SCC 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, CANADA WITHOUT POVERTY, THE CANADIAN MENTAL HEALTH ASSOCIATION, ABORIGINAL COUNCIL OF WINNIPEG, INC. and END HOMELESSNESS WINNIPEG INC.

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I. OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position

1. Public interest standing is essential to the democratic process and to the rule of law, particularly for members of historically disadvantaged groups. At its core, it is meant to prevent the immunization of legislation or state actions from challenge.[1] Although the legal test for public interest standing has been liberalized, governments continue to use objections on standing to force the abandonment of proceeding or significant delay. Such procedural tactics reinforce and perpetuate barriers to access to justice. This appeal is emblematic of the reward governments receive when they challenge public interest standing: impugned legislation remain operational.

2. The Canadian Mental Health Association (National), Canada Without Poverty, the Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc. (together, the "Coalition") argue a presumption of public interest standing is necessary in constitutional cases to uphold the rule of law and eliminate government's perverse incentive to use standing arguments as a tool for obstruction and delay.

3. Public interest standing is fundamentally important to the Coalition. The very issue which has been prevented from reaching the courts, namely the forced health treatments to members of a historically disadvantaged group, is of *equal* importance to the Coalition. It is an affront to the rule of law that more than five years after the filing of the original action, the merits of the case have yet to be addressed by any court.

4. The current public interest standing test is not the problem. It is our approach to public interest standing with the onus on those seeking standing which creates unequal access to courts. Currently, well-resourced governments can use procedural tactics to either delay or prevent constitutional challenges from getting to court, denying access to courts to disadvantaged groups whose rights are protected under the *Constitution.*

5. Parties seeking public interest standing often face multiple, intersecting and systemic barriers to inclusion, frequently as a direct result of government (in)actions. Reversing the onus is a necessary step to achieving access to justice, substantive equality and respect for the rule of law and to balance the scales of justice between government and marginalized groups.

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[1] *Canadian Council of Churches v Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236 at 252-253 [*Canadian Council of Churches*].

B. Statement of Facts

6. The Coalition agrees with the facts set out in the Respondent's factum and wishes to emphasize the following:

- On 12 September 2016, the Council of Canadians with Disabilities (the "CCD") and two individual plaintiffs began their action. More than five years later, their constitutional concerns remain unaddressed. While the government continues to prolong the case, involuntary patients with mental disabilities in British Columbia are forcibly treated without their consent, including through electroconvulsive therapy, psychotropic medications, and psychosurgery.[2]
- The denial of autonomy and the imposition of involuntary treatments by governments is an important issue affecting several disadvantaged groups. These groups face multiple barriers in accessing justice, particularly in complex *Charter* litigation.

PART II. THE COALITION POSITION ON THE QUESTION IN ISSUE

7. The Coalition takes no position on the outcome of this appeal. It asks this Court to reverse the onus of proving public interest standing for constitutional challenges and to impose on governments the obligation to demonstrate that standing is not appropriate.

PART III. STATEMENT OF ARGUMENT

A. The incremental relaxation of the public interest standing test

8. At its core, public interest standing facilitates access to justice for those who struggle to effectively assert their rights. Within the constitutional context, it addresses "whether a question of constitutionality should be immunized from judicial review by denying [an individual or group the opportunity] to challenge the impugned statute".[3] It plays an essential role in ensuring disadvantaged communities can meaningfully challenge government legislation and (in)actions.

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[2] *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 at paras 18 and 22 [*CCD CA*].

[3] *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at 145 [*Thorson*]. See also *Canadian Council of Churches*, *supra* note 1 at 252-253; Gerrard J Kennedy & Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada, (2017) 45:4 Fed L Rev 707 at 720 [Kennedy & Sossin 2017].

9. Since the mid 1970s, this Court has incrementally liberalized its approach to public interest standing.[4] The trilogy of *Thornson*,[5] *McNeil*,[6] and *Borowski*[7] paved a path for public interest litigants to challenge the constitutionality of government (in)actions through the creation of a tripartite test.[8] For several years, even individual litigants faced challenges in satisfying the third criteria of this test – that there was *no other* reasonable effective manner in which the issue could be brought forward.[9]

10. With the enactment of the *Charter* in 1982, the concept of public interest standing evolved.[10] Through the operation of the *Charter*, this Court emphasized the importance of public interest standing as an opportunity to challenge legislation and public acts.[11] It held that public interest standing is an essential element of the rule of law and democracy. [12]

11. In *Downtown Eastside*, this Court adjusted the third prong of the test to respond to serious concerns about how strictly it was being applied by courts.[13] The Court aimed to promote greater access to justice for parties seeking public interest standing.[14] In its decision, this Court emphasized that the test requires purposive and flexible interpretation.[15] It found, contrary to *Council of Canadians*,[16] that private litigants need not be prioritized over public interest groups, suggesting that a more relaxed approach to standing may be needed in systemic cases.[17]

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[4] *Thorson*, *supra* note 3; *Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265 [*McNeil*]; *Minister of Justice (Can) v Borowski*, [1981] 2 SCR 575 [*Borowski*]; *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607; *Canadian Canadian Council of Churches*, *supra* note 1 at 249-250; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].
[5] *Thorson*, *supra* note 3.
[6] *McNeil*, *supra* note 4.
[7] *Borowski*, *supra* note 4.
[8] *Downtown Eastside*, *supra* note 4 at para 37.
[9] *Mercer v Attorney General of Canada*, (1972), 24 DLR (3d) 758.
[10] *CCD CA*, *supra* note 2 at para 68; see also *Hunter et al v Southam Inc.*, [1984] 2 SCR 145 at 155.
[11] *Downtown Eastside*, *supra* note 4 at para 73.
[12] *Canadian Council of Churches*, *supra* note 1 at 250-251. See also Kennedy & Sossin 2017, *supra* note 3 at 720.
[13] *Downtown Eastside*, *supra* note 4 at paras 51-52.
[14] *Ibid* at para 51.
[15] *Ibid* at paras 49 and 50.
[16] *Canadian Council of Churches*, *supra* note 1 at 255-256.
[17] *Downtown Eastside*, *supra* note 4 at paras 51-52.

12. Since *Downtown Eastside*, this Court has held that "the presence of other claimants does not necessarily preclude public interest standing"[18] and that courts should use their discretion "to allow more plaintiffs through the door".[19] Overall, as stated by the British Columbia Court of Appeal, courts have become "increasingly attuned to the importance of upholding the legality principle and the practical realities of providing meaningful access to justice for vulnerable and marginalized citizens affected by legislation of questionable constitutional validity".[20]

B. The Court's public interest standing approach exacerbates access to justice barriers

13. The stakes of public interest standing decisions in constitutional cases are high. These decisions determine *who* is entitled to vindicate their fundamental rights and freedoms, *what* issues will be addressed by the courts, and the *types* of legal remedies available to address potentially unconstitutional legislation and government (in)action. [21] As such, "a complete denial of standing is a blunt procedural instrument"[22] which effectively denies access to justice.

14. Requiring parties seeking standing to bear the onus of meeting the public interest standing test perpetuates access to justice barriers, particularly for disadvantaged groups, in four ways.

(i) Failure to consider innate imbalances of power in constitutional challenges

15. First, requiring parties seeking standing to bear the onus fails to consider the imbalance of power and resources between governments and litigants. Those who are engaged in constitutional challenges are disproportionately either members of historically disadvantaged groups or their advocates. [23] They often face barriers accessing justice and in obtaining legal information or legal

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[18] *Manitoba Metis Federation Inc. v Canada (Attorney General)*, [2013] 1 SCR 623 at para 43.
[19] *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 18 [*Lukács*].
[20] *CCD CA*, *supra* note 2 at para 4.
[21] Matt Malone, "Standing in the Way: Comparing Constraints on Access to Justice after the Liberalization of Public Interest Standing in Canada and Israel" (2017) 46:4 Advoc Q 451 at 458 [Malone].
[22] *CCD CA*, *supra* note 2 at para 88.
[23] Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Eastside Sex Workers United against Violence", (2013) 22:2 Const Forum Const 21; Gerard J. Kennedy & Lorne Sossin, "Justiciability, Access to Justice and Summary Procedures in Public Interest Litigation" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis, 2019) at 128 [Kennedy & Sossin 2019], Book of Authorities at Tab 3.

services which are acceptable, culturally appropriate, adequate and accessible.[24]

16. An intersectional perspective highlights that those most affected by impugned legislation and discriminatory government (in)actions regularly face compounding[25] and persistent forms of inequality resulting in distinct access to justice barriers. These include financial, linguistic, resource, accessibility, and geographical barriers due to race, class, gender, disability, and sexual orientation.[26] Governments, on the other hand, are far better resourced and better positioned to navigate the "machinery of law".[27] They have larger budgets, whole departments of legal counsel as well as more time, and technical expertise. As stated by Kennedy and Sossin, "[p]eople grow old and die but the Crown does not. People can run out of money, but the Crown cannot […]".[28] A presumption of standing is a required step to right this imbalance.

(ii) Enabling governments to immunize themselves from judicial scrutiny

17. Second, it enables governments to use delay tactics to effectively immunize themselves from legal challenges with chilling effects on essential law review and reform. Since the enactment of the *Charter*, government respondents routinely rely on procedural motions to strike out claims on the basis that claimants lack standing to bring actions.

18. For example, governments frequently pursue motions to strike when pleadings contain novel *Charter* arguments or raise alleged issues of justiciability.[29] Within the human rights context, governments have made motions to strike relying on the argument that they are not "service" providers.[30] While courts often hesitate to strike pleadings prematurely, public interest

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[24] Allison Fenske & Beverly Froese, "Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba" (Winnipeg: Canadian Centre for Policy Alternatives – Manitoba, 2017) at 2.

[25] Grace Ajele and Jena McGill, Intersectionality in Law and Legal Contexts, (Toronto: Women's Legal Education and Action Fund, 2020) at 33; Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", (1989) 1:8 U Chicago Legal F 139 at 139.

[26] Kimberley Byers "When Access Isn't Enough: Examining the Intersection Between Social Inequality and Access to Justice" (October 9, 2014), online (blog): *Canadian Forum on Civil Justice/Forum canadien sur la justice civile* <https://cfcj-fcjc.org/a2jblog/when-access-isnt-enough-examining-the-intersection-between-social-inequality-and-access-to-justice/>.

[27] Mary Eberts, "Lawyers Feed the Hungry: Access to Justice, the Rule of Law and the Private Practice of Law" (2013) 76 Sask L Rev 115 at 5, Book of Authorities at Tab 4.

[28] Kennedy & Sossin 2019, *supra* note 23 at 128.

[29] See e.g. Tanudjaja v Canada (Attorney General), 2014 ONCA 852.

[30] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (CanLII) at paras 30-35.

litigants must devote scarce resources to raise defences to these motions.[31] These governmental tactics stymie constitutional litigation, imposing an undue burden on marginalized individuals and their advocates. All those who mount constitutional challenges start from a place of disadvantage simply because they are up against a government.[32]

19. In this appeal, more than five years have passed, and the substantive issue has yet to be addressed. It was after *two years* of litigation that the co-plaintiffs – adults with mental disabilities experiencing forced psychiatric treatment– were no longer able to pursue their challenge.[33] This case exemplifies how governments successfully use procedural motions to immunize themselves from public interest litigation. The serious and justiciable issue raised in this appeal and other similar cases may never reach the courts.[34]

(iii) Judicial bias for individual litigants

20. Third, governments continue to benefit from a jurisprudential bias towards individual litigants that tends to deny the systemic insights that often come from public interest groups.

21. Public interest groups play an important role in assisting courts in understanding necessary factual, social, historical, and psychological contexts within which litigation arises. As stated by this Court, social context evidence is often of fundamental importance as it raises evidence that is "difficult to prove through testimony and exhibits".[35] Organizations can raise social context without compromising the availability of evidence from directly impacted individuals.[36] Without necessary context from public interest groups, court decisions about members of disadvantaged groups may be "highly susceptible to paternalistic assumptions that perpetuate discrimination".[37]

22. Courts recognize that groups seeking public interest standing such as the CCD often play *intermediary* roles, "translating ordinary stories in ordinary language into legal narratives" for

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[*Caring Society*]. See also Anne Levesque, "Gaming the [Human Rights] System?: A Critical Look at Discrimination Complaints Involving Government Services", (2020) 9:1 Can J HR 37.

[31] Vasuda Sinha, Lorne Sossin & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure", (2017) 26 JL & Pol'y 43 at 46-50.

[32] Kennedy & Sossin 2019, *supra* note 23 at 128.

[33] *CCD CA*, *supra* note 2 at para 30.

[34] Kennedy & Sossin 2017, *supra* note 3 at 720.

[35] *R v Le*, 2019 SCC 34 at paras 83 and 98.

[36] *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 340, 344-346 [*Canadian Doctors*].

[37] Dianne Pothier, "But It's For Your Own Good", in Margo Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism"* (Vancouver: UBC Press, 2007) 40 at 52, Book of Authorities at Tab 2 [Pothier].

courts. [38] This intermediary role is particularly important given the innate imbalance between parties in constitutional questions.

23. The predisposition to private litigants, even post *Downtown Eastside*, is most stark in cases involving "concerned citizens".[39] These cases reveal, at least in part, that privileged individuals who have the resources to challenge government decisions continue to be more likely to meet the standing test.[40] They also highlight an opportunity for governments to rely on a court bias in favour of individual litigants to avoid judicial scrutiny.

24. In this case, when the Attorney General brought a summary trial application on the issue of standing to dismiss the CCD claim, it relied only on an affidavit by a court clerk with some attachments.[41] In contrast, the CCD presented an affidavit by the Chair of the CCD *Mental Health Committee* whose experience and expertise is in *mental health law*.[42] The Chambers Judge dismissed the CCD action including on the basis that a serious justiciable issue had not been raised as they had not plead "a particular factual context of an individual's case".[43]

25. This continued judicial bias ignores the direct connection of public interest organizations to individuals with lived experience, disregarding the fact that public interest organizations are often composed of persons with lived experience and relevant expertise.

(iv) Avoiding systemic remedies

26. Fourth, failing to reverse the onus for public interest standing will impact the types of remedies sought and achieved in constitutional cases. When public interest litigants face overly burdensome legal tests to access the courts, an individualized approach to litigation is preferred. Practically, even if individuals can mount the resources, courage, and patience to raise and sustain a constitutional challenge, individual remedies are more likely to result, including where

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[38] *Canadian Doctors*, supra note 36 at paras 345-353; Pothier, *supra* note 37 at 52. See also Angus Grant, "Stand by Me: Public Interest Standing and Immigration and Refugee Advocacy in Canada" (2019) 90:2 SCLR 147, Book of Authorities at Tab 1.

[39] *Terrigno v Calgary (City)*, 2021 ABQB 41 at paras 18-19; *Alford v Canada (Attorney General)*, 2019 ONCA 657 at para 4; *Lukács*, *supra* note 19.

[40] *MacLaren v British Columbia (Attorney General)*, 2018 BCSC 1753 [*Maclaren*] (held the CCD did not raise a serious justiciable issue and that it had only a weak genuine interest because its advocacy focused on persons with physical disabilities at paras 40 and 53).

[41] Factum of the Respondent at para 21.

[42] *MacLaren*, *supra* note 40 at para 14.

[43] *Ibid* at paras 37-39.

systemic remedies are preferable and necessary.[44]

27. This preference for individualized approaches is problematic. Systemic remedies play an essential role in preventing future discrimination.[45] They address the structural barriers to inclusion for members of disadvantaged groups by tackling impugned government policies, practices, and procedures.[46] Today, many systemic issues are "the result of historical attitudes, stereotypes and practices that have become embedded in the normal operation of institutions".[47] Failing to provide systemic remedies tips the scales of justice against disadvantaged groups.

C. Enriching democracy, access to justice and equality through public interest standing

28. The current requirement that those seeking public interest standing bear the onus of persuading the court they deserve to be heard is the antithesis of access to justice and substantive equality. A presumption in favour of public interest standing for plaintiffs in constitutional challenges is a required step to rebalance the scales of justice and encourage meaningful access to courts for disadvantaged individuals.

29. Over the last 30 years, there has been broad societal recognition of the importance of access to justice.[48] The access to justice crisis is a widely accepted fact. In *Hryniak*, this Court recognized that "[w]ithout an effective and accessible means of enforcing rights, **the rule of law is threatened**" (emphasis added).[49] Importantly, access to justice "is not only about enabling individuals to access [legal remedies…], but also about breaking down the barriers that often prevent people from ensuring their legal rights are respected".[50]

30. Similarly, a substantive equality approach recognizes that in certain cases, positive steps are required to ensure that members of historically disadvantaged groups are meaningfully heard and included.[51] Substantive equality invites us to look at the "actual impacts" of (in)actions on

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[44] Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44 UBC L Rv 255 at 265.
[45] Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Human Rights 1 at 3 [Brodsky et al].
[46] *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1145.
[47] Brodsky et al, *supra* note 45 at 4.
[48] Malone, *supra* note 21 at 457.
[49] *Hryniak v Mauldin*, 2014 SCC 7 at paras 1 and 26. See also *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 229-30.
[50] Kennedy & Sossin 2019, *supra* note 23 at 124.
[51] *Caring Society*, supra note 30 at paras 399-400; and *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 62 at para 78.

the individuals or groups concerned.[52] It recognizes that "the "persistent systemic disadvantages have operated to limit the opportunities available" to that group's members.[53]

31. Public interest standing is essential to democracy. It provides an opportunity to disadvantaged communities to scrutinize legislation and state conduct.[54] It has been recognized that "[c]ourts cannot fulfill that function in a democratic state if they are not a forum to which all individuals may turn for the determination or enforcement [of] their rights".[55] The "ability to invoke the protection of the courts underpins the rule of law upon which Canada was created".[56]

32. As seen in this appeal, placing the onus on individuals and public interest groups to satisfy the test for standing creates additional access to justice barriers for those facing persistent systemic and compounding disadvantages, contrary to this Court's guidance in *Fraser*.[57]

33. In a free and democratic society, when a government's laws are being challenged, it should be up to the state to justify denying the plaintiff access to courts. A presumption of standing is a logical evolution of our growing understanding of access to justice and substantive equality as it removes the burdens on disadvantaged communities and ensures well-resourced governments bear the onus to bring evidence to the contrary. Righting the balance requires placing the responsibility on the party with the power and resources. The presumption proposed by the Coalition is for constitutional cases only. It recognizes that by their very nature, well-resourced governments will always be the responding party.

34. A presumption of standing will not lead to blanket approval for all who wish to litigate. Courts will continue to be empowered to address cases brought for frivolous or vexatious reasons.[58] The onus will simply shift to governments to demonstrate that standing should not be recognized. In practice, governments will be able to rebut the presumption of standing by tendering evidence demonstrating that the criteria for standing have not been met.

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[52] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 42 [*Fraser*].
[53] *Ibid*.
[54] *CCD CA*, *supra* note 2 at para 2.
[55] *Vilardell v Dunham*, 2012 BCSC 748 at para 375.
[56] *Government Employees' Union, Re*, 1985 CanLII 143 (BC CA) at page 4.
[57] *Fraser*, *supra* note 52 at paras 31 and 63.
[58] *Supreme Court Civil Rules*, BC Reg 168/2009, s 9-5(1); *Court of Queen's Bench Rules*, Man Reg 553/88, s 25.11; *Rules of Civil Procedure*, RRO 1990, Reg 194, s 2.1.

35. The Supreme Court of Canada has previously acted creatively to respond to the access to justice crisis in Canada.[59] For example, the court expanded the obligation to provide low-income persons with legal representation in certain cases involving the state.[60]A few years later, this Court allowed for the award of interim costs to litigants, including for cases of public importance when litigants do not have capacity to bring their issue to trial.[61]

36. While our approach to public interest standing has incrementally widened since *Downtown Eastside*, it should be of no surprise that those facing intersecting inequalities feel less empowered or able to engage in complex constitutional challenges, particularly when they face persistent procedural hurdles imposed by powerful and well-resourced governments. Direction by this Court is needed. While it is not a magic bullet, reversing the onus is a necessary step to achieve access to justice, substantive equality, and respect for the rule of law.

PART IV. SUBMISSIONS ON COSTS

37. The Coalition does not seek costs and should not be liable to pay costs to any party.

PART V. ORDER SOUGHT

38. The Coalition takes no position regarding the disposition of this appeal.

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

Joëlle Pastora Sala, Allison Fenske, Natalie Copps & Chimwemwe Undi

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[59] Malone, *supra* note 21 at 475.
[60] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46.
[61] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71; *R v Caron*, 2011 SCC 5.

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