FURTHER RESTRICTIONS ON ACCESS TO *CHARTER* REVIEW

A Comment on *Hy and Zel's Inc.* v. *Ontario (A.G.)*

June Ross

In *Hy and Zel's Inc.* v. *Ontario (Attorney General)*[1] the Supreme Court of Canada denied standing to parties in a civil action wishing to challenge legislation under which they were being prosecuted criminally. On the face of it, this seems astonishing. But, when one considers that the court has already restricted the right of corporate applicants to rely on the *Charter* rights of others, and has already indicated that it will not expand the principles governing public interest plaintiff standing, the decision is simply another example, albeit extreme, of the court's use of standing and similar threshold rules to limit the availability of judicial review.

The case arose as follows. Two corporations involved in retail sales had been charged under the *Retail Business Holidays Act*[2] with being open for business contrary to the Act. In addition, the Attorney General in separate proceedings sought injunctions against the corporations to require them to comply with the Act.[3] The corporations, adding as applicants a number of their respective employees, commenced cross-applications seeking declarations that the Act or some portion of it infringed s. 2(a) or s. 15 of the *Charter of Rights and Freedoms*. The purpose of the cross-applications was to ensure that "if the Attorney General decided to withdraw the s. 8 closing applications, the time, money and effort involved in the defence of those applications would not be wasted."[4] The cross-applications proceeded through the courts, while the injunction applications were adjourned.[5]

In the lower courts, the declaration applications were dismissed on the merits.[6] In the Supreme Court of Canada a majority of the court, in a judgment written by Major J., held that neither the corporations nor their employees had standing to bring the declaration applications.[7]

The standing issue arose because the proceeding before the court was a civil declaration application, rather than a criminal proceeding. The distinction became significant in previous cases where parties sought to rely on *Charter* rights and freedoms of third parties. In *R.* v. *Big M Drug Mart Ltd.*[8] an objection was raised that a corporate accused should not be able to rely on s. 2(a) of the *Charter*. The Supreme Court of Canada responded that an accused could raise any constitutional defect in a law under which it was charged — the constitutionality of the law, not the particular rights of the accused, was the paramount issue.

This principle was limited in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*,[9] a declaratory action by a corporation threatened with regulatory proceedings. The corporation was permitted to argue that provincial advertising regulations violated its freedom of expression, and that the regulations were outside provincial legislative jurisdiction. The corporation was not permitted to rely on the *Charter* rights of others found in s. 7.[10] The *Big M* principle was held not applicable to a civil action.[11]

Peter Hogg has argued, and the dissent in *Hy and Zel's* agreed, that the limitation on the *Big M* principle is irrational.[12] Plaintiffs whose private rights are affected by a law, whether in a civil or criminal context, should be able to challenge its constitutional validity, on federal or *Charter* grounds: "the overriding concern is whether governments have respected the limits of their constitutional authority."[13]

The *Irwin Toy* principle may be avoided if a corporation can attain public interest standing. Unlike a private plaintiff, a public interest plaintiff can rely on the rights of others and, indeed, must if its own rights are not involved. As a public interest plaintiff, a corporation can rely on rights guaranteed only to individuals.[14] The appellants in *Hy and Zel's* apparently sought public interest standing, presumably for this reason.[15] The court was prepared to assume that a serious issue was raised, and held that the liability to prosecution of both retailers and their employees meant that they were directly affected by the legislation. But public interest standing was denied because there were other reasonable means of bringing the constitutional issues before the court.

In previous public interest standing cases, the other means of access to the courts involved other plaintiffs, seen as more appropriate parties because of their interest in the issues raised. In *Hy and Zel's*, the other means of access included criminal enforcement proceedings such as those actually commenced against the same parties. The interest that caused these plaintiffs to be directly affected created an alternative means of access to the courts and so denied them public interest standing.

This aspect of the decision is not really concerned with entitlement to bring a proceeding, but with the form of action. The use of a civil declaratory action as an alternative to criminal proceedings was recently considered by the Supreme Court of Canada in *Kourtessis* v. *Canada (Minister of National Revenue)*.[16] To some extent, the court demonstrated the virtue of consistency in that one test applied to determine the availability of a civil action was stated to be whether other reasonable means of access to the court existed.[17] Generally, a declaratory action should not be used as a substitute for a trial ruling in a criminal case. But in *Hy and Zel's*, no procedural issues, such as appeal rights or the fragmentation of trials, arose as a result of the declaratory action. The nature of the constitutional challenge presented in the criminal and civil proceedings was identical. The declaratory action possessed an advantage in that it also invoked the interests of employees who, while subject to charge, had not been charged. Further, the action had already proceeded to the Supreme Court of Canada. In these circumstances it seems unreasonable to deny the parties their chosen procedure.[18]

Another means to bring the *Charter* issue to court referred to by the majority was a constitutional challenge by parties claiming that their own religious rights were violated. This form of constitutional challenge would have the advantage of dealing with facts specific to the parties and would ensure that the court heard from persons "most directly affected".

There was no reference to any such litigation actually commenced, but an assumption that it was reasonable to anticipate it. Practical obstacles to such litigation were not addressed. This may partly be attributed to a lack of evidence on the point. The court noted the appellants' failure to provide evidence demonstrating that no other reasonable and effective access to the court existed. Applicants for public interest standing are then left in the unenviable position of having to prove a negative. While applicants do bear the onus of meeting all parts of the public interest standing test, in appropriate cases the onus can be met by a combination of argument and judicial notice. The court should consider who potential plaintiffs might be and what obstacles they might face.

For example, as discussed in the dissent, while the *Charter* rights of employees may be affected, they are unlikely to have the political or financial resources to bring their concerns to court. Retailers who belong to minority religions may have the financial wherewithal to challenge the law, but how many such retailers exist? Further, ascribing a religion to a retailer gives rise to definitional problems that may affect the claim to standing. The retail business is likely conducted through a corporate vehicle. The individual retailer may only be a part, perhaps a minority, of a group that carries on business through a corporation or partnership. Thus, the limitation of standing to persons whose religious rights are personally affected may well preclude judicial review of the law, at least for some substantial period of time.

The majority decision alters and expands the *Irwin Toy* rule prohibiting reliance on the *Charter* rights of others in civil proceedings. It has become a rule of standing in declaratory applications. One's own *Charter* rights, not only one's own proprietary or contractual rights, must be affected to seek a declaration of invalidity under the *Charter*. The rule is now applied to individuals as well as to corporations. The failure of the employee appellants to provide evidence of effect on their own religious freedom or equality meant that they, too, were denied standing. The most significant expansion is that public interest standing will not be available as a means to

circumvent the *Irwin Toy* rule, at least where regulatory legislation is challenged. Plaintiffs who are subject to prosecution must raise their constitutional objections in that action. If private rights are affected in a civil context, this option is not available,[19] but public interest standing still would likely be denied on the basis that plaintiffs whose *Charter* rights are directly involved might come forward. In this case, the court's approach resulted in inefficiency. In others, the consequence may be that unconstitutional laws will be applied to the detriment of private rights.

L'Heureux-Dubé J., in dissent, made many valid criticisms of the majority judgment, and carefully justified a grant of standing to the appellants. She held that the appellants had private standing. This, however, would have been a barren form of standing, if the *Irwin Toy* principle denied them the ability to rely on s. 2(a) or s. 15 of the *Charter*. She resolved this issue by departing from the rule in *Irwin Toy*, holding that Platintiffs with private standing may rely on the *Charter* rights of others. She also found that the test for public interest standing, applied flexibly and purposively, was met. She considered the traditional justifications for limiting standing and demonstrated that they were not served by denying standing to a privately affected party. In fact, judicial economy would have been better served, and a multiplicity of proceedings avoided, by granting standing in the case. The only surprising thing about the dissent is that it attracted only two members of the full court.

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Endnotes

1. [1993] S.C.J. No. 113.
2. R.S.O. 1980, c. 453.
3. Pursuant to the *Retail Business Holidays Act, ibid.* s. 8. An interim injunction was granted with respect to Paul Magder Furs Ltd. and was enforced in contempt proceedings. The injunction application against Hy & Zel's was adjourned.
4. *Hy and Zel's, supra* note 1, per L'Heureux-Dubé J. referring to a statement by counsel.
5. In the case of Hy and Zel's Inc. the injunction application apparently was simply adjourned while the declaration application proceeded. In the case of Paul Magder Furs Limited, the corporation made efforts both to appeal the interim injunction and to have the s. 8 application brought back before the court, both of which were denied due to the corporation's continuing contempt of the interim injunction.
6. The courts held that the constitutional issues had been determined in *Peel (Regional Municipality)* v. *Great Atlantic & Pacific Co. of Canada Ltd.* 2 O.R. (3d) 65. *Peel* was appealed to the Supreme Court of Canada, but had not been heard prior to the hearing in *Hy and Zel's*, and was discontinued prior to the judgment in *Hy and Zel's*: leave to appeal granted sub nom. *Oshawa Group Ltd.* v. *Ontario (Attorney General)*, [1991] 3 S.C.R. x; notice of discontinuance of appeal filed August 31, 1993, S.C.C. Bulletin, p. 1493.
7. Lamer C.J., La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ. concurring. L'Heureux-Dubé J. wrote a dissenting judgment, McLachlin J. concurring.
8. [1985] 1 S.C.R. 295.
9. [1989] 1 S.C.R. 927.
10. The court held that the s. 7 interests, life, liberty and the security of the person did not apply to corporations.
11. The court applied the *Irwin Toy* limiting principle to a civil action for damages in *Dywidag Systems v. Zutphen Bros. Construction*, [1990] 1 S.C.R. 705. On the other hand, the court has reaffirmed the *Big M* principle in *R.* v. *Wholesale Travel Group*, [1991] 3 S.C.R. 154, allowing a corporate accused in penal proceedings to rely on s. 7 of the *Charter*.
12. P.W. Hogg, *Constitutional Law of Canada, 3rd ed.* (Toronto: Carswell, 1992) at 1269-1274.
13. *Hy and Zel's, supra* note 1, per L'Heureux-Dubé.
14. *Canadian Council of Churches* v. *Canada*, [1992] 1 S.C.R. 236.
15. The majority commented that the parties did not present evidence pertaining to private standing, and indicated that the public interest standing test must be met "where, as in the present case, the party does not claim a breach of its own rights under the Charter but those of others.
16. [1993] S.C.J. no. 45.
17. Per LaForest, L'Heureux-Dubé and Cory JJ. Sopinka, McLachlin, Iaccobucci JJ. referred to the court's discretion to deny declaratory relief in somewhat more limited terms, where another procedure would provide "more effective relief" or where it appeared that the legislature had intended that another procedure should be followed.
18. The dissent noted that the appellants had expected that the cross-application for a declaration would function as a test case with regard to outstanding prosecutions, and that it would discredit the administration of justice to simply postpone the issue.
19. *Dywidag Systems* v. *Zutphen Bros. Construction, supra* note 11.