SCC File No.: 39430

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Respondent)

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

Respondent
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ALBERTA; ATTORNEY GENERAL OF SASKATCHEWAN; ATTORNEY GENERAL OF ONTARIO; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; WEST COAST LEGAL EDUCATION AND ACTION FUND; ECOJUSTICE CANADA SOCIETY; WEST COAST PRISON JUSTICE SOCIETY; EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH; CANADIAN CIVIL LIBERTIES ASSOCIATION; ADVOCACY CENTRE FOR TENANTS ONTARIO, ARCH DISABILITY LAW CENTRE, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC, HIV & AIDS LEGAL CLINIC ONTARIO, AND SOUTH ASIAN LEGAL CLINIC ONTARIO; DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS; TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA; NATIONAL COUNCIL OF CANADIAN MUSLIMS; MENTAL HEALTH LEGAL COMMITTEE; CANADIAN ASSOCIATION OF REFUGEE LAWYERS; CENTRE FOR FREE EXPRESSION; FEDERATION OF ASIAN CANADIAN LAWYERS AND CANADIAN MUSLIM LAWYERS ASSOCIATION; JOHN HOWARD SOCIETY OF CANADA AND QUEEN'S PRISON LAW CLINIC; ANIMAL JUSTICE; CANADIAN MENTAL HEALTH ASSOCIATION (NATIONAL), CANADA WITHOUT POVERTY, ABORIGINAL COUNCIL OF WINNIPEG INC. AND END HOMELESSNESS WINNIPEG INC.; CANADIAN CONSTITUTION FOUNDATION

Interveners

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INDEX

PAGE

PART I – OVERVIEW AND FACTS

1. The Intervener, the Empowerment Council, Systemic Advocates in Addictions and Mental Health ["the EC"] is an Ontario organization advocating on behalf of persons with addictions and mental health issues. All of EC's members, staff and clients have lived experience of addictions or mental health issues. They include individuals who have been involuntarily hospitalized as psychiatric patients, involuntarily administered psychiatric medications, or both.

2. The EC exists to advance the rights of its constituency in circumstances where they are not able or permitted to advance those rights as individuals. This includes litigation. The EC contributes the broader viewpoint of persons with mental health issues, as an organization with experience advancing the rights of marginalized individuals unable or unwilling to pursue litigation on their own behalf.

3. The measure of the public interest standing test must be whether it achieves its purpose. Public interest standing serves justice by safeguarding the rights of vulnerable individuals unable to commence or sustain litigation to defend those rights. The test may require screening litigation for viability. But the test must not inhibit access to justice by imposing seemingly neutral requirements, which are, in fact, significant burdens.

4. The calibration and interpretation of the public interest standing test must be context specific. It must be grounded in the reality of vulnerable litigants. An overly narrow test for public interest standing risks ongoing breaches of *Charter*-protected rights of vulnerable individuals who are not able to commence or sustain complex and expensive litigation while they are in crisis or when their personal crisis has resolved.

5. It is imperative that public interest standing be sufficiently broad, flexible and purposive to allow for genuinely interested and affected public interest groups to advance legitimate *Charter* claims on behalf of those who continue to suffer the adverse effects of the impugned laws.

PART II – ISSUES

6. EC takes a position on two issues in this appeal: (1) how new requirements for public interest litigants would perpetuate harm for vulnerable individuals and (2) factors a purposive application of the public interest standing test must take into account. The EC's position is that:

A. The public interest standing test must reflect the reality that the "price" of constitutional litigation includes both a financial and a human cost.

B. The test should not be structured to prefer an individual's suffering over the prevention of that suffering, and its application should not support this outcome. A blanket requirement or preference for individual plaintiffs, or individual evidence, means litigation after rights are violated or at serious risk. Public interest litigation can prevent harm because it can commence as soon as the risks are identified by qualified and interested parties capable of litigating them.

C. A systemic claim, with a systemic remedy means there is a class of individuals at risk.

PART III – STATEMENT OF ARGUMENT

A. The costs and benefits of granting standing must remain grounded in the stakes

(i) Contextualizing the costs to an individual plaintiff

7. The opposite of litigation by an individual plaintiff is not a case in the abstract. The AGBC's proposed additions to the public interest standing test include an insistence that an individual litigant is preferable. In considering this argument, the Court must be mindful of the tremendous burden on the imagined individual litigant, and ask whether it is necessary to ensure useful litigation. [1]

8. Bearing the responsibility for starting and sustaining constitutional litigation is difficult and onerous for any directly affected vulnerable individual. It is lengthy, complex and resource intensive. A preference for individual litigants presumes that vulnerable individuals experiencing rights infringements will have routine access to counsel, experts, funding, and other necessary material resources. The reality of those with lived experience of mental health issues does not accord with such presumptions. Access to provincially funded legal aid is by no means guaranteed

[1] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 51.

for such matters. Retaining private counsel is not generally an option for clients with serious mental health issues, who are most often recipients of social assistance.[2]

9. Beyond the financial costs, however, a preference for individual litigants subjects individuals who have experienced, or are at risk of, rights violations to the rigours of litigation. The routine and regular requirements of affidavit evidence and cross examinations, for example, would likely force the plaintiffs to re-live their own trauma. The long-term impact of litigation on individual plaintiffs risks re-traumatizing them. [3]

10. In challenging the constitutionality of mental health legislation, any individual plaintiffs would be required to disclose their own private psychiatric records. They may not be willing to do this, due to the sensitive nature of such personal health information and because of the discrimination faced by persons with serious mental health issues.[4]

11. In the context of mental health litigation, the reality of time is another critical factor. A preference for individual plaintiffs presumes individuals can advance a claim while in an acute mental health crisis, at their most vulnerable, involuntarily detained or threatened with forced medication.

12. Even if the individual overcame this first hurdle, they will likely be discharged from hospital or no longer threatened with forced medication long before even a trial decision is made. A preference for individual litigants presumes their willingness to remain identified with, involved in and tethered to litigation about deeply personal and difficult experiences, long after their personal crisis resolved. It also presumes a necessity to subject them to such heavy burdens.

13. The "cost" associated with this type of litigation includes the human cost, beyond the

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[2] *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (March 2011) at p. 7, 12, 36; Laura Johnston, "Operating in Darkness: BC's Mental Health Act Detention System" (2017) at p. 12, online (pdf): *Community Legal Assistance Society*

[3] Office of the Ombudsperson, "Committed to Change: Protecting the Rights of Involuntary Patients under the Mental Health Act," March 2019; See also, Kendra Milne, Its Time to Change the Mental Health Act, Bar Talk, August 2020; J. Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011), 44 *U.B.C. L. Rev.* 255, at 266 [Book of Authorities, "BOA", Tab 1].

[4] Elaine Gibson, "Privacy Protection and Confidentiality of Psychiatric Health Care Records," in Colleen Flood and Jennifer Chandler, eds. *Law and Mind: Mental Health Law and Policy*, (LexisNexis Canada: Toronto, 2016) 162-184.

financial burdens, albeit the resource considerations are not trivial. Constitutional litigation is expensive. It is also known that constitutional litigation is invariably lengthy, complex and resource-intensive.[5] An individual plaintiff's association with a case may well wane before an issue is decided, or the financial obligations entailed by increased debt to Legal Aid or other means may begin to outweigh the benefits.

14. For all these reasons, even if an individual plaintiff raises a constitutional challenge to the impugned legislation, they are unlikely to carry this constitutional challenge all the way forward.

15. The public interest standing test must reflect the reality that, for marginalized and vulnerable individuals, bearing the cost of reliving, presenting and being identified with sensitive personal facts is a predictable disincentive to commencing this kind litigation, and to continuing it. It must also acknowledge that any preference for individual litigants assumes individuals willing and able to bear this cost exist, *and* that it is somehow preferable or necessary for them to do so in the interests of justice.

B. Without public interest standing, the impugned BC laws will likely be "immunized from any future challenge"[6]

16. The human costs at stake in the public interest standing test go beyond those of the imagined individual plaintiff. A preference for individual plaintiffs and evidence is a preference for actual violations of rights over protecting those rights. Systemic advocacy groups must be allowed public interest standing to carry the case forward on the clients' behalf. The alternative is the Court waiting until an individual has experienced the harm engendered by the impugned legislation before considering the legality of the impugned legislation that gives rise to the risk of that harm.

17. For this reason, the question at the heart of the test for public interest standing in this case is not and should not be whether the proposed litigant is the best possible litigant to advance this case. The question is whether the case the applicant could bring is better than no litigation at all. Applications of the test cannot ignore the reality of the situation before them. If an issue is manifestly justiciable, but no individual plaintiff has been able to commence and/or sustain such

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[5] *Thompson v. Attorney General of Ontario*, 2011 ONSC 2023, 106 OR (3d) at para 55.
[6] *Thompson v. Attorney General of Ontario*, 2011 ONSC 2023, 106 OR (3d) at para 55.

litigation, this is critical relevant information about what the realistic alternative cases might be. An overly-narrow public interest standing test results in continued violation of *Charter*-protected rights and liberty interests, in cases where the impugned legislation is indeed unconstitutional, while the system waits for the elusive better litigant.

18. Public interest standing or comparable litigation efforts have proven necessary to ensure that the constitutionality of mental health legislative frameworks in other parts of the country are reviewed. The case of *Thompson v. Ontario (AG)* saw the EC in identical circumstances.[7] In that case, Ms. Thompson and the Empowerment Council brought a *Charter* Challenge to certain provisions of the *Mental Health Act.* However, before this challenge could be heard by the Court, Ms. Thompson left the country and had not returned. The Empowerment Council sought, and was granted, public interest standing to carry the constitutional challenge forward. The Ontario Superior Court of Justice recognized that "if public interest standing were not granted to the Council, there was a very real risk that the impugned provisions of the Act might be immunized from any future challenge." [8] The Court found that "mootness would be a chronic problem plaguing such appeals,"[9] and that "most appellant-patients would be unable to secure counsel, largely due to the lack of, or the uncertainty surrounding the receipt of, timely legal aid." [10]

19. In Alberta, the trial level litigation in *JH v Alberta* [11] concerned both individual violations of JH's rights, and system level attacks on the underlying legislation. The proceeding began when JH managed to have a lengthy hospital stay reviewed by the Court, and an astounding number of procedural and legal failures were revealed. It was a case with an individual plaintiff who had experienced an inordinate number of rights violations over a period of months. JH was out of hospital before the end of trial, however, and it was Alberta who tried to terminate the proceedings on the basis of mootness.[12] The trial judge ultimately found both individual violations of JH's

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[7] *Thompson v. Attorney General of Ontario*, 2011 ONSC 2023, 106 OR (3d) at para 55.
[8] *Thompson v. Attorney General of Ontario*, 2011 ONSC 2023, 106 OR (3d) at para 55.
[9] *Thompson v. Attorney General of Ontario*, 2011 ONSC 2023, 106 OR (3d) at para 61.
[10] *Thompson v. Attorney General of Ontario*, 2011 ONSC 2023, 106 OR (3d) at para 61.
[11] *JH v Alberta,* 2020 ABCA 317.
[12] *JH v Alberta,* 2020 ABCA 317 at para 24. Plaintiffs also fall away from mental health litigation as "psychiatric refugees", who flee jurisdictions like BC where they may face repeated abuse

rights, and violations of *Charter* rights flowing from the statutory construction of Alberta's *Mental Health Act.*[13] Alberta appealed only the statutory issues – making JH the respondent in an appeal that had little to do with the individual case he brought to secure his release from hospital, long after his hospitalization had concluded, and yet at his own expense. The people of Alberta were fortunate that JH and his counsel were prepared to participate in the appeal, but the Court was assisted by two interveners offering a complete legal picture. The facts of the case are an object lesson in the ways requiring individual plaintiffs both functions to prefer individualized suffering over prevention, and leaves critical constitutional questions to the winds of chance.

C. The access to justice barriers for psychiatric consumer survivors is a relevant consideration

20. The public interest standing test should also recognize the unique barriers to access to justice that individuals subject to involuntary psychiatric detention experience.

21. In *JH,* the Alberta Court of Appeal specifically considered the interaction between individuals subject to involuntary psychiatric detention and/or medication, and barriers to resources for decision-making and advocating for themselves.[14] Individuals within a regime of involuntary detention and medication are "uniquely vulnerable"[15] in part due to the simple fact of their detention.[16] Such detention may include lack of access to phones or the internet, physical restraint, chemical restraint and/or the effects of medications that impair cognitive functioning.[17]

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within the psychiatric system: Ruby Dhand, "A 'Psychiatric Refugee': why one woman fled BC's mental health laws," CBC Sept 16, 2020 available online:

https://www.cbc.ca/radio/the180/facts-vs-values-in-canadian-health-care-forced-psychiatric-care-and-urban-indigenous-people-need-a-voice-1.3764173/a-psychiatric-refugee-why-one-woman-fled-b-c-s-mental-health-laws-1.3764440

[13] *Mental Health Act*, RSA 2000, c M-13

[14] *JH v Alberta,* 2020 ABCA 317 at paras 98-102.

[15] *JH v Alberta,* 2020 ABCA 317 at para 100.

[16] *JH v Alberta,* 2020 ABCA 317 at paras100-103.

[17] (BC) *Mental Health Act*, R.S.B.C. 1996, c. 288, s 31(1); *JH v Alberta,* 2020 ABCA 317 at para 100. People with psychiatric histories who are involuntarily detained are also vulnerable to being subjected to restraints for the forcible injection of psychiatric medication and/or electro-convulsive therapy.

In this context, the Alberta Court of Appeal held additional protections were necessary to ensure basic procedural fairness and access to counsel. Similar considerations exist at the systemic level, when access to constitutional review of widespread rights violations is at stake.[18]

22. At the systemic review level, the application of the public interest standing test must take into account the control exerted over prospective litigants by the impugned coercive regime at the very moment they are imagined to be best positioned to advance claims.[19] A "deemed [treatment] consent model", like the one impugned in *JH v Alberta,* presents significant danger: including being "deprived of the right to a capacity assessment, the right to a substitute decision-maker and/or representative and other legal safeguards."[20] The right to determine what is done to one's own body, including the right to consent to or refuse psychiatric medication treatment, is fundamental to individual autonomy.[21] Despite nearly 20 years having elapsed since this Court's Judgment expressly recognizing this, the *status quo* in B.C. has remained in place, until now, without a meaningful review.[22]

23. Justice Major, writing in 2003 for the majority of the Supreme Court in *Starson v Swayze*[23], identified the right to refuse unwanted medical treatment as "fundamental to a person's dignity and autonomy", and that "this right is equally important in the context of treatment for mental illness". [24] This Court cited the Ontario Court of Appeal case *Fleming v. Reid* (1991), which recognized that "Few medical procedures can be more intrusive than the forcible injection of powerful mind-altering drugs which are often accompanied by severe and sometimes irreversible

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[18] *JH v Alberta,* 2020 ABCA 317.
[19] See Dhand, Ruby and Kerri Joffe, "Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*," *Manitoba Law Journal* (Criminal Law Edition) (2020) 43 (3): 207-249 at 224
[20] D'Arcy Hiltz, Anita Szigeti & Ruby Dhand, *Halsbury's Laws of Canada Mental Health Law*, 3rd ed (Toronto: Lexis Nexis, 2019) at 139 [BOA, Tab 2]; see (BC) *Mental Health Act*, R.S.B.C. 1996, c. 288, s. 8(a).
[21] *Fleming v. Reid*, 1991 CanLII 2728 (ON CA).
[22] In *McCorkell,* the Supreme Court of British Columbia rejected Charter challenge for BC's civil commitment criteria (at the time) *McCorkell v. Director of Riverview Hospital,* 1993 CanLII 1200 (BCSC). Also, see *Mullins v. Levy*, 2005 BCSC 1217, aff'd 2009 BCCA 6. *Mullins v. Levy,* 2005 BCSC 1217 at para. 20. See also, *Mullins v. Levy,* 2002 BCSC 1366.
[23] *Starson v. Swayze*, 2003 SCC 32 (CanLII), [2003] 1 SCR 722.
[24] *Starson v. Swayze*, 2003 SCC 32 (CanLII), [2003] 1 SCR 722 at para 75.

adverse side effects."[25] The Ontario Court of Appeal also made the following observations in *Fleming v. Reid*:

> The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self- determination. The doctrine of informed consent ensures the freedom of individuals to make choices about their medical care. It is the patient, not the doctor, who ultimately must decide if treatment -- any treatment -- is to be administered.
>
> A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her refusal to consent to the proposed treatment. A doctor is not free to disregard such advance instructions, even in an emergency. The patient's right to forgo treatment, in the absence of some overriding societal interest, is paramount to the doctor's obligation to provide medical care. This right must be honoured, even though the treatment may be beneficial or necessary to preserve the patient's life or health, and regardless of how ill-advised the patient's decision may appear to others.
>
> These traditional common law principles extend to mentally competent patients in psychiatric facilities. They, like competent adults generally, are entitled to control the course of their medical treatment. Their right of self-determination is not forfeited when they enter a psychiatric facility. They may, if they wish, reject their doctor's psychiatric advice and refuse to take psychotropic drugs, just as patients suffering other forms of illness may reject their doctor's advice and refuse, for instance, to take insulin or undergo chemotherapy. The fact that these patients, whether voluntarily or involuntarily, are hospitalized in a mental institution in order to obtain care and treatment for a mental disorder does not necessarily render them incompetent to make psychiatric treatment decisions. They may be incapacitated for particular reasons but nonetheless be competent to decide upon their medical care.[26]

24. Individuals living with serious mental health issues and especially those involuntarily detained or forcibly medicated face multiple barriers to accessing justice. In determining whether to grant an applicant public interest standing, one relevant consideration is whether the imagined

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[25] *Fleming v. Reid*, 1991 CanLII 2728 (ON CA).
[26] *Fleming v. Reid*, 1991 CanLII 2728 (ON CA) at Part IV.

individual plaintiff would have the benefit of legislative safeguards (including capacity tests, substitute decision-makers, orders of a tribunal, explicit limitations on treatment and consultation).

25. Barriers to access to justice for persons with mental health issues must also be considered within the overarching context of intersecting social determinants of health such as systemic discrimination, racism, poverty and colonialism, which further marginalize consumers. [27]

26. Organizations like the Empowerment Council, which provide a voice for consumer/survivors, are the exception in Canada, not the norm. Given the severe cuts to legal aid, consumer/survivors often struggle to access appropriate legal representation before the civil mental health tribunals and there is no independent rights advice office available for people with psychiatric histories upon their detention.[28]

D. This is a systemic issue, with a systemic remedy

27. Regardless of whether this constitutional challenge is brought by an individual plaintiff or by a systemic advocacy group, what is being advanced is a systemic claim, with a systemic remedy (i.e. declaration that the impugned provisions in the B.C. *Mental Health Act* are unconstitutional and therefore are of no force or effect).

28. In such a situation, it is unreasonable to insist on an individual plaintiff, or an individual factual record. These are systemic issues, which systemic advocacy groups (such as the CCD) are able to bring forward, based on the collective experience of the client population whose fundamental rights are impacted by these laws.

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[27] Dhand, Ruby, "Access to Justice for Ethno-Racial Psychiatric Consumer/Survivors in Ontario " (2011) 29 Windsor Yearbook of Access to Justice 127-162; Dhand, Ruby, *Creating a Cultural Analysis Tool for the Implementation of Ontario's Civil Mental Health Laws,* 45 INT'L J. L. & PSYCHIATRY 25, 32 (2016).

[28] See Office of the Ombudsperson, "Committed to Change: Protecting the Rights of Involuntary Patients under the Mental Health Act," March 2019; See also, Kendra Milne, Its Time to Change the Mental Health Act, Bar Talk, August 2020

PART IV & V – COSTS AND ORDER SOUGHT

29. The EC does not seek costs and asks that no costs be awarded against it. The EC takes no position on the disposition of this appeal as it pertains to the facts of the cases before the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF DECEMBER, 2021

Anita Szigeti, Sarah Rankin, Maya Kotob
Counsel for the Intervener, the Empowerment Council

PART VI – TABLE OF AUTHORITIES

INTERVENER'S AUTHORITIES	CITED AT PARAGRAPH NO.
CASES	
Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45	7
Fleming v. Reid, 1991 CanLII 2728 (ON CA).	22, 23
JH v Alberta, 2020 ABCA 317.	19, 21
McCorkell v. Director of Riverview Hospital, 1993 CanLII 1200 (BCSC).	22
Mullins v. Levy, 2005 BCSC 1217, aff'd 2009 BCCA 6	22
Mullins v. Levy, 2002 BCSC 1366	22
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Office of the Ombudsperson, "Committed to Change: Protecting the Rights of Involuntary Patients under the Mental Health Act," March 2019	9, 26
LEGISLATION	
Mental Health Act, RSA 2000, c M-13	19
(BC) *Mental Health Act*, R.S.B.C. 1996, c. 288, s. 8(a), s 31(1);	21, 22