Canadian Council of Churches *v*. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236

**The Canadian Council of Churches** *Appellant*

*v.*

**Her Majesty The Queen and**

**The Minister of Employment and Immigration** *Respondents*

and

**The Coalition of Provincial Organizations**

**of the Handicapped, The Quebec Multi**

**Ethnic Association for the Integration of**

**Handicapped People, League for Human Rights**

**of B'Nai Brith Canada, Women's Legal Education**

**and Action (LEAF) and Canadian Disability**

**Rights Council (CDRC)** *Interveners*

Indexed as: Canadian Council of Churches *v.* Canada (Minister of Employment and Immigration)

File No.: 21946.

1991: October 11; 1992: January 23.

Present: La Forest, L'Heureux‑Dubé, Sopinka, Gonthier, Cory, Stevenson and Iacobucci JJ.

on appeal from the federal court of appeal

*Standing ‑‑ Public interest group ‑‑ Immigration Act amendments making provisions with respect to determination of refugee status more stringent ‑‑ Public interest group active in work amongst refugees and immigrants ‑‑ Action commenced to challenge constitutionality of Act under the Charter ‑‑ Whether standing should be granted to challenge provisions ‑‑ Immigration Act, 1976, S.C. 1976-77, as am. by S.C. 1988, c. 35 and c. 36 ‑‑ Canadian Charter of Rights and Freedoms, s. 7.*

The Canadian Council of Churches is a federal corporation which represents the interests of a broad group of member churches including the protection and resettlement of refugees. The Council had expressed its concerns about the refugee determination process in the proposed amendments to the *Immigration Act, 1976* (which later came into force on January 1, 1989) to members of the government and to the parliamentary committees considering the legislation. These amendments changed the procedures for determining whether applicants came within the definition of a Convention Refugee.

The Council sought a declaration that many, if not most, of the amended provisions violated the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to bring the action and had not demonstrated a cause of action. The application to strike out was dismissed at trial but to a large extent was granted on appeal. Appellant appealed and respondents cross-appealed. At issue here is whether the appellant should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended *Immigration Act, 1976*.

*Held*: The appeal should be dismissed; the cross-appeal should be allowed.

Recognition of the need to grant public interest standing, whether because of the importance of public rights or the need to conform with the *Constitution Act, 1982*, in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. A balance must be struck between ensuring access to the courts and preserving judicial resources. The courts must not be allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well‑meaning organizations pursuing their own particular cases.

Status has been granted to prevent the immunization of legislation or public acts from any challenge. Public interest standing, however, is not required when it can be shown on a balance of probabilities that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court, while they should be given a liberal and generous interpretation, need not and should not be expanded.

Three aspects of the claim must be considered when public interest standing is sought. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the Court?

Although the claim at issue made a sweeping attack on most of the many amendments to the Act, some serious issues as to the validity of the legislation were raised. Appellant had a genuine interest in this field. Each refugee claimant, however, has standing to initiate a constitutional challenge to secure his or her own rights under the *Charter* and the disadvantages faced by refugees as a group do not preclude their effective access to the court. Many refugee claimants can and have appealed administrative decisions under the statute and each case presented a clear concrete factual background upon which the decision of the court could be based. The possibility of the imposition of a 72‑hour removal order against refugee claimants does not undermine their ability to challenge the legislative scheme. The Federal Court has jurisdiction to grant injunctive relief against a removal order. Given the average length of time required for an ordinary case to reach the initial "credible basis" hearing, there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim.

**Cases Cited**

**Considered:** *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435; *Australian Conservation Foundation Incorporated v. Commonwealth of Australia* (1980), 28 A.L.R. 257; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; **referred to:** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

**Statutes and Regulations Cited**

*Canadian Bill of Rights*, R.S.C., 1985, App. III.

*Canadian Charter of Rights and Freedoms*, Preamble, s. 7.

*Constitution Act, 1982*, s. 52(1).

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

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Australia. Australian Law Reform Commission. Discussion Paper No. 4. *Access to the Courts--I: Standing: Public Interest Suits.* Sydney: 1977.

Canada. Auditor General. *Report of the Auditor General of Canada to the House of Commons, Fiscal Year Ended 31 March 1990.* Ottawa: Minister of Supply and Services Canada, 1990.

Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, New York: Foundation Press, Inc., 1988.

*United States Constitution*, Article III, s. 2(1).

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 534, 36 F.T.R. 80, 68 D.L.R. (4th) 197, 106 N.R. 61, 46 C.R.R. 290, 44 Admin. L. R. 56, 10 Imm. L. R. (2d) 81, allowing an appeal from a judgement of Rouleau J., [1989] 3 F.C. 3, 27 F.T.R. 129, 41 C.R.R. 152, 38 Admin. L. R. 269, 8 Imm. L. R. (2d) 298, dismissing an application to strike out. Appeal dismissed and cross-appeal allowed.

*Steven M. Barrett*, *Barb Jackman* and *Ethan Poskanzer*, for the appellant.

*Graham R. Garton*, for the respondents.

*Anne M. Molloy*, for the interveners The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration of Handicapped People.

*David Matas* and *Marvin Kurz*, for the intervener League for Human Rights of B'Nai Brith Canada.

*Mary Eberts* and *Dulcie McCallum*, for the interveners Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC).

//*Cory J.*//

The judgment of the Court was delivered by

Cory J. -- At issue on this appeal is whether the Canadian Council of Churches should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended *Immigration Act, 1976* which came into effect January 1, 1989.

Factual Background

The Canadian Council of Churches (the Council), a federal corporation, represents the interests of a broad group of member churches. Through an Inter-Church Committee for Refugees it co-ordinates the work of the churches aimed at the protection and resettlement of refugees. The Council together with other interested organizations has created an organization known as the Concerned Delegation of Church, Legal, Medical and Humanitarian Organizations. Through this body the Council has commented on the development of refugee policy and procedures both in this country and in others.

In 1988 the Parliament of Canada passed amendments to the *Immigration Act, 1976*, S.C. 1976‑77, c. 52, by S.C. 1988, c. 35 and c. 36. The amended act came into force on January 1, 1989. It completely changed the procedures for determining whether applicants come within the definition of a Convention Refugee. While the amendments were still under consideration the Council expressed its concerns about the proposed new refugee determination process to members of the government and to the parliamentary committees which considered the legislation. On the first business day after the amended act came into force, the Council commenced this action, seeking a declaration that many if not most of the amended provisions violated the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, R.S.C., 1985, App. III. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to bring the action and had not demonstrated a cause of action.

Proceedings in the Courts Below

*Federal Court, Trial Division, Rouleau J.*, [1989] 3 F.C. 3

Rouleau J. dismissed the application. His judgment reflects his concern that there might be no other reasonable, effective or practical manner to bring the constitutional question before the Court. He was particularly disturbed that refugee claimants might be faced with a 72-hour removal order. In his view, such an order would not leave sufficient time for an applicant to attempt either to stay the proceedings or to obtain an injunction restraining the implementation removal order.

*Federal Court of Appeal*, [1990] 2 F.C. 534

MacGuigan J.A. speaking for a unanimous Court allowed the appeal and set aside all but four aspects of the statement of claim.

In his view the real issue was whether or not there was another reasonably effective or practical manner in which the issue could be brought before the Court. He thought there was. He observed that the statute was regulatory in nature and individuals subject to its scheme had, by means of judicial review, already challenged the same provisions impugned by the Council. Thus there was a reasonable and effective alternative manner in which the issue could properly be brought before the Court.

He went on to consider in detail the allegations contained in the statement of the claim. He concluded that some were purely hypothetical, had no merit and failed to disclose any reasonable cause of action. He rejected other claims on the grounds that they did not raise a constitutional challenge and others on the basis that they raised issues that had already been resolved by recent decisions of the Federal Court of Appeal.

He granted the Council standing on the following matters raised on the statement of claim.

1. The claim in paragraph 3(*c*) of the statement of claim which alleges that the requirement that detainees obtain counsel within 24 hours from the making of a removal order violates s. 7 of the *Charter* (at p. 558);

2. The claim in paragraph 6(*a*) which alleges that provisions temporarily excluding claimants from having claims considered violate s. 7 of the *Charter* (at p. 554);

3. The claim in paragraph 10(*a*) which alleges that provisions allowing the removal of a claimant within 72 hours leave too short a time to consult counsel and violate s. 7 of the *Charter* (at p. 561);

4. The claim in paragraph 14(*c*) which alleges that the provisions permitting the removal of a claimant with a right to appeal within 24 hours if a notice of appeal is not filed in that time violate the Constitution (at p. 562).

The appellant seeks to have the order of the Federal Court of Appeal set aside. The respondents has cross-appealed to have the remaining positions of the statement of claim struck out.

Issues

The principal question to be resolved is whether the Federal Court of Appeal erred in holding that the Canadian Council of Churches should be denied standing to challenge many of the provisions of the *Immigration Act, 1976*.

The secondary issue is whether the Federal Court of Appeal erred in holding that certain allegations in the statement of claim failed to disclose a cause of action and others were hypothetical or premature.

The Approaches Taken in Other Common Law Jurisdictions to Granting Parties' Status to Bring Action

It may be illuminating to consider by way of comparison the position taken in other common law jurisdictions on this issue of standing. The highest Courts of the United Kingdom, Australia and the United States have struggled with the problem. They have all recognized the need to balance the access of public interest groups to the Courts against the need to conserve scarce judicial resources. It will be seen that each of these jurisdictions has taken a more restrictive approach to granting status to parties than have the courts in Canada.

*The United Kingdom*

Traditionally only the Attorney General of the United Kingdom had standing to litigate matters for the protection of public rights. The Attorney General was not a member of cabinet and as a result had a greater appearance of independence from the political branch of government than holders of the same office in other jurisdictions. As well, it must be remembered that in the United Kingdom, Parliament is supreme. Thus there is no prospect of the courts' finding that the government has acted unconstitutionally as there is in Canada and the United States.

The English courts have developed three exceptions to the rule that only the Attorney General can represent the interests of the public. First an individual may have standing to litigate a question of public right if the impugned activity simultaneously affects the individual's private rights. Second, an individual may bring an action claiming a violation of a public right if that individual suffered special damage as a result of the impugned activity. Thirdly, a local authority may bring an action where it considers it necessary to protect or promote the interests of the citizens within its borders.

These exceptions were affirmed in *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, at p. 506. In that case the plaintiff sought standing to obtain an injunction against a postal union. It was argued that the union's announced plan that it would not process any mail for South Africa for a period of one week would violate the criminal law. The Attorney General refused to bring an action against the union. Yet, the House of Lords refused to grant standing to Gouriet. It held that he could only litigate the issue in a relator action brought by the Attorney General.

There are now various statutes in the United Kingdom which provide that a Court may in certain circumstances grant an applicant leave to bring an action. Recent cases have turned upon the wording of the particular statutory provisions and as a result they are of limited assistance in consideration of the issue in Canada.

*Australia*

The Australian Law Reform Commission published a paper on the question of public interest standing in 1977, (*Access to the Courts -- I: Standing: Public Interest Suits* (No. 4, 1977)). The report reviewed circumstances which had resulted in demand for increased access to the Courts in common law jurisdictions. It identified the first as the introduction of legal aid which permitted socially-disadvantaged citizens to assert their private legal rights. The second was the provision of legal representation for "diffuse" interest groups in areas such as consumer and environmental protection. It noted that these organizations often raise issues that are not connected with the private rights or interests in property which would provide the traditional common law basis for standing. The Commission put forward three alternative solutions to the question of when standing should be granted. They were as follows:

(1)  Open Door Policy. This would allow any person to take any proceedings in the public law area and reliance would be placed on the discipline of costs to limit the number of these cases.

(2)  United States Method. The so called United States method would enable the Courts to screen the proposed plaintiffs as a part of the determination of the particular case.

(3)  Preliminary Screening. This method would institute a preliminary screening procedure which would be undertaken by the Court before the substantive issue was considered.

The Commission recommended the open-ended approach. The report did not discuss the relative merits of introducing reforms by means of legislation or through the evolution of the common law. Nor did it address concerns as to what should be the role of the courts, a matter which is crucial to the American approach to the question.

Subsequent to the publication of the Law Reform Report the High Court of Australia considered the problem in *Australian Conservation Foundation Incorporated v. Commonwealth of Australia* (1980), 28 A.L.R. 257 (H.C.). The Foundation was an environmental group very active in Australia. It challenged a decision made by the Government of Australia to establish a resort area. The challenge was based upon environmental legislation which, the majority of the High Court concluded, did not create any private rights. It determined the only duty the legislation imposed was a public one cast upon the Minister, which was not owed to any one individual. The application of the Conservation Foundation for status as a party was therefore rejected.

Gibbs J. put the position in this way at p. 270:

A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

He specifically rejected the Foundation's claim that it had a special interest either as a result of its communication with the Government on the issue or because its membership had chosen to specify environmental protection as one of its objects.

In concurring reasons Mason J. observed that the Canadian approach as expressed in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, was directly contradicted in Australia by cases holding that the taxpayer has no standing to challenge the validity of a statute which authorizes the appropriation or expenditure of funds in a suit for declaratory relief.

Thus, despite the report and recommendation of the Australian Law Reform Commission, the position taken in that country on the issue of granting status is far more restrictive than it is in Canada.

*The United States of America*

Article III of the Constitution of the United States is the source of the authority of Federal Courts which extends to all "cases and controversies". This provision provides:

**Section 2, Clause 1. Subjects of jurisdiction**. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority,--to all Cases affecting Ambassadors, other public Ministers and Consuls,--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;-- between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The United States Supreme Court has interpreted this provision as restricting access to the courts to litigants who have suffered a personal injury which they wish to redress. The leading decision on the question is *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In that case, a group of citizens challenged the Federal Government's decision to give property to a Christian educational institution without charge. It was the group's contention that the gift of state property violated the Constitution. It claimed standing on the basis that each of their members was an individual taxpayer and that the gift constituted an improper use of their taxes. Rehnquist J. gave the reasons for the majority denying standing to the group. He interpreted Article III as demanding the fulfilment of three conditions. In order to secure standing a plaintiff must show:

(1)  "he has personally suffered some actual or threatened injury" as a result of the impugned act,

(2)  that the injury "fairly can be traced to the challenged action" and

(3)  that the injury is "likely to be redressed by a favorable decision".

To these constitutional requirements for standing, Rehnquist J. added "prudential principles". He determined that a court may exercise its discretion to deny standing even if all the above conditions were met if the plaintiff presents "abstract questions of wide public significance", rests its claim on the rights of third parties, or does not present a claim falling within the "zone of interests" protected by the law in question.

He observed that, "This Court repeatedly has rejected claims of standing predicated "`on the right, possessed by every citizen, to require that the Government be administered according to law'. . . ." He expressed his concern that the Federal Court should not overstep its traditional role by entering into conflict with the legislative branch over claims asserted by individuals who have not suffered a "cognizable injury".

Tribe has referred to the position taken by the Supreme Court of the United States as "one of the most criticized aspects of constitutional law". (See *American Constitutional Law* (2nd ed.), at p. 110.) However, he carefully noted that the court's position was a legitimate approach to standing based upon a coherent view of the role of the courts. He observed that a narrow rule of standing enhanced the view that the Federal Court should determine issues between private parties and not take on a role "as the branch of government best able to develop a coherent interpretation of the Constitution . . . ." He noted that the courts' resistance to hearing cases brought by those without a personal interest in the impugned activity of the state is founded on a policy of deference to the legislature. He observed that the Congress may, if it wishes, pass legislation which allows for more generous standing than that which the court has discretion to award since Article III limits the court's discretion on standing but not that of the legislature.

Once again it will be seen that the principles enunciated by the United States Supreme Court on standing are more restrictive than those that are applicable in Canada.

The Question of Standing in Canada

Courts in Canada like those in other common law jurisdictions traditionally dealt with individuals. For example, courts determine whether an individual is guilty of a crime; they determine rights as between individuals; they determine the rights of individuals in their relationships with the state in all its various manifestations. One great advantage of operating in the traditional mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not overextended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing.

On the other hand there can be no doubt that the complexity of society has spawned ever more complex issues for resolution by the courts. Modern society requires regulation to survive. Transportation by motor vehicle and aircraft requires greater regulation for public safety than did travel by covered wagon. Light and power provided by nuclear energy requires greater control than did the kerosene lamp.

The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the *Charter* this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; *Thorson v. Attorney General of Canada*, *supra*, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575. Writing for the majority in *Borowski*, *supra*, Martland J. set forth the conditions which a plaintiff must satisfy in order to be granted standing, at p. 598:

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

Those then were the conditions which had to be met in 1981.

In 1982 with the passage of the *Charter* there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. The *Charter* enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those *Charter* rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the *Charter*. By its terms the *Charter* indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, *Charter* rights might be unenforced and *Charter* freedoms shackled. The *Constitution Act, 1982* does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with the law.

The rule of law is recognized in the preamble of the *Charter* which reads:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

The rule of law is thus recognized as a corner stone of our democratic form of government. It is the rule of law which guarantees the rights of citizens to protection against arbitrary and unconstitutional government action. This same right is affirmed in s. 52(1) which states:

**52.** (1)  The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Parliament and the legislatures are thus required to act within the bounds of the constitution and in accordance with the *Charter*. Courts are the final arbitors as to when that duty has been breached. As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the *Charter*.

The question of standing was first reviewed in the post-*Charter* era in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. In that case Le Dain J. speaking for the Court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for "the limits of statutory authority".

The standard set by this Court for public interest plaintiffs to receive standing also addresses the concern for the proper allocation of judicial resources. This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation. In *Finlay*, *supra*, it was specifically recognized that the traditional concerns about widening access to the courts are addressed by the conditions imposed for the exercise of judicial discretion to grant public interest standing set out in the trilogy. Le Dain J. put it in this way, at p. 631:

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

Should the Current Test for Public Interest Standing be Extended

The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982*. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations[[1]](#footnote-1)\* pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

The Application of the Principles for Public Interest Standing to this Case

It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

(1)  *Serious Issue of Invalidity*

It was noted in *Finlay*, *supra*, that the issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge. In the case at bar the Federal Court of Appeal in its careful reasons turned its attention to the question of whether the amended statement of claim raised a reasonable cause of action. The claim makes a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the *Immigration Act, 1976*. Some of the allegations are so hypothetical in nature that it would be impossible for any court to make a determination with regard to them. In many ways the statement of claim more closely resembles submissions that might be made to a parliamentary committee considering the legislation than it does an attack on the validity of the provisions of the legislation. No doubt the similarity can be explained by the fact that the action was brought on the first working day following the passage of the legislation. It is perhaps unfortunate that this court is asked to fulfil the function of a motion's court judge reviewing the provisions of a statement of claim. However, I am prepared to accept that some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation.

(2)  *Has the Plaintiff Demonstrated a Genuine Interest*?

There can be no doubt that the applicant has satisfied this part of the test. The Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

(3)*Whether there is Another Reasonable and Effective Way to Bring the Issue Before the Court*

It is this third issue that gives rise to the real difficulty in this case. The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the *Charter*. The applicant Council recognizes the possibility that such actions could be brought but argues that the disadvantages which refugees face as a group preclude their effective use of access to the court. I cannot accept that submission. Since the institution of this action by the Council, a great many refugee claimants have, pursuant to the provisions of the statute, appealed administrative decisions which affected them. The respondents have advised that nearly 33,000 claims for refugee status were submitted in the first 15 months following the enactment of the legislation. In 1990, some 3,000 individuals initiated claims every month. The Federal Court of Appeal has a wide experience in this field. MacGuigan J.A., writing for the court, took judicial notice of the fact that refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis. I accept without hesitation this observation. It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear concrete factual background upon which the decision of the court could be based.

The appellant also argued that the possibility of the imposition of a 72-hour removal order against refugee claimants undermines their ability to challenge the legislative scheme. I cannot accept that contention. It is clear that the Federal Court has jurisdiction to grant injunctive relief against a removal order: see *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302 (F.C.A.). Further, from the information submitted by the respondents it is evident that persons submitting claims to refugee status in Canada are in no danger of early or speedy removal. As of March 31, 1990 it required an average of five months for a claim to be considered at the initial "credible basis" hearing. It is therefore clear that in the ordinary case there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim. However, even where the claims have not been accepted "the majority of removal orders affecting refugee claimants have not been carried out". (See *Report of the Auditor General of Canada to the House of Commons, Fiscal Year Ended 31 March 1990*, at pp. 352-53, paragraph 14.43.) Even though the Federal Court has been prepared in appropriate cases to exercise its jurisdiction to prevent removal of refugee claimants there is apparently very little need for it to do so. The means exist to ensure that the issues which are sought to be litigated on behalf of individual applicants may readily be brought before the court without any fear that a 72‑hour removal order will deprive them of their rights.

From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. The Council must, therefore, be denied standing on each of the counts of the statement of claims. This is sufficient to dispose of the appeal. The respondents must also succeed on their cross-appeal to strike out what remained of the claim as the plaintiff council does not satisfy the test for standing on any part of the statement of claim. I would simply mention two other matters.

Intervener Status

It has been seen that a public interest litigant is more likely to be granted standing in Canada than in other common law jurisdictions. Indeed if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. Yet the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained.

Review of the Statement of Claim to Determine if it Discloses a Cause of Action

In light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail. Had it been necessary to do so I would have had some difficulty agreeing with all of the conclusions of the Federal Court of Appeal on this issue. Perhaps it is sufficient to set out once again the principles which should guide a court in considering whether a reasonable cause of action has been disclosed by a statement of claim. It was put in this way by Wilson J. giving the reasons of this Court in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:

. . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

If these guidelines had been followed a different result would have been reached with regard to some aspects of this statement of claim. A party who did have standing might well find in this vast broadside of grievances some telling shots that would form the basis for a cause of action somewhat wider than that permitted by the Federal Court of Appeal.

Disposition of the Result

In the result I would dismiss the appeal and allow the cross-appeal on the basis that the plaintiff does not satisfy the test for public interest standing. Both the dismissal of the appeal and the allowance of the cross-appeal are to be without costs.

*Appeal dismissed and cross-appeal allowed.*

*Solicitors for the appellant: Sack Goldblatt Mitchell, Toronto.*

*Solicitor for the respondents: John C. Tait, Ottawa.*

*Solicitors for the interveners The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration of Handicapped People: Advocacy Resource Centre for the Handicapped, Toronto.*

*Solicitors for the intervener League for Human Rights of B'Nai Brith Canada: David Matas, Winnipeg, and Dale Streiman and Kurz, Brampton.*

*Solicitors for the interveners Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC): Tory, Tory, DesLauriers & Binnington, Toronto and Dulcie McCallum, Victoria.*

1. \* See Erratum [2012] 1 S.C.R. iv [↑](#footnote-ref-1)