S.C.C. File No.: 39430

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

B E T W E E N:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Respondent)

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

Respondent
(Appellant)

[*Style of cause continued on next page*]

FACTUM OF THE JOINT INTERVENERS FEDERATION OF ASIAN CANADIAN LAWYERS AND THE CANADIAN MUSLIM LAWYERS ASSOCIATION

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
fahad.siddiqui@nortonrosefulbright.com

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

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

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

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

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

INTERVENERS

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 mark.witten@gov.bc.ca Counsel for the Appellant	Olthuis Van Ert 66 Lisgar Street Ottawa, Ontario K2P 0C1 Dahlia Shuhaibar Tel: (613) 501-5350 Fax: (613) 651-0304 dshuhaibar@ovcounsel.com Agent for the Appellant
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 mfeder@mccarthy.ca Counsel for the Respondent	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 neffendi@blg.com Agent for the Respondent
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 elin@mandellpinder.com Counsel for 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 jeff.beedell@gowlingwlg.com Agent for 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 tdickson@jfklaw.ca Counsel for 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 jeff.beedell@gowlingwlg.com Agent for 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 kpsmith@ecojustice.ca Counsel for 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 greg@amlc.ca Counsel for 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 anita@asabarristers.com Counsel for 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 Ext: 102 Fax: (613) 695-8580 mfmajor@supremeadvocacy.ca Agent for Empowerment Council, Systemic Advocates in Addictions and Mental Health
Torys LLP 79 Wellington St. West Suite 3000, Box 270, TD South Tower Toronto, Ontario M5K 1N2 Andrew Bernstein Emily Sherkey Tel: (416) 865-7678 Fax: (416) 865-7380 abernstein@torys.com Counsel for Canadian Civil Liberties Association	Supreme Advocacy LLP 100 - 340 Gilmour Street Ottawa, Ontario K2P 0R3 Eugene Meehan, Q.C. Tel: (613) 695-8855 Ext: 101 Fax: (613) 695-8580 emeehan@supremeadvocacy.ca Agent for Canadian Civil Liberties Association
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 shanoum@lao.on.ca Counsel for 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, Ontario K1P 1J9 Nadia Effendi Tel: (613) 787-3562 Fax: (613) 230-8842 neffendi@blg.com Agent for 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 University of Toronto 78 Queen's Park Crescent Toronto, Ontario M5S 2C5 Cheryl Milne Kent Roach Tel: (416) 978-0092 Fax: (416) 978-8894 cheryl.milne@utoronto.ca Counsel for David Asper Centre for Constitutional Rights	Norton Rose Fulbright Canada LLP 45 O'Connor Street Suite 1500 Ottawa, Ontario K1P 1A4 Matthew J. Halpin Tel: (613) 780-8654 Fax: (613) 230-5459 matthew.halpin@nortonrosefulbright.com Agent for David Asper Centre for Constitutional Rights
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 christine.mohr@justice.gc.ca Counsel for 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 christopher.rupar@justice.gc.ca Agent for Attorney General of Canada
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 rdalziel@litigationchambers.com Counsel for Trial Lawyers Association of British Columbia	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 matthew.halpin@nortonrosefulbright.com Agent for Trial Lawyers Association of British Columbia

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 leah.mcdaniel@gov.ab.ca Counsel for 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 lynne.watt@gowlingwlg.com Agent for Attorney General of Alberta
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 somer@nccm.ca Counsel for National Council of Canadian Muslims	Supreme Advocacy LLP 100- 340 Gilmour Street Ottawa, Ontario K2P 0R3 Marie-France Major Tel: (613) 695-8855 Ext: 102 Fax: (613) 695-8580 mfmajor@supremeadvocacy.ca Agent for 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 spectork@gmail.com Counsel for Mental Health Legal Committee	Raven, Cameron, Ballantyne & Yazbeck LLP 220, avenue Laurier Ouest Suite 1600 Ottawa, Ontario K1P 5Z9 James Cameron Tel: (613) 567-2901 Fax: (613) 567-2921 jcameron@ravenlaw.com Agent for Mental Health Legal Committee

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 navanea@lao.on.ca Counsel for Canadian Association of Refugee Lawyers	
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 sharon.pratchler2@gov.sk.ca Counsel for 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 lynne.watt@gowlingwlg.com Agent for Attorney General of Saskatchewan
Pooran Law Professional Corporation 400 - 1500 Don Mills Road Toronto, Ontario M3B 3H4 Faisal Bhabha Madison Pearlman Tel: (416) 860-7572 Fax: (416) 860-7577 fbhabha@pooranlaw.com Counsel for Centre for Free Expression	Khalid M. Elgazzar 440 Laurier Avenue West Suite 200 Ottawa, Ontario K1R 7X6 Tel: (613) 663-9991 Fax: (613) 663-5552 ke@elgazzar.ca Agent for Centre for Free Expression

Alison M. Latimer 1200 - 1111 Melville Street Vancouver, British Columbia V6E 3V6 Tel: (778) 847-7324 alison@alatimer.ca Counsel for 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 DBosse@juristespower.ca Agent for John Howard Society of Canada and Queen's Prison Law Clinic
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 Yashoda.Ranganathan@ontario.ca Counsel for 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 mvincelette@juristespower.ca Agent for Attorney General of Ontario
Animal Justice 720 Bathurst Street Toronto, Ontario M5S 2R4 Kaitlyn Mitchell Scott Tinney Tel: (647) 746-8702 kmitchell@animaljustice.ca Counsel for Animal Justice	Power Law 130 Albert Street Suite 1103 Ottawa, Ontario K1P 5G4 Maxine Vincelette Tel: (613) 702-5573 Fax: (613) 702-5573 mvincelette@juristespower.ca Agent for 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 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 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 msheeley@osler.com Counsel for 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 glangen@osler.com Agent for Canadian Constitution Foundation

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PART I – OVERVIEW[1]

1. The Federation of Asian Canadian Lawyers (**FACL**) and Canadian Muslim Lawyers Association (**CMLA**, and together with FACL, the **Interveners**) respectfully intervene on one question: whether courts should be able to consider visible minority status when determining public interest standing.

2. The case law consistently emphasizes the importance of the challenges facing potential individual plaintiffs when determining standing.

3. At the same time, courts and scholars have recognized the unique challenges facing racialized Canadians in particular.

4. As not-for-profit organizations dedicated to addressing systemic barriers facing racialized communities, the Interveners respectfully submit that visible minority status should be a factor available for consideration as part of the public interest standing analysis.

PART II – STATEMENT OF POSITION

5. In clarifying the appropriate balance set out in *Downtown Eastside* on this appeal,[2] this Court should consider identifying the visible minority status of persons affected by legislation of questionable constitutionality as a potentially relevant consideration.

6. This recognition would assist in ensuring that courts are properly equipped to address the circumstances of racialized Canadians and would be consistent with (i) the goals of standing law, (ii) the principle that common law rules should be consistent with the *Charter*,[3] and (iii) the jurisprudence that recognizes the unique circumstances facing racialized Canadians.

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[1] The Interveners take no position on the facts of this appeal. The Interveners rely on the statement of the facts as set out in the Factum of the Appellant, the Attorney General of British Columbia at paras 1-30 [Appellant Factum].

[2] Appellant Factum at para 31(i); *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 [*Downtown Eastside*].

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

PART III – STATEMENT OF ARGUMENT

A. The Significance of the Socio-Economic Circumstances of Potential Plaintiffs

7. As this Court has stated, "There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[4]

8. Public interest standing facilitates challenges to legislation of questionable constitutionality harmful to the impecunious, marginalized, or those for whom carrying on litigation would be impractical. For example:

a. In *Downtown Eastside*, the Court specifically noted the impracticality of sex workers bringing a constitutional challenge due to (i) the fear of a loss of privacy and safety, (ii) the threat of potentially increased violence by clients, and (iii) the difficulty of individual litigants providing timely and appropriate instructions.[5]

b. In *Trial Lawyers Association*, the Court declared legislation imposing hearing fees that limited access to the courts unconstitutional. This remedy was only made possible because the Trial Lawyers' Association of British Columbia was granted leave to be added as a party in this Court and at the Court of Appeal.[6]

c. In *Chaoulli*, Justice Binnie noted that it would be unreasonable to expect seriously ailing persons to undertake a lengthy and costly systemic constitutional challenge given that their material, physical and emotional resources are likely to be focussed on their personal circumstances.[7]

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[4] *British Columbia Government Employees' Union v. British Columbia*, [1988] 2 S.C.R. 214, [1988] S.C.J. No. 76 at para 25.
[5] *Downtown Eastside*, *supra* note 2 at para 71.
[6] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at paras 68–69; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* [2013] S.C.C.A. No. 137, 2013 CarswellBC 1002.
[7] *Chaoulli v Quebec (Attorney General),* 2005 SCC 35, at para 189.

d. In 2019, the Canadian Civil Liberties Association (**CCLA**) was granted public interest standing by the Ontario Superior Court of Justice and successfully challenged the administrative segregation regime in federal penitentiaries.[8] The government did not challenge the CCLA's position that this was a reasonable and effective means of advancing the case given the difficulty administratively segregated inmates would have in bringing the lawsuit.[9]

e. In *Unishare Investments Ltd.*, MacPherson J. (as he then was) held that it is not reasonable or realistic to expect lower income individuals to mount a constitutional challenge.[10]

f. In *Fraser*, the court held that the harsh socio-economic realities and fear of reprisals experienced by foreign migrant agricultural workers constitute significant barriers to their participation in court challenges. As Ducharme J. explained, this group is "wholly absent from the Canadian constitutional landscape."[11]

9. These decisions illustrate that constitutional litigation is often not a level playing field. The potential plaintiffs in the above cases faced practical and systemic obstacles preventing them from challenging legislation opposite well-resourced and publicly-funded government entities.

B. Consideration of Race in Public Standing is Consistent with Other Principles of Law

i. Substantive Equality and Common Law Rules

10. In *Salituro*, Justice Iacobucci stated that "where principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule

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[8] *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243.
[9] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491, at paras 13–14.
[10] *Unishare Investments Ltd v. R*, [1994] OJ No. 1079, 18 O.R. (3d) 603 (Ont Gen Div), aff'd [1997] O.J. No. 4009 (Ont CA), leave to appeal refused, [1997] S.C.C.A. No. 616 (SCC).
[11] *Fraser v Canada (Attorney General)*, [2005] OJ No. 5580, 2005 CarswellOnt 7457 (SC) at paras 111–119.

closely," and, in appropriate circumstances, the "rule ought to be changed."[12]

11. Recognizing race as a potential consideration would align standing law with *Charter* jurisprudence.[13]

12. As this Court recently stated, "substantive equality is the 'animating norm' of the section 15 framework" and demands attention to the "full context of claimant groups' situations" and the persistent systemic disadvantages they face.[14]

13. Indeed, the consideration of claimant groups' circumstances is a common feature of section 15 jurisprudence:

a. In *Fraser*, this Court held that a particular pension plan that discriminated against job-sharing employees violated section 15 as it perpetuated the historical disadvantages experienced by women who typically rely on job-sharing arrangements to assist with child care commitments.[15]

b. In *Kapp*, this Court held that a communal fishing license, which was designed to ameliorate the historical socioeconomic disadvantages experienced by Aboriginal peoples, furthered the objective of substantive equality and was not discriminatory.[16]

c. In *Eldridge*, this Court determined that facially neutral rules, which failed to provide deaf patients with medical interpretation services, constituted a

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[12] *R v. Salituro*, [1991] 3 S.C.R. 654, 50 O.A.C. 125 [*Salituro*] at para 52; see also, *Hill v. Church of Scientology Toronto*, [1995] 2 S.C.R. 1130, 24 O.R. (3d) 865 at para 94 (the Court reiterated that the interpretation of the common law in accordance with *Charter* values is "simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values").
[13] *Charter*, *supra* note 3 at s 15.
[14] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 42 [*Fraser*] citing: *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 2; *R v. Kapp*, 2008 SCC 41 at paras 15–16; *Québec (Procureure générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para 17.
[15] *Fraser*, *supra* note 14 at paras 3–5.
[16] *R v. Kapp*, 2008 SCC 41 at paras 3, 59–61.

> discriminatory practice that denied deaf persons' equal benefit of the law by impairing their abilities to communicate with health care providers and increasing the risk of ineffective treatment.[17]

14. This Court has also drawn on *Charter* jurisprudence to elaborate common law rules regarding publication bans;[18] doctor patient privilege;[19] the tort of defamation and the defenses of fair comment and responsible communication on matters of public interest.[20]

15. The Interveners respectfully submit that a similar approach is warranted in this case. Clarification that the public interest standing analysis may account for all of the circumstances facing racialized communities would better align the law of standing with this Court's approach to substantive equality. In so doing, the Court would also ensure that the views of such communities are properly accounted for in legislative challenges.

ii. Other Areas of Law

16. The law's capacity to account for the unique experiences of particular groups is evident in a range of cases.

17. The Court of Appeal for Nova Scotia recently confirmed the need to consider the heritage of African-Canadians in the sentencing context. Writing for a unanimous court, Derrick J.A. concluded that failing to consider the unique experiences of African-Canadians during sentencing may amount to an error of law.[21]

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[17] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] SCJ No. 86 at paras 4, 79.

[18] *Dagenais v. Canadian Broadcasting Corp*, [1994] 3 S.C.R. 835, 76 O.A.C. 81 at 878.

[19] *M(A) v. Ryan*, [1997] 1 S.C.R. 157, 143 D.L.R. (4th) 1 at paras 30–31 [*Ryan*].

[20] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at paras 2, 16, 36; *Grant v. Torstar Corp*., 2009 SCC 61 at paras 7, 44, 87, 126.

[21] *R v. Anderson*, 2021 NSCA 62 at para 118; See also *R v Morris*, 2021 ONCA 680.

18. Other adjudicative contexts have accounted for Indigenous heritage as well: bail hearings;[22] parole hearings;[23] Ontario review board hearings;[24] dangerous offender designation determinations;[25] administrative appeals from solitary confinement;[26] court marshal proceedings;[27] applications to withdraw guilty pleas;[28] child protection hearings;[29] stays of proceedings in the criminal context;[30] regulatory fines;[31] professional misconduct hearings;[32] faint hope applications;[33] and extradition proceedings.[34]

19. These decisions reflect the ongoing "progressive attunement" of Canada's legal system, which is evolving to better account for the unique experiences of marginalized groups.[35]

20. The Interveners respectfully submit that it is appropriate for the law of standing to do the same.

C. The Circumstances of Visible Minority Communities

i. Judicial Commentary on Immutable Characteristics

21. Public interest standing must account for the circumstances actually faced by the individuals directly affected by legislation.[36]

22. Courts in Canada and the United States have taken judicial notice of the intersection between certain immutable characteristics and systemic barriers, historic prejudice and present

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[22] See e.g. *R v. Robinson*, 2009 ONCA 205; *R v. Hope*, 2016 ONCA 648; *R v. Louie*, 2019 BCCA 257.
[23] See e.g. *R v. Jensen*, [2005] O.J. No 1052 C.R.R. (2d) 126, 27 C.R. (6th) 240 (ON CA).
[24] See e.g. *R v. Sim*, [2005] 78 O.R. (3d) 183, 203 O.A.C. 128 (ON CA).
[25] See e.g. *R v. Moise*, 2015 SKCA 39.
[26] See e.g. *Hamm v. Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440.
[27] See e.g. *R v. Levi-Gould*, 2016 CM 4003.
[28] See e.g. *R v. Ceballo*, 2019 ONCJ 612.
[29] See e.g. *Alberta (Child, Youth and Family Enhancement Act, Director) v. JSA*, 2019 ABPC 32.
[30] See e.g. *R v. Miller*, 2019 ONCJ 480.
[31] See e.g. *R v. Doxtator*, 2019 ONCJ 420.
[32] See e.g. *Law Society of Upper Canada v. Terence John Robinson*, 2013 ONLSAP 18.
[33] See e.g. *R v. Abram*, 2019 ONSC 3383.
[34] See e.g. *United States of America v. Leonard*, 2012 ONCA 622.
[35] *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para 78.
[36] *Downtown Eastside*, *supra* note 2 at para 71.

hardship. For example:

a. In *Gladue*, Justices Cory and Iacobucci recognized that "many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions."[37]

b. In *Ipeelee*, this Court held that "courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."[38]

c. In *Thornburg v. Gingles*, a Supreme Court of the United States (**SCOTUS**) decision on voter legislation, Justice Brennan noted that the "opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination."[39]

d. In *Gratz v. Bollinger*, a SCOTUS decision on scholastic admission policies, Justice Ginsburg noted in dissent that "unemployment, poverty, and access to health care vary disproportionately by race."[40]

ii. Race and Socio-Economic Status

23. Government of Canada publications and census data confirm the unfortunate intersection between visible minority status and financial hardship in this country.[41]

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[37] *R v. Gladue*, [1999] 1 S.C.R. 688, 171 DLR (4th) 385 at para 68 [*Gladue*].
[38] *R v. Ipeelee*, 2012 SCC 13 at para 60 [*Ipeelee*].
[39] *Thornburg v. Gingles*, 478 US 30 at 64.
[40] *Gratz v. Bollinger*, 539 US 244 at 299.
[41] See e.g., Government of Canada, "Towards a Poverty Reduction Strategy: A backgrounder on poverty in Canada" October 2016 (Statistics Canada surveys confirm that "visible minorities face additional challenges that make them more vulnerable to low income."); Government of Canada, National Council of Welfare Reports: "Poverty Profile: Special Edition" (2012) (Census data demonstrates that on average, visible minorities earn about $5,000 less from employment than

24. The link between visible minority status and financial hardship has also been thoroughly explored in secondary sources.[42] For instance, in 2019, the Canadian Centre for Policy Alternatives published a report that found racialized workers "experienced higher unemployment rates, lower earnings, and employment segregation in the labour market."[43]

25. The Interveners submit that a broad and flexible conception of public interest standing best serves the goals of safeguarding the rule of law and ensuring access to justice. The approach should ensure that members of vulnerable communities directly affected by legislation, including racialized communities, should have their day in court even if they lack the means or capacity to sustain private litigation.[44]

PART IV – COST SUBMISSIONS

26. The Interveners do not seek costs, and request that no costs order be made against them.

PART V – ORDER REQUESTED

27. The Interveners make no request in respect of the outcome of the appeal. Rather, the Interveners respectfully request that the Court consider the above submissions in coming to its decision.

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their non-visible minority counterparts.), citing Government of Canada, "Data Tables, 2016 Census" (2016).

[42] See e.g. Jean Kunz, Anne Milan & Sylvain Schetagne, *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income* (Toronto: The Foundation, 2000); see also Jeffrey Reitz & Rupa Banerjee, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research on Public Policy, 2007) 489–545.

[43] Sheila Block, Grace-Edward Galabuzi & Ricardo Tranjan, "Canada's Colour Coded Income Inequality" (Canadian Centre for Policy Alternatives 2019) at p. 6.

[44] *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at para 18.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF DECEMBER, 2021.

NORTON ROSE FULBRIGHT CANADA LLP

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

Fahad Siddiqui LSO#: 67001A
Tel: (416) 216-2424
Fax: (416) 216-3930
E-mail: fahad.siddiqui@nortonrosefulbright.com

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

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