SCC File No. 39430

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

B E T W E E N:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Respondent)

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

[*Style of cause continued on next page*]

FACTUM OF THE INTERVENER,
CANADIAN CONSTITUTION FOUNDATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2020-156)

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Mark Sheeley
Lipi Mishra

Tel: 416-862-6791
Fax: 416-862-6666
Email: msheeley@osler.com
lmishra@osler.com

Counsel for the Intervener,
Canadian Constitution Foundation

OSLER, HOSKIN & HARCOURT LLP
Suite 1500, 50 O'Connor Street
Ottawa, ON K1P 6L2

Geoff Langen

Tel: 613-787-1015
Fax: 613-235-2867
Email: glangen@osler.com

Agent for the Intervener,
Canadian Constitution Foundation

- and -

ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ALBERTA; ATTORNEY GENERAL OF SASKATCHEWAN; ATTORNEY GENERAL OF ONTARIO; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; WEST COAST LEGAL EDUCATION AND ACTION FUND; ECOJUSTICE SOCIETY; WEST COAST PRISON JUSTICE SOCIETY; EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH; CANADIAN CIVIL LIBERTIES ASSOCIATION; ADVOCACY CENTRE FOR TENANTS ONTARIO, ARCH DISABILITY LAW CENTRE, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC, HIV & AIDS LEGAL CLINIC ONTARIO, AND SOUTH ASIAN LEGAL CLINIC ONTARIO; DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS; TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA; NATIONAL COUNCIL OF CANADIAN MUSLIMS; MENTAL HEALTH LEGAL COMMITTEE; CANADIAN ASSOCIATION OF REFUGEE LAWYERS; CENTRE FOR FREE EXPRESSION; FEDERATION OF ASIAN CANADIAN LAWYERS AND CANADIAN MUSLIM LAWYERS ASSOCIATION; JOHN HOWARD SOCIETY OF CANADA AND QUEEN'S PRISON LAW CLINIC; ANIMAL JUSTICE; CANADIAN MENTAL HEALTH ASSOCIATION (NATIONAL), CANADA WITHOUT POVERTY, ABORIGINAL COUNCIL OF WINNIPEG INC. AND END HOMELESSNESS WINNIPEG INC.; CANADIAN CONSTITUTION FOUNDATION

INTERVENERS

ORIGINAL TO: **The Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

ATTORNEY GENERAL OF BRITISH COLUMBIA
Legal Services Branch
1301 – 865 Hornby Street
Vancouver, British Columbia V6Z 2G3

Mark Witten
Emily Lapper

Tel: (604) 660-3093
Fax: (604) 660-6797
E-mail: mark.witten@gov.bc.ca
emily.lapper@gov.bc.ca

Counsel for the Appellant, Attorney General of British Columbia

GIB VAN ERT LAW
148 Third Avenue
Ottawa, Ontario K1S 2K1

Dahlia Shuhaibar

Tel: (613) 501-5350
Fax: (613) 651-0304
Email: dahlia@gibvanertlaw.com

Ottawa Agent for the Appellant, Attorney General of British Columbia

MCCARTHY TÉTRAULT LLP
Suite 2400, 745 Thurlow Street
Vancouver, British Columbia V6E 0C5

Michael A. Feder, Q.C.
Katherine Booth
Kevin Love

Tel: (604) 643-5983
Fax: (604) 622-5614
E-mail: mfeder@mccarthy.ca
kbooth@mccarthy.ca
klove@clasbc.net

Counsel for the Respondent,
Council of Canadians with Disabilities

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi

Tel: (613) 787-3562
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Agent for the Respondent,
Council of Canadians with Disabilities

ATTORNEY GENERAL OF CANADA
Department of Justice,
National Litigation Sector
400 – 120 Adelaide Street West
Toronto, ON M5H 1T1

Christine Mohr
Tel: 416.953.9546
Fax: 416.952.4518
Email: christine.mohr@justice.gc.ca

Counsel for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: 416.941.2351
Fax: 613.954.1920
Email: christopher.rupar@justice.gc.ca

Agent for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
Constitution Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Yashoda Ranganathan
David Tortell
Tel: 647.637.0883
Fax: 416.326.4015
Email: yashoda.ranganathan@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

POWER LAW
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613.702.5573
Fax: 613.702.5566
Email: mvincelette@juristespower.ca

Agent for the Intervener,
Attorney General of Ontario

ATTORNEY GENERAL OF SASKATCHEWAN
820 – 1874 Scarth Street
Regina, SK S4P 4B3

Sharon H. Pratchler, Q.C.
Tel: 306.787.5584
Fax: 306.787.9111
Email: Sharon.pratchler2@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Saskatchewan

ALBERTA JUSTICE CONSTITUTIONAL AND ABORIGINAL LAW
1000, 10025 – 102A Avenue
Edmonton, AB T5J 2Z2

Leah M. McDaniel
Tel: 780.422.7145
Fax: 780.643.0852
Email: leah.mcdaniel@gov.bc.ca

Counsel for the Intervener,
Attorney General of Alberta

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

ALLEN/MCMILLAN LITIGATION COUNSEL
1625 – 1185 West Georgia Street
Vancouver, BC V6E 4E6

Greg J. Allen
Nojan Kamoosi
Tel: 604.628.3982
Fax: 604.628.3832
Email: greg@amic.ca

Counsel for the Intervener,
West Coast Prison Justice Society

ANITA SZIGETI ADVOCATES
2001 – 400 University Avenue
Toronto, ON M5G 1S5

Anita Svigeti
Maya Kotob
Sarah Rankin
Tel: 416.504.6544
Fax: 416.204.9562
Email: anita@asabarristers.com

Counsel for the Intervener, Empowerment Council, Systemic Advocates in Addictions and Mental Health

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Empowerment Council, Systemic Advocates in Addictions and Mental Health

TORYS LLP
3000 – 79 Wellington Street
Box 270, TD South Tower
Toronto, ON M5K 1N2

Andrew Bernstein
Emily Sherkey
Tel: 416.865.7678
Fax: 416.865.7380
Email: abernstein@torys.com

Counsel for the Intervener, Canadian Civil Liberties Association

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.

Tel: 613.695.8855 Ext. 101
Fax: 613.695.8580
Email: emeehan@supremeadvocacy.ca

Agent for the Intervener, Canadian Civil Liberties Association

ARCH DISABILITY LAW CENTRE
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7

Mariam Shanouda
Jessica De Marinis
Tel: 416.482.8255 Ext. 2224
416.482.8255 Ext. 2232
Fax.: 416.482.2981
Email: shanoum@lao.on.ca
demarij@lao.on.ca

Counsel for the Interveners,
Advocacy Centre for Tenants Ontario,
ARCH Disability Law Centre,
Canadian Environmental Law Association,
Chinese and Southeast Asian Legal Clinic,
HIV and AIDS Legal Clinic Ontario and
South Asian Legal Clinic Ontario

BORDEN LADNER GERVAIS LLP
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3562
Fax: 613.230.8842

Email: neffendi@blg.com

Agent for the Interveners,
Advocacy Centre for Tenants Ontario,
ARCH Disability Law Centre,
Canadian Environmental Law Association,
Chinese and Southeast Asian Legal Clinic,
HIV and AIDS Legal Clinic Ontario and
South Asian Legal Clinic Ontario

UNIVERSITY OF TORONTO
78 Queen's Park Crescent
Toronto, ON M5S 2C5

Cheryl Milne
Kent Roach
Tel: 416.978.0092
Fax: 416.978.8894
Email: Cheryl.milne@utoronto.ca

Counsel for the Intervener,
David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Matthew Halpin
Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Agent for the Intervener,
David Asper Centre for Constitutional Rights

ECOJUSTICE CANADA SOCIETY
390 - 425 Carrall Street
Vancouver, BC V6B 6E3

Kegan Pepper-Smith
Daniel Cheater
Tel: 604.685.5618
Fax: 604.685.7813
Email: kpsmith@ecojustice.ca

Counsel for the Intervener,
Ecojustice Canada Society

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1

Ryan D.W. Dalziel, Q.C.
Aubin P. Calvert
Tel: 604.891.2400
Fax: 604.647.4554
Email: rdalziel@litigationchambers.com

Counsel for the Intervener,
Trial Lawyers Association of British Columbia

NORTON ROSE FULBRIGHT CANADA LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Matthew Halpin
Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Agent for the Intervener,
Trial Lawyers Association of British Columbia

NATIONAL COUNCIL OF CANADIAN MUSLIMS
300 – 116 Albert Street
Ottawa, ON K1P 5G3

Sameha Omer
Tel: 613.254.9404 Ext. 224
Fax: 613.701.4062
Email: somer@nccm.ca

Counsel for the Intervener,
National Council of Canadian Muslims

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
National Council of Canadian Muslims

MENTAL HEALTH LEGAL COMMITTEE
2201 – 250 Yong Street
Toronto, ON M5B 2L7

Karen R. Spector
Kelley Bryan
C. Tess Sheldon
Tel: 416.995.3477
Fax: 416.855.9745
Email: spectork@gmail.com

Counsel for the Intervener, Mental Health Legal Committee

MANDELL PINDER LLP
422 - 1080 Mainland Street
Vancouver, BC V6B 2T4

Elin Sigurdson
Monique Pongracie-Speier, Q.C.
Tel: 604.681.4146
Fax: 604.681.0959
Email: eli@mandellpinder.com

Counsel for the Intervener, British Columbia Civil Liberties Association

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Agent for the Intervener, British Columbia Civil Liberties Association

LEGAL AID ONTARIO
Refugee Law Office
20 Dundas Street West
Toronto, ON M5G 2H1

Anthony Navaneelan
Naseem Mithoowani
Tel: 416.977.8111 Ext. 7181
Fax: 416.977.5567
Email: naveen@lao.on.ca

Counsel for the Intervener, Canadian Association of Refugee Lawyers

JFK LAW CORPORATION
340 – 1122 Mainland Street
Vancouver, VC V6B 5L1

Tim Dickson
Jason Harmon
Tel: 604.687.0549
Fax: 604.687.2696
Email: tdiskson@jfklaw.ca

Counsel for the Intervener,
West Coast Legal Education and Action Fund

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Agent for the Intervener,
West Coast Legal Education and Action Fund

POORANLAW PROFESSIONAL CORPORATION
400 - 1500 Don Mills Road
Toronto, ON M3B 3H4

Faisal Bhabha
Madison Pearlman
Tel: 416.860.7572
Fax: 416.860.5755
Email: fbhabha@pooranlaw.com

Counsel for the Intervener,
Centre for Free Expression

KHALID M. ELGAZZAR
200 – 440 Laurier Avenue West
Ottawa, ON K1R 7X6

Tel: 613.663.9994
Fax: 613.663.5552
Email: ke@elgazzar.ca

Agent for the Intervener,
Centre for Free Expression

NORTON ROSE FULBRIGHT CANADA LLP
3000 – 222 Bay Street
P.O. Box 53
Toronto, ON M5K 1E7

Fahad Siddiqui
Tel: 416.216.2424
Fax: 416.216.3930
Email: fagad.siddiqui@nortonrosefulbright.com

Counsel for the Intervener,
Federation of Asian Canadian Lawyers and Canadian Muslim Lawyers Association

NORTON ROSE FULBRIGHT CANADA LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Matthew Halpin
Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Agent for the Intervener,
Federation of Asian Canadian Lawyers and Canadian Muslim Lawyers Association

ALISON M. LATIMER
300 – 171 Water Street
Vancouver, BC V6B 1A7

Tel: 778.847.7324
Fax: n/a
Email: alison@alatimer.ca

Counsel for the Intervener,
John Howard Society of Canada and Queen's Prison Law Clinic

POWER LAW
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Darius Bossé
Tel: 613.702.5566
Fax: 613.702.5566
Email: dbosse@juristespower.ca

Agent for the Intervener,
John Howard Society of Canada and Queen's Prison Law Clinic

ANIMAL JUSTICE
720 Bathurst Street
Toronto, ON M5S 2R4

Kaitlyn Mitchell
Scott Tinney
Tel: 547.746.8702
Fax: n/a
Email: kmitchell@animaljustice.ca

Counsel for the Intervener,
Animal Justice

POWER LAW
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: 613.702.5573
Fax: 613.702.5566
Email: mvincelette@juristespower.ca

Agent for the Intervener,
Animal Justice

PUBLIC INTEREST LAW CENTRE
100 – 287 Broadway Street
Winnipeg, MB R3C 0R9

Joëlle Pastora Sala
Chimwemwe Undi
Natalie Copps
Tel: 204.985.9735
Fax: 204.985.8544
Email: jopas@pilc.mb.ca

Counsel for the Intervener, Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.

POWER LAW
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Darius Bossé

Tel: 613.702.5566
Fax: 613.702.5566
Email: dbosse@juristespower.ca

Agent for the Intervener, Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.

TABLE OF CONTENTS

Page

PART I - OVERVIEW AND CONCISE STATEMENT OF FACTS

1. Public interest standing is the cornerstone of *Charter* litigation. It is the vehicle through which litigants can challenge government action with broad social effects, and therefore, is central to upholding constitutional rights and freedoms afforded to all Canadians. It enables litigants to bring a case notwithstanding their lack of direct involvement in the matter, or any infringement of their personal rights.

2. As one of Canada's leading defenders of the constitutional rights and freedoms of all Canadians, the Canadian Constitution Foundation (the "**CCF**") intervenes in this appeal to urge this Court to maintain a broad framework for public interest standing in recognition of public interest litigants' vital role in pursuing public interest litigation. Since the unanimous decision in *Downtown Eastside*,[1] Canadian courts and public interest litigants have benefitted from the Supreme Court's clear guidance on the contours of public interest standing.

3. The CCF takes issue with the chambers judge's suggestion that an advocacy group with a broad mandate may be viewed as having only a "weak" interest in pursuing public interest litigation focused on a subset of that mandate.[2] Public interest organizations with a history of responsible and effective advocacy should not be denied public interest standing simply because that past advocacy was not narrowly focused on the matter in issue.

4. The CCF further urges this Court not to impose as a gating requirement that a public interest litigant must prove that it is "unrealistic" for individual plaintiffs to participate in the proceeding. The relative availability of other litigants should remain a relevant, rather than a determinative, fact in the highly contextual assessment of whether a proceeding is a reasonable and effective means to adjudicate the issue.

5. The *Downtown Eastside* framework requires no reformulation, modification or gloss.

---

1 *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [*Downtown Eastside*].

2 *MacLaren v British Columbia (Attorney General)*, 2018 BCSC 1753 at para 43-44, 53 [BCSC Decision].

PART II - ISSUES

6. The CCF intervenes with respect to the appropriate analytical framework for evaluating whether to grant public interest standing.

7. In particular, the CCF provides its perspective on the imperative to maintain a sufficiently broad, flexible and purposive approach to public interest standing to allow for genuinely interested and affected public interest groups to advance legitimate *Charter* claims.

8. The CCF takes no position on the merits of the underlying dispute.

PART III - STATEMENT OF ARGUMENT

A. Public interest standing should not be tied to the presence of a private litigant, particularly in *Charter* cases

9. Public interest standing permits public-minded litigants to bring important justiciable issues before the courts for determination in appropriate cases. In turn, this enables the courts to fulfill their constitutional role of scrutinizing the legality of government action, striking it down when it is unlawful, and thereby establishing and enforcing the rule of law—as envisioned by the *Charter*. Adopting an unduly narrow approach to public interest standing similar to that articulated by the chambers judge would unjustifiably preclude public interest litigation to the detriment of all Canadians.

10. There should be no serious debate that an individual plaintiff with a direct interest is not a condition precedent in all cases. In *Thorson*, Justice Laskin set out the prime rationale behind public interest standing in the absence of a private litigant, namely that a "telling consideration" was "whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute" and that "it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislated power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."[3]

---

[3] *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at para 12 [*Thorson*].

11. The Supreme Court granted standing to the appellant in *Thorson* to bring a constitutional challenge to the *Official Languages Act* notwithstanding that the impugned law did not personally affect him.

12. The jurisprudence has since evolved to recognize that the appropriate question is not whether the issue cannot be addressed by other means, but rather whether the proposed litigation is a reasonable and effective means of doing so. The judicial discretion residing within the current analytical framework offers judges the necessary leeway to ensure judicial resources are spent wisely but not at the expense of access to justice or the principle of legality.

13. Insofar as judges have exercised this discretion in a liberal and generous manner that subjects state action to constitutional scrutiny,[4] while also preventing courts from overstepping, this Court should refrain from disturbing the well-functioning legal test that promotes robust *Charter* protection.[5]

B. "Public Interest" is itself a shifting target and demands a flexible and purposive approach to standing

14. The notion of "public interest" is itself a complex concept to navigate because it is amorphous and mutable. What is considered in the "public interest" is constantly evolving; what may be deemed in the public interest today may not be in a decade. Thus, a flexible and purposive approach to determining public interest standing enables courts to remain nimble and provide recourse for organizations like the CCF to effectively litigate serious constitutional issues.

---

4 *Downtown Eastside*, *supra* note 1 at para 35.

5 *R v Nur*, 2015 SCC 15 at para 59 ("This Court does not and should not lightly overrule its prior decisions, particularly when they have been elaborated consistently over a number of years and when they represent the considered view of firm majorities: [citations omitted]. Deciding whether to do so requires us to balance correctness against certainty: [citations omitted]. We must be especially careful before reversing a precedent where the effect is — as it would be here — to diminish *Charter* protection: [citations omitted]).

15. The importance of context in constitutional adjudication was emphasized by Justice Wilson in *Edmonton Journal v Alberta (Attorney General),* where she noted that a right or freedom must be assessed within the context of both the case and competing values since rights and freedoms can have different meanings in different contexts.[6] Context enables a court to focus on the particular aspect of the right or freedom at stake and ensure that the constitutional guarantee is given a full and proper interpretation. Similarly, in *R v Seaboyer*, this Court noted that "constitutional questions must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis".[7]

16. *Carter v Canada* is a compelling example of how the notion of "public interest" is ever-evolving.[8] In 2015, the Supreme Court unanimously struck down the *Criminal Code* provisions prohibiting physician-assisted suicide[9] as unconstitutional for infringing the right to life, liberty and security of the person of individuals seeking medical assistance to end their intolerable suffering in a manner that is not in accordance with the principles of fundamental justice. Less than 25 years earlier, in another landmark case that reached the country's highest court, the Supreme Court upheld this blanket prohibition on assisted suicide in *Rodriguez v British Columbia*, a case with similar fact patterns.[10]

---

6 *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at p 1355-1356.

7 *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, paras 140, 204.

8 *Carter v Canada (Attorney General)*, 2015 SCC 5.

9 Section 241(*b*) of the *Criminal Code* said that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14 said that no person may consent to death being inflicted on them. Together, these provisions prohibited the provision of assistance in dying in Canada.

10 *Rodriguez v British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. The facts in *Carter* and *Rodriguez* had similarities: both Sue Rodriguez and Gloria Taylor (one of the parties in *Carter*) had been suffering from amyotrophic lateral sclerosis (ALS), a motor neuron disease that naturally degrades one's ability to move.

17. This pair of *Charter* cases demonstrates how issues in the "public interest" are mutable and morph with the times and societal notions of justice and equality. In *Carter*, the Court discussed how contextual factors, or "the matrix of legislative and social facts", including change in the circumstances or evidence that "fundamentally shifts the parameters of the debate", may prompt departures from its own precedents.[11] Thus, what may be viewed in the public interest today may evolve in the future with new data, and differing social values and definition of what constitutes the public good.

18. *Carter* is important for another reason: this case was spearheaded by the organizational plaintiff British Columbia Civil Liberties Association, which filed the case in April 2011 on behalf of the individual plaintiffs, and attracted numerous public interest litigants, including the Canadian Civil Liberties Association.

19. The analytical framework for public interest standing must remain sufficiently flexible to account for changes in the surrounding social and political context of the times. Furthermore, in our current moment, individuals face tremendous personal and professional consequences for mere statements of opinion on a variety of issues, let alone acting as a plaintiff in a contentious constitutional challenge engage those issues.

20. The flexible and purposive approach to public interest standing as mandated by *Downtown Eastside* provides courts with the necessary latitude to exercise their discretion within that broader context. Modifying the *Downtown Eastside* framework to limit public interest standing will adversely impact Canadians, across social and political lines, who rely upon public interest organizations to defend their rights and freedoms.

---

[11] *Carter*, *supra* note 8 para 47, 44. The Court also said that "*stare decisis* is not a straitjacket that condemns the law to stasis" (para 44).

C. Experienced public interest organizations can be better equipped plaintiffs

21. While a directly affected individual may be the most appropriate plaintiff all else being equal, in many cases "all else" is not equal and experienced public interest organizations may be better equipped to effectively manage constitutional litigation, irrespective of whether that litigation requires complex adjudicative facts to establish a breach.

22. A purposive and flexible analysis ensures that responsible and experienced public interest litigants are not precluded from pursuing cases that would not otherwise be litigated. Indeed, such organizational plaintiffs—such as the CCF—are often better equipped than individual claimants to advance complex constitutional litigation as they have more resources and expertise, including access to experienced counsel with the requisite skills to ensure that the resulting litigation is conducted in a sophisticated and orderly manner.[12]

23. It is both non-sensical and counterintuitive for the law of public standing to devolve into a fixation on how—or through whom—facts will be proven at trial. Rather, the better question is one that is focused on whether a public interest plaintiff is well-situated to prove the claim, not how it will do so. An individual plaintiff, or an individual factual record, particularly on claims that raise systemic issues, is unnecessary. These claims are better advanced by the very organizations whose specific mandates are rooted in the issues raised by such putative litigation.

24. A proper application of the flexible and purposive approach to public interest standing mandated by *Downtown Eastside* recognizes that in some circumstances, a private litigant may be available, but not reasonable or effective. Holding that it would not be reasonable to expect ill patients to initiate complex constitutional litigation, Justices Binnie and LeBel's remarks in *Chaoulli* identified this practical reality of public interest litigation:

> From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. The

---

[12] See *Downtown Eastside*, *supra* note 1 at paras 51 and 74.

> material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances.[13]

25. The CCF's own experience pursuing *Charter* litigation in superior courts, including as a public interest litigant, clearly demonstrates the important role that organizational plaintiffs can play in constitutional challenges, without indirectly affected individual plaintiffs.

26. This February, the CCF, as a public interest litigant, obtained a declaration that subsection 91(1) of the *Canada Elections Act*, SC 2000, c 9, contravened paragraph 2(b) of the *Charter*.[14] Subsection 91(1) made it an offense to attempt to influence an election by making or publishing certain types of false statements about political candidates and other public figures during the election period. The CCF challenged the section, arguing that it was an unjustified restriction on free speech and was overly broad. The Ontario Superior Court of Justice agreed with the CCF and struck down subsection 91(1) of the *Canada Elections Act* as an unjustified infringement on free expression.

27. It is unclear how denying the CCF standing because other individuals could have brought the challenge advances the interests of justice. To the contrary, enabling efficient and effective constitutional litigation enhances the interests of justice, even in the absence of an individual plaintiff. Furthermore, the CCF's recent elections case is a clear illustration of how an organizational public interest litigant can draw on its resources, including experience and knowledge leadership and/or staff, to work with members of the academic community and experienced counsel to effectively develop and advance a constitutional challenge.

28. Moreover, a narrow test emphasizing the availability of a private litigant often requires claimants to wait until rights violations have already occurred before initiating litigation. Yet, as this Court found in *Vriend v Alberta*, requiring litigants to "wait until someone is discriminated against […] would not only be wasteful of judicial resources, but also unfair in that it would impose

---

13 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 189 [*Chaoulli*].

14 *Canadian Constitution Foundation v Canada (Attorney General)*, 2021 ONSC 1224.

burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases".[15]

29. It is neither reasonable nor effective to require individuals to suffer significant rights violations to bring forward a claim as a private litigant, particularly when there is an appropriate public interest litigant that can bring forward the claim.

30. If public interest standing is given a narrow and exclusive application, the CCF's work with respect to *Charter* litigation—and the work of other organizations similar to the CCF—may be significantly curtailed, and Canadians will have less access to the courts to resolve legal issues and assert their *Charter* rights to liberty and equality. A liberal and generous interpretation of the requirements for public interest standing is therefore necessary to ensure access to the courts on the part of Canadians who cannot effectively litigate issues of importance to themselves and the wider public.

31. This Court has an opportunity in this appeal to affirm an uncontroversial approach to public interest standing. It should do so.

PART IV - SUBMISSIONS ON COSTS

32. The CCF makes no submissions regarding costs.

33. The CCF does not seek costs and asks that no costs be ordered against it.

PART V - ORDER SOUGHT

34. The CCF takes no position with respect to the disposition of the appeal and makes no submissions on the ultimate order to be made.

---

[15] *Vriend v Alberta*, [1998] 1 SCR 493 at para 47.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of December, 2021.

per

Mark Sheeley
Lipi Mishra

Osler, Hoskin & Harcourt LLP
Lawyers for the Intervener,
the Canadian Constitution Foundation

PART VI - TABLE OF AUTHORITIES

Authority	**Para**
Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 SCR 524	2, 5, 13, 20, 22, 24
Canadian Constitution Foundation v Canada (Attorney General), 2021 ONSC 1224	26
Chaoulli v Quebec (Attorney General), 2005 SCC 35	24
Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326	15
MacLaren v British Columbia (Attorney General), 2018 BCSC 1753	3
R v Nur, 2015 SCC 15	13
R v Seaboyer; R v Gayme, [1991] 2 SCR 577	15
Thorson v Attorney General of Canada, [1975] 1 SCR 138	10, 11
Vriend v Alberta, [1998] 1 SCR 493	28