Court File No. 33981

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPELLANT
(Respondent)

AND:

DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE and SHERYL KISELBACH

RESPONDENTS
(Appellants)

FACTUM OF THE INTERVENER
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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PART I – OVERVIEW OF FACTS AND POSITION

1. The David Asper Centre for Constitutional Rights (AC) is a part of the University of Toronto, Faculty of Law. Its mission includes the realization of constitutional rights for vulnerable individuals and groups. It intervenes pursuant to the order of Deschamps J. of Nov 4, 2011 and accepts the facts as outlined in the Appellant's and Respondent's facta.

2. The AC submits that the test for public interest standing should be made consistent with this Honourable Court's recognition of the inherently systemic nature of remedies under s.52(1) of the *Constitution Act, 1982*. A focus on the remedies sought under s.52(1) for unconstitutional legislation, as distinct from individual remedies available for unconstitutional acts under s.24(1) of the *Charter*, would make clear that the requirements that litigants be specially prejudiced by impugned laws, or that they stand to receive a personal remedy, are not necessary.

3. A remedy focused approach to public interest standing will advance access to justice and the rule of law by recognizing that those with a genuine interest and who raise a serious issue about the constitutionality of laws under s.52(1) should presumptively have standing, subject to the judicial exercise of discretion. This approach can avoid unnecessary threshold litigation over standing, including disputes over the exact scope of any new exceptions that might be created for systemic litigation or litigation on behalf of the vulnerable. Our proposed approach recognizes that all s.52(1) remedies are inherently systemic and that the public has a general interest in having the constitutionality of laws assessed.

PART II - STATEMENT OF POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

4. 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 to the test for public interest standing is overly restrictive and fails to consider the systemic nature of the s.52(1) claim.

PART III – STATEMENT OF ARGUMENT

The Need to Reform Standing to Better Protect Access to Justice and the Rule of Law

5. Public interest standing has become too restrictive under the *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*[1] test. As administered by some lower courts,[2] this test denies standing on the mechanical assumption that litigation by more directly affected persons who can receive a personal remedy is possible and preferable. Standing jurisprudence is now dominated by the question of whether litigation by those especially affected is possible in a manner that has obscured the underlying rationale for granting public interest standing. Ironically, standing has contracted in the *Charter* era even though the rights enjoyed by all, as well as the costs of litigation, have both increased.

6. Standing can be simplified to better achieve access to justice and the vindication of the rule of law by focusing on the remedy sought. Standing sought for a s.52(1) declaration should be defined broadly in recognition of the public and systemic nature of the remedy which is designed to vindicate and clarify the rights of all. Section 52 remedies are intimately connected with the original, most principled and powerful rationale for public interest standing: the right of the citizenry to constitutional behaviour.[3]

7. The requirement that the claim be brought by a specially affected litigant who stands to receive a personal remedy is relevant under s.24(1) of the *Charter* but not s.52(1). Section 52(1) remedies are systemic remedies that benefit the public as a whole and fulfill the general interest in having governments respect the Constitution. The frequent use of suspended declarations of invalidity and the ability of governments to enact a range of constitutional replies to s.52 declarations makes it unrealistic to insist that any s.52(1) remedy necessarily result in a concrete remedy for an exceptionally prejudiced litigant.

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[1] [1992] 1 SCR 236 [*Canadian Council of Churches*].
[2] *Lexogest Inc v Manitoba (Attorney-General)* (1993), 110 DLR (4th) 523 (Man CA); *Canadian Civil Liberties Association (Corporation of the) v Canada (Attorney General)* (1998), 40 O.R. (3d) 489, 161 DLR (4th) 225 (ONCA); *R v Banks*, 2007 ONCA 19 at paras 23-25, leave refused 220 CCC (3d) vi; *Mullins v Levy*, 2009 BCCA 6; 304 DLR (4th) 64. For academic criticisms of the standing jurisprudence, see Jane Bailey, " Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44 UBC L Rev 255; June M Ross, "Standing in Charter Declaratory Actions" (1995) 33 Osgoode Hall LJ 151; WA Bogart, "Understanding Standing, Chapter IV: *Minister of Finance of Canada v. Finlay*" (1988) 10 SCLR 377; Russell Binch, "The Mere Busybody: Autonomy, Equality and Standing" (2002-2003) 40 Alta L Rev 369.
[3] *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at 163 [*Thorson*].

8. The AC submits that standing should presumptively be granted to those with a genuine interest in the matter, who raise a serious issue that impugned laws are unconstitutional and with sufficient facts to adjudicate the claim, subject to judicially exercised discretion to deny standing.

The Importance of the Distinction Between s.52 and s.24(1) Constitutional Remedies

9. This Honourable Court has long distinguished between the inherently systemic nature of s.52(1) and personal remedies under s.24(1). In *R v. Big M Drug Mart Ltd.*,[4] Dickson C.J. stressed that "[w]here, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant."[5] Under s.52 "it is the nature of the law, not the status of the accused, that is in issue".[6] Hence the accused and those facing civil proceedings initiated by the state[7] should be able to ask a court "to prevent a violation of the fundamental principle of constitutional law embodied in s. 52".[8] 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."[9]

10. In *Schachter v. Canada*,[10] this Honourable Court recognized that the purpose of s.24(1) was to "provide for an individual remedy for the person whose rights have been so infringed" and that "an individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*." The Court also recognized that a claimant for a s.52(1) remedy might not receive any immediate or personal remedy if a declaration of invalidity were suspended or if the legislature enacted a new law in response to a s.52(1) remedy.

11. In *R v. Ferguson*,[11] this Honourable Court stressed again that "ss. 52(1) and 24(1) serve

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[4] [1985] 1 SCR 295 [*Big M*].
[5] *Ibid* at para 37.
[6] *Ibid* at para 41.
[7] See *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157.
[8] *Big M*, *supra* note 4 at para 47.
[9] *Hy and Zel's Inc v Ontario (Attorney General); Paul Magder Furs Ltd v Ontario (Attorney General)*, [1993] 3 SCR 675 at para 64, L'Heureux-Dube J, dissenting [*Hy and Zel's*].
[10] [1992] 2 SCR 679 at paras 90-92 [*Schachter*]. Although the Court did not rely on the distinction between s.24(1) and s.52 remedies in *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 at para 81, that decision did not abolish the fundamental distinction between s 24 and s 52 remedies.
[11] 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*].

different remedial purposes"[12] with the accused being able to seek a s.52(1) remedy against laws providing mandatory minimum sentences on the basis that they violate not only the accused's rights but those of third parties not before the court and not entitled to a personal remedy from the invalidation of the law. This Honourable Court warned that using personal remedies under s.24(1) in an attempt to cure unconstitutional laws could undermine the fundamental and interrelated roles of s.52 and the rule of law.[13] It is submitted that the corollary of these principles is that public interest standing to seek a s.52(1) remedy should be defined broadly because it seeks to affirm the rule of law and the "right of the citizenry to constitutional behavior from Parliament."[14]

12. In *Ravndahl v. Saskatchewan,*[15] McLachlin C.J. stressed that it "[i]t is important to distinguish the appellant's personal, or *in personam*, remedies, brought by her as an individual, from an *in rem* remedy flowing from s. 52 that may extend a benefit to the appellant and all similarly affected persons" and quoted with approval a passage from a factum of the Attorney General of Ontario which recognized that the presumptive beneficiary of a s.52(1) declaration might not receive any personal remedy.[16] Given this reality, it makes little sense to require those who seek standing for a s.52(1) remedy to demonstrate that they are specially affected by a law or stand to receive a personal remedy if they are successful.

History of Standing Through the Lens of the Distinction Between ss. 24(1) and 52 Remedies

13. Public interest standing has a long history that predates s.52(1) of the *Constitution Act, 1982*. In *Thorson*, a majority of the Supreme Court recognized the right of a citizen to seek a declaration that the *Official Languages Act* was unconstitutional. Today, this declaration would be sought under s.52(1) of the *Constitution Act, 1982*. Justice Laskin did not follow the restrictive precedent in *Smith v. The Attorney General of Ontario,*[17] which effectively required litigation by those specially affected by the law and who would receive a personal remedy. *Smith* expressed concerns that if standing were granted it "would involve the consequence that

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[12] *Ibid* at para 61.
[13] *Ibid* at paras 66-73.
[14] *Thorson, supra* note 3 at 163.
[15] *Ravndahl v. Saskatchewan,* 2009 SCC 7, [2009] 1 SCR 181at para 27 [*Ravndahl*].
[16] See also *Canada (Attorney General) v Hislop,* [2007] 1 SCR 429 [*Hislop*].
[17] [1924] SCR 331 [*Smith*].

virtually every resident of Ontario could maintain a similar action".[18] In contrast, Laskin J. stressed "the right of the citizenry to constitutional behaviour by Parliament".[19]

14. In *Nova Scotia Board of Censors v. McNeil,*[20] this Honourable Court unanimously granted standing to a resident of Nova Scotia to seek a declaration that provincial censorship legislation was unconstitutional. Today, this would be a s.52 case. In *Minister of Justice (Canada) v. Borowski,*[21] this Honourable Court recognized that *McNeil* "went beyond the *Thorson* judgment in that it recognized the possibility of a person having status to attack the validity of legislation in the circumstances defined in that case *even though there existed classes of persons who were specially affected and who might be exceptionally prejudiced by it*." *Finlay v. Canada (Minister of Finance)*[22] demonstrates that a focus on a general declaration also justified a broad approach to standing. This Honourable Court granted Mr. Finlay public interest standing noting that "the judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody is addressed by the requirements affirmed in *Borowski* that there be a serious issue raised and that a citizen have a genuine interest in the issue."[23] In these non-*Charter* cases, it is respectfully submitted that this Honourable Court did not hesitate to interpret public interest standing broadly and generously, recognizing that subject to judicial discretion, any genuinely interested person could raise a serious issue of constitutionality.

The Danger of Creating Exceptions for Declaratory Legislation or Systemic Litigation

15. It may be tempting to expand or relax standing in cases involving systemic litigation or litigation by or on behalf of the vulnerable. However, there is a danger that such changes might produce even more expensive threshold litigation. In *McNeil,* Laskin C.J. noted that the distinction between regulatory and declaratory statutes in *Thorson* was not "controlling, especially in the light of the reserve of discretion in the Court, and more especially because the word or the term 'regulatory' is not a term of art, not one susceptible of an invariable meaning which would in all cases serve to distinguish those in which standing to a taxpayer or citizen

[18] *Ibid* at para 18.
[19] *Thorson*, *supra* note 3 at 163.
[20] *Nova Scotia Board of Censors v McNeil,* [1976] 2 SCR 265 [*McNeil*].
[21] [1981] 2 SCR 575 at 596 [*Borowski*] (emphasis added).
[22] [1986] 2 SCR 607 [*Finlay*].
[23] *Ibid* at para 34.

would be granted and those in which it would not."[24] The AC submits that the distinction between "systemic" and other forms of litigation including litigation for the "vulnerable" should similarly not be controlling. The principled issue is not the varying characterization of the litigation. The real issue is the right of the citizenry to constitutional behaviour.

How McNeil, Borowski and Other Cases Might Be Denied Standing Today

16. If *McNeil* arose anew today, standing might be denied on the basis that film distributors were more directly affected and could bring a challenge. This is unfortunately the case even though the *Charter* has only increased the legal protections for free expression. Although this Honourable Court granted standing in *Borowski*,[25] Laskin C.J.'s prediction in dissent that doctors and "husbands"[26] were more directly affected by the impugned law and could challenge the abortion law was correct.[27] Nevertheless, that does not change the issue of principle that the citizenry had a right to constitutional behavior. The AC respectfully submits that the possibility that these precedents might be decided differently today indicates the need to bring standing back to its original rationale and to abandon or at least significantly relax the requirement that there be no other reasonable and effective means to litigate a case.

Trends Toward Broader Standing

17. Fortunately, a broader and more realistic approach to standing has implicitly been taken, albeit in a number of *Charter* cases in which standing was not challenged. Examples of this more generous *de facto* approach include *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,[28] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*,[29] and *Canada (Attorney General) v. PHS Community Services Society*.[30] In these cases, public interest groups sought a s.52 remedy. Such litigation is often necessary because of financial and other obstacles that directly affected individuals may face in litigating a case. In all of these cases, it might be possible to identify some specially prejudiced individual raising similar claims; however, the AC submits that this should not serve

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[24] *McNeil*, *supra* note 20 at 269.
[25] *Borowski*, *supra* note 21.
[26] *Ibid* at 584.
[27] *R v Morgentaler*, [1988] 1 SCR 30 [*Morgentaler*]; *Tremblay v Daigle*, [1989] 2 SCR 530.
[28] 2004 SCC 4, [2004] 1 SCR 76.
[29] 2004 SCC 45, [2004] 2 SCR 427.
[30] 2011 SCC 44.

as a bar to standing. The applicant in *Rodriguez v British Columbia (Attorney General)*[31] might also have been denied standing given the ability to challenge *Criminal Code* provisions in actual prosecutions.

18. In *Vriend v. Alberta,*[32] this Honourable Court recognized that requiring people directly affected by each discriminatory practice to commence litigation would be both "wasteful of judicial resources" and "unfair in that it would impose the burdens of delay, costs, and personal vulnerability to discrimination for those individuals involved in the eventual cases." In *Chaoulli v. Quebec (Attorney General),*[33] this Honourable Court recognized that it was neither practical nor realistic to expect the most directly affected patients to bring a challenge, and therefore granted standing to an interested doctor and a patient who had not demonstrated that the impugned law had delayed his surgery.

19. The remedy sought in *Vriend* and *Chaoulli,* and in lower court decisions[34] that also recognize the impracticality of forcing the most directly affected party to litigate, was a systemic remedy involving s.52(1). In contrast, public interest standing has been interpreted less broadly in cases where no general piece of legislation has been challenged.[35] In the case at bar, Saunders J.A. recognized that the standing claims of Sheryl Kiselbach should be decided under s.52(1) and not s.24(1) because she challenged legislation.[36] The causal connection between a *Charter* violation and harm to the litigant may be relevant to a personal s.24(1) remedy.

The Harmful Impact of Smith and Comparative Analogues on Public Interest Standing

20. The restrictive and outdated precedent of *Smith* still has an adverse effect on judicial understandings of who is directly affected by laws. In *Hy and Zel's,* the majority of the Court held that it was not necessary to determine whether *Smith* was still appropriate in light of public interest standing. The emphasis on a right to a personal remedy in *Smith* was applied to deny

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[31] [1993] 3 SCR 519.
[32] [1998] 1 SCR 493 at para 47 [*Vriend*].
[33] 2005 SCC 35, [2005] 1 SCR 791at paras 186, 189 [*Chaoulli*].
[34] *Unishare Investments Ltd v R,* 1994 CanLII 7270 (ON SC) at para 11; *Fraser v Canada (Attorney General),* 2005 CanLII 47783; *Federated Anti-Poverty Groups of British Columbia et al v AGBC et al,* 1991 CanLII 251 (BCSC) at 32-35*; Canadian Assn of the Deaf v Canada,* 2006 FC 971*; Morgentaler v The Province of New Brunswick,* 2008 NBQB 258; *Amnesty International Canada v Canada (Chief of the Defence Staff),* 2008 FC 336, [2008] 4 FCR 546.
[35] *Canadian Bar Association v British Columbia,* 2006 BCSC 1342 at para 45 [*Canadian Bar Association*].
[36] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General),* 2010 BCCA 439 at paras 23, 35 [*SWUAV*].

private interest standing in *Finlay* even though LeDain J. recognized that "the American requirement of 'nexus' or 'directness'… stems from the special constitutional requirement of case or controversy for federal jurisdiction under Article III of the Constitution, and for this reason the American cases on standing must be treated with some caution".[37]

21. The rationale underlying *Smith* in 1924 and the foreign law cited by the Appellant[38] cannot be reconciled with the importance in Canada today of s.52 remedies and their underlying principle that there is a right to constitutional behavior. *Smith* is not helpful when considering general remedies for unconstitutional laws under s.52(1) of the *Constitution Act, 1982*. In 1924, the prospect that all citizens might be granted standing to raise a constitutional claim was a decisive reason not to grant standing. Today, the *Charter* grants many rights that are enjoyed by all and the idea that someone must be exceptionally prejudiced by an unconstitutional law loses much of its original rationale.[39] If this Honourable Court disapproved of *Smith*, then standing law could develop in a more integrated and generous manner with a focus on the distinction between personal remedies under s.24 and more general s.52 remedies.

The Factual Sufficiency of the Case is a Separate Issue

22. The Appellant has stressed "that constitutional law is best developed and decided in cases involving specific facts."[40] It insists that the complex issues raised in this case should be litigated by those accused of prostitution related offences. This focus on particular adjudicative facts discounts not only the nature of the *Charter* challenge, but the nature of a s.52(1) remedy.

23. Litigants seeking a s.52(1) remedy challenge the facial validity of the impugned law and have a duty to provide a sufficient factual basis in either adjudicative or legislative facts to

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[37] *Finlay*, *supra* at note 22 at para 21.The High Court of Australia has subsumed questions of standing in constitutional cases into the requirement that there be a 'matter' before the Court and has decided that there is no 'matter' within the meaning of the constitution"unless there is some immediate right, duty or liability to be established by the determination of the Court." *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 511, Aickin J (the plaintiff's interest must be related to the relief claimed, such that there must be some tangible advantage to the claimant in granting the remedy sought). Similarly, the more restrictive rules of standing in the United States are based on Article III of the constitution, which limits the jurisdiction of the federal courts to 'cases' and 'controversies'. The test for standing under the *Human Rights Act* 1998 (c 42), s 7(1) in the UK is, like s 24(1) of the *Charter*, limited to individual victims of violations.

[38] Factum of the Appellant at paras 46-49.

[39] *Charlottetown (City) v PEI*, (1998) 167 DLR (4th) 268 at para 92; *Ontario (Attorney General) v Fraser*, [2011] SCC 20.

[40] See Factum of the Appellant at para 1.

establish that the law violates *Charter* rights. In such cases of facial challenges to laws, "background evidence of a general nature may be relevant to set the context of the issue quite apart from the position of the specific parties."[41] Often the most relevant facts in a s.52(1) case will be legislative facts established by the government under s.1. This Honourable Court has developed doctrines that require any litigant to present sufficient facts to litigate a case and such issues of factual sufficiency should be kept functionally distinct from standing.[42]

Fears about Floodgates and Judicial Economy Should Not Defeat a More Generous Approach to Standing

24. Concerns about a multiplicity of suits and effects on judicial economy are overstated and do not defeat the case for recognizing presumptive standing whenever a litigant seeking a s.52(1) remedy demonstrates a genuine interest and a serious issue to be tried, subject to judicially exercised discretion to deny standing. As L'Heureux-Dube J. stated in dissent in *Hy and Zel's*:

> In general terms, as this Court recognized in *Thorson*, concerns about judicial economy and the multiplicity of lawsuits are often overstated. In the usual case, there are enough practical disincentives to litigants by reason of costs and inconvenience to discourage those who have no real stake in the outcome of the litigation from engaging in frivolous lawsuits. Furthermore, as standing is discretionary, courts always retain a mechanism to refuse to entertain the arguments of those whose motive to litigate is clearly suspect. In view of these practical realities, care should be taken not to exaggerate the threat to the justice system by a more liberal approach to standing; indeed, as Laskin J. suggested in *Thorson*, this concern should rarely provide the basis upon which to deny standing to an otherwise worthy plaintiff.[43]

25. The AC appreciates the importance of limiting standing as a means to preserve judicial resources and to avoid a multiplicity of unmeritorious or vexatious suits.[44] Nevertheless, this concern must be considered in light of the overriding importance of assessing the constitutional validity of laws to protect the rule of law. Securing access to justice by providing an effective and realistic avenue for constitutional challenge of impugned legislation is of paramount importance. As this Honourable Court has noted, "the right to access to the courts is under the

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[41] *Hy and Zel's*, *supra* note 9 at para 8, L'Heureux-Dube J, dissenting.
[42] *MacKay v Manitoba*, [1989] 2 SCR 357, at pp. 361-62; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086, at 1093. As L'Heureux-Dube J stated in her dissent in *Hy and Zel's*, *supra* note 9 at para 89: "This Court's decisions *MacKay* and *Danson*, which dealt with the need to avoid deciding *Charter* issues in a factual vacuum, are not at all relevant to the question of standing. If anything, they lend support to the notion that standing is an issue separate and apart from the question of the sufficiency of the evidence and, furthermore, that an appellant's standing can be unassailable even when there is not a shred of evidence to support a *Charter* claim."
[43] *Ibid* at para 68.
[44] *Canadian Council of Churches*, *supra* note 1 at para 34.

rule of law one of the foundational pillars protecting the rights and freedoms of our citizens".[45]

The Continued Role of Judicial Discretion

26. We argue that a court should consider a number of factors that would recommend the conferral of standing, including the importance of bringing a timely challenge to a potentially unconstitutional law, the gravity of the potential rights infringement, and the ability of the individual or group to serve as a suitable claimant in the action. Importantly, the courts should also take into account the practical difficulties of a more directly affected litigant bringing the challenge, such as facing the serious burdens of a prosecution or an onerous administrative process, particularly where another individual or group is fully willing and able to challenge the law in question. We believe that it would be possible for courts to exercise their discretion to deny standing in the case of clearly frivolous or vexatious suits, or situations where the claimant is simply incapable of effectively mounting a case due to lack of genuine interest or experience or because they will be unable to adduce the necessary facts to establish a *Charter* violation.

PART IV – COSTS

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

PART V – ORDER REQUESTED

28. The Asper Centre takes no position on the disposition of the appeal but requests that it be allowed 10 minutes to provide oral representations.

All of which is respectfully submitted, this 2nd day of January, 2012

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Kent Roach Cheryl Milne

Counsel for the Asper Centre

[45] *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at paras 25-26.

PART VI – TABLE OF AUTHORITIES

	Cases	**paragraph**
39.	*Unishare Investments Ltd v R*, 1994 CanLII 7270 (ON SC)	19
40.	*Vriend v Alberta*, [1998] 1 SCR 493	18, 19

Commentary

41.	Jane Bailey, “Reopening Law’s Gate: Public Interest Standing and Access to Justice” (2011) 44 UBC L Rev 255	5
42.	June M Ross, “Standing in Charter Declaratory Actions” (1995) 33 Osgoode Hall LJ 151	5
43.	WA Bogart, "Understanding Standing, Chapter IV: *Minister of Finance of Canada v. Finlay*" (1988) 10 SCLR 377	5
44.	Russell Binch, “The Mere Busybody: Autonomy, Equality and Standing” (2002-2003) 40 Alta L Rev 369	5