

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Respondent)

AND:

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

AND:

ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ONTARIO;
ATTORNEY GENERAL OF SASKATCHEWAN; ATTORNEY GENERAL OF ALBERTA;
WEST COAST PRISON JUSTICE SOCIETY; EMPOWERMENT COUNCIL, SYSTEMIC
ADVOCATES IN ADDICTIONS AND MENTAL HEALTH; CANADIAN CIVIL LIBERTIES
ASSOCIATION; DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS;
ECOJUSTICE CANADA SOCIETY; TRIAL LAWYERS ASSOCIATION OF BRITISH
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(Pursuant to R. 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society* (“**SWUAV**”)¹ articulated a principled and practical framework for assessing public interest standing in constitutional cases. That framework was designed to satisfy the twin values of “ensuring access to the courts and preserving judicial resources”.²
2. While purporting to “vindicate” the *SWUAV* framework,³ the Appellant Attorney General of British Columbia (“**AGBC**”) really seeks to undermine it. The AGBC proposes to import new criteria into the *SWUAV* framework, including that organizational plaintiffs should function as “proxies” for individuals; should be required to explain why they sue alone if they take action without an individual co-plaintiff; and should be required to show, in preliminary proceedings and upon demand, how they intend to prove their claims.⁴ The Appellant’s proposals rest on the faulty assumptions that systemic *Charter* challenges by public interest organizational plaintiffs are “abstract” and “plaintiff-less” litigation.⁵ The Appellant asks the Court to endorse these notions and to change the *SWUAV* framework to reflect them. In effect, the AGBC would have the Court adopt a rebuttable presumption against public interest standing for organizational plaintiffs in systemic *Charter* litigation.
3. The British Columbia Civil Liberties Association (“**BCCLA**”) intervenes in the appeal to resist the AGBC’s proposal and the imposition of any such presumption.

¹ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 (“**SWUAV**”).

² *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 252, as quoted in *SWUAV*, para 23.

³ Appellant’s Factum (“**AF**”), para 45.

⁴ AF, paras 40, 63, 66 and 98.

⁵ See, e.g., AF, paras 3, 59.

PART II - POSITION ON QUESTION RAISED

4. Since 1963, the BCCLA has played a prominent role in promoting, defending, sustaining and extending civil liberties and human rights in Canada, including, in recent decades, as a public interest plaintiff in systemic *Charter* litigation.⁶ The BCCLA intervenes in this case to oppose an erosion of the *SWUAV* framework and the Appellant's attempt to move the law towards a rebuttable presumption against public interest standing for organizational plaintiffs. The proposed presumption is inconsistent with the purposive approach to standing animating the *SWUAV* framework. The framework must remain focused on the core values it is designed to serve.

5. The BCCLA takes no position on the facts of the case or the disposition of the appeal.

PART III - ARGUMENT

6. For nearly a decade, the *SWUAV* framework has instructed trial courts on how to determine public interest standing to bring constitutional cases. The court is to undertake a case-specific assessment of the attributes of the proposed plaintiff and the case, and to cumulatively weigh and assess three factors: (a) whether the case raises a serious justiciable issue; (b) whether the plaintiff has a "real stake" or a "genuine interest" in its outcome; and (c) whether the case is a reasonable and effective means to litigate the matter.⁷

7. An assessment of standing pursuant to the *SWUAV* framework requires purposive attention to the values that public interest standing is intended to serve: the "underlying concern with the principle of legality" and regard for the "effective operation of the court system as a whole" through prudent use of judicial resources.⁸ Legality is concerned with the ideas that state action must conform to the Constitution and to statutory authority, and that there must be

⁶ For recent examples, see *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 and 2019 BCCA 228 (collectively, "***Solitary Confinement***"); *Carter v Canada (Attorney General)*, 2012 BCSC 886, 2013 BCCA 435 and 2015 SCC 5, [2015] 1 SCR 331 ("***Carter***"); and *Amnesty International Canada v Canadian Forces*, 2007 FC 1147, 2008 FC 336 and *Amnesty International Canada v Canada*, 2008 FCA 401. See para 10, below, for the BCCLA's definition of "systemic *Charter* litigation".

⁷ *SWUAV*, paras 2-3, 20, 23, 36, 37 and 67.

⁸ *SWUAV*, paras 1, 23, 26, 31-34, 43 and 49.

practical and effective ways to challenge the lawfulness of state action.⁹ The prudence value reflects a concern that if standing standards are too relaxed, it could result “in many persons having the right to bring similar claims and [that] ‘grave inconvenience’ could be the result”.¹⁰

8. For the reasons explained below, the Appellant’s proposals to presumptively limit standing for organizational plaintiffs will not serve these interests. They would instead undermine them.

A. A plaintiff’s public interest standing should be evaluated against the claim it advances and the remedy it seeks

9. A court’s case-specific assessment of public interest standing must remain sensitive to the claim before it. In the context of systemic *Charter* litigation, the *SWUAV* framework must not be distorted by requirements or presumptions that would disadvantage organizations pursuing claims that can be reasonably and effectively adjudicated by them. Instead the court must closely consider the ways in which *this* claim seeking *these* remedies may be reasonably and effectively adjudicated.

10. The meaning of “systemic *Charter* litigation” is contentious in this appeal.¹¹ The BCCLA uses the phrase “systemic *Charter* litigation” to mean litigation that challenges the *Charter*-compliance of laws or government actions that affect “... members of a defined and identifiable group in a serious, specific and broadly-based manner regardless of the individual attributes or experiences of any particular member of the group.”¹² Properly framed systemic litigation assists trial courts to efficiently determine serious, justiciable issues about the unconstitutional effects of laws or state action at the level of populations or constituencies, not solely at the level of the individual.¹³

⁹ *SWUAV*, para 31.

¹⁰ *SWUAV*, para 26, referring to *Smith v Attorney General of Ontario*, [1924] SCR 331 at 337.

¹¹ AF, paras 55, 56, 58, 73-80; Respondent’s Factum (“**RF**”), para 18.

¹² Reasons for Judgment of the British Columbia Court of Appeal, August 26, 2020 (“**BCCA Reasons**”), para 112, Appellant’s Record (“**AR**”), Tab 3 at 68.

¹³ *Chaouilli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791, para 189, per Binnie and LeBel JJ, dissenting, but not on this point.

11. Systemic *Charter* litigation brought by organizational plaintiffs is not, as the AGBC suggests, “plaintiff-less” litigation.¹⁴ Instead, systemic *Charter* litigation is often brought by organizational plaintiffs precisely because the matters at issue in the litigation transcend the interests of *a* directly affected individual and instead affect a population.¹⁵ The *SWUAV* framework is sensitive to this reality.

12. Organizational plaintiffs concerned with broader public interests are appropriate applicants for the types of remedies typically sought in systemic *Charter* litigation. A systemic claim typically aims to address unconstitutionality by seeking a remedy of broad, not individual, effect. For example, the plaintiff may, as in *SWUAV* and the case at bar, seek declaratory relief pursuant to s. 52 of the *Constitution Act, 1982*.¹⁶ Such declarations are inherently of general impact. They speak to the constitutionality of the law for everyone.

13. The substance of the *Charter* law relied on in a systemic *Charter* challenge may also offer a useful measure to assess the fit between an organizational plaintiff and the claim it seeks to advance. *Canada (Attorney General) v Bedford*¹⁷ offers a useful illustration. In that case, this Court held that for a law to offend s. 7 of the *Charter*, it need only affect “one person” in a grossly disproportionate manner.¹⁸ In so finding, this Court was not concerned with whether the grossly disproportionate effect operated against the plaintiff, a witness or a stranger to the litigation; the fact that *anyone* would be so affected was sufficient to infringe s. 7 of the *Charter*.¹⁹ If an organizational plaintiff brings systemic *Charter* litigation challenging a law on the grounds of gross disproportionality, the logic of *Bedford* will tend to attenuate standing concerns because “permitting the proposed action to go forward will serve the purpose of upholding the principle of legality” without in any way straining the law.²⁰

¹⁴ AF, para 59.

¹⁵ *SWUAV*, paras 51 and 73.

¹⁶ *SWUAV*, para 7; Amended Notice of Civil Claim, AR, Tab 8 at 118.

¹⁷ *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 (“*Bedford*”).

¹⁸ *Bedford*, paras 122-123.

¹⁹ This was despite the private interest standing of the applicants; see *Bedford*, para 17.

²⁰ *SWUAV*, para 50.

14. In contrast to maintaining the contextually sensitive approach required by *SWUAV*, adding new arbitrary barriers to standing (such as whether an individual plaintiff will have direct evidence) would only serve to undermine the courts' ability to address potentially unconstitutional laws, contrary to the principle of legality. The AGBC's suggestion²¹ that legality, an animating principle and central concern of public interest standing,²² should not be given too much consideration in the assessment of standing misses the point of the principle itself. Systemic *Charter* litigation is brought to enforce the supremacy of the Constitution over laws of general application. Legality is the very essence of this type of action.

B. Public interest standing should not be tied to how the facts of the case will be proved

15. The Appellant rightly emphasizes the value of concrete adjudicative facts in systemic *Charter* litigation but wrongly tethers the analysis of public interest standing for organizational plaintiffs to how the facts may be proved.²³ The AGBC's focus on modes of proof is misplaced because the specific method for proof of a case (and in particular whether that method includes a directly affected plaintiff), is peripheral to the standing analysis.

16. The criteria prescribed by the *SWUAV* framework focus on the substance of the claim, the interest of the plaintiff and whether that case can be reasonably and effectively adjudicated with the plaintiff before the court. The framework does not focus on the modes of presenting evidence because those mechanics do not necessarily affect the reasonableness and effectiveness of the claim's adjudication. Such details are not salient to whether the court will have the benefit of the contending points of view of those most affected nor to whether the court will be equipped to play its proper role in our Constitutional democracy.²⁴ Instead of a formalistic inquiry into a plaintiff's trial plan, the approach in *SWUAV* demands a holistic review of the claim to be exercised in a "liberal and generous manner".²⁵

²¹ AF, paras 2, 36, 46, 49, 51-53.

²² *SWUAV*, para 33.

²³ AF, paras 46, 55-58, 60-68.

²⁴ *SWUAV*, para 1.

²⁵ *SWUAV*, para 2.

17. Certainly, an organizational plaintiff intent on advancing systemic *Charter* litigation must plead and, unless admitted, prove the material facts of its cause of action.²⁶ This will usually require the public interest litigant to lead evidence to prove adjudicative facts, *i.e.* those establishing the where, when and why of a particular situation.²⁷ But a requirement to prove adjudicative facts should not dictate *how* those facts may be proven. Canadian law does not require that adjudicative facts in *Charter* cases usually (let alone always) be proven on the evidence of an individual plaintiff.²⁸ The law of public interest standing should not be rigged so as to effectively impose a presumption in favour of this method of proof.

18. Recent cases highlight the role that individual facts typically play in systemic *Charter* litigation; these facts tend to illustrate, rather than define, the material facts of the claim.

19. In *Carter*, a case in which the BCCLA was an organizational co-plaintiff, it was not crucial to the adjudication of the claim that the plaintiff Gloria Taylor had amyotrophic lateral sclerosis (ALS) nor that the plaintiff Lee Carter's mother, Kay Carter, suffered from spinal stenosis before she died with medical assistance in Switzerland, with the help of her daughter. Gloria Taylor's and Kay Carter's circumstances illustrated how the impugned laws were liable to affect a person suffering from a serious, irremediable medical condition. Likewise, Lee Carter's circumstances illustrated how a risk of prosecution under s. 241(b) of the *Criminal Code*, RSC 1985, c. C-46 (as it then read) could affect a person who decided to assist a loved one in seeking medically assisted death.²⁹ None of Gloria Taylor's, Kay Carter's nor Lee Carter's circumstances

²⁶ *Contra* the suggestion of the AGBC, AF, para 56, the Court of Appeal expressly recognized that public interest litigants must plead material facts sufficient to lay the foundation for public interest standing; see BCCA Reasons, para 97, AR, Tab 3 at 64.

²⁷ *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458 ("*Spence*"), para 58. An exception arises in the rare case of a law with an unconstitutional purpose that may be decided on a question of law alone, see *Manitoba (A.G.) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110 at 133, discussed in *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1100-1101.

²⁸ In *Carter* for example, the impact of the impugned law on grievously ill individuals and their loved ones was the subject of extensive non-party lay evidence; see paras 14-16.

²⁹ *Carter*, para 20.

purported to define the experiences of everyone affected by the laws. Instead, they exemplified them.

20. *SWUAV* was also systemic *Charter* litigation. The statement of claim pleaded facts about the experiences of Ms. Kiselbach, a former sex worker, with the effects of the *Criminal Code* provisions at issue.³⁰ Ms. Kiselbach's facts were not germane to the systemic challenge because they were *her* experiences. Rather, Ms. Kiselbach's experiences were indicative of how sex workers, more generally, were affected by the impugned laws. In that case, the plaintiffs would not have limited their claim to proof based on Ms. Kiselbach's individualized facts. They would have advanced evidence through non-plaintiff witnesses, too.³¹

21. It is also necessary to bear in mind the important role that expert evidence typically plays in systemic *Charter* litigation.³² Social facts are often dispositive in *Charter* claims;³³ they provide the information and context about the "society at large" in which a systemic claim is set, and evidence about how specific populations experience the law's impact. This Court has made it clear that social facts should be established by expert evidence, rather than by reliance on judicial notice.³⁴ The presence of an individual plaintiff does not enhance the reasonableness or effectiveness of a systemic claim where social fact evidence must be adduced through experts.

22. *Solitary Confinement* is an example of systemic *Charter* litigation successfully prosecuted by organizational plaintiffs. In that case, the BCCLA and the John Howard Society pleaded material facts to support their allegations that the practice of solitary confinement authorized by the *Corrections and Conditional Release Act*, SC 1992, c 20 causes "significant adverse effects on the physical, psychological, and social health of inmates"; is carried on without independent oversight; and disproportionately affects Aboriginal and mentally ill people

³⁰ Ms. Kiselbach was recognized to have public interest standing. Her argument for private interest standing was not addressed by this Court: *SWUAV*, para 77.

³¹ *SWUAV*, para 71.

³² *Bedford v Canada*, 2010 ONSC 4264, para 84; *Bedford*, para 53; see also *Carter, Bedford, Solitary Confinement*, and *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661.

³³ *Spence*, para 64.

³⁴ *Bedford*, para 53; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74, [2003] 3 SCR 571, paras 26-28.

in prison.³⁵ At trial, the plaintiffs adduced evidence sufficient to show that the law unconstitutionally affected populations of incarcerated individuals. The resulting trial record provided an appropriate basis for appellate review.³⁶

23. Given the nature and realities of systemic *Charter* litigation, the AGBC's preoccupation with how the facts of the claim may be proved is unwarranted, unhelpful and unnecessary. The ability of a litigant to prove a systemic Charter claim does not turn on whether the litigant is an organization with public interest standing or an individual with private standing. Rather, the proof of the claim will turn on whether the litigant can adduce admissible and probative evidence – by any permissible means – and has skilled counsel to organize and present it.³⁷

C. Organizational plaintiffs should not be required to function as proxies to satisfy the test for standing

24. The AGBC's proposed addition of a 'proxy' requirement to the test for public interest standing³⁸ is ill-suited to the ultimate goal of the *SWUAV* framework: determining whether the proposed suit is, in all the circumstances, a reasonable and effective means of advancing a serious legal claim.³⁹ In some cases, a representative "by and for" organization⁴⁰ may be a particularly effective plaintiff but it will not necessarily be the *only* appropriate plaintiff – just as a given individual will not necessarily be the *only* appropriate plaintiff to advance a claim.

25. Moreover, the *SWUAV* framework should not be changed to require that an organizational plaintiff stand for a certain "type" of individual. To insist that an organization function as a "proxy" for anyone misunderstands what it is that makes systemic *Charter* litigation systemic in nature, *i.e.* litigation that is concerned with the broad-based impact of the law "regardless of the individual attributes or experiences of any particular member of the group."⁴¹ A group that coalesces around a more broadly-defined concern, such as civil liberties,

³⁵ 2018 BCSC 62, para 2. The organizations' standing to advance the claims was not disputed.

³⁶ *Solitary Confinement*, applications for leave to appeal and cross-appeal allowed February 13, 2020, 2020 CanLII 10501 (SCC) but appeals later discontinued.

³⁷ *SWUAV*, paras 51 and 74.

³⁸ See AF, para 98.

³⁹ *SWUAV*, para 52.

⁴⁰ *SWUAV*, para 58.

⁴¹ BCCA Reasons, para 112.

equality, environmental protection or disability, may be a suitable plaintiff to advance a claim addressing the rights of those affected by a law or government action.

26. More importantly, the proposed proxy requirement would both undermine the legality principle and promote the dissipation of judicial resources. The premise of the AGBC's argument is that only the "right" person can test the constitutionality of a law.⁴² If this is so, laws will be insulated from review, and an essential aspect of the superior courts' constitutional function will be constrained, until the "right" plaintiff appears. This is an assault on the principle of legality. Further, if the standing criteria require Courts to look for the "right" applicant to test the constitutionality of a law, this will tend to invite a multiplicity of litigants to bring similar claims, at "grave inconvenience" to the functioning of the justice system.⁴³

D. This Court should not impose a rebuttable presumption against public interest standing for organizations

27. The AGBC's proposals to burden the *SWUAV* framework with new strictures on public interest standing for organizations do not advance the aims set out in *SWUAV*. The principle of legality (including access to the courts) and the prudent use of judicial resources require that the focus in an examination of public interest standing remains whether, *in all the circumstances*, the organization is positioned to advance a reasonable and effective claim. The analysis should respond to the nature of the claim, including whether the claim is a systemic claim, and how *that* claim can reasonably and effectively be made out.⁴⁴

28. This Court should not adopt the AGBC's skepticism of organizational plaintiffs in systemic *Charter* litigation. The decades-long history of systemic *Charter* litigation in Canada shows that organizational plaintiffs, such as societies, non-profit bodies and other interest-based groups, have tended to distinguish themselves as assets to the justice system.⁴⁵

⁴² AF, paras 40, 60, 66.

⁴³ *SWUAV*, para 26.

⁴⁴ *SWUAV*, paras 47, 50.

⁴⁵ See, for example: *Carter, Solitary Confinement* discussed above; see also *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348, paras 52, 53, 59-60.

29. The positive track record of organizational plaintiffs is not surprising. Organizational litigants are by their nature positioned to offer a nuanced understanding of the implications of unconstitutional laws since they are usually concerned with the law's impact on constituencies or groups of people in similar, but not identical, circumstances.⁴⁶ This kind of expertise – a factor expressly recognized in the *SWUAV* framework⁴⁷ – helps frame the issues in a systemic *Charter* challenge in a manner suitable for adjudication. Well-framed systemic claims promote the effective use of judicial resources by reducing or eliminating the likelihood of a multiplicity of proceedings that test the law in (potentially duplicative) slices.⁴⁸

30. If any presumption should be recognized, it is a presumption in favour of organizational capacity to advance reasonable and effective systemic *Charter* litigation given the ability of organizations to enhance the goals of judicial economy and access to the courts.

31. The BCCLA submits that this Court should decline the AGBC's invitation to tilt public interest standing criteria away from organizational plaintiffs. The concerns that principally guide the law of public interest standing in Canada – the principle of legality and prudence in the use of judicial resources – do not justify such limits.

PART IV - SUBMISSION ON COSTS AND ORDER SOUGHT

32. The BCCLA takes no position on the disposition of the appeal, seeks no costs and requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 1st day of December, 2021.



Elin Sigurdson



Monique Pongracic-Speier, Q.C.

⁴⁶ On this point, the BCCLA adopts and relies upon the arguments at RF, paras 70-72.

⁴⁷ *SWUAV*, para 51.

⁴⁸ *SWUAV*, paras 51, 70 and 73.

PART V - TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

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