S.C.C. 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 ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, WEST COAST LEGAL EDUCATION AND ACTION FUND, ECOJUSTICE CANADA SOCIETY, WEST COAST PRISON JUSTICE SOCIETY, EMPOWERMENT COUNCIL and 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., and CANADIAN CONSTITUTION FOUNDATION

INTERVENERS

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ALBERTA

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

ALBERTA JUSTICE
Constitutional and Aboriginal Law
1000, 10025 - 102A Avenue
Edmonton, AB T5J 2Z2

Leah M. McDaniel
Telephone: (780) 422-7145
FAX: (780) 643-0852
Email: leah.mcdaniel@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

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

Ottawa Agent for Counsel for the Intervener,
Attorney General of Alberta

ATTORNEY GENERAL OF BRITISH COLUMBIA
Legal Services Branch
1301 - 865 Hornby Street
Vancouver, BC V6Z 2G3

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

Counsel for the Appellant

GIB VAN ERT LAW
148 Third Ave.
Ottawa, ON K1S 2K1

Dahlia Shuhaibar
Tel: (613) 501-5350
Fax (613) 651-0304
Email: dahlia@gibvanertlaw.com

Ottawa Agent for Counsel for the Appellant

McCARTHY TÉTRAULT LLP
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5

Michael A. Feder
Katherine Booth
Kevin Love
Tel: (604) 643-5983
Fax: (604) 622-7900
Email: mfeder@mccarthy.ca

Counsel for the Respondent

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

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

Ottawa Agent for Counsel for the Respondent

AND TO THE INTERVENERS:

ATTORNEY GENERAL OF CANADA
Department of Justice,
National Litigation Sector
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Christine Mohr
Tel: (416) 953-9546
Fax: (416) 952-4518
Email: 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, ON K1A 0H8

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

Ottawa Agent for Counsel for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

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

Counsel for the Intervener,
Attorney General of Ontario

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

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

Ottawa Agent for Counsel for the Intervener,
Attorney General of Ontario

MINISTRY OF JUSTICE AND ATTORNEY GENERAL
Government of Saskatchewan
820 - 1874 Scarth Street
Regina, SK S4P 4B3

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

Counsel for the Intervener,
Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

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

Ottawa Agent for Counsel for the Intervener,
Attorney General of Saskatchewan

MANDELL, PINDER LLP
422 - 1080 Mainland Street
Vancouver, BC V6B 2T4

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

Counsel for the Intervener, British Columbia Civil Liberties Association

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

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

Ottawa Agent for Counsel for the Intervener, British Columbia Civil Liberties Association

JFK LAW CORPORATION
340-1122 Mainland Street
Vancouver, BC V6B 5L1

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

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

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

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

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

ECOJUSTICE CANADA SOCIETY
390 - 425 Carrall Street
Vancouver, BC V6B 6E3

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

Counsel for the Intervener,
Ecojustice Canada Society

ALLEN/MCMILLAN LITIGATION COUNSEL
1625 -1185 West Georgia Street
Vancouver, BC V6E 4E6

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

Counsel for the Intervener,
West Coast Prison Justice Society

ANITA SZIGETI ADVOCATES
400 University Avenue, Suite 2001
Toronto, ON M5G 1S5

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

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

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

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

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

TORYS LLP
79 Wellington St. West
Suite 3000, Box 270, TD South Tower
Toronto, ON M5K 1N2

Andrew Bernstein
Emily Sherkey
Tel: (416) 865-7678
Fax: (416) 865-7380
Email: abernstein@torys.com

Counsel for the Intervener,
Canadian Civil Liberties Association

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Canadian Civil Liberties Association

ARCH DISABILITY LAW CENTRE
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7

Mariam Shanouda
Jessica De Marinis
Tel: (416) 482-8255 Ext: 2224
Fax: (416) 482-2981
Email: 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

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

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

Ottawa Agent for 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, ON M5S 2C5

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

Counsel for the Intervener, David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CAN LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

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

Ottawa Agent for Counsel for the Intervener, David Asper Centre for Constitutional Rights

HUNTER LITIGATION CHAMBERS
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1

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

Counsel for the Intervener,
Trial Lawyers Association of British Columbia

NORTON ROSE FULBRIGHT CAN LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

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

Ottawa Agent for Counsel for the Intervener,
Trial Lawyers Association of British Columbia

NATIONAL COUNCIL OF CANADIAN MUSLIMS
300 - 116 Albert Street
Ottawa, ON K1P 5G3

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

Counsel for the Intervener,
National Council of Canadian Muslims

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

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

Ottawa Agent for Counsel for the Intervener,
National Council of Canadian Muslims

MENTAL HEALTH LEGAL COMMITTEE
250 Younge Street
Suite 2201
Toronto, ON M5B 2L7

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

Counsel for the Intervener,
Mental Health Legal Committee

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
Email: jcameron@ravenlaw.com

Ottawa Agent for Counsel for the Intervener,
Mental Health Legal Committee

LEGAL AID ONTARIO
Refugee Law Office
20 Dundas Street West
Toronto, ON M5G 2H1

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

Counsel for the Intervener, Canadian Association of Refugee Lawyers

POORANLAW PROFESSIONAL CORP.
400 - 1500 Don Mills Road
Toronto, ON M3B 3H4

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

Counsel for the Intervener, Centre for Free Expression

Khalid M. Elgazzar
440 Laurier Avenue West, Suite 200
Ottawa, ON K1R 7X6

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

Ottawa Agent for Counsel for the Intervener, Centre for Free Expression

NORTON ROSE FULBRIGHT CAN LLP
222 Bay Street, Suite 3000
P.O. Box 53
Toronto, ON M5K 1E7

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

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

NORTON ROSE FULBRIGHT CAN LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

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

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

Alison M. Latimer
300-171 Water Street
Vancouver, BC V6B 1A7

Tel: (778) 847-7324
Email: 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, ON K1P 5G4

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

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

ANIMAL JUSTICE
720 Bathurst Street
Toronto, ON M5S 2R4

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

Counsel for the Intervener,
Animal Justice

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

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

Ottawa Agent for Counsel for the Intervener,
Animal Justice

PUBLIC INTEREST LAW CENTRE
100 - 287 Broadway
Winnipeg, MB R3C 0R9

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

Counsel for the Intervener, 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, ON K1P 5G4

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

Ottawa Agent for Counsel for the Intervener,
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, ON M5X 1B8

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

Counsel for the Intervener,
Canadian Constitution Foundation

OSLER, HOSKIN & HARCOURT LLP
340 Albert Street, Suite 1900
Ottawa, ON K1R 7Y6

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

Ottawa Agent for Counsel for the Intervener,
Canadian Constitution Foundation

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. In this appeal, the Court has an opportunity to provide guidance on the proper application of the legal test for public interest standing, and in particular to assess the carefully constructed, discretionary balancing exercise articulated in ***Downtown Eastside***[1] and confirm the importance of a sufficiently concrete factual foundation in public interest standing cases.

2. In this case, the British Columbia ("BC") Court of Appeal articulated a re-balanced approach to the multi-factored public interest standing inquiry, placing greater emphasis on certain factors to the exclusion of others. In doing so, the BC Court of Appeal opened the door for a constitutional challenge by the Council of Canadians with Disabilities ("CCD") to proceed, without the necessity of CCD pleading any specific factual impacts relating to any particular individuals.

3. The Attorney General of Alberta ("Alberta") intervenes in this case specifically with respect to the legal test for public interest standing, and the issue of whether a claimant who seeks public interest standing to pursue a constitutional claim should be required to demonstrate a sufficiently concrete adjudicative, factual context in order to proceed. Alberta takes no position on the outcome of this particular case.

4. Alberta asserts that, at a minimum, a claimant should be required to plead a sufficiently concrete factual foundation in order to be granted public interest standing. Constitutional cases require a concrete factual matrix, and public interest standing should not be granted on the basis of hypothetical or abstract facts. Considerations about access to justice or legality should not override the requirement for a sufficiently concrete factual setting.

PART II – ISSUES

5. Alberta's submissions focus on the following issue: is a claimant required to plead a sufficiently concrete factual context in order to be granted public interest standing?

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

PART III – ARGUMENT

6. The concept of standing asks whether a litigant has a sufficient stake in the outcome of a claim to "invoke the judicial process."[2] Standing rules were traditionally restrictive, requiring a party to be directly affected before bringing a claim. Today, standing law has been liberalized, permitting private litigants who meet certain requirements to raise important (often constitutional) questions before the court, for public rather than private reasons.

7. In ***Downtown Eastside***, this Court articulated a legal framework for assessing requests for public interest standing; one which balances competing considerations and necessitates a contextual, case-based, and discretionary analysis.

8. One of the key questions raised in this appeal is whether these rules should be relaxed further to permit public interest litigants to challenge the constitutionality of legislation – not only without being required to demonstrate their own direct factual impact, but without being required to plead *any* specific factual impact.

9. Alberta asserts that in order to be granted public interest standing, a claimant must be required to demonstrate *through its pleadings* that its claim is brought on the basis of a sufficiently concrete factual matrix. All litigation, including public interest constitutional litigation, should be tethered to a factual foundation. What may be considered "sufficiently concrete" will vary depending on the context, but every case must have some basis in fact.

10. Considerations of legality or access to justice should not override this basic legal requirement and effectively permit private references under the guise of public interest standing.

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[2] Peter W Hogg, *Constitutional Law of* Canada, 5th ed Supp, looseleaf (Toronto: Thomson Reuters Canada Limited, 2019) at 59.2(a).

A. The law is clear: constitutional cases require facts

11. The starting point for this analysis is a basic legal proposition: cases require facts. Factual determinations have always been an integral part of judicial decision making, and constitutional cases are no exception.[3]

12. This Court has frequently stressed the importance of a factual basis in constitutional cases.[4] In doing so, courts ensure that constitutional litigation "remains firmly grounded in the discipline of the common law methodology."[5]

13. Indeed, a factual foundation is essential to a constitutional claim. As confirmed in ***MacKay***:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. ... Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases [emphasis added].[6]

14. The Court has historically stopped short of requiring a specifically pleaded factual matrix in *every* case; instead carving out a hypothetical and rare exception for cases where legislation is blatantly unconstitutional on its face.[7] However, where legislation is constitutionally challenged on the basis that its *effects* violate constitutional rights (*i.e.* the vast majority of constitutional claims), courts have rightly insisted on a concrete factual foundation. In such circumstances, this

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[3] Brian G Morgan, "Proof of Facts in Charter Litigation," in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 162.

[4] See *e.g. MacKay v Manitoba*, [1989] 2 SCR 357 at 361-62 [***MacKay***]; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 767-68; *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59 at 83; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1099 [***Danson***]; *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 15; and *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 35, citing *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

[5] Morgan, *supra* note 3 at 162.

[6] *MacKay*, *supra* note 4 at 361.

[7] *Danson*, *supra* note 4 at 1100-01, citing Beetz J in *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 at 113.

Court has described the absence of a factual basis as "not just a technicality that could be overlooked," but rather a "flaw that is fatal."[8]

15. This seemingly simple proposition has wide-reaching implications for public interest standing. If a directly affected litigant must demonstrate a sufficiently concrete factual foundation to proceed in a constitutional challenge, surely a public interest litigant must do the same.

16. Indeed, a concrete factual setting is particularly important in public interest litigation. As one commentator notes: "[s]ome have argued that the model of 'concrete adverseness' effectively frames issues with 'sufficient specificity.' As the adversarial model is relaxed to include plaintiffs representing larger swaths of the public, issues lose this frame and the courts threaten to turn into a forum for resolving social issues beyond its scope."[9]

17. The discretionary public interest standing inquiry involves a balancing of several factors, all with a view to a purposive approach. However, that balancing *must* involve an examination of the factual underpinnings of a claim; not to assess whether those facts are provable, but to asses whether there is a concrete factual underpinning to the claim at all. Public interest standing rules ought not to be re-balanced in favour of permitting claims lacking a concrete factual foundation, lest public interest litigation become detached from the common law method and from this Court's foundational jurisprudence on the importance of facts in constitutional cases. Litigants would be able to bring private references asking courts to speculate on hypothetical future impacts which may never happen, something a litigant with standing cannot do.

B. Public interest litigants must present a concrete factual foundation: hypothetical cases should not be entertained

18. Where a public interest litigant launches a claim without pleading specific, concrete facts, it is substantively attempting to litigate on the basis of hypothetical assertions: allegations of how legislation *may* be interpreted or *may* be applied, rather than allegations about how legislation *has actually* impacted any particular persons or groups.

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[8] *MacKay*, *supra* note 4 at 361-62 and 366.

[9] Matt Malone, "Standing in the Way: Comparing Constraints on Access to Justice after the Liberalization of Public Interest Standing in Canada and Israel" (2017) 46:4 Advoc Q 451 at 457.

19. A non-specific assertion of a potential factual context is precisely the definition of a hypothetical.[10] In his text, Robert Sharpe (later Justice Sharpe) described the hypothetical in the following terms: "[a] question or issue may be described as hypothetical when it rests upon a factual assumption which may or may not be true or provable. A related but distinct problem is that of the abstract question, an issue which lacks a grounding in fact."[11]

20. Hypothetical claims give rise to a number of challenges. Such claims are ill-suited to the common law adjudication model, and raise concerns regarding the proper role of courts. This is why, at a minimum, a public interest litigant must plead a sufficiently concrete, non-hypothetical factual matrix in order to be granted standing to proceed.

a. Hypothetical claims are ill-suited to judicial determination

21. Hypothetical claims cannot be defined and assessed through the lens of standard litigation tools, and are ill-suited for judicial determination generally. As stated by (now Justice) Lorne Sossin, "[t]he rationale for not deciding hypothetical or abstract questions lies in their incompatibility with the common law method of adjudication, which depends on a live dispute between adversarial parties."[12]

22. It is incumbent on a public interest litigant to come to court with a pleading that asserts specific factual impacts – whether those impacts reflect the experience of a named plaintiff, or someone else. Further, standing should not be granted on the basis of a promise of a factual setting to come. Public interest litigants should not be permitted to ground their standing on hypothetical facts, and then spend the litigation process searching for evidence to establish these hypotheticals. That is a claim in search of a case.

23. Such an approach invites presumptive standing, skips over the normally robust pre-trial discovery litigation processes, and effectively invites litigation in the abstract. The question is not

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[10] Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto, ON: Carswell, 2012) at 48 and 71.

[11] Robert J Sharpe "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 335.

[12] Sossin, *supra* note 10 at 48.

merely an evidentiary one; it is a threshold question that should be assessed at the time standing is challenged.

24. Litigation does not take place merely by trial alone, and much litigation happens before parties ever step foot in a courtroom. This is as it should be – pre-trial processes are designed to elucidate claims, narrow issues, promote access to justice, and facilitate fair and just adjudication. Standard litigation tools, including documentary and oral discovery, are premised on the presence of specific factual assertions. These tools are not helpful if a claim is pled in the abstract.

25. Alberta's experience in defending an ongoing abstract claim provides a case example.

26. Alberta is in the process of defending a claim by a public sector union, alleging the *Critical Infrastructure Defence Act*[13] violates its *Charter* rights and those of its members. The claim was brought mere days after the legislation was proclaimed, and alleges that the *Act* "will" have a detrimental impact on the union's associational activities, presumably at some point in the future. Alberta unsuccessfully sought to strike the claim, asserting the claimants lacked both private and public interest standing to bring the claim in the absence of any particular factual allegations.[14] Although the Alberta Court of Queen's Bench agreed that the claimants lack private standing, it concluded the claim could proceed on the basis of "a reasonable hypothetical scenario."[15]

27. The nature of the factual assertions in the claim are prospective and hypothetical; they rest on factual circumstances which may or may not come to pass. Alberta cannot test an assertion of a prospective impact on associational activities via oral discovery and questioning. Alberta cannot examine records of the Plaintiffs which might support these assertions, as such records do not exist. The litigation effectively lobs a proposed interpretation of the legislation to the court, and asks the court to provide a legal opinion in the abstract on whether its interpretation is accurate and could violate *Charter* rights, devoid of any factual context.

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[13] SA 2020, c C-32.7.

[14] *Alberta Union of Public Employees v Her Majesty the Queen (Alberta)*, 2021 ABQB 371 [***AUPE v Alberta***].

[15] *Ibid* at paras 46-47, 49. The decision of the Alberta Court of Queen's Bench has been appealed to the Alberta Court of Appeal: Court of Appeal of Alberta File No. 2103-0148AC.

b. Hypothetical claims raise concerns about the proper role of courts

28. In addition to departing from the common law, adjudicating hypothetical claims under the guise of a relaxed public interest standing test raises concerns with the proper role of courts.[16]

29. At their core, courts are adjudicative, dispute-resolution tribunals. The presence of a concrete factual setting ensures that courts stay within their proper constitutional role. The comments by Laskin CJC, dissenting in ***Borowski (No. 1)*** are apposite on this point:

> The rationale of this policy [of requiring a claimant to be directly affected in order to bring a claim] is based on the purpose served by courts. They are dispute-resolving tribunals, established to determine contested rights or claims between or against persons or to determine their penal or criminal liability when charged with offences prosecuted by agents of the Crown. Courts do not normally deal with purely hypothetical matters where no concrete legal issues are involved, where there is no *lis* that engages their processes or where they are asked to answer questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law. Special legislative provisions for references to the courts to answer particular questions (which may be of a hypothetical nature) give that authority to governments alone and not to citizens or taxpayers [emphasis added].[17]

30. The United States Supreme Court put forward a similar and compelling observation in ***Duke Power***, where Justice Stevens noted: "whenever we are persuaded by reasons of expediency

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[16] See *e.g.* Sossin, *supra* note 10 at 152: "Any time a Court is asked to decide a case absent a live controversy, the proper sphere of judicial intervention and the separation of powers under Canada's constitution, is called into question." See also Sharpe, *supra* note 11 at 329: "The value or principle perhaps most frequently offered to justify not deciding such cases is the institutional role of the courts and the need to legitimize judicial review. The role of the courts is to decide actual disputes. Judicial pronouncements upon the constitutional validity of laws or practices may be seen as merely incidental to the task of deciding concrete cases. Courts are not entitled to pronounce upon constitutional issues at large or at will. From this perspective, judge-made-law (particularly when overruling the legislature) is only legitimate when it is the product of the adjudication of an actual dispute."

[17] *Borowski v Canada (Minister of Justice)*, [1981] 2 SCR 575 at 579 [***Borowski (No. 1)***]. See also Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford, UK: Hart Publishing, 2019) at 222.

to engage in the business of giving legal advice, we chip away at a part of the foundation of our independence and our strength."[18]

31. Finally, one member of the Alberta Court of Appeal put the matter pointedly, writing: "[k]nocking off legislation for hypothetical flaws is hard to distinguish from declaring it unconstitutional because the judicial branch thinks it knows better."[19]

32. Indeed, the carefully balanced ***Downtown Eastside*** framework already provides the necessary tools to consider the necessity of a concrete factual foundation, in light of the institutional capacity of courts – at both the first and third stages of the three-part inquiry.

33. At the first stage of the ***Downtown Eastside*** analysis, a court must ask whether the claim raises a "serious and justiciable" issue. Justiciability is concerned with the "proper role of the courts and their constitutional relationship to the other branches of government,"[20] including whether a court "has the institutional capacity and legitimacy to adjudicate the matter."[21] In assessing institutional capacity, courts are to consider whether "there is a sufficient factual and evidentiary basis for the claim."[22]

34. The third factor of the ***Downtown Eastside*** framework is even more explicit, directing courts to consider the prospective public interest claimant's capacity to bring the claim and to ask "whether the issue will be presented in a sufficiently concrete and well-developed factual setting."[23]

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[18] *Duke Power Co v Carolina Environmental Study Group Inc*, 438 US 59 (USNC, 1978) [***Duke Power***], cited in *Energy Probe v Canada* (1994), 17 OR (3d) 717 (Ont Gen Div) at 730-31.

[19] *R v Hills*, 2020 ABCA 263 at para 144, per Wakeling JA (concurring in the result).

[20] *Downtown Eastside, supra* note 1 at para 39, citing *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 631; see also *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 2 SCR 236 at 251-52.

[21] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 34.

[22] *Ibid*; see also Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada*, (Toronto: Carswell, 1986) at 173.

[23] *Downtown Eastside, supra* note 1 at para 51.

35. The importance of a concrete factual foundation is essential and should not be undermined through a re-balancing of the ***Downtown Eastside*** framework, with preference given to factors relating to access to justice and legality.

C. "Reasonable hypotheticals" cannot ground public interest standing

36. It has been suggested (including in this litigation[24]) that concrete facts are not required in all constitutional cases because the constitutionality of legislation can be assessed on the basis of "reasonable hypotheticals."[25] The prospect of a potential reasonable hypothetical does not, and cannot, ground public interest standing.

37. Reasonable hypotheticals have been used in assessing the constitutionality of legislation under ss. 7 and 12 of the *Charter*. However, this Court has *never* found that a reasonable hypothetical is a substitute for a claimant's standing. Rather, the Court has permitted consideration of hypothetical scenarios as part of assessing claims made by a claimant who already has standing.[26]

38. The availability of reasonable hypotheticals as an analytical tool does not mean that adjudicative facts are no longer required in constitutional cases, nor that constitutional cases can now be decided on a series of hypotheticals.[27] It cannot, and should not, be extended to permit standing in constitutional cases on the basis of hypotheticals.

39. If a further loosening of standing rules could essentially result in an ability to bring hypothetical claims devoid of a concrete factual setting, disconnected from any *lis* or live controversy, it would transform into an entitlement to bring a private reference. This would have significant precedential implications for constitutional claims. Across the country, litigation-minded public interest groups could bring their concerns about any piece of legislation to courts, asking legislation to be struck down on the basis of legal argument and legislative facts alone.

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[24] Application Response of CCD, filed August 15, 2018 at para 30 (Appellant's Record at 157); Respondent's Factum at para 74.

[25] See *e.g. AUPE v Alberta, supra* note 14 at para 49.

[26] *R v Nur*, 2015 SCC 15 at para 51.

[27] See *e.g.* comments in *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at paras 164-71.

Such an approach would be a significant departure from Canadian law, and bring the proper constitutional role of courts into question.

40. Private citizens have *no* ability to bring so-called "private references" to courts, nor should they. This limitation must necessarily extend to advocacy groups. The law of public interest standing ought not to countenance an approach that would effectively permit a private reference.

D. Conclusion

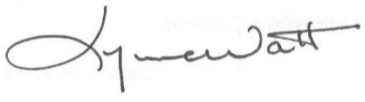
41. The law of public interest standing promotes a laudable and important goal: ensuring there are effective and practical ways to challenge state action in court. But at the same time, public interest standing should not be used to derogate from a court's essential role. Courts should be loathe to open the door to constitutional challenges from public interest litigants in the absence of any specific facts – simply based on hypothetical assertions by the litigant. Standing provides courts with an important tool to manage and screen out such claims at an early stage, ensuring "courts play their proper role within our democratic system of government."[28]

42. A public interest standing test that disregards concerns regarding the proper role of courts in favour of permitting amorphous, abstract, hypothetical claims to proceed departs too far from the purpose of standing law.

PART IV – COSTS

43. Alberta does not seeks costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of December, 2021.



for:

Leah M. McDaniel
Counsel for the Intervener,
Attorney General of Alberta

[28] *Downtown Eastside, supra* note 1 at para 1.

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	**Paragraph References** (to Factum)
Alberta Union of Public Employees v Her Majesty the Queen (Alberta), 2021 ABQB 371	26, 36
Borowski v Canada (Minister of Justice), [1981] 2 SCR 575	29
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Manitoba (Attorney General) v Metropolitan Stores Ltd, [1987] 1 SCR 110	14
Operation Dismantle v The Queen, [1985] 1 SCR 441	12
R v Edwards Books and Art Ltd, [1986] 2 SCR 713	12
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Rio Hotel Ltd v New Brunswick (Liquor Licensing Board), [1987] 2 SCR 59	12