

# BOOK REVIEW

## Boundaries of Judicial Review: The Law of Justiciability in Canada

BY LORNE SOSSIN

(Toronto: Carswell, 1999)<sup>1</sup> 246, xxxii pages

Never before has there been so much concern and debate about the appropriate role of the Canadian courts. Our sense of what kinds of disputes courts should be resolving is challenged by the nature of much high-profile litigation. Just this year, for example, a group of voters attempted to have the British Columbia Supreme Court set aside a provincial election for allegedly fraudulent assurances as to the existence of a budget surplus made during the course of an election campaign by a government seeking re-election.<sup>2</sup> Three social activists, two of them clergymen, defended a criminal charge of mischief for defacing a war memorial. They asserted that a memorial in which a sword is embedded in a cross amounts to blasphemy and a condonation of war.<sup>3</sup> Conrad Black is apparently persisting in his action in the Ontario courts to hold the Prime Minister accountable legally for blocking Mr. Black's efforts to become a member of the House of Lords.<sup>4</sup> Are these issues that are really suitable for judicial evaluation?

These discrete instances aside, the most pervasive controversy remains the legitimacy of the authority that the courts have exercised since 1982 with the advent of the *Canadian Charter of Rights and Freedoms*.<sup>5</sup> Was it a "good thing" that the courts were assigned the task of policing legislation and governmental action by reference to the standards enshrined in the *Charter*?

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<sup>1</sup> [hereinafter *Boundaries of Judicial Review*].

<sup>2</sup> For the judgment allowing this cause of action to proceed, see *Friesen v. Hammel*, [1997] W.W.R. 268 (B.C. S.C.).

<sup>3</sup> For an account and commentary, see M. Valpy, "When it's not Just War" *The Globe and Mail* (29 May 2000) R7. The three activists were later acquitted.

<sup>4</sup> See *Black v. Canada (Prime Minister)* (2000), 47 O.R. (3d) 532 (Sup. Ct.).

<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

Have the courts been exercising this new-found power with too little restraint? Have they been captured inappropriately by various interests groups seeking to achieve political ends through judicial rather than political processes?

Indeed, some argue that the *Charter* and the courts' role under it are largely responsible for the heightened expectations that many litigants now have of the judicial process in other situations where *Charter* values are not at stake. In part, this may explain the phenomenon of the three specific examples already provided. It may also account for the Supreme Court's expansive view of the reach of judicially enforceable constitutional norms as reflected in the resurrection of the preamble to the *Constitution Act, 1867*<sup>6</sup> as a potential source of constitutionally enforceable rights<sup>7</sup> and, even more notably, in the terms of the Court's judgment in *Reference re Secession of Quebec*.<sup>8</sup> In particular, the Court's articulation in that reference of four underlying constitutional principles<sup>9</sup> has begun to spawn new forms of or bases for litigation. This is exemplified most dramatically by the Ontario Divisional Court's use of the principle of respect for minorities as a basis for judicial review of the Ontario government's decision to close the largely francophone Hôpital Montfort in Ottawa.<sup>10</sup>

Given this significant evolution in the character of the disputes dealt with by Canadian courts, Lorne Sossin's *Boundaries of Judicial Review: The Law of Justiciability in Canada* has appeared at a particularly opportune time. The sustained nature of the challenges to judicial authority has called for a thorough examination of the underlying principle of justiciability and what makes a dispute suitable for judicial resolution. This work also fills a gap in Canadian legal literature to the extent that it is the first

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<sup>6</sup> (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C., 1985, App. II, No. 5.

<sup>7</sup> In particular, see the judgment of Lamer C.J.C. in *Reference re Remuneration of Judges of Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

<sup>8</sup> [1998] 2 S.C.R. 217.

<sup>9</sup> *Ibid.* at 248: "federalism, democracy, constitutionalism and the rule of law, and respect for minority rights."

<sup>10</sup> *Lalonde v. Ontario (Commission de restructuration des services de santé)* (1999), 181 D.L.R. (4th) 263 (Ont. Sup. Ct.).

sustained or book-length consideration of the concept of justiciability as developed by our courts. Moreover, to the extent that Sossin's research has revealed a Canadian approach to issues subsumed within a concept of justiciability that finds no precise parallels in other comparable common law jurisdictions, this is a work that will be of considerable worth to those outside Canada with an interest in the limits on the tasks that can be assigned to or assumed by, and performed well and appropriately by, courts as we generally conceive of them functioning in a common law setting.

One of the other singular contributions that Sossin has made in the writing of this book is the very identification and bringing together of various strands of Canadian jurisprudence in both public and private law that constitute the principal sources of our law of justiciability. Indeed, until comparatively recently, the expression or word was one that surfaced seldom in Canadian case law. Thus, even with modern aids such as searchable databases, there was no easy way of locating various precedents in which issues of justiciability had surfaced. There was no common language which our judges have used invariably to deal with such problems, and, indeed, on many occasions, what at root were issues of justiciability were categorized under other headings. Traditional tools for performing effective case law research were simply not reliable. Different techniques were required, and it is a tribute to Sossin's depth of knowledge, imagination, and hard work that we now have a work of reference for occasions when such issues surface.

Of course, as Sossin himself acknowledges in the first chapter, his task was not made easier by the fact that, even among those who had paid specific attention to the topic in the past, there had been no consensus as to the precise boundaries of the principles of justiciability.<sup>11</sup> Moreover, most (including Sossin) seem to accept that the delineation of what is appropriate for judicial determination cannot be the subject of precise philosophical, empirical or objective inquiry but also depends on normative assumptions and a broad range of contextual considerations. To concede this point, one only has to reflect

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<sup>11</sup> *Boundaries of Judicial Review*, *supra* note 1 at 2.

again on the extent to which our experience with and, in most instances, expectations of the judicial process have changed in Canada since the *Charter*.

A further example of justiciability concerns, which features prominently in Sossin's book, is provided by the considerable divergence on whether courts in the common law tradition should be involved in reference cases; that is, in the giving of purely advisory opinions to governments on the law. Indeed, this is a divergence which exists in the world of theory and in the laws of Canada, the United States, the United Kingdom, and Australia, to cite the jurisdictions used in the book for illustrative purposes. It is a divergence which is conditioned by the relevant constitutional norms of the various legal systems as well as more pragmatic considerations such as the extent to which courts can deal effectively with questions put to them in abstract terms and whether scarce judicial resources are deployed appropriately in allowing such cases to be presented.

In large measure, Sossin is content to use the rather more developed organizing principles of United States case law on justiciability as a framework for presenting and analyzing the relevant Canadian authorities. The relevant American doctrines are those of "standing, mootness, ripeness, and political questions,"<sup>12</sup> and the latter three constitute the three core chapters of this work. However, Sossin rejects standing as such as a component of justiciability for the reason that standing is about *who* may bring a case to the courts rather than *what* the courts may decide.<sup>13</sup> Nonetheless, to the extent that Canadian law of public interest standing requires judicial consideration of the extent to which the public interest litigant is raising a justiciable issue, he acknowledges quite correctly<sup>14</sup> that the jurisprudence on standing will quite often include relevant discussion of principles of justiciability.

Indeed, this is true of not just one but all three elements of the Canadian law of public interest standing. When Le Dain J. (for the Supreme Court in *Finlay v. Canada (Minister of*

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<sup>12</sup> *Ibid.* at 21.

<sup>13</sup> *Ibid.* at 5.

<sup>14</sup> *Ibid.* at 6.

*Finance*)<sup>15</sup> spoke of justiciability as one of the matters that had to be addressed in determining whether a public interest litigant should be accorded standing as a matter of judicial discretion, he specifically referred to the need to consider whether the question raised was one that was in and of itself “appropriate for judicial determination.”<sup>16</sup> Was it a question that raised legal issues suitable for the court’s consideration, such as the interpretation of a statute or an agreement?

However, each of the other two elements of Le Dain J.’s test (which continues to be applied in public interest standing cases) are also very much at the heart of the broader conception of justiciability that Sossin accepts for the purpose of his work. For Sossin, justiciability is not just about whether an issue is a “legal” one in abstract terms but it is also concerned with whether it will be presented in a manner which enables appropriate judicial resolution and whether or not it is timely for the court to take the case. These same considerations are embedded in the other two limbs of the *Finlay* test:

The judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody is addressed by the requirements ... that there be a serious issue raised and that a citizen have a genuine interest in the issue. ... The judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue ... is addressed by the requirement ... that there be no other reasonable and effective manner in which the issue may be brought before the court.<sup>17</sup>

Thus, while the emphasis might be different, many of the relevant concerns at the very least overlap as between the two domains of standing and justiciability. It therefore is not surprising that references to the standing cases recur throughout the book and why Sossin returns specifically to the standing cases in a separate section in Chapter 5, “Procedural Dimensions of Justiciability.”<sup>18</sup> At a theoretical level, this does, however, raise questions as to whether Sossin’s superficially attractive

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<sup>15</sup> [1986] 2 S.C.R. 607 [hereinafter *Finlay*].

<sup>16</sup> *Boundaries of Judicial Review*, *supra* note 1 at 4.

<sup>17</sup> *Finlay*, *supra* note 15 at 633.

<sup>18</sup> *Boundaries of Judicial Review*, *supra* note 1 at 202-06.

differentiation between standing and justiciability on the basis of “who” and “what” can withstand scrutiny. More particularly, it would have been informative to have heard a little more about why American justiciability doctrine actually includes standing.

There are also other instances in which questions can be raised or issue taken with the selection of what to include within the concept of justiciability and what to leave out. Thus, in Chapter 2, “The Doctrine of Ripeness,” the author asserts that Canadian law has developed various strands of a ripeness doctrine, all of which are founded on the principle that purely hypothetical questions are not justiciable in a Court.<sup>19</sup>

This statement seems, however, to be undercut by his inclusion of cases in which the court rejected an application for judicial review simply on the basis that there was an alternative remedy or avenue of recourse available. In many of these cases the court did not dismiss the application because the questions raised were hypothetical at least in the sense of not being able to “be answered with any assurance of correctness.”<sup>20</sup> Rather, the concern was with the allocation of scarce judicial resources and respect for legislative choice. Given that, there must be some question as to whether such cases fit readily within the author’s concept of “justiciability” and, even if they do, why Sossin does not also feature the case law on collateral attack<sup>21</sup> and, more generally, undue delay in seeking relief, case law which is based on those same concerns.

Similarly, there is room for debate about the contents of Chapter 6<sup>22</sup> which is aimed at demonstrating, notwithstanding the lack of explicit acknowledgment, that the Supreme Court has in effect adopted a form of “political questions” doctrine. My sense is that that argument could be made even more strongly by reference to the continued common law and statutory protections

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<sup>19</sup> *Ibid.* at 31.

<sup>20</sup> As defined by Lamer C.J.C. in *Reference re Excise Tax Act (Canada)*, (*sub nom. Reference re Goods & Services Tax*), [1992] 2 S.C.R. 445, cited in *Boundaries of Judicial Review*, *supra* note 1 at 27.

<sup>21</sup> There is in fact a mention of the collateral attack jurisprudence but only for a more general statement: see *Boundaries of Judicial Review*, *supra* note 1 at 84.

<sup>22</sup> *Ibid.* at 227-38.

afforded to the “Crown” in litigation, protections which at root are often concerned with putting certain issues (either directly or by procedural and evidential rules such as “executive privilege”) beyond the domain of the courts.

However, these are for the most part minor quibbles particularly in the case of Chapter 6, which is probably the strongest and most ground-breaking in the book. In demonstrating the extent to which Canadian courts refuse to deal with issues for reasons that correspond to the American “political questions” doctrine, Sossin undermines any continued acceptance at face value of Wilson J.’s oft-quoted statement in *Operation Dismantle Inc. v. R.*<sup>23</sup> that Canada does not have a “political questions” restriction on justiciability. From this point on, surely the task of our courts will be to recognize the reality that Sossin has exposed and either to reevaluate that reality when cases arise or, more probably, to develop a framework within which such concerns can be dealt with consistently and appropriately.

Indeed, for these purposes, the courts would do well to give serious consideration to the multi-factored approach that Sossin outlines in his conclusion to this important chapter as a basis for identifying those combinations of issues and context which contribute to make a matter non-justiciable as a “political” question:

In the case of the political questions analysis, a court should similarly consider a range of contextual factors, including evidence of a statutory intent to assign the dispute to another branch of government, the likelihood that the dispute could be resolved through political means, the nature of the issue and its seriousness for the party seeking judicial review.<sup>24</sup>

While such an approach does not produce automatic answers, it may at least serve to ensure that most judges are on the same page and lead to the evolution of a rather more sophisticated and appropriately detailed regime for dealing with such concerns. Indeed, Sossin himself is shrewd enough to recognize that his proposed framework for analysis is but a starting point, not an end point in the rationalization of this area of the law.

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<sup>23</sup> [1985] 1 S.C.R. 441 at 472.

<sup>24</sup> *Ibid.* at 200.

Other strengths of this work include Chapter 3, “The Doctrine of Mootness,”<sup>25</sup> which is comprehensive in its analysis of the issue, at least in the public law domain, and usefully prescriptive. Also, both the introductory and concluding chapters serve the normal purposes of such chapters very well.

Aside from the concerns expressed above about the delineation of the boundaries of justiciability, I think it is also fair to say that the work pays too little attention to the problem of justiciability in private law. Indeed, perhaps subconsciously, Sossin betrays his ambivalence on this in the two part title of his work. *Boundaries of Judicial Review* suggests a book confined to public law issues, while *The Law of Justiciability in Canada* holds out the promise of general coverage of the issue. The consequence is at times uneasy and frustrating compromise. As a traditionalist in such matters, I also lament the obvious absence (particularly in the case of Chapter 2) of an experienced legal editor with responsibility for careful proofreading and the removal of unnecessary repetition. It could and should have been a cleaner and tighter work. However, when measured against the book’s obvious contributions, these concerns are more than offset and can all be addressed in what I trust will be an automatic second edition. This is a field that cannot stand still and Lorne Sossin has had the wit to realize it in producing a work which occupies with distinction a previously unoccupied field.

David Mullan  
Osler, Hoskin & Harcourt  
Professor of Constitutional and Administrative Law  
Faculty of Law, Queen’s University

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<sup>25</sup> *Ibid.* at 93-130.