January 26, 2021

VIA EMAIL: registry-greffe@scc-csc.ca

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

Attention: Registrar

Dear Registrar:

Re: *Attorney General of British Columbia v. Council of Canadians with Disabilities*
Supreme Court of Canada File No. 39430

We write pursuant to Rule 28(2) to provide the reply of the Attorney General of British Columbia to the response filed by the Council of Canadians with Disabilities ("CCD") to its leave to appeal application. CCD's response misconceives the Attorney General's two arguments.

First, the Attorney General's concern for the integrity of the *Downtown Eastside* test for public interest standing proceeds from the Court of Appeal's reasoning as a whole and not, as CCD contends, from select passages (let alone, a *single* passage) of that court's reasons. The Court of Appeal's decision is replete with references to the re-balancing exercise it adopted, just as it was urged to do by CCD and the intervenors.[1] CCD's reliance on the purpose underlying the public interest test is a red herring. The Attorney General agrees that the *purpose* of the public interest standing test relates to legality and access to justice[2]; however, CCD conflates the *purpose* of the test with the *test itself.* That test, as articulated in *Downtown Eastside*, requires that legality and access to justice be considered and weighed cumulatively with other factors. The Court of Appeal's application of this test to overturn the discretionary decision of the Chief Justice (a point CCD does not address) failed to engage in the cumulative weighing exercise demanded by *Downtown Eastside.* Instead, the court below gave pre-eminent status to the principles of legality and access to justice, and in so doing demoted the requirement that issues be presented in a sufficiently concrete and well-developed factual setting.

Second, CCD mischaracterizes the Attorney General's argument about "reasonable hypotheticals". Our concern is not limited to a single adjudicative technique; it is a more general

[1] *Council of Canadians with Disabilities v. British Columbia (Attorney General),* 2020 BCCA 241 ("BCCA"), at paras. 78-79; 86-87, 97 [Tab 2C].

Ministry of Attorney General Legal Services Branch
Civil Litigation

Location:
1301 – 865 Hornby Street
Vancouver BC V6Z 2G3

Telephone: 604 660-3093
Facsimile: 604 660-3567
604 660-3833

concern about litigation in the abstract. The Attorney General has repeatedly acknowledged CCD's promise of a "robust record at trial".[3] The question is whether that promise was enough to win standing under *Downtown Eastside*. The Attorney General says it was not; rather, an applicant for standing must meet its evidentiary burden *at the time standing is challenged.*[4] Furthermore, that burden rested on CCD—and not, as CCD contends, on the Attorney General to prove that another organization could bring this challenge forward. Chief Justice Hinkson rightly rejected this argument when CCD advanced it at first instance.[5]

In this case, CCD claimed public interest standing on a record devoid of evidence from a single directly impacted individual—or even any evidence of CCD's efforts to obtain such evidence. If CCD is now unwilling to argue that it can rely on the hypothetical facts pleaded in its notice of civil claim, it has no factual setting to defend its claim for standing at all. The *Downtown Eastside* test for public interest standing does not work if an organization can simply defer the requirement to show a factual setting to the eve of trial. Without substantial supporting evidence before her, how is the application judge to determine whether "the issue will be presented in a sufficiently concrete and well-developed factual setting" or whether there is a "context more suitable for adversarial determination"?[6] The CCD had two years to develop a record to defend its claim to public interest standing and it failed to do so.

The unbalanced approach to public interest standard espoused by CCD and endorsed by the Court of Appeal, contrary to this Court's guidance in *Downtown Eastside*, will burden Attorneys General and the judicial system as a whole. CCD's brief response to the Attorney General's leave application fails to grapple with these consequences.

Sincerely,

Mark Witten & Emily Lapper
Barristers and Solicitors

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[2] Response of the Council of Canadians with Disabilities ("CCD Response"), at para. 27.
[3] Memorandum of Argument of the Attorney General of British Columbia ("AGBC Memorandum"), at paras. 49, 50 and 52.
[4] AGBC Memorandum, at para. 48.
[5] CCD Response, at para. 9; *MacLaren v. British Columbia (Attorney General),* 2018 BCSC 1753, at para. 63 [Tab 2A].
[6] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para. 51.