Fluker CFLR Grant Application Project Outline – Standing to Litigate in the Public Interest

Introduction and Research Objective

The law of standing concerns a claimant's entitlement to commence proceedings in adjudicative forums. The question of standing rarely arises in private disputes because each party to the adjudication typically has a direct interest in the outcome. However, it is more of an acute issue in proceedings where the claimant is seeking a remedy concerning a public right or interest, as opposed to a personal grievance. The traditional rule in Canada has been that only the Attorney General had standing commence proceedings to uphold a public right or interest (Cromwell, 1986).

In a series of decisions between 1975 and 1986 the Supreme Court of Canada developed an exception to the traditional rule that only the Attorney General has standing to litigate in public interest matters. The Court revisited and affirmed this exception in *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, and again more recently in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27. The exception, known as 'public interest standing', grants standing to a claimant to commence proceedings concerning the legality of the exercise of state power, notwithstanding that the claimant is not directly affected by the exercise of the power. The Court has emphasized that public interest standing serves to enhance access to justice and ensures government decisions are subjected to the principle of legality, particularly when the implications of the exercise of state power transcend the interests of those most directly affected. Important public interest cases have included sex workers rights, homelessness, animal rights, and immigration. The Court has prescribed three factors relevant in a consideration on whether to grant public interest standing: (1) the matter raises a serious and justiciable issue; (2) the applicant seeking standing has a genuine interest in the matter; (3) the claim is a reasonable and effective manner in which to bring the issue before the courts.

A closer look at the public interest standing jurisprudence reveals that the law of standing is concerned with much more than just procedure. While the law of standing clearly serves a gatekeeping function on access to the courts (Bailey, 2011), deliberations on public interest standing also have a strong connection to questions about the scope of legally recognized interests (Stone, 2010) and the proper role of the judiciary in societal and political matters (Sossin, 2012). Canada has no explicit separation of powers between the branches of government, but nonetheless the grant of public interest standing in certain cases has attracted significant criticism from those who assert an expansive approach to standing enables the judiciary to inappropriately decide political matters or question the wisdom of policy choices made by the legislative branch or its delegates (Morton & Knopff, 2000).

The primary objective of this research project is to explore how Canadian courts exercise their discretion to grant public interest standing. To date, the scholarship on this topic consists primarily of commentary on a single or select group of court decisions regarding the application of public interest standing in a particular subject. This research will deepen our understanding of the complexities associated with expanding the scope of legally recognized interests and the role of

the judiciary in societal and political matters and will provide preliminary answers on two questions: (1) what trends or patterns are evident in how Canadian courts apply the considerations relevant in deciding whether to grant public interest standing; and (2) what are the implications of the collected evidence for our understanding on the scope of legally recognized interests and the role of the judiciary in social and political matters?

Context

The common law rule of standing in Canada for public interest matters is that only the Attorney General is entitled to commence legal proceedings that seek to address a public wrong (Cromwell, 1986). The traditional basis for the rule is that the Attorney General is the sole guardian of the public interest and, on behalf of the Crown, exercises its *parens patriae* authority to vindicate public rights and interests on behalf of the citizenry (Jones, 2007; Jones, 2013; McAllister, 2002). In the exercise of these powers, the Attorney General is accountable to the legislative branch rather than the judicial branch. Thus, the common law holds that a claimant other than the Attorney General can only initiate public interest proceedings either with the consent of the Attorney General or if that claimant can demonstrate they will suffer special damages which are distinct in kind or magnitude from what the public will suffer generally. The historical origin of this standing rule is known as the 'public nuisance rule' and, even prior to the industrial revolution, the caselaw employed this test for standing in relation to criminal proceedings by the Crown against persons accused of blocking public roadways in 16th century England (Cromwell, 1986).

For most of the 20th century in Canada, the public nuisance rule meant it was very difficult for anyone to question whether legislation was lawful, and in particular whether legislation was constitutional. Unless a claimant could establish that legislation directly affected their personal, pecuniary, or property rights in a manner distinct from that of the public generally, only the Attorney General could initiate proceedings to question the constitutionality of the enactment. The classic statement of authority on this was *Smith v Attorney General of Ontario*, [1924] SCR 331, a 1924 Supreme Court of Canada decision wherein a claimant sought to challenge the legality of federal legislation which prevented the purchase of liquor from a seller located in another province. The Court referred to the public nuisance rule in denying the claimant standing to initiate their constitutional challenge to the legislation. This was the definitive statement on the law of standing regarding constitutional challenges until a decision issued by the Court in 1975 (Cromwell, 1986).

One traditional rationale for applying the public nuisance rule to limit standing in public interest matters to the Attorney General or claimants who can assert special damage is that it helps to ensure the courts only hear cases grounded in well-established facts which are argued with determined advocacy by true adversaries (Cromwell, 1986; Ontario Ministry of the Attorney General, 1989). Related to this concern is the 'floodgates' view that relaxed or expansive standing rules will expose the courts to large volumes of cases, or similarly allow for 'busybodies' who argue cases in hypotheticals. This view holds that a poor factual record creates risk that the court will 'get it wrong'. Critics of this rationale point out that while public interest NGOs may not be directly affected by an exercise of state power, these NGOs may sometimes bring a stronger factual

foundation than what could be offered by a directly affected individual and these NGOs often have extensive experience in the social context of the matter, all of which may place the court in a better position to address public interest matters (Phillips, 2013).

Another traditional rationale for applying the public nuisance rule to limit standing in public interest matters to the Attorney General takes direct issue with the role of the courts in addressing socio-political matters. This view asserts that disputes over policy or political issues should be resolved by the legislative branch. Again, the concern is that a relaxed approach to standing provides the courts with too much leeway to judicialize the implementation of public policy (Morton & Knopff, 2000).

What is now public interest standing was defined in a trilogy of cases in the 1970s and 1980s. The first case is *Thorson v Attorney General of Canada*, [1975] 1 SCR 138. In this case the claimant sought to challenge the constitutionality of a federal statute enacted in 1969 which declared English and French to be the official languages of Canada and required government services to be offered in both languages. The legislation was declaratory only, and thus it would be impossible for any individual to establish a direct effect on them personally or in a manner distinct from the public generally. In this decision, the Court explicitly observed that the application of the public nuisance rule to standing would effectively immunize the statute from legal challenge since the federal Attorney General, as the only entity able to question the legality of the statute under the traditional standing rule, was also a member of the executive who was responsible for overseeing implementation the legislation. On the presumption that the constitutionality of legislation must be justiciable, the Court asserted that it had discretion to grant standing to the claimant to commence proceedings. *Thorson* was the first decision by the Supreme Court of Canada to displace the public nuisance rule as the governing position on standing to commence proceedings in constitutional litigation (Cromwell, 1986).

The dominant position of the Attorney General to commence proceedings in the public interest was further eroded by the Court in *Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265, the second case in the defining trilogy. In this decision the Court granted standing to a claimant to challenge the constitutionality of provincial legislation that regulated the distribution of films in the province, despite the fact that the claimant was not within the class of persons (theatre owners) whose pecuniary rights would be directly affected by the legislation and that the claimant could not establish any impact on themselves which would be distinct from the public generally regarding the censorship implications of the statute. The fact that the claimant had a 'genuine' interest or a 'real stake' in a serious and justiciable matter and that there was no other reasonable way in which to bring the matter before the courts, was sufficient in the view of the Court for the grant of standing to commence the constitutional challenge to the legislation.

The displacement of the public nuisance rule on standing was limited to cases involving constitutional challenges until the Supreme Court of Canada expanded the application of public interest standing in *Minister of Finance (Canada) v Finlay*, [1986] 2 SCR 575, the final case in the original trilogy. Prior to the *Finlay* decision, it was unclear whether public interest standing was available to commence proceedings to challenge the legality of an executive or administrative decision made pursuant to legislation on non-constitutional grounds (Cromwell, 1987). The

claimant in *Finlay* was the recipient of social assistance payments in Manitoba who sought to contest the adequacy of this assistance on the basis that Manitoba was not in compliance with the terms upon which it received federal funding for the social assistance program. The Court granted public interest standing on the basis that the concerns about legal scrutiny and the principle of legality in relation to constitutional matters could also be applied in this case to the exercise of executive or administrative authority made pursuant to legislation.

This series of decisions by the Supreme Court of Canada between 1975 and 1986 effectively replaced the public nuisance rule on standing with a discretionary approach for cases where a claimant seeks to challenge the legality of the exercise of state power but cannot establish they are directly or personally affected by the exercise of that power. The Court's decision in *Finlay* articulated the factors to be considered by a court in deciding whether to grant public interest standing: (1) is there a justiciable and serious issue; (2) does the claimant have a genuine interest in the subject matter; and (3) is there another reasonable and effective manner to bring the case before the courts. While the public nuisance rule has never been explicitly overruled by Canadian courts in relation to standing on public interest matters, commentators have observed that the discretionary approach significantly eroded the dominant position of the Attorney General to commence proceedings in the public interest and that a more expansive approach to public interest standing is an explicit acknowledgement that the Attorney General is unable perform a dual function of ensuring government policy is implemented by the legislative branch or its delegates while at the same time acting to vindicate the public interest when the exercise of state power is alleged to be unlawful (Jones, 2013).

Nevertheless, the extent to which discretionary public interest standing will be granted by Canadian courts remains uncertain; there are inherent instabilities within the factors for consideration and wide variations in how courts apply them. For instance, justiciability is contested terrain outside of a constitutional challenge. And it can be difficult to ascertain the evidence needed to establish a 'genuine interest' or that the matter is a 'reasonable and effective way' in which to bring the public interest issue before the court.

Commentators observed that subsequent to the 1986 *Finlay* decision, the Supreme Court of Canada appeared to apply the factors narrowly such that discretion to grant public interest standing would be exercised only in very exceptional cases (Ross, 1995; Tollefson, 2002; Bailey, 2011; Phillips, 2013). Notable decisions by the Court in this regard included *Canadian Council of Churches v Canada*, [1992] 1 SCR 236 and *Hy & Zels Inc v Ontario (Attorney General)*, [1993] 3 SCR 675. These decisions revealed that while the traditional public nuisance rule on standing was cast into the background by the discretionary approach, the rule and its rationale would still have a significant influence on how Canadian courts exercise their discretion to grant standing in cases where someone other than the Attorney General was seeking to assert the public interest in legal proceedings.

The Supreme Court of Canada revisited and affirmed the discretionary approach to public interest standing in *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, and in this 2012 decision the Court reformulated the third factor in the list of considerations by reframing the consideration in a positive sense. Rather than require a claimant

to establish there is no other reasonable and effective manner to bring the dispute before the courts, the *Downtown Eastside Sex Workers* decision asks whether the claimant's case is a reasonable and effective manner to bring the dispute forward. This reformulation gives heightened importance to contextual factors such as the capacity of the claimant to litigate the case in terms of their resources and expertise. Commentators observed this reformulation would make it easier for well-organized and dedicated public interest NGOs to obtain public interest standing to challenge the exercise of state power and enhance access to justice for marginalized voices (Mullan, 2013; Phillips, 2013; Kerr and Sigurdson, 2017). However, it is clear from the jurisprudence that some courts have continued to apply the discretionary approach narrowly. For example, in a recent number of decisions denying public interest standing, Alberta courts have conflated public interest standing determinations with abuse of judicial process (Fluker, 2019; Lund, 2023). Moreover, the Supreme Court's more recent *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 decision is arguably a retrenchment on public interest standing and potentially elevates the evidentiary burden on public interest NGO applicants.

Methodology

This research will employ doctrinal legal research and empirical methods. The doctrinal research will proceed by collecting and organizing legal data, expounding on legal rules, and offering exegesis on authoritative legal sources (SSHRC, 1983). The legal data will be collected from one or more electronic legal databases, and the data will consist of Canadian judicial decisions on whether to grant public interest standing to an applicant. These decisions will be entered into an Excel spreadsheet or similar database in a manner that allows the data to be sorted and coded.

The coding phase will begin with the development of standard or common issues and sub-issues that arise in standing decisions. This will involve using a small selection of decisions chosen at random and analyzed by myself and the research assistant. We will compare notes on issues identified, the terminology used to describe those issues, and produce an agreed set of content units. We will also conduct tests to ensure reliability and the effectiveness of the selected content units, and to identify assumptions and exclusions in the coding exercise. Variables will likely include units such as category of applicant, public interest subject, level of court, jurisdiction, the outcome of the application, and the reasons given by the court for deciding whether to grant public interest standing. Once these initial research design features are settled, the data will be coded and entered into the database. We will use statistical analysis to identify trends in relation to considerations relied on by courts to decide an application for public interest standing, and also to determine whether there are differences in outcomes based on one or more of the variables such as category of applicant, public interest subject, level of court, or jurisdiction.

Timeline

May and June 2024	Train student in legal research and coding methods. Decide on content units for coding. Populate database with judicial decisions extracted from electronic databases and coded data.
July and August 2024	Complete the coding of data and undertake qualitative and quantitative analysis.
Fall 2024 and Winter 2025	Present preliminary findings at workshops, CBA-sponsored workshops, and conference proceedings and draft paper for peer-reviewed journal.
Spring 2025	Submit overall synthesis of the research in paper for publication in a peer-reviewed journal.

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