SCC Court 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 the next page]

….

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW

1. Ecojustice Canada Society ("**Ecojustice**") is Canada's largest environmental law charity. The majority of Ecojustice's clients rely on public interest standing to seek judicial recourse to protect their communities and the environment.[1]

2. Ecojustice was granted leave to intervene in this appeal on the issue of how considerations of legality and access to justice inform the *Downtown Eastside*[2] test for public interest standing.

3. Ecojustice submits that legality and access to justice are the key considerations in the public interest standing test. The principle of legality – that laws and state action are not immune from challenge – is the foundation from which public interest standing grew. An indispensable component of legality is ensuring access to justice, which this Court has recognized as the greatest challenge to maintaining the rule of law in Canada today.

4. Despite the widely recognized challenge of promoting access to justice, this Court has never fully articulated how this critical issue should be considered in the public interest standing test. This appeal – 10 years on from *Downtown Eastside* – serves as an opportunity to do so.

5. Litigation brought by groups to protect the environment illustrates the primary importance of legality and access to the public interest standing test. Environmental statutes often impose positive obligations on government. Where no one individual is sufficiently affected by state (in)action resulting in harm to the environment and communities, public interest standing serves a critical function in ensuring that (in)action is not immunized from challenge.

6. This Court should affirm the Court of Appeal's approach to legality and access to justice. The Court of Appeal rightly detailed barriers to access that are addressed by a grant of standing to a public interest litigant, and it properly recognized that legality and access to justice merit particular weight in the purposive and flexible application of the public interest standing test.

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[1] See e.g., *Communities and Coal Society v. Canada (Attorney General)*, 2018 FC 35 [***Communities and Coal Society***]; *David Suzuki Foundation v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2018 NLSC 146.

[2] *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [***Downtown Eastside***].

PART II – ECOJUSTICE'S POSITION ON THE QUESTIONS ON APPEAL

7. The first question on appeal considers the proper role for the principle of legality and access to justice in the public interest standing test. Ecojustice submits that these principles are and should continue to be the predominant considerations in application of the three-factor test established by this Court in *Downtown Eastside*.

8. Ecojustice makes no submissions on the second issue raised by the Appellant regarding the factual context required in public interest cases without an individual plaintiff.

PART III – CONCISE STATEMENT OF ARGUMENT

A. Legality is the foundational principle of the public interest standing test

9. As this Court held in *Downtown Eastside,* the principle of legality has two components: "that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action."[3]

10. It is the judiciary's role to give effect to this principle. However, courts cannot exercise this policing function of their own accord; they are dependent upon litigants, often ordinary citizens, pursuing challenges to unlawful laws or state action. Unfortunately, this can often be an impossible enterprise for those directly affected due to personal or systemic barriers.[4]

11. Public interest standing was introduced and liberalized by this Court to help ensure state laws and actions do not go unchallenged simply because of those barriers. Given the central role of legality in public law litigation generally[5] and in the development of public interest standing in Canada in particular,[6] the principle has long been recognized as the preeminent consideration guiding the public interest standing test. As this Court recognized in *Canadian Council of*

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[3] *Downtown Eastside*, *supra* note 2 at para 31.
[4] See e.g., *Downtown Eastside*, *supra* note 2 at para 71; *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817 at paras 52, 61.
[5] *Reece v. Edmonton (City)*, 2011 ABCA 238 at para 41, *per* Fraser CJ dissenting.
[6] *Downtown Eastside*, *supra* note 2 at para 31.

Churches, "the whole purpose of granting [public interest standing] is to prevent the immunization of legislation or public acts from any challenge."[7]

i. Litigation on behalf of the environment demonstrates the paramount importance of the legality principle

12. The role of legality in the public interest standing test is particularly significant where those directly affected are manifestly incapable of seeking judicial recourse. This is often the case in litigation brought to protect the environment.

13. Nearly thirty years ago this Court recognized protecting the environment as "one of the major challenges of our time."[8] Since then, the challenge and urgency has only increased.[9]

14. The "environment" includes a wide array of natural features, including the Earth's surface and its atmosphere, waters, fish and wildlife,[10] that are often not privately owned. Instead, they are held by governments, which are often the very entities that carry out or authorize their destruction.[11]

15. The procedural hurdle of standing often limits access to judicial recourse to prevent, limit, or remediate that destruction.[12] Litigation on behalf of at-risk species provides a valuable example. Under the governing federal and provincial legislation, which was introduced to, among other things, prevent species from "becoming extirpated or extinct as a consequence of human activities",[13] individuals and associations by necessity rely on public interest standing to vindicate the interests of species threatened by unlawful government (in)action. As recently recognized by the Nova Scotia Supreme Court in a case brought under that province's *Endangered Species Act* (*ESA*):[14]

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[7] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 [***Canadian Council of Churches***] at 252.
[8] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at 16.
[9] See e.g., *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 7-12.
[10] See e.g., *Impact Assessment Act*, SC 2019, c 28, s 1, s 2.
[11] *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38 at paras 74, 81.
[12] Environmental Law Centre (Alberta) Society, "Standing in Environmental Matters" (Edmonton, Alberta: 2014) [**ELC Standing Report**] at 9.
[13] *Endangered Species Act*, SNS 1998, c 11, s 2(1)(s); *Species at Risk Act*, SC 2002, c 29, s 6; *Endangered Species Act, 2007*, SO 2007, c 6, s 1.
[14] *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175 [***Bancroft***] at para 152 in

> … no one suggests the species themselves are capable of bringing an application, and the *ESA* does not provide for penalties or other consequences against the Minister where deadlines have been breached. There are no alternative routes to compel the Minister to meet his duties under the *ESA*. The species need [the public interest applicants] to take such action and speak for them. It would be absurd if no person or interested entity could bring such reviews under the *ESA* to hold government to account. How else would the [species] find protection when and if a government failed to reasonably execute its duties and responsibilities? [emphasis added]

In other words, public interest standing is *the* procedural vehicle that parties representing the interests of non-human species must rely upon to ensure government (in)action is not immunized from challenge.

16. Legality is of paramount importance in the public interest standing test in these and corresponding situations of manifest or demonstrated incapacity of those directly affected. Otherwise, the purpose of public interest standing will be undermined simply because those parties are unable to seek judicial redress on their own.[15]

B. A commitment to legality must include prioritizing access to justice

17. A commitment to legality is meaningless if there are no practical and effective ways to challenge state laws or actions that do not conform to the Constitution or statutory authority.[16] In the context of public interest standing, the question of whether there are practical and effective ways to challenge laws or actions is often inextricably linked to concerns about access to justice.

18. Access to justice is a necessary prerequisite to upholding the rule of law.[17] As stated by Dickson C.J., "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[18] Because access to justice is a fundamental, constitutionally-protected right,[19] it has

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discussion about standing to obtain a *mandamus* remedy.

[15] *Canadian Council of Churches*, *supra* note 7 at 256; *Downtown Eastside*, *supra* note 2 at para 33; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 [***Delta Air Lines***] at para 18.

[16] *Downtown Eastside*, *supra* note 2 at para 31.

[17] *Hryniak v. Mauldin*, 2014 SCC 7 [***Hryniak***] at para 1: "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."

[18] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214 at 230; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 [***Trial Lawyers***] at para 38.

[19] *Trial Lawyers*, *supra* note 18 at paras 38-39.

been considered by this Court in many cases and contexts, including with regard to court hearing fees,[20] summary judgments,[21] and class proceedings.[22]

i. This Court has yet to articulate the role of access to justice in the public interest standing test

19. Despite the importance of the issue, this Court has not yet explained how access to justice considerations should inform the public interest standing test. In the trilogy of cases – *Thorson*,[23] *MacNeil*,[24] and *Borowski*[25] – by which this Court established the law of public interest standing, the phrase "access to justice" does not appear anywhere in the reasons for judgment. Neither, with one exception,[26] does it appear in the subsequent cases – *Finlay*,[27] *Canadian Council of Churches*,[28] and others – by which this Court refined the law of public interest standing in the remainder of the twentieth century.

20. It is only recently that this Court has made an explicit connection between public interest standing and "access to justice",[29] but it has yet to fully explain how access should be considered in application of the test. Justice Abella, in dissent in *Delta Air Lines*, came closest when she stressed the importance for facilitating access to justice within the standing framework by stating: "[a]ccess to justice demands that courts and tribunals be encouraged to, not restrained from,

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[20] *Trial Lawyers*, *supra* note 18 at paras 38-39.
[21] *Hryniak*, *supra* note 17.
[22] *AIC Limited v. Fischer*, 2013 SCC 69 [***AIC Limited***].
[23] *Thorson v. Attorney General of Canada*, [1975] 1 SCR 138 [***Thorson***].
[24] *Nova Scotia Board of Censors v. McNeil*, [1976] 2 SCR 265.
[25] *Minister of Justice (Can.) v. Borowski*, [1981] 2 SCR 575.
[26] *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 SCR 675at 705, *per* L'Heureux-Dubé and McLachlin JJ., dissenting, in reference to Laskin J.'s decision in *Thorson*, *supra* note 23.
[27] *Finlay v. Canada (Minister of Finance),* [1986] 2 SCR 607.
[28] *Canadian Council of Churches*, supra note 7.
[29] *Downtown Eastside*, *supra* note 2 at para 51: "Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected"; *Delta Air Lines*, *supra* note 15 at para 18 *per* McLachlin C.J.: "In determining whether to grant public interest standing, courts must take a 'flexible, discretionary approach'. This requires balancing the preservation of judicial resources with access to justice. The whole point is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door" (citations omitted).

developing screening methods to ensure that access to justice will be available to those who need it most in a timely way. That is why courts developed standing rules in the first place."[30]

ii. Environmental litigation demonstrates how public interest standing furthers access to justice

21. Those directly affected may be denied access to justice because social, economic, or psychological barriers prevent them from bringing litigation.[31] However, access to justice considerations arise even in the absence of vulnerable directly affected populations. Environmental litigation again provides a helpful example.

22. Community groups often form for the purposes of raising collective concerns about state action that may adversely impact their local environment.[32] These groups, and the individuals that comprise their membership, may not be sufficiently affected by the state action so as to qualify for direct standing.[33] Beyond just ensuring that unlawful state action is not immunized from challenge, public interest standing therefore facilitates access to justice by providing communities with a procedural vehicle to obtain judicial remedy for harm to their local environment.[34]

iii. Class actions jurisprudence provides a helpful model for elaborating on the role of access to justice in public interest standing

23. This Court's development of access to justice considerations in class action certification jurisprudence helps demonstrate the benefits of explicitly articulating how access considerations inform the public interest standing test.

24. This Court has recognized class actions as an "important procedural tool designed to help improve access to justice."[35] Both class actions and public interest standing are mechanisms that

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[30] *Delta Air Lines*, *supra* note 15 at para 62 (citations omitted).
[31] *Trial Lawyers*, *supra* note 18 at paras 45-46; *AIC Limited*, *supra* note 22 at para 27; *Downtown Eastside*, *supra* note 2 at para 51.
[32] See e.g., *Communities and Coal Society*, *supra* note 1 at paras 26-39; *West Kootenay Community EcoSociety v. Her Majesty the Queen*, 2005 BCSC 744 [***West Kootenay Community EcoSociety***] at paras 31-35; *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*, 1993 CanLII 4582 (NSSC) [***Coalition of Citizens***] at 22, rev'd on other grounds, 1993 NSCA 170.
[33] *West Kootenay Community EcoSociety*, *supra* note 32 at para 36.
[34] *Communities and Coal Society*, *supra* note 1 at para 39; *West Kootenay Community EcoSociety*, *supra* note 32 at paras 34-36; *Coalition of Citizens*, *supra* note 32 at 20-22.
[35] *Endean v. British Columbia*, 2016 SCC 42 at para 1.

address barriers to accessing the courts. Class actions do this by "making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own."[36] Allowing associations to represent the collective interests of their members through granting public interest standing achieves this same end.

25. In *AIC Limited,* this Court considered whether a proposed class action was the preferred procedure for resolution of the common issues raised in an action "…from the point of view of providing access to justice."[37] Justice Cromwell for the Court found the appeal served as "an opportunity for this Court to elaborate the analytical approach to this question under the [class action legislation], building on the Court's judgment in *Hollick v Toronto (City),* 2001 SCC 68…",[38] with the overarching consideration being: "… what is access to justice in this context?"[39] Justice Cromwell then identified a number of questions, including "what are the barriers to access to justice?", to help courts determine whether a class action is the preferred procedure from an access to justice perspective.[40]

26. It has been a decade since this Court established the contemporary public interest standing test. As was done in *AIC Limited,* this appeal provides the Court with an opportunity to clearly explain access to justice's role in the "purposive and flexible" approach to that test.[41] Ecojustice submits that the Court of Appeal correctly affirmed that access to justice is of paramount importance in the public interest standing test. This approach is consistent with this Court's jurisprudence on access to justice in other contexts and should be endorsed.

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[36] *AIC Limited*, *supra* note 22 at para 29.
[37] *Ibid* at para 3.
[38] *Ibid* at para 3.
[39] *Ibid* at para 27.
[40] *Ibid* at para 26: "A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered: *Hollick*, at para. 33. To determine whether both of these elements are present, it may be helpful to address a series of questions. These questions must not be considered in isolation or in a specific order, but should inform the overall comparative analysis. I will set out the questions and comment briefly on each."
[41] *Downtown Eastside*, *supra* note 2 at para 37.

C. Access to justice and legality in the lower court decisions

i. The chambers judge's approach undermines legality and restricts access to justice

27. Ecojustice respectfully submits that the chambers judge's approach to public interest standing undermines the principles of legality and access. An endorsement of this approach could dramatically limit the ability of public interest litigants to seek judicial recourse for those otherwise incapable of doing so on their own.

28. First, with respect to the second *Downtown Eastside* factor (genuine interest in the issue(s) raised), the chambers judge appears to have set an unrealistic standard of exclusive or predominant interest in the issue(s) raised.[42] An endorsement of this standard could make it more difficult for public interest litigants to remedy harm to the environment. For example, under this approach, an association with a history of extensive work on issues of biodiversity protection but limited work on a particular at-risk species, might be unable to seek recourse for that species where the government fails to meet its obligations under endangered species legislation.

29. Second, with respect to the third *Downtown Eastside* factor (whether the litigation is a reasonable and effective way to bring the issue before the court), the chambers judge appears to suggest that there must be a demonstration of unanimity or general agreement that all those affected by the alleged illegality are supportive of the litigant's position.[43] Such a standard would be difficult if not impossible for public interest litigants to meet, particularly in the environmental context, where the public's perspective is often fragmented[44] and community groups form to represent a discrete perspective on a contentious local issue.[45]

30. Ecojustice respectfully submits that these errors may have been avoided if the chambers judge was guided by a recognition of legality and access to justice being the foremost considerations in applying the three-factor public interest standing test.

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[42] *MacLaren v British Columbia (Attorney General)*, 2018 BCSC 1753 [**BCSC Reasons**] at paras 44, 53.
[43] BCSC Reasons, *supra* note 42 at paras 72, 76.
[44] *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 FC 211 at para 54.
[45] See e.g., *Communities and Coal Society*, *supra* note 1 at paras 32-39; ELC Standing Report, *supra* note 12 at 9.

ii. The Court of Appeal's approach upholds legality and promotes access to justice

31. The Court of Appeal did not recast the public interest standing test. Rather, the Court appropriately articulated the central roles of access to justice and the principle of legality in the flexible and purposive application of the test.

32. Madam Justice Dickson, writing for the full panel of the Court of Appeal, accurately recognized the rule of law as the foundation of legality and access[46] and correctly described the evolution of standing to embrace parties not directly affected by legislation or state action.[47]

33. Dickson J.A. then, as Cromwell J. did in *AIC Limited*,[48] canvased situations where financial and other barriers effectively precluded individuals from challenging unconstitutional laws and actions.[49] In so doing, Dickson J.A. recognized:[50]

> … the goals of upholding the legality principle and facilitating access to justice merit particular weight in the balancing exercise a judge must undertake when deciding whether to grant or refuse public interest standing. While other concerns must also be accounted for, these goals are the key components of the flexible and purposive approach mandated in *Downtown Eastside*.

34. There is no error in this statement. Dickson J.A. simply considered and elaborated on what this Court has already established: that upholding legality and ensuring access to justice is of paramount importance when applying the public interest standing test.

D. Conclusion

35. This appeal presents an important opportunity for this Court to illuminate the role that principles critical to our constitutional democracy and the rule of law play in the public interest standing test. Ecojustice submits that the Court of Appeal adopted the right approach to legality and access to justice by recognizing that these principles merit particular weight when applying the test for public interest standing. This Court should affirm that approach.

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[46] *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 [**BCCA Reasons**] at paras 72-74.
[47] BCCA Reasons, *supra* note 47 at paras 67-71.
[48] *AIC Limited*, *supra* note 22 at para 27.
[49] BCCA Reasons, *supra* note 47 at paras 75-78.
[50] BCCA Reasons, *supra* note 47 at para 79.

PART IV – SUBMISSIONS ON COSTS

36. Ecojustice requests that there be no costs awarded to or against it in relation to the appeal.

PART V – ORDER SOUGHT

37. Ecojustice takes no position on the disposition of the appeal.

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

Kegan Pepper-Smith
Daniel Cheater
Lawyers for the Intervener, Ecojustice Canada Society

PART VII – TABLE OF AUTHORITIES

AUTHORITY	PARA(S),
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