File No.:

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPLICANT
(Respondent)

AND:

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
ATTORNEY GENERAL OF BRITISH COLUMBIA, APPLICANT
(Pursuant to s. 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26)

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APPLICANT'S MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

A. Overview

1. At the heart of the law of public interest standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 at para. 23, quoting with approval from *Canadian Council of Churches v. Canada (Minister of Employment and Immigration,* [1992] 1 S.C.R. 236 at p. 252. The Court of Appeal for British Columbia upset that balance in this case.

2. The Court of Appeal articulated a new approach to the multi-factored test for public interest standing prescribed by this Court in *Downtown Eastside,* one that gives *more* weight at the outset to the factors of access to justice and the principle of legality, over the other, countervailing concerns identified by this Court. In the result, the Court of Appeal, in effect, dispensed with the need for a "sufficiently concrete and well-developed factual setting" required by *Downtown Eastside*, finding that "systemic" constitutional challenges do not necessarily require an individual plaintiff—or even the specific factual context of an individual's case.

3. In doing so, the Court of Appeal overturned the discretionary decision of the Chief Justice of the Supreme Court of British Columbia denying the respondent, the Council for Canadians with Disabilities ("CCD"), public interest standing. The Court of Appeal did so despite the fact that CCD itself only weakly demonstrated a genuine interest in the litigation, had no individual co-plaintiff to provide specific adjudicative facts (and had tendered no evidence of any efforts to find a suitable individual co-plaintiff), relied on a series of hypothetical facts in its notice of civil claim, failed to produce a single document relevant to any of the material facts in the litigation, and tendered no evidence of any efforts to locate a single proposed witness who could attest to their experience or expertise with the impugned legislation. Further, the Court of

Appeal reached this decision even though a parallel constitutional challenge launched by three individual, directly affected plaintiffs has been commenced in British Columbia.

4. The Court of Appeal's decision expands the test for public interest standing beyond the limits prescribed by this Court in *Downtown Eastside* and risks transforming public interest standing into a private reference power for organizations to bring "systemic" constitutional challenges devoid of any factual context. The Court of Appeal's decision places an enormous institutional burden on the judicial system of British Columbia and the Attorney General of British Columbia ("AGBC"). Under the Court of Appeal's new approach to public interest standing, the AGBC will be forced to defend constitutional claims and challenges to its legislation without any factual foundation. The British Columbia courts will be required to adjudicate these complex claims without the factual context necessary for judicial determination. Were the Court of Appeal's approach to public interest standing to be followed in other provinces, the impacts for courts and Attorneys General across the country would be grave. The AGBC therefore respectfully requests that leave to appeal be granted.

B. **The Proceedings So Far**

5. CCD describes itself as a "national human rights organization of people with disabilities working for an inclusive and accessible Canada" (*MacLaren v. British Columbia (Attorney General),* 2018 BCSC 1753, para. 13 [Tab 2A]); *Council of Canadians with Disabilities v. British Columbia (Attorney General),* 2020 BCCA 241, para. 14 [Tab 2C]). Based in Winnipeg, CCD performs its mandate by undertaking law reform, policy development, and rights advancement work on behalf of people with disabilities, including litigation (BCSC, para. 14; BCCA, para. 14). Although CCD has been a frequent intervener and a party to one court case, it has previously engaged in "little advocacy for mental illness" (BCSC, para. 74).

6. In September 2016, CCD and two individual plaintiffs (Mary Louise MacLaren and D.C.) commenced the underlying action seeking to challenge the constitutionality of certain provisions of British Columbia's mental health legislation, which provide for "deemed consent" to psychiatric health care treatment for patients who have been involuntarily admitted

to a mental health facility (BCSC, para. 1; BCCA, paras. 15-19). The impugned provisions are s. 31(1) of the *Mental Health Act,* R.S.B.C. 1996, c. 288, ss. 2(b) and (c) of the *Health Care (Consent) and Care Facility (Admission) Act,* R.S.B.C. 1996, c. 181, and s. 11(1)(b) and (c) of the *Representation Agreement Act,* R.S.B.C. 1996, c. 405 (the "Impugned Provisions").[1]

7. Through a series of detailed factual allegations, the individual plaintiffs alleged that treatment decisions made on their behalf while they were involuntary patients in a mental health facility infringed their rights under ss. 7 and 15 of the *Charter* (BCSC, para. 1; BCCA, paras. 15-19). These allegations described the experiences of the individual plaintiffs under various of the Impugned Provisions, including specific allegations related to the individual plaintiffs' medical diagnoses, course of medical treatment (including the alleged provision of certain psychiatric medication and electroconvulsive therapy without consent), and the alleged impacts of these treatments for the plaintiffs.[2] In the AGBC's original response to civil claim, filed in November 2016, it did not seek to challenge the plaintiffs' standing.[3]

8. In 2017, when the litigation was still in the preliminary document discovery phase, the individual plaintiffs discontinued their claims, leaving CCD as the sole plaintiff (BCSC, para. 2). In December 2017, CCD amended its notice of civil claim to replace the individual plaintiffs' specific factual allegations and claims of *Charter* violations with a series of hypothetical allegations regarding the nature, administration, and impacts of the Impugned Provisions. Further, CCD restyled the claim as a "comprehensive and systemic challenge" to the Impugned Provisions relevant to "all residents of British Columbia" (BCSC, para. 18; BCCA, para. 22).[4] The amended claim added a number of broad allegations relating to the use of threats, force, and restraints in connection with involuntary treatment and suggested a hypothetical scenario whereby patients might receive involuntary "psychosurgeries" (i.e. lobotomies).[5] The amended claim also alleged CCD met the test for public interest standing.[6]

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[1] These provisions are summarized at paras. 6-12 of the Court of Appeal's judgment [Tab 2C].
[2] Notice of Civil Claim filed on September 12, 2016 at paras. 17-48 [Tab 4A].
[3] Response to Civil Claim filed on November 10, 2016 [Tab 4B].
[4] Amended Notice of Civil Claim filed on December 11, 2017 at paras. 29, 32-47 [Tab 4D].
[5] Amended Notice of Civil Claim filed on December 11, 2017 at paras. 32-47 [Tab 4D].
[6] Amended Notice of Civil Claim filed on December 11, 2017 at paras. 19-31 [Tab 4D].

CCD sought a declaration that the Impugned Provisions unjustifiably infringe ss. 7 and 15 of the *Charter* and are, to that extent, of no force and effect.[7] Concurrent with the service of the amended claim in December 2017, CCD also served a list of documents. A total of four documents were listed: CCD's Letters Patent, CCD's 2014 Bylaws, a corporate search, and a list of CCD members.[8]

9. In response, the AGBC amended its response to civil claim to say that, without an individual plaintiff, CCD did not meet the test for public interest standing, as the constitutional validity of the Impugned Provisions could not be litigated in the abstract (BCCA, paras. 23).[9] The AGBC subsequently brought a summary trial application seeking to dismiss the action on the basis that CCD lacked the requisite public interest standing to maintain it (BCSC, para. 3).

10. In response to the AGBC's summary trial application, CCD filed a single affidavit, which was sworn by Melanie Benard, a non-practicing lawyer in Quebec specializing in mental health law and the Chair of CCD's Mental Health Committee (BCSC, para. 14; BCCA, para. 27). In her affidavit, Ms. Benard deposed that there are approximately 20,000 involuntary admissions under the *Mental Health Act* each year in British Columbia; that involuntarily admitted patients face "numerous barriers to accessing the court system"; that it was "not realistic" to expect any of the thousands of directly affected individuals to sustain a constitutional challenge; and that CCD's claim "raises a comprehensive and systemic challenge to the Impugned Provisions of three inter-related statutes, not all of which would necessarily be engaged by a challenge raised by an individual".[10] She further deposed that at the trial of the action, "CCD intends to lead evidence from both fact and expert witnesses, including from people with direct experience of the Impugned Provisions".[11]

11. CCD filed no other evidence. In July 2018, following service of the AGBC's notice of application seeking to strike the claim for lack of standing, CCD served a supplemental list of

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[7] Amended Notice of Civil Claim filed on December 11, 2017 at p. 13, Part 2, para. 1 [Tab 4D].
[8] Affidavit #1 of Heather Lewis made 13 July 2018 at Exhibit "I" [Tab 4H].
[9] Amended Response to Civil Claim filed on January 31, 2018 at paras. 47a and 47b [Tab 4E].
[10] Affidavit #1 of Melanie Benard made 15 August 2018, at paras. 22, 25, 29, and 51 [Tab 4J].
[11] Affidavit #1 of Melanie Benard made 15 August 2018, at para. 58 [Tab 4J].

documents. The supplemental list contained 80 documents, all of which related to the organization and stated purpose of CCD (BCCA, para. 24). Almost two years after the litigation had been commenced, CCD had still not produced or listed a single document relevant to any issue in the action other than that of its own standing.

12. The lack of evidence tendered by CCD can likely be explained, at least in part, by its apparent intention to prove constitutional infirmity by way of "reasonable hypotheticals". In response to the AGBC's objection to the complete absence of adjudicative facts, CCD responded:

> …it has never been a requirement or reality of constitutional litigation—whether that litigation is brought by a litigant with public interest standing or someone directly affected—that the plaintiff's evidence be presented through the plaintiff personally. This is especially so considering that "a challenge to a law does not require that the impugned provision contravene the rights" of even a claimant with standing as of right. He or she is free to pursue his or her challenge based on reasonable hypotheticals—i.e., examples concerning the law's application to non-parties that are foreseeable but not necessarily even proven": *R. v. Nur*, 2015 SCC 15 at para. 51.[12]

13. In 2019, while the Court of Appeal's decision in this matter was under reserve, two further claims were filed in British Columbia seeking to challenge the Impugned Provisions: a class action proceeding seeking, among other relief, a declaration that the Impugned Provisions unjustifiability infringe ss. 7, 12, and 15(1) of the *Charter,*[13] and a new action challenging the constitutionality of the Impugned Provisions, which was subsequently discontinued.[14] Both cases were commenced by directly impacted individual plaintiffs. The Court of Appeal accepted this evidence as relevant to the issue of CCD's standing in this case (BCCA, paras. 122-123).

C. **Judgments Below**

(1) Supreme Court of British Columbia (in Chambers) (Hinkson C.J.)

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[12] Application Response filed by CCD on August 15, 2018 at para. 30 [Tab 4I].
[13] *L.M. et al. v. Her Majesty the Queen in Right of the Province of British Columbia et al.,* SCBC Action No. VIC-S-S-194863, Affidavit #2 of Heather Lewis made 9 November 2020 ("Lewis Affidavit") at Exhibit "A" [Tab 4K].
[14] *Mary Louise MacLaren et al. v. Vancouver Island Health Authority,* SCBC Action No. 190021, Lewis Affidavit at Exhibit "B" [Tab 4K].

14. Hinkson C.J. declined to exercise his discretion to grant CCD public interest standing and dismissed the claim (para. 99).

15. The Chief Justice highlighted that the three public interest standing factors "must be weighed cumulatively in the exercise of judicial discretion, but that none of the factors, and especially the third one should be treated as a hard and fast requirement or a free-standing independent test" (para. 25). He proceeded to consider and weigh the three factors.

16. The Chief Justice was particularly concerned that CCD's claim lacked the "indispensable factual foundation that particularizes the claim and permits the enquiry and relief sought" (para. 38). Further, although he was satisfied that CCD had a broad interest in the promotion of human rights, equality, and autonomy, which "could be affected by the impugned legislative scheme and could permit the CCD to assert a genuine interest in the impugned legal scheme", in his view, CCD had demonstrated only limited involvement in advocacy and litigation relating specifically to mental health-related disabilities (paras. 43-44). That being so, he concluded that CCD only "weakly" demonstrated a "genuine interest" (para. 53).

17. The Chief Justice further found that CCD had not persuaded him that the litigation was a reasonable and effective means of bringing the constitutional challenge forward (para. 96). In his view, CCD had failed to establish a sufficiently concrete and well-developed factual setting, and there was an "insufficient factual matrix" to determine the constitutional issues raised by the claim (para. 69).

18. In this regard, the Chief Justice found that CCD's promise of a robust record at trial did not satisfy its present onus to meet the test for public interest standing (paras. 58-69). Although the Chief Justice was of the view that CCD had access to adequate resources to advance the claim, he was not persuaded that CCD fairly represented the interests of those who may be directly affected by the Impugned Provisions, let alone all British Columbians (at paras. 72-76). Finally, he noted that CCD's assertion that it was not realistic to expect individual plaintiffs directly affected by the Impugned Provisions to maintain a constitutional challenge to the

Impugned Provisions was "unsupported by any evidentiary foundation" and was unfounded, noting numerous constitutional challenges to mental health legislation brought by directly impacted plaintiffs (paras. 82-92). He rejected CCD's assertion that *none* of the alleged 20,000 involuntarily admitted patients each year would be willing or able to participate in the constitutional challenge proposed by the CCD (paras. 94-95).

19. Having cumulatively weighed the three factors for public interest standing, the Chief Justice exercised his discretion to deny CCD standing and dismissed the claim (paras. 98-99).

(2) Court of Appeal for British Columbia (Frankel, Dickson, DeWitt-Van Oosten JJ.A.)

20. The Court of Appeal, for reasons given by Dickson J.A., allowed the appeal, set aside the order dismissing the action, and remitted the CCD's application for public interest standing to the Supreme Court of British Columbia for fresh consideration.

21. After reviewing the history of public interest standing and the test set out by this Court in *Downtown Eastside,* Dickson J.A. found that the goals of upholding the legality principle and facilitating access to justice merit "particular weight" in the exercise of discretion with respect to public interest standing (para. 79). She reasoned that, "while other concerns must also be accounted for, these goals are the key components of the flexible and purposive approach mandated in *Downtown Eastside*" (para. 79). Accordingly, she stated the test for public interest standing in the following terms (para. 86):

> In exercising their discretion to grant or refuse public interest standing, judges must balance access to justice with the preservation of judicial resources, with a particular view to upholding the legality principle. In doing so, they must interpret and apply the governing principles in a liberal and generous way.

22. Applying this approach, Dickson J.A. concluded that the Chief Justice erred in his assessment of the factual foundation required to ground the constitutional challenge and satisfy the first factor in the test for public interest standing, the "serious justiciable issue" criterion (para. 104). In Dickson J.A.'s view, CCD's claim did not require the factual context of an individual's case (para. 114). Rather, she found that "broad systemic constitutional challenges are a "unique

form of civil litigation" and do not always require "an individual plaintiff or plaintiff-specific material facts" (para. 97). She described CCD's claim as a "comprehensive and systemic constitutional challenge…that directly affects all members of a defined and identifiable group in a serious, specific and broadly-based manner *regardless* of the individual attributes or experiences of any particular member of the group" (para. 112, emphasis added). As a result, she held that "CCD's claim does not require 'a particular factual context of an individual's case' or an individual plaintiff and it manifestly raises a serious justiciable issue" (para. 114).

23. Given her conclusion that the Chief Justice erred in his assessment of the first factor for public interest standing, Dickson J.A. considered it unnecessary to address the other grounds of appeal. Although she briefly commented on the Chief Justice's analysis of the third *Borowski* factor (para. 115), she did not go on to consider the Chief Justice's reasons with respect to the second or third factors of the test, or to address his cumulative assessment of these interrelated factors, in her judgment.

24. As noted, the Court of Appeal admitted fresh evidence of the two claims challenging the Impugned Provisions that were filed in British Columbia by individual plaintiffs in 2019 (para. 122). In Dickson J.A.'s view, the Supreme Court of British Columbia was best placed to assess CCD's standing application and draw whatever inferences may be appropriate based on a revised record that incorporates the new information with respect to those claims (para. 123). Accordingly, the Court of Appeal set aside the order dismissing the action and remitted the issue of CCD's standing to the Supreme Court of British Columbia for fresh consideration (para. 124).

PART II – ISSUES

25. This leave application raises two related issues of public importance:
    i. Are the principles of legality and access to justice the primary considerations in the *Downtown Eastside* test for public interest standing?
    ii. Can reasonable hypotheticals provide a sufficient evidentiary basis for public interest litigation in cases without an individual plaintiff?

PART III – STATEMENT OF ARGUMENT

26. There are three reasons why leave to appeal should be granted:

A. The proper approach to public interest standing is a matter of public importance, which frequently comes before courts across the country and will always involve provincial and federal Attorneys General.

B. The proposed appeal is necessary to avoid a significant institutional burden on the judicial system of British Columbia, and potentially across the country, resulting from the Court of Appeal's new approach to public interest standing, by clarifying:
   i. the appropriate weight to be given to the factors established in *Downtown Eastside;* and
   ii. the scope of the evidence required to establish a sufficient factual matrix in public interest cases without an individual plaintiff.

C. The proposed appeal is meritorious. The Court of Appeal's approach to the test for public interest standing rebalances the factors identified by this Court in *Downtown Eastside,* effectively strips the test of the requirement for a "sufficiently concrete and well-developed factual setting", and constitutes an error of law.

A. The Proper Approach to Public Interest Standing is a Matter of Public Importance

27. The law of standing is one of the key mechanisms by which courts may ensure they play a proper role within our democratic system of government. As Justice Cromwell explained in *Downtown Eastside* (at para. 1):

> The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government…

28. In *Downtown Eastside,* this Court refined the three-part test for public interest standing. Under that test, public interest standing is available, at the court's discretion, only if the applicant

satisfies the three elements identified in *Canada (Minister of Justice) v. Borowski,* [1981] 2 S.C.R. 575: (1) the case raises a serious justiciable issue; (2) the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and (3) the proposed suit is, in all of the circumstances, a reasonable and effective means to bring the case to court (*Downtown Eastside,* para. 2). A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. Importantly, the factors are "interrelated considerations" to be "weighed cumulatively" in exercising judicial discretion (*Downtown Eastside*, para. 20; see also paras. 35-36).

29. However, the need to grant standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. As this Court explained in *Canadian Council of Churches,* it is essential that a balance be struck between ensuring access to the courts and preserving judicial resources (at p. 252):

> It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

30. Accordingly, all of the other relevant considerations being equal, a party with standing as of right will generally be preferred (*Downtown Eastside,* para. 37).

31. It has now been almost a decade since this Court refined the test for public interest standing in Canada in *Downtown Eastside*. In that time, constitutional challenges brought by public interest

litigants have proliferated.[15] Many of these cases have determined important constitutional issues for our country with significant impacts for the rights of Canadians.[16] Public interest litigation has become a frequent means of bringing matters before the courts. The proper approach to the test for public interest litigation—to providing for a balance between ensuring access to the courts and preserving judicial resources and to safeguarding the proper role of courts within our democracy—is therefore one of critical public importance.

B. Failure to Place Limits on Public Interest Standing Will Impose Significant Institutional Burdens on the Judicial System

32. As the volume of public interest litigation has grown in recent years, public interest litigants have continued to push the boundaries of justiciability.[17] The test for public interest standing in Canada *already* represents one of the most flexible and permissive standards in any common law jurisdiction.[18] Yet, under the Court of Appeal's approach, public interest standing in Canada will become more permissive still, undermining long-standing authority from this Court on the necessary limitations of public interest standing. In the result, the burden on the AGBC to defend constitutional claims in the absence of a factual context and, correspondingly, on the courts in British Columbia to adjudicate such claims in a factual vacuum, will be

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[15] See, for example, *Carter v. Canada (Attorney General),* 2015 SCC 5 ["*Carter*"]; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* 2020 SCC 13 [*"Conseil*"]; *British Columbia Civil Liberties Association v. Canada (Attorney Genera*l), 2019 BCCA 228, appeal to the SCC discontinued (File No. 38814) [*"BCCLA"*]; *Canadian Civil Liberties Association v. Canada,* 2019 ONCA 243, leave to appeal to SCC discontinued (File No. 38574) [*"CCLA*"]; *Saskatchewan v. Good Spirit School Division No. 204*, 2020 SKCA 34, leave to appeal to SCC filed (File No. 39212); *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City),* 2015 BCCA 142; *Alford. v. Canada (Attorney General),* 2019 ONCA 657; *Ontario (Attorney General) v. Bogaerts,* 2019 ONCA 876; *Canada (Procureur général) c. Barreau du Québec*, 2014 QCCA 2234, leave to appeal to SCC refused, 2015 CanLII 38347; *M.K. v. British Columbia (Attorney General),* 2020 BCCA 261; *Taylor v. Newfoundland and Labrador,* 2020 NLSC 125 [*"Taylor"*].

[16] See, for example, *Carter*; *Conseil*; *BCCLA; CCLA*.

[17] See, for example, *La Rose v. Canada*, 2020 FC 1008*; Tanudjaja v. Canada (Attorney General),* 2014 ONCA 852, leave to appeal to the SCC dismissed, 2015 CanLII 36780 (SCC); *Campisi v. Ontario (Attorney General)*, 2018 ONCA 869; *Taylor* at paras. 145-199.

[18] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 at pp. 243-248. See also, *Lexmark International Inc. v. Static Control Components, Inc,* 572 U.S. 118 (2014) [Tab 5B]; *Taylor v. Lancashire County Council and another,* [2005] EWCA Civ 284 [Tab 5C]; *Australian Conservation Foundation Inc. v. Commonwealth,* (1980) 28 A.L.R. 257 [Tab 5A].

enormous. Moreover, the new approach to public interest standing from the Court of Appeal for British Columbia may be relied upon by public interest litigants in other provinces seeking a more liberal approach. Accordingly, the impacts of the Court of Appeal's decision are likely to be felt by Attorneys General across the country, both provincially and federally, as well as courts in every jurisdiction.

33. Two issues arise in the proposed appeal that require intervention from this Court to avoid the institutional burdens resulting from the Court of Appeal's approach to public interest standing:
    i. the appropriate weight to be given to the factors established in *Downtown Eastside;* and
    ii. the scope of the evidence required to establish a sufficient factual matrix in public interest litigation, particularly in cases without an individual plaintiff.

34. Guidance from this Court on the proper approach to public interest standing and its limitations will ensure that the aims of public interest standing are appropriately realized and that courts across the country continue to play the proper role within our democracy in determining the justiciability of the public interest cases that come before them. Further, it will avoid Attorneys General becoming hopelessly overburdened defending challenges to their legislation without any factual context or an affected individual's case.

i. The Appropriate Balancing Exercise Required by *Downtown Eastside* Does Not Prioritize Legality and Access to Justice

35. The test articulated by this Court in *Downtown Eastside* envisioned a balancing exercise: in exercising its discretion to grant public interest standing, a court must "balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action" (*Downtown Eastside,* para. 23). In other words, the traditional concerns justifying limitations on standing (i.e. properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government) *must be weighed against* the countervailing factors of ensuring access to the courts and the principle of legality (i.e. the principle that state action should conform to the Constitution and statutory authority; and that there must be practical and effective ways to challenge the legality

of state action) (*Downtown Eastside,* paras. 22-31). As Cromwell J. explained in *Downtown Eastside*, and as the Court of Appeal recognized in this case, the test has always been "viewed as one to be resolved through the wise exercise of judicial discretion"; a trial judge's weighing should not be lightly interfered with (*Downtown Eastside*, para. 35; BCCA, para. 60).

36. The Court of Appeal disturbed this balancing exercise, finding that the law of public interest standing had evolved to require that the principles of legality and access to justice be given "particular weight" and that "[w]hile other concerns must also be accounted for, these goals are the key components" of the *Downtown Eastside* test (paras. 78-79). The Court of Appeal further instructs that courts are to have a "particular view to upholding the legality principle" when they engage in the balancing exercise and that the "detail of the intended trial evidence or the claim's ultimate prospect of success" are not relevant to the standing inquiry (paras. 86-87).

37. Under Dickson J.A.'s approach, therefore, the principles of legality and access to justice are no longer factors to be weighed on a case-by-case basis, taking into account all the circumstances of the case, but rather are assigned extra weight at the outset of the analysis. This is contrary to this Court's repeated direction in *Downtown Eastside* that the factors "should be assessed and weighed cumulatively" (paras. 20, 36, 53). In other words, contrary to the global weighing exercise prescribed by this Court, the Court of Appeal established a hierarchy of factors.

38. The AGBC does not contest the substance or importance of the principles of legality and access to justice. However, it submits that the test for public interest standing should address the need to prevent legislation from being immunized while at the same time, and to the greatest extent possible, addressing traditional concerns that justify the need to restrict standing. The test articulated in *Downtown Eastside* achieves this balance by establishing a preference for deciding concrete cases brought by litigants with private interest standing, while giving the court discretion to grant standing to some public interest litigants, in appropriate cases, where the application of the traditional standing rules would immunize legislation from judicial review (*Downtown Eastside,* para. 37).

39. The rebalancing of the test articulated by the Court of Appeal ignores significant concerns that should properly animate the standing analysis. By assigning greater weight to the principles of

legality and access to justice, the Court of Appeal neglected important countervailing factors in this case: the existence of a parallel constitutional challenge brought by an individual directly affected plaintiff; an abundance of impacted individuals to act as potential plaintiffs (and no real explanation of CCD's efforts to locate a suitable plaintiff); a long-track record of individuals challenging mental health legislation before the courts; and a misconceived strategy to rely, instead, upon "reasonable hypotheticals". Legality and access to justice are concerns that required emphasis in a case like *Downtown Eastside,* where there was ample evidence on the record showing that no individual plaintiffs were willing to bring a challenge forward (at paras. 71-72). But to prioritize these factors as a matter of course, in *every* case, risks transforming the test for public interest standing into a private reference power. Rather, a case-by-case analysis is required, wherein the factors articulated by this Court are weighed according to all the circumstances of the case in a "wise exercise of judicial discretion" (*Downtown Eastside*, para. 35).

40. The Court of Appeal's unexpected rebalancing of the principles articulated by this Court in *Downtown Eastside,* and the risks inherent under this new approach, should weigh heavily in favour of granting leave.

ii. Reasonable Hypotheticals Do Not Provide a Sufficient Evidentiary Basis for Public Interest Litigation in Cases Without an Individual Plaintiff

41. This Court has repeatedly held that constitutional law is best developed and decided in cases involving specific facts. As this Court stated in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

42. In *Hy and Zel's Inc. v. Ontario (Attorney General),* [1993] 3 S.C.R. 675, public interest standing was denied. In reaching this decision, Major J., writing for the majority, examined the lack of a proper evidentiary basis for the challenge (at pp. 693-694):

> In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised.

43. The importance of a sufficient factual matrix was more recently reiterated by this Court in *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 (at para. 22):

> Where a person challenging a law's constitutionality fails to provide an adequate factual basis to decide the challenge, the challenge fails. As Cory J. put it on behalf of the Court in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 366, "the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position" (emphasis added). [emphasis in original]

44. In *Downtown Eastside,* this Court certainly, and properly, mandated a flexible and purposive approach to public interest standing rooted in judicial discretion. However, it did not dispense with the notion that constitutional litigation should proceed on the basis of a sufficiently robust factual record. To the contrary, Cromwell J. emphasized the importance of a sufficient factual matrix in three of the four considerations at the third factor, noting that the court should consider "whether the issue will be presented in a sufficiently concrete and well-developed factual setting"; whether there is a "context more suitable for adversarial determination"; and whether there may be other plaintiffs with "specific and factually established complaints" (para. 51). Further, on the facts, he noted that he was satisfied that the proposed public interest litigants "provide a concrete factual background and represent those most directly affected by the legislation" (para. 74). As *Downtown Eastside* shows, public interest litigants must still demonstrate that they can provide a sufficient factual record.

45. Notwithstanding the clear direction from this Court on the importance of a sufficient factual record to the standing analysis in *Downtown Eastside*, the Court of Appeal held that "the focus of a standing inquiry is on whether the public interest litigant is an appropriate party to advance a justiciable claim, not on the detail of intended trial evidence or the claim's ultimate prospect of success" (para. 87). The court went on to hold that "broad systemic constitutional challenges are a unique form of civil litigation, as are the form of pleadings and evidence required to advance and prove them" and affirmed that an individual plaintiff or plaintiff-specific material

facts are not always necessary to advance a systemic constitutional challenge (para. 97). The Court of Appeal's approach, in effect, dispensed with the need for a "sufficiently concrete and well-developed factual setting" from the *Downtown Eastside* test.

46. Comparing the factual context in *Downtown Eastside* with the present case is illustrative. In *Downtown Eastside*, the plaintiff Downtown Eastside Sex Workers United Against Violence Society was an advocacy society run by current and former sex workers that was found to "represent those most directly affected by the legislation" (para. 74). The individual plaintiff, Sheryl Kiselbach, was a former sex worker who, at the time the action was filed, was working as a violence prevention coordinator in Vancouver's Downtown Eastside. During her time as a sex worker, Ms. Kiselbach was convicted of several prostitution offences. She testified that she was unable to participate in a court challenge to the prostitution provisions while working as a sex worker because of the risk of public exposure, fear for personal safety, and potential loss of income assistance and employment opportunities (paras. 5-6). In addition, the respondents' evidence included affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (para. 74).

47. In the present case, the sole plaintiff, CCD, is an organization with no direct experience of the Impugned Provisions or established relationship with "those most directly affected". Ms. Benard's affidavit made no mention of any of CCD's members ever having been involuntarily detained under the Impugned Provisions, nor did she provide any evidence that CCD's advocacy and research work had ever focused on the consent provisions of British Columbia's mental health legislation. CCD therefore relied entirely on a series of hypothetical facts in its notice of civil claim. At the time the application challenging CCD's standing was heard, almost two years after the claim was filed, CCD had not identified—let alone filed evidence from—a single proposed witness who was directly affected by the Impugned Provisions, or any expert who could attest to the effects of the Impugned Provisions. Nor had CCD produced a single document that could prove or disprove the hypothetical factual allegations on which they relied. CCD provided no explanation for its failure to do so, arguing instead that it was able to rely on reasonable hypotheticals to prove a "systemic" constitutional claim and would adduce a more robust record at trial.

48. The proposed appeal therefore provides a unique platform from which this Court may address three inter-related issues with respect to the appropriate factual matrix under the public interest standing test: (1) the onus on the proposed litigant to develop a record sufficient to show a factual matrix (though not to prove the *Charter* breach) *at the time standing is challenged*, as opposed to at trial; (2) the use of and reliance on "reasonable hypotheticals" in public interest litigation without an individual plaintiff; and (3) whether the onus on a party seeking public interest standing to demonstrate a sufficient factual matrix is materially different when the challenge is framed as "systemic" in nature. None of these issues appears to have been the subject of direct consideration by this Court in its prior jurisprudence on public interest standing.

49. Without considering the second or third factors of the test in *Downtown Eastside,* the Court of Appeal concluded that it would be open to CCD to establish its claim by adducing evidence from directly affected non-plaintiff and expert witnesses at trial rather than from an individual plaintiff and that the AGBC could rely on litigation management tools to seek access to relevant documents or other forms of discovery in advance of trial (para. 113). In doing so, the court held that CCD's failure to point to any direct evidence of the effects of the Impugned Provisions at the time of a preliminary challenge to standing was not fatal to its cause, and tacitly endorsed CCD's approach of relying only on hypothetical facts in its pleading with the future promise of a "robust record" to come at trial.

50. The Court of Appeal's approach to the issue of the necessary factual matrix for public interest litigation will necessarily result in increasingly abstract *Charter* challenges, untethered from the factual context of any directly affected individuals. These concerns are particularly acute in cases where an organization is bringing the challenge forward without an individual plaintiff. Plaintiff-less litigation should be the exception, not the norm. Applicants should be required to demonstrate efforts to obtain an individual plaintiff, as was the case in *Downtown Eastside* (para. 71). Vague assertions, unsupported by any direct evidence, about the difficulties inherent in advancing *Charter* litigation should not suffice.

51. Further, where an organization seeks to advance public interest litigation without any plaintiff-specific facts, the organization should be required to demonstrate, with specificity, the factual

matrix it intends to rely upon. Without an individual plaintiff, the allegations made in a pleading are grounded in hypotheticals that the Attorney General cannot effectively test. Something more than a series of pleaded hypothetical scenarios and future promises of evidence to come at trial, without a single witness or expert identified, should be necessary. The proposed plaintiff bears the onus to establish the conditions for a grant of public interest standing. A party should be required to take steps to prepare and coordinate evidence sufficient to demonstrate the necessary factual matrix on a standing application. In *Downtown Eastside,* the respondents' evidence, at the time standing was challenged, included affidavits from more than 90 directly affected individuals (para. 74). CCD had every opportunity to provide a legal and evidentiary response to the AGBC's application—and had almost two years since the time the litigation was filed to consider the types of evidence and witnesses that may be required.

52. To find that institutional litigants may seek to rely on the future promise of a robust record at trial and on reasonable hypotheticals in its pleading, as the Court of Appeal did here, presents a real risk of trial unfairness and "trial by ambush". Defending *Charter* litigation without an individualized factual matrix is prejudicial to Attorneys General. Instead of being able to rely on oral and documentary discovery rules enshrined in the rules of court, a challenge with no plaintiff places the Attorney General at the mercy of a trial management judge to make orders allowing it to learn about the case against it. Moreover, it brings into question the courts' institutional capacity to reach an appropriate determination in the absence of the contending points of view of the persons most directly affected by the issue. Permitting parties to rely on future promises of a record to be presented at trial risks simply deferring a finding of non-justiciability until after the trial has completed—hardly an economic use of judicial resources. Moreover, such litigation can easily result in great public cost given the strong likelihood of appeals in constitutional litigation. This very litigation could plausibly end up before this Court, with an insufficient factual record.

53. Finally, framing the litigation as "systemic" in nature should be no answer to frailties in a public interest litigant's proposed factual matrix. As Saunders J.A. wrote in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General),* 2010 BCCA 439, "the term 'systemic' is something of a chameleon" (para. 58). The courts use the term "systemic" in various senses: to describe situations in which an entire legislative scheme is challenged; to

describe schemes that disproportionately affect some persons; and to describe the cumulative effects of legislation. Ascribing the label "systemic" to a proposed constitutional challenge should not fundamentally alter a court's analysis of public interest standing. Both *Downtown Eastside* and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 were characterized as "systemic" challenges, and no modification to the test was necessary for the court to reach a decision on public interest standing.

54. Providing guidance on the appropriate use of reasonable hypotheticals and the evidentiary threshold required to establish a factual matrix for "systemic" constitutional challenges brought by way of public interest litigation represents a matter of first impression for this Court. The importance of such guidance cannot be overstated for public interest litigants, Attorneys General, the courts, and the public whose rights may be affected by these cases.

C. **The Appeal is Meritorious**

55. Finally, the proposed appeal is meritorious. The Court of Appeal's approach to the test for public interest standing rebalances the factors identified by this Court in *Downtown Eastside*—effectively stripping the test of the requirement for a sufficient factual matrix—and constitutes an error of law.

56. The Court of Appeal's emphasis on the principles of access to justice and legality to the detriment of other, countervailing concerns, will lead courts to strip meaningful content from the test in *Downtown Eastside*, as the Court of Appeal did here, downplaying the requirement of a factual matrix, almost to the point of total erasure. By not addressing all of the factors in the public interest test in her reasons, Dickson J.A. failed to appreciate that these factors are interrelated (*Downtown Eastside,* at para. 36). Her failure to even consider the Chief Justice's reasons with respect to the second or third factors in the test means she was unable to address how the Chief Justice might have exercised his discretion to *cumulatively* weigh these interrelated factors in the manner prescribed by *Downtown Eastside* (para. 36).

57. The Court of Appeal's approach has completely untethered public interest litigation from individual right-holders, who have suffered direct impacts to their rights. Under the rebalanced test adopted by the Court of Appeal, public interest organizations will be free to pursue *Charter*

claims based on reasonable hypotheticals, unconstrained by the nuance of the factual matrices this Court has repeatedly said are essential to constitutional litigation. The AGBC will be required to defend hypothetical claims, and the British Columbia courts will be required to adjudicate constitutional challenges in a factual vacuum, placing an enormous institutional burden on the judicial system in the province.

58. The Court of Appeal's approach risks turning the test for public interest standing into precisely the blanket approval for "every well-meaning organization pursuing their own particular case in the knowledge that their cause is all important" that this Court cautioned against in *Canadian Council of Churches.* In the result, the Court of Appeal effectively transformed the test for public interest standing into a private reference power for organizations to bring "systemic" constitutional challenges devoid of any factual context.

59. For these reasons, the Court of Appeal's approach to public interest standing warrants consideration by this Court.

PART IV – SUBMISSION ON COSTS

60. The AGBC does not seek costs on this application and makes no submissions as to costs.

PART V – NATURE OF ORDER SOUGHT

61. The AGBC requests that leave to appeal from the order of the Court of Appeal for British Columbia be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 12th day of November, 2020

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PART VI – TABLE OF AUTHORITIES

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