of public interest standing. He cites *Antrim Yards* *supra* note 79, a case which predated *Hy and Zel's*, *ibid.*, as an example of this approach. If entitlement to public interest standing were determined generously and purposively, as *per* L'Heureux-Dubé J. in the dissent in *Hy and Zel's*, this approach would offer the court a tool to ensure that the case is permitted to proceed only if the *Charter* interests will be argued in a full and competent manner, which is Roach's concern. But with the restrictive approach to public interest standing shown by the majority, the more likely result is a denial of public interest standing.

judicial resources.¹¹⁰

3. A Purposive Inquiry

As a rule of standing, the *Irwin Toy* rule should be examined in terms of the purposes underlying standing requirements. This was not attempted in the cases establishing the rule; in *Irwin Toy* and *Dywidag Systems*, the court simply declined to “extend” the *Big M* rule to civil actions.¹¹¹ This task was, however, undertaken in relation to the standing of the applicants in *Hy and Zel’s, per L’Heureux-Dubé J.’s* dissenting decision. She held that interests in judicial economy would be served by allowing standing: the parties would not be otherwise uninvolved as they had to deal with these issues. The case could determine the outcome in numerous outstanding penal proceedings. Further, the requirements of the adversarial system would be served because the court would have before it a “live controversy” involving “[t]he parties most directly affected by the Act.”¹¹² As discussed with regard to the public interest standing ruling in the case, it cannot be objected that these parties would be insufficiently motivated. However,

¹¹⁰ L’Heureux-Dubé J., dissenting in *Hy and Zel’s, ibid.*, argued persuasively that this was the result of the majority’s denial of standing. The case had already proceeded to the Supreme Court of Canada, with the lower courts having determined the issue on the merits. Criminal proceedings had been adjourned pending the result in the declaration application. The denial of standing simply meant that the case would begin anew. Another example of the difficulties that may arise from a refusal to permit reliance on third party rights occurred in *Dahlem (Guardian ad litem of) v. Thore* (1994), 2 E.T.R. (2d) 300 (B.C.S.C.) [hereinafter *Dahlem*]. The recipients of a gift from a person certified as a patient (pursuant to the *Patients Property Act* R.S.B.C. 1979, c. 313, s. 20), against whom the Public Trustee had commenced an action to set a gift aside, were held to lack standing to challenge the validity of the *Act* under the *Charter*. Their own constitutional rights were unaffected and their personal financial interest was not a public interest as to the rights of patients or potential patients. They were, therefore, held not to have public interest standing.

The implication of the decision is that a public interest group representing patients or potential patients bringing a declaratory action would be in a better position to bring the issue to court. Contrary to *Canadian Council of Churches, supra* note 10, this would prefer a general declaratory suit without a concrete factual background over the concrete factual background presented in the case. This was not a case in which reliance on third party rights would involve a lack of such a background, for the patient’s constitutional interest in being treated as competent to make a gift was simply the other side of a transaction directly involving the recipient who sought to raise it. Just as speakers can refer to both listeners’ rights and the press regarding the public right to receive information (even in declaratory actions such as *Irwin Toy, supra* note 5 and *Edmonton*

¹¹¹ *Irwin Toy, ibid.* at 1004; and *Dywidag Systems, supra* note 104 at 708-09. Roach, *supra* note 15, para. 5.355, adopts this language, speaking of the *Big M* rule as the exception, although it is simply an application to the *Charter* of the private standing rule in *Smith, supra* note 14.

¹¹² *Supra* note 11 at 718.

the characterization of the parties as directly affected by the legislation somewhat begs the point made by the majority, that they are not directly affected by the *Charter* rights relied on. Because of this, the separate applicants may not be the best representatives of religious freedom, and the factual context may be inadequate. If parties directly affected in both senses had commenced litigation, these concerns might be better served.¹¹³ But the fact that such litigation might be preferable should not bar standing in less than ideal litigation, where the ideal suit has not been and, for practical reasons, may not be commenced.

In my view, it is unnecessary and unfortunate to bar *Charter* litigation by parties with traditional private interests. *Charter* litigation presents even greater than usual financial cost. Often, only those who suffer equivalent or greater financial losses may be willing to put this kind of personal investment into the determination of a public issue. The fact that there are personal benefits to the parties does not detract from the potential public benefit of the decision.¹¹⁴ The Sunday closing cases prior to *Hy and Zel's* provide examples.¹¹⁵ The parties' personal interests did not prevent the courts from analyzing the public impact of the issues.¹¹⁶ These were quasi-criminal cases governed by the *Big M* standing rule, but there is no reason why a court could not equally determine public issues in private civil suits. It is also not clear that the issues would have reached the courts otherwise. The affected religious groups are diverse and geographically scattered. Regulations now exist

¹¹³ This would not be true in all cases. Sometimes the factual context will be identical; for example, where there is a close relationship between the party with a traditional private interest and the person or persons whose *Charter* right is affected. See the examples referred to, including *Dahlem*, *supra* note 110. Further, the court may find that it can resolve representational issues by allowing intervention.

However, because there may be cases in which litigation will be preferably presented by parties more closely connected to the *Charter* interests, and in which such litigation either has been or will clearly be undertaken, the approach adopted by L'Heureux-Dubé J. in *Hy and Zel's*, *ibid.*, and advocated by Roach, *supra* note 15, as discussed *supra* note 107, seems to be the best one. This involves treating the standing of persons with traditional private standing as discretionary and subject to similar considerations as public interest standing.

¹¹⁴ Gibson, *supra* note 3 at 449, discusses the incidental benefits to disadvantaged individuals arising from *Charter* challenges brought by corporations and advantaged individuals.

¹¹⁵ *Big M*, *supra* note 7; *Edwards Books*, *supra* note 5.

¹¹⁶ With regard to the impact of *Charter* litigation relating to Sunday closing laws, see M. Brundrett, "Demythologizing Sunday Shopping: Sunday Retail Restrictions and the Charter" (1992) 50 U.T. Fac. L. Rev. 1. He argues that economically motivated litigation has lent an air of unreality to the claims for religious freedom, but nonetheless supports one result of the litigation, which has been to require (either judicial or legislative) accommodation of minority religious retailers.

at federal, provincial, and municipal levels. These factors would make a public interest case difficult to organize and fund.

The results in the Sunday closing cases may be challenged, but this should be done directly. If the Supreme Court of Canada has set up unduly restrictive standards for Sunday closing laws, then its approach to the meaning of section 2(a) or the application of section 1 should be re-examined. Avoidance of these issues through the use of standing rules does not resolve them. They remain to be dealt with on another occasion.

D. Distinguishing Standing and Remedy

A distinct issue arises as to the appropriate remedy in a *Charter* case. Should a remedy benefit persons whose own *Charter* rights are not affected?¹¹⁷ The answer must be that this will be merited in some cases, because of the policy concerns that affect the court's choice of an appropriate remedy. The court must consider the implications of striking down a law or tailoring a more specific remedy.¹¹⁸ The concerns that guide the court in selecting an appropriate remedy are distinct from those underlying standing.

The choice of an appropriate remedy was addressed in *Schachter*. While the case dealt with remedies to extend benefits provided in underinclusive laws, the court indicated that the remedy of reading down a law to exclude unconstitutional applications was also available under

¹¹⁷ See on this point, C. Tollefson, Case Comment on *R. v. Wholesale Travel Group Inc* (1992) 71 Can. Bar Rev. 369 at 378, who argues that while a corporate accused may well have a "stake or interest in the validity of the charging law sufficient to give rise to standing to allege its unconstitutionality," the court should not automatically strike out laws that violate the *Charter* rights of individuals, thus providing an incidental benefit to corporate accused. Rather, the court should consider the American "as applied" approach (at 379) to constitutional validity and should develop a "nuanced approach to remedial possibilities ... responsive to the distinctions between corporate and individual rights claimants" (at 382-83). In the case, Lamer C.J.C. for the majority, held that a law which applied to corporations and human persons, and violated the section 7 rights of the latter only, was of no force and effect under section 52(1) of the *Constitution Act, 1982 supra* note 13. The fact that corporations would receive an incidental benefit was not a sufficient reason to alter the court's usual approach to section 52(1): *R. v. Wholesale Travel Group Inc.* [1991] 3 S.C.R. 154 [hereinafter *Wholesale Travel*]. The *Wholesale Travel* case predated *Schachter, supra* note 13, which signalled a more flexible approach to remedies as discussed below.

¹¹⁸ Tailoring an appropriate remedy can be done by reading down a law under section 52 or by providing a constitutional exemption under section 24; Roach, *supra* note 15, paras. 14.170-14.890, discusses these alternatives, noting their similar effect at para. 14.570. For reading down, see *Schachter, supra* note 13. For constitutional exemption, see *Rodriguez supra* note 6 at 571-80, *per* Lamer C.J.C. in dissent.

section 52 of the *Constitution Act, 1982*¹¹⁹ The majority judgment provided general guidelines as to the choice of remedial alternatives.

The manner in which the section 1 test has been failed is critical to the determination of the appropriate remedy. If the purpose of the law is inadequate, generally the law should be struck down entirely.¹²⁰ A similar result would follow if the law lacks a rational connection with its purpose.¹²¹

On the other hand, where a law passes the objective and rational connection tests, but fails the minimal impairment or effects tests under section 1, there is more flexibility in defining the extent of the inconsistency and the appropriate remedy. In choosing a remedy that has the effect of narrowing the application of a law, the court must

¹¹⁹ *Schachter, ibid.* at 695:

A court has flexibility in determining what course of action to take following a violation of the Charter. ... Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency." Depending upon the circumstances, a court may simply strike down ... or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy.

Further, when the majority provided guidelines for choice of an appropriate remedy, although the judgment discussed reading in, the cases referred to dealt with reading down or constitutional exemptions. Under this approach there would be very little need for individualized constitutional exemptions under section 24 of the *Charter*. The majority judgment indicated that a section 24 remedy would usually be superfluous where a section 52 remedy was granted. It would not be needed if the law were struck down, and would simply duplicate the effect of reading down or reading in under section 52. However, in *Rodriguez ibid.*, the minority would have provided a section 24 constitutional exemption as an individual remedy in conjunction with a delayed striking down of the law.

¹²⁰ In *Big M, supra* note 7, the religious purpose of the Sunday closing rule meant that it had to be struck down entirely. Creating exemptions to it would not have been an adequate remedy. In *Edwards Books, supra* note 5, on the other hand, the Sunday closing rule had a secular purpose. The majority did not reach the question of remedy because it found the rule including the statutory form of exemption to be reasonable. The majority did indicate that, had the section 1 test not been met, it would have had to consider the application of a constitutional exemption.

¹²¹ The majority decision in *Schachter, supra* note 13 at 699-700, referred to *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, as an example. In that case, a majority of the court found that the rational connection test was probably not met. It is logical that, in most such cases, the appropriate remedial choice will be to strike down the entire portion of the legislation that fails on this element of the proportionality test. The objective of the law would not be furthered by upholding legislation that lacks a rational connection as it stands.

ensure that the narrowed law is defined with adequate precision,¹²² that it remains consistent with the legislative objective,¹²³ and that its

¹²² If reading down would require the court to make “*ad hoc* choices from a variety of options, none of which [is] pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution,” this indicates that the task should be left to the legislature: *Schachter, ibid.* at 707. For example, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 169, where law did not adequately limit a power of search and seizure, it was the “legislature’s responsibility to enact legislation that embodies appropriate safeguards;” the courts should not “fill in the details that will render legislative lacunae constitutional.” This concern was referred to by Lamer C.J.C., in dissent in *Rodriguez supra* note 6, as a reason not to read down the *Criminal Code* prohibition of assisted suicides. However, he did not find a similar problem with regard to the constitutional exemption remedy, thus distinguishing the availability of these remedies in a manner not apparent in other jurisprudence. Another example referred to in *Schachter, ibid.* at 276, was *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 [hereinafter *Rocket*]; the court should not rewrite overly limited exceptions to a general prohibition on advertising by dentists. See also the discussion of constitutional exemption in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*], where the majority held that the *Criminal Code* ban on evidence of prior sexual activity should be struck down, rather than subjected to constitutional exemptions. One reason advanced was that there would be significant difficulty in applying the exemption: “[t]his amounts to saying that [the law] should not be applied when it should not be applied, unless some criterion outside the *Charter* is found” (at 628-29). The formulation of this issue of remedial precision is criticized in Roach, *supra* note 15, paras. 14.810-14.820. In *Rodriguez ibid.* Lamer C.J.C., in his discussion of the constitutional exemption, referred to this requirement and found it to be satisfied.

¹²³ If the effect of reading down changes the law substantially, and would therefore interfere with the legislature’s objective, reading down will not be appropriate. The advantage of reading down is that it permits a law to remain in place, and to apply as intended, subject to a relatively minor qualification. The Supreme Court of Canada has rejected reading down where it would result in a substantial change to the law. In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 101, Sopinka J. referred to the remedies of reading down and the constitutional exemption as “companions” and found neither one to be appropriate. In discussing the choice of remedy, Sopinka J. commented that, while the court must remedy *Charter* violations, it should “refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the *Charter*. ... Reading down may in some cases be the remedy that achieves [these] objectives. ... The same result may on occasion be obtained by resort to the constitutional exemption” (at 104-05). The law in issue—banning political activity by public servants—would be invalid in many of its applications and would, “as a result of wholesale reading down, bear little resemblance to the law that Parliament passed. ... In these circumstances it is preferable to strike out the section to the extent of its inconsistency” (at 105). In *Seaboyer, ibid.* at 628, McLachlin J. for the majority referred to reading down and the constitutional exemption as techniques to declare the legislation “valid in part” and held that the doctrine of constitutional exemption should not be applied because the result would not substantially uphold the law as enacted:

It would import into the provision an element which the legislature specifically chose to exclude—the discretion of the trial judge. Add to this the host of judge-made procedures which have been proposed to effect this judicial amendment to the legislation, and the will of the legislature becomes increasingly obscured. The exemption, while perhaps saving the law in one sense, dramatically alters it in another.

significance is not unduly changed.¹²⁴ Where these criteria are not met, the court should elect to strike down the law.

To date, the court has tended to strike out laws, rather than tailor specific remedies, arguing that this approach best observes its policy of minimizing interfering with the role of the legislature.¹²⁵ If that approach is to be reassessed, it should be done openly and with clear consideration of the policy implications. The effect of the chosen remedy should be assessed in an inquiry similar to that undertaken in *Schachter*. The purposes underlying the choice of remedy and the grant of standing are quite distinct. None of these purposes will be achieved if standing law is employed as an indirect way of limiting the effect of the

¹²⁴ This involves considerations of the interrelatedness of the entire law. In *Devinev. Quebec (A.G.)*, [1988] 2 S.C.R. 790, the challenged language law limiting the use of English on commercial signs constituted a single scheme. The court struck down extreme portions of the law. To not strike down other less extreme ones would leave comparatively more restrictions, rather than less, in those areas where government felt some leeway was needed. Therefore the whole law should be struck down. Similarly in *Morgentaler #1* *supra* note 43, the abortion provisions of the *Criminal Code* were a comprehensive code. The court struck down the whole law, not selected portions.

The social significance of the remaining portion of the law is also of concern. If the challenged law is significant or long standing, and especially if it is “encouraged” by the Constitution, it is more important for the court to try to fashion a narrow remedy rather than strike down the whole law. This principle has been applied in cases involving human rights legislation: see, for example, *Blainey v. Ontario Hockey Ass'n* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal to S.C.C. denied [1986] 1 S.C.R. xii; *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.); and *Vriendv. Alberta* (1994), 152 A.R. 1 (Q.B.).

¹²⁵ In *Wholesale Travel* *supra* note 117, Lamer C.J.C. for the majority held that any incidental benefit to the corporate accused was an insufficient reason to alter the court’s usual remedy of declaring the law to be of no force and effect.

Reading down or constitutional exemptions remain exceptional, and declarations of invalidity the usual remedy. No majority judgment in the Supreme Court of Canada has yet applied the constitutional exemption, and reading down has seldom been used in circumstances in which the remedy would be clearly at odds with legislative intention. (For an exception, see *R. v. Grant*, [1993] 3 S.C.R. 223, discussed in Roach, *supra* note 15, para. 14.490, wherein the court read down a statutory search power to restrict it to emergent circumstances). While there are a number of cases where the court has interpreted broad or ambiguous statutes narrowly so as to avoid *Charter* concerns that would otherwise arise, the court has been very reluctant to use one of these remedies to overcome a clear mandatory provision. Even the dissenting judgment in *Rodriguez* *supra* note 6, which would have employed a constitutional exemption, had significant reservations about this remedy. Lamer C.J.C. indicated that, while a constitutional exemption was necessary to remedy the *Charter* violation he found to exist, the exemption should only be used as a temporary measure accompanying a delayed striking down of the law. There are some examples of use of constitutional exemptions by lower courts, but these are also exceptions to the usual approach of striking down laws. See, generally, Roach, *supra* note 15 at 14-7-14-36.

Charter.¹²⁶

E. Conclusion Regarding Traditional Private Standing

The denial of standing in *Hy and Zel*'s was inexplicable in terms of the purposes underlying standing. While the court may need to rethink its freedom of religion rulings, or the appropriate form of remedy in such cases, these concerns are simply avoided rather than properly considered by the use of strict standing rules. It seems clear that the approach of L'Heureux-Dubé J. in *Hy and Zel*'s was correct, and that plaintiffs with traditional private standing under the *Smith* rule should have access to the court and should be entitled to rely on the *Charter* rights of others in civil proceedings, including declaratory actions, as well as in criminal proceedings. Granting standing to these persons is consistent with the purposes of standing law relating to the efficient use of judicial resources. The economic motivations behind the litigation imply that such plaintiffs will be involved in litigation in any event and, if prevented from raising *Charter* issues in one proceeding, may be back before the court in another form of action. However, concerns relating to the provision of an adequate factual context may favour the presentation of the issue in another action, brought by persons more closely related to the *Charter* rights and freedoms involved. Thus it is probably wise to treat this as a discretionary form of standing. If the issue is better presented in another action that is ongoing or will clearly be undertaken, the court may decline to recognize the standing of the plaintiff in favour of the better plaintiff and better presentation of the issue.

V. THE "SECTION 24" PLAINTIFF: A NEW FORM OF PRIVATE STANDING

¹²⁶ In *Wholesale Travel* *ibid.*, as indicated above, the court declined to link standing and remedies issues. None of the case law links the issues of standing and remedy. The issue of standing is a preliminary one, a decision which the court should make. Once that decision is made, the plaintiff's position does not affect the court's view of what is an appropriate remedy, although it may mean that the plaintiff will not benefit from the granted remedy. This occurred in *R. v. Wilson* (1993), 86 B.C.L.R. (2d) 103 (C.A.) where it was argued that the considerations of standing and remedy should be linked, but the court declined to do this. The accused had standing to argue the violation of others' *Charter* rights under the rule in *Big M*, *supra* note 7. His counsel argued that the law should be struck down, not read down, because his client had standing and because that was the only way he would personally benefit. The court held that the appropriate remedy depended on the factors set out in *Schachter*, *supra* note 13, not on the person who raised the constitutional challenge.

A. *Support for a New Form of Private Standing*

While the Supreme Court of Canada has demonstrated a restrictive approach to both public interest and traditional private standing in *Charter* declaratory actions, it has provided at least implicit support for a new form of private standing. This implicit support is also available in a number of lower court decisions. I address this new form of standing not as a substitute for other forms of standing, but as a useful additional approach.

Many *Charter* cases have been brought by persons who did not have, in the words of Laskin C.J.C. in *Borowski #1*, a “special interest ... beyond the general interest that is common to all members of the relevant society.”¹²⁷ These cases involved actions or applications for declarations that regulatory legislation infringed the *Charter*. In most, but not all, cases the plaintiff or applicant was subject to the regulation, but no proceedings had been commenced or threatened. The parties, therefore, were not as clearly within the traditional rules for private standing as the corporate parties in *Hy and Zel’s*. But the parties were more clearly connected to the *Charter* issues raised, and therefore would not be barred from standing by the *Hy and Zel’s* ruling.

In *Somerville v. Canada (A.G.)*,¹²⁸ an individual applicant, simply by establishing his eligibility to vote,¹²⁹ was entitled to seek a declaration that amendments to the *Canada Elections Act*¹³⁰ infringed sections 2(b) and 3 of the *Charter*. The statutory provisions in question were regulatory, limiting third party spending on election advertising to \$1,000 and making overspending an offence. Somerville was not even required to take the step undertaken by Smith, of showing an intended and frustrated business transaction. If Somerville could bring the action, clearly any eligible elector could.¹³¹

¹²⁷ *Supra* note 15 at 578.

¹²⁸ [1993] A.J. No. 504 (Q.L.) [hereinafter *Somerville*].

¹²⁹ This was done in an affidavit filed in the application. The judgment does not mention standing, and counsel for the applicant advised the author in a telephone conversation that it was not raised in argument.

¹³⁰ S.C. 1993, c. 19.

¹³¹ In an earlier declaratory action involving an earlier version of the same legislation, *National Citizens’ Coalition Inc. v. Canada (A.G.)* (1984), 11 D.L.R. (4th) 481 at 485 (Alta. Q.B.), the standing of the two plaintiffs—the National Citizen’s Coalition Inc. and an individual citizen who was a member of that organization—was challenged on the ground that “the plaintiffs had not shown any special interest in the impugned law other than that of a general nature.” The court held that public interest standing was available to both plaintiffs. This approach was also adopted in

Thus, standing was uncontroversial in circumstances directly analogous to those prevailing in *Smith. Somerville* is one of an increasing number of public rights claims which is also a legitimate and, indeed, pressing use of judicial resources. The case decided an important constitutional issue of practical import to many people, following a hearing in which the issue was identified in an adequately precise manner, pertinent evidence was called, and argument for both sides of the issue was presented.

There are examples of this form of standing that have reached the level of the Supreme Court of Canada. *Edmonton Journal*¹³² involved a challenge to a statutory provision prohibiting the media from publishing material in court documents. There had been no prosecutions commenced or threatened. The publisher of the *Edmonton Journal* brought a declaration application. Its standing was not questioned.¹³³

*Danson*¹³⁴ was an application for a declaration that Ontario Rules of Civil Procedure providing for the imposition of costs personally against a lawyer violated the *Charter*. The application was brought without any factual context. The ensuing problems, which resulted in dismissal of the application, were not characterized as related to the status of the plaintiff.¹³⁵ The plaintiff was a lawyer and as such might be

Reform Party of Canada v. Canada (A.G.) (1993), 145 A.R. 272 (C.A.). The case dealt with *Canada Elections Act* *ibid.*, provisions reserving and allocating political broadcast time. Standing was granted to a political party, found to be directly affected by the provisions, and to an individual candidate and members found to be genuinely interested in the issues.

¹³² *Supra* note 67.

¹³³ There was some discussion regarding its standing as a corporation to invoke section 15. However, there was no suggestion by either the parties or the court that it lacked sufficient private rights (freedom of expression), special interest, or damage to bring the action under section 2(b): *ibid.* at 1382, *per* La Forest J. in dissent, *rev'g* on other grounds (1987), 78 A.R. 375 at 380 (C.A.), *aff'g* (1985), 63 A.R. 114 at 116 (Q.B.).

¹³⁴ *Supra* note 65.

¹³⁵ *Ibid.* In the first instance, (1985), 51 O.R. (2d) 405 at 410 [H.C.J.], McRae J. held that *Danson* represented, in the terms adopted from Strayer, *supra* note 17 at 146, "not the public, but an interested class of which he is a member," and that, as a member of the Ontario Bar, he was "imminently threatened with legal consequences of a regulatory or enforcement nature." In the Ontario Court of Appeal, (1987), 60 O.R. (2d) 676 at 681, *per* Finlayson J.A., it was indicated that standing, which the court characterized as public interest standing, would be determined on the hearing of the application; the concurring judges did not deal with this point. The court confined its decision on the preliminary objection to the application to the issue of an adequate factual undertaking. The Supreme Court of Canada, in *Danson, ibid.* at 1102, indicated that the application could not proceed in the absence of a factual foundation, adding that "[i]t is not necessary that the appellant prove that the impugned rules were applied against him personally (standing not being an issue); but he must present admissible evidence that the effects of the impugned rules violate provisions of the *Charter*."

threatened with legal consequences of a regulatory nature. Rather than awaiting an order of costs against him, he brought a declaration application.¹³⁶

In *Information Retailers Ass'n of Metropolitan Toronto Inc. v. Metropolitan Toronto (Municipality of)*¹³⁷ an incorporated association of individual and corporate booksellers, and a publishers' association, were held, without discussion, to have status to bring an application for a declaration that by-laws regulating the sale of erotic books and magazines were invalid because of conflict with the *Charter*. In *O.P.S.E.U. v. Ontario (A.G.)*¹³⁸ a union and individual public servants had status to seek a declaration that legislation restricting political activity by public servants and unions contravened the *Charter*. *Klein v. Law Society of Upper Canada*¹³⁹ was a *Charter* challenge, brought by a lawyer who was not under threat of any disciplinary proceedings, to law society rules prohibiting advertising.¹⁴⁰ *Institute of Edible Oil Foods v. Ontario*¹⁴¹ was a declaratory application by a trade association, wherein two corporate members and an individual consumer challenged the validity of legislation regulating the colouring of margarine under sections 2(b) and 15 of the *Charter*.¹⁴²

These cases indicate at least a liberalization, if not an abandonment, of the *Smith* exceptional prejudice requirement. Canadian courts have not insisted that regulatory proceedings be commenced or threatened, at least where there are economic implications, or where a class of persons, rather than the public at large,

¹³⁶ See also *MacKay*, supra note 69 at 360, wherein the court's support for the applicant's standing was somewhat more equivocal; it held that the "important issue" of standing had not been considered because it had not been raised by the parties.

¹³⁷ (1984), 48 O.R. (2d) 290 (H.C.J. Div. Ct.), aff'd (1985), 52 O.R. (2d) 449 (C.A.).

¹³⁸ (1988), 65 O.R. (2d) 689 (H.C.J.).

¹³⁹ (1985), 50 O.R. (2d) 118 (H.C.J. Div. Ct.) [hereinafter *Klein*].

¹⁴⁰ In the companion case to *Klein, ibid.*, law society proceedings had been instituted.

¹⁴¹ (1987), 63 O.R. (2d) 436 (H.C.J.), aff'd (1989), 71 O.R. (2d) 158 (C.A.) [hereinafter *Edible Oil Foods*].

¹⁴² The corporations were held not to have status to raise section 15 rights, but the individual consumer's status was assumed. Further, the status of all applicants pertaining to the section 2(b) challenge was assumed. For other examples of private standing, see D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 265, where the author refers to a "wide range of circumstances" in which private standing has been recognized in *Charter* challenges.

is affected.¹⁴³ In some of the cases, negative economic implications are not obvious, but there was an interference with a business activity or transaction, such as the publishing of particular information or the purchase of political advertising. One consumer plaintiff, however, was affected neither economically nor in her business activities and, therefore, joined in *Edible Oil Foods*¹⁴⁴ There is a particularly compelling argument that consumers with an interest in receiving prohibited commercial expression should have standing to challenge regulatory laws because the courts have relied, to a significant degree, on consumers' constitutionally protected interest in receiving information as the basis for upholding challenges to laws brought by advertisers.¹⁴⁵

B. *The Impact of Section 24*

While alternative bases for justifying private standing arguably exist in most of the cases, the only apparent source of the standing of the consumer—and what may well be the operative basis for the standing of other plaintiffs who coincidentally suffered an economic detriment or had their business activities curtailed—is the violation of a *Charter* right or freedom *simpliciter*. The breach of a *Charter* right or freedom does not fall in the category of rights traditionally actionable in private law that give rise to private standing (as an alternative to the *Smith* requirement of exceptional prejudice arising out of violation of a public right).¹⁴⁶ Nonetheless, private persons whose rights are infringed are

¹⁴³ The cases referred to (other than *Somerville*, *supra* note 128) differ from *Smith*, *supra* note 14, in that the prohibitions applied to more limited classes of persons, but in each of them the persons bringing the application were in no different position than the “relevant society” (*supra* note 100 and accompanying text). Potential litigators may not include every resident or citizen but still involve significant numbers. Strayer, *supra* note 17 at 146, indicates that this situation falls between purely “private” and purely “public” actions, and that “the problem of standing to sue arises just as in the purely ‘public’ action.” The question of prematurity is discussed in Sharpe, *supra* note 23 at 340-42; and Hogg, *supra* note 20 at 1277-78.

¹⁴⁴ The Institute itself, and the Information Retailers Association, were also unaffected, unless they are treated as representatives of the economic interests of their members. See also *Conseil du Patronat*, *supra* note 71.

¹⁴⁵ In cases brought by advertisers, they have, at least in part, relied on the rights of third parties: *Irwin Toy*, *supra* note 5; and *Rocket*, *supra* note 122.

¹⁴⁶ *Finlay*, *supra* note 15 at 619, referring to private rights which give rise to “an actionable wrong within the categories of private law” (citing S.M. Thio, *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971) at 161) or a right created by statute for the benefit of a plaintiff (referring to I. Zamir, *The Declaratory Judgment* (London: Stevens & Sons, 1962) at 269).

entitled to a remedy under section 24 of the *Charter*.¹⁴⁷ Further, there is a case for arguing that, in some circumstances the existence of a law whose terms violate a right or freedom, without an actual or even threatened application, amounts to an infringement under section 24. The Supreme Court of Canada has recognized that the existence of such a law can deter persons from engaging in constitutionally protected activity. This deterrence has influenced the court in its selection of an appropriate remedy, and would seem to be an equally persuasive basis for a grant of private standing to sue.¹⁴⁸

The emphasis in *Hy and Zel's* on the desirability of parties who are directly affected in the sense that their *Charter* rights are involved, and the discounting of the traditional private interest, also support the view that an effect on *Charter* rights or freedoms in and of itself should be sufficient to ensure standing to seek a declaration that the law conflicts with the *Charter*. While *Hy and Zel's* does not mandate this conclusion, in that it could be that *both* traditional private standing and interference with one's own *Charter* rights is required to bring such an action, a two-pronged standing requirement seems unduly restrictive. It could operate to bar claims by the individuals most closely linked to *Charter* values, such as the consumer in the *Edible Oil Foods* case, or minority religious employees whose working days are limited by Sunday closing statutes, but who are not themselves subject to or threatened with prosecution.

Section 24 supports a standing rule for declaratory actions concerning violation of *Charter* rights and freedoms, to supplement the traditional rules applied under section 52. Section 24 indicates that private persons whose rights or freedoms have been infringed or denied

¹⁴⁷ Declaratory proceedings pertaining to the constitutionality of statutes or regulations are generally considered under section 52, not section 24; the Supreme Court of Canada in *Schachter*, *supra* note 13 at 720, indicated that "[a]n individual remedy under section 24(1) of the *Charter* will rarely be available in conjunction with an action under section 52 of the *Constitution Act, 1982*" But this was because an individual remedy would either be superfluous or inconsistent with the general remedy. This does not deny that section 24(2) may be influential in defining the types of rights or interests that give rise to private standing to sue for a declaration of invalidity due to conflict with the *Charter*.

¹⁴⁸ *Rockett*, *supra* note 122 at 252. The existence of this deterrent effect, without the commencement or threat of enforcement proceedings, supports a present rather than merely a future infringement of *Charter* rights or freedoms. Even if the infringement is regarded more as threatened than actual, this would not prevent the application of section 24. See the discussion in *Roach*, *supra* note 15, paras. 5.610-5.690 and the cases cited therein. The case of *Rodriguez* *supra* note 6 at 584-85, *per Sopinka J.*, can also be characterized in this way. The criminal prohibition on assisted suicide, either through its deterrent effect on Ms. Rodriguez and others whose assistance she might seek, or through the potential application of the criminal prohibition, would have been sufficient to show an infringement of section 7 had the other requirements of that section been met.

are entitled to an “appropriate and just” remedy. If the infringement or denial is not accompanied by some injury compensable in damages, or by a negative administrative decision, or some other personalized grievance, it may be that the most appropriate and just remedy would be a declaration of invalidity of a law. Therefore, standing for purposes of such a declaration should depend simply on a showing of an infringement of the plaintiff’s rights or freedoms. Section 24 does not require, and a plaintiff should not have to prove, that he or she suffered a corresponding interference with legal rights actionable under private law, or some form of exceptional prejudice or special damage.¹⁴⁹

This result is supported not only by the language of section 24, but by its history as well. As described by Dale Gibson, the several drafts of section 24 broadened its application. There was clearly a concern that private persons be guaranteed access to the courts for the vindication of *Charter* rights and freedoms. Private persons were intended to have a major role in the maintenance of these public obligations.¹⁵⁰

While this approach to private standing may be supported by section 24, it is not compelled. Section 24 is not an independent source

¹⁴⁹ Much of the commentary on standing under section 24(1) of the *Charter* has generally indicated that the requirement of a *Charter* infringement is a stricter test of standing than the public interest standing available under section 52(1); but has not broadly explored the private standing implications of section 24: Hogg, *supra* note 20 at 916-17; A.A. McClellan & B.P. Elman, “The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24” (1983) 21 *Alta. L. Rev.* 205 at 212-13; G.R. Garton, “Civil Litigation under the Charter” in N.R. Finkelstein & B. MacLeod Rogers, eds., *Charter Issues in Civil Cases* (Toronto: Carswell, 1988) 73 at 74-75.

However, other commentators have envisioned such a role for section 24. Strayer, *supra* note 17 at 185, has taken the position advocated here, suggesting that section 24 may clarify standing as of right where a person’s interests are “affected similarly to the interests of the public at large.” Strayer also discussed, at 156, the impact of a constitutionally protected freedom on McNeil’s claim for standing (see the discussion *supra* note 98 and accompanying text) and suggested, at 175-79, that the combination of the right to vote in section 3 of the *Charter* and of section 24 reinforces the common law position that the right to vote is a private legal right, and that denial of it may be challenged in the courts by any voter.

Roach, *ibid.*, para 5.410, in a discussion of section 24, indicated that “it is arguable that all individuals have standing to assert rights to freedom of expression or voting rights because the benefits of those rights are distributed so widely,” citing in support of the former point *Canadian Civil Liberties* *supra* note 38, a case in which the court referred to the broad impact of the right as supporting the Corporation’s claim for public interest standing. S. Blake, in “Standing to Litigate Constitutional Rights and Freedoms in Canada and the United States” (1984) 16 *Ottawa L. Rev.* 66, took the position that those whose *Charter* rights or freedoms have been affected should always be entitled to standing, and that this is required by section 24. See also the comments of Bogart, *supra* note 109 at 15-16, discussed *infra* notes 164-68 and accompanying text.

¹⁵⁰ D. Gibson & S. Gibson, “Enforcement of the Canadian Charter of Rights and Freedoms” in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* 2d ed., (Toronto: Carswell, 1989) 781 at 784-86.

of jurisdiction for the courts; a court resorted to under the section must be “of competent jurisdiction.” It must have, independent of the *Charter*, jurisdiction over the subject matter and the parties.¹⁵¹ Thus it may be that accessibility of parties to the court should be determined by the normal rules which, in the case of private declaratory actions regarding the constitutionality of legislation, depend on a showing of exceptional prejudice. On the other hand, declaratory applications are brought before the superior courts—courts of general jurisdiction—which are always courts of competent jurisdiction for section 24 relief.¹⁵² Restrictions on standing to seek declaratory relief are discretionary, not jurisdictional.¹⁵³ In exercising this discretion, section 24 can provide a useful guide to an appropriate test of standing for *Charter* declaratory actions. It is for this reason that I refer to this form of standing as “section 24” standing, although the declaratory relief sought may be fully within section 52, and may not require reliance on section 24.¹⁵⁴

C. Ripeness

There remains the issue of *when Charter* rights are infringed or denied. Does the simple existence of a statute, without regulatory or enforcement proceedings being brought or threatened, or without a showing of exceptional prejudice, create an infringement or denial of a *Charter* right? To condition standing, or an infringement under section 24, on the coexistence of private rights or exceptional prejudice gives rise to the problem of allowing traditional legal interests to control the impact of guarantees designed to protect entirely different interests.¹⁵⁵ A better guide to standing for the purposes of the *Charter* is found by examining its purposes directly, in other words, in the substantive law of the *Charter*.

American jurisprudence provides an analogy. While standing doctrine is constitutionally grounded, and is in at least some respects

¹⁵¹ *Mills*, *supra* note 7; see, generally, *Hogg*, *supra* note 20 at 918-21; and *Gibson*, *ibid.* at 798-803.

¹⁵² *Kourtessis*, *supra* note 83; and *Hogg*, *ibid.* at 918.

¹⁵³ *Thorson*, *supra* note 17.

¹⁵⁴ *Schachter*, *supra* note 13.

¹⁵⁵ *Roach*, *supra* note 15, para. 5.320.

narrower than Canadian doctrine,¹⁵⁶ private standing in the United States has expanded to include non-economic injury (“injury in fact”), provided it falls within the “zone of interests to be protected” by the constitutional guarantee in question.¹⁵⁷ While standing may be denied where “abstract questions ... amount to generalized grievances,”¹⁵⁸ this does not today result in a rule as restrictive as that applied in *Smith* or described by Laskin C.J.C. in *Borowski #1*. This is clear from an examination of the American doctrine of “ripeness” which governs the appropriateness of pre-enforcement declaratory actions relating to regulatory laws. Ripeness has similarities to standing in that it requires concrete harm,¹⁵⁹ but it focuses more on issues of timing rather than on the identity of the plaintiff.¹⁶⁰

The ripeness of a constitutional claim depends on the nature of the claim and of the constitutional provisions relied upon. The American doctrine reflects, as I am suggesting standing in *Charter* declaratory actions should, the substantive requirements of

¹⁵⁶ See the discussion in *Canadian Council of Churches* *supra* note 10 at 246-48.

¹⁵⁷ L. Tribe, *American Constitutional Law* 2d ed. (Mineola, New York: Foundation Press, 1988) at 108, citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 545 U.S. 464 (1982) at 474-75.

¹⁵⁸ *Ibid.*

¹⁵⁹ G.R. Nichol, Jr., “Ripeness and the Constitution” (1987) 54 U. Chi. L. Rev. 153 at 170, citing L.L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown and Co., 1965) at 417:

By applying a more sensitive measurement of concrete injury, the Court has substantially liberalized access to judicial review over the past three decades. Gradually, the Court has alleviated the traditional dilemma of the federal plaintiff seeking to challenge the constitutionality of government regulation. No longer do the principles of federal jurisdiction require that he become a lawbreaker in order to get into court. Ultimately, the Supreme Court has concluded, with Professor Jaffe, that “even a wrongdoer is entitled to know his rights.” Moreover, ripeness decisions repeatedly have recognized the present harms that flow from the threat of future sanction.

¹⁶⁰ Tribe, *supra* note 157 at 78, citing, with added emphasis, *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 at 79 (1961):

Findings of nonjusticiability based on this concern typically arise when a litigant has challenged at an early stage, often in a suit for declaratory relief, the constitutionality of a statutory or regulatory scheme. In such cases the litigant may have a plausible claim that the challenged provision, by somehow limiting his available legal options, threatens him with direct injury sufficient to confer standing to sue. But standing doctrine discusses only “*what issues* a litigant might raise, not *when* he might raise them. That a proper party is before [a] court is not answer to the objection that he is there prematurely”—that he raises unduly “hypothetical” or “abstract” issues.

The reasoning in *Smith* relied substantially on the hypothetical nature of the issue, as noted *supra* note 93 and accompanying text.

demonstrating a constitutional violation. Different constitutional provisions give rise to different degrees of concern about ripeness. Free speech and electoral challenges are generally not challenged on ripeness grounds. Because of concern about the deterrent effect of regulatory legislation on speech, the mere passage of a statute is taken to injure free expression interests. Other constitutional rights, such as equal protection and due process, have been defined in a more context-specific manner and have been made subject to more stringent ripeness requirements.¹⁶¹

In addition to the substantive requirements of the particular constitutional guarantee, ripeness also depends on the nature of the alleged violation and on the evidence that will be necessary to establish it. In some circumstances, “hypothetical” facts have a reasonable degree of certainty, or do not affect the court’s ability to determine the merits. Exceptions have developed to the ripeness requirement where it is clear that the challenged law applies to the plaintiff’s activities—so that the plaintiff must refrain from these activities or face reasonably certain enforcement—or where the issues presented are legal and will not be affected by factual developments.¹⁶² These factors likewise should influence a Canadian court’s assessment.¹⁶³

¹⁶¹ Tribe, *ibid.* at 167. As an example of this contrast, the author notes that while legislative schemes imposing prior restraints on expression have been struck down because of a potential for arbitrary enforcement, schemes challenged on equal protection grounds have been required to show actual discriminatory enforcement, not merely the potential. For a Canadian example, consider *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583 (Div. Ct.), aff’d (1984), 45 O.R. (2d) 80 (C.A.), in which a power to censor was struck down (although on the ground that the limit on expression was so vague as not to be prescribed by law), as compared with *R. v. Ladouceur*, [1990] 1 S.C.R. 1257. In the latter case, Cory J. for the majority found that a police power to randomly stop motor vehicles was not invalid, but indicated that a constitutional remedy would be available in the case of improper applications of the power.

¹⁶² Tribe, *ibid.* at 80-81.

¹⁶³ The Supreme Court of Canada in *Smith*, *supra* note 14, did not undertake such an inquiry. If it had, it would seem clear that the issue was not really hypothetical, and certainly not in a way that affected the court’s ability to determine the merits. Smith had ordered and been refused liquor; the application of the statute to his action was clear and the issues he raised would not have been affected by further developments in the facts. Three of the four judges did, in fact, examine the merits on alternate reasons. See also Cromwell, *supra* note 19 at 74. Strayer, *supra* note 17 at 211-12 refers to the court’s consideration of the merits as evidence that Canadian courts have generally been willing to decide speculative issues, provided that they are adequately precise. He contrasts *Smith* with *Saumur v. Quebec (A.G.)* [1964] 2 S.C.R. 252, in which the issues were not sufficiently precise and were not answered by the court. In that case, the plaintiff sought a declaration that a statute prohibiting the distribution of literature abusive to religion was unconstitutional, and that it *did not* apply to the plaintiff’s activities. The latter issue could not be resolved in the absence of specific facts.

D. Implications of Section 24 Standing

William Bogart has argued that “[a]ttacks on statutes and subordinate legislation make easier targets for a claim to standing based primarily on the importance of adherence to the Charter.”¹⁶⁴ He gave as an example McNeil, whose interest in viewing movies, while “more fragile and tangential in a conventional sense than the movie operators pointing to their ledger sheets,”¹⁶⁵ nonetheless “had value, could be recognized and was inexorably connected to the very issues in the lawsuit—the boundaries of the power of the censor.”¹⁶⁶ Bogart went on to argue that there should be limits on the entitlement to challenge the constitutionality of legislation, giving as an example a challenge to a municipal by-law restricting the size of signs during town elections, suggesting that only residents or candidates should have status to challenge the constitutionality of this legislation: “[i]t may be that a piece of unconstitutional legislation is operating but its impact is limited and its “victims” seem to have freely accepted its consequences.”¹⁶⁷

Approaching standing as an issue of whether there has been, substantively, an infringement of the plaintiff’s *Charter* rights and freedoms would give the result Bogart seeks. In the *McNeil* scenario, the plaintiff who could provide evidence of a desire to view censored films could show an infringement of his or her own section 2(b) rights. The statute challenged was a provincial statute and would affect the right of all moviegoers resident in the province, as McNeil was. In the case of the municipal by-law, a person either deterred from placing signs in the municipality, or who resided in the municipality and whose receipt of information was affected, would have a basis for showing a violation of his or her *Charter* rights or freedoms. It is not a matter of coincidence that the result sought by Bogart is obtained. By examining the issue of standing in the context of asserting a violation of the *Charter*, the purposive interpretation of the right or freedom guides the court in

¹⁶⁴ *Supra* note 107 at 15.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

determining whether the asserted interest “[has] value, [can] be recognized and [is] inexorably connected to the very issues in the lawsuit.”¹⁶⁸

Consider the description of private standing by Laskin C.J.C. in *Borowski #1*,¹⁶⁹ when he asserted that a passionate believer in the right to use marijuana would not be entitled to challenge, in a declaratory action, a criminal prohibition of possession. If a plaintiff could make an arguable case that marijuana smoking was a *Charter*-protected activity that he or she wished to engage in, perhaps as part of a religious ceremony,¹⁷⁰ then there is a good case for private standing to challenge the law. If the activity which the plaintiff seeks to engage in can be clearly described, may be constitutionally protected, and is prohibited by the challenged law, then nothing is gained and something is lost by denying standing. Like *Somerville*, the case would determine an important constitutional issue of practical import, following a hearing in which the issue is identified in an adequately precise manner and pertinent evidence is presented. The case would not become better suited for adjudication by awaiting a prosecution. Indeed, a provincial court trial may well be less appropriate than a superior court action for the preparation and presentation of evidence on the religious and social policy issues that would be involved. A denial of standing would deny the full protection of *Charter* rights; individuals may be deterred by fear of criminal sanction from engaging in constitutionally protected activity.

Examining the matter in terms of the impact of granting standing on concerns of judicial economy and concerns relating to the requirements of the adversarial system leads to the same conclusion. The declaratory action could serve judicial economy by determining an issue of application in a multitude of penal proceedings. A multitude of *Charter* declaratory applications is unlikely because of the personal and financial cost of bringing the suit. The plaintiff's position as directly affected by the *Charter* rights involved, even if not by the penal aspects of

¹⁶⁸ *Ibid.* Later in the same article, at 22-23, Bogart gives qualified support for the result in *Big M*, *supra* note 7, arguing that standing should not be restricted to those whose own *Charter* rights are affected. Section 24 standing is one useful approach, but is not a substitute for other forms of standing.

¹⁶⁹ *Supra* note 100 and accompanying text.

¹⁷⁰ In *People v. Woody*, 61 Cal. 2d 716 (1964), discussed in Tribe, *supra* note 157 at 1247, the California Supreme Court held unconstitutional the application of a state criminal statute to native Americans using peyote in a religious ceremony. But the United States Supreme Court subsequently rejected such a claim in *Employment Div., Dept. of Human Resources (Ors.) Smith*, 494 U.S. 872 (1990).

the law, would support both his or her representativeness on this issue, and his or her ability to provide a concrete factual background.¹⁷¹

“Section 24” standing will not provide an adequate substitute for public interest standing. There will remain cases where it will be difficult to identify any party whose *Charter* rights have been infringed, as in *Thorson* and *Borowski #1*. Where widely-held *Charter* rights have been affected, as in *McNeil*, the cost and inconvenience of litigation may mean that section 24 parties will not be forthcoming. If they do come forward, these sort of cases may be nominal substitutes for public interest organizations. In these circumstances, it would seem appropriate to allow the organizations to bring the actions directly, rather than through such a ruse. At the very least, where organizations include among their members those who would have section 24 standing, this should give additional credence to their claim for standing.

“Section 24” standing is also not an adequate substitute for private standing. Again, the cost and inconvenience of litigation must be considered. Because of these factors, it is likely that many important *Charter* issues will be heard only if parties with traditional private interests are permitted to raise them. Only parties who suffer financially may be willing to make the financial investment to challenge the law. It would be unfortunate to lose the incidental, but substantial, societal benefits that may be obtained from this type of litigation.

Nonetheless, this form of standing provides a useful additional approach. By definition, section 24 standing focuses on rights and freedoms protected by the *Charter*, so that access to *Charter* review will depend upon a direct consideration of these vital, but non-traditional interests, rather than upon coincident traditional interests. Further, a development of the law concerning the ripeness of particular

¹⁷¹ *Little Sisters Book and Art Emporium, Canada (Minister of Justice)*[1992] B.C.J. No. 2351 (Q.L.) provides an analogy. The court refused to exercise its discretion against hearing a declaratory action. A retailer of gay and lesbian literature sought a declaration that customs legislation violated section 2(b) of the *Charter*. Its standing was not questioned, but the Minister of Justice sought to strike out the declaratory action, arguing that challenges to the legislation should be brought in the context of the review of specific customs decisions. Issues of ripeness or abstractness were thus raised. The court held that the nature of the challenge, which was to the customs process rather than a specific decision, was properly dealt with in a declaratory action and noted that the plaintiff retailer was in a good position to provide a concrete factual context at the trial. While the plaintiff possessed a traditional private interest (interference with economic transactions) as well as interference with its freedom of expression under the *Charter*, and its standing was not in issue, the issues and the nature of the court’s discretionary power are similar to those which would arise in the standing issue described in the text. The court was exercising a discretionary power as to whether it should hear the action and, in doing so, considered adversarial concerns relating to the provision of an adequate factual context for determination of the issue.

constitutional claims will increase our understanding of the nature of the rights and freedoms and of the dynamics that cause their infringement.

VI. CONCLUSION

Standing requirements are intended to ensure the efficient use of our scarce judicial resources. In doing this, they may control access to the court, but must allow sufficient access so that the court's function of overseeing government compliance with the *Charter* can be realized. Standing requirements are also intended to ensure that cases which come before the courts satisfy the requirements of the adversarial process, so that the court's jurisprudence will be realistic and useful. An issue must be defined with some precision, and be fully argued by a motivated advocate, if this is to be achieved. In some, but not all cases, the provision of a factual context, involving the application of the law subject to *Charter* challenge, will also contribute to this goal.

A review of the law pertaining to public interest and private standing in declaratory actions involving the *Charter* indicates that the Supreme Court of Canada has adopted an overly restrictive approach to standing that does not respond to these purposes. In *Canadian Council of Churches*, the court barred a public interest organization from access to *Charter* review of immigration laws because traditional private litigation could raise and in fact was raising similar issues. While the result in the case may have been consistent with the objectives of standing law, the Court's restrictive description of the availability of public interest standing was not. This restrictive approach was applied in *Hy and Zel's*, and public interest standing was denied in circumstances where adversarial concerns and the need for efficient use of judicial resources supported a grant of standing.

The *Irwin Toy* rule, applied in *Hy and Zel's* as a rule of standing, means that the traditional form of private standing is not available in *Charter* declaratory actions or other civil proceedings. The need to restrict this form of standing in absolute terms has not been justified by the Supreme Court of Canada. A purposive approach, as adopted by the dissent in *Hy and Zel's*, would better meet concerns about this form of standing.

While the approach in these cases needs rethinking, another development in standing law, described as "section 24" standing, holds promise. This is a new form of private standing and will not substitute for public interest standing in all cases, but may provide an alternative approach where widely-held *Charter* rights or freedoms are sought to be

enforced. It is hoped that in the future development of this concept, the courts will focus on both the purposes of standing rules and their obligation to enforce the *Charter*, and will develop *Charter*-directed guidelines for standing that will not be limited by a concern with the co-existence of other, more traditional, private interests.