

SCC clarifies test for public interest standing in *British Columbia v. Council of Canadians with Disabilities*

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Introduction

A recent Supreme Court of Canada decision in a case between British Columbia and the Council of Canadians with Disabilities will remove significant barriers to access to justice.

On June 23, 2022, the Supreme Court of Canada (SCC) released its decision in *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, [2022 SCC 27](#) (CCD v. BC), which considered the test for public interest standing. BLG acted as agent for the respondent/appellant on cross-appeal, the Council of Canadians with Disabilities (CCD).

Public interest standing is an integral tool that allows individuals and groups to have constitutional cases heard in court when the matter does not impact them personally. It assists in ensuring that issues of public importance can be litigated, even where those directly impacted may not be in a position to commence the litigation themselves.

In a unanimous decision that will benefit those seeking public interest standing, Chief Justice Wagner writing for the Court held that public interest litigation may proceed without a directly affected plaintiff, as long as a concrete and well-developed factual setting can be established. The Court further held that the CCD should be granted public interest standing in their constitutional challenge of B.C.'s *Mental Health Act* and its related legislation.

The SCC decision confirms the factors for public interest standing as then-Justice [Thomas Cromwell](#) laid out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (*Downtown Eastside*).

The SCC decision emphasized applying these factors in a flexible, generous way, guided by the underlying purposes of standing. Below, we summarize the SCC's key points and possible legal ramifications.

The law before the SCC's decision

In 2016, CCD and two individual plaintiffs filed a Notice of Civil Claim against the Attorney General of British Columbia (AGBC), alleging that the province's use of involuntary psychiatric treatment violates sections 7 and 15(1) of the *Charter of Rights and Freedoms*. The individual plaintiffs alleged they had been harmed by forced psychiatric treatment. In 2017, both individual plaintiffs withdrew from the litigation, leaving CCD as the only plaintiff. CCD amended its Notice of Civil Claim to replace all factual allegations relating to the two individuals with more general allegations about the harms of forced psychiatric treatment on involuntary patients. CCD pleaded that it should be granted public interest standing and allowed to continue the action.

In response to the CCD's amended Notice of Civil Claim, the AGBC filed a Notice of Application seeking to dismiss the action, asserting that CCD lacked standing on its own. The chambers judge granted the AGBC's application and denied CCD public interest standing, finding that the CCD failed to satisfy the three-part test set out in *Downtown Eastside*, which asks whether:

- the case raises a serious justiciable issue;
- the party bringing the action has a genuine interest in the matter; and
- the proposed suit is a reasonable and effective means of bringing the case to court.

The B.C. Court of Appeal (BCCA) allowed the appeal, highlighting the prominent access to justice barriers facing marginalized people, and holding that these barriers merit particular weight in the balancing exercise. The BCCA determined that the chambers judge erred in requiring the factual context of an individual case as part of the serious justiciable issue analysis, as it would be possible for CCD to instead establish a claim by presenting evidence through non-plaintiff witnesses and expert testimony. The BCCA remitted the matter back to the BC Supreme Court for fresh consideration.

The AGBC appealed to the SCC. During oral argument in January 2022, CCD sought leave to cross-appeal the BCCA's order remitting the matter back to the BC Supreme Court, asking the SCC to instead grant it public interest standing.

The SCC's decision

The primary issue the Court considered was how to apply the public interest standing test from *Downtown Eastside*. Specifically, should the principles of legality and access to justice be given particular weight, as held by the BCCA, and how can a litigant seeking public interesting standing with no directly affected co-plaintiff satisfy the "sufficiently concrete and well-developed factual setting" component of the "reasonable and effective means" factor?

In its unanimous decision, the SCC confirmed the three-factor test from *Downtown Eastside*, emphasizing how each factor must be weighed purposively and with regard to the circumstances.

These purposes include efficiently allocating scarce judicial resources and screening out "busybody" litigants, ensuring that courts have the benefit of the contending points

of view of those most directly affected by the issues, and ensuring that courts play their proper role within our democratic system of government. In addition, courts must consider the purposes that justify granting standing, including the principle of legality and ensuring access to justice. The ultimate goal is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it.

The SCC held that there does not need to be a directly affected plaintiff to establish a “concrete and well-developed factual setting” to satisfy the “reasonable and effective means” factor. Public interest litigants may instead be able to rely on directly affected non-plaintiff witnesses or experts. A court should take a factual, contextual approach that considers the stage of litigation at which standing is challenged, the nature of the case and the issues before the court.

The SCC provided a non-exhaustive list of factors to help assess whether a sufficiently concrete and well-developed factual setting will be produced at trial:

- **Stage of the proceedings:** Early in the proceedings, a concrete factual basis may not be pivotal, and the specific weight will ultimately depend on both the circumstances and trial judge’s discretion. However, at trial, the absence of a factual basis should generally be fatal to public interest standing.
- **Pleadings:** The nature of the pleadings and the material facts pleaded may reveal whether the case can likely be argued on the face of legislation alone or whether individualized facts are needed.
- **The nature of the public interest litigant:** Depending on the relationship with directly affected individuals, it may be reasonable to infer that the public interest litigant will be able to offer evidence from affected individuals.
- **Undertakings:** Given their professional obligations, an undertaking by counsel to provide evidence might help persuade a court that a sufficient factual setting will exist at trial, but an undertaking alone will rarely suffice.
- **Actual evidence:** Though not required, providing actual evidence can be a clear and compelling response to a challenge to standing at a preliminary stage. This can include, for example, a list of potential witnesses and the evidence they will provide.

These factors provide clarity in analyzing the contentious issues at hand in these cases. To conclude its decision the SCC cautioned against using “the blunt instrument of a denial of standing,” encouraging instead other litigation management strategies to ensure the efficient and effective use of judicial resources.

Nevertheless, courts can still reconsider standing in later stages, ensuring plaintiffs work towards demonstrating a concrete and well-developed factual setting. A defendant wishing to revisit standing may apply to do so only if a material change has occurred. This material change must raise serious doubt that the public interest litigant will be able to put forward a sufficiently concrete and well-developed factual setting, and that alternative litigation management strategies are inadequate to address the deficiency.

Application of the test

The Court granted CCD’s request at the oral hearing for leave to cross appeal, agreeing that remitting the matter for reconsideration would only cause further delay, and that it was in the interests of justice to address the standing issue now. The Court proceeded

to apply the *Downtown Eastside* test, highlighting that unlike what the lower courts had done, it weighed all of the factors cumulatively, flexibly, and purposively.

Serious justiciable issue

The SCC found that CCD’s pleadings were well drafted and raised a serious issue, namely the involuntary and forcible psychiatric treatment of persons with mental disabilities. The issue is “far from frivolous,” “important,” and “substantial.” The pleadings reveal facts and a cause of action, which if proven, could support a Charter claim.

Genuine interest in the matter

The SCC found that CCD’s extensive experience advocating for persons with disabilities was sufficient to demonstrate a “link with the claim” and an “interest in the issues.” The Court rejected the AGBC’s argument that CCD’s work would need to be more narrowly focused on people with mental illness to justify public interest standing.

Reasonable and effective means

The SCC examined this factor by turning to four “interrelated matters” as raised in *Downtown Eastside*:

- **The plaintiff’s capacity to bring the claim forward:** The SCC was satisfied CCD had the resources and expertise to advance its claim and that it would be able to establish a “sufficiently concrete and well-developed factual setting.” Given CCD’s work is directed “by and for people with disabilities,” the SCC found it reasonable to infer CCD has the capacity to present evidence from individuals directly affected. As the pleadings revealed the case was largely based on the face of the statute and not on individual facts, and as the case was still at the pleadings stage, the Court had a low expectation for factual evidence. The Court was also further assured by the undertaking of CCD’s counsel to provide concrete circumstances of specific patients at a later stage.
- **Whether the case is of public interest and what impact it will have on access to justice:** The SCC was satisfied the claim raised issues of public importance that transcended CCD’s immediate interests, with the potential to affect a large group of people. The SCC also found that granting public interest standing would promote access to justice for a disadvantaged group – people with mental disabilities – who have historically faced serious barriers to bringing litigation.
- **Whether there are alternative means to bring the claim forward, including parallel proceedings:** The SCC rejected the AGBC’s assertion that a proposed class action in B.C. would be a better vehicle for raising these issues, highlighting the uncertainty about whether the class proceeding will be certified, and noting that class actions are typically focussed on securing damages rather than striking down unconstitutional legislation.
- **The potential impact of the proceedings on the rights of others:** While the AGBC argued CCD’s claim may prejudice people who support the challenged legislation, the Court rejected that support for a law should protect it from constitutional challenge.

Cumulative weighing

After weighing each factor, the SCC exercised its discretion to grant public interest standing. It noted that the AGBC can apply to have the issue of standing reconsidered if CCD fails to promptly adduce evidence of its promised factual setting.

The SCC also took the exceptional step of awarding special costs throughout to CCD on a full indemnity basis, highlighting that the substantive issues have yet to be addressed in six years of litigation due to the AGBC's challenge to CCD's standing.

Key takeaways

- To be granted standing, a public interest litigant is not required to have a directly affected co-plaintiff as long as they can establish a concrete and well-developed factual setting.
- The flexible and discretionary approach to public interest standing must be guided by all the underlying purposes of standing. No one purpose, principle, or factor takes precedence in the analysis.
- The decision to grant public interest standing is discretionary, fact- and context-specific. The goal is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it.
- Our courts will discourage using standing to reject a claim during the early stages of a litigious dispute.

By clarifying the law on public interest standing and confirming that public interest litigants can proceed with litigation without directly affected co-plaintiffs, this decision will have a profound impact on access to justice, particularly for marginalized groups that face barriers to litigation.

Reach out to any of the key contacts below if you have further questions about the SCC decision.

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