Court File No. 39430

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

B E T W E E N:

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APPELLANT

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT

-and-

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(Title of proceedings continued on next page)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal raises the following fundamental question: Can a constitutional challenge to legislation be brought by a public interest organization in the abstract, in the absence of adjudicative facts concerning directly affected individuals?

2. Allowing cases to proceed in the absence of evidence about directly affected individuals deprives courts of the type of evidence they need. It also puts a strain on judicial resources, thus reducing access to justice, and requires courts to step beyond their proper constitutional role and into the policy realm. Accordingly, public interest standing should not be granted if the case lacks the necessary "concrete adverseness" for the proper adjudication of the constitutional issues raised.

3. The British Columbia Court of Appeal's (BCCA) approach to the test for public interest standing upset the careful balance struck in *Downtown Eastside* by according "particular weight" to the principles of legality and access to justice.[1] Review of this Court's jurisprudence amply demonstrates that constitutional issues are best decided when a court is presented with a sufficiently concrete and well-developed factual setting. This is especially so in the Charter context, including in "systemic" challenges, as the factual and legal analysis at all stages is often complex and multifaceted, and will involve both collective and individual dimensions.

4. In view of this, the balanced approach to public interest standing adopted by this Court in *Downtown Eastside Sex Workers United Against Violence Society* should be maintained. The existing approach is a flexible and discretionary test that balances "the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action". If adopted, the approach of the BCCA would erode lower courts' ability to exercise their crucial gatekeeping role. Rather than increasing access to justice, recalibration of the test along the lines proposed by the respondent would have the opposite effect.

5. The same considerations that were weighed by the Court in 2012 hold true today and no recalibration is warranted. The test continues to strike the right balance "between ensuring access

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[1] Order of the British Columbia Court of Appeal, August 26, 2020, per Frankel, Dickson and DeWitt-VanOosten, JJ.A., reported as *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241, at paras 79, 86 [BCCA Reasons].

to the courts and preserving judicial resources".

B. Statement of Facts

6. The Attorney General of Canada ("Canada") accepts the facts as described in the BCCA decision.

PART II – QUESTION IN ISSUE

7. Canada's submissions in this appeal are directed at the question of whether, and in what circumstances, a court may permit a constitutional challenge to legislation to be brought by a public interest organization in the abstract, in the absence of adjudicative facts concerning directly affected individuals.

PART III – STATEMENT OF ARGUMENT

A. This Court's balanced approach to public interest standing in *Downtown Eastside* should be maintained

8. The test for public interest standing has developed significantly since the Supreme Court first granted a taxpayer standing in a class action in 1974.[2] In the decades following, the courts carefully and incrementally refined the test in order to balance access to justice and preservation of judicial resources.[3] In 2012, some two decades after it last considered the issue, the Court in *Downtown Eastside* altered the test in two significant ways. First, it held that a public interest litigant need only show that the proposed suit was "*a*" as opposed to the "*only*" reasonable and effective means to bring the case to court. Second, it adopted a flexible, discretionary approach, confirming that the three factors are not to be treated as a rigid checklist but rather are considerations to be "weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing".[4]

9. *Downtown Eastside* has been described by some as a necessary recalibration, and deemed a "major shift" and a "win for access to justice".[5] At the same time, it preserved courts' ability to

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[2] *Thorson v Attorney General of Canada*,), [1975] 1 SCR 138.
[3] *Cdn Council of Churches v Canada (Min of Employment and Immigration)*, [1992] 1 SCR 236.
[4] *Canada (Attorney General) v Downtown Eastside Sex Workers united Against Violence Society*, 2012 SCC 45, [*Downtown Eastside*] at para 3.
[5] Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter:

maintain control over their own processes, both for reasons of judicial economy, as well as ensuring that disputes continue to be determined on the basis of a concrete, rather than abstract, factual footing. This ensures that courts are not unnecessarily drawn into the realm of policy-making.[6]

10. The Court provided guidance on how courts should assess whether a particular means of bringing a matter to court is "reasonable and effective". The Court explained that "[b]y taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, *whether the issues are presented in a context suitable for judicial determination in an adversarial setting* and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality".[7]

11. The Court's examples of the matters to be taken into account, including the plaintiff's capacity to bring forward a claim, the public interest in the case, realistic alternatives to standing, and the potential impact of the proceedings on the rights of those directly affected, illustrate the need for a flexible, practical and pragmatic approach.[8] Where a court is conducting this examination in respect of a public interest organization that seeks standing and there is no private interest plaintiff before the court, particular attention should be given to the nature of the case, and the type of evidence required to properly adjudicate the factual and legal issues and to fashion appropriate remedies.

B. A concrete factual matrix is essential to the proper adjudication of *Charter* claims

12. In our adversarial system of justice, the central function assigned to our courts is to adjudicate disputes based on the pleadings and evidence placed before them. This principle is reflected in the jurisprudence in a number of areas, including mootness, references, declaratory proceedings and unripe cases.[9]

Canada (AG) v Downtown Eastside Sex Workers United Against Violence", (2013) 22:3 Constitutional Forum, 21 at 21, 27, **Book of Authorities of the Attorney General of British Columbia (AGBC BOA) Tab 3**.

[6] *Downtown Eastside*, at paras 30, 39.

[7] *Downtown Eastside*, at paras 50-51 [emphasis added].

[8] *Downtown Eastside*, at para 51.

[9] Lorne M. Sossin, Boundaries of Judicial Review, The Law of Justiciability in Canada, 2nd Ed.,

13. This Court has emphasized the importance of a proper pleading setting out a valid cause of action to the adjudication of constitutional claims.[10] Similarly, courts have long recognized the need for a concrete factual matrix in Charter adjudication, and have accordingly insisted on the necessity of a robust evidentiary record.[11] There are at least two reasons for this insistence. First, while an individual plaintiff may not be necessary in all cases, most constitutional challenges, and in particular, those relating to the Charter, will require a detailed and comprehensive assessment of the factual context, which can only be accomplished by examining the circumstances of affected individuals. In the rare cases where there is no individual rights-holder before the court, this should be provided by way of affidavit evidence. Second, the absence of an adjudicative context risks the court stepping outside its proper constitutional role and entering into the realm of policy making.

1. Charter analysis requires adjudicative facts

14. When claims are framed in the abstract, or on the basis of speculation as opposed to the lived experience of those directly impacted, the court is deprived of the material facts necessary to ground the legal analysis. Indeed, this Court has cautioned against "a too abstract, too theoretical, approach to constitutional interpretation", noting that "[t]he Constitution, … must be applied on a realistic basis taking account of the practical, living facts to which a legislature must respond."[12]

15. The jurisprudence of this Court demonstrates the centrality of direct evidence when considering breach, justification and remedies. This is especially important in the s. 15 context, where courts must determine whether the impugned distinction perpetuates, reinforces or exacerbates disadvantage.[13] This can only be achieved through a "contextual, not formalistic, [examination] grounded in the actual situation of the group and the potential of the impugned law

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(Toronto, ON: Carsewell, 2012), pp 33, 39 and110, **AGBC BOA, Tab 6**.. See also: Robert J. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in Robert J. Sharpe, ed. Charter Litigation (Toronto: Butterworths, 1987) at 327-356, **AGBC BOA, Tab 9**; *Poitras v Sawbridge Band*, 2013 FC 910 at paras 26-30; *Phantom Mortgage Corp v Kyle*, 2015 BCSC 931 at para 20.

[10] *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at paras 43, 11.

[11] *Mackay v Manitoba*, [1989] 2 SCR 357, *Reference re Same-Sex Marriage*, 2004 SCC 79.

[12] *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 795 per La Forest J. concurring in the result, cited with approval by the majority in *Reference Re Provincial Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 181. See also: *McKinney v University of Guelph*, [1990] 3 SCR 229, at para 125.

[13] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para 50 [*Fraser*].

to worsen their situation."[14]

16. In the context of adverse effect discrimination claims, this Court has noted that "[e]vidence about the claimant group's situation, on its own, may amount to merely a 'web of instinct' if too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim."[15] In most cases, the presence of a directly affected individual before the court is key to ensuring that the impact of the impugned law on the claimant group can be fully understood, and importantly, grounded in the actual setting in which the allegations arise.

17. This Court's decision in *Gosselin* illustrates this point. Ms. Gosselin argued that Quebec legislation violated sections 7 and 15 of the Charter because it required persons under 30 to attend training programs in order to receive the same welfare benefits as their older counterparts. The majority of the Court found that she had not established any adverse effect on the class she represented, and rejected her argument that the impugned regime failed to address the needs and circumstances of the group because the ability to "top up" the basic entitlement by participating in programs was more theoretical than real. The majority affirmed the findings of the trial judge who had cautioned against generalizing from Ms. Gosselin's experience, and against over-reliance on opinion statements by experts in this regard, given the absence of any evidence to support the experts' claims about the material situation of individuals in the under-30 age group. [16] The trial judge had emphasized, and the majority agreed, that the record contained no first-hand evidence supporting Ms. Gosselin's claim about the difficulties with the programs, and no indication that she was representative of the under-30 class.[17]

18. Similarly, with respect to the section 1 analysis, courts charged with assessing the proportionality of limits placed on Charter rights in pursuit of government objectives do so with "close attention to detail and factual setting".[18] A good example of this is *Alberta v. Hutterian Brethren of Wilson Colony*. In considering whether a limit on religious freedom was justified, and specifically whether there was proportionality between its deleterious and salutary effects, this

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[14] *Withler v Canada (Attorney General)*, [2011] 1 SCR 396, at para. 37
[15] *Fraser*, at para 60.
[16] *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429, at paras 45-47 [*Gosselin*].
[17] *Gosselin*, at paras 8, 47.
[18] *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, at para 87.

Court recognized that it could not stop at a "bare assertion by a claimant that a particular limit curtails his or her religious practice".[19] The Court had to "go further and evaluate the degree to which the limit actually impacts on the adherent."[20]

19. The claimants asserted that the universal photo requirement for all Alberta drivers' licenses, presented them with an invidious choice between violating a tenet of their religion and accepting the end of their rural communal life. The Court tested this assertion against the claimants' evidence, and ultimately found, based on a careful review of the record, that there were practical alternatives available to mitigate the law's impact. The Court in *Hutterian Brethren* recognized that failing to conduct this further factual inquiry "would cast an impossibly high burden of justification on the state".[21]

20. It is well established that governments seeking to justify limits on Charter rights must ground their arguments in concrete and sufficiently particularized public policy objectives. Vague and symbolic objectives such as "enhancing respect for the law" and "appropriate punishment" have been rightly questioned as overly abstract, and susceptible to distortion. In this Court's words, such abstraction reduces Charter litigation to "a contest of 'our symbols are better than your symbols'".[22] This concern applies to all stages of Charter litigation.

21. The need for adjudicative facts is equally important with respect to the determination of appropriate remedies. In *Schachter*, the Court was critical of Canada's decision not to attempt a justification under s. 1 at trial, as this "deprive[d] the Court of access to the kind of evidence that a s. 1 analysis would have brought to light" which the Court said left it in a "difficult position in attempting to determine what remedy is appropriate in the present context".[23]

22. This jurisprudence demonstrates that laws should not be struck or decision-making overturned on the basis of abstract or speculative claims. In the normal course, *Charter* challenges should be grounded in the lived reality of plaintiffs directly affected by the impugned law or government action. It is only through the evidence of such individuals that courts are properly equipped to assess the actual impact of the law. Without the presence of directly affected plaintiffs,

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[19] *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, at para 90 [*Hutterian*].
[20] *Hutterian*, at para 90.
[21] *Hutterian*, at para 90.
[22] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, at paras 22-23.
[23] *Schachter v Canada*, [1992] 2 SCR 679, at 695.

courts are hampered in their ability to appreciate the concrete, often messy reality critical to understanding the full complexity of the problems that governments and legislatures routinely face. This is particularly important in challenging institutional settings such as prisons, where decision-making implicates not just the individual before the court but the safety of the institution as a whole and other rights-holders. The presence before the court of individual claimants whose evidence can be tested, and whose circumstances reflect the reality of such institutional settings, is critical to the fair adjudication of complex Charter claims.

23. In the circumstance that a law may be difficult to challenge due to barriers faced by potential litigants, it may be appropriate for a public interest organization to bring a Charter challenge in the absence of an individual co-plaintiff. However, this should be the exception, not the norm, and courts should ensure that governments are able to vigorously test the evidence of directly affected individuals, which will then enable it to properly assess an alleged breach, a government's justification of such a breach, and to fashion an appropriate remedy.

2. Other forms of constitutional challenges similarly require adjudicative facts

24. The Charter jurisprudence concerning the need for adjudicative facts is a "subset of an older, broader rule expressed in non-Charter constitutional cases that constitutional issues should not be decided unless a full and adequate evidentiary record is before the Court."[24]

25. Though there are exceptions and each case must be assessed on its own facts,[25] challenges to the legality of regulatory decision-making, or the review of legislation under the division of powers, will often require a court to assess not only legislative facts, but also adjudicative facts as to the impact of the action, or in division of powers cases, the purpose and effects of the law. For example, when assessing whether the jurisdiction over labour relations or working conditions falls within the provincial or federal authority, the court will need to examine the factual character of the work's essential operational nature.[26]

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[24] *Canada (Citizenship and Immigration) v Cdn Council for Refugees*, 2021 FCA 72, para 79 [*Cdn Council for Refugees*].
[25] *Danson v Ontario*, [1990] 2 SCR 1086, at 1099-1101.
[26] *Tessier ltée c Québec (Commission des lesions professionnelles)*, 2012 SCC 23, at paras 18, 37-38; *Northern Telecom Ltd v Communication Workers of Canada (1979)*, [1980] 1 SCR 115 at para 32. See also: *Alberta (Attorney General) v. British Columbia (Attorney General)*, 2021 FCA 84.

3. The absence of an adjudicative context risks courts going beyond their proper role

26. While courts need not insist on the presence of an affected individual participating as a plaintiff, they should be cautious in accepting a norm whereby abstract challenges are routinely brought by public interest groups in the absence of adjudicative facts. Assessing the constitutionality of legislation or state action on the basis of competing expert opinions, general social science evidence, speculative facts, or the presumed impacts of a law, is likely to have detrimental effects on the administration of justice, the separation of powers and access to justice.

27. While social science research is an important source of evidence that may assist courts in the adjudication of complex social issues, it may also be prone to both technical bias and issue bias.[27] That is, it is sometimes informed by the policy orientation of academic researchers and expert witnesses and as a result may not fully or accurately reflect the perspectives and experiences of the different populations affected by a given law. When the scope of the available social science research is limited in this way, it may not include the experiences and concerns of the populations in contemplation of Parliament in enacting laws and policy. While awareness by courts of the possibility of issue bias may mitigate these concerns, these limitations increase the risk that courts will be drawn into the domain of policymaking when presented with abstract claims that lack an adjudicative context. The requirement for adjudicative facts, which demonstrate the lived experience of those most directly affected by legislation or government action at issue is an important means to guard against this risk.

C. Systemic challenges should not proceed without being grounded in individual facts

28. Framing the litigation as "systemic" should not fundamentally alter the court's analysis of public interest standing.[28] The term has been used variously to describe a standard Charter challenge to one or more statutory provisions, adverse effects claims relating to government action or inaction; and broad-based challenges brought against entire legislative schemes. While both individual and public interest litigants have increasingly sought to frame constitutional and non-constitutional claims as systemic, such labelling does not alter the threshold for standing, the

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[27] Haak, Deborah M., "The Good Governance of Empirical Evidence about Prostitution, Sex Work, and Sex Trafficking in Constitutional Litigation", 46 Queen's LJ 187 (2021), at 206, **Attorney General of Canada's Book of Authorities, Tab 1.**

[28] AGBC Factum, at para 73.

requirements of proper pleadings, or the evidentiary burden.[29] Accordingly, the BCCA's suggestion that systemic claims are a unique form of litigation that warrant a relaxation of the test for standing should be firmly rejected.

29. When the infringement of individual rights is alleged in a systemic challenge, adjudicative fact evidence of both an individual and collective dimension must be tendered, through lay and expert witnesses' oral or written testimony, which is then capable of being tested through cross-examination. As this Court noted in *Moore*, "[t]he considerations and evidence at play in a group complaint may undoubtedly differ from those in an individual complaint, but the focus is always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground."[30] While this comment was made in the context of a human rights complaint, there is "considerable overlap" with s. 15 of the Charter, "particularly with regard to fundamental premises."[31]

30. The Charter provides for "the unremitting protection of individual rights and liberties."[32] In the particular context of s. 15, this Court has noted that the term "individual" was used intentionally.[33] Generally, systemic discrimination claims are often concerned with attitudes or assumptions that may be diffuse in an institutional setting, or subtly embedded in the structures of decision-making. Even in such cases, the bottom line question of discrimination operates at the level of the individual.

31. It is acknowledged that public interest organizations have an important role to play in systemic challenges, both in terms of resources and their broad perspective, yet all s. 15 claims must be grounded in a concrete factual context detailing the experience of directly affected individuals. In those cases where a public interest plaintiff is granted standing and no directly affected individual is before the court as a plaintiff, the organization should be expected to tender evidence of directly affected individuals by way of affidavit.

32. The same approach is warranted with regard to Charter guarantees generally, including s.

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[29] *Canadian National Railway Co v Canada (CHRC)*, [1987] 1 SCR 1114, as cited in *Moore v British Columbia (Education)*, 2012 SCC 61, at paras 59-60 [*Moore*]. See also: *Greenwood v HMQ*, 2021 FCA 186 at para 153.
[30] *Moore*, at para 59.
[31] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at 175; *British Columbia (Public Service Employee Relations Commission)*, [1999] 3 SCR 3, at para 48.
[32] *Hunter v Southam Inc*, [1984] 2 SCR 145, at 155.
[33] *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429, at paras 72-73.

7, where courts must determine whether an individual has been deprived of life, liberty or security of the person. Recently, in *Ontario (Attorney General) v. Bogaerts*, which concerned the statutory powers granted to inspectors and agents for the enforcement of animal protection legislation, the Ontario Court of Appeal expressed dismay "that the constitutional arguments were advanced in the abstract without a proper factual foundation". The court attributed this in part to the public interest standing ruling, noting it would have been preferable had the case been advanced by a person directly affected, or on a proper record.[34] Similarly, in the challenge to the safe third country regulations, the Federal Court of Appeal reiterated how essential a sufficient evidentiary record is for a proper consideration of Charter issues, particularly where "the allegation of unconstitutionality stems from the alleged effects of the impugned provision".[35]

33. When correctly applied, *Downtown Eastside* guards against this kind of abstract decontextualized Charter challenge. Under the existing test, courts determining whether the proposed suit is a reasonable and effective means of bringing an issue forward, must do so "in light of the need to ensure full and complete adversarial presentation."[36] That cases continue to reach the appellate level without the necessary factual foundation recommends, not a diminishment of the concern for "concrete adverseness", but reaffirmation of the importance of maintaining the balance struck by this Court in *Downtown Eastside.*

PART IV - SUBMISSIONS ON COSTS

34. The AGC is not seeking costs and no costs should be ordered against him.

PART V - NATURE OF ORDER SOUGHT

35. The AGC requests that the appeal be determined in accordance with the above principles.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 2nd day of December, 2021.

Mohr, Christine

Digitally signed by Mohr, Christine
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Christine Mohr
Of Counsel for the Attorney General of Canada

[34] *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876, at paras 32-33, 39.
[35] *Cdn Council for Refugees* at paras 74-80.
[36] *Downtown Eastside*, at para 49.

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