Court 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, 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 AND 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 FOR REFUGEE LAWYERS, WEST COAST LEGAL EDUCATION AND ACTION FUND, 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 INTERVENERS, 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

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

ARCH Disability Law Centre
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7

Mariam Shanouda
Jessica De Marinis
Tel: 416.482.8255 Ext. 2224
416.482.8255 Ext. 2232
Fax.: 416.482.2981
Email: shanoum@lao.on.ca
demarij@lao.on.ca

Counsel for the Interveners,
Advocacy Centre for Tenants Ontario,
ARCH Disability Law Centre,
Canadian Environmental Law Association,
Chinese and Southeast Asian Legal Clinic,
HIV and AIDS Legal Clinic Ontario and
South Asian Legal Clinic Ontario

Borden Ladner Gervais LLP
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3562
Fax: 613.230.8842

Email: neffendi@blg.com

Agent for the Interveners,
Advocacy Centre for Tenants Ontario,
ARCH Disability Law Centre,
Canadian Environmental Law Association,
Chinese and Southeast Asian Legal Clinic,
HIV and AIDS Legal Clinic Ontario and
South Asian Legal Clinic Ontario

ORIGINAL TO: **Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

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
emily.lapper@gov.bc.ca

Counsel for the Appellant,
Attorney General of British Columbia

Gib Van Ert Law
148 Third Avenue
Ottawa, ON K1S 2K1

Dahlia Shuhaibar

Tel: 613.501.5350
Fax.: 613.651.0304
Email: dahlia@gibvanertlaw.com

Agent for the Appellant,
Attorney General of British Columbia

McCarthy Tétrault LLP
2400 – 745 Thurlow Street
Vancouver, BC V6E 0C5

Michael A. Feder, Q.C.
Katherine Booth
Kevin Love
Tel: 604.643.5983
Fax: 604.622.5614
Email: mfeder@mccarthy.ca
kbooth@mccarthy.ca
klove@clasbc.net

Counsel for the Respondent,
Council for Canadians with Disabilities

Borden Ladner Gervais LLP
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Agent for the Respondent,
Council for Canadians with Disabilities

Attorney General of Canada
Department of Justice,
National Litigation Sector
400 – 120 Adelaide Street West
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
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: 416.941.2351
Fax: 613.954.1920
Email: christopher.rupar@justice.gc.ca

Agent for the Intervener,
Attorney General of Canada

Attorney General of Ontario
Constitution 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
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: 613.702.5573
Fax: 613.702.5566
Email: mvincelette@juristespower.ca

Agent for the Intervener,
Attorney General of Ontario

Attorney General 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
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Saskatchewan

Alberta Justice Constitutional and Aboriginal Law
1000, 10025 – 102A Avenue
Edmonton, AB T5J 2Z2

Leah M. McDaniel
Tel: 780.422.7145
Fax: 780.643.0852
Email: leah.mcdaniel@gov.bc.ca

Counsel for the Intervener,
Attorney General of Alberta

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

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
2001 – 400 University Avenue
Toronto, ON M5G 1S5

Anita Svigeti
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

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

Torys LLP
3000 – 79 Wellington Street
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. 101
Fax: 613.695.8580
Email: emeehan@supremeadvocacy.ca

Agent for the Intervener,
Canadian Civil Liberties Association

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 Canada LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Matthew Halpin

Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Agent for the Intervener,
David Asper Centre for Constitutional Rights

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
dcheater@ecojustice.ca

Counsel for the Intervener,
Ecojustice Canada Society

Hunter Litigation Chambers Law Corporation
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 Canada LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Matthew Halpin

Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Agent 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: 613.254.9404 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

Agent for the Intervener,
National Council of Canadian Muslims

Mental Health Legal Committee
2201 – 250 Yong Street
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
220, avenue Laurier Ouest
Suite 1600
Ottawa, ON K1P 5Z9

James Cameron
Tel: 613.567.2901
Fax: 613.567.2921
Email: jcameron@ravenlaw.com

Agent for the Intervener,
Mental Health Legal Committee

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
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Agent for the Intervener,
British Columbia Civil Liberties Association

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

JFK Law Corporation
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1

Tim Dickson
Jason Harman
Tel: 604.687.0549
Fax: 604.687.2696
Email:tdickson@jfklaw.ca

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

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

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

PooranLaw Professional Corporation
400 - 1500 Don Mills Road
Toronto, ON M3B 3H4

Faisal Bhabha
Madison Pearlman
Tel: 416.860.7572
Fax: 416.860.5755
Email: fbhabha@pooranlaw.com

Counsel for the Intervener,
Centre for Free Expression

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

Tel: 613.663.9994
Fax: 613.663.5552
Email: ke@elgazzar.ca

Agent for the Intervener,
Centre for Free Expression

Norton Rose Fulbright Canada LLP
3000 – 222 Bay Street
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 Canada LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Matthew Halpin
Tel: 613.780.8654
Fax: 613.230.5459
Email:matthew.halpin@nortonrosefulbright.com

Agent 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
Fax: n/a
Email: alison@alatimer.ca

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

Power Law
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Darius Bossé
Tel: 613.702.5566
Fax: 613.702.5566
Email: dbosse@juristespower.ca

Agent 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: 547.746.8702
Fax: n/a
Email: kmitchell@animaljustice.ca

Counsel for the Intervener,
Animal Justice

Power Law
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: 613.702.5573
Fax: 613.702.5566
Email: mvincelette@juristespower.ca

Agent for the Intervener,
Animal Justice

Public Interest Law Centre
100 – 287 Broadway Street
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
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Darius Bossé

Tel: 613.702.5566
Fax: 613.702.5566
Email: dbosse@juristespower.ca

Agent 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
1 First Canadian Place, P.O. Box 50
Toronto, ON K5X 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
900 – 340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen

Tel: 613.787.1015
Fax: 613.235.2867
Email: glangen@osler.com

Agent for the Intervener,
Canadian Constitution Foundation

Table of Contents

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Public interest standing has been, and must remain, a fundamental exercise of judicial discretion aimed at addressing access to justice barriers for persons who are unable to bring forward a claim on their own. In the seminal decision of *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*,[1] this Honourable Court interpreted and applied the public interest standing test purposively and flexibly with this goal in mind.[2] The Coalition of Specialty Community Legal Clinics (the "Coalition") intervenes in this appeal to ensure that the test continues to be interpreted and applied in this manner.

2. The Coalition's client communities are comprised of marginalized and equity-seeking groups including low-income tenants and those living in precarious housing, persons with disabilities, persons living with and affected by HIV, persons from racialized communities, and persons with intersecting identities. These individuals have a history of marginalization and exclusion, and disproportionately experience rights violations.

3. Marginalized and equity-seeking communities often face insurmountable barriers in accessing justice. Public interest standing is intended to be a mechanism by which the rights of these individuals can be advanced notwithstanding a constellation of intersecting societal factors that prevent individuals from doing so. The test for standing must be applied and interpreted in a way that is alive to the realities of the barriers faced by marginalized groups.

B. Statement of Facts

4. The Coalition takes no position on the facts of this appeal.

---

[1] 2012 SCC 45 [***Downtown Eastside***].
[2] *Downtown Eastside*, at paras 20 and 23.

PART II – STATEMENT OF ISSUES

5. At issue in this appeal is the application of the test for public interest standing, including consideration of access to justice. In this respect, the Coalition's submissions are limited to three points:

a) the test for public interest standing must be grounded in context about the actual barriers to accessing justice;

b) courts should only deny public interest standing in the clearest of cases; and

c) the mere existence of parallel litigation is not sufficient to deny public interest standing.

PART III – STATEMENT OF ARGUMENT

A. The test for public interest standing must be grounded in context about the actual barriers to accessing justice

6. Access to justice must be grounded in the real barriers facing marginalized communities and equity-seeking groups, whose rights are often advanced through public interest litigation. As one of the principles central to the development of public interest standing, the principle of legality requires that there must be practical and effective ways for persons to challenge a law or action.[3] Thus, access to justice risks becoming illusory without a comprehensive and concrete understanding of the barriers faced by marginalized and equity-seeking groups.

7. There are a myriad of barriers to accessing justice for equity-seeking and marginalized groups that extend beyond the proverbial 'getting through the door'. In Justice Cromwell's words, "[a]ccess to justice requires access to just results, not simply to process for its own sake."[4] As recognized in *Downtown Eastside* and reiterated more

---

[3] *Downtown Eastside*, at paras 31-33.
[4] *AIC Limited v Fisher*, 2013 SCC 69 at para 56 [***AIC Limited***].

recently by this Honourable Court in *Ontario (Attorney General) v G*,[5] the barriers include risk of public exposure, loss of privacy, fear for their personal safety, and the potential loss of social services, income assistance, or employment opportunities.[6]

8. The Coalition submits that appreciating the realities for many litigants requires consideration of the "matrix of personal, situational, and institutional and systemic factors,"[7] that make some legal issues and some litigants less likely to come before the court. Persons from equity-seeking groups, often experience pervasive barriers to their full inclusion and participation in Canadian society, including lack of adequate, affordable, accessible housing;[8] higher unemployment rates and lower wages sometimes related to their immigration status[9] or due to disability;[10] insufficient disability-related accommodations;[11] pervasive stigma;[12] precarious or no immigration status;[13] and being subject to systemic discrimination on the basis of protected and intersecting grounds.

9. These communities are often subject to isolation and marginalization, are more likely to be overregulated by the law, and may experience legal problems that are more complex in nature and raise novel rights violations.[14] Taken together, these circumstances illustrate that not all parties are able to come before the court and those who are able to appear, do not do so on an equal basis.

---

[5] 2020 SCC 38 [***Ontario v G***].
[6] See *Ontario v G*, at para 288, reasons of Justices Cote and Brown, dissenting in part, citing both *Downtown Eastside* as well as the majority reasoning at para 62.
[7] Lorne Sossin & Gerard J Kennedy "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45:4 Federal L Rev 707 at 710.
[8] *Tanudjaja v Canada*, 2014 ONCA 852.
[9] *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 345 and 350.
[10] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 56 [***Eldridge***].
[11] *Eldridge,* at para 56.
[12] *Ontario v G,* at paras 61-63; *R v Mabior*, 2012 SCC 47 at para 67.
[13] *Lavoie v* Canada, 2002 SCC 23 at para 45.
[14] Vasuda Sinha, Lorne Sossin & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 25:3 J L & Soc Pol'y 43 at 53; Reem Bahdi, "Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives" (2018) 96 Can Bar Rev 74.

B. Courts should only deny public interest standing in the clearest of cases

10. The Coalition respectfully submits that to realize access to justice for marginalized and equity-seeking groups, courts should exercise their discretion to deny public interest standing sparingly and only in the clearest of cases. This cautious approach represents a proactive way to remove barriers that hinder access to the legal system, and a concrete and practical acknowledgement of the existing barriers that prevent persons from marginalized or equity-seeking groups from advancing their rights on equal footing as others.

11. The denial of standing may have the effect of preventing the realization of justice for individuals who are likely not in a position to otherwise advance litigation on their own. The test for public interest standing must be applied in a manner that considers the impact on the parties before the court, and in particular the severity of bringing about a premature end to rights-based legal challenges.

12. While continuing to balance the important goals of facilitating access to justice with the efficient use of judicial resources, the Coalition submits that courts should err on the side of caution before denying standing to a public interest litigant. Instead of denying standing, the Coalition submits that the public interest standing analysis must expressly engage in an exploration of whether there are less blunt litigation tools available to ensure efficient use of judicial resources, including but not limited to a stay of proceedings[15] or demands for particulars.[16]

13. This approach aligns the test for public interest standing with other discretionary judicial powers. This Court has directed that where courts have discretion to order a

---

[15] *Downtown Eastside*, at para 64.
[16] *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 at para 88.

premature end to an action, they should use this power sparingly due to the impact on access to justice[17] and the "very serious consequences"[18] it may have on the parties.

14. In *Canada (Attorney General) v Confédération des syndicats nationaux*,[19] this Court considered its power to dismiss an action where it has no basis in law. Notably, similar to challenges to standing, the exercise of this power sought to strike the proper balance between management of judicial resources and facilitating access to courts. Balancing these interests, this Court offered the following commentary:

> The courts must be cautious in exercising this power, however. Although the proper administration of justice requires that the courts' resources not be expended on actions that are bound to fail, **the cardinal principle of access to justice requires that the power be used sparingly**, where it is clear that an action has no reasonable chance of success.[20]

15. Another example of similar judicial caution applies to motions to strike claims.[21] The test applied in these motions is whether it is plain and obvious, assuming the facts pled to be true, that the pleading discloses no reasonable prospect of success.[22] Granting a motion to strike truncates the course of litigation without a hearing on the merits. In these motions, the court weighs the competing interests of best use of judicial resources against allowing parties access to courts to advance novel claims.[23]

16. As contemplated in *R v Imperial Tobacco Canada Ltd*,[24] however, because the law is not static and unchanging, there is a particular interest in allowing novel claims to proceed.[25] In this regard, this Court's instructions were clear: given the severity of

---

[17] *Canada (Attorney General) v Confédération des syndicats nationaux*, 2014 SCC 49 at para 1 [***Syndicats Nationaux***].
[18] *Syndicats nationaux*, at para 17.
[19] *Syndicats nationaux*, at para 17.
[20] *Syndicats nationaux*, at para 1 [emphasis added].
[21] See for example, *Hunt v Carey Canada Inc*, [1990] 2 SCR 959.
[22] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [***Imperial Tobacco***].
[23] *Imperial Tobacco*, at paras 17-21.
[24] *Imperial Tobacco,* 2011 SCC 42.
[25] *Imperial Tobacco* at para 21.

truncating a claim at this stage, motions to strike must be granted with care, and courts must err on the side of permitting an arguable claim to proceed to trial.[26]

17. The Quebec Court of Appeal grappled with a similar tension in *Acadia Subaru c Michaud*.[27] Here, the Court considered its power to impose sanctions, up to and including dismissal, on claims that were unfounded or frivolous.[28] Notwithstanding the importance of ensuring efficient use of judicial resources, and especially in light of the early stage of the proceeding in this case, the Court was guided by the "traditional cautiousness" towards dismissing claims completely.[29]

18. Moreover, the Court highlighted its particular role in guarding against the risk that defendants may move to impose sanctions or dismiss claims improperly.[30] Proper access to the courts, as noted by the Court, is a value to be "preserved for both sides of a dispute," and it would be wrong to dismiss an action outright when the alleged abuse of process could have been remedied another way.[31]

19. These examples demonstrate a clear recognition by the courts that the discretion to end claims prematurely, without addressing the merits of the allegations, is a blunt and powerful instrument that ought to be used sparingly with a mind to access to justice.

20. While each of these examples contemplate different powers with different legal tests, the similar thread running through them is the balancing exercise between effective use of judicial resources and ensuring access to courts. Similarly, each power – like the test for public interest standing – engages with the potential for a severe and premature termination of an action without a hearing on its merits. Unlike the test for public interest standing, however, each of these discretionary powers is accompanied by a strong judicial statement about the cautionary manner in which the power should be exercised.

---

[26] *Imperial Tobacco* at para 21.
[27] 2011 QCCA 1037 [***Acadia Subaru***].
[28] *Acadia Subaru*, at paras 22-24.
[29] *Acadia Subaru*, at para 30.
[30] *Acadia Subaru*, at para 30.
[31] *Acadia Subaru*, at para 30.

21. Not only would similar direction with respect to denying public interest standing bring some alignment with other judicial powers, but it would also be consistent with the manner in which the test for public interest standing developed before the Federal Court and Federal Court of Appeal on applications for judicial review. Recently, in *Lukács v Canada (Transportation Agency),*[32] the Federal Court of Appeal affirmed that the discretion to deny standing on a preliminary motion should be "exercised sparingly – and explicitly."[33]

22. Moreover, this approach aligns with the objectives that have informed the application of the test since *Downtown Eastside*. In *Delta Air Lines Inc v Lukács*,[34] for example, this Court held that "[t]he whole point [of public interest standing] is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door … the objective is to hear from the plaintiffs or complainants "with most at stake".[35]

23. The test for public interest standing is a blunt and powerful instrument that can end claims prematurely, without addressing the merits of the allegations. To account for the powerful nature of this instrument, and in order to be alive to the realities faced by the marginalized and equity-seeking groups whose interests are often represented by public interest litigants, courts must exercise their discretion to deny public interest standing sparingly and only in the clearest of cases.

C. The mere existence of parallel litigation is not determinative of standing

24. For the purposes of assessing public interest standing, where potentially parallel legal proceedings exist, the court should consider a non-exhaustive list of factors to determine whether the proposed action is a reasonable and effective way to bring the

---

[32] 2021 FCA 141 [***Lukács***].
[33] *Lukács*, at para 33, citing *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13-14.
[34] 2018 SCC 2 [***Delta***].
[35] *Delta*, at para 18.

issue before the court.[36] The fact that another legal proceeding appears to raise similar legal issues should not be treated as dispositive.[37]

25. In *Downtown Eastside*, this Court directed that a court may consider the jurisdiction in which the parallel proceeding is commenced,[38] the legal issue and the perspective from which it is raised,[39] whether there are other litigation management strategies to ensure the efficient use of judicial resources,[40] and the scope of the legal challenge.[41]

26. Further, in *Downtown Eastside*, as a factor in this assessment, this Court considered the practical realities facing sex workers. Those considerations included the likelihood that other plaintiff sex workers would be in a position to advance a claim similar to the one brought by the proposed public interest litigant.[42]

27. The Coalition submits that this list of factors should be non-exhaustive. In addition to the considerations set out in *Downtown Eastside*, courts should also consider whether the parallel proceeding is an accessible and meaningful means of addressing the rights and interests of the particular client community in question.

28. What is accessible and meaningful will take colour from the nature of the parallel proceeding and the particular characteristics and needs of the community being represented by the proposed public interest litigant.

29. Applying this factor to the case at hand, and without commenting on the particular outcome that should be reached in this case, this factor would invite the court to consider how and to what extent the parallel class proceeding facilitated both procedural access to justice and substantive results for the class members[43] As instructed by this Court in

---

[36] *Downtown Eastside*, at para 63.
[37] *Downtown Eastside*, at paras 63 and 67.
[38] *Downtown Eastside*, at para 64.
[39] *Downtown Eastside*, at para 64.
[40] *Downtown Eastside*, at para 64.
[41] *Downtown Eastside*, at para 68.
[42] *Downtown Eastside*, at para 67.
[43] *AIC Limited* at para 24.

AIC Limited v Fischer, access to justice in the context of class actions includes consideration of both fair processes and access to just and effective remedies if the claims are established.[44]

30. Necessarily, this assessment must be alive to the myriad of actual barriers faced by marginalized and equity-seeking groups. These barriers shape the kinds of litigants and legal issues that come before the courts.[45] Courts must consider the full matrix of factors that impact the manner and extent to which litigants can commence and sustain legal challenges.

31. In the event that litigants are able to sustain the legal challenge to completion, courts must further consider the kinds of remedies available to them and whether those meaningfully address the allegation raised.[46] For example, some class action proceedings achieve effective outcomes, and some do not. In *Welsh v Ontario*,[47] Justice Perrell noted the limitations of the proposed settlement in that it failed to provide remedies to class members for discrimination in a variety of forms, deficiencies in service delivery, and violations of dignity.[48]

32. Therefore, a fulsome case by case assessment of non-exhaustive factors is required to determine whether a claim is a reasonable and effective means of bringing the issues before the court. The fact that another legal proceeding exists that appears to raise similar legal issues should not be treated as dispositive.

---

[44] *AIC Limited* at para 24.
[45] *AIC Limited* at para 31.
[46] Reem Bahdi, "Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives" (2018) 96 Can Bar Rev 74.
[47] 2018 ONSC 3217 [***Welsh* ONSC**], overturned on appeal, 2019 ONCA 41, on the issue of class counsel fees.
[48] *Welsh* ONSC at para 80.

PART IV – SUBMISSIONS ON COSTS

33. The Coalition does not seek costs and asks that costs not be awarded against them.

PART V – ORDER

34. The Coalition makes no submissions on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of December, 2021.

Per:

Mariam Shanouda
Jessica De Marinis

Counsel for the Interveners

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

PART VII – AUTHORITIES

Caselaw

No.	Authority	Paragraph Reference
1.	*AIC Limited v Fischer*, 2013 SCC 69 (CanLII)	7, 29, 30
2.	*Acadia Subaru c Michaud*, 2011 QCCA 1037 (CanLII)	17, 18
3.	*Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374	33
4.	*Canada (Attorney General) v Confédération des syndicats nationaux,* 2014 SCC 49 (CanLII)	13, 14
5.	*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII)	1, 6, 12, 24, 25, 26
6.	*Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 (CanLII)	8
7.	*Council of Canadians with Disabilities v British Columbia (Attorney General),* 2020 BCCA 241 (CanLII)	12
8.	*Delta Air Lines Inc. v Lukács,* 2018 SCC 2 (CanLII)	22
9.	*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 (CanLII), (1997) 151 DLR (4th) 577	8
10.	*Hunt v Carey Canada Inc,* [1990] 2 SCR 959 (CanLII), (1990) 74 DLR (4th) 321	15
11.	*Lavoie v* Canada, 2002 SCC 23 (CanLII)	8
12.	*Lukács v Canada (Transportation Agency),* 2021 FCA 141 (CanLII)	21
13.	*Ontario (Attorney General) v G*, 2020 SCC 38 (CanLII)	7, 8
14.	*R v Imperial Tobacco Canada Ltd.,* 2011 SCC 42 (CanLII)	15, 16
15.	*R v Mabior,* 2012 SCC 47 (CanLII)	8
16.	*Tanudjaja v Canada (Attorney General),* 2014 ONCA 852 (CanLII)	8

No.	Authority	Paragraph Reference
17.	*Welsh v Ontario,* 2018 ONSC 3217 (CanLII)	31
18.	*Welsh v Ontario,* 2019 ONCA 41 (CanLII)	31

Secondary Sources:

No.	Secondary Source	Paragraph Reference
1.	Lorne Sossin & Gerard J Kennedy "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45:4 Federal L Rev 707	8
2.	Reem Bahdi, "Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives" (2018) 96 Can Bar Rev 74	31
3.	Vasuda Sinha, Lorne Sossin & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 25:3 J L & Soc Pol'y 43	9