S.C.C. File No. 39430

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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TABLE OF CONTENTS

PART I – OVERVIEW **1**

PART II – STATEMENT OF ISSUES **2**

PART III – ARGUMENT **2**

A. The Problem: Lack of Public Interest Standing Treated as a Technical Objection 2

B. A Saskatchewan Case-Study: the *Good Spirit* Litigation 3

C. Proposed Requirements for Public Interest Standing 6

(1) Pre-Trial Determination of Standing 7

(2) Alignment of Interests 7

(3) Firm Evidential Foundation for Standing 8

(4) No Personal Interest in the Outcome 9

D. Conclusion 10

PART IV – COSTS **10**

PART VII – TABLE OF AUTHORITIES **11**

PART I – OVERVIEW

1. Public interest standing is a necessary tool to facilitate access to justice in certain situations. However, public interest standing must always be focused on the interests of rights-holders who would be affected by the decision, rather than becoming a banner that can be seized by an entity wishing to advance its own interests, as opposed to those of the rights-holders. Saskatchewan makes no comment on the particular facts of this case when identifying this issue but rather is identifying the risk that must be mitigated more generally when dealing with claims of public interest standing.

2. As well, the test for public interest standing must also take into account the fair process issues for potential defendants. From a defendant's perspective, when sued in a constitutional case or otherwise, it is important to identify and mitigate various risks posed by the litigation. In a public interest standing case, the risk is that the case goes ahead without adjudicative facts and ultimately is decided incorrectly, on public interest standing.

3. Factors that may come up in public interest standing cases include: (a) lack of evidence to show that a real rights-holder is affected; (b) lack of consultation with rights-holders, which is necessary to ensure that they support the action; (c) lack of evidence showing an alignment of interests between the applicant and the rights-holders; (d) potential conflicts of interest between the applicant and the rights-holders; (e) abstract claims without adjudicative facts.

4. Saskatchewan will rely on the recently concluded *Good Spirit* school funding litigation as a case-study of what can go wrong if the rules for public interest standing are not rigorously applied. Based on the *Good Spirit* litigation, Saskatchewan proposes three factors which should be incorporated into the test for public interest standing, as well as a procedural requirement that public interest standing always be determined at the beginning of a trial.

5. There must be sufficient rigour in the criteria for public interest standing, and in the application of those criteria, to ensure that there are no repetitions of the experience in the *Good Spirit* case. In that case, the issue of standing was repeatedly deferred, resulting in a trial that lasted 51 days and cost the parties over $4,000,000 in public funds. On appeal, the Court of Appeal held that public interest standing had not been established. Over $4,000,000 in public funding intended for education was diverted from the classroom into the courtroom.

PART II – STATEMENT OF ISSUES

6. Saskatchewan intervenes in this case for three reasons, which directly relate to the issues raised by the Appellant:

(a) To demonstrate the difficulties that result if courts interpret *Downtown Eastside* as obviating or eliminating the need to establish public interest standing through a sufficient evidential basis. Saskatchewan's experience with the *Good Spirit* education funding case, graphically demonstrates these concerns.

(b) To set out the touchstones or metrics that assist in determining if there is a valid claim of public interest standing, as opposed to one that is appropriating the rights of others in order to advance the interests of an applicant that are not aligned with the interests of the rights-holders;

(c) To develop an approach that sets out the qualitative aspects of the evidence that must be adduced to establish public interest standing, including demonstrating an alignment of interests between the applicant for public interest standing, and the rights-holders.

PART III – ARGUMENT

A. The Problem: Lack of Public Interest Standing Treated as a Technical Objection

7. Saskatchewan agrees that courts are to exercise their discretion to grant public interest standing in a "flexible and generous manner" and that this Court rejected a rigid application of the three factors courts must consider in deciding public interest standing in *Downtown Eastside*. However, *Downtown Eastside* was not an invitation to courts to ignore, or gloss over, the application of these factors.

8. This Court was clear in *Downtown Eastside* that the law of standing is to strike a balance between ensuring court access and preserving judicial resources.[1] However, if the criteria are not rigorously applied, it not only puts scarce judicial resources at risk, but also risks undermining the interests of the very persons public interest standing law is intended to benefit (i.e., the rights-holders). An applicant for public interest standing must clearly demonstrate that the purpose of the litigation is to benefit the rights-holders.

9. Saskatchewan submits that trial courts would benefit from clear guidance that (1) public interest standing should not be presumed, (2) the public interest standing test remains a robust and meaningful standard that courts must apply, and (3) sufficient evidence is required before standing may be granted.

10. In addition, there is a need for a procedural requirement, namely that public interest standing must be determined at the beginning of the trial. If not, and the trial proceeds with public interest standing simply treated as one issue to be determined, it virtually eliminates the need to establish public interest standing. The case will proceed on the assumption that public interest standing is likely. Objections by a government to the lack of public interest standing should not be dismissed as simply technical or procedural objections. Rather, such objections to public interest standing relate to a substantive issue at the heart of the litigation: whose *Charter* rights are alleged to have been infringed, and in what way?

11. This Court in *Downtown Eastside* was setting out the threshold which must be met for public interest standing. However, if the issue of public interest standing is not determined at the beginning of a case, based on clear attention to the criteria established by this Court and a firm evidential foundation, the result is that public interest standing comes close to being presumed.

B. A Saskatchewan Case-Study: The *Good Spirit* Litigation

12. A review of the history of the *Good Spirit* case illustrates Saskatchewan's concern with a lax application of public standing principles. The case was triggered when a public school closed in the small town of Theodore, near Yorkton. A Catholic separate school was then established.

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[1] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524, at para. 23 ["*Downtown Eastside*"].

Students from the closed public school, including non-Catholic students, switched to the separate school. The public school board challenged the government funding formula which treated all students alike, regardless of religion, which meant that non-Catholic students could attend the separate school.

13. On three separate occasions in the *Good Spirit* litigation, the defendant separate school board sought pre-trial determinations of the public school board's standing, in 2008,[2] 2012,[3] and 2015.[4] In each case, the decision on standing was deferred to trial, rather than requiring the plaintiff to establish its claim to public interest standing at the beginning of the case.

14. As well, partway through the 51 day trial, counsel for the Government made an application alleging abuse of process, because the public school board was calling evidence relating to an independent religious school in Regina to establish the *Charter* breach. The trial judge rejected the application, but noted that even half-way through the trial the basic question of standing had not been resolved: "On whose behalf is Good Spirit alleging that *Charter* rights have been infringed?"[5] However, the trial judge again deferred the standing issue to the conclusion of the trial.

15. The standing issue was clearly relevant to the evidence being called by the public school board. Although the case arose in Theodore, at trial the public school board ultimately relied on the *Charter* rights of parents at an independent religious school in Regina to challenge the government funding received by separate schools. At no point did the public school board call any evidence from any individuals asserting that their *Charter* rights were infringed, nor did the independent religious school participate in the court action. In fact, the president of the

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[2] *York School Division No. 36 v Theodore Roman Catholic School Division No. 138*, 2008 SKQB 384 (CanLII) (the parties' names were subsequently changed in a school division re-organisation).

[3] *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*, 2012 SKQB 343 (CanLII); leave to appeal denied, *Christ the Teacher Roman Catholic Separate School Division No 212 v Good Spirit School Division No 204*, 2012 SKCA 99 (CanLII).

[4] *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 2012* (SK QB), August 6, 2015 (unreported) [**Book of Authorities, Tab 1**].

[5] *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2016 SKQB 148 (CanLII), para. 29.

independent religious school testified that they did not want funding to the separate schools to be cut, as did a representative of a different minority faith.[6]

16. At the end of the 51 day trial, the trial judge held that the public school board had public interest standing, and ruled in its favour on the merits of the constitutional issues.[7] The result would be significant cuts in funding for the separate schools, even though representatives of the rights-holders had testified that they did not want that result.

17. On appeal, the Saskatchewan Court of Appeal unanimously allowed the appeals of the Government and the separate school board on all grounds, including the finding that there was no public interest standing.[8] This Court denied leave to appeal from that decision.[9]

18. On the standing issue, the Court of Appeal found that there was no "true plaintiff".[10] It also held that the case was essentially a funding dispute between the two school boards and the Government.[11] The Court of Appeal agreed with the Government's submission that the public school board was essentially trying to expand its market share.[12] The Court of Appeal also noted that if the constitutional analysis of the trial judge were upheld, not only would it affect the funding for the separate schools, but it potentially could also restrict the ability of the Government to provide funding for independent religious schools.[13]

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[6] *Saskatchewan v Good Spirit School Division No. 204*, 2020 SKCA 34 (CanLII), para. 57 ["*Good Spirit – CA Judgment*"].

[7] *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2017 SKQB 109 (CanLII) ["*Good Spirit – Trial Judgment*"].

[8] *Good Spirit – CA Judgment*, paras. 43 to 68.

[9] *Good Spirit School Division No. 204 v. Government of Saskatchewan, et al.*, 2021 CanLII 13276 (SCC).

[10] *Good Spirit – CA Judgment*, para. 315.

[11] *Good Spirit – CA Judgment*, paras. 66, 90, 258.

[12] *Good Spirit – CA Judgment*, para. 86.

[13] *Good Spirit – CA Judgment*, paras. 56, 62, 338.

19. The net result was that the *Charter* rights of the rights-holders could potentially be used against them, to favour the public school board.

20. That decision on appeal came after the tremendous investment of time, judicial resources, and public resources in a 51 day trial. On the issue of costs, the trial judge found that the public school board had spent $3,021,854.52 in legal fees and expenses, while the separate school board had spent $1,238,932.07 in fees and disbursements, for a combined total of $4,260,786.59.[14] Since school boards are funded entirely by the Government of Saskatchewan and by local taxation, that was over $4 million dollars of public funds thrown away, rather than spent on educating students.

C. Proposed Requirements for Public Interest Standing

21. The grant of public interest standing continues to be a discretionary exercise, based on the application of the three part test from *Downtown Eastside*, applied in a flexible, generous and liberal manner. However, the application of the discretion in a flexible manner should not be conflated with eliminating the need for an evidential basis for the claim of public interest standing, nor should it be conflated with obviating the need for a factual matrix for the *Charter* claim.

22. Saskatchewan submits that the test for public interest standing should be expanded to include the following four factors:

(1) an application for public interest standing should be determined before trial;

(2) there must be an alignment of interest between the applicant for public interest standing and the individuals whose *Charter* rights the applicant wishes to rely upon;

(3) there must be a firm evidential foundation for the claim for public interest standing, relying on the *Charter* rights of the rights-holders;

(4) the applicant for public interest standing must not have a personal stake in the outcome of the case, particularly a direct financial benefit.

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[14] *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2018 SKQB 30 (CanLII) , paras. 8–11.

23. These factors should be expressly made part of the test for public interest standing. *Downtown Eastside* should not be a presumptive grant of public interest standing to anyone simply based on the commencement of a court action challenging legislation. Unlike direct standing, public interest standing must be demonstrated rather than presumed. Courts should only exercise their discretion to grant public interest standing after a full application of the three issues in the *Downtown Eastside* test.

(1) Pre-Trial Determination of Standing

24. Trials which result from constitutional challenges, particularly those which involve systemic claims, are lengthy. Deferring a decision on whether there is an evidential basis for a claim of public interest standing until the end of the trial effectively grants presumptive public interest standing to advance the claim.

25. To ensure that public interest standing is not granted presumptively, there must be an opportunity to test the claim for public interest standing in a pre-trial application. To make the pre-trial application meaningful, the applicant for public interest standing must be required to demonstrate a sufficient evidential basis for its assertion of standing, if the claim for public interest standing is challenged.

(2) Alignment of Interests

26. Saskatchewan submits that an alignment of interests between the applicant for public interest standing, and the rights-holders whose *Charter* rights are said to be engaged, is an important touchstone for the determination of grants of public interest standing. The demonstration of an alignment of interests provides an important screening or vetting mechanism to determine if it is in the public interest to grant standing.

27. An inquiry into the alignment of interests between rights-holders and the applicant for public interest standing will result in an assessment of whose interests are truly being advanced by the litigation. A consideration of whether an alignment of interests exists between the applicant for public interest standing and rights-holders is currently incorporated into the third step in the test for public interest standing. As outlined in *Downtown Eastside*:

> The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account… If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.[15]

28. Saskatchewan submits that the courts should consider whether there are indicators of alignment in interests between the applicant, and the rights-holders whose *Charter* rights the applicant seeks to rely upon. A good starting point is to consider the absence or presence of consultation with rights-holders. An additional factor to consider is the remedy sought: would it advance the interests of rights-holders as opposed to advancing the interests of the applicant seeking public interest standing? If there is an alignment between the interests of the applicant for public interest standing and those more directly affected, it should not be difficult to produce evidence to support the claim for public interest standing.

(3) Firm Evidential Foundation for Standing

29. In *Downtown Eastside*, extensive evidence was tendered in a pre-trial application to establish public interest standing. In particular, the evidence included more than 90 affidavits from current or past sex workers from the Downtown Eastside neighbourhood. As noted by this Court, the applicant for public interest standing in *Downtown Eastside* "… provide[d] a concrete factual background and represent[ed] those most directly affected by the legislation".[16]

30. In addition, the evidentiary record in *Downtown Eastside* clearly established the alignment between the interests of those most directly affected and the applicant for public interest standing:

> As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run "by and for" current and former sex workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the needs of street-based sex workers and its objects include working toward better health and safety for sex workers, working against all forms of violence against sex workers and lobbying for policy and legal changes that will improve the lives and working conditions of the sex workers…[17]

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[15] *Downtown Eastside*, para. 51.

[16] *Downtown Eastside*, para. 74.

[17] *Downtown Eastside*, para. 58 [citation omitted].

31. Saskatchewan submits that this aspect of the third step in the Court's test for public interest standing should include reference to specific factors to be assessed to determine if the necessary alignment exists. At a minimum, the evidence to establish public interest standing should address: the engagement or consultation with rights-holders who would be most directly affected by the litigation; whether such engagement or consultation demonstrated support for the litigation, including the remedy requested; what impact the legislative scheme currently has on those individuals who are rights-holders; and what effect the requested remedy will have on them, as explained by the rights-holders themselves who are directly affected.

32. One other aspect of the need for a firm evidential foundation is that even if public interest standing is granted, the matter is still a civil action. It cannot be considered a private reference. As this Court has emphasised, *Charter* claims ".. should not and must not be made in a factual vacuum".[18] In the context of public interest standing, that means that there must be witnesses called by the applicant, both at the stage of establishing standing, and if standing be granted, at the trial proper. A grant of public interest standing does not relieve the applicant of the burden of proof, and of calling evidence to support the claim.

33. The requirement for evidence means that the defendant will be able to test the material before the court, and the court will have the benefit of the necessary factual foundation.

(4) No Personal Interest in the Outcome

34. The final requirement proposed by Saskatchewan is that the applicant for public interest standing must not personally receive a financial or other benefit that directly accrues to them or their organization, as opposed to benefitting the rights-holders who are directly affected.

35. This was one of the most serious concerns in the *Good Spirit* case: the public school board was relying on the rights of third parties to achieve a financial benefit for itself, to increase its market share.[19] The Court of Appeal found that if the public school board had been successful in its *Charter* argument, the independent religious schools might actually have lost their funding: "In

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[18] *MacKay v. Manitoba*, [1989] 2 SCR 357, at pp. 361–362.

[19] *Good Spirit – CA Judgment*, para. 86.

essence, Good Spirit sought public interest standing on behalf of faith groups whose interests collide with its own."[20]

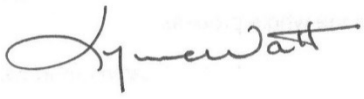
D. Conclusion

36. Evidence establishing alignment of interests between the rights-holders and the applicant for public interest standing is key. Absent such evidence, there is a real risk of entities or organizations capturing the flag and using the action as a vehicle to advance their own interests, versus those of the rights-holders.

PART IV – COSTS

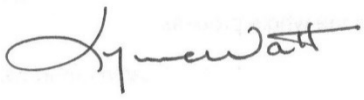
37. Saskatchewan does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of December, 2021.



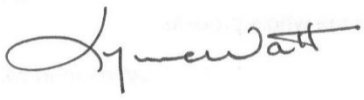
for:

Sharon H. Pratchler, Q.C.



for:

Thomson Irvine, Q.C.



for:

Jeffrey Crawford

Counsel for the Intervener,
Attorney General for Saskatchewan

[20] *Good Spirit – CA Judgment*, para. 58.

PART VII – TABLE OF AUTHORITIES

Case Law	Paragraph(s)
Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 SCR 524	8, 27, 29, 30
Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212, 2012 SKQB 343 (CanLII); leave to appeal denied, *Christ the Teacher Roman Catholic Separate School Division No 212 v Good Spirit School Division No 204*, 2012 SKCA 99 (CanLII)	13
Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212 (SK QB), August 6, 2015 (unreported)	13
Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212, 2016 SKQB 148 (CanLII)	14
Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212, 2017 SKQB 109 (CanLII)	16
Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212, 2018 SKQB 30 (CanLII)	20
Good Spirit School Division No. 204 v. Government of Saskatchewan, et al., 2021 CanLII 13276 (SCC)	17
MacKay v. Manitoba, [1989] 2 SCR 357	32
Saskatchewan v Good Spirit School Division No. 204, 2020 SKCA 34 (CanLII)	15, 17, 18, 35
York School Division No. 36 v Theodore Roman Catholic School Division No. 138, 2008 SKQB 384 (CanLII)	13