Court of Appeal File No. CA45711

COURT OF APPEAL

BETWEEN:

COUNCIL OF CANADIANS WITH DISABILITIES

APPELLANT
(Plaintiff)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Defendant)

- and –

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, WEST COAST LEGAL EDUCATION AND ACTION FUND, and ECOJUSTICE CANADA SOCIETY

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OPENING STATEMENT

The chambers judge concluded that the Appellant Council of Canadians with Disabilities ("**CCD**") did not have public interest standing in the underlying litigation, in part because the CCD as a party would not advance an action specifically founded on one individual's experience. The British Columbia Civil Liberties Association ("**BCCLA**") intervenes to identify the ways in which the court's analysis on this matter errs in principle and departs markedly from the Supreme Court of Canada's ("**SCC**") test set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("***SWUAV***"), specifically with respect to the role and nature of facts in wholly public interest standing litigation (i.e., litigation where there is no accompanying plaintiff with private interest standing).

The broader result of the chambers judge's reasoning is to severely restrict the scope of public interest standing contrary to *SWUAV*. The SCC's approach in *SWUAV* specifically endorsed the grant of wholly public interest standing. For public interest standing to be meaningfully available, especially for the benefit of vulnerable groups, it must encompass cases where a representative plaintiff with public interest standing is permitted to adduce the extensive evidence required for the court to assess the constitutional validity of a law or state action through non-plaintiff witnesses comprising affected members of the group.

The BCCLA agrees that a proper factual foundation is required for the adjudication of constitutional issues. However, unnecessarily grafting a second requirement for conventionally defined "adjudicative" facts on to that requirement, as was done below, prevents legitimate public interest plaintiffs from proceeding. The proper question for whether a public interest plaintiff can provide a sufficient factual matrix for its claim is: "does the plaintiff have the expertise and resources (e.g., witnesses, counsel, funding) to adduce the kind of evidence required." If so, it should be given the opportunity to try. There is no need for the anticipated evidence to link directly to a participating private interest plaintiff. Public interest standing is fundamentally about the impact of government action on the public. Affected members of the public are the necessary and appropriate witnesses and they will establish the material facts at trial.

PART I. STATEMENT OF FACTS

1. The BCCLA relies on the Statement of Facts in the Appellant's Factum.[1]

PART II. ISSUES

2. The BCCLA addresses three matters that arise from the Appellant's issues:

   a. The nature of the requirement of a sufficient factual matrix for a constitutional challenge and how that requirement should be understood by courts;

   b. The necessary implications of *SWUAV* regarding the requirement to establish a sufficient factual matrix; and

   c. The nature and import of "adjudicative" versus "legislative" facts.

PART III. ARGUMENT

3. The Appellant argues that the chambers judge erred in misapprehending the factors governing public interest standing. The BCCLA submits that this error was driven by (at least) three intertwined factors pertaining to the sufficiency of facts for constitutional litigation. First, the chambers judge's analysis improperly conflated the question of whether the plaintiff party is capable of providing a sufficient factual matrix with the question of whether any of the proposed witnesses had standing. Second, the judge applied the test for standing so as to require a plaintiff to provide "adjudicative" facts in a narrow and traditional sense, notwithstanding that such an approach is fundamentally inconsistent with *SWUAV*. Third, the chambers judge misapprehended the purpose of the distinction between "adjudicative" and "legislative" facts and, in doing so, gave "adjudicative" facts an unwarranted primacy in *Charter* litigation standing.

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[1] The BCCLA does, however, for the reasons set out in this factum, depart from the Appellant's use of the term "adjudicative facts" in para. 8.

4. The BCCLA's submissions focus on paragraphs 37-39, 58, 60, 62-6, 67 and 69 of the chambers judge's decision.

a. Serious Justiciable Issue and Sufficient Factual Matrix

5. The chambers judge's analysis departs from matters relevant to standing and slips into a consideration of the distinct question of the sufficiency of a factual record (i.e. paras. 67, 69). The guiding authorities that address sufficiency of a factual record for *Charter* purposes, such as *Mackay v. Manitoba*, [1989] 2 SCR 357 ("***Mackay***"), and *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086 ("***Danson***"), do not support the chambers judge's approach as it refers to public interest standing.

6. When a court adjudicates a constitutional challenge, it is necessarily addressing a matter of broad public importance. The ability to properly decide such a question does not turn on whether a plaintiff party has itself experienced the alleged unconstitutional effects. The question before the court is whether the affected "public" – whose rights are alleged to be impaired by the state – is, on the evidence, harmed (and, if so, whether justifiably). These findings should be made with the benefit of direct evidence from affected individuals. However, nothing in that proposition requires a public interest plaintiff itself to be directly affected, nor for an affected individual to be a plaintiff. To the contrary, *SWUAV* and *Danson* itself demonstrate that the proper question is simply whether a plaintiff is in a position to bring forward the necessary evidence.

7. In *Mackay*, the Court considered whether a constitutional question could be determined without any factual record whatsoever, and in doing so commented on the importance of a factual basis for *Charter* cases. The parties had simply presented legal arguments to the courts below. The SCC agreed with the interveners that - given their import and impact - *Charter* cases could not and should not be resolved in a "factual vacuum". Indeed, the court emphasized the assistance that a court receives from expert opinion and the fact that "relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects" (para. 8). It did not say that direct evidence of harm from a plaintiff is required.

8. In *Danson*, the SCC revisited the issue of a sufficient factual record. There, the applicant had proceeded without any evidence, having filed under an Ontario rule applicable where it is unlikely that material facts will be in dispute (paras. 1-4). The Attorney General of Ontario applied to quash the case on the grounds, *inter alia*, that the procedure was not available for a constitutional matter. The SCC held that it would be ill-advised to proceed in such a manner in any constitutional case in which the effects of the law were in issue (as was the case in *Danson*). In so holding, the SCC commented:

> 27 It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* vol. 2, (1958), para. 15.03 at p. 353 (see also Morgan, "Proof of Facts in Charter Litigation", in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987). **Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent"**.
>
> 28 Such facts are specific, **and must be proved by admissible evidence**. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. **Such facts are of a more general nature, and are subject to less stringent admissibility requirements** ...
>
> ...
>
> 34 ... As the application is presently framed, however, it cannot proceed without a factual foundation. **It is not necessary that the appellant prove that the impugned rules were applied against him personally (standing not being an issue)**; but he must present **admissible** evidence that the effects of the impugned rules violate provisions of the *Charter*. (emphasis added)

9. In *Danson*, the SCC referenced both "adjudicative" and "legislative" facts as means for creating a foundation for a *Charter* case. The Court emphasized that both types must be established by admissible evidence, but noted that the test for admitting evidence of legislative facts may be less strict. At no point did the Court hold that there must be adjudicative facts to make out a *Charter* claim. To the contrary, it noted that adjudicative facts were not required in the instant case given that the plaintiff's standing was unchallenged (paras. 33-34). In other words, the SCC accepted that evidence

about actual or threatened use of the impugned law could be provided through witnesses other than Mr. Danson.

10. In both *Mackay* and *Danson*, the SCC's concern was that there be admissible evidence adduced to permit sufficient factual findings to be made at trial. Neither case supports the idea that in order to be "sufficient" some of the evidence about the effect of the law must be adduced directly through a plaintiff.

11. Furthermore, neither case impugned the plaintiff's standing as a result of insufficient evidence. There is no authority for the proposition that the existence of a "serious justiciable issue" for public interest standing is to be established, at an interlocutory stage and for purposes of determining standing, by placing trial evidence before the court. A serious justiciable issue, like a *prima facie* case, either exists on the pleadings and the affidavits on the standing motion taken at face value – or it does not.

b. The Necessary Implications of *SWUAV*

12. The holdings in *Mackay* and *Danson* must be considered alongside *SWUAV*, which squarely addresses the question of standing. In *SWUAV*, the SCC made it clear that entirely representative actions (brought solely by public interest plaintiffs) are capable of bringing sufficiently factual constitutional cases before the courts. The chambers judge's analysis is inconsistent in that it implicitly rejects that possibility.

13. In *SWUAV*, both the Society (SWUAV) and an individual (Ms. Kiselbach) were ultimately granted public interest standing by the SCC. Private interest standing for Ms. Kiselbach had also been sought based on her past experience as a sex worker and her ongoing experience of stigma. Ms. Kiselbach was denied private standing by the chambers judge (paras. 9-10), who also denied both plaintiffs public interest standing. The BC Court of Appeal ("**BCCA**") held that both plaintiffs should have been granted public interest standing.

14. The SCC agreed with the BCCA. It further held that there was no need for it to address whether Ms. Kiselbach was also entitled to private interest standing (para. 77). Thus, the notion that a plaintiff with private interest standing was fundamental to a

constitutional case was necessarily rejected by the SCC. To the contrary: the Court contemplated a factual case for constitutional adjudication based on the evidence of non-plaintiff witnesses not as merely satisfactory, but as a means to provide a desirable and widely representative evidentiary record. The SCC was concerned with whether a proposed public interest plaintiff had the ability to generate a record for constitutional adjudication that would enable a court to assess the laws' effect on those directly affected (para. 73). As can be seen in its conclusions, the SCC plainly did not require a public interest party to give the evidence of impact itself:

> 74 The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. **They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver** (R.F., at para. 20). ... This in turn, suggests that the present litigation constitutes an effective means of bringing the issue to court in that **it will be presented in a context suitable for adversarial determination**. (emphasis added)

15. In *SWUAV*, the Court outlined the need for admissible evidence demonstrating the broad impact and effects of the legislation on the most directly affected, reflecting the actual concerns about a sufficient factual basis expressed in *Mackay* and *Danson*, and concluded those concerns could be addressed by a capable and resourceful public interest plaintiff.

c. "Adjudicative" Facts and Public Interest Litigation

16. A rigid requirement for plaintiff-specific "adjudicative facts" is inconsistent with the realities of *Charter* litigation and with the nature of the court's constitutional obligation to adjudicate cases with broad public implications. Such a requirement is also inconsistent with the purpose for which facts have been so distinguished and defined.

17. The purpose of the distinction between "adjudicative" and "legislative" facts does not relate to standing nor even to establishing a *prima facie* case. Rather, the categories

were developed to provide a means for assessing the applicable standard of proof for purposes of the admissibility of evidence. The distinction and definitions were coined by Professor Kenneth Culp Davis for the purpose of analyzing whether, when and how administrative tribunals might admit some forms of evidence more readily (e.g., by notice) given their policy mandates: Kenneth Culp Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55:3 Harv L Rev 364 (Davis).

18. As a result, it is unsurprising that the distinction between "adjudicative" and "legislative" facts primarily arises in Canadian law in relation to judicial notice: *R. v. Spence*, 2005 SCC 71 ("**Spence**") at paras. 58—64. Moreover, the distinction continues, even under recent Canadian constitutional law, to be made for purposes of addressing means and strictness of proof: *Cambie Surgeries Corporation v.British Columbia (Attorney General)*, 2017 BCSC 860 ("**Cambie**") at paras. 48—63.

19. Notably, the term "legislative" for the purpose of categorizing types of facts refers to the nature of the analysis involved in determining the issues at hand.[2] Davis described the intended meaning of the terms as follows (Davis, pp. 402-04; emphasis added):

> Through adjudication administrative agencies create law and determine policy, as well as make findings which concern only the parties to the specific case. … Frequently agencies' choices of law or policy must depend on fact-finding. But the fact-finding for such purposes is different from the process of finding facts which concern only the parties to a particular case and calls for different rules of evidence.

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[2] Similar to the U.S. courts' occasional use of the term "constitutional facts" as discussed above by Davis, Canadian courts sometimes use the terms "legislative fact" and "social fact", as a shorthand term to reference what are, in reality, merely subcategories of Davis' conception of legislative fact: Lokan, Andrew K., and Christopher M. Dassios, *Constitutinal Litigation in Canada*, (Toronto: Thomson/Carswell, 2006) (loose-leaf updated 2018, release 3), para. 8.1(2) at pp. 8-18.1-2; *Spence*, at paras. 56-57; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 ("**Bedford**") at paras. 48-53. To understand the distinction between "legislative" fact and "adjudicative" fact and what that distinction comprehends, it is necessary to have regard to the definition and full scope of the terms as defined by Davis.

> When an agency finds facts concerning immediate parties – what the parties did, what the circumstances were, what the background conditions were – the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. **When a tribunal or agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which form its legislative judgment may conveniently be denominated legislative facts**. The distinction is important; the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion arises from attempting to apply the tradition rules to legislative facts.
>
> The courts have generally treated legislative facts differently from adjudicative facts, even though the distinction has not been clearly articulated and explanations have been beclouded by an erroneous use of the concept of judicial notice. The distinction between legislative and adjudicative facts apparently has been clearly recognized only in constitutional cases, in which a category of "constitutional facts" has emerged. Often referred to as "social and economic data", constitutional facts are those which assist a court in forming a judgment on a question of constitutional law. ...
>
> ...
>
> The Court's reliance on extra-record constitutional facts has become fairly familiar. **But what has not been so generally recognized is that constitutional facts are only one manifestation of a larger category of facts which are utilized for informing a court's legislative judgment on questions of law and policy**.

20. Davis' sweeping conception of legislative fact is critical to a proper understanding of the distinction: Kenneth L. Karst, "Legislative Facts in Constitutional Litigation" (1960) 1960 Sup Ct L Rev 75 (Karst). Legislative facts, including in constitutional litigation, *include* any and all facts outside the narrow definition of "adjudicative facts": Karst, at pp. 82-86 and 99-109. Further, "adjudicative" facts and "legislative" facts cannot be separated into watertight compartments: some adjudicative facts are *also* legislative facts.

21. Karst describes the role of the distinction between varieties of facts in constitutional law as follows (p. 77; emphasis added):

> ... when a court makes law, including constitutional law, it must attempt to decide not only the case before it but also a great many similar "cases" not in court. Uncomfortable as a court may be beyond the area of

> its special competence, **the court's legislative function requires it to be informed on matters far beyond the facts of the particular case. These "legislative facts" of broader application need illumination so that the court can make the best possible prediction of the effects of its decision**.
>
> Of course the facts concerning the parties before the court – the "adjudicative facts", as recent fashion would have it – may be important as demonstrations of the general effects of the governmental action. **Thus many adjudicative facts are also legislative facts in that they bear on the legislative question of the reasonableness, or constitutionality, of a government action**. ... Wherever the legislative facts are to be found, a court which examines closely the concrete elements of the factual context of governmental action improves its chances for success in discovering and defining interests of constitutional significance.

22. Moreover, "legislative" and "adjudicative" facts may be too intertwined, or the distinction between them too fine, to enable a line to be drawn at all: see *Bedford*, para. 52; *Cambie*, at para. 77.[3] Indeed, in public interest litigation a rigid taxonomy of facts serves no principled purpose. The fact that there is overlap between these categories of facts is not troubling if the purpose of attempting to draw the distinction is, as it was in *Cambie*, to ascertain the applicable standard of admissibility.

23. However, in the present case, the chambers judge invoked the distinction surrounding the category of "adjudicative" facts for the purpose of determining whether to grant public interest standing, with regard to both the "serious justiciable question" and "reasonable and effective means" analyses. In this context, the distinction is not only unnecessary and unhelpful, it is harmful in that it works to undermine the analysis in *SWUAV*.

24. The BCCLA submits that "adjudicative facts" in the context of public interest standing must be understood in one of two ways.

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[3] Notably, Steeves J. made alternative findings at paras. 67, 68 and 72 in which he held that the evidence provided by directly affected non-plaintiff witnesses was "adjudicative" fact evidence and, in the alternative, was "legislative" fact evidence that was central to the dispute and thus requiring proof at a strict standard. The BCCLA would reverse his alternatives. We submit such evidence is in fact legislative fact evidence. In the alternative, it must at least be characterized as adjudicative fact evidence for purposes of a *Charter* case.

25. First, as the BCCLA says is consistent with the existing law, "adjudicative" fact evidence is simply *irrelevant* where the question is whether a person (organization or individual) should be granted public interest standing when proceeding alone. There is no legal or logical reason to require the evidence of impact to be produced through a plaintiff party. As contemplated in *SWUAV*, evidence of impact can be put before the court through affected members of the public as non-plaintiff witnesses. The proper question is "does the proposed public interest plaintiff have the knowledge and resources to bring representative and directly impacted witnesses before the court?"

26. In the alternative, if there is any requirement for "adjudicative" fact evidence in wholly public interest litigation, then such must mean the "who, what, where, when, and why" evidence of affected representative members of the public. *Charter* litigation is not a direct analog for civil litigation and there is no need to force it to be so. As demonstrated by the decision below, the result of doing so is a hollowing out of *SWUAV*, to the detriment of both the principle of legality and access to justice.

PART IV. NATURE OF ORDER SOUGHT

27. The BCCLA respectfully seeks leave to make oral submissions at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 29, 2019

Sheila M. Tucker, Q.C.

Elin Sigurdson
Solicitors for the Intervenor

LIST OF AUTHORITIES