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)

[*Style of cause continued on next page*]

FACTUM OF THE INTERVENER
TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF POSITION

1. The law of standing is about "who is entitled to bring a case to court for a decision" (*Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, at para. 1 (emphasis added)). And yet the gauntlet that a would-be public interest litigant must run in the name of "standing" traverses a hodge-podge of issues, some of which have little to do with the relationship between the litigant and the subject matter of the litigation (upon which one might expect the "who" question to concentrate). Those include, among other things, a preliminary assessment of the merits, an inquiry into justiciability, and an increasingly problematic focus on how the litigation has been set up.

2. The evolution of the concept of public interest standing explains how this came to pass. Traditionally, standing rested entirely upon a litigant's interest in an action. The requirement was that the interest stem from an interference with the plaintiff's own rights or other damage "peculiar to himself" (*Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331, at p. 157). That created a problem: if no litigant could claim any greater interest than anyone else, legislation would be immune from challenge. The situation was remedied in the trilogy of *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662 and *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575, in which this Court introduced and developed an alternative, discretionary basis for standing. This allowed "public interest standing" to be grounded in lesser interests than would qualify for standing as of right, in appropriate circumstances – that is, having regard to questions of justiciability and the availability of alternative ways of bringing the matter before the court.

3. The central teaching of *Downtown Eastside* was that just because there is another way to court, that does not mean it is the only way to court (*Downtown Eastside*, at para. 44). The standing jurisprudence – notably *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 and *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 – had become too hung up on whether someone else could, would, or should be the challenger. Following *Downtown Eastside*, a would-be public interest litigant need only show that (1) the case raises a serious

justiciable issue; (2) the litigant has a real stake or a genuine interest in its outcome; and (3) the litigation is a reasonable and effective means of bringing the issue forward.

4. All of that, though, has carried "public interest standing" quite far from the foundational principles of standing, with the result that it risks being at once too broad (in terms of the wide-ranging inquiry into whether the litigation is reasonably and meritoriously set up) and too shallow (in that it does little to identify the interests properly capable of giving rise to standing).

5. That trend may be pushed even further in this appeal, by reason of the significance that the Appellant ascribes to the inability of institutional litigants *themselves* to supply individualized facts for constitutional adjudication, and the corresponding proposal that the third step of the *Downtown Eastside* test be viewed as a gauge of the ability of an institutional litigant to serve as a proxy for, represent, or otherwise compensate for the absence of individual rights holders and the "factual matrices" they might have supplied.

6. The Trial Lawyers' Association of British Columbia ("TLABC") intervenes to urge this Court not to embrace that vision of the third step of the *Downtown Eastside* test. In particular, TLABC says that this vision – and the premium it places on the involvement of "individual rights holders" – struggles to find purchase in the theories of the judicial role on which it purports to rest.

7. If there is a concern about the ability of the current framework to "ensure that courts play their proper role within our democratic system of government" (*Downtown Eastside*, at para. 1), the solution is not for this Court to be even more elaborately prescriptive about how trial judges are to assess the reasonableness of the litigation as a vehicle for bringing a matter before the court. Adding bells and whistles to the *Downtown Eastside* framework – such as a pivot point around the presence or absence of an individual co-plaintiff, triggering special evidentiary burdens, to be discharged at a point in the proceeding of the defendant's choosing – does little, if anything, to bring the test into alignment with the governing principles of standing. And it would come at a cost: depriving trial judges of the flexibility to decide, having regard to the specific constitutional challenge before them, just how much of a "concrete and well-developed factual setting" will be *sufficient* for its resolution (*Downtown Eastside*, at para. 51), whether that can be achieved without an individual plaintiff, and at what stage of the litigation that is best decided.

8. The other elements of the *Downtown Eastside* framework are better suited to addressing the threat that "plaintiff-less litigation" is said to pose for the legitimate exercise of judicial power. For one thing, the doctrine of justiciability, with its own rich jurisprudence, is there to guard against litigation that is excessively hypothetical, speculative, or otherwise intrusive into the role of the legislative or executive branch. It is capable of determining whether a litigant has presented issues fit for adjudication with more nuance than broad pronouncements tending to equate justiciability with the presence of a *lis* founded upon individualized facts.

9. For another – and this is TLABC's focus – the interest component of the test for public interest standing is capable of accommodating concerns about the legitimate exercise of judicial power.

10. If the usefulness of the "interest" component of the test for addressing such concerns is not readily apparent, that is because of how little attention it has garnered since the last word from this Court on standing in a global sense in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. Despite the interest component being less prominent in this appeal, TLABC's submissions canvass it in depth so that the Court will be alert to this underdeveloped aspect of the framework as an avenue for tailoring public interest standing to its underlying purposes, in the event any tailoring is required.

PART II: POSITIONS ON QUESTIONS

11. TLABC's position is that this Court ought not to treat the third step of the *Downtown Eastside* test as a gauge for whether an institutional litigant is a proper substitute for individual rights holders. That is not what sensitivity to the judicial function requires. The legitimate exercise of judicial power is better served by careful attention to the nature of the interests that may be invoked in support of standing.

PART III: ARGUMENT

12. The law of standing – of which public interest standing is properly viewed as an extension – recognizes that certain interests are capable of supporting the legitimate exercise of judicial power even absent any invasion of the litigant's own legal rights. By examining what those interests are, one can see more easily into what gives a "public interest" litigant an appropriate role

to play. This, in turn, explains why giving the "interest" component of the test more work to do is a better way of answering concerns about the appropriate judicial role than inviting even more detailed scrutiny of the reasonableness of the litigation as a vehicle for bringing a matter before the Court.

A. The Nature and Origins of the Interest Requirement

13. Standing has traditionally focused on the nature of a litigant's interest (S.M. Thio, *Locus Standi and Judicial Review* (1971), p. 16). In *Robertson v. Montreal* (1915), 52 S.C.R. 30, Fitzpatrick C.J. described the rule that a person bringing an action must have an interest in it as "elementary in every system of law" (p. 33), and declared an interest "no greater or other than that of the rest of the public" to be insufficient to support an action seeking to test the *vires* of a municipal bylaw (p. 34).

14. Accordingly, a plaintiff had to show either an interference with his own rights or damage "peculiar to himself" – something capable of differentiating the plaintiff's interests from those of the general public (*Smith*, at p. 175; Thio, at pp. 29-30). This formulation derived from the law of public nuisance. The difficulty was that the public nuisance approach was premised on the ability of the Attorney General to enforce public rights – a premise that made it unsuitable for constitutional and administrative challenges, given that the Attorney General is also responsible for defending the government's legislation (*Thorson*, at p. 150).

15. The unsatisfactory state of affairs to which the rule in *Smith* gave rise – that is, the prospect of legislation being immune from challenge by virtue of the fact that no citizen could claim any greater interest in its constitutionality than anyone else – came to a head in *Thorson*. Mr. Thorson sought to challenge declaratory legislation (the *Official Languages Act*, and the appropriation of funds for its implementation), despite the fact that he could assert no interest other than the right of every citizen to constitutional behaviour by Parliament (*Thorson*, at p. 163). The Court recognized that standing was discretionary (*Thorson*, at p. 147). *McNeil* involved a challenge to a censorship legislation limiting the exhibition of films. From the perspective of understanding the interest requirement, it is significant for its treatment of *relative* interests: the fact that there was a group of regulated parties who were *more* directly affected did not preclude a member of the

viewing public from being granted standing by virtue of the control over what members of the public could or could not see (*McNeil*, at pp. 635, 637).

16. In the last case in the trilogy, *Borowski*, the plaintiff's status as a "concerned citizen" when it came to abortion was deemed sufficient in circumstances where it was difficult to conceive of a challenge by any directly affected person because the impugned criminal provisions were exculpatory (*Borowski*, at p. 595). This aspect of *Borowski* is the genesis of the ability of a would-be public interest litigant to rely on concern about and engagement with an issue to establish a "genuine interest".

17. The two strands of standing jurisprudence converged in *Finlay*, in which Le Dain J. addressed the relationship between the discretionary approach established in the trilogy, on the one hand, and standing as of right – what Le Dain J. referred to as the "general rule". Mr. Finlay, a recipient of welfare benefits from the province of Manitoba, challenged and sought to enjoin federal payments to Manitoba on administrative law grounds relating to the illegality of the Manitoba benefits scheme. Le Dain J. first considered whether Mr. Finlay could establish standing without resort to the judicial discretion established in the trilogy. He found that, although Mr. Finlay had a personal stake in the legality of the Manitoba benefits scheme, it was too remote from the impugned federal action for there to be standing under the general rule (*i.e.* as of right). That same stake, though, supported a finding of public interest standing on the discretionary grounds established in the trilogy, in view of the presence of a serious justiciable issue and the absence of any other reasonable and effective means by which the issue might be brought before the Court.

18. *Finlay* is important for what it tells us about the nature of the interests capable of giving rise to standing under the general rule. They are not limited to a party's own legal rights, whether under private law or statute (*Finlay*, at p. 619, citing Thio, at p. 161). For standing purposes, a litigant may acquire the requisite interest – a "personal stake" – by virtue of the impugned measure's prejudicial *effects*, and the corresponding prospect that a judicial remedy would be of practical benefit. The effects need only be sufficiently personal and direct.

19. In this, Le Dain J. took inspiration in part from the American approach – albeit cautiously, owing to the perils of adopting principles developed in the context of a constitutional requirement

of a “case or controversy”. That approach looked to the existence of an “injury” with a nexus to the action attacked, such that the litigant stands to benefit in its personal interests from the relief sought (*Finlay*, at p. 622). In this way, prejudicial *effects*, as well as the invasion of a personal right, could be a cognizable injury for which a judicial remedy was properly available. Le Dain J. was also of the view existence of a practical benefit is of assistance in delineating which injuries are sufficiently *direct* to support a finding of standing (*Finlay*, at p. 623).

20. Those are the sorts of interests that *Finlay* says give rise to standing under the general rule – and that also tells us something about the “interests” component of the test for discretionary *public* interest standing. The interests that may be relied upon to establish standing may usefully be arrayed along a spectrum. At one end, there is an invasion of the plaintiff’s own legal rights, in respect of which standing is generally uncontroversial. At the other, there is the right of all citizens to constitutional behaviour on the part of the legislature (*Thorson*, at p. 163).

21. In between, there are the sort of effects-based interests at issue in *Finlay*. Some of these may be sufficiently direct and personal to establish standing as of right. The remainder – the band within with the test for public interest standing operates – can do no more than contribute to the exercise of discretion in favour of standing. Rather than viewing “public interest standing” as a free-standing concept, it should be viewed as an extension of ordinary standing, engaged at the point where the interest has become too attenuated to support standing as of right. That is the point at which the matter becomes one of judicial discretion, and additional considerations come to the fore. But that does not mean that the nature and degree of the plaintiff’s interest disappears from the analysis.

B. The Interest requirement can and should do more work in resolving standing problems

22. Despite the limited attention it has received in the jurisprudence, the interest element has more to contribute to the standing analysis than measuring the genuineness of a proposed plaintiff’s interest, provided two things are kept in mind.

23. First, “interests” can vary in kind as well as in degree: there is a difference between being “interested” in a matter in the sense of having devoted one’s energy and attention to it and being “interested” in a matter because the impugned legislation gives rise to an injury to one’s interests in a way that a judicial remedy could ameliorate. If there is any meaningful distinction between a

"genuine interest" and a "real stake" (*Downtown Eastside*, at para. 37), it is that. Sometimes it will be appropriate to extend standing to a concerned group by reason of its concern – indeed, that form of interest may be particularly suitable in areas such as the environment, where obvious plaintiffs are scarce. But some interests are appropriately cast in terms of practical effects and practical redressability – an "injury", in the broad sense contemplated in *Finlay*, and a corresponding stake in the outcome of the litigation. Even where an injury of that sort is not sufficiently *direct* to support standing as of right, it may nonetheless be capable of offering compelling support for public interest standing.

24. Second, an institutional litigant is capable of having a "stake" in the litigation in the sense contemplated in *Finlay* just as an individual is. But the nature of the stakes may differ: because institutional litigants (*i.e.* a non-profit society) and individuals (or, for that matter, corporations) have different types of interests, the manner in which their interests can be affected – the sorts of judicially redressable "injuries" they can suffer – are different. The interests of an institutional plaintiff (*i.e.* a non-profit society) derive from its purposes and mandate. For example, measures that impede an organization's fulfilment of a practical mandate are damaging to an organization's interests in a way that is analogous to the damage that an individual's interests.

25. Careful consideration of the interests at stake has an important role to play in ensuring the legitimacy of the judicial function, just as the principle of legality does. Each is bound up with a competing philosophy of the judicial role: one which prioritizes the function of the judiciary in confining the legislature and the executive within their lawful powers (which, taken to its extreme, would be agnostic as to *who* put the judicial machinery in motion), and another that prioritizes the protection of the rights of individuals (and thus insists that a person seeking to challenge governmental action demonstrate an interest personal to himself) (Thio, pp. 2-5). This Court has embraced a mix of these philosophies, and the test for public interest standing should be calibrated accordingly.

26. Placing renewed focus on the interest requirement offers a principled solution to the problem of the legitimate use of judicial power. The more a legislative or administrative measure is susceptible to challenge by other reasonable and realistic means, the less the legality principle is able to justify the conferral of standing. The less the legality principle is able to justify the

conferral of standing, the more the exercise of judicial power depends for its legitimacy on the nature of the litigant's interest.

27. Inflexible adherence to the preferability of individualized litigation – including its use as a yardstick against which public interest litigation is measured – will not enhance the ability of the test for public interest standing to keep courts within their constitutional role. As the significance of the legality principle wanes in a particular case, it is the interests at stake that step in to ground the legitimate use of judicial power.

PART IV, V AND VI: COSTS, ORDER SOUGHT AND CONFIDENTIALITY

28. TLABC does not seek costs and asks that no costs be awarded against it. TLABC has no position on confidentiality.

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

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PART VI: TABLE OF AUTHORITIES

CASES	**CITED AT PARA.**
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