Constitutional Challenges: Public Interest Standing

Introduction

Canada's Constitution is a document that both exists for and has relevance to all Canadians. This article will explain public interest standing and how it allows concerned Canadians to have constitutional challenges heard in court even if the contested government law or action does not affect them personally. But because the issues are of broad public interest, such challenges are important to others, particularly the economically and socially marginalized. Public interest standing is one way to ensure governments abide by the Constitution.

Constitutional issues can be raised in court through reference questions submitted by governments, through private litigation and criminal prosecution, or by private interest standing when a law or government action has or will have an impact on the litigant(s). Issues can also be raised by public interest standing.

In public interest standing, courts have the discretion to hear constitutional challenges of government action brought forward by interested individuals, groups or corporations who may not have a personal stake in the issue. Generally, courts will grant standing when the challenged government action has broad social effect.[1]

Examples of Public Interest Standing Cases

There have been several high profile Supreme Court of Canada cases where the Court granted public interest standing. One was *Nova Scotia Board of Censors v McNeil*,[2] where a film buff was granted public interest standing to challenge the province's ban on a particular racy film. He argued that the ban, based on public morality, was a federal jurisdiction and was unconstitutional. He lost because the majority of the court found it constitutional that a province reject a film based on its own local standards of morality.

In *Chaoulli v Quebec (Attorney General)*[3] a doctor and patient of Quebec's public healthcare system were given public interest standing to challenge provincial legislation that forbid access to private healthcare and insurance. Since there was no alternative to waiting lists in the public healthcare system, they argued the legislation violated their constitutional rights to security of the person. The Supreme Court of Canada agreed, ruling that Quebec's monopoly on healthcare was unconstitutional.

More recently, Rocco Galati, a Toronto lawyer, used public interest standing to launch a challenge in the Federal Court to Hon. Marc Nadon's appointment to the Supreme Court of Canada. The challenge prompted the federal government to ask advice about the appointment of justices from Quebec to the Supreme Court in the Supreme Court

Reference. The Supreme Court found that the appointment was unconstitutional. Vindication in the approach has led Galati to file for public interest standing in two more cases to be heard.[4] When asked about his successful challenge, he said it was his duty as a citizen to do it since no one else did; "As Canadians we prefer not to engage, and pretend that everything is OK, and it's not."[5]

Origins of Public Interest Standing

Traditionally, only those individuals who had a direct investment in the effects of legislation could get what was known as private interest standing in court outside of a regular civil or criminal case.

This changed with a series of Supreme Court rulings in the 1970s and 1980s. In *Thorson v Canada*[6] the Suprme Court decided to grant standing to Joseph Thorson to bring a constitutional challenge to the *Official Languages Act*.[7] The government argued he did not have standing as the law did not personally affect him, but the Court found Thorson's case sound enough to be granted a hearing. It reasoned that the result would be "alarming, if there was no way in which a question of alleged excess of executive power"[8] could be heard. Since there was no other way for the case to be heard, and since he argued as a taxpayer he had a genuine interest, the Supreme Court had the discretion to allow it to be heard. In two cases that followed, *Minister of Justice Canada v Borowski*[9] and C*anadian Council of Churches v Canada*,[10] the Supreme Court set out a test as to who is entitled to public interest standing and in what circumstances. It became known as the *Borowski* test:

(1) Is the issue raised a serious one?;

(2) Does the party bringing the case have a personal stake in the matter, or have a genuine interest in the validity of the legislation?; and

(3) Is there no other reasonable or effective way to bring the issue before the court?

This three-step test ensures that the case deserves a hearing, that it weeds out frivolous challenges by requiring a genuine interest, and it ensures that the busy and expensive judicial system is not overburdened with such cases.[11]

A Development in Public Interest Standing: *SWUAV* and Access to Justice

In *Thorson v Canada* and the cases that followed, the Supreme Court was concerned with the rule of law. Granting individuals, groups or corporations public interest standing allowed courts to scrutinize government action or law when no one else could, or would, challenge it. This rationale lay behind the three-part Borowski test and the court's discretion to hear public interest standing cases.

In 2012, in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society (SWUAV)*,[12] the Supreme Court recognized another important reason for

providing public interest standing: access to justice.

SWUAV, a society of Downtown Eastside sex worker advocates in Vancouver, felt Canada's prostitution laws endangered sex workers and thus violated their constitutionally guaranteed rights. When SWUAV applied to have its case heard based on public interest standing, the government argued they did not have that standing. The chambers judge agreed with the government. Justice Ehrcke determined that the first two requirements of the test to grant public interest standing were met, but SWUAV's application failed on the third requirement that there is no other reasonable or effective way to have the issue brought before the court. He determined there was another way the issue could be brought to trial since the Bedford case, a private interest standing case about the same matter, was about to be heard in Ontario. Also a sex worker charged with a prostitution offense could challenge the law's constitutionality in the course of a criminal case.[13]

For the third part of the test, SWUAV had argued that the current sex workers in its society were too vulnerable to mount a private interest standing challenge. If they did so, they would face reprisal from clients, the police, family members and acquaintances. SWUAV also argued that sex workers who could raise a constitutional challenge during criminal prosecution would be prevented from doing so because of the prohibitive costs associated with it.[14] Without the Society receiving public interest standing, their clients would not have access to justice.

SWUAV appealed the decision to the British Columbia Court of Appeal. There, the Court overturned the previous decision. The majority opinion reviewed previous rulings on public interest standing where the Supreme Court of Canada said that discretion to grant it "must not be exercised mechanistically." Rather, public interest standing should be exercised "in a broad and liberal manner."[15] In considering the whole case, the Court determined it was deserving of standing. On the third step of the test, the Court ruled that waiting for a criminal case or private interest standing was not a more effective way to bring the broad and multi-faceted issue before the Court, and unless Bedford was appealed to the Supreme Court it would not be binding in British Columbia.[16]

When the government appealed SWUAV, the Supreme Court stood by the Court of Appeal's ruling and clarified the interpretation of the test for public interest standing. The Supreme Court stated that the test is not considered a "checklist."[17] Rather, the three factors are to be weighed together "in light of their purposes."[18]

Therefore, the Supreme Court recast the third part of the test to be more flexible:

> (3) Whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court?[19]

In considering this question, several factors related to access to justice must be canvassed. A court must ask if the applicant for public interest standing has sufficient resources and expertise to bring the suit. The court must also be practical when a number of litigants may bring the issue to court. One party may have a particularly useful perspective. A court must

also ask if the case transcends the interests of those most directly affected by the challenged legislation. In assessing this, "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."[20]

The Supreme Court found that SWUAV met the requirements of the third part of the test when this flexible approach was applied. It found the Society to be well organized with the legal resources and expertise about sex workers necessary to challenge the laws. Granting them standing would "prevent a multiplicity of individual challenges in the context of criminal prosecutions."[21] And since its vulnerable clients would not apply for private interest standing for fear of losing privacy and security, SWUAV's challenge would allow them access to justice.[22]

Conclusion

Public interest standing is a tool that reminds us that the Constitution exists for all Canadians. It is an excellent example of democracy in action since it allows concerned individuals, groups or corporations to have courts review government laws and actions for their constitutionality. As SWUAV has shown, it can also be an effective way of reviewing laws that affect the marginalized for their constitutionality. Since those in a vulnerable financial, health or social position may be unable or unwilling to mount a challenge based on private interest standing, public interest standing is vital to access to justice.

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[1] Dana Phillips, "Public Interest Standing, Access to Justice and Democracy under the *Charter*: Canada (AG) v Downtown Eastside Sex Workers United Against Violence." (2013) 22 Const Forum Const 21 at 22.

[2]*Nova Scotia Board of Censors v McNeil*, 1978 CanLII 6 (SCC).

[3]*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

[4] One challenges a federal appointment of a Quebec Court of Appeal Justice from the Federal Court of Appeal. The Justice was not a current member of the Quebec Bar when section 98 of the *Constitution Acts* indicates they are to be current. The other challenges the recently passed changes to the *Citizenship Act*, arguing that section 91 of the *Constitution Acts* only gives jurisdiction to the federal government over "aliens and naturalization" but does not give jurisdiction to the federal government to strip citizens of citizenship. Alison Crawford, "Rocco Galati challenge to Mainville appointment seen as unlikely to proceed," *CBC News* (19 June 2014) online: CBC News < http://www.cbc.ca/news/politics/rocco-galati-challenge-to-mainville-appointment-seen-as-unlikely-to-succeed-1.2679944> and Susana Mas, "Rocco Galati launches lawsuit over Citizenship Act changes," *CBC News* (25 June 2014) online: CBC News.

[5] Alyshah Hasham, "Rocco Galati: the lawyer who lives to take on government," *The Star*

(19 October 2013) online:

[6] *Thorson v Attorney General of Canada*, 1974 CanLII 6 (SCC).

[7] *Official Languages Act*, RSC 1985, c 31.

[8] *Supra* note 6 at page 145.

[9] *Minister of Justice Canada v Borowski*, 1981 CanLII 34 (SCC).

[10] *Canadian Council of Churches v Canada*, 1992 CanLII 116 (SCC).

[11] Phillips, *supra* note 1 at 22.

[12] *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, 2012 SCC 45. <http://www.canlii.org/en/ca/scc/doc/2012/2012scc45/2012scc45.html?searchUrlHash=AAAAAAAAAAEAFzIwMDggQkNTQyAxNzI2IChDYW5MSUkpAAAAAQAzL2VuL2JjL2Jjc2MvZG9jLzIwMDgvMjAwOGJjc2MxNzI2LzIwMDhiY3NjMTcyNi5odG1sAQ>

[13] *Downtown Eastside Sex Workers United Against Violence Society v Attorney General (Canada)*, 2008 BCSC 1726 at paras 74-78.

[14] *Ibid*.

[15] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439 at para 41. <http://www.canlii.org/en/bc/bcca/doc/2010/2010bcca439/2010bcca439.html?searchUrlHash=AAAAAAAAAAEAFzIwMDggQkNTQyAxNzI2IChDYW5MSUkpAAAAAQAzL2VuL2JjL2Jjc2MvZG9jLzIwMDgvMjAwOGJjc2MxNzI2LzIwMDhiY3NjMTcyNi5odG1sAQ.

[16] *Ibid* at paras 66 - 68.

[17] *Supra* note 12 at para 36.

[18] *Ibid* at para 36.

[19] *Ibid* at para 52. Emphasis added.

[20] *Ibid* at para 51.

[21] *Ibid* at para 73.

[22] *Ibid* at para 71.