

2021 ABQB 371
Alberta Court of Queen's Bench

Alberta Union of Public Employees v. Her Majesty the Queen (Alberta)

2021 CarswellAlta 1339, 2021 ABQB 371, [2021] A.W.L.D. 3086, 28 Alta. L.R. (7th) 412, 334 A.C.W.S. (3d) 303

Alberta Union of Public Employees, Guy Smith, Susan Slade, and Karen Weiers (Plaintiffs / Respondents) and Her Majesty the Queen in Right of Alberta (Defendant / Applicant)

S. Leonard J.

Heard: January 19, 2021

Judgment: June 1, 2021

Docket: Edmonton 2003-10486

Counsel: Patrick Nugent, Holly McEwan, for Plaintiffs / Respondents
David Kamal, Leah McDaniel, for Defendant / Applicant

Subject: Civil Practice and Procedure; Constitutional; Property; Human Rights

Headnote

Constitutional law --- Procedure in constitutional challenges — Standing

Defendant province enacted [Critical Infrastructure Defence Act](#), prohibiting persons from unlawfully entering, damaging or interfering with construction of "essential infrastructure" — Plaintiff union and individuals brought action against defendant, challenging constitutionality of Act — Defendant applied to strike statement of claim as abuse of process on grounds of lack of standing and frivolity — Application dismissed — While there was no precedent for finding that lack of standing equated to abuse of process, it could support striking on basis that there was no reasonable prospect claim would succeed — Plaintiffs, who had not been charged with any offence under Act, lacked private interest standing — Constitutionality of Act was substantial issue that was far from frivolous — Case lacked evidentiary record, but there was reasonable hypothetical scenario to satisfy need for context within which to consider constitutionality of Act — Act prohibits entry on streets, sidewalks or ditches "without lawful right" and, as phrase was undefined, plaintiffs' assertion that they would be prevented from leafleting and picketing was not unreasonable — Plaintiffs had genuine interest and capacity to bring claim — There was public interest in having court consider constitutionality of Act, and proposed suit was reasonable and effective means of bringing case to court — Pleadings disclosed reasonable claim that was justiciable.

Table of Authorities

Cases considered by S. Leonard J.:

CCSAGE Naturally Green v. Director, Sec. 47.5 EPA, MNR and OEB (2018), 2018 ONSC 237, 2018 CarswellOnt 13182 (Ont. Div. Ct.) — referred to

CSN c. Canada (Procureur général) (2014), 2014 SCC 49, 2014 CSC 49, 2014 CarswellQue 6645, 2014 CarswellQue 6646, 373 D.L.R. (4th) 193, (sub nom. *Confédération des syndicats nationaux v. Canada (Attorney General)*) 460 N.R. 164, (sub nom. *Canada (AG) v. Confédération des syndicats nationaux*) 2014 C.L.L.C. 240-003, [2014] 2 S.C.R. 477 (S.C.C.) — followed

Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) (2008), 2008 BCSC 1726, 2008 CarswellBC 2709, 90 B.C.L.R. (4th) 177, [2009] 5 W.W.R. 696, 182 C.R.R. (2d) 262, 305 D.L.R. (4th) 713 (B.C. S.C.) — referred to

Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) (2010), 2010 BCCA 439, 2010 CarswellBC 2729, 10 B.C.L.R. (5th) 33, 324 D.L.R. (4th) 1, 260 C.C.C. (3d) 95, [2011] 1 W.W.R. 628, 294 B.C.A.C. 70, 498 W.A.C. 70, 219 C.R.R. (2d) 171 (B.C. C.A.) — followed

- (a) the Court has no jurisdiction;
- (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
- (c) a commencement document or pleading is frivolous, irrelevant or improper;
- (d) a commencement document or pleading constitutes an abuse of process;
- (d) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

12 Pleadings should only be struck where it is "plain and obvious" that the claim cannot succeed. The test is a "stringent one" and requires a Court to assume that facts as pleaded are true: [Odhavji Estate v Woodhouse, 2003 SCC 69 at para 15](#). Courts have the power to strike a pleading where the action is "bound to fail." However, this power must be used sparingly and only where "it is clear that an action has no reasonable chance of success" *Canada (Attorney General) v Confederation des syndicats nationaux*, [2014 SCC 49 \(S.C.C.\)](#) at para 1 (*Confederation*,). See also [Reece v Edmonton \(City\), 2011 ABCA 238, at paras 128–130](#), leave to appeal dismissed, 2012 CanLII 22074 (SCC).

13 The Defendant claims that this action is an abuse of process because the Plaintiffs do not have standing to bring the claim and because the pleadings do not disclose a reasonable cause of action. No authority was provided for the proposition that a lack of standing on its own equates to an abuse of process. However, if there is no standing to bring the claim, it follows that there is no reasonable prospect that a claim will succeed: [Soldier v Canada \(Attorney General\), 2009 MBCA 12 at paras 36–37](#). It is therefore appropriate to consider the issue of standing in an application under [Rule 3.68](#).

Do the Plaintiffs have private interest standing

14 Private interest standing arises "as a matter of right arising from a direct relationship between the person and the state." A direct relationship arises where "the state engages a person in a court process." In such a situation, a person "may challenge the constitutional validity of the legislation as part of making full answer and defence.": [Downtown Eastside Sex Workers United Against Violence Society v Canada \(Attorney General\), 2010 BCCA 439 at para 23 \(Downtown Eastside CA\), aff'd 2012 SCC 45 \(S.C.C.\) \(Downtown Eastside SCC, \)](#).

15 The Plaintiffs have not been charged with any offence under the [CIDA](#). The Defendant argues that the Plaintiffs therefore do not have a direct relationship with the state such that they can challenge the [CIDA](#).

16 The Plaintiffs' position in response is that the [CIDA](#) "will have a chilling effect on otherwise legal leafletting and picketing activity." In addition, the collective agreements of several of the bargaining units have expired and the perceived inability to engage in leafletting and lawful picketing hinders the AUPE's ability to engage in collective bargaining. As such, the Plaintiffs argue that they have a "direct, personal interest in the impugned provisions:" *Downtown Eastside CA* at para 29.

17 In an application to strike proceedings, I must accept the pleadings as true. However, I am not required to accept the "legal characterization of those facts:" [Confederation](#) at para 20. I therefore must accept that the Defendants have experienced a chilling effect as a result of the [CIDA](#). I must also accept the assertion that their collective bargaining is hindered by the legislation. As will be discussed later in these reasons, it is difficult to determine what an unlawful entry onto a public road or sidewalk might include. I accept that the uncertainty is sufficient to ground a claim that the AUPE could be legally affected by the [CIDA](#) if its members enter a road or sidewalk, for example, without a lawful right to do so.

18 However, the AUPE is not charged with an offence and it is not a defendant in an action commenced pursuant to the [CIDA](#). The AUPE "cannot attract private interest standing by purporting to act in a representative capacity on behalf of its members:" *Downtown Eastside CA* at para 15. I find that the AUPE lacks private interest standing

19 Although the individual Plaintiffs could be charged with an offence under the act, this has not occurred. Private interest standing "cannot be founded on hypothetical possibilities:" [Downtown Eastside Sex Workers United Against Violence Society v. Canada \(Attorney General\), 2008 BCSC 1726 at para 47](#). I find that the individual Plaintiffs do not have private interest standing.

Do the Plaintiffs have public interest standing?

20 In determining whether to grant public interest standing, courts must balance access to courts against the need to preserve judicial resources. The limits are placed on standing in order to ensure that courts are not burdened by "marginal or redundant cases:" [Downtown Eastside SCC](#) at para 1.

21 Courts consider three factors in determining whether a party has public interest standing:

- (1) whether the case raises a serious justiciable issue;
- (2) whether the party bringing the action has a real stake or a genuine interest in its outcome; and
- (3) whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.

22 These three requirements are not "hard and fast" nor are they treated as "free standing, independently operating tests." They are "assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and [are] applied in a flexible and generous manner that best serves those underlying purposes:" [Downtown Eastside SCC](#) at para 20.

Does this case raise a serious justiciable issue?

23 A justiciable issue is one that is "appropriate for judicial determination:" [Downtown Eastside SCC](#) at para 30. In order to determine whether an issue is appropriate for judicial determination, the Court must consider "the nature of the issue and the institutional capacity of the courts to address it:" [Downtown Eastside SCC](#) at para 30.

24 A serious justiciable issue must raise a "substantial constitutional issue" or an "important one", which is "far from frivolous". However, this is a preliminary analysis — so long as some aspects of the claim could raise a serious issue of validity, that may be sufficient, and it is not necessary to examine every claim on this basis: [Downtown Eastside SCC](#) at para 42.

25 The Plaintiffs allege that the [CIDA](#) is unconstitutional in that it violates their individual rights under [section 2 of the Charter](#) and it intrudes upon federal jurisdiction. A justiciable issue is not created by merely asserting that an act is unconstitutional: "There must be a substantial constitutional issue, it must be important and far from frivolous. In order to make such an assessment, the evidentiary record will usually be an essential component of [any Charter challenge](#)": [CCSAG Naturally Green v Director, Sec. 47.5 EPA, MNRF and OEB, 2018 ONSC 237 at para 31](#).

26 The Plaintiffs allege that the [CIDA](#) prevents them from engaging in lawful picketing and leafleting. This is an important issue. I accept that the constitutionality of the [CIDA](#) is a substantial issue that is far from frivolous. The question of whether the Plaintiffs have public interest standing turns largely on whether there is a sufficient evidentiary record to adjudicate the claim.

Is there a sufficient evidentiary record?

27 This case lacks an evidentiary record. The only assertion of fact is that the Plaintiffs have experienced a chilling effect on legal leafletting and picketing activity. The Defendant emphasizes that the [CIDA](#) does not restrict legal activities. It prohibits people from entering or destroying essential infrastructure without lawful right, justification or excuse. It also prohibits people from interfering with construction, maintenance or use of essential infrastructure without lawful right, justification or excuse. As such, the Defendant contends that that the [CIDA](#) does not prevent the Plaintiffs from lawfully entering public property nor does it actually prohibit picketing, leafletting or demonstrations in public spaces.