Court File No: 39430

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF 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 INTERVENER, MENTAL HEALTH LEGAL COMMITTEE
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

KAREN R. SPECTOR, KELLEY BRYAN, and C. TESS SHELDON

Karen R. Spector, Barrister & Solicitor
250 Yonge Street, Suite 2201
Toronto, Ontario, M5B 2L7
Tel: 416.995.3477
Email: spectork@gmail.com

Kelley Bryan
Perez Bryan Procope LLP
Suite 400, 43 Front Street East
Toronto, Ontario M5E 1B3
Tel/Fax: 416.320.1914
Email: kbryan@pbplawyers.com

C. Tess Sheldon
University of Windsor, Faculty of Law
410 Sunset Avenue
Windsor, Ontario, N9B 3P4
Tel: (519) 253-3000 x 2943
Email: tess.sheldon@uwindsor.ca

Counsel for the Intervener,
Mental Health Legal Committee

RAVEN, CAMERON, BALLANTYNE & YAZBECK LLP/s.r.l.
Barristers & Solicitors
1600-220 Laurier Avenue West
Ottawa, ON K1P 5Z9
Per: James G. Cameron
Tel: (613) 567-2901
Fax: (613) 567-2921
Email: jcameron@ravenlaw.com

Ottawa Agent for the Intervener,
Mental Health Legal Committee

- 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

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

COPIES TO:

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

Mark Witten
Emily Lapper
Tel: 604.660.5476
Fax: 604.660.2636
Email: mark.witten@gov.bc.ca

Counsel for the Appellant,
Attorney General of British Columbia

OLTHUIS VAN ERT
66 Lisgar Street
Ottawa, ON K2P 0C1

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

Ottawa Agent for the Appellant,
Attorney General of British Columbia

McCARTHY TÉTRAULT LLP
Suite 2400, 754 Thurlow Street
Vancouver, BC V6E 0C5

Michael A. Feder QC
Katherine Booth
Connor Bildfell
Tel: 604.643.7100
Fax: 604.643.7900
Email: mfeder@mccarthy.ca
kbooth@mccarthy.ca
cbildfell@mccarthy.ca

Counsel for the Respondent,
Council of Canadians with Disabilities

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

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

Ottawa Agent for the Respondent,
Council of Canadian 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

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

Sharon H. Pratchler, Q.C.
Tel: 306.787.5584
Fax: 306.787.9111
Email: Sharon.pratchler2@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
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 Szigeti
Maya Kotob
Sarah Rankin

Tel: 416.504.6544
Fax: 416.204.9562
Email: anita@asabarristers.com

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

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

Marie-France Major
Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

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.
Marie-France Major
Tel: 613.695.8855 Ext. 101
Fax: 613.695.8580
Email: emeehan@supremeadvocacy.ca

Agent for the Intervener,
Canadian Civil Liberties Association

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

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

THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
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

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

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

Elin Sigurdson
Monique Pongracie-Speier, Q.C.
Tel: 604.681.4146
Fax: 604.681.0959
Email: eli@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: naveen@lao.on.ca

Counsel for the Intervener,
Canadian Association of Refugee Lawyers

JFK LAW CORPORATION
340 – 1122 Mainland Street
Vancouver, VC V6B 5L1

Tim A. Dickson
Jason Harman
Tel: 604.687.0549
Fax: 604.687.2696
Email: tdiskson@jfklaw.ca
jharman@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:
fagad.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

1. The Mental Health Legal Committee (MHLC) intervenes in this appeal to offer the perspective of legal practitioners with expertise in providing client-instructed advocacy to persons with mental health disabilities. This case concerns the barriers facing persons with mental health disabilities bringing constitutional challenges, the criteria for establishing public interest standing and the resulting implications for access to justice.

2. The appellant asks this Court to impose new barriers on public interest organizations seeking standing to challenge the constitutionality of legislation by requiring the presence of an individual co-litigant or, alternatively, that they satisfy the evidentiary and legal burden of explaining the absence of an individual co-litigant. These new barriers would have a profoundly negative effect on equal access to justice for marginalized groups and place a higher burden on persons with mental health disabilities.

PART II – QUESTIONS IN ISSUE

3. The MHLC will address the adverse impact on persons with mental health disabilities that results from the proposed narrowing and/or misapplication of the test for public interest standing in constitutional cases.

PART III - STATEMENT OF ARGUMENT

4. The MHLC submits that:

(I) Public interest standing cannot rest solely on the particular factual context of an individual co-litigant, especially when challenging mental health legislation;

(II) The appellant's proposed requirement that public interest litigants explain the absence of an individual co-litigant has a discriminatory and disproportionate impact on persons with mental health disabilities; and

(III) The test for public interest standing must not be unduly narrowed through the imposition of procedural barriers, but should be affirmed as promoting equal access to justice.

I. Public interest standing must not depend on individual co-litigants, especially when challenging mental health legislation

5. The British Columbia Court of Appeal (BCCA) agreed that the respondent's constitutional challenge raises a serious justiciable issue, notwithstanding the lack of an individual co-litigant. The BCCA accepted that it was sufficient for a public interest litigant to plead facts arising from the application of legislation that directly affects all members of a defined and identifiable group. The BCCA also agreed that the Council of Canadians with Disabilities (CCD) could establish the evidentiary foundation for its claim through directly affected non-party individuals and expert witnesses, rather than through an individual co-litigant.[1]

6. Requiring an individual co-litigant will adversely impact persons with mental health issues by imposing an additional – often insurmountable – obstacle before impugned legislation can be reviewed by a court. Equal access to justice requires that the factual context for constitutional litigation respecting marginalized groups be adduced through non-party fact and expert witnesses. This is a proportionate approach to public interest standing which allows the lived experience of affected individuals to be placed before the court, while relieving marginalized persons of the heavy burden involved in initiating and sustaining public interest litigation personally.

7. The law of standing must not operate to compel an individual member of a marginalized group to personally bear the load of complex, contested and protracted public interest litigation, particularly if the impact of an impugned provision on that marginalized group is the subject of a constitutional challenge. To do otherwise would lead to an absurd and patently unjust formulation of the test for public interest standing. Yet this is the outcome urged upon this Court by the appellant.

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[1] *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 ["BCCA Reasons"], at paras 110-114.

8. As a practical matter, individuals with mental health disabilities who are adversely impacted by mental health laws face barriers in mounting and sustaining constitutional litigation for a multitude of reasons. These include:

(a) **Lack of funding to hire counsel:** The experience of mental health disabilities is statistically linked to poverty, constitutional litigation is complex and costly, and publicly available funding sources are severely limited.[2]

(b) **Lack of access to experienced and specialized counsel:** This may be a corollary of the lack of funding but may also stem from geographic differences in the availability of specialized counsel, or inadequate structural mechanisms to support psychiatric clients in identifying such counsel.[3]

(c) **Fluctuating capacity to retain and instruct counsel:** With rare exceptions, a lawyer's authority to act flows only from instructions received from a directly affected client who is capable of instructing counsel. This professional duty is no less significant for clients with mental health disabilities. In constitutional litigation, a client must be able to instruct the lawyer to commence the proceeding and remain capable to instruct counsel over the course of multiple years and numerous litigation stages. If an individual plaintiff loses the capacity to instruct counsel during protracted and complex constitutional litigation, the lawyer loses the authority to advance the case, no matter how meritorious, how important it is to the public interest, or how close the matter may be to completion.[4]

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[2] Legal Aid Ontario, "The Mental Health Strategy for Legal Aid Ontario" (11 March 2016); Centre for Disability Law and Policy, "Final Report: Access to Justice of Persons with Disabilities" (Galway: National University of Ireland, 2019) at 17*ff.*

[3] Jaime Baxter & Albert Yoon, "No Lawyer for a Hundred Miles?: Mapping the New Geography of Access of Justice in Canada" (2014) 52 Osgoode Hall LJ 9.

[4] Law Commission of Ontario, "Final Report on Legal Capacity, Decision-Making and Guardianship" (2017) at 203-204, 235, 239; A Procope, "The Ongoing History of Section 3 Counsel: Origins of the Role and A Path Forward" (Paper delivered at the conference "Your Comprehensive Guide to Section 3 counsel under the *Substitute Decisions Act*, Ontario Bar Association, Toronto, October 2020) at 4-12, 26-30; *Gligorevic v McMaster* 2012 ONCA 115 at paras 89-95, 101-104; *Sylvester v Britton*, 2018 ONSC 6620 at paras 60-64, 74.

(d) **Lack of, or fluctuating access to, socioeconomic supports and conditions that are necessary to a client's sustained availability to instruct counsel**: Persons with mental health disabilities may be underhoused[5], lack reliable access to means of communication, and face multiple intersecting systemic barriers to being available to instruct counsel. If an individual litigant with mental health disabilities loses their housing or cannot be located, counsel will be left without an instructing client and therefore unable to proceed.

(e) **Fluctuating willingness to continue multi-year contested litigation:** A client's willingness to continue in lengthy constitutional litigation may wax and wane for reasons unrelated to the merits and public importance of the case.[6] This may be due to their mental health disabilities or other challenges in their life.[7]

(f) **Privacy and dignity considerations in light of the open court principle:** An individual litigant in a *Charter* challenge involving their mental health must be prepared to have their highly private personal health information disseminated to parties and interveners, aired and debated in a public courtroom, and exposed to media scrutiny given the high-profile nature of constitutional litigation.[8] This has a particular impact on dignity, as in this case. An individual litigant ought not to be expected to withstand years of litigation about events they may find humiliating or distressing, in order to advance a public cause.[9]

(g) **Personal supports:** An individual seeking to challenge forced treatment provisions may face opposition from personal supports, such as family or friends, who may prefer that the individual be forcibly treated while in psychiatric detention.

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[5] Inclusion Canada, "Meeting Canada's Obligations to Affordable Housing and Supports for People with Disabilities to Live Independently in the Community" (Submitted to UN Special Rapporteur on the Right to Housing, 2017).
[6] ARCH Disability Law Centre, "Submission to the Law Commission of Ontario in Response to Law As it Affects Persons with Disabilities" (2009) at 13.
[7] *Thompson v Attorney General of Ontario,* 2011 ONSC 2023 at para 55.; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59.
[8] Helgi Maki & C Tess Sheldon, "Trauma-Informed Strategies in Public Interest Litigation: Avoiding Unintended Consequences Through Integrative Legal Perspectives" (2019) 90:2 Supreme Court Law Review 65 [MHLC's Book of Authorities (BOA), TAB 1].
[9] BCCA Reasons at para 21.

Persons with mental health disabilities may reasonably be unwilling or unable to risk fracturing their support systems in order to advance public interest litigation.

9. Given all of the above, the search for a suitable individual client to challenge the constitutionality of mental health legislation may be described as the search for a unicorn[10]. It requires an extraordinary confluence of prerequisite factors: the wherewithal and resources to find and retain counsel; enduring mental capacity to instruct counsel in complex *Charter* litigation; life circumstances that lend themselves to sustained availability and willingness to participate in a contested legal matter over multiple years; openness to the invasive scrutiny of their highly private health matters by strangers – and that this particular individual, by happenstance, also be someone who has personally suffered the precise harms which trigger the constitutional analysis. To require all this would effectively insulate mental health legislation from review. [11]

10. The above concerns dissolve when a public interest litigant is permitted to rely on non-applicant witnesses. Individuals with mental health disabilities who have been impacted by allegedly unconstitutional legislation should have their voices heard by the court and be able to participate to the extent needed to explore their personal factual circumstances but need not be personally responsible for shouldering a public cause.

II. The appellant's proposed requirement that public interest litigants explain the absence of an individual litigant has a discriminatory impact

11. The appellant asks this Honourable Court to impose a new burden on public interest organizations to justify the absence of an individual litigant. The appellant submits that "applicants should first be required to explain the absence of an individual plaintiff" and must provide "evidence of efforts to engage a directly impacted individual plaintiff or co-plaintiff and an explanation of why those efforts proved unsuccessful."[12]

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[10] *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 at 340.

[11] Even individual litigants face barriers to bring systemic claims: *Gnanasegaram v Allianz Insurance Co of Canada*, 2005 CanLII 7883 (CA); *Bhindi v City of Ottawa*, 2021 HRTO 525 at para 10; *Carasco v University of Windsor,* 2012 HRTO 195 at para 14.

[12] Factum of the Appellant, at p 21, para 63 [emphasis added].

12. The MHLC submits that this Honourable Court should reject such an unwarranted requirement, which would amount to a discriminatory barrier to advancing legal rights for marginalized persons. A requirement that public interest organizations explain the unavailability of an individual co-litigant relies on discriminatory and paternalistic beliefs that clients with mental health disabilities are not entitled to the same solicitor-client privilege that extends to other clients. This Honourable Court has recognized the damaging impact of stigma and discrimination that persons with mental health disabilities face in *R v Swain*: "The mentally ill have historically been the subjects of abuse, neglect and discrimination in our society."[13]

13. The appellant also asks this Court to infer from the lack of an individual co-litigant that those with a more direct and personal stake in the matter have deliberately refrained from challenging the law. The appellant states "[i]ndeed, apart from two discontinued individual plaintiffs, there was no evidence that any involuntary patients or family members in British Columbia supported CCD's litigation".[14]

14. The MHLC submits that the appellant's position ignores the structural, disability-related barriers to bringing constitutional claims. While the third part of the test for public interest standing set out in *Downtown Eastside* includes consideration of whether "those with a more direct and personal stake in the matter have deliberately refrained from suing",[15] it does not follow that the absence of an individual litigant amounts to general support for the impugned provisions. A court does not need affidavit evidence regarding the absence of an individual litigant to acknowledge[16] these well-recognized barriers to access to justice. The mere absence of an individual plaintiff cannot be construed as a deliberate choice of the impacted individuals to affirm the continued operation of the impugned "deemed consent" provisions challenged in this case.

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[13] *R v Swain*, [1991] 1 SCR 933 at 973-974; Ontario Human Rights Commission, "Policy on Preventing Discrimination Based on Mental Health Disabilities and Addictions" (Toronto: OHRC, 2014) at 13.
[14] Factum of the Appellant, at p 8, para 111.
[15] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 [*Downtown Eastside*], at para 51.
[16] *R v S(RD)*, [1997] 3 SCR 484.

15. By equating the lack of a directly impacted individual litigant with support for the impugned legislation, the appellant's submission is premised upon the purported therapeutic benefits of coercive mental health legislation. Such an inference draws on "for your own good" rationales[17] which perpetuate the discriminatory and paternalistic view that persons with mental health disabilities are "childlike", in need of help and lack the ability to make autonomous decisions. This approach disregards and silences the perspective of directly affected persons with disabilities who experience the impacts of the legislation as punitive.[18] It adversely impacts persons with mental health disabilities by relying on sanist stereotypes about the purported benefits of coercion[19] and thereby creates further barriers accessing justice.

16. Procedural obstacles to public interest standing are rendered invisible when a law purports to be of therapeutic benefit to prospective individual litigants. By imposing additional requirements for public interest standing, the appellant is conflating the purported need for evidence from directly impacted individuals which is relevant to the merits of the constitutional challenge with the requirement for the test for public interest standing.

III. The test for public interest standing established in *Downtown Eastside* should be affirmed as it promotes equal access to justice

17. Public interest standing is a key tool for access to justice for the MHLC's clients, members of a marginalized group. In *Downtown Eastside*, this Honourable Court directed courts to take a flexible, liberal, and purposive approach to determining the standing of public interest organizations to bring constitutional challenges in the absence of an

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[17] Dianne Pothier, "But It's For Your Own Good" in Margot Young, Susan Boyd, Gwen Brodsky & Shelagh Day, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) [BOA, TAB 2]; Marcia Rioux, Joan Gilmour & Natalia Angel-Cabo, "Negotiating Capacity: Legally Constructed Entitlement and Protection" in *Coercive Care: Rights, Law and Policy* (London: Taylor and Francis, 2013) at 66-69.

[18] C Tess Sheldon**,** Karen R Spector & Mercedes Perez, "Re-Centering Equality from the Inside: The Interplay Between Sections 7 and 15 of the Charter in Challenges to Psychiatric Detention" (2016) 35:2 NJCL 193 at 198 [BOA, TAB 3].

[19] Michael Perlin, "On Sanism" (1992) 6 SMU Law Review 373; Michael L. Perlin, "Sanism and the Law" (2013) 15:10 American Medical Assoc J Ethics 878 at 878.

individual litigant.[20] This Court also recognized the importance of access to justice: "Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected".[21]

18. The BCCA appropriately recognized the principles of legality and access to justice as the "key components"[22] of the test, which is entirely consistent with the purposive and flexible approach in *Downtown Eastside*. The test for standing must also engage the principle of equality and consider the value of equal access to justice. Maintaining a purposive approach to the test for public interest standing is necessary to avoid insulating from *Charter* review legislation that impacts marginalized communities, including persons with mental health disabilities.

19. The experience of poverty impedes access to court. Persons with disabilities are far more likely to experience poverty, have lower levels of education, be unemployed or under-employed and are less likely to live in adequate, safe and affordable housing.[23] Their economic marginalization is further aggravated by the physical, environmental and systemic barriers they face accessing and utilizing the justice system.

20. Equal access to justice is fundamental for the enjoyment and fulfilment of other human rights.[24] Nevertheless, disability-related barriers persist in all aspects of the justice system[25], affecting persons with disabilities as witnesses, defendants, complainants, plaintiffs, lawyers and judges.[26] These barriers result from power dynamics entrenched in

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[20] *Downtown Eastside* at paras 20-21, 37-52.
[21] *Downtown Eastside* at para 51.
[22] BCCA Reasons at para 79.
[23] Council of Canadians with Disabilities, "As a Matter of Fact: Poverty and Disability in Canada" (2010); *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624, at para 56.
[24] United Nations Office of the High Commissioner for Human Rights, "International Principles and Guidelines on Access to Justice for Persons with Disabilities" (2020).
[25] The Honourable Justice Richard D Schneider, "The Mentally Ill: "Under-Righted" or "Under-Lawyered?" (2008) 25 Windsor Review Legal and Social Issues 145.
[26] Eilionóir Flynn, "Access to Justice and its Relevance to People with Disabilities" in *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities (*London & New York: Routledge, 2017) [BOA, TAB 4] at 14*ff*.

legal processes as well as unequal access to "the opportunity to shape the structure and content of legal rules".[27] A definition and application of the test for public interest standing that does not fully consider these barriers will interfere with opportunities to subject government action to *Charter* scrutiny, particularly action that impacts persons with mental health disabilities.

21. A purposive interpretation of the test for public interest standing is supported by the persuasive authority of Canada's international commitments. The *Convention on the Rights of Persons with Disabilities* (*CRPD*) requires that States Parties remove the barriers that hinder access to justice for persons with disabilities.[28] The *CRPD* is relevant to the substance of the underlying constitutional challenge in this case, as well as the issue of public interest standing. Articles 12 and 13 guarantee effective access to justice for persons with disabilities on an equal basis with others. Canada is a signatory to the *CRPD*. The former United Nations Special Rapporteur on the Rights of Persons with Disabilities found that while Canada lagged in the implementation of its *CRPD* obligations, Canada "has the potential to undertake a major transformation and fully embrace the human rights-based approach to disability introduced by the Convention".[29] In their review of mental health legislation, courts have considered the relevance of the *CRPD*[30] which "holds tremendous promise for future litigants".[31]

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[27] Sagit Mor, "With Access and Justice for All" (2018) 39 Cardozo Law Review 611 at 633.
[28] UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[29] United Nations Office of the High Commissioner for Human Rights, "End of Mission Statement by the United Nations Special Rapporteur on the Rights of Persons with Disabilities, Ms. Catalina Devandas-Aguilar, on her Visit to Canada" (April 12, 2019).
[30] Steven J Hoffman, Lathika Sritharan & Ali Tejpar, "Is the UN *Convention on the Rights of Persons with Disabilities* Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada" (2016) 16 BMC International Health and Human Rights 28.
[31] Ravi Malhotra, "The Impact of the *Convention on the Rights of Persons with Disabilities* on Canadian Jurisprudence: The Case of *Leobrera v. Canada*" (2017) 54:3 ABLR 637at 648.

IV. Conclusion

22. The MHLC submits that the test for public interest standing must not be unduly narrowed through the imposition of procedural obstacles, undermining equal access to justice for persons with mental health disabilities. Requiring a directly affected individual to pursue a constitutional challenge alongside a public interest organization defeats the very purpose of public interest standing. It also conflates the test for public interest standing with the criteria for private interest standing. Any concern with the purported insufficiency of evidence of a proper factual matrix is relevant to the merits of the constitutional challenge and must not be a basis to deny public interest standing.

23. The profound barriers faced by persons with mental health disabilities in bringing constitutional challenges gives rise to the need for a flexible approach to public interest standing for this population. Marginalized groups must not be subjected to a higher burden for satisfying the test. To do so renders unconstitutional legislation that interferes with their *Charter* rights immune from review.

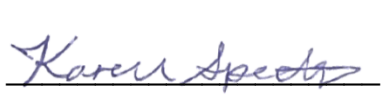
PART IV - SUBMISSIONS ON COSTS

24. The MHLC does not seek any costs and asks that costs not be ordered against it.

PART V - ORDER SOUGHT

25. The MHLC respectfully requests that this Honourable Court consider the MHLC's submissions in determining this appeal.

ALL OF WHICH is respectfully submitted this 3rd day of December, 2021.



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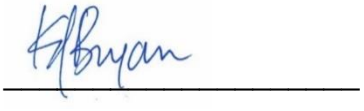

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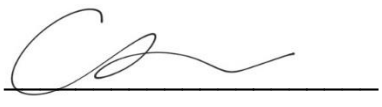

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ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant (Respondent)

COUNCIL OF CANADIANS WITH DISABILITIES

Respondent (Appellant)

Court File No: 39430

IN THE SUPREME COURT OF CANADA

FACTUM OF THE INTERVENER MENTAL HEALTH LEGAL COMMITTEE

KAREN R. SPECTOR
Barrister & Solicitor
250 Yonge Street, Suite 2201
Toronto, ON
M5B 2L7

Karen R. Spector (44669J)
T: 416-995-3477
E: spectork@gmail.com

PEREZ BRYAN PROCOPE
Suite 400, 43 Front St. E.
Toronto, ON
M5E 1B3

Kelley J. Bryan (51203O)
T: (416) 320-1914
E: kbryan@pbplawyers.com

UNIVERSITY OF WINDSOR
Faculty of Law
410 Sunset Avenue
Windsor, ON
N9B 3P4

C. Tess Sheldon (51410A)
T: (519) 253-3000 x 2943
E: tess.sheldon@uwindsor.ca

Counsel for the Intervener, the Mental Health Legal Committee