Court of Appeal File No. CA45711

IN THE COURT OF APPEAL

ON APPEAL FROM: the Order of the Honourable Chief Justice Hinkson of the Supreme Court of British Columbia, pronounced on the 12th day of October 2018.

BETWEEN:

COUNCIL OF CANADIANS WITH DISABILITIES

APPELLANT
(Plaintiff)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Defendant)

- and –

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, WEST COAST LEGAL EDUCATION AND ACTION FUND, and ECOJUSTICE CANADA SOCIETY

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Part 1: OVERVIEW

1. Public interest standing is a crucial tool by which traditionally marginalized and oppressed persons can challenge laws that function to reproduce or magnify their oppression. As a consequence of marginalization, oppressed persons frequently do not have access to the capital (financial, human, and cultural) to sustain complex legal challenges against the power of the state. A contextual approach to the public interest standing test set out in *SWUAV*[1] must appreciate how intersecting forms of disadvantage can reduce access to justice for some groups. Courts must also acknowledge that public interest organizations fulfills a necessary and critical function in a free and democratic society by helping traditionally marginalized communities access legal representation by facilitating capital (as defined above) and also by providing persistence of presence.

2. When assessing whether public interest standing offers a "reasonable and effective"[2] means of litigating systemic claims on behalf of traditionally marginalized groups, courts should also recognize that modern *Charter* litigation – particularly in claims seeking remedies under s. 52 of the *Constitution Act, 1982* – already relies predominantly on evidence from sources other than the individual plaintiffs. Contrary to Chief Justice Hinkson's statement in this case, the reality of modern *Charter* litigation demonstrates that, particularly for these kinds of claims, an "individual evidential record" is in fact not "necessary to decide the constitutional issues alleged."[3]

Part 2: WC LEAF'S POSITION ON THE QUESTION IN ISSUE

3. The British Columbia Supreme Court erred by unduly narrowing the test for public interest standing.

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[1] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*SWUAV*].

[2] *SWUAV, supra* note 1 at paras. 37 and 50-51.

[3] *MacLaren v. British Columbia (Attorney General)*, 2018 BCSC 1753 [*MacLaren*] at para. 95.

Part 3: STATEMENT OF ARGUMENT

A. Adopting a Contextual Approach

4. A narrow interpretation of *SWUAV* disproportionately and adversely impacts women and other traditionally marginalized groups that frequently rely upon public interest organizations for assistance in vindicating their constitutionally protected rights and freedoms.

5. Public interest standing is indispensable in determining the scope of rights and protections under the *Charter* in the modern era. Meaningful adjudication of *Charter* claims promotes the rule of law and permits the growth of our living tree Constitution. The *Charter*'s promise as a means for enhancing democratic engagement and substantive equality requires an analytical approach to public interest standing that enables those most in need of the *Charter*'s protection to bring systemic challenges to allegedly infringing legislation.

6. The evolution of the doctrine of public interest standing and the proliferation of *Charter* challenges mounted by public interest organizations – either on their own or in conjunction with individual plaintiffs – highlights the need for meaningful access to the courts and a systemic framing of challenges to laws and government actions that have broad social impacts. This access need is particularly acute where rights claimants are members of marginalized communities, such as persons with disabilities or women, and those who experience intersecting disadvantaging barriers to their full and equitable participation.

7. Courts have recognized the interconnection between access to justice and the rule of law as a core constitutional value, such that ensuring access to the courts to hold governments accountable and to seek vindication of constitutionally protected rights and freedoms is an essential component of the rule of law.[4] As such, inherent in the notion of public interest standing is the aim of enhancing or facilitating access to justice.[5] The Supreme Court of Canada recognizes that public interest standing animates access to justice for members of

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[4] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 40.

[5] *Canadian Council for Refugees, et al. v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 [*Canadian Council for Refugees*] at paras. 61-63.

society who experience disadvantage and whose legal rights are engaged.[6]

8. Courts have long recognized the disproportionate impact of economic disadvantage, which can create barriers to accessing justice. The "feminization of poverty" is understood by the Supreme Court of Canada as arising from the "multiplicity of economic barriers women face in society."[7] The "persistent social and economic disadvantage" experienced by persons with disabilities has been understood to arise from histories of their exclusion from society and attitudes of paternalism.[8] The fact that such barriers may result in the unwillingness or practical inability of many people from marginalized communities to come forward as individual plaintiffs was recognized in the Supreme Court of Canada's reformulation of public interest standing as an access to justice issue in *SWUAV*.[9]

9. Compounded by economic disadvantage, the barriers that members of marginalized communities experience in seeking access to the courts to vindicate their *Charter* rights are not remediable simply by funding cases brought by individual litigants, as the chambers judge appears to suggest.[10] Courts recognize a constellation of factors that effectively bar individuals from pursuing systemic constitutional challenges, including considerations well beyond

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[6] *SWUAV, supra* note 1 at para. 51.

[7] *Moge v. Moge*, [1992] 3 SCR 813 at 853-854 (*per* L'Heureux-Dubé J.); *Marzetti v. Marzetti*, [1994] 2 SCR 765 at 801. See also, *Quebec (Attorney General) v. Alliance du personnel professionel et technique de la santé et des services sociaux*, 2018 SCC 17 and *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 (concerning the economic disadvantage experienced by women in the workforce).

[8] *Eldridge v. British Columbia (Attorney General)*, [1997] 2 SCR 624 at 668-669; see also *Moore v. British Columbia (Education)*, 2012 SCC 61 (concerning the disadvantage experienced by persons with mental disabilities).

[9] *SWUAV, supra* note 1 at paras. 51, 71; see also, *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (Ont. Sup. Ct. J.) (finding seasonal farmworkers experience significant barrier to participation in litigation, granting public interest standing to union).

[10] *MacLaren, supra* note 3 at para. 95.

financial means.[11] The adverse impact that serving as a plaintiff in a multi-year, multi-court, adversarial and often high profile case may have on an individual's social life, physical health and mental well-being, employment, family, privacy interests and security are recognized barriers to participation as a plaintiff in constitutional litigation.[12]

10. Moreover, the fact that some members of a marginalized community may be motivated and able to pursue individual or even systemic challenges does not obviate the need to fully consider whether granting public interest standing will facilitate or stymie access to justice more broadly. That analysis must be conducted in light of both the lived reality of individuals whose the public interest organization seeks to vindicate and the systemic nature of the claim at issue.[13]

11. Further, in many constitutional challenges, adjudication of the case requires analysis of a multiplicity of considerations that would not arise on the facts of one, or even a few, directly impacted individuals. Public interest litigation widens the lens on understanding the constitutionality of laws and state action, promoting a broader notion of access to justice informed by the principle of legality. The court must therefore exercise its discretion in applying the test for public interest standing in a contextual manner animated by access to justice concerns and in recognition of the many pertinent benefits of public interest litigation that diverge from the private law paradigm of an adversarial dispute between individual litigants.

12. Public interest litigation advances the rights of those who may be unwilling or unable to pursue a constitutional challenge, or who may be unaware of arguable constitutional infirmities in the legislative scheme. In the current challenge to the constitutionality of Canada's Safe

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[11] See, e.g., *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 [*SWUAV* BCCA] at paras. 51, 55, 59; *Chaoulli v. Quebec*, 2005 SCC 35 at para. 189; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2016 BCSC 1391 at para. 28.

[12] See, e.g., *Canadian Doctors for Refugee Care v. Canada (Attorney General),* 2014 FC 651 at para. 340 (concerning the impediments to participation by individual litigants, including physical and mental health).

[13] *SWUAV, supra* note 1 at para. 71.

Third Country Agreement with the United States, the Federal Court dismissed Canada's suggestion that the three public interest organizations who were successfully granted public interest standing should instead "assist" the individual plaintiffs in the background. The court observed: "It is generally not appropriate for 'ghost' parties to lurk in the background, providing extensive funding, evidence, advice, or information."[14]

13. Given the highly contentious issues that arise in *Charter* challenges, it is unlikely that any public interest organization could purport to represent the multiplicity of perspectives that are likely to exist in connection with a particular law or government action. The fact that different constituencies have deeply divergent perspectives and that no one litigant – whether a public interest litigant or an individual directly impacted – can speak for all with one voice does not answer the court's inquiry into whether a grant of public interest standing in a specific case will enhance access to justice and promote the principle of legality. These considerations are especially significant in litigation against the Crown, where the effect of an unduly narrow application of the test for public interest standing stands to deter or impede litigation seeking to assert, apply or expand *Charter* rights and freedoms.

B. Public Interest Litigants May Anchor Systemic Claims, as a Matter of Law and Practice

14. Courts have also recognized the unique nature of systemic constitutional challenges and have differentiated such cases from the adjudication of private disputes in which an individualized factual matrix is necessary for the adversarial process. In *Crockford*, for instance, this Court found that complaints of systemic discrimination are legally distinct from individual claims of discrimination, and that:

> The types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.[15]

15. Likewise in *SWUAV* BCCA, this Court acknowledged the context of the claim as a

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[14] *Canadian Council for Refugees, supra* note 5 at paras. 66-68.

[15] *British Columbia v. Crockford*, 2006 BCCA 360 at para. 49.

comprehensive challenge to a legislative scheme which relied heavily on systemic considerations.[16] Systemic constitutional claims are manifestly not cases in which a "series of claims for individual relief" are sought in the aggregate.[17]

16. The Supreme Court of Canada has also consistently held that challenges to legislation are remedied under s. 52 of the *Constitution Act, 1982* and that such challenges do not necessarily require that the impugned legislation contravene the rights of the claimant directly, otherwise "bad laws might remain on the books indefinitely".[18] If an individual plaintiff may obtain a s. 52 remedy because legislation infringes the rights of non-litigants, then there should be little hesitation in granting a public interest organization standing to pursue such a remedy.

17. Further, the practical reality of modern *Charter* litigation is that trial records predominantly draw on evidence from sources other than the named plaintiffs. Justice Thomas of the Ontario Superior Court recently encapsulated this reality when he rejected an argument that the relief sought

> requires a detailed examination of each individual [case]. Such is not the nature of public interest litigation examining systematic misconduct. It seems to me that representative evidence coupled with expert evidence could potentially make a case for a broad declaration fashioned appropriately by the trial judge.[19]

18. In the following sections we provide a brief review of four recent *Charter* judgments showing that, irrespective of the presence of individual plaintiffs, and whether or not they are

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[16] *SWUAV* BCCA, *supra* note 11 at para. 56.

[17] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 44.

[18] *R. v. Nur,* 2015 SCC 15 at para. 51, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 314; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 799; *R. v. Mills*, [1999] 3 S.C.R. 668 at 704-5; *R. v. Ferguson*, 2008 SCC 6 at paras. 58-66. See also "imaginable circumstances" in *R. v. Goltz,* [1991] 3 S.C.R. 485 at 515-16.

[19] *Williams v. London Police Services Board*, 2019 ONSC 227 (Chambers) at para. 49 [emphasis added].

joined by a public interest organization as a party, it is the whole body of evidence – usually a very substantial body of evidence, much of it expert opinion – that supports the courts' findings, and not the evidence of the individual litigants.

Carter v. Canada (Attorney General)

19. *Carter* is the physician assistance in dying case brought by four individual plaintiffs and by the BC Civil Liberties Association as a public interest litigant. The trial judgment spans 1416 paragraphs, with only 32 paragraphs (2%) dedicated to the facts of the individual plaintiffs. Expert evidence, on the other hand, consisted of 722 paragraphs (51%).[20] Justice Lynn Smith commented in the reasons for judgment on the "extensive nature of the record" before her, encompassing as it did "some 36 binders of affidavits, transcripts and documents … [composed of] 116 affidavits".[21]

20. In distinguishing the case from an earlier one (*Rodriguez*),[22] Justice Smith noted that, while the adjudicative facts were not meaningfully distinguishable, the legislative and social fact evidence was far more robust in the case before her, including "an enormous amount of evidence about the experience with legal physician-assisted death in other jurisdictions." Justice Smith held:

> The record permits assessment of the current approach to and understanding of end-of-life decision-making, and the current understanding of the efficacy of possible safeguards that might permit persons in the position of Ms. Taylor to have the option that she seeks, while protecting those who are vulnerable.[23]

21. She further noted that, while the amplification of the record did not permit her to ignore *stare decisis,* the "importance of the factual matrix in constitutional adjudication" was a factor in

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[20] *Carter v. Canada (Attorney General),* 2012 BCSC 866 [*Carter*] at paras. 44-76 and 160-882.

[21] *Carter, supra* at note 20 at paras. 114-5.

[22] *Rodriguez v. British Columbia (Attorney General),* 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519.

[23] *Carter, supra* at note 20 at paras. 941-5 and 1001.

justifying a fresh determination of the issues.[24] In affirming the trial judgment, the Supreme Court of Canada acknowledged that record was grounded on broad legislative and social fact evidence, even as the adjudicative facts were bound by *stare decisis.*[25]

Bedford v. Canada

22. *Bedford* is the Ontario trial decision challenging the prostitution provisions of the *Criminal Code*.[26] *Bedford* was brought by three plaintiffs with private standing; no public interest organization was a party in the case. The trial judgment spans 541 paragraphs with only 17 paragraphs (3%) dedicated to summarizing the facts of the individual plaintiffs. Summaries of expert evidence, on the other hand, consisted of 94 paragraphs (17%).[27]

23. Justice Himel noted that the application record consisted of

> [o]ver 25,000 pages of evidence in 88 volumes, amassed over two and a half years…. The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents.[28]

24. The trial judge further relied predominantly on expert evidence when addressing the individual legal arguments[29] and the Supreme Court of Canada largely upheld her order.[30]

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[24] *Carter, supra* at note 20 at para. 946.

[25] *Carter v. Canada (Attorney General),* 2015 SCC 5 at paras. 3 and 44-7.

[26] *Criminal Code*, R.S.C. 1985, c. C-46.

[27] *Bedford v. Canada*, 2010 ONSC 4264 [*Bedford*] at paras. 26-43 and 119-213.

[28] *Bedford, supra* note 27 at para. 84.

[29] See, for example, *Bedford, supra* note 27 at paras. 226-7, 293-8, 302-25, and 328-51.

[30] *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

British Columbia Civil Liberties Association v. Canada (Attorney General) (BCCLA v. Canada)

25. The British Columbia Civil Liberties Association ("BCCLA") challenged in BC Supreme Court sections of the *Corrections and Conditional Release Act*[31] that permitted the "administrative segregation" of inmates in federal penitentiaries. The John Howard Society of Canada joined BCCLA; no private interest litigants were involved. The government did not dispute the public interest standing of either public interest organization, apparently on the basis that they were seeking a s. 52(1) remedy.[32]

26. Justice Leask noted that "under very tight timelines" the plaintiffs compiled "a substantial evidentiary record".[33] The plaintiffs' evidence consisted of 10 expert witnesses and 8 lay witnesses, including former Correctional Service of Canada employees and prisoners who had experienced administrative segregation.[34] In the resulting judgment, which was over 600 paragraphs long, Justice Leask found the impugned provisions to infringe unjustifiably ss. 7 and 15 of the *Charter.*[35] This Court's judgment on the appeal is under reserve.

Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen ("CCLA v. Canada")

27. In *CCLA v. Canada,* the Corporation of the Canadian Civil Liberties Association ("CCLA") sought and received public interest standing to challenge the same provisions in Ontario. The CCLA was the sole plaintiff at the hearing; no individual plaintiffs joined.[36] The CCLA successfully argued that the Act violated the s. 7 rights of prisoners and that the

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[31] *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

[32] *British Columbia Civil Liberties Association v. Canada (Attorney General),* 2018 BCSC 62 [*BCCLA v. Canada*] at para. 6.

[33] *BCCLA v. Canada, supra* note 32 at para. 8 (WC LEAF intervened in the case at the trial and on appeal).

[34] *BCCLA v. Canada, supra* note 32 at para. 9.

[35] *BCCLA v. Canada, supra* note 32 at para. 609.

[36] The Canadian Association of Elizabeth Fry Societies had originally joined the CCLA as a co-public interest plaintiff but withdrew from the case before it proceeded to the hearing.

infringement was not saved by s. 1.[37]

28. The Attorney General of Canada acquiesced to the plaintiff's standing so long as it sought a declaration of invalidity pursuant to s. 52(1).[38] The AGC's acquiescence in this regard properly reflects the relationship between public interest standing and claims for relief against systemic oppression of marginalized and vulnerable populations.

29. Given the absence of private interest litigants, the record before Justice Marrocco consisted entirely of social and legislative fact evidence, including numerous reports and international statements and rules, as well as the evidence of the former United Nations Special Rapporteur on Torture, Professor Mendez.[39] On appeal, the court expanded Justice Marrocco's holding to include a finding of an unjustifiable s. 12 infringement.[40]

C. Conclusion

30. The test for public interest standing appropriately affords judges considerable flexibility and discretion in its application. However, the exercise of that discretion must not lose sight of the unique nature of systemic constitutional challenges and their divergence from the paradigm of private dispute resolution, the potential for public interest organizations to advance access to justice both for members of disadvantaged groups and in the broader public interest, and the role of such cases in protecting and promoting the rule of law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, April 29, 2019

Tim Dickson, Jason Harman and Rajwant Mangat

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[37] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 [*CCLA v. Canada*] at para. 167.

[38] *CCLA v. Canada*, *supra* note 37 at para. 14.

[39] *CCLA v. Canada, supra* note 37 at paras. 29-42 and 62.

[40] *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 at paras. 2 and 150.

LIST OF AUTHORITIES