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2012 SCC 45
Supreme Court of Canada

Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)

2012 CarswellBC 2818, 2012 CarswellBC 2819, 2012 SCC 45, [2012] 10 W.W.R. 423, [2012] 2 S.C.R. 524, [2012] B.C.W.L.D. 6622, [2012] B.C.W.L.D. 6634, [2012] B.C.W.L.D. 6663, [2012] A.C.S. No. 45, [2012] S.C.J. No. 45, 103 W.C.B. (2d) 625, 220 A.C.W.S. (3d) 536, 23 C.P.C. (7th) 217, 266 C.R.R. (2d) 1, 290 C.C.C. (3d) 1, 325 B.C.A.C. 1, 34 B.C.L.R. (5th) 1, 352 D.L.R. (4th) 587, 553 W.A.C. 1, 95 C.R. (6th) 1

Attorney General of Canada, Appellant and Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach, Respondents and Attorney General of Ontario, Community Legal Assistance Society, British Columbia Civil Liberties Association, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and Positive Living Society of British Columbia, Interveners

McLachlin C.J.C, LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: January 19, 2012
Judgment: September 21, 2012 *
Docket: 33981

Proceedings: affirming *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)* (2010), [2011] 1 W.W.R. 628, 260 C.C.C. (3d) 95, 219 C.R.R. (2d) 171, 294 B.C.A.C. 70, 498 W.A.C. 70, 2010 CarswellBC 2729, 2010 BCCA 439, 324 D.L.R. (4th) 1, 10 B.C.L.R. (5th) 33 (B.C. C.A.)**Proceedings: reversing *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)* (2008), [2009] 5 W.W.R. 696, 182 C.R.R. (2d) 262, 305 D.L.R. (4th) 713, 2008 BCSC 1726, 2008 CarswellBC 2709, 90 B.C.L.R. (4th) 177 (B.C. S.C.)**

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Subject: Constitutional; Civil Practice and Procedure; Criminal; Public

Headnote

Constitutional law --- Procedure in constitutional challenges — Standing

Society for women in sex trade and former sex worker commenced action seeking declaration that various provisions of Criminal Code dealing with prostitution violated Canadian Charter of Rights and Freedoms — Crown's application to dismiss action on basis that neither society nor former sex worker had standing was granted — Society and former sex worker appealed — Appeal was allowed — Crown appealed — Appeal dismissed — There was no dispute that action raised serious and justiciable issues — Existence of parallel litigation, even one that raised many of same issues, was not necessarily sufficient basis for denying standing — It was very unlikely that persons charged for prostitution-related offences would bring claim similar to that of society and former sex worker — Record showed that society and former sex worker had capacity to undertake litigation.

Criminal law --- Offences — Prostitution and related offences — Prostitution — Constitutional validity of provision

Society for women in sex trade and former sex worker commenced action seeking declaration that various provisions of Criminal Code dealing with prostitution violated Canadian Charter of Rights and Freedoms — Crown's application to dismiss action on basis that neither society nor former sex worker had standing was granted — Society and former sex worker appealed — Appeal was allowed — Crown appealed — Appeal dismissed — There was no dispute that action raised serious and justiciable issues — Existence of parallel litigation, even one that raised many of same issues, was not necessarily sufficient basis for denying standing — It was very unlikely that persons charged for prostitution-related offences would bring claim similar to that of society and former sex worker — Record showed that society and former sex worker had capacity to undertake litigation.

Droit constitutionnel --- Procédure dans le cadre de contestations constitutionnelles — Intérêt pour agir

Groupe représentant des travailleuses du sexe et une ancienne travailleuse du sexe ont déposé une action visant à obtenir un jugement déclarant que plusieurs dispositions du Code criminel traitant de la prostitution contrevenaient à la Charte canadiennne des droits et libertés — Gouvernement a déposé avec succès une requête en irrecevabilité faisant valoir que ni le groupe ni l'ancienne travailleuse du sexe n'avaient l'intérêt pour agir — Groupe et l'ancienne travailleuse du sexe ont interjeté appel — Appel a été accueilli — Gouvernement a formé un pourvoi — Pourvoi rejeté — Nul ne contestait que l'action soulevait des questions sérieuses et justiciables — Existence d'une instance parallèle, même si elle soulevait beaucoup de questions identiques, n'était pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir — Il était très peu probable que des personnes accusées d'avoir commis des infractions relatives à la prostitution engageraient une action semblable à celle du groupe et de l'ancienne travailleuse du sexe — Selon le dossier, le groupe et l'ancienne travailleuse du sexe avaient la capacité pour entreprendre la présente action.

Droit criminel --- Infractions — Prostitution et infractions liées — Prostitution — Validité constitutionnelle d'une disposition

Groupe représentant des travailleuses du sexe et une ancienne travailleuse du sexe ont déposé une action visant à obtenir un jugement déclarant que plusieurs dispositions du Code criminel traitant de la prostitution contrevenaient à la Charte canadiennne des droits et libertés — Gouvernement a déposé avec succès une requête en irrecevabilité faisant valoir que ni le groupe ni l'ancienne travailleuse du sexe n'avaient l'intérêt pour agir — Groupe et l'ancienne travailleuse du sexe ont interjeté appel — Appel a été accueilli — Gouvernement a formé un pourvoi — Pourvoi rejeté — Nul ne contestait que l'action soulevait des questions sérieuses et justiciables — Existence d'une instance parallèle, même si elle soulevait beaucoup de questions identiques, n'était pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir — Il était très peu probable que des personnes accusées d'avoir commis des infractions relatives à la prostitution engageraient une action semblable à celle du groupe et de l'ancienne travailleuse du sexe — Selon le dossier, le groupe et l'ancienne travailleuse du sexe avaient la capacité pour entreprendre la présente action.

A society for women in the sex trade and a former sex worker commenced an action seeking a declaration that various provisions of the Criminal Code dealing with prostitution violated the Canadian Charter of Rights and Freedoms. The Crown's application to dismiss the action on the basis that neither the society nor the former sex worker had standing was granted. The application judge found that neither the society nor the sex worker had private interest standing and that discretionary public interest standing should not have been granted to them.

The society and the former sex worker appealed. The appeal was allowed. The Court of Appeal found that the public interest standing ought to have been granted in the case. The Court of Appeal found that there was no other reasonable and effective manner to bring the issue before the court. The Crown appealed.

Held: The appeal was dismissed.

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Per Cromwell J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver, Karakatsanis JJ. concurring): There was no dispute that the action raised serious and justiciable issues and that both the society and the former sex worker had a strong engagement with the issues. The existence of a parallel litigation, even one that raised many of the same issues, was not necessarily a sufficient basis for denying standing. It was very unlikely that persons charged for prostitution-related offences would bring a claim similar to that of the society and the former sex worker. The record showed that the society and the former sex worker had the capacity to undertake the litigation.

Un groupe représentant des travailleuses du sexe et une ancienne travailleuse du sexe ont déposé une action visant à obtenir un jugement déclarant que plusieurs dispositions du Code criminel traitant de la prostitution contrevenaient à la Charte canadiennne des droits et libertés. Le gouvernement a déposé avec succès une requête en irrecevabilité faisant valoir que ni le groupe ni l'ancienne travailleuse du sexe n'avaient l'intérêt pour agir. Le juge des requêtes a conclu que ni le groupe ni l'ancienne travailleuse du sexe n'avaient la qualité pour agir dans l'intérêt privé et que la qualité pour agir dans l'intérêt public qui est tributaire de l'exercice d'un pouvoir discrétionnaire ne devrait pas leur être reconnue.

Le groupe et l'ancienne travailleuse du sexe ont interjeté appel. L'appel a été accueilli. La Cour d'appel a conclu que la qualité pour agir dans l'intérêt public aurait dû leur être reconnue en l'espèce. La Cour d'appel a conclu qu'il n'y avait pas d'autre manière raisonnable et efficace de soumettre la question à la cour. Le gouvernement a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Cromwell, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver, Karakatsanis, JJ. souscrivant à son opinion) : Nul ne contestait que l'action soulevait des questions sérieuses et justiciables et que le groupe et l'ancienne travailleuse du sexe ont démontré un solide engagement à l'égard de l'enjeu en cause. L'existence d'une instance parallèle, même si elle soulevait beaucoup de questions identiques, n'était pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir. Il était très peu probable que des personnes accusées d'avoir commis des infractions relatives à la prostitution engageraient une action semblable à celle du groupe et de l'ancienne travailleuse du sexe. Selon le dossier, le groupe et l'ancienne travailleuse du sexe avaient la capacité pour entreprendre la présente action.

Annotation

As early as *R. v. Mills* (1986), 52 C.R. (3d) 1 (S.C.C.) the Supreme Court of Canada declared that the *Charter* did not confer new jurisdiction. It interpreted "court of competent jurisdiction" in section 24(1) of the *Charter* to mean that a court must have an established jurisdiction before it can consider *Charter* issues. In criminal matters this now generally means the trial judge or, in rare cases, the Superior Court exercising review jurisdiction.

The *Downtown Eastside* ruling confirms that a party other than an accused will in some cases gain public interest standing to bring a motion for declaratory relief alleging that a *Criminal Code* provision violates the *Charter*. Justice Cromwell for the Court calls for discretion and provides detailed and practical guidelines. This approach appears to widen the scope for such standing.

The Court presumably envisages such challenges being presented to superior courts. Provincial courts lack statutory jurisdiction to hear motions for declaratory relief, except when this is by an accused relying on the supremacy clause in section 52 of the *Constitution Act, 1982* (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.)). When the Supreme Court held in *Ward v. Vancouver (City)* (2010), 76 C.R. (6th) 207 (S.C.C.) that an aggrieved citizen can sue for damages for a *Charter* breach, it expressly relied on section 24(1) to hold that provincial courts lacked jurisdiction.

The litigant groups here had to wait five years to gain standing. Their grounds for challenging the prostitution-related provisions differ from the overbreadth and gross disproportionality arguments which succeeded in part in *Bedford v. Canada (Attorney General)* (2012), 91 C.R. (6th) 257 (Ont. C.A). It would be fair to the litigants and preserve judicial resources for the Supreme Court to grant them leave to intervene to present their arguments when the Court hears the *Bedford* appeal.

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Table of Authorities

Cases considered by *Cromwell J.*:

Baker v. Carr (1962), 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (U.S. Sup. Ct.) — referred to

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statute" (p. 145). He concluded that "*it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication*" (p. 145 (emphasis added)).

32 The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).

33 The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the *Charter* and the courts' new concomitant constitutional role called for a "general and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

34 In *Hy and Zel's*, Major J. commented on the underlying rationale for restricting standing and the balance that needs to be struck between limiting standing and giving due effect to the principle of legality:

> If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations. [p. 692]

(4) Discretion

35 From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147, 161 and 163; *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.), at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

36 It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

(5) A Purposive and Flexible Approach to Applying the Three Factors

37 In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

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38 The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) Serious Justiciable Issue

39 This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

40 By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 *U.B.C. L. Rev.* 727, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.

41 This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody: *Canadian Council of Churches*, at p. 252; *Finlay*, at pp. 631- 33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

42 To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.). Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) The Nature of the Plaintiff's Interest

43 In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with

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the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. T. Roach, *Constitutional Remedies in Canada* (loose-leaf), at ¶ 5.120).

(c) Reasonable and Effective Means of Bringing the Issue Before the Court

44 This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show ... that there is *no* other reasonable and effective manner in which the issue may be brought before the Court" (p. 598 (emphasis added)); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

45 A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

46 The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] *another* reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

47 A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff (pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

48 Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) This Factor Must Be Applied Purposively

49 This third factor should be applied in light of the need to ensure full and complete adversarial presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at ¶ 5.120. In *Hy and Zel's*, Major J. linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle

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of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

50 The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

51 It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.

- The court should consider 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. 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. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

- The court should turn its mind to 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. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

- The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.), at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

52 I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.

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