

Attorney General of Canada (appellant) v. 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)  
(33981; 2012 SCC 45; 2012 CSC 45)

**Indexed As: Downtown Eastside Sex Workers United Against Violence Society et al. v. Canada (Attorney General)**

Supreme Court of Canada  
McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ.  
September 21, 2012.

**Summary:**

Kiselbach, a former sex trade worker, and Downtown Eastside Sex Workers United Against Violence Society (SWUAV) challenged the constitutional validity of various Criminal Code sections related to prostitution. They sought to do this through a declaratory action that invoked ss. 2(b), 2(d), and 15 of the Canadian Charter of Rights and Freedoms. The Attorney General of Canada (AGC) applied to dismiss the action on the basis that neither Kiselbach nor SWUAV had standing, private or public, to challenge the constitutional validity of the provisions in issue. The AGC also applied to have portions of the pleadings struck under rule 19(24) of the Rules of Court and for an order staying that part of the action on the basis that the pleadings disclosed no reasonable claim, and alternatively, applied for particulars. In response to the rule 19(24) application, the plaintiffs sought to further amend their statement of claim.

The British Columbia Supreme Court, in a decision reported at [2008] B.C.T.C. Uned. F54, allowed the application to further amend the statement of claim. The court did not decide the rule 19(24) application, finding instead that the plaintiffs lacked standing to bring the claim. However, the court observed that many of the alleged defects could be remedied by further amendments to the statement of claim or through the delivery of particulars. Further, the court found that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation," and recognized that portions of it relating to s. 7 of the Charter were not challenged by the AGC under rule 19(24). Kiselbach and SWUAV appealed.

The British Columbia Court of Appeal, Groberman, J.A., dissenting, held that Kiselbach and SWUAV had public interest standing. Accordingly, the appeal was allowed, the order dismissing the action was set aside, and the matter was remitted to the British Columbia Supreme Court for disposition of the rule 19(24) application and the application for particulars. See 294 B.C.A.C. 70; 498 W.A.C. 70. Kiselbach and SWUAV sought increased costs, in the Court of Appeal and in the Supreme Court of British Columbia, payable forthwith. The AGC opposed an

order that costs be payable forthwith, opposed an order for special or increased costs, and asked that costs be left to the Supreme Court of Canada, which had granted leave to appeal (see 421 N.R. 400). In the alternative, the AGC asked that party and party costs should be awarded at Scale 3 in the Court of Appeal and Scale C in the Supreme Court of British Columbia.

The British Columbia Court of Appeal, in a decision reported at 314 B.C.A.C. 137; 534 W.A.C. 137, awarded party and party costs at Scale 3 on the appeal and Scale C in the Supreme Court of British Columbia. The court ordered, outside of its usual practice, that the costs of the motion in the Supreme Court of British Columbia on Scale C were recoverable in any event of the cause. The AGC appealed the decision on the merits and costs.

The Supreme Court of Canada dismissed the appeal with costs. The court held that Kiselbach and SWUAV had public interest standing; it was not necessary to address the issue of whether Kiselbach had private interest standing.

### **Civil Rights - Topic 8583**

Canadian Charter of Rights and Freedoms - Practice - Who may raise Charter issues (incl. standing) - The Supreme Court of Canada stated that "Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government ... The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations. In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court ... The courts exercise this discretion to grant or refuse standing in a 'liberal and generous manner'." - The court held that the three factors were not to be treated as a rigid checklist, but as interrelated considerations to be taken into account and weighed in exercising judicial discretion in a way that served the underlying purposes of the law of standing - In particular, it was not necessary to show that there was no other reasonable and effective manner in which the issue might be brought before the court - See paragraphs 1 to 3, 20 to 52.

### **Civil Rights - Topic 8583**

Canadian Charter of Rights and Freedoms - Practice - Who may raise Charter issues (incl. standing) - Downtown Eastside Sex Workers United Against Violence Society and Kiselbach, a former sex trade worker currently working as a violence prevention coordinator in the Downtown Eastside, challenged the constitutional validity of various Criminal Code sections related to prostitution - They sought a declaration that these provisions violated ss. 2(b), 2(d), and 15 of the Canadian Charter of Rights and Freedoms

- A motions judge held that the Society and Kiselbach lacked standing - On appeal, the British Columbia Court of Appeal held that they had public interest standing - The Attorney General of Canada appealed - The Supreme Court of Canada considered the circumstances of the case in light of the three factors which had to be considered when determining whether a litigant had public interest standing: whether the case raised a serious justiciable issue, whether the respondents had a real stake or a genuine interest in the issue(s), and whether the suit was a reasonable and effective means of bringing the issues before the courts in all of the circumstances - Although there was little dispute that the first two factors favoured granting standing, all three factors had to be reviewed as they had to be weighed cumulatively rather than individually - The court held that when all three factors were considered in a purposive, flexible and generous manner, the Court of Appeal was right to grant public interest standing to the Society and Kiselbach - See paragraphs 1 to 17 and 53 to 76.

### **Civil Rights - Topic 8583**

Canadian Charter of Rights and Freedoms - Practice - Who may raise Charter issues (incl. standing) - Downtown Eastside Sex Workers United Against Violence Society and Kiselbach, a former sex trade worker currently working as a violence prevention coordinator in the Downtown Eastside, challenged the constitutional validity of various Criminal Code sections related to prostitution - They sought a declaration that these provisions violated ss. 2(b), 2(d), and 15 of the Canadian Charter of Rights and Freedoms - A motions judge held that the Society and Kiselbach lacked standing - On appeal, the British Columbia Court of Appeal held that they had public interest standing - The Attorney General of Canada appealed - The Supreme Court of Canada stated that "The existence of parallel litigation is certainly a highly relevant consideration that will often support denying standing. However, I agree with the chambers judge that the existence of a civil case in another province even one that raises many of the same issues is not necessarily a sufficient basis for denying standing. There are several reasons for this. One is that, given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. What is needed is a practical and pragmatic assessment of whether having parallel proceedings in different provinces is a reasonable and effective approach in the particular circumstances of the case." - The court found that the Society and Kiselbach challenged the legislation from a distinctive context - Second, the cases to which the court was referred did not challenge nearly the entire legislative scheme as did Kiselbach and the Society - A stay of proceedings pending resolution of the other proceedings was one possibility that should be taken into account in exercising the court's discretion as to standing - Third, many difficulties could arise when constitutional challenges were brought by accused in criminal proceedings - See paragraphs 62 to 72.

### **Practice - Topic 221**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Public interest standing (incl. requirements of) - [See all **Civil Rights - Topic 8583**].

### **Practice - Topic 221**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Public interest standing (incl. requirements of) - The Supreme Court of Canada stated that it "... has taken a purposive approach to the development of the law of standing in public law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance 'between ensuring access to the courts and preserving judicial resources ...!'." - See paragraph 23.

### **Cases Noticed:**

Finlay v. Canada, [1986] 2 S.C.R. 607; 71 N.R. 338, consd. [para. 1].  
Canadian Council of Churches v. Canada et al., [1992] 1 S.C.R. 236; 132 N.R. 241, consd. [para. 2].  
Bedford et al. v. Canada (Attorney General) et al., [2010] O.T.C. Uned. 4264; 2010 ONSC 4264, rev'd in part (2012), 290 O.A.C. 236; 109 O.R.(3d) 1; 2012 ONCA 186, refd to. [para. 12].  
Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791; 335 N.R. 25; 2005 SCC 35, refd to. [para. 15].  
Borowski v. Minister of Justice and Minister of Finance of Canada, [1981] 2 S.C.R. 575; 39 N.R. 331; 12 Sask.R. 420, consd. [para. 18].  
Smith v. Attorney General of Ontario, [1924] S.C.R. 331, refd to. [para. 26].  
Hy and Zel's Inc. v. Ontario (Attorney General) - see Magder (Paul) Furs Ltd. et al. v. Ontario (Attorney General).  
Magder (Paul) Furs Ltd. et al. v. Ontario (Attorney General), [1993] 3 S.C.R. 675; 160 N.R. 161; 67 O.A.C. 81, consd. [para. 27].  
Thorson v. Canada (Attorney General), [1975] 1 S.C.R. 138; 1 N.R. 225; 43 D.L.R.(3d) 1, consd. [para. 28].  
Baker v. Carr (1962), 369 U.S. 186, refd to. [para. 29].  
Auditor General of Canada v. Canada (Minister of Energy, Mines and Resources) et al., [1989] 2 S.C.R. 49; 97 N.R. 241, refd to. [para. 30].  
Nova Scotia Board of Censors v. McNeil - see McNeil v. Nova Scotia Board of Censors.  
McNeil v. Nova Scotia Board of Censors, [1976] 2 S.C.R. 265; 5 N.R. 43; 12 N.S.R.(2d) 85; 6 A.P.R. 85; 55 D.L.R.(3d) 632, consd. [para. 35].  
Operation Dismantle Inc. et al. v. Canada et al., [1985] 1 S.C.R. 441; 59 N.R. 1, refd to. [para. 40].  
R. v. Edwards Books and Art Ltd. - see R. v. Videoflicks et al.  
R. v. Videoflicks et al., [1986] 2 S.C.R. 713; 71 N.R. 161; 19 O.A.C. 239, consd. [para. 42].  
Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123; 109 N.R. 81; 68 Man.R.(2d) 1, refd to. [para. 55].  
R. v. Skinner, [1990] 1 S.C.R. 1235; 109 N.R. 241; 98 N.S.R.(2d) 181; 263 A.P.R. 181, refd to. [para. 55].  
R. v. Smith (1988), 44 C.C.C. (3d) 385 (Ont. H.C.), refd to. [para. 68].  
R. v. Gagne, [1988] O.J. No. 2518 (Prov. Ct.), refd to. [para. 68].  
R. v. Jahelka; R. v. Stignitta (1987), 79 A.R. 44; 43 D.L.R.(4th) 111 (C.A.), refd to. [para. 68].

R. v. Kazelman, [1987] O.J. No. 1931 (Prov. Ct.), refd to. [para. 68].  
R. v. Bavington, 1987 CarswellOnt 3371 (Prov. Ct.), refd to. [para. 68].  
R. v. Cunningham (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.), refd to. [para. 68].  
R. v. Bear (1986), 47 Alta. L.R.(2d) 255 (Prov. Ct.), refd to. [para. 68].  
R. v. McLean (1986), 2 B.C.L.R.(2d) 232 (S.C.), refd to. [para. 68].  
R. v. Bailey, [1986] O.J. No. 2795 (Prov. Ct.), refd to. [para. 68].  
R. v. Blais (L.) (2008), 260 B.C.A.C. 145; 439 W.A.C. 145; 301 D.L.R.(4th) 464; 2008 BCCA 389, refd to. [para. 68].  
R. v. Downey and Reynolds, [1992] 2 S.C.R. 10; 136 N.R. 266; 125 A.R. 342; 14 W.A.C. 342, refd to. [para. 68].  
R. v. Boston, [1988] B.C.J. No. 1185 (C.A.), refd to. [para. 68].  
R. v. DiGiuseppe (R.) et al. (2002), 155 O.A.C. 62; 161 C.C.C.(3d) 424 (C.A.), refd to. [para. 68].  
R. v. Stagnitta - see R. v. Jahelka; R. v. Stagnitta.  
R. v. Jahelka; R. v. Stagnitta, [1990] 1 S.C.R. 1226; 109 N.R. 264; 108 A.R. 44, refd to. [para. 68].  
Odhavji Estate et al. v. Woodhouse et al., [2003] 3 S.C.R. 263; 312 N.R. 305; 180 O.A.C. 201; 2003 SCC 69, appld. [para. 78].

#### **Authors and Works Noticed:**

Fiss, Owen M., *The Social and Political Foundations of Adjudication* (1982), 6 *Law & Hum. Behav.* 121, generally [para. 22].  
Roach, Kent T., *Constitutional Remedies in Canada* (December 2011 Looseleaf Update), ¶ 5.120 [paras. 43, 49].  
Scott, Kenneth E., *Standing in the Supreme Court - A Functional Analysis* (1973), 86 *Harv. L. Rev.* 645, p. 674 [para. 28].  
Sossin, Lorne, *The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?* (2007), 40 *U.B.C. Law Rev.* 727, pp. 733, 734 [para. 40].  
Sossin, Lorne M., *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd Ed. 2012), pp. 6 to 10 [para. 30]; 27 [para. 40].

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This appeal was heard on January 19, 2012, by McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ., of the Supreme Court of Canada. Cromwell, J., delivered the following reasons for judgment for the court on September 21, 2012.

Appeal dismissed.

Editor: Jana A. Andersen

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