S.C.C. 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)

**Style of cause continued on next page*

FACTUM OF THE INTERVENERS,
JOHN HOWARD SOCIETY AND QUEEN'S PRISON LAW CLINIC
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

ALISON M. LATIMER
Barrister & Solicitor
1200 – 1111 Melville Street
Vancouver BC V6E 3V6
Tel: 778.847.7324
Email: alison@alatimer.ca

Alison M. Latimer, Q.C.

Counsel for the Interveners, John Howard Society and Queen's Prison Law Clinic

POWER LAW
1103 – 130 Albert Street
Ottawa, ON K1P 5G4
Tel: 613.702.5566 / Fax: 613.702.5566
Email: dbosse@juristespower.ca

Darius Bossé

Agent for the Interveners, John Howard Society of Canada and Queen's Prison Law Clinic

**Style of cause continued*

- 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, DAVIDASPER CENTRE FOR CONSTITUTIONAL RIGHTS,ECOJUSTICE CANADA SOCIETY, TRIAL LAWYERSASSOCIATION 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 ACTIONFUND, CENTRE FOR FREE EXPRESSION, FEDERATION OF ASIAN CANADIANLAWYERS,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 WINNIPEGINC,
AND CANADIAN CONSTITUTION FOUNDATION

INTERVENORS

ORIGINAL TO: REGISTRAR

COPIES TO:

MINISTRY OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA
Legal Services Branch
865 Hornby Street, Suite 1301
Vancouver, British Columbia V6Z 2G3
Tel: 604.660.3093 / Fax: 604.660.2636
Email: mark.witten@gov.bc.ca
emily.lapper@gov.bc.ca

Mark Witten
Emily Lapper

Counsel for the Appellant,
Attorney General of British Columbia

OLTHUIS VAN ERT
66 Lisgar Street
Ottawa, Ontario K2P 0C1
Tel: 613.501.5350 / Fax: 613.651.0304
Email: dshuhaibar@ovcounsel.com

Dahlia Shuhaibar

Agent for the Appellant,
Attorney General of British Columbia

MCCARTHY TÉTRAULT LLP
Suite 2400, 745 Thurlow Street
Vancouver, British Columbia V6E 0C5
Tel: 604.643.5983 / Fax: 604.622.5614
Email: mfeder@mccarthy.ca
kbooth@mccarthy.ca
cbildfell@mccarthy.ca

Michael A. Feder, Q.C.
Katherine Booth
Kevin Love

Counsel for the Respondent,
Council of Canadians with Disabilities

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9
Tel: 613.787.3562 / Fax: 613.230.8842
Email: neffendi@blg.com

Nadia Effendi

Agent for the Respondent,
Council of Canadians with Disabilities

ATTORNEY GENERAL OF CANADA
Department of Justice,
National Litigation Sector
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1
Tel: 416.953.9546 / Fax: 416.952.4518
Email: christine.mohr@justice.gc.ca

Christine Mohr

Counsel for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8
Tel: 613.941.2351 / Fax: 613.954.1920
Email: christopher.rupar@justice.gc.ca

Christopher M. Rupar

Agent for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
Constitution Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Tel: 647.637.0883 / Fax: 416.326.4015
Email: yashoda.ranganathan@ontario.ca

Yashoda Ranganathan
David Tortell

Counsel for the Intervener,
Attorney General of Ontario

POWER LAW
1103 –130 Albert Street
Ottawa, ON K1P 5G4
Tel: 613.702.5573 / Fax: 613.702.5573
Email: mvincelette@juristespower.ca

Maxine Vincelette

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
Tel: 306.787.5584 / Fax: 306.787.9111
Email: sharon.pratchler2@gov.sk.ca

Sharon H. Pratchler, Q.C.

Counsel for the Intervener,
Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613.786.8695 / Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

D. Lynne Watt

Agent for the Intervener,
Attorney General of Saskatchewan

ALBERTA JUSTICE
Constitutional and Aboriginal Law
1000, 10025 –102A Avenue
Edmonton, AB T5J 2Z2
Tel: 780.422.7145 / Fax: 780.643.0852
Email: leah.mcdaniel@gov.ab.ca

Leah M. McDaniel

Counsel for the Intervener,
Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613.786.8695 / Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

D. Lynne Watt

Agent for the Intervener,
Attorney General of Alberta

ALLEN/MCMILLAN LITIGATION COUNSEL
1625 – 1185 West Georgia Street
Vancouver, BC V6E 4E6
Tel: 604.628.3982 / Fax: 604.628.3832
Email: greg@amlc.ca

Greg J. Allen
Nojan Kamoosi

Counsel for the Intervener,
West Coast Prison Justice Society

ANITA SZIGETI ADVOCATES
400 University Avenue, Suite 400
Toronto, ON M5G 1S5
Tel: 416.504.6544 / Fax: 416.204.9562
Email: anita@asabarristers.com

Anita Svigeti
Maya Kotob
Sarah Rankin

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

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext. 102 /
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Marie-France Major

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

TORYS LLP
79 Wellington Street, Suite 3000
Box 270, TD South Tower
Toronto, ON M5K 1N2
Tel: 416.865.7678 / Fax: 416.865.7380
Email: abernstein@torys.com

Andrew Bernstein
Emily Sherkey

Counsel for the Intervener,
Canadian Civil Liberties Association

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext. 101 /
Fax: 613.695.8580
Email: emeehan@supremeadvocacy.ca

Eugene Meehan, Q.C.

Agent for the Intervener,
Canadian Civil Liberties Association

ARCH DISABILITY LAW CENTRE
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7
Tel: 416.482.8255 Ext. 2224
Fax: 416.482.2981
Email: shanoum@lao.on.ca

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 and AIDS Legal Clinic Ontario and South Asian Legal Clinic Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9
Tel: 613.787.3562 / Fax: 613.230.8842
Email: neffendi@blg.com

Nadia Effendi

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
Tel: 416.978.0092 / Fax: 416.978.8894
Email : cheryl.milne@utoronto.ca

Cheryl Milne
Kent Roach

Counsel for the Intervener,
David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Tel: 613.780.8654 / Fax: 613.230.5459
Email:
matthew.halpin@nortonrosefulbright.com

Matthew Halpin

Agent for the Intervener, David Asper Centre for Constitutional Rights

ECOJUSTICE CANADA SOCIETY
390 – 425 Carrall Street
Vancouver, BC V6B 6E3
Tel: 604.685.5618 / Fax: 604.685.7813
Email: kpsmith@ecojustice.ca

Kegan Pepper-Smith
Daniel Cheater

Counsel for the Intervener,
Ecojustice Canada Society

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1
Tel : 604.891.2400 / Fax : 604.647.4554
Email : rdalziel@litigationchambers.com

Ryan D.W. Dalziel, Q.C.
Aubin P. Calbert

Counsel for the Intervener, Trial Lawyers Association of British Columbia

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Tel: 613.780.8654 / Fax: 613.230.5459
Email:
matthew.halpin@nortonrosefulbright.com

Matthew Halpin

Agent for the Intervener, Trial Lawyers Association of British Columbia

NATIONAL COUNCIL OF CANADIAN MUSLIMS
300 – 116 Albert Street
Ottawa, ON K1P 5G3
Tel: 613.254.9704 Ext. 224 /
Fax: 613.701.4062
Email: somer@nccm.ca

Sameha Omer

Counsel for the Intervener,
National Council of Canadian Muslims

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext. 102 /
Fax: 613.695.8580
Email : mfmajor@supremeadvocacy.ca

Marie-France Major

Agent for the Intervener,
National Council of Canadian Muslims

MANDELL PINDER LLP
422 – 1080 Mainland Street
Vancouver, BC V6B 2T4
Tel : 604.681.4146 / Fax : 604.681.0959
Email : elin@mandellpinder.com

Elin Sigurdson
Monique Pongracic-Speier, Q.C.

Counsel for the Intervener,
British Columbia Civil Liberties Association

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613.786.0171 / Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Jeffrey W. Beedell

Agent for the Intervener, British
Columbia Civil Liberties Association

LEGAL AID ONTARIO
Refugee Law Office
20 Dundas Street West
Toronto, ON M5G 2H1
Tel :416.977.8111 Ext. 7181 /
Fax: 416.977.5567
Email: naveen@lao.on.ca

Anthony Navaneelan
Naseem Mithoowani

Counsel for the Intervener,
Canadian Association of Refugee Lawyers

JFK LAW CORPORATION
340 – 1122 Mainland Street
Vancouver, VC V6B 5L1
Tel: 604.687.0549 / Fax: 604.687.2696
Email: tdiskson@jfklaw.ca
jharman@jfklaw.ca

Tim A. Dickson
Jason Harman

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

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613.786.0171 / Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Jeffrey W. Beedell

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

POORANLAW PROFESSIONAL CORPORATION
400 – 1500 Don Mills Road
Toronto, ON M3B 3H4
Tel: 416.860.7572 / Fax: 416.860.5755
Email : fbhabha@pooranlaw.com

Faisal Bhabha
Madison Pearlman

Counsel for the Intervener,
Centre for Free Expression

KHALID M. ELGAZZAR
440 Laurier Avenue West, Suite 200
Ottawa, ON K1R 7X6
Tel: 613.663.9991 / Fax: 613.663.5552
Email: ke@elgazzar.ca

Khalid M. Elgazzar

Agent for the Intervener, Centre for Free Expression

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000
P.O. Box 53
Toronto, ON M5K 1E7
Tel: 416.216.2424 / Fax: 416.216.3930
Email:
fahad.siddiqui@nortonrosefulbright.com

Fahad Siddiqui

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

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Tel: 613.780.8654 / Fax: 613.230.5459
Email:
matthew.halpin@nortonrosefulbright.com

Matthew Halpin

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

ANIMAL JUSTICE
720 Bathurst Street
Toronto, ON M5S 2R4
Tel: 647.746.8702 / Fax: N/A
Email: kmitchell@animaljustice.ca

Kaitlyn Mitchell
Scott Tinney

Counsel for the Intervener,
Animal Justice

POWER LAW
1103 – 130 Albert Street
Ottawa, ON K1P 5G4
Tel: 613.702.5573 / Fax:613.702.5573
Email : mvincelette@juristespower.ca

Maxine Vincelette

Agent for the Intervener,
Animal Justice

PUBLIC INTEREST LAW CENTRE
100 – 287 Broadway Street
Winnipeg, MB R3C 0R9
Tel: 204.985.9735 / Fax: 204.985.8544
Email : jopas@pilc.mb.ca

Joëlle Pastora Sala
Chimwemwe Undi
Natalie Copps

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

Darius Bossé

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 M5X 1B8
Tel: 416.862.6791 / Fax: 416.862.6666
Email: msheeley@osler.com

Mark Shelley
Lipi Mishra

Counsel for the Intervener,
Canadian Constitution Foundation

OSLER HOSKIN & HARCOURT LLP
340 Albert Street, Suite 1900
Ottawa, ON K1R 7Y6
Tel: 613.787.1015 / Fax: 613.235.2867
Email : glangen@osler.com

Geoffrey Langen

Agent for Counsel for the Intervener,
Canadian Constitution Foundation

MENTAL HEALTH LEGAL COMMITTEE
250 Younge Street, Suite 2201
Toronto, ON M5B 2L7
Tel: 416.995.3477 / Fax: 416.855.9745
Email: spectork@gmail.com

Karen R. Spector
Kelley Bryan
C. Tess Sheldon

Counsel for the Intervener, Mental Health Legal Committee

RAVEN CAMERON BALLANTYNE & YAZBECK LLP
220 Laurier Avenue West, Suite 1600
Ottawa, ON K1P 5Z9
Tel: 613.567.2901 / Fax: 613.567.2921
Email: jcameron@ravenlaw.com

James Cameron

Counsel for the Intervener, Mental Health Legal Committee

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PART I – CONCISE OVERVIEW OF POSITION WITH RESPECT TO THE QUESTIONS ON WHICH THE INTERVENER HAS INTERVENED AND CONCISE STATEMENT OF FACTS

1. Less than ten short years ago, this Court clarified the test for public interest standing in *Downtown Eastside*, with a particular focus on the third stage of the test.[1] Contrary to the appellant's protestations, on this appeal the appellant invites significant departures from that test.

2. This Court should refuse that invitation. The test articulated in *Downtown Eastside* achieves a just balance between the purposes underlying the limitations on standing and the important role of the courts in assessing the legality of government action. Courts have not struggled to apply it and, as the appellant rightly concedes, the test has been well-received by legal academics.[2] The seriousness of overturning recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. The Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protections,[3] including by diminishing access to courts where those rights may be vindicated.

3. The specific departures urged by the appellant warrant careful scrutiny by this Court. In the absence of particularized individual facts in the pleadings,[4] the appellant says that litigation advanced by parties with solely public interest standing should be limited to cases that challenge laws as "unconstitutional on their face," rather than in their impact.[5] The appellant says this appeal is not a facial challenge to legislation and the respondent disagrees.[6] These interveners take no position on what kind of challenge is at hand but say, whichever view this Court takes of the nature of the underlying claim, it should reject the invitation to limit public interest standing to facial challenges to legislation or to impose a requirement for individual facts at the pleadings stage (which amounts to the same thing). Litigants with public interest standing must be permitted to challenge the adverse impacts of the law and/ or the misapplication of a law without pleading

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[1] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [***Downtown Eastside***] at ¶¶37-52.
[2] Appellant's Factum ("**AF**") at ¶44.
[3] *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at ¶¶141-143.
[4] AF at ¶¶84-86.
[5] AF at ¶¶83-86.
[6] AF at ¶¶60-61; Respondent's Factum at ¶10.

individual facts. The appellant's proposed limitation would impose a particularly harsh burden on individuals, such as those represented by these interveners, individuals in conflict with the law. Such individuals live lives already thick with regulation and executive control that very often engage their ss. 7 and 15 rights. They may reasonably seek to avoid drawing hostile attention to themselves. It is unfair to ask them individually to police the executive. They are also often ill-equipped to act as plaintiffs.

4. The appellant also seeks to impose a requirement on public interest litigants to lead evidence of efforts made to engage an individual with direct standing.[7] Such a requirement is unwarranted and undesirable. The perspective of a plaintiff with direct standing is not invariably preferable to the perspective of an organization with public interest standing.

5. Nor does or should the test require that a public interest litigant specify, at a time of the defendant's choosing, what witnesses will attest to their direct experience with the laws.[8] To impose such an obligation would be impractical, unfair and present a significant obstacle for access to justice.

PART II – CONCISE OVERVIEW OF INTERVENER'S POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS ON WHICH INTERVENER HAS INTERVENED

6. The appellant Attorney General's arguments raise two issues: first, whether this Court should restore the decision of the Chief Justice denying CCD public interest standing; and second, whether this Court should articulate a new approach to the test of public interest standing. These interveners take no position on the first issue and direct submissions solely at the second issue.

PART III – STATEMENT OF ARGUMENT

A. Litigants with public interest standing may challenge adverse impacts of a law and the misapplication of a law without individualized pleadings

7. The appellant concedes that litigation can proceed without a directly impacted plaintiff in that narrow category of cases where "the legislation's very existence, or the manner in which it was enacted, can be challenged on the legislative facts alone".[9] In contrast, where a "qualitative"

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[7] AF at ¶¶40, 63-65.
[8] AF at ¶¶48, 66-67, 69-72, 88.
[9] AF at ¶60.

examination of the law's impact is at stake, for example cases engaging ss. 7 or 15 of the *Charter*,[10] the appellant argues an individual factual matrix is required as a matter of justiciability at the pleadings stage.[11]

8. The appellant's position, if accepted, would represent a significant narrowing of the law on public interest standing. It would prevent litigants with public interest standing from challenging *Charter* wrongs that arise because of the adverse impacts of a law on a group of people and from challenging *Charter* wrongs that arise because of misapplication, and even systemic misapplication, of a law. Such challenges would only be permitted if there was an individual willing to put themselves forward in the pleadings to ground the claim. That requirement essentially turns a witness into a party. No such limitations or requirements are found in *Downtown Eastside* and in the wake of that decision courts have interpreted public interest standing as permitting pursuit of such claims.[12]

9. The reason the appellant's position gives rise to this limitation or requirement is apparent when focus is placed, as the appellant does, on the initiating pleadings. A plaintiff with direct standing, such as Gloria Taylor in the *Carter* case,[13] will plead the individual adjudicative facts that gave rise to the claim. For example, Ms. Taylor would plead facts concerning her own grievous and irremediable medical condition, her own desire for a voluntary and autonomous choice to end her own suffering, and how the impugned law's prohibition on such a choice impacted her physical and mental condition. In contrast, a plaintiff with public interest standing will not have such individual adjudicative facts to plead. A plaintiff with public interest standing would instead plead that the law impacts individuals who have grievous and irremediable medical conditions, and who wish for a voluntary and autonomous choice to end their own suffering, and what the impacts of limiting such a choice are. This was precisely the type of pleading advanced by one of the interveners in this case, the John Howard Society of Canada, recently in its successful challenge to the laws that authorized prolonged and indefinite solitary confinement.[14] Such a

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[10] AF at ¶¶84-87.
[11] Part E (i) of AF "Serious Justiciable Issue" at ¶¶82-89.
[12] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 [***BCCLA_CA***] at ¶¶269-272.
[13] *Carter v Canada (Attorney General)*, 2015 SCC 5 [***Carter***].
[14] *BCCLA_CA.*

pleading is no more "hypothetical" than is an Attorney General's pleading that, for example, a law protects vulnerable people or prison safety or gives rise to other salutary impacts for the purpose of a section 1 analysis. Both are pleadings of material fact about how the law impacts some, and perhaps not all people. Both assertions will eventually require proof at trial with admissible evidence. Neither is grounded in individualized fact.

10. A requirement or limitation such as that proposed by the appellant would present a significant barrier for those like the group of individuals represented by these interveners - not only prisoners, but others in conflict with the law such as those on judicial interim release, those serving probation or conditional sentences, parolees and those on statutory release.

11. First, the lives of individuals in conflict with the law are already thick with regulation and executive control that very often engage, among other things, their ss. 7 and 15 rights. In many cases it is unfair to expect any one of those individuals to carry the burden of vindicating rights on behalf of all similarly situated people. It is unfair because it opens that individual up to stigma and negative public attention. Prisoners, for example, are intensely stigmatized and risk considerable negative public attention which may be wholly unrelated to the merits of any particular *Charter* challenge by simply attaching themselves as a party to any public litigation. It is unfortunately common in public and media discussions of prisoner rights claims to shift the focus from the legal right at issue to the criminal history of the person asserting the right, and question whether such "bad" people are deserving of rights at all. Many prisoners and others in conflict with the law would reasonably seek to avoid drawing further hostile attention to themselves and their offences. It is also unfair to place those individuals in the position of policing the executive. This is particularly unjust where such attention might result in retaliation from correctional staff and/ or undermine the individual's prospects for conditional release and successful reintegration in the community.[15]

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[15] Canada, Standing Senate Committee on Human Rights, Report on the Human Rights of Federally-Sentenced Persons (June 2021) [**2021 Senate Report**] at pp 175-184; 2019 Canada, Standing Senate Committee on Human Rights, *Interim Report – Study on the Human Rights of Federally -Sentenced Persons: The Most Basic Human Right is to be Treated as a Human Being* (February 2019) [**2019 Interim Senate Report**] at p 24; 2002 Department of Justice Canada, Study of the Legal Services Needs of Prisoners in Federal Penitentiaries in Canada, (July 31, 2002) [**2002 DOJ Report**] at pp 22, 33; 2008 Parkes at pp 105-106; Debra Parkes, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48:2 Canadian Journal of

12. Second, a further unfairness arises because those in conflict with the law are often ill-equipped to act as plaintiffs which is essentially what inclusion in the pleadings accomplishes. They have disproportionately low levels of education, many face literacy issues, and prisoners also have higher rates of mental illness and mental disability.[16] Additionally, there is also often a profound asymmetry of knowledge and information between the state and the individual in litigation and this is particularly acute when the individual is in conflict with the law. Individual prisoners are often unable to access the information essential to their claim before discovery. In addition to slow access to the prisoner's own correctional files, prisoners face lack of access to counsel,[17] breaches of privilege,[18] and lack of access to legal materials, computers and law libraries to permit self-representation, even if that was otherwise realistic.[19]

13. They also face disproportionate socio-economic disadvantage which negatively impacts both their ability to access counsel, their ability to bear the risk of an adverse costs award, and their vulnerability to settlement of systemic claims in exchange for individual remedies that do not address public interest goals.[20]

14. Those in conflict with the law lack stability and control over their jurisdiction as they are literally in the control of the opposing party. Prisoners are often moved to different institutions or leave prison altogether, which makes it difficult for them to see a lengthy *Charter* challenge through to its completion. Thus, as this Court observed in *Downtown Eastside*, there are practical aspects of running a major constitutional lawsuit including the need to be able to communicate

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Criminology and Criminal Justice at p 272; Adelina Iftene, "Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries" (Toronto: University of Toronto Press, 2019) [**Iftene**] at p 226.

[16] Debra Parkes et al, "Listening to Their Voices: Women Prisoners and Access to Justice in Manitoba" (2008) 26:1 Windsor YB Access Just 85 [**2008 Parkes**] at p 103.

[17] 2021 Senate Report at pp 181-182.

[18] 2021 Senate Report at p 82; 2002 DOJ Report at p 22.

[19] 2019 Interim Senate Report, p. 64; 2002 DOJ Report at pp 18, 24; 2021 Senate Report at p 181; Nellie Parr, "Inadequate Resources for and Access to Penitentiary Libraries Diminish Access to Justice Transformation" (2018) 27:1 Journal of Prisoners on Prisons [**Parr**] at p 1; Office of the Correctional Investigator of Canada (2016) Annual Report – 2015-2016, Ottawa at p 57; see also: Correctional Service of Canada (2018) Commissioner's Directive 720 Education Programs and Services for Inmates, Ottawa; Iftene at pp 188 and 227; 2008 Parkes at p 104.

[20] Iftene at pp 267-268.

with counsel and provide timely and appropriate instructions that may be difficult in the context of individual circumstances.[21]

15. Third, such asymmetrical access to information and knowledge may obfuscate, at early stages of the litigation, the question of whether the *Charter* wrongs identified arise because of latent defects in the statute or discretionary decisions that might meaningfully be addressed with remedies short of striking the law down. Courts should be sensitive to that difficulty when addressing an application to strike for want of standing at an early stage in the proceedings. Narrowing the test for public interest standing as the appellant suggests is undesirable because the question of whether *Charter* wrongs are caused by a statute or arise as an effect of the misadministration of that statute is not always obvious at the pleadings stage. Indeed, the question of whether a *Charter* wrong is caused by a statute or arises merely as an effect of the misadministration of that statute, is not always obvious even after a lengthy trial.[22] It is a legal issue that remains in a state of some uncertainty. The proper interpretation of *Little Sisters*,[23] in light of this Court's later judgments in cases like *Boudreault*[24] - where the majority and dissent departed on whether courts should be concerned with how legislation operates in practice when they consider striking down legislation – requires clarification.[25] It would stifle the development of the law to bar public interest litigants from proceeding in cases that raise this issue especially

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[21] *Downtown Eastside* at ¶71.

[22] See for e.g. *British Columbia Civil Liberties Association & John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62 where what was at issue was a constitutional challenge to laws that authorize solitary confinement or, in the alternative, the administration of those laws. The Attorney General argued that any of the alleged *Charter* wrongs that were made out in the record arose from the misadministration of the law. The trial judge found that all of the *Charter* wrongs were caused by the law itself. The BC Court of Appeal found some were caused by the law and others by its administration. Canada sought leave and was granted leave to appeal to this Court. However, ultimately the law was repealed and Canada abandoned its appeal.

[23] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 [***Little Sisters***].

[24] *R v Boudreault*, 2018 SCC 58 [***Boudreault***].

[25] Latimer and Berger, "A Plumber with Words: Seeking Constitutional Responsibility and an End to the Little Sisters Problem", (2021) 104 SCR (2d) (forthcoming).

as it usually engages an assessment of the habitual administration of the law and/or its predictable impacts, not simply an individual case.

16. Finally, even if the case plainly involves *Charter* wrongs that arise from the adverse impacts or misadministration of a law, public interest litigants should be permitted to pursue those claims without identifying an individual in the pleadings. In some cases, for reasons further explained above, public interest litigants are better positioned to pursue those claims than any individual. Such cases include, for example, cases that seek to address systemic adverse impacts or misadministration of a law in circumstances where the systemic nature of those impacts or that misadministration should itself be of concern to the Court and where there is no or insufficient pecuniary or other incentive to seek judicial redress on an individual basis.[26] Litigants with public interest standing who may pursue such litigation are not "busybodies"; they are pursuing causes of action in a manner that preserves scarce judicial resources. They are positioned to marshal contending points of view of persons most directly affected. In pursuing those cases, they further not only the principle of legality but also access to justice.

B. No requirement to make efforts to engage an individual with direct standing

17. For related reasons, there is no requirement and there should be no requirement for litigants with public interest standing to attempt to find an individual with direct standing. The perspective of individual plaintiffs with direct standing is not invariably preferable to the perspective of an organization without direct standing.

18. Reformulating the *Downtown Eastside* test in such a manner would significantly narrow it. In *Downtown Eastside,* this Court made clear that: "It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court."[27]

19. Thus, the focus is on the suit *as proposed*, not on a hypothetical suit that may be advanced by someone with direct standing. A non-exhaustive list of those considerations that inform an

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[26] See e.g. *Little Sisters* and *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228.
[27] *Downtown Eastside* at ¶44 (emphasis added).

assessment of the proposed suit which are of particular relevance to litigation involving those in conflict with the law include:

a. the plaintiff's capacity to bring forward the claim including the plaintiff's resources and expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting;

b. that one idea which animates public interest litigation is that it may provide access to justice for disadvantaged persons;

c. whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination.[28]

20. On this latter point, the Court expanded:

> The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.[29]

21. It would therefore be a reversal of this Court's judgment in *Downtown Eastside* to now find that litigation advanced by a plaintiff with direct standing is always to be preferred in comparison to litigation advanced by a plaintiff with public interest standing.

22. The interveners submit that in the prison context, and for those in conflict with the law, for all the reasons set out above, a litigant with public interest standing may often be better resourced,

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[28] *Downtown Eastside* at ¶51.
[29] *Downtown Eastside* at ¶51 (emphasis added).

have more expertise, and thus be better positioned to advance an issue more efficiently and to make more effective use of judicial resources than a litigant with direct interest. In making this submission, the interveners say the "reasonable and effective" assessment for public interest standing must include close attention to context and vulnerability. Such an assessment should consider, for example, whether and how participation as a party, as contrasted with participation as a witness might: (a) cause or exacerbate vulnerability (b) result in unfair tactical advantage (c) frustrate the end of resolving systemic, as opposed to individual, problems.

23. In all the circumstances, this Court should not empower the state with more procedural powers to strategically delay or prevent from proceeding relatively well-funded and well-resourced claims brought on behalf of or in the interests of marginalized individuals in favour of claims brought by individuals with direct standing.

C. No requirement to specify, at a time of the Attorney General's choosing, what particular evidence will be led at trial

24. In *Downtown Eastside* this Court did not make any finding that litigants with public interest standing should be required, at a time of the Attorney General's choosing before trial, to identify what particular evidence will be led at trial.

25. The plaintiffs in *Downtown Eastside* had marshalled affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver and included a named individual who had been directly affected by the impugned laws for decades.[30] Not all litigants with public interest standing should be required to deploy an analogous level of resources in response to a challenge to standing before trial.

26. To impose such a requirement on public interest litigants would give rise to even more preliminary objections to public interest standing even in cases where that standing is clearly present. The rules of civil litigation in each province set timelines for the discovery process and then the delivery of expert reports and the exchange of witness lists. Those rules are reciprocal on all parties to the litigation. If any challenge to public interest standing, no matter how far fetched, gave rise to the requirement for plaintiffs to divulge their admissible evidence at an earlier stage

[30] *Downtown Eastside* at ¶¶59, 71, 74.

in the litigation then such motions would become purely tactical. Even if doomed to fail, such a motion could divert scarce resources away from meaningful trial preparation, give the opposing party an asymmetrical, unfair and significantly more detailed preview of the plaintiffs' case than would a pleading based on direct standing, and force the plaintiff to show its evidentiary cards before all of the potential sources of evidence had been explored.

27. The unfairness is particularly stark when one considers the *Charter* context where the Attorney General's entire section 1 defence – even when it relies on competing rights of third parties and alleged salutary impacts of the laws – very often if not invariably lacks the kind of individualized particularization sought here.

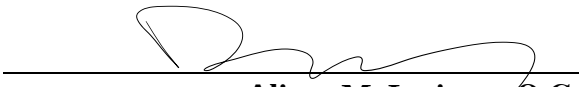
28. In the alternative, if such a requirement is to be imposed, it should carry a reciprocal requirement for the defendant to demonstrate what admissible evidence will be relied on in defence in respect of, for example, competing rights and the salutary impacts of the law. In circumstances where courts find public interest standing to be relatively clear, dismissal of such a motion should also carry significant costs consequences in any event of the cause if unsuccessful.

PART IV – ORDERS SOUGHT

29. The interveners do not seek costs and asks that no costs be awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: December 3, 2021



Alison M. Latimer, Q.C.
Counsel for the Interveners,
John Howard Society of Canada and
the Queen's University Prison Law Clinic

PART V – TABLE OF AUTHORITIES

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