Court File No. 39430

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT (Respondent)

AND:

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT (Appellant)

AND:

ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ONTARIO; ATTORNEY GENERAL OF SASKATCHEWAN; ATTORNEY GENERAL OF ALBERTA; WEST COAST PRISON JUSTICE SOCIETY; EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH; CANADIAN CIVIL LIBERTIES ASSOCIATION; DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS; ECOJUSTICE CANADA SOCIETY; TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA; ANIMAL JUSTICE; ADVOCACY CENTRE FOR TENANTS ONTARIO, ARCH DISABILITY LAW CENTRE, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC, HIV & AIDS LEGAL CLINIC ONTARIO AND SOUTH ASIAN LEGAL CLINIC ONTARIO (JOINTLY); CANADIAN MENTAL HEALTH ASSOCIATION (NATIONAL), CANADA WITHOUT POVERTY, ABORIGINAL COUNCIL OF WINNIPEG INC., AND END HOMELESSNESS WINNIPEG INC. (JOINTLY); CANADIAN CONSTITUTION FOUNDATION; JOHN HOWARD SOCIETY OF CANADA AND QUEEN'S PRISON LAW CLINIC (JOINTLY); FEDERATION OF ASIAN CANADIAN LAWYERS AND THE CANADIAN MUSLIM LAWYERS ASSOCIATION (JOINTLY); CENTRE FOR FREE EXPRESSION; WEST COAST LEGAL EDUCATION AND ACTION FUND; CANADIAN ASSOCIATION OF REFUGEE LAWYERS; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; MENTAL HEALTH LEGAL COMMITTEE; AND NATIONAL COUNCIL OF CANADIAN MUSLIMS

INTERVENERS

FACTUM OF THE INTERVENER
WEST COAST LEGAL EDUCATION AND ACTION FUND
(Pursuant to Rules 37 & 42 of the *Rules of the Supreme Court of Canada*)

JFK LAW CORPORATION
Barristers and Solicitors
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1

Tim Dickson,
Jason Harman
Tel: 604-687-0549
Fax: 604-687-2696
Email: tdickson@jfklaw.ca
jharman@jfklaw.ca

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

GOWLING WLG (Canada) LLP
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeff Beedell
Tel.: 613-786-0197
Fax: 613-563-9869
Email: jeff.beedell@gowlingwlg.com

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

ORIGINAL TO:

Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

Copies to:

MINISTRY OF ATTORNEY GENERAL,
LEGAL SERVICES BRANCH
Suite 1301, 865 Hornby Street
Vancouver, British Columbia V6Z 2G3

Mark Witten
Emily Lapper
Tel: 604-660-3093
Fax: 604-660-6797
Email: mark.witten@gov.bc.ca
emily.lapper@gov.bc.ca

Counsel for the Appellant,
Attorney General of British Columbia

OLTHUIS VAN ERT
66 Lisgar St.
Ottawa, Ontario K2P 0C1

Dahlia Shuhaibar
Tel: 613-501-5350
Fax: 613-651-0304
Email: dshuhaibar@ovcounsel.com

Ottawa Agent for Counsel for the
Appellant, Attorney General of British
Columbia

MCCARTHY TÉTRAULT LLP
Barristers & Solicitors
2400 - 754 Thurlow Street
Vancouver, BC V6E 1T2

Michael Feder, Q.C.
Katherine Booth
Kevin Love
Tel: 604-643-7100
Fax: 604-643-7900
Email: mfeder@mccarthy.ca
kbooth@mccarthy.ca
klove@clasbc.net

Counsel for the Respondent, Council of Canadians with Disabilities

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
World Exchange Plaza
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 Counsel for the Respondent, Council of Canadians with Disabilities

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

Elin Sigurdson
Monique Pongracic-Speier, Q.C.
Tel: 604-681-4146
Fax: 604-681-0959
Email: elin@mandellpinder.com

Counsel for the Intervener, British Columbia Civil Liberties Association

GOWLING WLG (Canada) LLP
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeff Beedell
Tel.: 613-786-0197
Fax: 613-563-9869
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, British Columbia Civil Liberties Association

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

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 Cost Prison Justice Society

ANITA SZIGETI ADVOCATES
400 University Avenue, Suite 2011
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
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

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

TORYS LLP
79 Wellington Street West
Suite 3000, 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
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel: 613-695-8855 ext. 101
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for Counsel 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
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 & Aids Legal Clinic Ontario and South Asian Legal Clinic Ontario

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
World Exchange Plaza
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 Counsel for the Interveners, Advocacy Centre for Tenants Ontario, ARCH Disability Law Centre, Canadian Environmental Law Association, Chinese and Southeast Asian Legal Clinic, HIV & Aids Legal Clinic Ontario and South Asian Legal Clinic Ontario

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
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

Matthew Halpin
Tel: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for Counsel for the Intervener, David Asper Centre for Constitutional Rights

ATTORNEY GENERAL OF CANADA
Department of Justice
National Litigtation 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
Ottawa Agent for Counsel for the Intervener, Attorney General of Canada

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
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

Matthew Halpin
Tel: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for Counsel for the Intervener, Trial Lawyers Association of British Columbia

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.ab.ca

Counsel for the Intervener, Attorney General of Alberta

GOWLING WLG (Canada) LLP
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Alberta

NATIONAL COUNCIL OF CANADIAN MUSLIMS
300 – 116 Albert Street
Ottawa, ON K1P 5G3

Sameha Omer
Tel: 613-254-9704 ext. 224
Fax: 613-701-4062
Email: somer@nccm.ca

Counsel for the Intervner, National Council of Canadian Muslims

SUPREME ADVOCACY
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

Ottawa Agent for Counsel for the Intervener, National Council of Canadian Muslims

MENTAL HEALTH LEGAL COMMITTEE
250 Younge Street, Suite 2201
Toronto, ON M5B 2L7

Karen R. Spector
Kelley Bryan
C. Tess Sheldon
Tel: 416-995-3477
Fax: 416-855-9745
Email: spectork@gmail.com

Counsel for the Intervener, Mental Health Legal Committee

RAVEN, CAMERON, BALLANTYNE &YAZBECK LLP
220 Laurier Avenue West, Suite 1600
Ottawa, ON K1P 5Z9

James Cameron
Tel: 613-567-2901
Fax: 613-567-2921
Email: jcameron@ravenlaw.com

Ottawa Agent for Counsel for the Intervener, Mental Health Legal Committee

LEGAL AID ONTARIO
Refugee Law Office
20 Dundas Street West
Toronto, ON M5G 2H1

Anthony Navaneelan
Naseem Mithoowani
Tel: 416-977-8111 ext. 7181
Fax: 416-977-5567
Email: navanea@lao.on.ca

Counsel for the Intervener, Canadian Association of Refugee Lawyers

ATTORNEY GENERAL OF SASKATCHEWAN
820 – 1874 Scarth Street
Regina, SK S4P 4B3

Sharon H. Pratchler, Q.C.
Tel: 306-787-5584
Fax: 306-787-9111
Email: Sharon.pratchler2@gov.sk.ca

Counsel for the Intervener, Attorney General of Saskatchewan

GOWLING WLG (Canada) LLP
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Saskatchewan

POORANLAW PROFESSIONAL CORPORATION
400 – 1500 Don Mills Road
Toronto, ON M3B 3H4

Faisal Bhabha
Madison Pearlman
Tel: 416-860-7572
Fax: 416-860-7577
Email: fbhabha@pooranlaw.com

Counsel for the Intervener, Centre for Free Expression

KHALID M. ELGAZZAR
440 Laurier Avenue West, Suite 200
Ottawa, ON K1R 7X6

Khalid M. Elgazzar
Tel: 613-663-9991
Fax: 613-663-5552
Email: ke@elgazzar.ca

Ottawa Agent for Counsel 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

Matthew Halpin
Tel: 416-219-2424
Fax: 416-216-3930
Email:
fahad.siddiqui@nortonrosefulbright.com

Counsel for the Interveners, 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

Matthew Halpin
Tel: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for Counsel for the Interveners, Federation of Asian Canadian Lawyers and Canadian Muslim Lawyers Association

ALISON M. LATIMER
1200 – 1111 Melville Street
Vancouver, BC V6E 3V6

Alison M. Latimer
Tel: 779-847-7324
Email: alison@alatimer.ca

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

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé
Tel: 613-702-5566
Fax: 613-702-5566
Email : dbosse@juristespower.ca

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

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Yashoda Ranganathan
David Tortell
Tel: 647-637-0883
Fax: 416-326-4015
Email: yoshada.ranganathan@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5573
Fax: 613-702-5573
Email : mvincelette@juristespower.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

ANIMAL JUSTICE
720 Bathurst Street
Toronto, ON M5S 2R4

Kaitlyn Mitchell
Scott Tinney
Tel: 647-746-8702
Email: kmitchell@animaljustice.ca

Counsel for the Intervener, Animal Justice

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5573
Fax: 613-702-5573
Email : mvincelette@juristespower.ca

Ottawa Agent for Counsel for the Intervener, Animal Justice

PUBLIC INTEREST LAW CENTRE
100 – 287 Broadway
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 Interveners, Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé
Tel: 613-702-5566
Fax: 613-702-5566
Email : dbosse@juristespower.ca

Ottawa Agent for Counsel for the Interveners, Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.

OLSER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Mark Skeeley
Lipi Mishra
Tel: 416-862-6791
Fax: 416-862-6666
Email: msheeley@osler.com

Counsel for the Intervener, Canadian Constitution Foundation

OLSER, HOSKIN & HARCOURT LLP
340 Albert Street, Suite 1900
Ottawa, ON K1R 7Y6

Geoffrey Langen
Tel: 613-787-1015
Fax: 613-235-2867
Email: glangen@osler.com

Ottawa Agent for Counsel for the Intervener, Canadian Constitution Foundation

Table of Contents

PARTS I AND II: OVERVIEW AND POSITION ON THE QUESTIONS IN ISSUE

1. This case affords this Court the opportunity to confirm that the test for public interest standing must reflect the realities of constitutional litigation and the difficulties facing marginalized and vulnerable communities. Public interest organizations that litigate these cases are frequently the most, if not the only, effective and efficient actor to bring challenges to unconstitutional legislation or government action. Narrowing the test, as proposed by the appellant Attorney General of British Columbia, to make a public interest litigant the handmaiden of private litigants would severely undermine access to justice and effectively eliminate the role of public interest standing. Our factum sets forth the following three arguments with a focus on *Charter* litigation.

2. First, the test for public interest standing must reflect the practice of modern *Charter* litigation. As set out below, the practice of *Charter* litigation seeking s. 52(1) relief has developed to involve voluminous records populated by non-party lay and expert evidence. The records now required by the jurisprudence are designed to give trial courts the necessary evidentiary backdrop to fully understand the impact of the impugned law and whether it is justifiable. To accomplish this task, the litigation cannot – and does not – depend on the factual matrix of individual litigants but rather on the evidence of diverse witnesses and experts speaking to a broad range of experiences of harm arising from the challenged laws.

3. Second, a contextual approach to the test for public interest standing militates against the narrow test proposed by the appellant. A contextual approach appreciates that marginalized and vulnerable populations frequently require the assistance of public interest organizations to step forward, either as the sole plaintiff or alongside individual litigants, to challenge unconstitutional laws.[1] A contextual approach to the test accounts for the uneven playing field facing potential plaintiffs in such litigation and the historical disadvantages that make accessing the courts and sustaining prolonged and complex litigation so daunting for those who may otherwise have a right to bring a claim and secure remedies for violations of *Charter* rights and freedoms.

---

[1] See *BCCLA v. Canada, infra* note 15 and *CCLA v. Canada, infra* note 18 (litigation sustained wholly by public interest litigants). See *Carter, infra* note 5 and *Bedford, infra* note 11 (litigation sustained by both private and public interest litigants).

4. Third, requiring a public interest litigant to be hitched to an individual serves only to impede access to justice. The appellant's articulation of the test conflates two separate aspects: demonstrating sufficient interest, as required for public interest standing, and fulfilling a plaintiff's evidentiary burden. These distinct aspects of a proceeding also have their own timetable, with standing to be challenged at the earliest stages, and evidence to be adjudged at trial. By erroneously confounding these two necessary, but separate, components of litigation, the appellant's proposed approach would severely erode access to justice for communities that depend on public interest organizations to launch challenges to unconstitutional legislation.

5. West Coast Legal Education and Action Fund ("**West Coast LEAF**") submissions are focused on providing the Court with a review of the practical realities of civil *Charter* litigation and the impacts of the proposed narrowing of the test on public interest litigants like West Coast LEAF and the communities on behalf of whom it advocates.

PART III: STATEMENT OF ARGUMENT

A. Public Interest Litigation Driven by Broad Evidentiary Record

6. Our courts have recognized the unique nature of constitutional challenges and have differentiated such cases from the adjudication of private disputes in which an individualized factual matrix is usually sufficient for the adversarial process. Consequently, the practical reality of modern constitutional litigation is that, for trial records to be sufficient to justify the striking out of laws, they must draw on evidence from sources other than a directly affected plaintiff.[2]

7. The requirement of an adequate evidentiary record reflects the fact that constitutional litigation frequently involves either generalized or systemic impacts. Systemic constitutional claims are manifestly not cases in which a "series of claims for individual relief" are sought in the aggregate.[3] Justice Thomas of the Ontario Superior Court recently encapsulated this reality when he rejected an argument that the relief sought:

> [R]equires a detailed examination of each individual [case]. Such is not the nature of public interest litigation examining systematic misconduct. It seems to

[2] See, e.g. *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 28.
[3] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 44.

> me that representative evidence coupled with expert evidence could potentially make a case for a broad declaration fashioned appropriately by the trial judge.[4]

8. In the following sections we provide a brief review of five prominent *Charter* trial judgments that demonstrate that, irrespective of the presence of individual plaintiffs and whether or not they are joined by a public interest organization as a party, it is the whole body of evidence – usually a very substantial body of evidence, much of it expert opinion – that is the main grounding for the courts' findings, and not the evidence of the individual litigants.

(1) Carter v. Canada (Attorney General)

9. *Carter* is the physician assistance in dying case brought by four individual plaintiffs and by the BC Civil Liberties Association as a public interest litigant. The trial judgment spans 1416 paragraphs, with only 32 paragraphs (2%) dedicated to the facts of the individual plaintiffs. Expert evidence, on the other hand, consisted of 722 paragraphs (51%).[5] Justice Lynn Smith commented in the reasons for judgment on the "extensive nature of the record" before her, encompassing as it did "some 36 binders of affidavits, transcripts and documents … [composed of] 116 affidavits".[6]

10. In distinguishing the case from binding precedent (*Rodriguez*[7]), Justice Smith noted that, while the adjudicative facts were not meaningfully distinguishable, the legislative and social fact evidence was far more robust in the case before her, including "an enormous amount of evidence about the experience with legal physician-assisted death in other jurisdictions." Justice Smith held:

> The record permits assessment of the current approach to and understanding of end-of-life decision-making, and the current understanding of the efficacy of possible safeguards that might permit persons in the position of Ms. Taylor to have the option that she seeks, while protecting those who are vulnerable.[8]

11. She further noted that, while the amplification of the record did not permit her to ignore *stare decisis*, the "importance of the factual matrix in constitutional adjudication" was a factor in justifying a fresh determination of the issues.[9] In affirming the trial judgment, this Court

---

[4] *Williams v. London Police Services Board*, 2019 ONSC 227 (Chambers) at para. 49.
[5] *Carter v. Canada (Attorney General)*, 2012 BCSC 866 [***Carter***] at paras. 44-76 and 160-882.
[6] *Carter, supra* at note 5 at paras. 114-5.
[7] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.
[8] *Carter, supra* at note 5 at paras. 941-5 and 1001.
[9] *Carter, supra* at note 5 at para. 946.

acknowledged that the record was grounded on broad legislative and social fact evidence, even as the adjudicative facts were bound by *stare decisis*.[10]

(2) Bedford v. Canada

12. *Bedford* is the Ontario trial decision involving the challenge to the prostitution provisions of the *Criminal Code*. *Bedford* was brought by three plaintiffs with private standing; no public interest organization was a party in the case. The trial judgment spans 541 paragraphs with only 17 paragraphs (3%) dedicated to summarizing the facts of the individual plaintiffs. Summaries of expert evidence, on the other hand, consisted of 94 paragraphs (17%).[11]

13. Justice Himel noted that the application record consisted of:[12]

> Over 25,000 pages of evidence in 88 volumes, amassed over two and a half years…. The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents.

14. The trial judge further relied predominantly on expert evidence when addressing the individual legal arguments.[13] This Court largely upheld her order.[14]

(3) British Columbia Civil Liberties Association v. Canada (Attorney General)

15. The British Columbia Civil Liberties Association ("**BCCLA**") challenged in BC Supreme Court sections of the *Corrections and Conditional Release Act* that permitted the "administrative segregation" of inmates in federal penitentiaries. The John Howard Society of Canada joined BCCLA; no private interest litigants were involved. The government did not dispute the public interest standing of either public interest organization, apparently on the basis

---

[10] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 3 and 44-7.
[11] *Bedford v. Canada*, 2010 ONSC 4264 [***Bedford***] at paras. 26-43 and 119-213.
[12] *Bedford*, *supra* note 11 at para 84.
[13] See, for example, *Bedford*, *supra* note 11 at paras. 226-7, 293-8, 302-25, and 328-51.
[14] *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

that they were seeking a s. 52(1) remedy.[15]

16. Justice Leask noted that "under very tight timelines" the plaintiffs compiled "a substantial evidentiary record". The plaintiffs' evidence consisted of 10 expert witnesses and 8 lay witnesses, including former Correctional Service of Canada employees and prisoners who had experienced administrative segregation. In the resulting judgment, which was over 600 paragraphs long, Justice Leask found the impugned provisions to unjustifiably infringe ss. 7 and 15 of the *Charter*.[16] The order was largely upheld on appeal; a further appeal to this Court was discontinued by the parties.[17]

(4) Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen

17. In *CCLA v. Canada*, the Corporation of the Canadian Civil Liberties Association ("**CCLA**") sought and received public interest standing to challenge the same provisions in Ontario as in *BCCLA v. Canada*. The CCLA was the sole plaintiff at the hearing; no individual plaintiffs joined. The CCLA successfully argued that the Act violated the s. 7 rights of prisoners and that the infringement was not saved by s. 1. The Attorney General of Canada acquiesced to the plaintiff's standing so long as it sought a declaration of invalidity pursuant to s. 52(1). The AGC's acquiescence in this regard properly reflects the relationship between public interest standing and claims for relief against oppression of marginalized and vulnerable populations.[18]

18. Given the absence of private interest litigants, the record before Justice Marrocco consisted entirely of social and legislative fact evidence, including numerous reports and international statements and rules, as well as the evidence of the former United Nations Special Rapporteur on Torture, Professor Mendez.[19] On appeal, the court expanded Justice Marrocco's holding to include a finding of an unjustifiable s. 12 infringement; further appeal to this Court was discontinued by the parties.[20]

---

[15] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 [***BCCLA v. Canada***] at para. 6 (West Coast LEAF intervened in the case).
[16] *BCCLA v. Canada, supra* note 15 at paras. 8, 9, and 609.
[17] *Attorney General of Canada v. British Columbia Civil Liberties Association, et al.*, 2019 BCCA 228.
[18] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 [***CCLA v. Canada***] at paras. 14 and 167.
[19] *CCLA v. Canada, supra* note 18 at paras. 29-42 and 62.
[20] *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 at paras. 2 and 150.

(5) Cambie Surgeries Corporation v British Columbia (Attorney General)

19. In *Cambie Surgeries,* two corporate plaintiffs and five individual plaintiffs sued British Columbia claiming that the provincial health care legislation was unconstitutional for breach of ss. 7 and 15 of the *Charter.* The centerpiece of the claim was the prohibition on private insurance for medically required services. The trial judge concluded there was not a breach of the *Charter* and suggested that, if there had been, it would have been justified under s. 1.[21]

20. The evidentiary record at trial was predominantly composed of non-party evidence. Prior to trial, one of the five individual plaintiffs died. Further, the trial judge confirmed the corporate plaintiffs did not have ss. 7 and 15 rights and did not satisfy the bar for public interest standing. Notwithstanding these setbacks, the evidentiary record was voluminous, as recorded in the reasons for judgment:[22]

> The lay evidence in this trial includes oral testimony, affidavits and medical records of 17 patients, 36 physicians (some of whom acted as treating physicians for some of the patient plaintiffs, witnesses or intervenors), 17 health authorities' or ministerial agents and directors, and five other lay witnesses ...
>
> The parties have tendered the evidence of 75 lay witnesses…
>
> There were also a total of 40 expert reports …. The plaintiffs tendered 19 expert reports, the defendant tendered 17, Canada and the Coalition Intervenors tendered two each…
>
> The second source of documents tendered not through witnesses, is found in … the "Common Book of Documents"…. [I[n total, more than 17,500 pages and 590 documents were tendered through the Common Books.

21. The individual plaintiffs' evidence as health care patients was canvassed by the trial judge over approximately 100 paragraphs (paras. 452 to 566). The twelve non-party patient witnesses, on the other hand, spanned approximately 150 paragraphs (paras. 567 to 712). Moreover, lay evidence from the thirty-six physician witnesses and administrative witnesses constituted another 350 paragraphs of the reasons (paras.713-1063). In applying the law to the facts, the trial judge considered both the patient plaintiffs and the patient witnesses equally (at paras. 1807-1942). The appeal of Justice Steeves' decision is under reserve.[23]

---

[21] *Cambie Surgeries Corporation v British Columbia (Attorney General),* 2020 BCSC 1310 [***Cambie Surgeries***].
[22] *Cambie Surgeries, supra* note 21 at paras. 54-59.
[23] Court of Appeal of British Columbia, Docket no. CA7004.

B. Contextual Approach Necessary to Advance Rights for Marginalized Groups

22. It remains the case, as this Court declared unanimously in 2014, that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today".[24] In *Downtown Eastside*, this Court also noted that courts should consider 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".[25] Courts have long recognized the disproportionate impact of economic disadvantage, which can create barriers to accessing justice. The "feminization of poverty" is understood by this Court as arising from the "multiplicity of economic barriers women face in society."[26] The "persistent social and economic disadvantage" experienced by persons with disabilities has been understood to arise from histories of their exclusion from society and attitudes of paternalism.[27] The fact that such barriers may result in the unwillingness or practical inability of many people from marginalized communities to come forward as individual plaintiffs was recognized in the Supreme Court of Canada's reformulation of public interest standing as an access to justice issue in *Downtown Eastside*.[28]

23. Compounded by economic disadvantage, the barriers that members of marginalized communities experience in seeking access to the courts to vindicate their *Charter* rights are not remediable simply by funding cases brought by individual litigants, as the chambers judge appears to suggest.[29] Courts recognize a constellation of factors that effectively bar individuals from pursuing systemic constitutional challenges, including considerations well beyond financial means.[30] The adverse impact that serving as a plaintiff in a multi-year, multi-court, adversarial

---

[24] *Hryniak v. Mauldin*, 2014 SCC 7 at para 1.
[25] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [***Downtown Eastside***] at para. 51.
[26] *Moge v. Moge*, [1992] 3 SCR 813 at 853-854 (*per* L'Heureux-Dubé J.); *Marzetti v. Marzetti*, [1994] 2 SCR 765 at 801. See also, *Quebec (Attorney General) v. Alliance du personnel professionel et technique de la santé et des services sociaux*, 2018 SCC 17 and *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 (concerning the economic disadvantage experienced by women in the workforce).
[27] *Eldridge v. British Columbia (Attorney General)*, [1997] 2 SCR 624 at 668-669; see also *Moore v. British Columbia (Education)*, 2012 SCC 61 (concerning the disadvantage experienced by persons with mental disabilities).
[28] *Downtown Eastside*, *supra* note 25 at paras. 51, 71; see also, *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (concerning the disadvantages faced by seasonal workers).
[29] *MacLaren v. British Columbia (Attorney General)*, 2018 BCSC 1753 at para. 95.
[30] See, e.g., *Downtown Eastside Sex Workers United Against Violence Society v. Canada*

and often high profile case may have on an individual's social life, physical health and mental well-being, employment, family, privacy interests and security are recognized barriers to participation as a plaintiff in constitutional litigation.[31] A contextual approach to public interest standing is attuned to these disadvantages and the obligation of the courts "to allow more plaintiffs through the door".[32]

24. Likewise, a contextual approach appreciates that in some instances, existing barriers can make litigation affecting marginalized and vulnerable communities difficult to undertake by or even with directly-affected individuals. In *Canadian Council for Refugees v. Canada,* the Federal Court granted public interest standing to three organizations (the Canadian Council for Refugees, Amnesty International, and the Canadian Council of Churches) partly on the basis that the directly-affected individuals (e.g. refugee claimants) might not be in a position to apply to the court and further may not be able to see the litigation through to its conclusion.[33] Similarly, in *B.C./Yukon Association of Drug War Survivors,* Chief Justice Hinkson of the B.C. Supreme Court held that "[g]iven the challenges faced by many members of [the plaintiff society, an organization of drug users and former drug users]… they should not and cannot be expected to mount individual challenges to the City's legislative scheme and related actions on their own".[34]

C. Standing Test Should Not Require a Costly Examination of the Merits

25. In *Downtown Eastside* this Court established an expedient and proportional test for public interest standing. The test is commensurate with the preliminary nature of the standing inquiry and is attuned to the unique circumstances in which private interest standing is unlikely to be a viable or effective means of litigating matters in the public interest. A challenge to the standing of an institutional plaintiff should occur at an early stage of the proceedings and should not become an occasion for parties to preview a trial of the claim on its merits.

(Attorney General), 2010 BCCA 439 at paras. 51, 55, 59; *Chaoulli v. Quebec*, 2005 SCC 35 at para. 189; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2016 BCSC 1391 at para. 28.

[31] See, e.g., *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at para. 340 (concerning impediments to participation, including physical and mental health).

[32] *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 18.

[33] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 at para. 63.

[34] *B.C./Yukon Association of Drug War Survivors v. Abbotsford*, 2014 BCSC 1817 at para. 61.

26. The test proposed by the appellant erroneously conflates the question of standing – which focuses on sufficient interest in the litigation – with the evidentiary burden of the plaintiff. If conjoined, the law would demand that public interest litigants pre-emptively satisfy their evidentiary burden at the same preliminary stage as they are required to prove standing, contrary to this Court's dictum in *Downtown Eastside*:[35]

> To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner.

27. The appellant'sposition would turn a challenge on standing into a dress-rehearsal of the merits of the claim at the earliest stages of litigation. Requiring such a stringent test for access by public interest litigants would represent a substantial barrier in terms of both cost and time. West Coast LEAF, and other public interest organizations who work in collaboration with equity seeking groups, would be compelled to commit significant additional resources to litigation just to clear the earliest stages of a proceeding.

28. A foreseeable consequence of placing a significant burden on public interest organizations would be a chill on public interest litigation brought in the absence of a directly-affected co-plaintiff. This Court has acknowledged the interconnection between financial barriers and public interest litigation when, in *Okanagan Indian Band*, it reworked discretion on costs in order "to avoid the harshness that might result from adherence to the traditional principles" and to "ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole".[36]

29. This Court's objective in *Okanagan Indian Band* is rooted in the same fundamental principles at issue in public interest standing more generally: to avoid discouraging *bona fide* challenges and to ensure that *Charter* litigation is not beyond the reach of individuals (or groups) of ordinary means.[37] Adopting the appellant's proposed test would discourage access by the

---

[35] *Downtown Eastside, supra* note 25 at para. 42.
[36] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 [***Okanagan Indian Band***] at para. 27.
[37] *Okanagan Indian Band, supra* note 36 at para. 28, citing *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 1987 CanLII 4184 (ON SC), 60 O.R. (2d) 486 (H.C.J.) at 526.

groups already facing the greatest barriers to accessing justice in the first place.

PART IV: ORDERS SOUGHT

30. West Coast LEAF does not seek any order, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF DECEMBER, 2021.

Tim Dickson
Jason Harman

Counsel for the Intervener, West Coast LEAF

PART VII: TABLE OF AUTHORITIES

NAME	**PARA NO.**
CASES:	
Attorney General of Canada v. British Columbia Civil Liberties Association, et al., 2019 BCCA 228	16
B.C./Yukon Association of Drug War Survivors v. Abbotsford (City), 2014 BCSC 1817	24
Bedford v. Canada, 2010 ONSC 4264	3, 12, 14
British Columbia (Attorney General) v. Christie, 2007 SCC 21	6
British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCSC 62	3, 15, 16
British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71	28, 29
Canada (Attorney General) v. Bedford, 2013 SCC 72	13
Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45	22, 26
Canadian Civil Liberties Association v. Canada, 2019 ONCA 243	18
Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship), 2017 FC 1131	23, 24
Cambie Surgeries Corporation v British Columbia (Attorney General), 2020 BCSC 1310	19, 20
Carter v. Canada (Attorney General), 2012 BCSC 866	3, 9, 10, 11
Carter v. Canada (Attorney General), 2015 SCC 5	11
Centrale des syndicats du Québec v. Quebec (Attorney General), 2018 SCC 18	22
Chaoulli v. Quebec, 2005 SCC 35	23
Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen, 2017 ONSC 7491	17
Delta Air Lines Inc. v. Lukács, 2018 SCC 2	23

NAME	**PARA NO.**
Downtown Eastside Sex Workers United Against Violence Society v. Canada, (Attorney General), 2010 BCCA 439	23
Fraser v. Canada (Attorney General), 2005 CanLII 47783	22
Eldridge v. British Columbia (Attorney General), [1997] 2 SCR 624	22
Hryniak v. Mauldin, 2014 SCC 7	22
MacLaren v. British Columbia (Attorney General), 2018 BCSC 1753	23
Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14	7
Marzetti v. Marzetti, [1994] 2 SCR 765	22
Moge v. Moge, [1992] 3 SCR 813	22
Moore v. British Columbia (Education), 2012 SCC 61	22
Quebec (Attorney General) v. Alliance du personnel professionel et technique de la santé et des services sociaux, 2018 SCC 17	22
Re Lavigne and Ontario Public Service Employees Union (No. 2) (1987), 1987 CanLII 4184 (ON SC), 60 O.R. (2d) 486 (H.C.J.)	29
Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519.	10
Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2016 BCSC 1391	23
Williams v. London Police Services Board, 2019 ONSC 227 (Chambers)	7