Minister of Justice v. Borowski: The Inapplicability of the Standing Rules in Constitutional Litigation

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In the *Borowski* case, the Supreme Court confirms the trend toward more lenient rules of standing in division of powers litigation first adopted in cases such as *Thorson* and *McNeil*. The author argues that this trend is disturbing and ought to be reversed. The courts typically confuse issues of standing with the substantive merits of a case. Oftentimes this confusion permits the doctrine of standing to be used as a *de facto* merits lever, allowing a court to dismiss cases it simply does not wish to hear. Under the existing law of standing, the courts permit private parties to challenge statutes on the grounds of the constitutional division of legislative powers. By and large, the private parties who take advantage of this privilege are corporations and individual businessmen. The author asserts that these parties are not appropriate challengers because often their motives are improper. They do not seek to have constitutional norms enforced. They seek to avoid government regulation by having the impugned statute declared *ultra vires*. They then hope that the other level of government will be more *laissez-faire* in its regulatory undertakings. The courts are not the proper forum to attain such a "remedy". The author concludes that private litigants should be denied standing in division of powers cases except on the rare occasions when individuals are confronted directly with conflicting legislation in which case they are entitled to a judicial decision establishing paramountcy.

Dans l'affaire *Borowski*, la Cour suprême a assoupli les règles concernant l'intérêt du demandeur dans les litiges constitutionnel portant sur la séparation des pouvoirs, adoptant ainsi l'approche consacrée dans les arrêts *Thorson* et *McNeil*. L'auteur se porte critique de cette tendance et souhaite un revirement jurisprudentiel dans l'avenir. Selon lui, les tribunaux ayant rarement fait la distinction entre les questions de procédure et de fond soulevées dans un litige, un manque de clarté a ainsi permis un filtrage des demandes par ceux-ci. Sous le droit actuel, les tribunaux permettent aux individus de contester les lois au motif que l'assemblée législative qui les a adoptées aurait outrepassé sa juridiction. En général, les citoyens qui tirent le plus grand profit de ce privilège seraient les sociétés et les hommes d'affaires: l'auteur soutient que ces personnes ne sont pas des demandeurs adéquats parce qu'ils ont des motifs déplacés. Ainsi, ils ne recherchent pas la bonne application des normes constitutionnelles autant que la disparition de règlements exécutifs encombrants, espérant par là assouplir le contrôle de leurs activités par les divers paliers administratifs du gouvernement. Selon l'auteur, ces disputes ne devraient pas être résolues par les tribunaux. Celle-ci soutient en conclusion qu'il y aurait intérêt à limiter l'accès dont jouissent les citoyens ordinaires pour régler les questions de partage des compétences législatives, sauf dans les cas exceptionnels où l'individu est directement affecté par un conflit de lois, et où une décision serait nécessaire afin de déterminer laquelle doit prévaloir.

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Synopsis

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Introduction

The Supreme Court of Canada's decision in *Minister of Justice of Canada* v. *Borowski* [1] will be seen by many as a final and definitive clarification of the law of standing in constitutional litigation. With the majority's endorsement of the "genuine interest" test,[2] the confusion surrounding the law of standing has arguably been resolved. Undoubtedly, many will believe that the law in this area has now been settled. In my view, the law of standing, even after *Borowski*, is, in practical terms, far from settled. Indeed, this recent decision exemplifies all that is wrong in this important area of the law. In the *Borowski* case, the court made no distinction between a declaratory action to challenge the validity of an act under s. 91 or s. 92 of the *Constitution Act, 1867* [3] and standing to obtain a declaratory judgment on operative effect in the face of the *Canadian Bill of Rights*.[4] I argue that such a distinction is critical. While it may be suggested that a "genuine interest" test is adequate to

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[1](1981) 130 D.L.R. (3d) 588, (1981) 39 N.R. 331 (S.C.C.) [hereinafter *Borowski*].

[2]*Ibid.*, 606.

[3]30 & 31 Vict., c. 3 (U.K.). Indeed Mr Justice Martland rejects explicitly such a distinction in *Borowski*, *ibid*, 596 as does Chief Justice Laskin in dissent at 605.

[4]R.S.C. 1970, Appendix III.

decide standing questions under the *Bill of Rights* and, more importantly, under the new *Charter of Rights and Freedoms*,[5] the standing rules, as stated in *Borowski*, should not be applied to constitutional litigation involving the division of legislative powers. In that context the rules are used arbitrarily by the courts and they are abused readily by litigants.

In this comment I analyze the inherent defects in the law of standing in light of the decision in *Borowski*. First, I discuss the confusion between the law of standing and the merits in constitutional division of powers cases. Secondly, I examine the types of plaintiffs who are granted standing to challenge the constitutional validity of legislation. Thirdly, I argue that the present standing rules are no more than a convenient but arbitrary *de facto* merits lever. And fourthly, I discuss how the privilege of standing that is granted to individuals has been abused and for this reason ought to be curtailed significantly.

The facts in *Borowski* are simple. Joseph Borowski had challenged the therapeutic abortion provisions of the *Criminal Code*[6] arguing that they were inoperative as being in violation of the right to life as guaranteed by the *Canadian Bill of Rights*.[7] The Minister of Justice challenged Borowski's standing to bring this action. It was not Borowski's own life that was at stake but rather the lives of foetuses who were unrelated to Borowski. The earlier standing rules, as outlined in *Smith* v. *A.-G. Ontario*,[8] had required that the plaintiff have a direct stake in the issue. To be granted standing the plaintiff had to show that he was personally affected by the impugned statute. Smith, for example, wishing to import alcoholic beverages into Ontario, challenged the validity of the Order in Council which proclaimed the *Canada Temperance Act*[9] in force in Ontario. The Supreme Court denied Smith standing because, as he had not violated the *Act* and was consequently not threatened with sanctions, he did not have sufficient interest to test its validity.

The standing rules relating to division of powers litigation were broadened considerably in recent years. In *Thorson* v. *A.-G. Canada*,[10] the appellant challenged the validity of the *Official Languages Act*[11] because he did not agree with the federal government's views on bilingualism and he thought the *Act* a waste of taxpayers' money. He argued that the *Act* was *ultra vires* the Federal Parliament. Thorson was not personally affected by the *Act*

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[5] Part I of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).
[6] R.S.C. 1970, c. C-34, s. 251.
[7] R.S.C. 1970, Appendix III, s. 1(a).
[8] [1924] S.C.R. 331, [1924] 3 D.L.R. 189 [hereinafter cited to S.C.R.].
[9] R.S.C. 1906, c. 152, as am. S.C. 1919, c. 8.
[10] [1975] 1 S.C.R. 138, (1974) 43 D.L.R. (3d) 1 [hereinafter cited to S.C.R.].
[11] R.S.C. 1970, c. 0-2.

and, therefore, did not have a direct stake in the issues. However, the Supreme Court held that he had raised a justiciable issue and granted him standing specifically because the *Act*, being declaratory, affected everyone alike; to deny Thorson standing would preclude the Court from ever pronouncing upon the *Act's* validity. Thorson had also met several other procedural requirements. He was a citizen and a taxpayer: two requirements that the Court adopted from *MacIlreith* v. *Hart* [12] where the plaintiff, as resident and ratepayer, had been granted standing to challenge a municipal expenditure which the Court had found to be *ultra vires* the powers of the local government. Thorson had also attempted without success to persuade the Attorney-General to bring this action — a requirement adopted from Lord Denning's decision in *McWhirter*.[13]

The Supreme Court broadened the standing rules even further in *Nova Scotia Board of Censors* v. *McNeil*.[14] McNeil, wanting to see the film *Last Tango in Paris* which had been censored by the provincial Board of Censors, challenged their constitutional authority to do so, arguing that censorship was in pith and substance criminal law, a federal matter under s. 91(27) of the *Constitution Act, 1867*. In this case the provincial *Act* [15] was regulatory and had a more direct effect on film exchanges and theatre owners than on the film-viewing public. All parties conceded that the issue was justiciable. McNeil was granted standing because the *Act* affected the general public in one of its central aspects and the Court could see no other way to subject it to judicial review. McNeil, too, had asked the Attorney General to refer the constitutionality of the *Act* to the provincial Supreme Court but to no avail.

With such broad standing rules laid down in *Thorson* and *McNeil* it came as no surprise that Borowski was granted standing to challenge the therapeutic abortion provisions of the *Criminal Code*.[16] It should be noted again that, unlike the other standing cases, *Borowski* did not involve a challenge with respect to the division of legislative powers and, as I will argue, the liberalized standing rules contained in that case are not appropriate in division of powers litigation. With this distinction in mind, it can be stated fairly that Joseph Borowski did meet the tests for standing set down in *Thorson* and *McNeil*. Borowski was both a citizen and a taxpayer and he had done all he could to persuade public officials to impugn the validity of the therapeutic abortion provisions including resigning from his position as Cabinet Minister in the Manitoba Government, opposing a provincial budget that allocated

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[12](1908) 39 S.C.R. 657.

[13]*A.-G. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] Q.B. 629, [1973] 1 All E.R. 689 (C.A.).

[14][1976] 2 S.C.R. 265, (1975) 55 D.L.R. (3d) 632 [hereinafter cited to S.C.R.].

[15]*Theatres and Amusements Act*, R.S.N.S. 1967, c. 304.

[16]R.S.C. 1970, c. C-34, s. 251.

funds to abortions, refusing to pay income tax in protest against tax money spent on abortions, corresponding with the Manitoba Premier and the Prime Minister and with Manitoba and federal Cabinet Ministers and, finally, requesting the Manitoba Official Guardian to take legal action, all to no avail.[17]

Martland J., writing for the majority,[18] and Laskin C.J.C., in dissent,[19] agreed that the issue was a justiciable one. Their disagreement seems to have revolved around whether or not there was a better plaintiff: someone affected more directly by the provisions who would be likely to challenge them. Martland J. held that, to meet the requirements of standing, the plaintiff must show (a) that he is affected directly by the statute or that he has a genuine interest in its validity and (b) that "there is no other reasonable and effective manner in which the issue may be brought before the court".[20] The latter requirement is, in effect, the "no better plaintiff" rule. Martland J. granted Borowski standing because Borowski had a genuine interest in the validity of the therapeutic abortion provisions and because Martland J. believed that "[t]here are in this case no persons directly affected who could effectively challenge the legislation".[21] In his dissenting notes, the Chief Justice stated that Borowski should be denied standing because "here there are persons with an interest in the operation of s. 251(4), (5) and (6) who might challenge it as offending the *Canadian Bill of Rights*".[22] It was agreed that women who had abortions, doctors who performed them and the hospitals in which they were performed all had more direct interests in the issues. Martland J. believed that these parties would be unlikely to challenge provisions that exempted them from criminal liability.[23] Laskin C.J.C., although he did not contemplate the likelihood that any of these parties would challenge the provisions, expressed concern that, if Borowski was granted standing, the Court would hear argument from a party having an emotional concern with the question but not from those with more compelling and immediate interests.[24] Thus Martland J. granted Borowski standing because he believed there was no better plaintiff while Laskin C.J.C. would have denied him standing because he believed there were better plaintiffs.

This disagreement suggests that, although the standing rules in constitutional litigation have ostensibly been settled by the Supreme Court, they

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[17] *Borowski, supra*, note 1, 600-1.
[18] *Ibid.*, 600 and 606.
[19] *Ibid.*, 596.
[20] *Ibid.*, 606.
[21] *Ibid.*
[22] *Ibid.*, 596.
[23] *Ibid.*, 605.
[24] *Ibid.*, 597.

cannot be applied easily in practice. The purpose of this comment is to discuss why they are so difficult to apply. I will commence by analyzing the relevance of the merits of a constitutional case to the issue of standing. Then, after briefly noting who is typically granted standing, I will discuss the arbitrary fashion in which standing rules are applied. Finally, I will examine suggested alternative standing rules taking into consideration the prevalent abuse of the privilege of standing by private litigants.

I. The Confusion Between Standing and the Merits

Standing is considered to be a separate procedural issue to be decided before the substantive issues are considered. However, in previous standing cases, the Justices have been unable to ignore the merits of the case when deciding the standing issue. Duff J., in *Smith*, said that he "was loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure" and then went on to dismiss the case on the merits as well.[25] Davies J., in *MacIlreith*,[26] approached the problem backwards. He first decided for the plaintiff on the merits and then went on to find that the plaintiff had standing. Both the standing issue and the substantive issues of these cases were before the Supreme Court at the same time.

In *Thorson*, *McNeil*, and *Borowski*, the standing issue was decided separately, before the substantive issues were argued. The standing issue was decided in Thorson's favour mainly because he had raised a justiciable issue. Laskin J., as he then was, said this:

> The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.[27]

To decide whether the issue is justiciable the court must look to the merits. In *McNeil*, the parties conceded that a justiciable issue had been raised.[28] Laskin C.J.C. granted standing but regretted doing so without hearing arguments as to the merits of the case. He said:

> it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing.[29]

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[25] *Supra*, note 8, 338.
[26] *Supra*, note 12.
[27] *Supra*, note 10, 145.
[28] *Supra*, note 14, 267.
[29] *Ibid.*

He again considered the merits of the case to be relevant to the issue of standing. In my view, the merits of a case are in fact irrelevant to this issue. Much of the confusion surrounding the standing rules is caused by uncertainty on the bench as to the relevancy of the merits of the case in deciding the standing issue.

A. *There Must be a Justiciable Issue*

In the more recent cases, although the merits are considered, they are not dealt with in depth. To get standing the plaintiff need not show that the merits weigh in his favour. He need only show that his case has "some merit" in it. Is this really a standing issue? Courts do not wish to hear arguments on hypothetical or moot points and they will dismiss any case that is frivolous or vexatious. The purpose of the requirement of standing is not to ensure that only cases with merit in them come before the court but to ensure that the proper parties argue the case. The court has other methods to dismiss cases lacking in merits. Whether or not there is a justiciable issue is a separate hurdle that must be overcome regardless of standing. That hurdle being crossed, are the merits of the case relevant to the issue of standing? In *McNeil*, Laskin C.J.C. thought so[30] but did not explain how they are relevant.

B. *The Relationship Between Standing and the Substantive Issues*

In contract and tort cases, standing is a substantive issue as well as a procedural issue. Unless a plaintiff can prove he was a party to the contract he cannot sue for its breach because his rights are no more than those set out in the contract.[31] Unless a plaintiff can prove he suffered a personal injury he cannot bring a tort action for damages because carelessness does not become a tort until someone is injured.[32] Standing to sue is the pivotal issue out of which all other issues flow. The issues turu on facts, rights and duties peculiar to the parties and the court must decide whether one party's rights have been infringed or the other has breached his duties. As the merits revolve around the plaintiff's personal rights, standing must be decided before any other issues, such as whether the contract has been breached or whether the defendant caused the injury, can be considered.

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[30] *Ibid.*

[31] See *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* [1915] A.C. 847 (H.L.); *Scruttons Ltd* v. *Midlands Silicones Ltd* [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.).

[32] J. Fleming, *The Law of Torts* 5th ed. (1977) 104; G. Fridman, *Introduction to the Law of Torts* (1978) 48.

In constitutional cases involving the division of legislative power, the standing of private parties has little if anything to do with the substantive issues. The merits do not turn on any complaints peculiar to the plaintiff.[33] It is the validity of the legislation that is at stake. The court is not asked to decide whether the plaintiff has suffered a wrong, but rather to determine which level of government has the power to legislate with respect to a certain matter. Being personally affected by a statute may be a motive for challenging it but it is not a relevant factor in assessing the validity of the statute. The degree to which the plaintiff is affected is irrelevant to the validity of the legislation.[34] It is valid or invalid regardless of whether the party challenging it is imprisoned for violating it or not touched by it at all.

C. *The Relationship Between Standing and the Evidence*

Adjudication of private disputes involves the application of contract and tort law to concrete sets of facts. The decision is based on facts peculiar to the plaintiff which the plaintiff is best able to prove. Constitutional adjudication, on the other hand, involves interpretation of a statute and of the constitution. There is no application of law to specific facts as there is in private adjudication. Facts may be of assistance in interpreting the statute and in determining whether its actual effect is *intra vires* or *ultra vires*. The facts peculiar to Mr McNeil were that he was deprived of the opportunity to see *Last Tango in Paris* by the Nova Scotia Board of Censors.[35] The issue in the case was whether the province had the constitutional authority to censor films where the federal government had already dealt with the matter under its criminal law power. The fact that McNeil was not allowed to see *Last Tango* is relevant only to show that the province had censored a film. Whether or not the province had the power to do so could be argued by anyone interested in the issue whether or not they cared to see *Last Tango*. The case does not turn on facts peculiar to the plaintiff but rather on judicial interpretation of the *Constitution Act, 1867*.[36] Facts are relevant only to determine the scope of the impugned legislation; that is, whether the statute intrudes directly into a field of the other level of government or whether the effect is merely an ancillary overlap on the other's jurisdiction. Thus in *A.-G. Canada* v. *Labatt Breweries of Canada Ltd*,[37] for example, evidence showing whether the federal *Food*

[33] Of course, the same argument does not apply to constitutional cases brought under s. 23 of the *Canadian Charter of Rights and Freedoms*, Part 1 of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.). An application under s. 23 is essentially a request for enforcement of a *personal* right.

[34] B. Strayer, *Judicial Review of Legislation in Canada* (1968) 122.

[35] *Supra*, note 14, 268.

[36] 30 & 31 Vict., c. 3 (U.K.).

[37] [1980] 1 F.C. 241, (1979) 26 N.R. 617 (C.A.), *rev'd* [1980] 1 S.C.R. 914.

and Drugs Act[38] had the nationwide effect of protecting consumers from deception or showing that it was aimed at particular local industries would have been relevant to demonstrate the extent of the possible intrusion into provincial jurisdiction. Labatt was in no better position than any other food or drug company or consumer to present the relevant evidence. The fact that the *Act* affected Labatt directly is only one example of intrusive effect and does not show whether this effect was merely ancillary or was the main purpose of the *Act*. Therefore, granting or denying standing to a particular private litigant has little impact upon the final outcome of a case, the purpose of which is to determine the validity of a legislative exercise of purported jurisdiction.

D. *The Relationship Between Standing and the Remedy*

In tort and contract cases, the remedy accrues to the plaintiff. The purpose of the remedy is to compensate the plaintiff for injuries suffered. The plaintiff must have suffered a direct harm. Damages cannot be assessed and awarded unless some actual and measurable harm has been incurred. In constitutional division of powers cases, the remedy that may be granted by the courts is declaratory. It does not accrue directly to the plaintiff or to anyone else. A declaration that one level of government rather than the other has the power to legislate with respect to a certain matter has the potential of affecting everyone in Canada to some degree. There exists a continuum on which every resident of Canada has a place depending on the degree to which he is affected. At one end is the mere citizen and close to him is the taxpayer; at the other end is the person whose daily conduct is regulated by the statute in question.[39] Any division of powers decision affects everyone, whether the effect be to denigrate or further the citizen's concept of federalism, to increase or decrease however minimally the financial burden on the taxpayer, or to affect substantially the regulatee's daily conduct. Of these potential interests in the validity of legislation, it is the citizen's concept of federalism that is most relevant to the substantive issue of the case, the validity of the statute. Yet, it is the regulatee who is deemed to have the necessary interest in the validity of the legislation because it affects directly his daily conduct. But it is the specific statute that disturbs him, not really the question of its constitutional validity. The effect on the regulatee of having the statute declared *ultra vires* is simply to allow one level of government, rather than the other, to regulate his conduct. Whether the other level of government would be more benevolent in its regulation is relevant to neither the issue of validity nor

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[38] R.S.C. 1970, c. F-27.

[39] Jaffe, *Standing to Secure Judicial Review: Public Actions* (1961) 74 Harv. L. Rev. 1265, 1267.

standing, although this is the outcome that the hopeful plaintiff intends. Benevolence or lack of interest iu the plaintiff's affairs on the part of the other level of government is the "remedy" that the plaintiff actually seeks. This is not a remedy the court is empowered to grant, nor is it a matter that ought properly to concern the court.

II. The Types of Parties Typically Granted Standing

It is interesting to note that courts have been quite willing to grant standing to private parties to protect their interests from intrusions that the governments declare to be in the public interest but have been very unwilling to grant standiug to public interest groups who challenge legislation in favour of certain private interests.[40] Thus, Labatt succeeded in challenging the food and beverage conteut regulations in the *Food and Drugs Act* which were enacted to protect consumers from deception,[41] but taxpayers have been unsuccessful in challenging tax rulings in favour of various private interests.[42] It is unlikely that the Consumers' Association of Canada would be granted standing to challenge marketing legislation enacted for the benefit of producers although it might be granted standing as *amicus curiae* if a party more directly affected (*e.g.*, a producer) were to challenge the legislation.

This anomaly likely arises in part from the court's perception of itself as the protector of individuals from the excesses of the State. Public interests are believed to be protected adequately by democratically elected governments. The anomaly also arises out of the fiction of the corporation as an individual entity. Corporations which are often large groups consisting of thousands of people are seen as individuals while public interest groups whose numbers are often only in the hundreds are seen as groups of individuals. A corporation need only show that its group interests are affected. It need not show that the interests of each individual within it are affected unlike a public interest group which, in order to get standing, must show that a substantial number of its members are individually affected.[43]

The "no better plaintiff" rule, as it is stated in *Borowski*,[44] increases the likelihood of a party being granted standing to challenge the validity of a statute, but it does nothing to alter the arbitrariness of the standing rules. "No

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[40] Johnson, *Locus Standi in Constitutional Cases After Thorson* [1975] Pub. L. 137, 140.

[41] *Supra*, note 37.

[42] Evans, *Standing to Challenge Unlawful Tax Expenditures* (1981) 3 Can. Tax. J. 17.

[43] This was the underlying assumption of the Québec Court of Appeal in *Jeunes Canadiens pour une civilisation chrétienne* v. *La Fondation du Théâtre du Nouveau-Monde* [1979] C.A. 491.

[44] *Supra*, note 1, 605-6.

better plaintiff" means simply that there is no one who is more directly affected by the legislation and who is likely to challenge it. As the disagreement between the majority and the dissenters in *Borowski* made plain, the court can always find a better plaintiff if it so chooses. Who is to say that someone else is more or less likely than the plaintiff to challenge the statute in dispute, especially when such person has not yet challenged it? The key to the door is still given only to those who show that there is a justiciable issue, that the case has merits. But even with that key, it is still very much a flip of the coin as to whether standing will be granted or denied to those who are not directly touched by the statute in question.

III. Standing as a *De Facto* Merits Lever

Is it fair to speculate that standing will be granted where the issue is one that a judge wishes to decide in favour of the plaintiff but denied when the court is not interested? In *McNeil*, Laskin C.J.C. granted standing and then in his dissent on the merits he argued that the Nova Scotia censorship laws were *ultra vires* as the plaintiff alleged.[45] In his dissent in *Borowski* he denied Borowski standing. Will he also decide against Borowski on the merits?

There are hints of the Justices' opinions regarding the merits of the case at bar in their decisions on the standing issue. Laskin C.J.C. characterized the abortion issue as "highly charged", "abstract" and lacking in "concreteness".[46] Martland J. characterized the issue as being one of "considerable importance".[47] It can be inferred from Chief Justice Laskin's comments that he did not want to tackle the abortion issue. The opposite inference cannot be drawn from Mr Justice Martland's comments. We do not know whether Martland J. really wished to deal with the emotionally-charged abortion question, for when he authored his opinion on the preliminary issue of standing, his retirement was imminent.

Many constitutional cases involve such volatile political questions about which there is no national consensus. This is because a constitution is by its very nature a political instrument. Where the question is political and the present law is as the judge likes it, the arbitrary standing rules provide an easy out. They relieve the judge from the duty of explaining on the merits why the law should be upheld and enable him to avoid the appearance of political bias. The standing rules are a convenient *de facto* merits lever. The important

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[45] *Nova Scotia Board of Censors* v. *McNeil* [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1 (merits).

[46] *Borowski*, *supra*, note 1, 598.

[47] *Ibid.*, 606.

question is this: Assuming that the goal of the standing rules — to limit the number of cases before the court — is desirable, must it be achieved by such an arbitrary and, with all respect, dishonest method?

IV. Alternatives to the Present Standing Rules

Because the present standing rules, as they relate to division of powers litigation, are so unfair and arbitrary, they ought to be discarded. However, merely discarding them will not make the problems surrounding them go away. The question remains: Who ought to be allowed to challenge the constitutional validity of a statute on the basis of the division of powers?

In my view, there are only two viable alternatives to the present standing rules. Either every citizen ought to be allowed to bring constitutional cases or no private individuals should be allowed to do so. Any line drawn between these poles will be no less arbitrary than the present standing rules because, as I have attempted to argue above, the identity and position of the challenger are quite irrelevant to the validity of the challenged statute. If the cut-off point for granting and denying standing lies between the two poles, it will depend invariably on factors that are peculiar to the challenger. Such factors hold no logical connection to the validity of the statute in question. In support of the view that standing should be broadened so that anyone may challenge the validity of a statute, Professor Strayer argues:

> It is submitted that the courts should be especially willing to exercise their discretion in favour of conferring standing in constitutional cases. The importance of enforcing constitutional norms transcends the existence or non-existence of a legal right in a private individual in a particular case. If the constitution is to be effective, the courts must be able to act in situations where a failure to act would permit a legislature to achieve a result beyond its legal powers.[48]

He suggests that the only limitations on the availability of judicial review should be those that are related to the effective operation of the courts, such as the traditional substantive levers like "ripeness" and "justiciable issue", which are not standing issues. Professor Strayer has considerable faith in the ability of the judiciary to deal with constitutional questions.[49] In support of the contrary view that private litigants should be denied standing to challenge the validity of a statute, Professor Weiler asserts his lack of faith in the ability of the courts to deal with the difficult issues that arise in constitutional cases.[50]

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[48] *Supra*, note 34, 123.

[49] *Ibid.*, ch. 8.

[50] P. Weiler, *In the Last Resort [:] A Critical Study of the Supreme Court of Canada* (1974) ch. 6.

However, this dispute misses the point. There is no connection between standing and the problems of judicial review, and we should not base decisions regarding standing on our faith or lack of faith in the judiciary. Any flaws in judicial review are not caused by allowing individuals to challenge the validity of statutes in the courts. Denying individuals standing on these grounds will result simply in our being reminded less often of the flaws in judicial review. However, there is another, more telling, argument in favour of restricted access to the courts in cases involving constitutional division of powers — the often improper motives of private litigants.

A. *The Motives of the Plaintiff*

One way to determine whether private individuals ought to be able to bring constitutional cases is to investigate their motives for doing so. Rarely do individuals challenge the validity of a statute solely because they believe sincerely that the statute in question is concerned with a matter that is properly within the sphere of the other level of government. One may think of a situation where a public interest group might challenge a statute because the group believes that the matter governed by the statute ought to be dealt with by the other level of government. An example of such a situation might occur if the Consumers' Association of Canada challenged provincial consumer protection legislation on the grounds that consumers could be protected more effectively by uniform national legislation.[51]

One motive, in the past, for challenging the validity of legislation has been the protection of civil liberties. In *Re Alberta Statutes*[52] and in *Saumur* v. *City of Québec*,[53] for example, the fact of divided powers was used to protect freedom of the press and freedom of religion, respectively, from intrusions by provincial legislatures. The effectiveness of these decisions in protecting civil liberties depended on the *laissez-faire* attitude of the federal government in these matters. To preclude individuals like Saumur from challenging the validity of legislation would have, in the past, left them with no means of protecting their civil liberties from government infringement. However, now that the *Canadian Charter of Rights and Freedoms*[54] has been proclaimed

[51] For the courts to accede to this argument would amount, of course, to a judicial amendment of the constitution.

[52] [1938] S.C.R. 100, [1938] 2 D.L.R. 81.

[53] [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641. More recently the same method was used in an attempt to protect the freedom of assembly in Canada. It failed. See *A.-G. Canada and Dupond* v. *The City of Montréal* [1978] 2 S.C.R. 770, (1978) 84 D.L.R. (3d) 420.

[54] Part I of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

individuals need no longer use the fact of divided jurisdiction to protect their civil liberties.[55] They may now challenge directly any legislation that violates the *Charter*. The protection of civil liberties is no longer a justification for granting standing in division of powers cases.

The primary motive that has led private individuals and corporations to challenge the validity of legislation has been the desire to avoid governmental regulation. As Professor Hogg observes:

> Apart from the reference procedure. . . judicial review usually occurs on the initiative of a private individual (or corporation) who is attempting to resist the application of a statute which appears to apply to him. The private party who makes a constitutional challenge to a statute is rarely motivated by a public-spirited concern with the federal distribution of powers; on the contrary, his desire is to avoid, by whatever legal means are at hand, the duty ostensibly imposed upon him by the statute. Mallory is accurate for most of the cases when he says that "the force that starts our interpretive machinery in motion is the reaction of a free economy against regulation".[56]

Many challengers do not care which level of government has the power to regulate their conduct. Their sole hope is that the level of government holding the power will choose not to exercise it. As I have argued above,[57] when private corporations challenge the validity of a statute the remedy that they seek is to have the power to regulate their conduct granted to the level of government least interested in their affairs. In my opinion, this is an abuse of the federal system of government and an abuse of any right to have input with respect to the appropriate division of powers. Professor Weiler recognizes this motive of private parties and argues that it is one reason for denying such parties standing:

> In my view, there is something wrong with a legal system which allows a private business to impeach in this way the validity of laws enacted by a representative legislature. . . . We should simply not allow private individuals of their own motion to impeach the validity of statutes on the ground that they infringe the "exclusive" jurisdiction of another legislative body. . . . The point of a federal system is to allocate governing power to different regions and groups, not to confer immunities from regulation on private citizens (unlike the Canadian Bill of Rights).[58]

What possible justification can there be for allowing such insincere private interests to use the Constitution to evade their legal duties?

Professor Mullan, who advocates the broadening of the law of standing, does not seem concerned about this abuse. He says that "the scope for

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[55] The only exception may be challenges based on so-called "equality rights" because s. 32(2) of the *Charter* states that s. 15 does not have effect until three years after the date the remainder of the *Charter* comes into force.

[56] P. Hogg, *Constitutional Law of Canada* (1977) 78.

[57] See discussion *supra*, Part I(D).

[58] *Supra*, note 50, 180-1.

allowing interventions at the Supreme Court level ensures that other legitimate interests will be represented".[59] In other words, although improper legal motives of the challenger have caused the statute in question to be brought before the Court, intervention by the Attorney-General of the government that enacted the legislation will ensure that the Court hears adequate argument defending the validity of the statute. Why should a government be forced to defend its exercise of power with respect to a certain matter when the other level of government, whose power has ostensibly been "trenched upon", has no objection? Professor Weiler argues that a private citizen who wishes to challenge a particular statute, as well as being required to give notice of the challenge to the offending jurisdiction, ought to be required to obtain consent for the challenge "from the Attorney-General of the jurisdiction whose 'turf' he is defending".[60] In my view, private litigants should not even be permitted this much. The consent of the latter Attorney-General does not alter the litigant's initial motives for bringing the action. The insincerity remains. Furthermore, if the Attorney-General, as representative of the legislature whose powers are allegedly being trenched upon, does not consider the issue of sufficient importance to initiate the challenge himself, how can he justify granting permission to others to trouble the courts and the enacting legislature? In my view, there is only one situation where private citizens ought to be granted standing to challenge the validity of a statute on the basis of division of powers. That is where there is a direct conflict of laws so that obedience to one statute constitutes a violation of the other. I agree with Professor Weiler's submission that, in this situation, the affected individual should be entitled to ask "for the minimal judicial decision about paramountcy".[61]

B. *Enforcing the Division of Powers*

The argument that the effectiveness of a constituition requires that individuals be able to challenge *ultra vires* acts in the courts [62] ignores the fact that governments can and do protect their own spheres of power from being chiselled away by other levels of government. This is evident in the recent federal-provincial battles over, for example, energy and offshore resources. I have less faith than Professor Weiler in the ability of the various governments to negotiate the appropriate division of powers,[63] especially after having witnessed the recent negotiations surrounding the new Constitution. How-

[59] Mullan, *Standing After McNeil* (1976) 8 Ottawa L. Rev. 32, 47.
[60] *Supra*, note 50, 181.
[61] *Ibid.*
[62] See Strayer, *supra*, note 34, 123.
[63] *Supra*, note 50, 175.

ever, I do have faith in the ability of the respective governments to take their jurisdictional disputes to court; for example, the recent Newfoundland and Federal references with respect to offshore resources.[64] I do not believe that we need worry that the courts will not be able to give effect to the Constitution if private citizens are denied standing. After all, as Professor Hogg notes, one-third of all constitutional cases are references by governments.[65]

Conclusion: Deny Standing to Private Litigants

Individuals and corporations should be denied standing to challenge the constitutional validity of legislation except in the occasional case where they are directly confronted with conflicting legislation. The purpose of granting individuals standing was to give them a tool whereby they could enforce "the constitutional norms".[66] Cases are rare where a private citizen has used this privilege for this purpose. This privilege has been abused consistently by individuals and corporations seeking to avoid governmental regulation of their activities. Furthermore, the need to protect civil liberties from governmental intrusion is no longer a justification for granting standing to division of powers litigants. The decision in *Borowski*, rather than resolving the problems surrounding the law of standing, may serve to facilitate the abuse by private litigants of the privilege granted them to enforce "the constitutional norms" if the decision is incorrectly applied in cases involving the division of legislative powers. To prevent this abuse, private litigants must be denied standing in such constitutional litigation.

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[64] For Newfoundland, see *In the Matter of s. 6 of the Judicature Act, R.S.N. 1970, c. 187 as am. and in the Matter of a Reference by the Lieutenant-Governor in Council Concerning the Minerals and Other Natural Resources of the Continental Shelf Appertinent to the Province of Newfoundland*, (1982) No. 23, Supreme Court of Newfoundland (C.A.). Arguments in the Supreme Court of Canada heard 29 November 1982.

[65] *Supra*, note 56, 78.

[66] Strayer, *supra*, note 34, 123.