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)

AND:

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

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PART I – OVERVIEW AND FACTS

1. This Court has frequently affirmed that there is no hierarchy of *Charter* protections. Rights and freedoms should be interpreted in ways that reinforce rather than compete with one another. This applies not only when analyzing formal *Charter* claims, but also—perhaps, even, especially—when employing *Charter* values to interpret non-constitutional questions of law.

2. The present appeal raises, and has implications for, at least two key *Charter* values: equality and freedom of expression. Although equality and freedom of expression share related underlying rationales and goals, all too often they have been pitted against one another in *Charter* rights adjudication. This appeal presents an opportunity for the Court to develop a harmonized jurisprudence of freedom of expression and equality, mutually reinforced, in the service of access to justice.

3. Courts do not exist solely for dispute resolution between private individuals. Courts also perform an important public role "for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts."[1] Consequently, the value of public interest litigation and, by extension, of public interest standing, increases as society evolves. With greater civic engagement comes a greater need to ensure access to justice.

4. Access to justice is concerned with more than access to courts. It also encompasses access to legal representation and the availability of a fair legal process, which ensures, among other things, the right to speak, to see, to be heard, and to know the reasons behind decisions affecting one's interests. All these elements of access to justice reflect or serve expressive freedom interests. For this reason, CFE respectfully urges the Court to adopt a freedom of expression lens in analyzing the issues on appeal. In particular, CFE asks the Court to consider freedom of expression as directly relevant to the question of how to reasonably balance access to justice with judicial economy.

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[1] *Edmonton Journal v Alberta (AG)* [1989] 2 SCR 1236 at 1337 **[Edmonton Journal]**.

[2] *Council of Canadians with Disabilities v British Columbia (AG)*, 2020 BCCA 241 at para 73.

PART II– POSITION ON THE ISSUES

5. CFE's interest in this appeal is to urge the Court to uphold the judgment of the court below,[2] and preserve the "flexible", "generous" and "purposive" test for public interest standing outlined in *Downtown Eastside*.[3]

6. CFE makes three submissions:

   a. Public interest standing protects and promotes freedom of expression by facilitating the public's right to speak, to know, to hear, and to participate in the practise of democracy, which are constituent elements of freedom of expression;

   b. The test for public interest standing should be given a broad and liberal interpretation especially when a claim pertains to state action and the protection of fundamental rights and freedoms, given weak internal mechanisms to ensure constitutional legality; and

   c. There should be no presumptive preference for individual claims over public interest claims under the third stage of the governing test.

PART III – STATEMENT OF ARGUMENT

A. Public interest standing protects and promotes freedom of expression

(i) Freedom of expression is a fundamental right and value in Canadian society

7. This Court has, for more than 30 years, accepted that there are "three core rationales, or purposes" for freedom of expression: the preservation of individual self-realization; the advancement of knowledge; and the promotion of democracy.[4] In the context of this case, all three rationales are relevant. Public interest litigation, together with public interest standing, facilitates individual expression; advances knowledge; and promotes democracy.

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[2] *Council of Canadians with Disabilities v British Columbia (AG)*, 2020 BCCA 241 at para 73.
[3] *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 at paras 36-37 [**Downtown Eastside**].
[4] *Grant v Torstar Corp*., 2009 SCC 61 at para 47 **[Grant]** citing *Irwin Toy Ltd. v Quebec (Attorney General)* [1989] 1 SCR 927 at 976 **[Irwin Toy]**.

8. The commitment to protecting free expression has long been entrenched in Canada's legal and political systems. The positive right to freedom of expression is guaranteed under section 2(b) of the *Charter*.[5] Freedom of expression also operates as a constitutional value and operating norm in the application of public policy and rules.[6] Freedom of expression is a cornerstone right because "without freedom to comment and criticize, other fundamental rights and freedoms may be subverted by the state."[7]

9. The importance that this Court has placed on free expression stems from its central purpose in cultivating and protecting the democratic fabric of society. Without freedom of expression, the public loses the "free flow of ideas essential to political democracy and the functioning of democratic institutions".[8] Indeed, "the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society."[9]

10. The value of freedom of expression is seen throughout society, not just in politics. It is therefore important to extend freedom of expression to:

> … any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.[10]

11. Not only does robust freedom of expression help foster "a more relevant, vibrant and progressive society",[11] but it also helps the public to "put forward opinions about the functioning of public institutions."[12]

(ii) Public interest litigation is a form of expression and a means to advance freedom of expression

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[5] Canadian Charter of Rights and Freedoms, The Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 2(b).
[6] *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.,* 2002 SCC 8, para 18. See also: *Doré v Barreau du Québec*, 2012 SCC 12 at para 59.
[7] *R v Keegstra* [1990] 3 SCR 697, McLachlin J. dissenting, at 802-803 **[Keegstra]**.
[8] *Keegstra,* McLachlin J dissenting, at 802.
[9] *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22, at para 1. See also: *Irwin Toy* at 976-977.
[10] *Grant* at para 49 (emphasis added).
[11] *Keegstra,* McLachlin J dissenting, at 804.
[12] *Edmonton Journal* at 1336.

12. The courts are one of Canada's most important public institutions. Courts serve a dual function, as an institutional *pillar* of Canadian democracy and an institutional *lever* for public accountability. The availability of a reliable forum for adjudication that gives individuals a site in which to be heard helps make legal rights feel real.

13. Access to adjudication also provides a platform for individuals and groups who do not have access to other comparable platforms to publicly communicate social and political critique. Litigating public interest issues can be an important expressive act for aggrieved or dissenting members of the public. In the absence of public interest litigation, such individuals and groups may have few options to be heard and responded to by public authorities.

14. In theory, the courts are open to any member of the public who wishes to engage the state in litigation about matters of personal and public importance. Practically speaking, access to public interest litigation is severely curtailed by a complex set of barriers and limitations, including time, cost, personal stamina, and reputational risk. All of these barriers are mitigated when the litigant is not an individual. Public interest organizations thus serve as essential representative voices, or proxies, for the communities they serve. For this reason, the doctrine of public interest standing has been recognized as a necessary part of helping ensure that important issues reach adjudication, which in turn promotes access to justice.

(iii) Expressive freedom and equality are mutually reinforcing *Charter* values

15. The question of whether a court should exercise its discretion to grant standing to a party seeking to be a public interest litigant implicates inseparable questions about the *Charter* values of equality and expressive freedom. Although section 2(b) of the *Charter* is not expressly at issue in this appeal, freedom of expression as a constitutional right and value is engaged, to the extent that public interest standing is bolstered by both equality and freedom of expression considerations.

16. Courts exercising their discretion to grant public interest standing should consider whether granting standing will facilitate an airing of grievances, the making of plausible allegations, the examination of evidence and testing of witnesses, and the advancement of a credible argument about the state's legal duties. Courts must ask: Is the proposed case going to serve the aims of public accountability and transparency, the public's right to know, and the search for the truth? If

so, the *Charter* value of freedom of expression will militate in favour of granting public interest standing.

17. This Court has always given freedom of expression a broad and liberal interpretation.[13] The ability for individuals to engage the courts on matters of fundamental interest is essential for the "proper functioning of democratic governance".[14] This is because cases that individuals bring to courts which have a public interest dimension facilitate the constitutional "dialogue" between branches of government that is so critical to the functioning of a healthy democracy. Where individuals do not have the means to advance public interest litigation, the public loses. In contrast, the public stands to benefits when a third-party steps-up to seek public interest standing.

18. While democratic dialogue is what makes public interest litigation so important, not everyone has equal access to engage in public interest litigation. Those seeking justice for constitutional and human rights violations are often among society's most vulnerable individuals and groups. For this reason, concern about equality leads to recognizing that the free market will not ensure access to justice. If affected individuals themselves are not able to challenge the laws that adversely impact them, that does not diminish the public interest in having such matters heard and decided.

19. The principle of legality—that is, the notion that "state action should conform to the Constitution…and that there must be practical and effective ways to challenge the legality of state action"—is the foundation of public interest standing.[15] The principle of legality highlights the direct link between litigation as a process and litigation as a tool, and the ability for the public to hold governments accountable and express their criticisms of law and state action.

20. The inability of large numbers of people to access courts is widely understood as an equality issue, which it is.[16] The principle of equality requires that access to justice be enjoyed on an equal basis. But what does equal access to justice mean in real terms?

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[13] *Irwin Toy* at 970, 1006, McIntyre J dissenting; *Harper v Canada (AG),* 2004 SCC 33 at para 33
[14] *Grant* at para 48.
[15] *Downtown Eastside* at para 31.
[16] *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62 at para 25.

21. There is no consensus as to what access to justice entails.[17] Is it mere access to courts? Access to lawyers? Access to a particular venue or process? To a correct legal outcome or specific remedy? There may be many interests informing the priority of ensuring access to justice. There can be no question that expressive freedom is one such interest.

22. Public interest litigation is a mode of oversight in a rule-of-law system in which the government's authority is subject to a form of democratic accountability. Yet, many Canadians do not have the means to engage in legal action against the state on their own. In *Thorson,* this Court held that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."[18] Sometimes the only way a matter of public importance is going to reach the courts is by way of public interest standing.

23. In describing the importance of the open court principle, this Court has highlighted how public interest litigation is important to facilitating the public's right to know:

> The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption.[19]

24. Barriers that result in unequal access to the courts operate to limit and distort the exercise of expressive freedoms that are at the heart of a democratic society. This Court has observed that Canadian democracy has endeavoured over time to be more inclusive, but that it has been an uneven process that continues to this day to include women, minorities and indigenous people in the country's democratic fabric.[20] Courts are also now recognizing other barriers, including socio-economic, emotional, and psychological factors, which may create unique hardships for

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[17] Faisal Bhabha, "Institutionalizing Access to Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 Queens LJ at paras 1, 8-12.
[18] *Downtown Eastside* at para 31 citing *Thorson v Canada (AG)* [1975] 1 SCR 138, at 145 **[Thorson]**. (emphasis added).
[19] *Canadian Broadcasting Corp. v New Brunswick (Attorney General)* [1996] 3 SCR 480 at para 18.
[20] *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 63; *Reference Re Provincial Electoral Boundaries (Sask.)* [1991] 2 SCR 158 at 186.

some members of disadvantaged groups to meaningfully access courts for the purpose of challenging laws and policies that affect them.[21]

B. The public interest standing test should be interpreted broadly and liberally

(i) Weak internal mechanisms for government accountability

25. The need for a broad and liberal interpretation of the public interest standing test is due to weak internal mechanisms for maintaining constitutionality. Government lawyers have no authority to direct or alter government decisions to draft legislation once the legislative process has begun, even if it is likely unconstitutional.

26. In *Schmidt,* the Federal Court of Appeal (the "FCA") endorsed the Federal Court's conclusion that the Minister of Justice is permitted to operate on a "credible argument" standard when reviewing draft legislation and determining whether to report possible unconstitutionality to Parliament. The FCA held that the Minister may decline to report to Parliament even if a proposed law was deemed to have a near certain likelihood of being overturned by the courts for violating the *Charter*: "The obligation is to make a thorough search for inconsistencies and to report only if no credible argument can justify the inconsistency."[22]

27. With this *de minimis* internal framework for ensuring the constitutional consistency of legislation prior to its adoption, the public's right to know and ability to hold government accountable are both diminished. The need for unconstitutional legislation to be implemented as law in order for it to be challenged for unconstitutionality creates an even greater need to maintain the generous approach to public interest standing as a mechanism for ensuring constitutional compliance after unconstitutional legislation comes into operation.

28. The FCA in *Schmidt* confirmed that there is no positive obligation on Parliament, or on government lawyers, to ensure that laws are consistent with guaranteed *Charter* rights and

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[21] *Downtown Eastside* at para 51; *Council of Canadians with Disabilities v British Columbia (AG)*, 2020 BCCA 241 at para 76-77; *Chaoulli v Quebec (Attorney General),* 2005 SCC 35, at para 189 **[Chaoulli]**; *Trial Lawyers Association of British Columbia v British Columbia (AG),* 2014 SCC 59 at paras 45-46.

[22] *Schmidt v Canada (AG),* 2016 FC 269 at para 178, aff'd *Schmidt v Canada (AG),* 2018 FCA 55 **[Schmidt]** at para 103-104.

freedoms.[23] As a result, the burden of ensuring public accountability for constitutionality appears to rest primarily, if not exclusively, on members of the public who must bring forward their own legal challenges to remedy constitutional violations.

(iii) A narrow interpretation will limit free expression and *Charter* values

29. The government does not exercise primary responsibility for ensuring constitutional oversight of public law, policy, and action. Meanwhile, courts are passive; judges may only hear and decide, but do not initiate, cases. Public interest plaintiffs therefore perform a necessary public service by advancing important questions for adjudication.

30. Indeed, the *Charter*'s baseline guarantees are neither self-executing nor delivered without a legal process. Rights need courts. Victims of constitutional rights violations must *seek* justice to obtain justice. Public interest litigation makes important contributions to democratic society. It also comes at a high personal cost for individual litigants.

31. The more accessing justice costs, the less people will want to engage in justice advocacy. The ability of affected individuals to litigate should not be the primary determinant of which public interest cases go to court. Conditioning whether to hold a hearing about a particular matter of fundamental importance on the existence of a person willing and able to commence, fund, and assume the substantial burdens and risks of litigating does not contribute to the constructive development of jurisprudence.

32. In a rule-of-law system relying mainly on private litigation to trigger the adjudication of fundamental constitutional issues, there comes the risk that serious issues will not get to court. This risk cannot be eliminated but it can be mitigated by the operation of public interest standing, which directly increases access to adjudication. Public interest standing enables members of justice-seeking communities to aggregate their claims through an organizational representative and communicate grievances with a collective voice rather than individually. Because not all members of the public have the means or ability to launch legal challenges on their own, broad-based legal action can be especially valuable where the goal is to shift policy or obtain a systemic remedy.

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[23] *Schmidt* at paras 65-68.

33. Any limitations placed on a trial judge's discretion to grant public interest standing would have the effect of limiting the expressive freedoms of individuals and groups who rely on public interest litigation to engage in expression and dialogue about matters of fundamental importance. It would also diminish the quality of the rule of law and dilute the culture of rights and freedoms by making courts less accessible to those who need them.

C. There should be no presumptive preference for individual claims over public interest claims

34. A public interest claim is no less valid by virtue of being brought in the public interest as opposed to by way of an individual claim. In certain cases, such as where multiple people, or entire classes of people, are similarly adversely affected by a decision, policy, or statutory scheme, it may make sense to aggregate the interests in a shared voice.

35. In true public interest cases where there is a class of people who are similarly affected, the primary purpose of an individual litigant is to serve as a representative voice in support of the claim. This role is unnecessary for the party bringing a claim and can be fulfilled by serving as a witness.

36. In some cases, it might make more sense to have a public interest litigant rather than an individual litigant. This could be so, for example, where the public and personal interests in a case do not align. In such cases, the individual litigant may not be motivated or equipped to argue the public interest dimension of the case. The court might end up with an inadequate record on which to make a decision. On appeal, public interest interveners may get involved to attempt to broaden the analysis, raise context for consideration, and point to additional interests at stake. The public interest dimension of some public interest cases may only come to be fleshed out as the case makes its way through appeals. Such cases might have benefitted from being brought by a public interest litigant as opposed to an affected individual in the first place.

37. In *Chaoulli,* this Court held that, while a challenge must "have an actual basis in fact…the question is not whether the appellants are able to show that they are personally affected by an infringement."[24] This Court's jurisprudence on standing has recognized the importance of

[24] *Chaoulli* at para 35 (emphasis added).

systemic challenges. They are understood as a reasonable and effective means of engaging the courts, of giving organizations with a direct interest in a matter the capacity to litigate broad-based claims, and serving the important goals of access to justice.[25]

38. Courts should continue to adopt a pragmatic and practical approach to the third factor under the governing test, which looks at whether granting public interest standing will be a "reasonable and effective" way to bring the case to court. In *Downtown Eastside,* this Court held "there is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances."[26]

39. The Court of Appeal in this case followed this Court's guidance set out in *Downtown Eastside* in applying a flexible and purposive approach, recognizing the unique nature of public interest cases and the type of facts and evidence needed to substantiate claims. There is nothing in the case law that necessitates having an individual plaintiff and plaintiff-specific material facts in order to meet the current public interest standing test.[27]

PART IV & V– COSTS AND ORDER SOUGHT

40. CFE seeks no costs and asks that no costs be awarded against it. CFE takes no position on the disposition of this appeal as it relates to the facts of the case before the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, in the Province of Ontario, the 3rd day of December, 2021.

Digitally signed by Khalid M. Elgazzar
Date: 2021.12.03 11:40:48 -05'00'

for Faisal Bhabha

Digitally signed by Khalid M. Elgazzar
Date: 2021.12.03 11:41:23 -05'00'

for Madison Pearlman

[25] *Downtown Eastside* at para 71; *Chaoulli* at para 189.
[26] *Downtown Eastside* at para 50.
[27] *Council of Canadians with Disabilities v British Columbia (AG)*, 2020 BCCA 241 at para 97.

PART VI – TABLE OF AUTHORITIES

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