

DESWAUV: Why the SCC's flexible, pragmatic and purposive approach promotes access to justice

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How the courts exercise their discretion in granting or denying public interest standing has significant implications for access to justice. By determining who can be granted standing, the judiciary effectively controls whose voice can or cannot be heard in the courts. The recent Supreme Court of Canada decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society (DESWAUV)*¹ is significant because it offers the “final word” on judicial discretion in public interest standing. In entrenching a contextual and purposive approach to this exercise of discretion, the SCC's decision enhances access to justice. In this comment, we review key aspects of this decision, the new framework set out by the SCC and its procedural and substantive implications.

Background: The lower courts' decisions

In 2007, the Downtown Eastside Sex Workers United Against Violence Society (“the Society”) initiated a proceeding in British Columbia challenging the validity of prostitution-related provisions in the *Criminal Code of Canada*. The Society alleged that these provisions violated sex workers' rights under ss. 2(b), 2(d), 7 and 15 of the *Charter*.

The British Columbia Supreme Court refused public interest standing to the Society. In doing so, the BCSC applied the public interest framework outlined by the SCC in *Minister of Justice of Canada v. Borowski*.² To be granted public interest standing under this framework, the Society needed to demonstrate that

There was a serious legal issue of invalidity of legislation or public action;

The plaintiff (the Society) was directly affected by or had a genuine interest in the validity of the legislation or public action; and

There was no other reasonable and effective manner in which the issue may be brought before the court.³

While the BCSC held that the first two considerations were met, the Society failed to demonstrate that there “was no other

reasonable and effective manner” in which the issue could be adjudicated. In applying this prong of the test, the BCSC adopted the narrow approach exercised by the SCC in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*.⁴ The presence of private litigants who *could* potentially bring the same challenge was sufficient grounds on which the court could refuse public interest standing for the Society.

On appeal by the Society, the British Columbia Court of Appeal reversed the finding of the BCSC. In rejecting the BCSC's decision, the BCCA emphasized the broad-based systemic nature of the challenge, the essence of which was that the law exacerbated the pre-existing vulnerability of sex workers. According to the BCCA, the application of the third criterion required a more generous approach in cases of this nature.

Additionally, the BCCA held that the existence of parallel litigation in another province (in this case, a related challenge in Ontario) did not preclude the courts from granting standing on identical or similar issues. The Attorney General appealed this decision to the SCC, which rendered its decision on September 20, 2012.

The Supreme Court of Canada's decision

The public interest standing framework

The SCC affirmed a contextual and purposive approach to the exercise of discretion in applying the public interest standing framework. Under this approach, the three factors in this framework are to be assessed and weighted cumulatively and in a way that best serves the underlying purposes of limiting standing, namely promoting judicial efficiency, ensuring that the court has contending points of view of those directly affected by the issue and facilitating a proper judicial role. The court emphasized the importance of balancing the preservation of judicial resources with ensuring access to the courts when determining public interest standing. In addition, it reasoned that a contextual and purposive approach enhances the principle of legality by ensuring that constitutional issues affecting vulnerable individuals in society are not immune from challenge because of those individuals' incapability or inability to effectively mount such a challenge.

The SCC focused particularly on the third criterion of the public interest framework. It held that this criterion was to be applied flexibly and restated it as follows: “whether, *in all the circumstances*, the proposed suit is a reasonable and effective way to bring the issue before the courts.”⁵ The restated third criterion

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requires the court to examine the reasonableness and effectiveness of the proposed proceeding in the particular circumstances and compare this with other available options, bearing in mind that the mere existence of any other option is not sufficient to rebut this criterion. The SCC also outlined a list of non-exhaustive factors that the courts may consider in determining whether the proposed action is a "reasonable and effective means." These factors include:

The plaintiff's capacity to bring forth a claim (his/her resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting);

Whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action;

Whether there are *realistic* alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination, including the existence and importance of parallel litigation. A practical and pragmatic approach needs to be taken when considering this factor; and,

The potential impact of the proceedings on rights of others who are equally or more directly affected.⁶

When applying the "reasonable and effective means" criterion to the facts of the case, the court also gave weight to these considerations:

Whether the challenge was comprehensive and systemic in nature;⁷
The effectiveness of a comprehensive declaratory action;⁸
The practicality of running a major constitutional challenge.⁹

In summary, based on the SCC's analysis, the framework for determining public interest standing now may be viewed this way:

There must be a serious legal issue of invalidity of legislation or public action;

The plaintiff (the Society) must be directly affected by or had a genuine interest in the validity of the legislation or public action; and,

In all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.¹⁰

These criteria need to be considered cumulatively rather than separately. The exercise of discretion in applying this framework must be informed by adopting a flexible approach, taking into account the non-exhaustive factors and considerations listed under the third criterion. The court's decision must be based on a careful, liberal and generous exercise of discretion.

Application of the framework

Applying the contextual analysis, the SCC granted public interest standing to the Society. The first two criteria under the public interest standing framework were not disputed. The court's analysis focused primarily on the third criterion. In its analysis, the SCC held that the existence of potential plaintiffs in this case did not bar the Society from being granted standing. The court reasoned that when considering the practical realities, it would be unreasonable to expect sex workers directly impacted by the impugned provisions to bring the comprehensive and systemic challenge the Society was bringing, because of their social, economic and emotional vulnerabilities. Although many private challenges to prostitution provisions of the *Criminal Code* have been brought

in the past, most involved the challenge of a single provision. Furthermore, many of these claims were either dismissed or stayed pending the outcome in parallel litigation in Ontario. The SCC reasoned that the unsuccessful and fragmented litigation resulted from the unique vulnerabilities that directly affected individuals face in these cases. It also demonstrated the inability or unwillingness of individuals to bring a comprehensive challenge such as the one being brought by the Society.

The SCC also examined the respondent's *ability* to bring this claim. It reasoned that the Society's case raised important public interest issues, that its challenge was comprehensive and provided the ability to assess the constitutionality of the legislative scheme as a whole as it relates to prostitution. The court also emphasized that the comprehensiveness of this challenge would prevent future multiplicative litigation leading to the same conclusion. The fact that the Society was thoroughly equipped with the knowledge, skill and resources to effectively and actively pursue this claim in an adversarial setting was further reason to grant it standing.

The existence of parallel litigation, although a highly relevant factor, does not provide an automatic reason to deny standing. In this case, the SCC reasoned that the parallel litigation in Ontario did not bring as comprehensive a challenge to the prostitution provisions in the *Criminal Code*. In addition, the court reasoned that the litigation in Ontario did not sufficiently answer the

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concerns brought forth by the plaintiffs in *DESWAUV*.

Clearly, the SCC emphasized the actual *practical realities* surrounding a particular challenge in determining public interest standing rather than *theoretical possibilities*, signalling a significant breakthrough for access to justice.

Implications for access to justice

Without reservation, the SCC recognized the role of the courts in promoting access to justice and widened the scope in considering who may be able to launch constitutional challenges. As a result, the public interest litigant will now have a better chance of obtaining public interest standing. This especially affects marginalized groups whose individual members are unable bring these challenges because of their unique economic, social and emotional vulnerabilities.

The SCC's intention to promote access to justice through the judiciary is also seen in its reference to the *principle of legality* and its role in shaping public interest standing in Canada. In its decision, the court emphasized that no law should be exempt from challenge and that the basic purpose for allowing public interest

standing is to ensure that legislation is not immunized from such challenge.¹¹ The SCC clearly stated that granting standing in this case would “serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of Society.”¹² Through its reliance and emphasis on the principle of legality and in linking it to the purposive approach, the court’s decision enhances access to justice for marginalized groups by ensuring a more careful and informal assessment and application of the “reasonable and effective means” factor.

The court’s concern with access to justice is also demonstrated by its emphasis on “striking a balance between ensuring access to the courts and preserving judicial resources.”¹³ Although the court recognized that ensuring the efficient and effective use of scarce judicial resources was a limiting factor in granting standing, it stated that this consideration must take into account the need to ensure that important issues affecting the public interest are not immunized from challenge. In this case, the court concluded that granting public interest standing would promote the economical use of judicial resources. It contrasted the repetitive and often unsuccessful private constitutional litigation of single prostitution provisions in the *Criminal Code* with the ability of a well-equipped public interest litigant to bring a comprehensive challenge to the legislative scheme concerning prostitution in the *Criminal Code* at one time. The ability of public interest litigants to adequately make a case for their claim meant fewer delays in the process and an increased chance that the court would come to a proper decision the first time around.

Conclusion

The SCC’s approach is a positive step in promoting access to justice. The court’s recognition of the need to facilitate the ability of marginalized groups to be heard in a pragmatic manner is encouraging. This decision is likely to enhance the ability of public interest organizations to bring constitutional challenges when directly affected individuals are unable to do so on their own as a result of their marginalized positions in society. Giving these individuals a voice in the courts in this manner is a noteworthy win for access to justice.

Notes

1. 2012 SCC 45 [DESWAUV].
2. [1981] 2 SCR 575 [Borowski].
3. *Ibid* at 589.
4. [1992] 1 SCR 236.
5. DESWAUV, *supra* note 1 at para 37.
6. *Ibid* at para 51.
7. *Ibid* at para 70.
8. *Ibid*.
9. *Ibid* at para 71.
10. *Ibid* at para 37.
11. *Ibid* at para 33.
12. *Ibid* at para 76.
13. *Ibid* at para 23.



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