File No. 33981

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY AND SHERYL KISELBACH

Respondents

- and -

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PART I - OVERVIEW

1. This case is about the management of judicial resources in a society committed to the rule of law but plagued by problems of access to justice. In this context, the Canadian Civil Liberties Association ("CCLA") will argue that this Honourable Court should revisit the approach to public interest standing. A more liberal and purposive approach to standing is necessary in light of the considerable barriers faced by ordinary Canadians seeking to access justice. CCLA submits that such an approach should not treat public interest litigants as exceptional, but rather develop a test that permits public interest litigants to contribute appropriately to proper judicial scrutiny of government action.

2. CCLA will make submissions on why a purposive approach to standing is necessary and urges the Court to have regard to the following principles in articulating such an approach:

   (i) The concern that a liberal approach to public interest standing will overwhelm the courts has been overstated in light of the tools a court already has to decline to hear a case, including mootness, and where no serious issue has been raised; and

   (ii) A public interest litigant should not be denied standing merely because a similar or identical case could be litigated by a private litigant at a later date or because of an existing or ongoing case in another provincial jurisdiction, absent exceptional circumstances.

3. The CCLA takes no position on any contested issues of fact in this appeal.

PART II - QUESTIONS AT ISSUE

4. The CCLA's argument in this appeal is limited to the question of the appropriate test for granting public interest standing.

PART III - ARGUMENT

A) <u>The Need for a Purposive Approach to Public Interest Standing</u>

5. The existing approach to public interest standing attempts to reconcile two primary concerns. First, standing should be granted in certain cases to ensure that legislation and

government action are not immunized from challenge or review. Second, standing should be denied in certain cases to ensure the efficient use of scarce judicial resources. Related to the latter point is the notion that judicial resources ought to be preserved for cases where there are adversaries with both the interest and capacity to vigorously argue the case. The traditional assumption has been that these criteria will best be met in the context of litigation where parties have private interest standing, and that public interest standing is the exception to the rule.

6. The law of standing is one of the tools that courts use to effectively manage time and resources. However, as Prof. Cromwell (as he then was) noted in his seminal text on standing:

> …all courts, in all standing questions, would do well to begin by recognizing that standing is not a simple procedural question. Rather, it is one intimately connected with the accessibility of justice, recognition of legally protected interests and the definition of the appropriate role of the courts in society.[1]

7. The current test for granting public interest standing requires the public interest litigant to establish: (a) a serious issue as to the invalidity of the legislation in question; (b) that the plaintiff is directly affected by the legislation or has a genuine interest in its validity; and (c) that there is not another reasonable and effective way to bring the issue before the court. In many cases where public interest standing is at issue, the first two branches of this test are non-controversial and the crux of the dispute is whether there is another "reasonable and effective" way to bring the issue before the court.[2]

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[1] Thomas A. Cromwell, *Locus Standi – A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 92, Brief of Authorities of the Intervener, Canadian Civil Liberties Association [CCLA BOA], Tab 5.

[2] This test comes out of the trilogy of standing cases decided in the pre-*Charter* era: *Thorson v. Attorney General of Canada,* [1975] 1 S.C.R. 138 [*Thorson*], Brief of Authorities of the Respondents [Respondents' BOA], Tab 36; *Nova Scotia Board of Censors v. McNeil,* [1976] 2 S.C.R. 265 [*McNeil*], Respondents' BOA, Tab 22; and *Minister of Justice of Canada v. Borowski,* [1981] 2 S.C.R. 575 [*Borowski*], Brief of Authorities of the Appellant [Appellant's BOA], Tab 22. *Finlay v. Canada (Minister of Finance),* [1986] 2 S.C.R. 607 [*Finlay*], Appellant's BOA, Tab 14 extended this approach to standing beyond claims of unconstitutional/invalid legislation to include claims for injunctive or other relief related to a non-constitutional challenge to the statutory authority for administrative action.

8. The existing focus on the third branch of the test demonstrates a clear preference for the private interest litigant. This preference is highlighted in this Court's decision in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*[3] wherein the Court, while affirming the approach to public interest standing articulated in *Thorson, McNeil and Borowski,* also stated that "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."[4] Despite this Court's caution in *Council of Churches* that the principles with respect to discretionary standing "should be interpreted in a liberal and generous manner"[5], this preference for the individual private litigant has frequently acted as a total bar to the granting of standing.

9. CCLA submits that the current approach to public interest standing fails to adequately or directly address the underlying purposes of both ensuring that legislation is not immunized from review and that judicial resources are deployed efficiently. The disconnect between the purposes of standing and the existing test can be summarized in the following five points:

(a) The concern that a liberal approach to public interest standing will lead to the "proliferation of marginal or redundant suits"[6] is overstated. The time and costs associated with litigating a complex constitutional case already create significant disincentives for many litigants. There has been no flood of litigation since *Thorson*.[7]

(b) The objection that cases are best decided when there is a concrete dispute and factual record before the court ignores the role that courts frequently play in constitutional cases

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[3] [1992] 1 S.C.R. 236 [*Council of Churches*], Appellant's BOA, Tab 7.
[4] *Ibid.,* at 252.
[5] *Ibid.,* at 253.
[6] *Ibid.,* at 252.
[7] Despite the prominence of this concern in the decision in *Council of Churches,* this Court had recognized as early as *Thorson* that liberalizing standing rules did not result in an inordinate number of cases. See Thomas A. Cromwell, *Locus Standi – A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 179, CCLA BOA, Tab 5.

when no question of standing is raised.[8] Courts commonly consider scenarios well beyond the facts before them in order to assess whether a law can withstand *Charter* scrutiny. This Court's decision to embrace the "reasonable hypotheticals" approach in cases challenging mandatory minimum sentences is but one example.[9] Similarly, courts called upon to give advisory opinions in references must often consider the validity of a law in the abstract, demonstrating that courts are considered well-suited to engage in this kind of exercise.

(c) The objective that laws not be immunized from review is not met in cases where an overly formalistic approach to the standing question is adopted. Even in cases where the courts find that there are other potential litigants who *may* have a more direct interest in bringing a similar challenge, the very real barriers to this kind of litigation are frequently ignored or given short shrift.[10] This is particularly the case when the group most affected by a law are disenfranchised and impecunious and in instances when the individual interests at stake would not be served by lengthy or drawn-out litigation.

(d) The assumption that a private interest litigant will ensure a better or more efficient use of judicial resources is questionable. There are good reasons to doubt the proposition that multiple individual challenges arising out of criminal charges would constitute a more efficient and judicious use of resources as compared to a single *Charter* challenge. Moreover, public interest litigants may frequently be in a better position to adduce the kind of complex social science evidence that is often required in cases of this nature, providing the court with a more fulsome and helpful record on which to decide the case.

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[8] The idea that individual interest will be greater and therefore result in the presentation of a better case is also open to serious doubt. As Cromwell notes at p. 173: "The 'interest' of the parties in the outcome of the proceedings says little about the concreteness of the factual picture. Parties may well have 'an interest' in the outcome of the proceedings concerning a wholly hypothetical state of facts…Conversely, parties may have no interest in the outcome of proceedings even though they arise on a completely concrete set of facts. It seems then, that 'interest' is no guarantee of concreteness and *vice versa.* With respect to the parties doing justice to the case, there seems to be only a loose correlation between interest and this factor…Self-interest may be a circumstantial guarantee of diligence, but it is neither an infallible nor an exclusive one." CCLA BOA, Tab 5.

[9] *R v. Ferguson,* [2008] 1 S.C.R. 96 at paras. 12-13, CCLA BOA, Tab 2. See also Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40 U.B.C. L. Rev. 727 at 736, Respondents' BOA, Tab 47.

[10] However, see the dissenting reasons in *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 at paras. 186-189 wherein the dissenting judges (Binnie, LeBel and Fish JJ.) recognized the difficulties that a seriously ill person might face in seeking to challenge the health insurance scheme and thus determined that there was no "reasonable and effective" alternative to the challenge, CCLA BOA, Tab 1.

In any event, relying on a private litigant, particularly one charged with a criminal offence, to initiate wide-ranging constitutional challenges is a substantial burden. The preference for private litigants may thus frequently undermine rather than enhance access to justice for Canadians.

(e) Finally, while private standing is currently considered the rule and public interest standing the exception, courts have on occasion resisted this strict dichotomy and held that where the test for public interest standing is met, there is no need to consider whether standing can be established as of right.[11] Other cases demonstrate that there may be a level of confusion and perhaps artificiality to the distinction.[12] As such, the treatment of public interest standing as exceptional is not in keeping with an approach that focuses on access to justice, the rule of law, ensuring important constitutional questions are not immunized from review, and the appropriate and efficient management of scarce judicial resources.

10. In addition to these specific critiques, the current approach to public interest standing fails to recognize the public benefit served by litigation that tests the constitutionality of legislation and the legality of government action.[13] All Canadians are entitled to a government

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[11] For example, in *Schaeffer v. Wood,* 2011 ONCA 716, CCLA BOA, Tab 3, the Ontario Court of Appeal considered whether applicants seeking declarations that, among other things, police officers involved in incidents investigated by the Special Investigations Unit (SIU) were not entitled to obtain legal assistance in preparing their notes with respect to the incident. On the question of standing, the applicants had submitted that they had both private and public interest standing. Sharpe J.A., writing for the Court, stated at para. 36 "…I view the issue of public interest standing as dispositive and accordingly, need not consider private interest standing." See also *Pratten v. British Columbia (Attorney General),* 2010 BCSC 1444 at para. 35, Appellant's BOA, Tab 27. In this case, where certain facts related to private standing were unclear, the Court found that the plaintiff had public interest standing and "potentially direct interest standing" as well.

[12] For example, notwithstanding the fact that members of the Respondent Downtown Eastside Sex Workers United Against Violence ("SWUAV") are currently engaged in sex work, they were found to lack private interest standing while all three individual litigants in the *Bedford* case in Ontario were found to have such standing. See *Bedford v. Canada,* 2010 ONSC 4264, 327 D.L.R. (4th) 52 at paras. 46-57, Appellant's BOA, Tab 3.

[13] See Kent Roach, *Constitutional Remedies in Canada,* looseleaf (Toronto: Canada Law Book, 2010) at 5.20, CCLA BOA, Tab 8. Professor Roach states that "Decisions about standing and timing reflect views about the appropriate role of courts. If courts are concerned about achieving corrective justice between governments and individuals, then they will only consider claims made by those who stand to receive a personal remedy. However, if they are concerned with the regulation of governmental behaviour, they will be more inclined to hear from a wider group of litigants and to decide claims even though no individual can receive a tangible remedy from the decision." In *Thorson,* at 163 Laskin J. noted that "It is not the alleged waste of public funds alone that will support standing but rather the rights of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question." Respondents' BOA, Tab 36.

that operates within the confines of the Constitution. Assessing the constitutionality of legislation and government action benefits everyone, including the government; it does society no good to have laws on the books that are invalid, and yet no way of knowing that this is the case or challenging those laws in the courts.

11. Finally, a revised approach to public interest standing is required in light of the very real access to justice crisis that Canada faces. The difficulties encountered by Canadians in accessing justice have been widely discussed and acknowledged.[14] The rising costs of litigation and the narrow scope of legal aid mean that, even when a litigant could easily establish standing as of right, there remain significant barriers to commencing litigation that would be of broader public benefit. Liberalizing the approach to public interest standing is one of the tools that may help ensure access to justice for a broader segment of the Canadian public and resolve core issues and debates that may otherwise not be adequately addressed, or addressed at all, through private interest litigation.[15]

12. CCLA submits that this Court should adopt a purposive approach to public interest standing that would directly address the need to enhance access to justice, ensure that legislation and government actions are not effectively immunized from review, and make efficient use of scarce judicial resources.

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[14] See e.g. The Right Honourable Beverley McLachlin, P.C., "The Challenges We Face" (Remarks presented at the Empire Club of Canada, Toronto, March 8, 2007; online: http://scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp, CCLA BOA, Tab 6. See also Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44 U.B.C. L. Rev 255 at 255-256 and associated footnotes [Bailey, "Reopening Law`s Gate"], Respondents' BOA, Tab 41.

[15] See Bailey, "Reopening Law's Gate", Respondents' BOA, Tab 41 and Carissima Mathen "Access to Charter Justice and the Rule of Law" (2009) 26 Nat'l J. Const. L. 191, Respondents' BOA, Tab 44. See also Lorne Sossin "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40 U.B.C. L. Rev. 727, Respondents' BOA, Tab 47.

B) Principles for a Purposive Approach to Public Interest Standing

i. Concerns about a Flood of Litigation are Overstated and Addressed by Other Means

13. In *Council of Churches* this Court declined to expand public interest standing in large part due to concerns that doing so would open the floodgates and consume scarce judicial resources.[16] However, commentators have long recognized that such concerns are overstated.[17] There are already significant hurdles associated with launching complex litigation and standing should not create yet another obstacle.

14. Moreover, standing is by no means the only tool available to courts concerned about the efficient management of their time and resources. Courts may decline to hear cases where the issue is moot and also have an inherent jurisdiction to decline to hear cases that would constitute an abuse of the court's process. These tools are powerful and, in appropriate cases, will ensure that frivolous or duplicative litigation is avoided. The goal should not be to avoid litigation *per se*, but only "marginal or redundant suits"[18].

15. In addition, the current test for public interest standing incorporates concerns that need not be tied to standing. For example, the first branch (i.e. whether the case raises a serious issue) may be either a question of the propriety of the pleadings or the justiciability of the issue before the court. In either case, courts have the capacity to address these issues without ruling on the standing of the litigant. Thus, if a public interest litigant has commenced an action that raises a

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[16] See *Council of Churches* at 252 wherein this Court stated that "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 a well-meaning organizations 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." Appellant's BOA, Tab 7.

[17] See e.g. Kent Roach, *Constitutional Remedies in Canada,* looseleaf (Toronto: Canada Law Book, 2010) at 5.230, CCLA BOA, Tab 8. See also T. Cromwell, *Locus Standi – A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 178-179, CCLA BOA, Tab 5.

[18] *Council of Churches,* at 252, Appellant's BOA, Tab 7.

question that is not justiciable or does not raise a serious issue, the court may decline to decide the case,[19] and the broader question of standing need not be canvassed.

ii. The Preference for the Private Interest Litigant Should be Eliminated

16. The third branch of the test for public interest standing (i.e. whether there is a reasonable and effective alternative) is unnecessary. Currently, the existence of similar ongoing litigation or the potential for a future challenge by a hypothetical litigant operate as bars to proceeding with a public interest case. CCLA submits that the hypothetical future litigant should never operate as a bar to granting standing and that, even in cases where similar or identical litigation is ongoing in another provincial jurisdiction, courts should not decline to hear a case save in certain exceptional circumstances.

The Hypothetical Litigant

17. The possibility that, at some later date, a hypothetical private interest litigant *could* launch a similar case is particularly troubling when used as a basis for denying standing. Viewed from the perspective of a purposive approach to standing, this preference for any private litigant, without knowing about his or her capacity to litigate the case, the circumstances in which the issue may arise, or the incentives and disincentives that may operate in those circumstances, lacks merit. Declining to hear a case on this basis alone ignores concerns about the efficient use of scarce judicial resources, immunizes legislation or government action from review (if the hypothetical challenge never comes to fruition), does nothing to enhance or further access to justice and undermines the rule of law.

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[19] See e.g. British Columbia, *Supreme Court Civil Rules*, r. 9-5(1), CCLA BOA, Tab 4 and Ontario, Rules of Civil Procedure, r. 21.01(1), CCLA BOA, Tab 7.

18. In a mature democracy, institutional mechanisms must exist to allow for the adjudication of important questions related to the constitutionality and legality of government action. Such mechanisms should not rest solely or primarily on the backs of individual litigants who must either run afoul of legislation or show that they are exceptionally prejudiced by it in order to mount a challenge. Forcing such individuals to martyr themselves so that a matter of public importance can be assessed by the courts is not in keeping with the rule of law in a free and democratic society.

The Actual Litigant

19. The existence of an actual litigant with private interest standing who has an ongoing similar or identical challenge may be seen as a tempting basis on which a court might decline to hear a case. However, such an approach may undermine the concern with judicial economy and will not necessarily produce a fulsome evidentiary record. This is particularly the case in criminal or administrative matters where the continuation of the legal proceeding may lie entirely in the Crown's or government's discretion. An acquittal or individual resolution may not address the broader public interest implications of a constitutional challenge and may tie the hands of the individual litigant in terms of proceeding with an appeal on an important point of law.

20. The existence of an ongoing challenge to legislation in one provincial jurisdiction should also not operate as a bar to a similar case proceeding in a different province. A decision handed down by a court in one province has no binding effect in another until and unless the matter is ultimately considered by this Court. There is a substantial benefit to be gained from having multiple appellate courts adjudicate similar issues of broad public interest. This Court is frequently assisted by decisions from multiple appellate courts considering similar issues and the

existence of conflicting jurisprudence is one basis upon which this Court may grant leave to appeal. Justice is not served by denying standing to litigants because they were not the first to file.

21. CCLA submits that, absent exceptional circumstances, the existence of similar or identical litigation in another jurisdiction should not operate as a bar to the granting of public interest standing. Different parties will have access to different evidence and varying levels of expertise in addressing issues with broad public implications. Courts and the public alike may benefit from multiple considerations of issues by learned jurists without necessarily detracting from the resources available to litigants in private disputes.

22. CCLA submits that in assessing whether a public interest litigant should be granted standing, the Court should have regard to whether the litigant can demonstrate the capacity to marshal the evidence necessary to establish a sound factual record and to sufficiently represent the interests at stake. Such criteria would better fulfill the purposes of public interest standing which are to ensure that illegal or unconstitutional action does not go unchallenged and that judicial resources are properly used.

PART IV - SUBMISSIONS ON COSTS

23. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V - ORDER REQUESTED

24. The CCLA respectfully requests the opportunity to make brief oral submissions at the hearing of this appeal.

25. The CCLA takes no position on the outcome of this appeal.

January 5, 2012 **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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Counsel for Canadian Civil Liberties Association

PART VI - LIST OF AUTHORITIES

CASES

	Paragraph # in Factum where case cited
Bedford v. Canada, 2010 ONSC 4264 (CanLII)	9(e)
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PART VII - LEGISLATION

N/A