SCC File No. 39430

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Respondent)

AND:

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

[*Style of cause continued on next page*]

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PART I – OVERVIEW OF FACTS AND POSITION

1. The David Asper Centre for Constitutional Rights (AC) submits that the test from *Canada (AG) v Downtown Eastside Sex Workers Against Violence*[1] is a suitable test for public interest standing. This standing test recognizes the systemic remedial role of s. 52(1) and responds to access to justice concerns and difficulties in seeking and obtaining effective systemic s. 24(1) remedies.

PART II – STATEMENT OF POSITION WITH RESPECT TO THE APPELLANT'S QUESTION

2. The AC takes no position on the ultimate disposition of the appeal. However, the AC's position in respect of the Appellant's questions in issue is that the Appellant's approach narrows the test for public interest standing and fails to consider the systemic nature of the s. 52(1) claim.

PART III – STATEMENT OF ARGUMENT

The Downtown Eastside test is a suitable test for public interest standing.

3. The test for public interest standing established by this Court in *Downtown Eastside* was a positive development. It recognized 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" and could not afford to engage in constitutional litigation.[2] It focuses on "practical realities, not theoretical possibilities."[3] The test is flexible in its

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[1] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45 [*Downtown Eastside*].
[2] *Ibid* at para 51.
[3] *Ibid* at para 51.

application. As such, it supports both access to justice and the principle of legality.[4] The test is also consistent with the Court's recognition of the inherently systemic nature of remedies under s. 52(1) of the *Constitution Act, 1982* and the practical and doctrinal difficulties in litigating and obtaining effective systemic remedies under s. 24(1) of the *Charter*.

Public interest standing is an important mechanism in cases seeking a section 52(1) remedy.

i. There is an important distinction between the s. 24(1) and s. 52(1) remedies.

4. This Court has long distinguished between the inherently systemic nature of s. 52(1) and the individual remedies available under s. 24(1) of the *Charter*. Whereas the purpose of s. 24(1) is to "provide for an individual remedy for the person whose rights have been so infringed,"[5] s. 52(1) provides a public and systemic remedy for all. Section 52 does not confer a personal remedy[6] and courts craft s. 52(1) remedies to achieve justice for all as well as to recognize competing social interests.[7]

5. The underlying principle in s. 52(1) cases is that "citizens have an interest in the constitutionally sound behaviour on the part of the legislatures, [and therefore] where the constitutionality of legislation is at issue, the primary focus is on the law itself, not the position of the parties."[8] Section 52 remedies are closely connected with the original and

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[4] *Ibid* at para 31. For arguments that the more flexible *Downtown Eastside* test could have resulted in a grant of public interest standing in *Canadian Council of Churches v Canada*, [1992] 1 SCR 236 and *Hy and Zel's Inc v Ontario (Attorney General)*, [1993] 3 SCR 675 [*Hy and Zel's Inc*] see Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, as updated) (WL) at 5.190-5.230. For a grant of public interest standing in a situation similar to *Canadian Churches* see *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131; *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651.

[5] *Schachter v Canada*, [1992] 2 SCR 679 at para 90.
[6] *R v Ferguson*, 2008 SCC 6 at para 59.
[7] *Ontario (Attorney General) v G*, 2020 SCC 38 [*Ontario v G*]; *R v Albashir*, 2021 SCC 48 [*Albashir*].
[8] *Hy and Zel's Inc*, *supra* note 4 at para 64, L'Heureux-Dubé dissenting.

most powerful rationale for public interest standing: the right of the entire citizenry to constitutional behaviour.[9] This Court has noted that constitutional "remedies reach beyond the claimant – and can even be granted when the claimant is not directly affected by the law – because "[n]o one should be subjected to unconstitutional law."[10] In that way, s. 52 remedies reflect both the *Charter*'s rights-protecting purpose and the public's interest in constitutional compliance.[11]

ii. Section 52 is a systemic remedy that does not require an individual plaintiff.

6. The public interest aspect of the principle of legality articulated by this Court in *Downtown Eastside*[12] makes clear that the requirements that litigants be specially affected by impugned laws, or that they stand to receive a personal remedy, are not necessary to be granted standing to seek a systemic remedy under s. 52(1). A declaration that a law is unconstitutional is designed to vindicate and clarify the rights of all those who are affected. In fact, the impugned law does not need to violate the rights of the claimant.[13] Because of the government's qualified immunity, an individual claimant will have a greater burden in obtaining damages under s. 24(1) if a law they have challenged is declared unconstitutional under s. 52(1).[14]

7. It is a tremendous burden on an individual claimant to bring forward systemic cases that require broader legislative facts to prove unconstitutionality. In granting public interest standing to a legal group, Chief Justice Hinkson has recognized that even private litigants "are unlikely to have the financial wherewithal or the luxury of the time required to litigate

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[9] *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at 163 [*Thorson*].
[10] *Ontario v G*, *supra* note 7 at para 109, citing *R v Nur*, 2015 SCC 15 at para 51.
[11] *Ontario v G*, *supra* note 7 at para 109.
[12] *Downtown Eastside*, *supra* note 1 at para 33.
[13] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 314.
[14] *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405. But see *Conseil scolaire francophonie de la Colombie-Britannique v British Columbia*, 2020 SCC 13 [*Conseil scolaire*].

the constitutionality of the payment of jury fees by litigants, or to wait for their day in court until the issue of the constitutionality of the payment of jury fees is litigated."[15]

iii. The remedy of a declaration of invalidity is often not rooted in specific individual facts.

8. Any litigant seeking a remedy under the *Charter* must always satisfy the factual burden, whether they use legislative or adjudicative facts.[16] In the context of a s. 52 challenge, "background evidence of a general nature may be relevant"[17] and legislative facts will often be the most relevant facts in the case. This is consistent with the Court's recognition that reasonable hypotheticals or reasonably foreseeable applications can be used instead of individual facts when a case is seeking the remedy of a declaration of invalidity. This more flexible approach has been used in various constitutional cases, including *R v Goltz*,[18] *R v Nur*,[19] and *R v Appulonappa*.[20] In *R. v. Boudreault*[21] it was applied to cover circumstances of those unable to pay fine surcharges, people who without legal aid would certainly be unable to bring a constitutional challenge. In a s. 52 challenge, legislative facts can better establish the factual basis required for the remedy sought.

Broad public interest standing provides access to justice and systemic remedies.

i. There are barriers to obtaining systemic remedies under section 24(1).

9. Canada has a rich history dating from before the *Charter* in granting broad public interest standing.[22] Public law standing, along with the reference proceedings, distinguishes the

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[15] *Trial Lawyers Association of British Columbia v British Columbia (Attorney Gener*al), 2016 BCSC 1391 at para 28, aff'd on other grounds 2017 BCCA 324, leave denied 2018 CanLII 68340 (SCC).
[16] *Mackay v Manitoba*, [1989] 2 SCR 357 at 361-62; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1093.
[17] *Hy and Zel's Inc*, *supra* note 4 at 719.
[18] *R v Goltz*, [1991] 3 SCR 485.
[19] *R v Nur*, 2015 SCC 15.
[20] *R v Appulonappa*, 2015 SCC 59.
[21] *R v Boudreault*, 2018 SCC 58.
[22] *Thorson*, *supra* note 9; *Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

Canadian constitution litigation from the American system and provides for broad systemic remedies. This Court has recognized that under *Downtown Eastside* "even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand."[23] There is an implicit recognition in this statement that the most directly affected will often be unable to litigate because of access to justice concerns.

10. Litigation, especially *Charter* litigation which increasingly relies on the proof of complex legislative facts through expert evidence, is beyond the reach of ordinary Canadians even though the *Charter* guarantees rights to all and especially to the most disadvantaged. Broad public interest standing is a critical means to allow the most disadvantaged – prisoners, those living in poverty, and groups protected by equality or legal rights – to obtain access to justice and effective remedies.

11. Legislative decisions over the last decade have had serious effects on access to justice for individual Canadians.[24] Legal aid funding is insufficient to guarantee individual representation across the country, and people's inability to retain counsel other than through contingency fees has been a source of concern for decades.[25] Because of these barriers to access to justice, public interest litigation and systemic remedies play a vital role in filling the access to justice gap left by the costs of constitutional litigation.

12. Although this Court has recently made individual s. 24(1) remedies more readily available in conjunction with suspended declarations of invalidity[26] and refused to extend qualified immunities to acts authorized under governmental policies,[27] it still remains difficult to obtain s. 24(1) remedies that have broad systemic effects. These difficulties relate to the low quantum of *Charter* damages and the consequent practical need to aggregate *Charter* damages through difficult and lengthy class actions. They also relate to the limits of s. 24(1)

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[23] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 43.
[24] Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice (2011) 44 UBC Law Rev 255 (WL) at 257.
[25] Micah B Rankin, "Access to Justice and the Institutional Limits of Independent Courts" (2012) 30 Windsor YB Access to Just 101 (WL) at 107.
[26] *Ontario v G*, *supra* note 7.
[27] *Conseil scolaire*, *supra* note 14.

declarations and the need for courts to order specific and enforceable injunctions under s. 24(1) if they are to retain jurisdiction. The AC submits that these barriers to systemic s. 24(1) remedies support the need to maintain a broad and flexible approach to public interest standing and systemic remedies under s. 52(1).

ii. The need to aggregate damage claims and the limits of class actions.

13. The Court has recognized that damages under s. 24(1) can be used to deter future violations of the *Charter*.[28] At the same time, the quantum of *Charter* damages, including in *Ward*, generally remains modest and at levels well below this Court's award of damages in the 1950s in landmark human rights cases.[29] This means that it would often be economically irrational for an individual to commence *Charter* litigation seeking *Charter* damages. This is so even if a lawyer took their case on a contingency basis and the government agrees not to seek costs should the *Charter* claim fail.

14. Given these economic realities, it is not surprising that there has been an increase in the number of *Charter* class actions seeking remedies for government actions and policies.[30] This type of litigation has a role to play in remedying certain *Charter* violations, but cannot be a substitute for systemic public interest litigation that aims to strike down unconstitutional laws and policies and in so doing prevent further rights violations.

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[28] *Vancouver (City) v Ward*, 2010 SCC 28.

[29] *Roncarelli v Duplessis*, [1959] SCR 121 at 160; *Lamb v Benoit et al*, [1959] SCR 321 at 344; *Chaput v Romain*, [1955] SCR 321 at 344; Kent Roach, "The Disappointing Remedy? Damages as a Remedy for Violations of Human Rights" (2019) 69 (1 supp) UTLJ 33 at 37-39,Intervener's Book of Authorities (BOA), Tab 1; W H Charles, *Understanding Charter Damages* (Toronto: Irwin Law, 2016) Appendix 1, BOA, Tab 2.

[30] See e.g., *Thorburn v British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480; *Good v Toronto Police Services Board*, 2016 ONCA 250; *Capital Health District Authority v Murray*, 2017 NSCA 28; *King & Dawson v Government of Prince Edward Island*, 2020 PECA 13; *Brazeau v Canada (Attorney General); Reddock v Canada (Attorney General)*, 2020 ONCA 184 [*Brazeau*]; *Elder Advocates of Alberta Society v Alberta Health Services*, 2021 ABCA 67.

15. Class actions are time-consuming and expensive, often taking years and great expense to be certified.[31] When used to challenge laws, this feature allows unconstitutional laws to remain in place for longer than they should. In contrast, the test for public interest standing more efficiently determines that a plaintiff has a genuine interest in the matter and is raising a serious issue. Because of their focus on damages (and contingency fees), class actions focus on historical wrongs over continuing *Charter* violations. Thus, class actions do not address one of the main purposes of the *Charter*: to prevent rights violations. Class actions are often settled, thus not providing the transparency of litigation on the merits afforded in cases where public interest standing is granted. Both American and Canadian commentators have raised concerns that damages may not effectively deter rights violations because governments are self-insuring, often fail to internalize costs, and are not as responsive as corporate defendants to the deterrent threat of even aggregated damage awards.[32]

16. There are skewed incentives in class actions: only cases that are economically viable for lawyers will be advanced. To ensure access to justice and the constitutionality of our legislation, public interest litigation rooted in public interest standing and supported by justified departures from ordinary costs rules should continue to play an important role preserving and advancing *Charter* rights.

17. An important *Charter* class action, *Brazeau v Canada*, awarded class action damages to offenders who had been held in administrative segregation for more than 15 days. The damage awarded amounted to $20 million, but only $500 for each inmate.[33] Despite this class action, public interest standing was obtained, and s. 52(1) litigation was subsequently commenced by the Canadian Civil Liberties Association and by the British Columbia Civil

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[31] R Douglas Elliott, "Eeny, Meeny, Miny, Moe: Choice of Process in Charter Claims" (2006) 21 Nat'l J Const L 167 at 181; Catherine Piché, "A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness" (2010) 41 Ottawa L Rev 25. There are 15 reported decisions in the *Brazeau* class action alone.

[32] Daryl J Levinson, "Making Governments Pay: Markets, Politics and the Allocation of Constitutional Costs" (2000) 67 U Chi L Rev 345 (WL); Craig Jones and Angela Baxter, "The Class Action and Public Authority Liability: "Preferability Re-Examined" (2007) 57 UNBLJ 27 (WL).

[33] *Brazeau v Canada*, *supra* note 30 at para 103.

Liberties Association. This litigation led to parts of the *Corrections and Conditional Release Act* being declared unconstitutional[34] and eventually being amended by Parliament.[35] These public interest standing challenges were necessary to ensure that the government could not continue disregarding *Charter* rights by simply paying modest damage awards to prisoners whose rights were violated. A restriction on the *Downtown Eastside* standing test could threaten such public interest litigation or, at least, make it more difficult by encouraging governments to engage in expensive and lengthy litigation over standing.

18. Class actions place strains on judicial and even governmental resources without even ensuring that ongoing *Charter* violations, as in the solitary confinement context, are stopped. In *Gosselin v Quebec*, the Court explicitly considered cost implications when it stated that a class damage award "would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province."[36] Concerns about remedies can restrict the recognition of novel *Charter* rights. Where a systemic remedy is required to protect *Charter* rights from unconstitutional litigation, broad public interest standing is often necessary.

19. If public interest standing were restricted, class actions could become the only economically viable way for lawyers to seek systemic *Charter* remedies under s. 24(1). Indeed, class actions combined with s. 52(1) litigation that took advantage of public interest standing have occupied much of the space in trying to prevent repetitive *Charter* violations in the prison context.[37] The AC submits that broad public interest standing plays a key role in ensuring access to justice and effective constitutional remedies. Restrictions on public interest standing raise a danger that constitutional litigation will be shaped by a quest for damages and contingency fees in a manner that may not always serve the public interest.

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[34] *Canadian Civil Liberties Assn v Canada (Attorney General)*, 2019 ONCA 243; *British Columbia Civil Liberties Assn v Canada (Attorney General)*, 2019 BCCA 228.
[35] Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess, 42nd Parl, 2019, c 27 (assented 21 June 2019).
[36] *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429 at para 297.
[37] See e.g., *Francis v Ontario*, 2021 ONCA 197, *Brazeau*, *supra* note 30; *Hamm v Canada (Attorney General)*, 2021 ABCA 190.

iii. The limits of declarations and injunctions under s. 24(1) as a systemic remedy.

20. The alternatives to damages are declarations and injunctions. This Court has expressed some preference for declarations as a flexible remedy.[38] At the same time, as Justice Iacobucci argued in his dissent in *Little Sisters*,[39] declarations may fail to produce effective constitutional compliance in the future. As in that case, they may result in disadvantaged individuals and groups having to commence new litigation.[40] The alternative is the injunction. This Court has, however, warned that injunctions need to be precise to ensure fairness to the government that may be held in contempt for their violation.[41]

21. Despite this Court's decision in *Doucet-Boudreau* to affirm retention of jurisdiction as a possible remedy,[42] there is a dearth of such public interest litigation in Canada compared to the United States, India, and South Africa. One looks in vain in the Canadian law reports to find cases where courts issued injunctions and retained jurisdiction in Canadian prison cases. Judges are reluctant to make specific and enforceable orders in cases where there may be a variety of ways to comply with the *Charter*. The limit on systemic injunctive relief is another reason why this Court should not restrict broad public interest standing which in the solitary confinement context provided the most realistic way to address these continuing violations suffered by some of the most disadvantaged in Canada.

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[38] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Canada (Prime Minister) v Khadr*, 2010 SCC 3.
[39] *Little Sisters Book and Art Emporium v Canada*, 2000 SCC 69 at para 258.
[40] *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2.
[41] *Thibodeau v Air Canada*, 2014 SCC 67 at para 125. See also *Canada (Attorney General) v Jodhan*, 2012 FCA 161 at para 171 ; *Canada v Long Plain First Nation*, 2015 FCA 177; *Ogiamien v Ontario*, 2016 ONSC 3080 at paras 309-311. See Roach, *Constitutional Remedies in Canada* supra note 4 at 13.1362.
[42] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.

The continued need for broad public interest standing.

22. This Court in *Ontario v G* and *Albashir* has made the s. 52(1) public interest challenge a more powerful remedial instrument by affirming that courts can order s. 24(1) remedies for individuals while ordering a s. 52(1) remedy, including suspended declarations of invalidity where an immediate remedy would harm important public interests.[43] The AC submits it would be a step backward for the Court having now strengthened the s. 52(1) action through this two-track approach to then restrict the ability of public interest groups to obtain public interest standing under s. 52(1).

23. A parallel class action or an attempt to obtain a declaration of an injunction as a s. 24(1) remedy does not make public interest standing less important. Broad public interest standing fills a gap in access to justice and provides effective remedies by ensuring that unconstitutional laws do not remain valid. Public interest standing provides a necessary and practical means to vindicate the *Charter* rights of disadvantaged people who often do not have the financial resources to take on infinitely resourced governments. The AC submits that broad public interest standing should not be curtailed.

PART IV – COSTS

24. The AC does not seek costs and respectfully requests that none be awarded against it.

PART V – ORDER REQUESTED

25. The Asper Centre takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of December, 2021.

Cheryl Milne

Counsel for the Intervener
David Asper Centre for Constitutional Rights

[43] *Ontario v G*, *supra* note 7; *Albashir*, *supra* note 7.

PART VI – TABLE OF AUTHORITIES

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SECONDARY SOURCES

Authority	**Paragraph(s)**
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