

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

BETWEEN:

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APPELLANT  
(Respondent)

AND:

**COUNCIL OF CANADIANS WITH DISABILITIES**

RESPONDENT  
(Appellant)

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## **PART I: OVERVIEW**

1. In this appeal, the Court is asked to address the legal test for public interest standing, with particular reference to the standing of public interest advocacy organizations.

2. The West Coast Prison Justice Society (“WCPJS”) supports a robust and expansive approach to public interest standing in which public interest advocacy organizations are given broad license to advance litigation on behalf of those who cannot meaningfully advance litigation themselves. WCPJS submits that this approach to public interest standing is consistent with this Court’s flexible, discretionary and purposive approach to the “reasonable and effective means” aspect of the *Borowski* test for public interest standing, as well as its recent statements on the constitutional importance of access to justice and its critical role in ensuring the rule of law.

3. WCPJS submits that an expansive approach to public interest standing will benefit many equity-seeking groups, but none moreso than prisoners. In these submissions, WCPJS will focus on the access to justice issues faced by prisoners in Canadian institutions. Prisoners face an array of barriers to access to justice which make it uniquely difficult to bring their claims forward for a merits determination. As such, prisoners often require the assistance of a public interest advocacy organization to properly vindicate their rights or advance meritorious claims which affect their interests.

4. The assistance which can be provided by public interest advocacy organizations is limited when their advocacy is tied to an individual plaintiff, who may abandon his or her case, accept a settlement offer, or have his or her issues rendered moot by a change in status. Moving beyond the requirement for an individual plaintiff will benefit public interest advocacy groups in their strategic litigation efforts, and accordingly benefit all prisoners.

## **PART II: STATEMENT OF POINTS IN ISSUE**

5. What is the proper approach to the test for public interest standing, in light of the significant barriers to access to justice experienced by prisoners and other equity-seeking groups?

### PART III: STATEMENT OF ARGUMENT

6. Like many equity-seeking groups in Canada, prisoners are not far removed from a time when they were prohibited from accessing the courts to protect their rights and advance claims against those who visited harm upon them.

7. It is difficult to fully appreciate the barriers to access to justice faced by prisoners in modern-day Canadian society without understanding the historical underpinnings of those barriers, and in particular the denial of prisoners' civil rights and access to courts over the long history of the common law. As such, WCPJS will begin its submissions with a brief review of the historical denial of prisoners' rights and access to justice in the Canadian legal tradition, before moving to a discussion of the modern-day barriers that prevent prisoners from meaningful access to justice.

#### Civil death and the "hands off" doctrine

8. As early as the reign of Edward III in the 14<sup>th</sup> Century, citizens convicted of felonies were stripped of effectively all civil rights in a process known as "civil death".<sup>1</sup> In Articles 30 to 38 of the *Civil Code of Lower Canada*, civil death was imposed on anyone condemned to death or condemned to "any other corporal punishment for life".<sup>2</sup> The property of those subjected to civil death was confiscated by the Crown, and the civil dead were prevented from being parties to lawsuits or giving evidence in a court of law.<sup>3</sup>

9. By the end of the 19<sup>th</sup> Century, civil death had been abolished in many common law traditions, but prisoners were still largely treated as though they enjoyed no civil rights.<sup>4</sup> The vestiges of civil death led to the "hands off" doctrine, which stated that the decisions of prison authorities and matters of prison administration were immune from judicial scrutiny and constitutional law.<sup>5</sup>

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<sup>1</sup> *Sauvé v Canada (Chief Electoral Officer)* (1999), 180 DLR (4<sup>th</sup>) 385 (FCA) at paras 22, 63, rev'd 2002 SCC 68; see also *May v Ferndale Institution*, 2005 SCC 82 [*Ferndale*] at para 22.

<sup>2</sup> *Civil Code of Lower Canada*, art 31-33.

<sup>3</sup> *Civil Code of Lower Canada*, art 35, 36.

<sup>4</sup> *Ferndale* at para 23.

<sup>5</sup> Lisa Kerr, "Contesting Expertise in Prison Law", 2014 60:1 McGill LJ 43 at 64. 4862-1823-2581, v. 1

10. In *R v Institutional Head of Beaver Creek Camp*,<sup>6</sup> the Ontario Court of Appeal explained the rationale for the hands off doctrine as follows:

Since [a convicted person's] right to liberty is for the time being non-existent, all decisions of the officers of the Penitentiary Service with respect to the place and manner of confinement are the exercise of an authority which is purely administrative, provided that such decisions do not otherwise transgress rights conferred or preserved by the Penitentiary Act. Likewise, the withdrawal of or restrictive interference with privileges, the normal punishment for a disciplinary offence which is not flagrant or serious, does not affect any civil right of the inmate as a person: and if the exercise of the disciplinary powers inherent in the administrative functions of the institutional head results only in the withdrawal of privileges, this is not the exercise of a power which so affects the civil rights of the prisoner as a person as to endow the withdrawal or interference with the character of a judicial act.<sup>7</sup>

11. The hands off doctrine effectively immunized prisons from public scrutiny through the courts, and placed prison officials in a position of untrammelled power over incarcerated persons, leading to rampant abuse and illegal conduct.<sup>8</sup> Unsurprisingly, this resulted in unrest among prison populations, culminating in a series of riots in the 1970s and corresponding reviews of prison administration.<sup>9</sup>

12. Following the prison unrest and a subsequent reassessment of the “hands off” doctrine, courts began to slowly recognize the humanity and inalienable civil rights of prisoners. In its landmark death penalty decision in *Furman v Georgia*, the United States Supreme Court (per Brennan J) wrote as follows about the inherent rights of prisoners:

An individual in prison does not lose “the right to have rights”. A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a “person” for purposes of due process of law and equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts.<sup>10</sup>

13. Canadian courts formally abandoned the “hands off” doctrine with this Court’s decision in *Martineau v Matsqui Institution*,<sup>11</sup> in which a prisoner had pursued a writ of *certiorari* with

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<sup>6</sup> *R v Institutional Head of Beaver Creek Camp*, (1968), 2 DLR (3d) 545 (Ont CA) [*Beaver Creek*].

<sup>7</sup> *Beaver Creek* at para 20.

<sup>8</sup> Debra Parkes, “The ‘Great Writ’ Reinvigorated? *Habeas Corpus* in Contemporary Canada”, 2012 36:1 Man LJ 351 at 353.

<sup>9</sup> *Ferndale* at para 25.

<sup>10</sup> *Furman v Georgia*, 408 US 238; see also *R v Miller and Cockriell* (1975), 63 DLR (3d) 193 (BCCA) at p 265, aff’d [1977] 2 SCR 680.

<sup>11</sup> *Martineau v Matsqui Institution*, [1980] 1 SCR 602 [*Martineau*].  
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respect to a decision of the Matsqui Institution's disciplinary board to sentence him to 15 days of solitary confinement. Dickson J, as he then was, wrote as follows:

In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.<sup>12</sup>

14. In 1992, the federal government formally ended the "hands off" doctrine by enacting the *Corrections and Conditional Release Act*,<sup>13</sup> which entrenched the concept that "offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted" as a guiding principle of corrections law in Canada.<sup>14</sup>

#### Modern day barriers to prisoners' access to justice

15. Although the "hands off" doctrine was abandoned in common law over 40 years ago, and in statute nearly 30 years ago, Canadian prisoners still face substantial barriers which render their ability to access justice illusory in many cases. In 1996, the Arbour Report decried the breakdown of the rule of law at Canadian prisons, noting that despite the proliferation of rules governing every aspect of prison life, prisons were effectively lawless states in which prisoners had little recourse to the protections afforded by the law to other citizens. Justice Arbour concluded that in Canadian prisons "[t]he Rule of Law is absent, although rules are everywhere."<sup>15</sup>

16. Little has changed since the Arbour Report, and the challenges faced by prisoners attempting to access justice remain insurmountable in many cases. This is a significant problem which should raise concern in this Court. This Court has made clear that access to justice is fundamental to our constitutional arrangements,<sup>16</sup> access to justice is a precondition

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<sup>12</sup> *Martineau* at p 622.

<sup>13</sup> *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

<sup>14</sup> CCRA at s 4(d).

<sup>15</sup> Canada, Commission of Inquiry Into Certain Events at the Prison for Women in Kingston (Ottawa: Public Works and Government Services Canada, 1996) at p 181.

<sup>16</sup> *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 41.

to the rule of law,<sup>17</sup> and ensuring access to justice is the greatest challenge to the rule of law in Canada today.<sup>18</sup> This Court has zealously advocated for access to justice for a variety of constituencies, and the present case offers it an opportunity to improve access to justice for the very constituencies who are still deprived of such access.

17. In *AIC Limited v Fischer*, this Court identified a variety of procedural and substantive barriers which can limit a litigant's access to justice, including:

- Limited economic means;
- Ignorance of the availability of substantive rights;
- Ignorance of the fact that significant injury has occurred;
- Limited language skills;
- Frail emotional or physical state;
- Fear of reprisals; and
- Alienation from the legal system.<sup>19</sup>

18. Each of these barriers apply to prisoners and operate to prevent prisoners from meaningfully exercising their rights. In this section, WCPJS will concentrate on the barriers that have the most impact on prisoners, and which could be best ameliorated by a robust and expansive approach to public interest standing in which public interest advocacy groups are permitted to advance claims on behalf of prisoners without the need for an individual prisoner to act as plaintiff.

19. It is well-established that Canadian prisoners typically lack the financial resources necessary to retain counsel to advance claims on their behalf.<sup>20</sup> While incarcerated, prisoners are paid a pittance for their labour, have a portion of their earnings deducted for things such as lodging and telephone usage, and are charged exorbitant prices for clothing and supplemental

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<sup>17</sup> *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and Mani-Utenam)*, 2020 SCC 4 at para 214; see also *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at para 25.

<sup>18</sup> *Hryniak v Mauldin*, 2014 SCC 7 at para 1.

<sup>19</sup> *AIC Limited v Fischer*, 2013 SCC 69 [*Fischer*] at para 27.

<sup>20</sup> Canada, Standing Senate Committee on Human Rights, *Human Rights of Federally-Sentenced Persons*, June 2021 at pp 85-86 [Standing Senate Committee on Human Rights Report].  
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food from their remaining funds.<sup>21</sup> In *Canada (Attorney General) v McArthur*,<sup>22</sup> this Court acknowledged that “[w]ith some notable exceptions, prison inmates are not rich people.”<sup>23</sup>

20. In *R v Bird*,<sup>24</sup> this Court recently recognized that there are “realistic concerns” regarding prisoners’ ability to engage with the legal system in a timely and accessible manner. These concerns include a potential lack of financial resources to retain counsel, previously noted in *McArthur*, as well as an inability to navigate the procedural elements of a court proceeding, and the difficulty of advancing a claim to hearing before the issue is rendered moot.<sup>25</sup>

21. Regardless of the strength of a prisoner’s claim, a case runs the risk of mootness when the prisoner is released from segregation or a Structured Intervention Unit (“SIU”) or paroled.<sup>26</sup> While time spent in segregation or SIUs can vary from prisoner to prisoner and institution to institution, it typically pales in comparison to the time necessary to bring a claim to hearing and determination. This issue is particularly pronounced in provincial prisons, where sentences must be less than two years and are often far shorter.

22. Although courts occasionally elect to address moot claims when the issue is of significance, many claims made by prisoners are dismissed as moot upon the release of the prisoner, or alternatively the release of the prisoner from segregation if the claim is based on the placement of the prisoner in segregation, and are never adjudicated on their merits.

23. With respect to their emotional and physical state as litigants, prisoners are much more likely than the general population to experience significant mental health challenges, whether predating their time in prison or arising as a result of the circumstances of their confinement.<sup>27</sup> Correctional institutions are ill-equipped to provide mental health services to prisoners, which

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<sup>21</sup> Standing Senate Committee on Human Rights Report at pp 85-86.

<sup>22</sup> *Canada (Attorney General) v McArthur*, 2010 SCC 63 [*McArthur*].

<sup>23</sup> *McArthur* at para 11.

<sup>24</sup> *R v Bird*, 2019 SCC 7 [*Bird*].

<sup>25</sup> *Bird* at paras 57-60, 126-129.

<sup>26</sup> Debra Parkes et al, “Listening to Their Voices: Women Prisoners and Access to Justice in Manitoba”, 2008 26:1 Windsor YB Access Just 85 at 89-90.

<sup>27</sup> John Howard Society, “Broken Record: The Continued Criminalization of Mental Health Issues”, 2021 at p 13 (accessed online at: <https://johnhoward.on.ca/wp-content/uploads/2021/01/Broken-Record.pdf>) [Broken Record].



further erodes prisoners' ability to commence and maintain claims when their rights are violated.<sup>28</sup>

24. Prisoners face practical barriers to access to justice resulting from their residence in a correctional institution, which alienates them from the legal system in several important ways. Institutional rules and procedures restrict prisoners' access to counsel, such as restrictions on telephone usage during normal business hours when counsel is available to speak with clients.<sup>29</sup> When prisoners are able to connect with counsel by phone, their telephone calls are often monitored by correctional officers.<sup>30</sup> Those prisoners who seek to represent themselves are confronted with byzantine grievance and judicial review procedures and prison libraries with hopelessly out of date legal resources.<sup>31</sup> These problems are even more pronounced for inmates with disabilities, who rarely receive accommodations to assist them in meaningfully engaging their right to access to justice and are therefore denied access to justice by virtue of their disability.<sup>32</sup>

25. In addition to the various barriers arising out of their mental health, lack of financial resources and the circumstances of their confinement, prisoners in correctional institutions also face serious risk of reprisals for filing grievances or otherwise enforcing their rights. Reprisals can take the form of restriction of privileges, harassment, physical assault, interference with correspondence and visits, arbitrary discipline action, and lack of support for access to certain programs or conditional release.<sup>33</sup> In some cases, reprisals may also come from fellow prisoners, who act out against peers who have taken steps to upset the status quo and raise concerns. Unsurprisingly, the risk of reprisals, whether by correctional officers or fellow prisoners, has a chilling effect on prisoners' willingness to advance claims or raise issues which could spur reprisals.

26. The aforementioned barriers, which affect all prisoners to some extent, are even more difficult for prisoners in isolation to overcome. It is widely accepted that isolation imposes severe psychological stress on prisoners, causing both physical and mental harm. Negative

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<sup>28</sup> Broken Record at p 13.

<sup>29</sup> Standing Senate Committee on Human Rights Report at p 182.

<sup>30</sup> Standing Senate Committee on Human Rights Report at p 182.

<sup>31</sup> Standing Senate Committee on Human Rights Report at pp 179-181.

<sup>32</sup> Standing Senate Committee on Human Rights Report at p 182.

<sup>33</sup> Standing Senate Committee on Human Rights Report at p 180.

health effects can be observed after just a few days in segregation, and prolonged placements can cause permanent harm.<sup>34</sup> Prisoners in isolation or segregation also face additional barriers with respect to access to counsel. In the past, certain institutions had fully prohibited counsel visits for prisoners in segregation.<sup>35</sup>

Public interest standing as a means to overcome barriers to prisoners' access to justice

27. In *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence*,<sup>36</sup> this Court adopted a flexible, discretionary and purposive approach to the aspect of the test for public interest standing in *Borowski*<sup>37</sup> as to whether there exists other reasonable and effective means of bringing the issue before the courts.<sup>38</sup> Within that flexible, discretionary and purposive approach, Cromwell J noted as a guiding principle the importance of access to justice for disadvantaged persons.<sup>39</sup> Cromwell J also stated that the plaintiff's resources, expertise and capacity to advance a claim were important factors to consider in the analysis.<sup>40</sup>

28. In light of the many barriers faced by prisoners and other equity-seeking groups in their attempts to access justice, WCPJS submits that the guidance from *Downtown Eastside* is best served by a broad approach to public interest standing in which public interest advocacy groups are given license to bring claims on behalf of disadvantaged groups without the necessity of finding and supporting an individual plaintiff who has suffered direct harm as a result of the impugned policy or action.

29. Using prisoners as a signal example, the individual plaintiff in question is unlikely to have the resources, expertise or capacity to bring and maintain a claim, even with the able assistance of a public interest advocacy group. If an individual plaintiff has the resources,

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<sup>34</sup> *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at para 16; *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 at paras 72-77; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at para 90.

<sup>35</sup> Standing Senate Committee on Human Rights Report at p 181; see also West Coast Prison Justice Society, "Solitary by Another Name: The Ongoing Use of Isolation in Canada's Federal Prisons", November 2020 at p 53 (accessed online at: <https://prisonjustice.org/wp-content/uploads/2020/11/Solitary-by-another-name-report.pdf>).

<sup>36</sup> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45 [*Downtown Eastside*].

<sup>37</sup> *Minister of Justice of Canada v Borowski*, [1981] 2 SCR 575.

<sup>38</sup> *Downtown Eastside* at para 51.

<sup>39</sup> *Downtown Eastside* at para 51.

<sup>40</sup> *Downtown Eastside* at para 51.

expertise and capacity to bring a claim, he or she may nevertheless be unwilling to do so, given the risk of reprisals by correctional officers and the high cost of “speaking out” as it relates to the prisoner’s relationship with correctional officers and prison administrators.

30. Claims which are brought by prisoners are at risk of dismissal for mootness if the prisoner is released or has his or her status otherwise change, which renders nugatory all work done on the prisoner’s case prior to the dismissal. Lastly, given their often precarious financial position and their extreme level of deprivation, prisoners’ claims are vulnerable to settlement offers designed to stifle otherwise worthwhile claims for a small portion of what would be required to settle a similar claim brought by a plaintiff with the resources and capacity of a non-incarcerated person.

31. WCPJS acknowledges that there is a risk that expanding this Court’s approach to public interest standing will result in a surfeit of claims brought by public interest advocacy groups. However, this risk is low, as public interest advocacy groups do not have the resources to advance claims unless those claims are critical to their core mandate and the needs of the communities they serve. Moreover, even if a robust approach to public interest standing were to result in a small increase in claims brought by public interest advocacy groups, any additional expenditure of judicial resources on such claims would be justified by the amelioration of the aforementioned harms caused by the many barriers to access to justice experienced by Canadian prisoners.

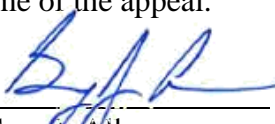
#### **PART IV: COSTS**


32. WCPJS seeks no order for costs and asks that no order for costs be made against it.

#### **PART V: NATURE OF ORDER SOUGHT**

33. Pursuant to the Order of Justice Rowe dated August 17, 2021, WCPJS has been granted leave to present oral argument at the hearing of this appeal for five minutes. As noted above, WCPJS takes no position on the outcome of the appeal.

DATED: December 3, 2021

  
 \_\_\_\_\_  
 Greg J. Allen

  
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 Nojan Kamoosi

Counsel for the Intervener, West Coast Prison Justice Society

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**PART VII — LEGISLATION AT ISSUE**