Public Interest Standing in Administrative Law

Myths and Real Difficulties

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Models of Judicial Review: Dispute Resolution v. Application of the Law

- US: “Dispute Resolution” Cases and Controversies – Art. 3 US Const.
- EU, Roman Law “Application of the Law”- *Actio popularis*
- Canada: Moderated Standing
- Why is PIS more associated with Constitutional, not Admin law?

Myth #1: It All started with the *Charter*

- From municipal law to constitutional law (*Thorson*, 1975) and back to administrative law (*Finlay*, 1986)
- Right to litigate “in the stead” of the municipality
- Problem: origins allow much wider relief: *MacIlreith v Hart* (1908)

Myth #2: Courts are Overrun by Public Interest Litigants

- “The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom” *Canada v. Downtown Eastside* (2012) para 28, Prof K.E. Scott.
- PI Litigants still must demonstrate “serious issue”, “genuine interest” & “reasonable means”. Why?
- Who is in the best position to prove elements? Reverse onus: NZ Law Comm.

Myth #3: Constitutional Standing is about "Ultimate Rightness"

- Admin law PIS would therefore be more technical and weaker
- Yet "the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes." *Downtown Eastside*, para 36.
- Quality v. Nature of the Arguments

Difficulty #1: Public Interest Issues are Complex

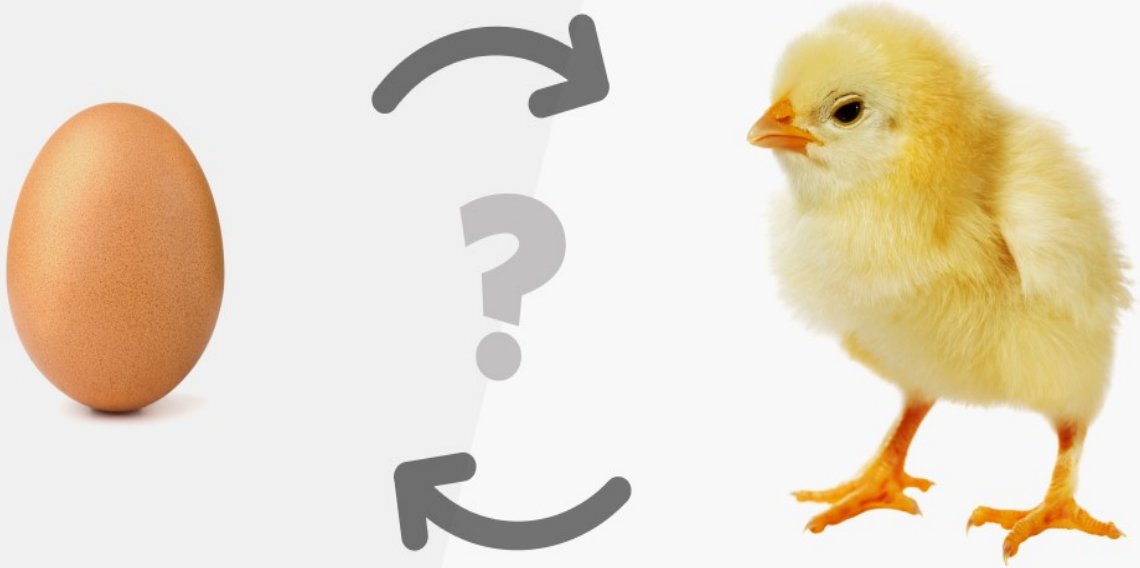
- Individual v. Decisions of General Application
- (*Finlay*, 1986 – *Oldman River*, 1992)
- The respondents “have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise” *Downtown Eastside*, para 74.

Difficulty #2: Time is *Not* on Your Side

- Ongoing v. Instantaneous Obligations (30 -90 days)
- “The precipitation of premature applications on incomplete evidence is hardly desirable.” Time limits in judicial review applications should not provoke a litigant “into ill-advised hyperactivity.”

Maurice K. J. *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [2000] 2 CMLR 94.

Difficulty #3: Substance Dictates Standing and Timing



- “It depends on the nature of the issues raised and whether the court has sufficient material before it” *Finlay* para 16.
- *LeBlanc et al. v. Moncton (City) et al.*, 2013 NBQB 236.

Conclusion

- PIS poses greater problems when directed at administrative decisions of general application.
- PI litigation is still perceived as an “attack” on government.
- “Imagine a culture where an argument is viewed [not as war but] as a dance, the participants are seen as performers, and the goal is to perform in a balanced and aesthetically pleasing way.” Lakoff, *Metaphores we Live By*.