

THE GR COURT DOCKET

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Lack of standing prevents challenge to COVID-19 restrictions

By Stephen Thiele

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The COVID-19 pandemic has led to various court challenges in connection with some of the restrictive measures imposed by federal, provincial and municipal governments across Canada. In general, the various court challenges have contended that certain restrictive measures have violated rights under the [Canadian Charter of Rights and Freedoms](#).

However, there are procedural limits to bringing a Charter challenge, including, as demonstrated recently in *Baber v. Ontario (Attorney General)* (unreported, CV-21-00659005, August 18, 2021), whether the party seeking to challenge a law is able to do so.

Legally speaking, a party seeking a legal remedy must have "standing". Where a party lacks standing or, in other words, does not have a sufficient connection to the action or is not harmed by the law in question, the party has no ability to obtain a remedy from the court.

In *Baber*, the court ruled that the applicant, a current independent member of the Ontario legislature, lacked standing to challenge public health restrictions

prohibiting and/or restricting outdoor protests and religious events on the grounds that the restrictions were contrary to [sections 2\(a\) through \(d\)](#) of the *Charter*. The applicant simply did not meet the three-part test for public interest standing set out by the Supreme Court of Canada in [Canada \(Attorney General\) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45](#). In that case, the Society, which was an organization of then current and former sex trade workers, had sought to Constitutionally challenge the prostitution provisions of the *Criminal Code* and were found, using a purposive approach, to be an appropriate party to bring the challenge.

Under the test, an applicant is required to demonstrate that:

- (a) there is a serious justifiable issue raised;
- (b) the applicant has a real stake in the proceedings or is engaged in the issue it raises; and
- (c) the proposed application is,

in all circumstances and in light of the relevant considerations, a reasonable and effective way to bring that issue before the court.

The decision to grant public interest standing is also discretionary.

Here, MPP Baber explained that he was a member of the Jewish Russian Community Centre at Rockford (“**JRCC-Rockford**”) and that on the Sabbath and other Jewish holidays, members therein were precluded from using cars and electronic devices or other means of communication, including computers. This restricted drive-in services or mobile services that could be held. As well, services were restricted because of the limitations placed on the maximum number of people who could attend outdoor services under prescribed public health regulations. Accordingly, MPP Baber contended that he, and an organization he had incorporated called Lift the Lockdown, were appropriate parties to seek a remedy.

The court noted, however, that there was no evidence that MPP Baber was authorized to bring his application on behalf of the JRCC-Rockford and that MPP Baber had admitted on cross-examination of an affidavit filed in support of his application that he personally did not refrain from driving or using electronic devices on the Sabbath or other Jewish holidays.

Meanwhile, Lift the Lockdown, filed no separate affidavit in support of the application.

As well, the court identified at least three other applications started by organizations who had a direct “private” interest standing as of right to the impugned restrictions imposed on religious services and outdoor gatherings.

In the circumstances, the court refused to exercise its discretion in favour of MPP Baber and held that he did not have standing to bring his application.

Since MPP Baber had no standing to obtain a remedy, the court was not required to consider the merits of his application.

Any Charter challenge to the public health restrictions imposed by the provincial government outdoor gatherings and religious events because of COVID-19 will thus have to await determination for another day in the other cases identified by the court, if those cases are heard at all now that public health restrictions are slowly being lifted across the province as a result of the increased numbers of people who are fully vaccinated.

Indeed, the next challenge to the COVID-19 pandemic may not be to the government public health restrictions imposed to deal with the health emergency, but to the mandatory vaccination policies of employers that workers be fully vaccinated in order to return to work or potentially face dismissal, and the decisions of businesses to require that customers show proof of being fully vaccinated or proof of a negative test result within a short period before attending their premises or venues.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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