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

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

Torys LLP
79 Wellington Street West
Suite 3000
Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Andrew Bernstein
Tel: 416.865.7678
Email: abernstein@torys.com
Alexandra Shelley
Tel: 416.865.8161
Email: ashelley@torys.com

Counsel for the Intervener,
Canadian Civil Liberties Association

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855
Fax: 613.695.8580

Eugene Meehan, Q.C.
Email: emeehan@supremeadvocacy.ca
Marie-France Major
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Canadian Civil Liberties Association

Attorney General of British Columbia
Legal Services Branch
1301 - 865 Hornby Street
Vancouver, British Columbia
V6Z 2G3

Mark Witten
Emily Lapper
Tel: (604) 660-3093
Fax: (604) 660-2636
E-mail: mark.witten@gov.bc.ca

Counsel for the Appellant,
Attorney General of British Columbia

Olthuis Van Ert
66 Lisgar Street
Ottawa, Ontario
K2P 0C1
Tel: (613) 501-5350
Fax: (613) 651-0304

Dahlia Shuhaibar
E-mail: dshuhaibar@ovcounsel.com

Agent for the Appellant,
Attorney General of British Columbia

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver, British Columbia
V6E 0C5

Michael A. Feder, Q.C.
Katherine Booth
Kevin Love
Tel: (604) 643-5983
Fax: (604) 622-5614
E-mail: mfeder@mccarthy.ca

Counsel for the Respondent,
Council of Canadians with Disabilities

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario
K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Agent for the Respondent,
Council of Canadians with Disabilities

Attorney General of Canada
Department of Justice, National Litigation Sector
120 Adelaide Street West, Suite 400
Toronto, Ontario
M5H 1T1

Christine Mohr
Tel: (416) 953-9546
Fax: (416) 952-4518
E-mail: christine.mohr@justice.gc.ca

Counsel for the Intervener,
Attorney General of Canada

Attorney General of Canada
Department of Justice Canada, Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, Ontario
K1A 0H8

Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for the Intervener,
Attorney General of Canada

Alberta Justice Constitutional and Aboriginal Law
1000, 10025 - 102A Avenue
Edmonton, Alberta
T5J 2Z2

Leah M. McDaniel
Tel: (780) 422-7145
Fax: (780) 643-0852
E-mail: leah.mcdaniel@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

Attorney General for Saskatchewan
820-1874 Scarth Street
Regina, Saskatchewan
S4P 4B3

Sharon H. Pratchler, Q.C.
Tel: (306) 787-5584
Fax: (306) 787-9111
E-mail: sharon.pratchler2@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Saskatchewan

Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario
M7A 2S9

Yashoda Ranganathan
David Tortell
Tel: (647) 637-0883
Fax: (416) 326-4015
E-mail: Yashoda.Ranganathan@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

Power Law
130 Albert Street
Suite 1103
Ottawa, Ontario
K1P 5G4

Maxine Vincelette
Tel: (613) 702-5573
Fax: (613) 702-5573
E-mail: mvincelette@juristespower.ca

Agent for the Intervener, Attorney General of Ontario

Mandell Pinder LLP
422 - 1080 Mainland Street
Vancouver, British Columbia
V6B 2T4

Elin Sigurdson
Monique Pongracic-Speier, Q.C.
Tel: (604) 681-4146
Fax: (604) 681-0959
E-mail: elin@mandellpinder.com

Counsel for the Intervener, British Columbia Civil Liberties Association

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: jeff.beedell@gowlingwlg.com

Agent for the Intervener, British Columbia Civil Liberties Association

JFK Law Corporation
340-1122 Mainland Street
Vancouver, British Columbia
V6B 5L1

Tim Dickson
Jason Harman
Tel: (604) 687-0549
Fax: (607) 687-2696
E-mail: tdickson@jfklaw.ca

Counsel for the Intervener, West Coast Legal Education and Action Fund

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: jeff.beedell@gowlingwlg.com

Agent for the Intervener, West Coast Legal Education and Action Fund

Ecojustice Canada Society
390 - 425 Carrall Street
Vancouver, British Columbia
V6B 6E3

Kegan Pepper-Smith
Daniel Cheater
Tel: (604) 685-5618
Fax: (604) 685-7813
E-mail: kpsmith@ecojustice.ca

Counsel for the Intervener,
Ecojustice Canada Society

Allen/McMillan Litigation Counsel
1625 -1185 West Georgia Street
Vancouver, British Columbia
V6E 4E6

Greg J. Allen
Nojan Kamoosi
Tel: (604) 628-3982
Fax: (604) 628-3832
E-mail: greg@amlc.ca

Counsel for the Intervener,
West Coast Prison Justice Society

Anita Szigeti Advocates
400 University Avenue, Suite 2001
Toronto, Ontario,
M5G 1S5

Anita Szigeti
Maya Kotob
Sarah Rankin
Tel: (416) 504-6544
Fax: (416) 204-9562
E-mail: anita@asabarristers.com

Counsel for the Intervener, Empowerment Council, Systemic Advocates in Addictions and Mental Health

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie France-Major
Tel: (613) 695-8855
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Empowerment Council, Systemic Advocates in Addictions and Mental Health

ARCH Disability Law Centre
55 University Avenue, 15th Floor
Toronto, Ontario
M5J 2H7

Mariam Shanouda
Jessica De Marinis
Tel: (416) 482-8255 Ext: 2224
Fax: (416) 482-2981
E-mail: shanoum@lao.on.ca

Counsel for the Intervener, 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

University of Toronto
78 Queen's Park Crescent
Toronto, Ontario M5S 2C5

Cheryl Milne
Kent Roach
Tel: (416) 978-0092
Fax: (416) 978-8894
E-mail: cheryl.milne@utoronto.ca

Counsel for the Interveners, David Asper Centre for Constitutional Rights

Hunter Litigation Chambers Law Corporation
2100 - 1040 West Georgia Street
Vancouver, British Columbia
V6E 4H1

Ryan D.W. Dalziel, Q.C.
Aubin P. Calvert
Tel: (604) 891-2400
Fax: (604) 647-4554
E-mail: rdalziel@litigationchambers.com

Counsel for the Intervener, Trial Lawyers Association of British Columbia

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario
K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Agent for the Intervener, 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

Norton Rose Fulbright Canada LLP
45 O'Connor Street Suite 1500
Ottawa, Ontario K1P 1A4

Matthew Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
E-mail:
matthew.halpin@nortonrosefulbright.com

Agent for the Interveners, David Asper Centre for Constitutional Rights

Norton Rose Fulbright Canada LLP
45 O'Connor Street
Suite 1500
Ottawa, Ontario
K1P 1A4

Matthew Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
E-mail:
matthew.halpin@nortonrosefulbright.com

Agent for the Intervener, Trial Lawyers Association of British Columbia

National Council of Canadian Muslims
300 - 116 Albert Street
Ottawa, Ontario
K1P 5G3

Sameha Omer
Tel: (613) 254-9704 Ext: 224
Fax: (613) 701-4062
E-mail: somer@nccm.ca

Counsel for the Intervener, National Council of Canadian Muslims

Mental Health Legal Committee
250 Younge Street
Suite 2201
Toronto, Ontario M5B 2L7

Karen R. Spector
Kelley Bryan
C. Tess Sheldon
Tel: (416) 995-3477
Fax: (416) 855-9745
E-mail: spectork@gmail.com

Counsel for the Intervener, Mental Health Legal Committe

Legal Aid Ontario
Refugee Law Office
20 Dundas Street West
Toronto, Ontario
M5G 2H1

Anthony Navaneelan
Naseem Mithoowani
Tel: (416) 977-8111 Ext: 7181
Fax: (416) 977-5567
E-mail: navanea@lao.on.ca

Counsel for the Intervener, Canadian Association of Refugee Lawyers

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener, National Council of Canadian Muslims

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l.
1600-220 Laurier Avenue West
Ottawa, ON K1P 5Z9

James Cameron
Tel: (613) 567-2901
Fax: (613) 567-2921
E-mail: jcameron@ravenlaw.com

Agent for the Intervener, Mental Health Legal Committee

PooranLaw Professional Corporation
400 - 1500 Don Mills Road
Toronto, Ontario
M3B 3H4

Faisal Bhabha
Madison Pearlman
Tel: (416) 860-7572
Fax: (416) 860-7577
E-mail: fbhabha@pooranlaw.com

Counsel for the Intervener, Centre for Free Expression

Norton Rose Fulbright Canada LLP
222 Bay Street, Suite 3000
P.O. Box 53
Toronto, Ontario
M5K 1E7

Fahad Siddiqui
Tel: (416) 216-2424
Fax: (416) 216-3930
E-mail:
fahad.siddiqui@nortonrosefulbright.com

Counsel for the Intervener, Federation of Asian Canadian Lawyers and Canadian Muslim Lawyers Association

Khalid M. Elgazzar
Barrister & Solicitor
440 Laurier Avenue West
Suite 200
Ottawa, Ontario
K1R 7X6

Tel: (613) 663-9991
Fax: (613) 663-5552
E-mail: ke@elgazzar.ca

Agent for the Intervener, Centre for Free Expression

Norton Rose Fulbright Canada LLP
45 O'Connor Street
Suite 1500
Ottawa, Ontario
K1P 1A4

Matthew Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
E-mail:
matthew.halpin@nortonrosefulbright.com

Agent for the Intervener, Federation of Asian Canadian Lawyers and Canadian Muslim Lawyers Association

Alison M. Latimer
Barrister & Solicitor
1200 - 1111 Melville Street
Vancouver, British Columbia
V6E 3V6

Tel: (778) 847-7324
E-mail: alison@alatimer.ca

Counsel for the Intervener, John Howard Society of Canada and Queen's Prison Law Clinic

Power Law
130 Albert Street
Suite 1103
Ottawa, Ontario
K1P 5G4

Darius Bossé
Tel: (613) 702-5566
Fax: (613) 702-5566
E-mail: DBosse@juristespower.ca

Agent for the Intervener, John Howard Society of Canada and Queen's Prison Law Clinic

Animal Justice
720 Bathurst Street
Toronto, Ontario
M5S 2R4

Kaitlyn Mitchell
Scott Tinney
Tel: (647) 746-8702
E-mail: kmitchell@animaljustice.ca

Counsel for the Intervener, Animal Justice

Power Law
130 Albert Street
Suite 1103
Ottawa, Ontario
K1P 5G4

Maxine Vincelette
Tel: (613) 702-5573
Fax: (613) 702-5573
E-mail: mvincelette@juristespower.ca

Agent for the Intervener, Animal Justice

Public Interest Law Centre
100 - 287 Broadway
Winnipeg, Manitoba
R3C 0R9

Joëlle Pastora Sala
Chimwemwe Undi
Natalie Copps
Tel: (204) 985-9735
Fax: (204) 985-8544
E-mail: jopas@pilc.mb.ca

Counsel for Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.

Power Law
130 Albert Street
Suite 1103
Ottawa, Ontario
K1P 5G4

Darius Bossé
Tel: (613) 702-5566
Fax: (613) 702-5566
E-mail: DBosse@juristespower.ca

Agent for Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.

Osler, Hoskin & Harcourt LLP
P.O. Box 50, 1 First Canadian Place
Toronto, Ontario
M5X 1B8

Mark Sheeley
Lipi Mishra
Tel: (416) 862-6791
Fax: (416) 862-6666
E-mail: msheeley@osler.com

Counsel for the Intervener, Canadian Constitution Foundation

Osler, Hoskin & Harcourt LLP
Suite 1900
340 Albert Street
Ottawa, Ontario
K1R 7Y6

Geoffrey Langen
Tel: (613) 787-1015
Fax: (613) 235-2867
E-mail: glangen@osler.com

Agent for the Intervener, Canadian Constitution Foundation

TABLE OF CONTENTS

PART I – OVERVIEW

1. Public interest standing increases access to justice. It allows public interest parties to ensure that governments are complying with their legal and constitutional obligations, even if the dispute does not directly affect their own rights. Many individual litigants whose rights have been violated do not have the resources or expertise needed to hold government accountable.

2. Upholding minority rights and maintaining the rule of law are animating principles of Canada's constitution. But upholding them requires access to the courts. That is a major challenge. The cost and complexity of the legal system are significant barriers for many individuals. These barriers are exacerbated when the affected individuals are marginalized or come from disadvantaged groups who are less likely to have the resources required to pursue their rights. Litigation is financially costly, but that is just the beginning. Individuals may not have the emotional wherewithal to withstand prolonged litigation or the exposure of intimate details of their personal lives to their families, employers or neighbours, or be able to assume the responsibility of representing their communities before the courts.

3. Public interest standing can contribute to improving access to justice, particularly to vindicate the rule of law and respect for minorities. Public interest litigants who are granted standing can bring matters to the courts which allow them to protect individual rights and prevent government overreach. The test for obtaining standing should therefore not be unduly restrained based on artificial, hypothetical or overstated concerns.

4. This Court last addressed the test for public interest standing in *Downtown Eastside*,[1] almost a decade ago. *Downtown Eastside* requires a purposive and not formalistic approach to standing. However, the CCLA submits that further refinements to the test are needed to reduce persisting barriers to access to justice, particularly for disadvantaged and marginalized groups, and to ensure that there is proper judicial scrutiny of government action.

5. CCLA acknowledges that numerous parties and interveners have raised important arguments about enhancing access to justice through public interest litigation. CCLA seeks to

---

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

focus its submissions on the second factor of the test – the requirement that a public interest litigant have a "genuine interest" or "real stake" in the proceeding.

6. It will be a rare litigant that starts a public interest case that meets the other relevant criteria, but is nevertheless still unsuitable. As a result, parties should be presumed to meet the "genuine interest" criteria, unless the party opposing standing establishes that the proposed public interest plaintiff is not appropriate to advocate for the holders of the rights in issue. This will eliminate an unnecessary barrier while still dealing with the Court's concerns about adversarial context and not exceeding its role in a democratic system of government.

PART II – POSITION ON THE QUESTIONS AT ISSUE

7. The CCLA's position focusses only on the second part of the legal test for public interest standing. CCLA supports positions taken in this appeal to reduce barriers in part three of the test to increase access to justice through public interest standing. It takes no position on the underlying merits of the appeal.

PART III – ARGUMENT

Neither Rights nor Process should be Static

8. This Court has long recognized that legal and constitutional rights must be capable of evolution and growth to reflect changes in society. In *Hunter v. Southam*, the Court stated that the function of the Constitution, together with the *Charter*, is to provide "for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[2]

9. The procedure for vindicating rights should not be static either. Canada's commitment to the rule of law and its constitutional values has increased by leaps and bounds since the *Charter* was enacted. But access to justice remains illusory for many. According to research done by the Canadian Forum on Civil Justice, 65% of Canadians are "uncertain of their rights, do not know

[2] *Hunter et al., v. Southam Inc.*, [1984] 2 S.C.R. 145, p. 155.

how to handle legal problems, are afraid to use the legal system, think nothing can be done, or believe that seeking justice will cost too much money or take too much time."[3]

10. Government conduct should not be immunized from review – and rights violations should not be prolonged or unaddressed – because litigation is prohibitively costly and complex. Public interest litigants can have a significant impact in ensuring governments uphold and respect rights and freedoms, particularly those of marginalized individuals and communities.

11. Public interest standing has been significantly enhanced from its historical origins. But the current test retains some unnecessarily rigid features that undermine it as a mechanism for holding governments accountable. The CCLA's position on this appeal is that these features, including the "real stake" requirement, are unnecessary in a modern system of justice.

Considering the Plaintiff's "Interest" or "Stake" in a Case is a Historical Artifact

12. This Court has periodically liberalized the test for public interest standing. Each time it restricted governments' opportunities to rely on standing rules to avoid explaining or justifying their conduct. But even today, some aspects of the existing test are largely historical artifacts that do not advance any meaningful goals.

13. Prior to the 1970s, an individual could only sue in respect of matters that directly impacted their legal rights. Only the Attorney General could seek relief in relation to matters of public interest. The concern in the case law was that opening up the courtroom doors to litigants without a direct interest would lead to a waste of judicial resources, as well as "grave inconvenience and public disorder."[4]

14. In *Thorson*,[5] this Court first decided there is judicial discretion to grant public interest standing. Subsequent decisions like *McNeil*, *Borowski*, *Finlay*, and *Canadian Council of Churches* made it theoretically possible for public interest litigants to obtain standing,[6] applying the principle

---

[3] Matt Malone, "Standing in the Way: Comparing Constraints on Access to Justice after the Liberalization of Public Interest Standing in Canada and Israel", 46 Advoc. Q. 451.

[4] *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 ("*Thorson*"), pp. 144-5.

[5] *Thorson*, [1975] 1 S.C.R. 138.

[6] *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607;

that government action should not be immune from constitutional review.[7] However, even in those decisions, the Court maintained a concern about overtaxing its limited resources and avoiding "the mere busybody" litigant. This limited the Court's willingness to fully develop a test for public interest standing that focuses on accountability and not process.[8]

15. Ultimately, a three-part test for public interest standing was established: (1) is there a serious issue relating to government action; (2) is the plaintiff directly affected by the government action or does it have a genuine interest in its validity?; and (3) is there no other reasonable and effective manner in which the issue may be before the court?[9] However, this test was applied rigidly, requiring a potential public interest plaintiff to independently establish all three parts of the test. Moreover, there was still a concern about preserving judicial resources for cases with a "real" litigant, instead of the hypothetical busybody.

16. In *Downtown Eastside*, the Court emphasized the need for a flexible and purposive approach, focusing on the third element of the test.[10] However, *Downtown Eastside* left the second criteria for standing – a plaintiff with a "genuine interest" – largely in place (albeit with a new name: "real stake"). The Court held that this remains necessary "to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government."[11]

17. While the Court has legitimate concerns about adversarial context and protecting the judicial role, the requirement of a "genuine interest" or "real stake" is not an effective means of addressing them. Historical involvement with an issue may signal interest in an issue, but its absence does not signal disinterest. This case provides the Court with an opportunity to revise the

---

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 ("*Canadian Council of Churches*").

[7] See *Thorson*, [1975] 1 S.C.R. 138, p. 145.

[8] *Canadian Council of Churches*, [1992] 1 S.C.R. 236.

[9] *Canadian Council of Churches*, [1992] 1 S.C.R. 236.

[10] *Downtown Eastside*, 2012 SCC 45, paras. 37, 44-51.

[11] *Downtown Eastside*, 2012 SCC 45, para. 1.

"real stake" aspect of the test so it can be more closely tailored to the (limited) objectives it is trying to achieve.

The CCLA's Proposed Revision

18. The CCLA asks the Court to change its approach to the second factor. Instead of "genuine interest" or "real stake," the Court should ask whether the party opposing standing has provided reasons why the public interest group cannot appropriately advocate for the rights holders, due to a lack of appreciation of their issues, conflict of interest, or other similar concerns. These must be grounded in evidence, not mere speculation. This accomplishes what the "genuine interest" or "real stake" requirement is intended to do (providing adversarial context, ensuring the court's role and avoiding the "busybody"), without unduly limiting standing to parties with a historical interest or presence.

19. The "genuine interest" or "real stake" threshold is first and foremost concerned about the hypothetical "busybody" – plaintiffs who theoretically consume judicial resources with cases in which they have little interest. But, as this Court found in *Downtown Eastside*, this concern is overstated: "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom."[12]

20. There has been no floodgate of unnecessary or frivolous litigation since *Downtown Eastside*. This is not a surprise. The time and costs associated with litigating a complex public interest case creates a significant disincentive for many litigants. Moreover, there are other means to ensure only justiciable claims are brought forward in a reasonable and effective manner. So even if busybodies exist, they are not a genuine concern.

21. Another rationale for the "genuine interest" requirement is to ensure that courts have the benefit of contending points of view of those most directly affected.[13] This underestimates the sophistication, preparation and commitment of numerous public interest litigants. Any lingering concern can be addressed by giving the party resisting standing the opportunity to rebut the presumption, by showing that the group is inappropriate for the reasons specified above (in

[12] *Downtown Eastside*, 2012 SCC 45, para. 28.
[13] *Downtown Eastside*, 2012 SCC 45, paras, 1, 29.

paragraph 18) This will ensure that courts can benefit from public interest litigants, who bring important perspectives and make meaningful contributions to the judicial process, while ensuring sufficient adversarial context.

22. Finally, the concern that courts play their proper role within our democratic system of government, and address questions that are appropriate for judicial determination, is not advanced by the "genuine interest" test, as currently formulated. Rather, it impedes access to justice and the rule of law, a crucial principle that underpins Canada's constitution.[14]

23. As set out above, the CCLA proposes a different use for the second factor. If the first and third criteria of the test are met, then "genuine interest" should be presumed, subject to the party resisting public interest standing to show why the proposed public interest plaintiff is not an appropriate party to advocate for the rights holders as set out above. CCLA concedes that these circumstances will be rare, and should be even more rare when the right being advanced affects marginalized groups.

"Genuine Interest" Requirement Discriminates against Marginalized Groups

24. The other problem with the "genuine interest" requirement as currently formulated is that it emphasizes a litigant's historical, rather than present, engagement with an issue. This is not a meaningful gauge of the litigant's capacity and commitment to litigate the matter. It also discriminates against disadvantaged or marginalized groups, who require greater access to justice instead of higher barriers.

25. A public interest litigant may have the capacity to meaningfully bring an important *Charter* issue before the court but nevertheless lack a history of engagement with that specific issue. This is particularly true where an issue is novel (*e.g.*, it may be the first time a court is asked to recognize specific rights), or the litigant itself is newly formed or newly representing a specific group's interests. By itself, this should not matter.

26. Cases that raise legitimate issues, brought by capable and committed litigants, where the case is a reasonable and effective means of getting the matter before the Court should mostly be

---

[14] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 48; and *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 49.

heard. Questions like historical engagement – that do not impact on the litigant's ability to present the case – should not be the basis to reject an important and meritorious claim.

27. CCLA therefore asks the Court to revise the test for public interest standing to remove the requirement that public interest litigants demonstrate a "genuine interest" or "engagement" with the issue. Instead, "genuine interest" should be presumed and the onus should be on government to show that the public interest litigant is not an appropriate party to advocate for the rights holders

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

28. The CCLA takes no position on the outcome of this appeal. The CCLA seeks no costs and asks that no costs be awarded against it.

December 2, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Andrew Bernstein

Alexandra Shelley

Torys LLP, Counsel for the Intervener
Canadian Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

CASES	Cited in paras.
Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45	4, 16, 19, 21
Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236	14, 15
Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607	14
Hunter et al., v. Southam Inc., [1984] 2 S.C.R. 145	8
Minister of Justice (Can.) v. Borowski, [1981] 2 S.C.R. 575	14
Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265	14
Reference re Secession of Quebec, [1998] 2 S.C.R. 217	22
Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138	13, 14
Toronto (City) v. Ontario (Attorney General), 2021 SCC 34	22

SECONDARY SOURCES	Cited in paras.
Matt Malone, "Standing in the Way: Comparing Constraints on Access to Justice after the Liberalization of Public Interest Standing in Canada and Israel", 46 Advoc. Q. 451	9