

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Respondent)

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

Respondent
(Appellant)

- and -

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PART I – OVERVIEW

1. Public interest standing increases access to justice. It allows public interest parties to ensure that governments are complying with their legal and constitutional obligations, even if the dispute does not directly affect their own rights. Many individual litigants whose rights have been violated do not have the resources or expertise needed to hold government accountable.

2. Upholding minority rights and maintaining the rule of law are animating principles of Canada's constitution. But upholding them requires access to the courts. That is a major challenge. The cost and complexity of the legal system are significant barriers for many individuals. These barriers are exacerbated when the affected individuals are marginalized or come from disadvantaged groups who are less likely to have the resources required to pursue their rights. Litigation is financially costly, but that is just the beginning. Individuals may not have the emotional wherewithal to withstand prolonged litigation or the exposure of intimate details of their personal lives to their families, employers or neighbours, or be able to assume the responsibility of representing their communities before the courts.

3. Public interest standing can contribute to improving access to justice, particularly to vindicate the rule of law and respect for minorities. Public interest litigants who are granted standing can bring matters to the courts which allow them to protect individual rights and prevent government overreach. The test for obtaining standing should therefore not be unduly restrained based on artificial, hypothetical or overstated concerns.

4. This Court last addressed the test for public interest standing in *Downtown Eastside*,¹ almost a decade ago. *Downtown Eastside* requires a purposive and not formalistic approach to standing. However, the CCLA submits that further refinements to the test are needed to reduce persisting barriers to access to justice, particularly for disadvantaged and marginalized groups, and to ensure that there is proper judicial scrutiny of government action.

5. CCLA acknowledges that numerous parties and interveners have raised important arguments about enhancing access to justice through public interest litigation. CCLA seeks to

¹ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* (“*Downtown Eastside*”), [2012 SCC 45](#).

focus its submissions on the second factor of the test – the requirement that a public interest litigant have a “genuine interest” or “real stake” in the proceeding.

6. It will be a rare litigant that starts a public interest case that meets the other relevant criteria, but is nevertheless still unsuitable. As a result, parties should be presumed to meet the “genuine interest” criteria, unless the party opposing standing establishes that the proposed public interest plaintiff is not appropriate to advocate for the holders of the rights in issue. This will eliminate an unnecessary barrier while still dealing with the Court’s concerns about adversarial context and not exceeding its role in a democratic system of government.

PART II – POSITION ON THE QUESTIONS AT ISSUE

7. The CCLA’s position focusses only on the second part of the legal test for public interest standing. CCLA supports positions taken in this appeal to reduce barriers in part three of the test to increase access to justice through public interest standing. It takes no position on the underlying merits of the appeal.

PART III – ARGUMENT

Neither Rights nor Process should be Static

8. This Court has long recognized that legal and constitutional rights must be capable of evolution and growth to reflect changes in society. In *Hunter v. Southam*, the Court stated that the function of the Constitution, together with the *Charter*, is to provide “for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”²

9. The procedure for vindicating rights should not be static either. Canada’s commitment to the rule of law and its constitutional values has increased by leaps and bounds since the *Charter* was enacted. But access to justice remains illusory for many. According to research done by the Canadian Forum on Civil Justice, 65% of Canadians are “uncertain of their rights, do not know

² *Hunter et al., v. Southam Inc.*, [\[1984\] 2 S.C.R. 145](#), p. 155.

how to handle legal problems, are afraid to use the legal system, think nothing can be done, or believe that seeking justice will cost too much money or take too much time.”³

10. Government conduct should not be immunized from review – and rights violations should not be prolonged or unaddressed – because litigation is prohibitively costly and complex. Public interest litigants can have a significant impact in ensuring governments uphold and respect rights and freedoms, particularly those of marginalized individuals and communities.

11. Public interest standing has been significantly enhanced from its historical origins. But the current test retains some unnecessarily rigid features that undermine it as a mechanism for holding governments accountable. The CCLA’s position on this appeal is that these features, including the “real stake” requirement, are unnecessary in a modern system of justice.

Considering the Plaintiff’s “Interest” or “Stake” in a Case is a Historical Artifact

12. This Court has periodically liberalized the test for public interest standing. Each time it restricted governments’ opportunities to rely on standing rules to avoid explaining or justifying their conduct. But even today, some aspects of the existing test are largely historical artifacts that do not advance any meaningful goals.

13. Prior to the 1970s, an individual could only sue in respect of matters that directly impacted their legal rights. Only the Attorney General could seek relief in relation to matters of public interest. The concern in the case law was that opening up the courtroom doors to litigants without a direct interest would lead to a waste of judicial resources, as well as “grave inconvenience and public disorder.”⁴

14. In *Thorson*,⁵ this Court first decided there is judicial discretion to grant public interest standing. Subsequent decisions like *McNeil*, *Borowski*, *Finlay*, and *Canadian Council of Churches* made it theoretically possible for public interest litigants to obtain standing,⁶ applying the principle

³ Matt Malone, “Standing in the Way: Comparing Constraints on Access to Justice after the Liberalization of Public Interest Standing in Canada and Israel”, [46 Advoc. Q. 451](#).

⁴ *Thorson v. Attorney General of Canada*, [\[1975\] 1 S.C.R. 138](#) (“*Thorson*”), pp. 144-5.

⁵ *Thorson*, [\[1975\] 1 S.C.R. 138](#).

⁶ *Nova Scotia Board of Censors v. McNeil*, [\[1976\] 2 S.C.R. 265](#); *Minister of Justice (Can.) v. Borowski*, [\[1981\] 2 S.C.R. 575](#); *Finlay v. Canada (Minister of Finance)*, [\[1986\] 2 S.C.R. 607](#);

that government action should not be immune from constitutional review.⁷ However, even in those decisions, the Court maintained a concern about overtaxing its limited resources and avoiding “the mere busybody” litigant. This limited the Court’s willingness to fully develop a test for public interest standing that focuses on accountability and not process.⁸

15. Ultimately, a three-part test for public interest standing was established: (1) is there a serious issue relating to government action; (2) is the plaintiff directly affected by the government action or does it have a genuine interest in its validity?; and (3) is there no other reasonable and effective manner in which the issue may be before the court?⁹ However, this test was applied rigidly, requiring a potential public interest plaintiff to independently establish all three parts of the test. Moreover, there was still a concern about preserving judicial resources for cases with a “real” litigant, instead of the hypothetical busybody.

16. In *Downtown Eastside*, the Court emphasized the need for a flexible and purposive approach, focusing on the third element of the test.¹⁰ However, *Downtown Eastside* left the second criteria for standing – a plaintiff with a “genuine interest” – largely in place (albeit with a new name: “real stake”). The Court held that this remains necessary “to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere ‘busybody’ litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government.”¹¹

17. While the Court has legitimate concerns about adversarial context and protecting the judicial role, the requirement of a “genuine interest” or “real stake” is not an effective means of addressing them. Historical involvement with an issue may signal interest in an issue, but its absence does not signal disinterest. This case provides the Court with an opportunity to revise the

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

⁷ See *Thorson*, [\[1975\] 1 S.C.R. 138](#), p. 145.

⁸ *Canadian Council of Churches*, [\[1992\] 1 S.C.R. 236](#).

⁹ *Canadian Council of Churches*, [\[1992\] 1 S.C.R. 236](#).

¹⁰ *Downtown Eastside*, [2012 SCC 45](#), paras. 37, 44-51.

¹¹ *Downtown Eastside*, [2012 SCC 45](#), para. 1.

“real stake” aspect of the test so it can be more closely tailored to the (limited) objectives it is trying to achieve.

The CCLA’s Proposed Revision

18. The CCLA asks the Court to change its approach to the second factor. Instead of “genuine interest” or “real stake,” the Court should ask whether the party opposing standing has provided reasons why the public interest group cannot appropriately advocate for the rights holders, due to a lack of appreciation of their issues, conflict of interest, or other similar concerns. These must be grounded in evidence, not mere speculation. This accomplishes what the “genuine interest” or “real stake” requirement is intended to do (providing adversarial context, ensuring the court’s role and avoiding the “busybody”), without unduly limiting standing to parties with a historical interest or presence.

19. The “genuine interest” or “real stake” threshold is first and foremost concerned about the hypothetical “busybody” – plaintiffs who theoretically consume judicial resources with cases in which they have little interest. But, as this Court found in *Downtown Eastside*, this concern is overstated: “[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom.”¹²

20. There has been no floodgate of unnecessary or frivolous litigation since *Downtown Eastside*. This is not a surprise. The time and costs associated with litigating a complex public interest case creates a significant disincentive for many litigants. Moreover, there are other means to ensure only justiciable claims are brought forward in a reasonable and effective manner. So even if busybodies exist, they are not a genuine concern.

21. Another rationale for the “genuine interest” requirement is to ensure that courts have the benefit of contending points of view of those most directly affected.¹³ This underestimates the sophistication, preparation and commitment of numerous public interest litigants. Any lingering concern can be addressed by giving the party resisting standing the opportunity to rebut the presumption, by showing that the group is inappropriate for the reasons specified above (in

¹² *Downtown Eastside*, [2012 SCC 45](#), para. 28.

¹³ *Downtown Eastside*, [2012 SCC 45](#), paras, 1, 29.

paragraph 18) This will ensure that courts can benefit from public interest litigants, who bring important perspectives and make meaningful contributions to the judicial process, while ensuring sufficient adversarial context.

22. Finally, the concern that courts play their proper role within our democratic system of government, and address questions that are appropriate for judicial determination, is not advanced by the “genuine interest” test, as currently formulated. Rather, it impedes access to justice and the rule of law, a crucial principle that underpins Canada’s constitution.¹⁴

23. As set out above, the CCLA proposes a different use for the second factor. If the first and third criteria of the test are met, then “genuine interest” should be presumed, subject to the party resisting public interest standing to show why the proposed public interest plaintiff is not an appropriate party to advocate for the rights holders as set out above. CCLA concedes that these circumstances will be rare, and should be even more rare when the right being advanced affects marginalized groups.

“Genuine Interest” Requirement Discriminates against Marginalized Groups

24. The other problem with the “genuine interest” requirement as currently formulated is that it emphasizes a litigant’s historical, rather than present, engagement with an issue. This is not a meaningful gauge of the litigant’s capacity and commitment to litigate the matter. It also discriminates against disadvantaged or marginalized groups, who require greater access to justice instead of higher barriers.

25. A public interest litigant may have the capacity to meaningfully bring an important *Charter* issue before the court but nevertheless lack a history of engagement with that specific issue. This is particularly true where an issue is novel (*e.g.*, it may be the first time a court is asked to recognize specific rights), or the litigant itself is newly formed or newly representing a specific group’s interests. By itself, this should not matter.

26. Cases that raise legitimate issues, brought by capable and committed litigants, where the case is a reasonable and effective means of getting the matter before the Court should mostly be

¹⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 48; and *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 49.

heard. Questions like historical engagement – that do not impact on the litigant’s ability to present the case – should not be the basis to reject an important and meritorious claim.

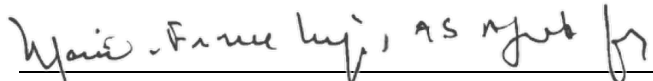
27. CCLA therefore asks the Court to revise the test for public interest standing to remove the requirement that public interest litigants demonstrate a “genuine interest” or “engagement” with the issue. Instead, “genuine interest” should be presumed and the onus should be on government to show that the public interest litigant is not an appropriate party to advocate for the rights holders

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

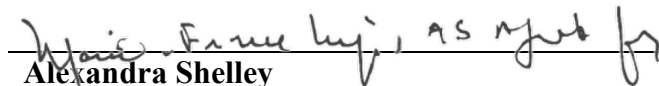
28. The CCLA takes no position on the outcome of this appeal. The CCLA seeks no costs and asks that no costs be awarded against it.

December 2, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Andrew Bernstein



Alexandra Shelley

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Canadian Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

CASES	Cited in paras.
<i>Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society</i> , 2012 SCC 45	4, 16, 19, 21
<i>Canadian Council of Churches v. Canada (Minister of Employment and Immigration)</i> , [1992] 1 S.C.R. 236	14, 15
<i>Finlay v. Canada (Minister of Finance)</i> , [1986] 2 S.C.R. 607	14
<i>Hunter et al., v. Southam Inc.</i> , [1984] 2 S.C.R. 145	8
<i>Minister of Justice (Can.) v. Borowski</i> , [1981] 2 S.C.R. 575	14
<i>Nova Scotia Board of Censors v. McNeil</i> , [1976] 2 S.C.R. 265	14
<i>Reference re Secession of Quebec</i> , [1998] 2 S.C.R. 217	22
<i>Thorson v. Attorney General of Canada</i> , [1975] 1 S.C.R. 138	13, 14
<i>Toronto (City) v. Ontario (Attorney General)</i> , 2021 SCC 34	22
SECONDARY SOURCES	Cited in paras.
Matt Malone, “Standing in the Way: Comparing Constraints on Access to Justice after the Liberalization of Public Interest Standing in Canada and Israel”, 46 Advoc. Q. 451	9