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Some Much Needed R&R: Revisiting and Relaxing the Test for Public Interest Standing in Canada

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Case Considered:

Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society, 2012 SCC 45

On September 21, 2012, the Supreme Court of Canada revisited the doctrine of public interest standing in *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, affirming the decision of the British Columbia Court of Appeal to grant the Downtown Eastside Sex Workers Against Violence Society (the Society) public interest standing to challenge the prostitution provisions of the Criminal Code (ss 210 to 213). We comment on this Supreme Court decision for its potential to revise how the doctrine of public interest standing is applied by Alberta courts going forward.

Judicial consideration of public interest standing in Canada has largely centered on the so-called trilogy of decisions establishing public interest standing as an exception to the common law rule on standing and thus as a method for groups or persons not directly affected to bring a matter before the courts: *Thorson v Attorney General of Canada*, [1975] 1 SCR 138*; Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265; and *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575. For an overview of public interest standing and the test to be met by an applicant, see the previous ABlawg posts written by Professor Shaun Fluker here and here. As the case law can attest, strict interpretation of the three-part test for public interest standing has consistently prevented parties from gaining public interest standing. In the vein of a checklist, failure by the applicant to meet one requirement spelled failure for the application as a whole. In this case, the chambers judge denied the Society public interest standing on the grounds that they had not satisfied the third element of the test: the absence of another reasonable and effective manner in which the issue may be brought before the court.

THE REVISED TEST

In considering the Society's application, the Supreme Court of Canada adopted a much more flexible and purposive approach to the test for public interest standing; potentially opening the door further to public interest applicants. Writing for the Court, Justice Cromwell held that:

> These factors, and especially the third one, should not be treated as hard and fast requirements or free standing, independently operating tests. Rather they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best services those underlying purposes. (at para 20)

Traditionally, these underlying purposes have been with a mind to exclude parties out of concern for limited judicial resources, the effective presentation of contending points of view and the propriety of judicial consideration of the issue. However Justice Cromwell here emphasized the need to balance these purposes with the reason public interest standing was created: to give effect to the principle of legality. In so far as it reinforces the right of the citizenry to state action that conforms to constitutional and statutory limits and provides a practical, effective way to challenge state action, public interest standing is a vital element of legality. This connection, Justice Cromwell reasoned, merits recognition by the courts in the form of a more general and liberal approach to standing than has previously been afforded applicants. We believe this reformulation will serve to the great advantage of future public interest litigants.

ELEMENT 1 – IS A SERIOUS JUSTICIABLE ISSUE RAISED?

Under this relaxation of the test for public interest standing, Courts may be satisfied by an issue's seriousness so long as at least one general element of serious nature exists upon examination of the merits of the case in a preliminary manner. In the loose language of case law cited by Justice Cromwell, even in the event of serious reservations by the Court, no further examination of the seriousness of every pleaded claim is necessary so long as "*some* aspect of the statement of claim *could* be said to raise a serious issue." (at para 42, emphasis added)

This approach stands in stark contrast to prior judicial interpretation concerned with overburdening the judiciary, unnecessary actions and busybodies. Using Justice Cromwell's approach, these policy considerations should not bar judicial consideration where a serious issue exists.

ELEMENT 2 – DOES THE PLAINTIFF HAVE A REAL STAKE OR GENUINE INTEREST?

Likewise, although previous strict interpretation of the second element of the test was used to conserve judicial resources, Justice Cromwell viewed the real concern to be ensuring the plaintiff has a real stake in the proceedings or is at least engaged in the issue. Such a finding, based on examination of an applicant's reputation, continuing interest and link to the claim will necessarily ensure the economical use of judicial resources without contemplating them directly.

ELEMENT 3 – IS THIS SUIT A REASONABLE AND EFFECTIVE MEANS OF BRINGING THE ISSUE TO COURT?

Finally, the third element is recast as a discussion of whether, given broad consideration of all circumstances, the proposed suit is a reasonable and effective means of bringing a challenge to court. To better reflect the rights-based rationale overarching public interest standing, Justice Cromwell indicated three principles that should guide the Court's approach: pragmatism, purposiveness and flexibility.

First, while the Court in *Borowski* and *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 applied the third element of the test for public interest standing as a strict requirement, Justice Cromwell found that this is by no means a universal or necessary practice. This leaves room for an approach that considers the nature of the challenge proposed by the applicants from a practical and pragmatic perspective.

Evidence of this more pragmatic approach can be found in *McNeil*, where the Plaintiff was a member of the public and had a different interest, and no other way practically speaking to get a challenge before the court. Even in *Borowski*, the Court found that although there were many others more directly affected than the Plaintiff, they were unlikely in practical terms to bring the type of challenge brought forward by the Plaintiff.

Second, purposive application of the third element of the test for public interest standing better reflects both the traditional concerns justifying restrictions on standing as well as the importance of upholding legality. A purposive approach would require the court to consider all of these underlying concerns.

Third, this element should be considered flexibly. Whether the issue is an economical use of judicial resources, is suitable for judicial determination, or will serve the purpose of upholding legality cannot be sufficiently expressed by a simple yes or no. To fully assess an action's reasonability and effectiveness, all of the surrounding circumstances and realistic alternatives must also be considered. In the case at hand, Justice Cromwell pointed to considerations such as the applicant's capacity to bring forward the claim, whether the applicant's public interest transcends the interest of those most directly affected, the importance of providing access to justice, and any elections by persons directly affected not to sue.

CONCLUSION

Justice Cromwell's decision effectively opens the door, or at least a window to public interest actors that were previously excluded by the strict interpretation of the test for public interest standing. This decision seems to echo what Justice Fraser pronounced in her strong dissenting opinion in *Reece v Edmonton (City)*, 2011 ABCA 238, sharing many of the same themes of purposiveness, flexibility and respect for the rule of law. While the Supreme Court does not go so far as to completely overhaul the doctrine of public interest standing in Canada, we believe it better reflects the important role of public interest litigation in Canada today.