Court File No. 33981

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

BETWEEN:

**ATTORNEY GENERAL OF CANADA**

APPELLANT
(RESPONDENT)

– and –

**DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY AND SHERYL KISELBACH**

RESPONDENTS
(APPELLANTS)

– and –

**ATTORNEY GENERAL OF ONTARIO, COMMUNITY LEGAL ASSISTANCE SOCIETY, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, ECOJUSTICE CANADA, COALITION OF WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND (WEST COAST LEAF), JUSTICE FOR CHILDREN AND YOUTH AND ARCH DISABILITY LAW CENTRE, CONSEIL SCOLAIRE FRANCOPHONE DE LA COLOMBIE-BRITANNIQUE, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, CANADIAN COUNCIL FOR REFUGEES, CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO AND POSITIVE LIVING SOCIETY OF BRITISH COLUMBIA**

INTERVENERS

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# FACTUM OF CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO AND POSITIVE LIVING SOCIETY OF BRITISH COLUMBIA

**(pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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**COUNSEL FOR CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO AND POSITIVE LIVING SOCIETY OF BRITISH COLUMBIA**

McCARTHY TÉTRAULT LLP
Suite 1300, 777 Dunsmuir Street
Vancouver, British Columbia V7Y 1K2
Telephone: (604) 643-5983
Fax: (604) 622-5614
Email: mfeder@mccarthy.ca
**MICHAEL A. FEDER**
**ALEXANDRA E. COCKS**
**JORDANNA CYTRYNBAUM**

**OTTAWA AGENT FOR CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO AND POSITIVE LIVING SOCIETY OF BRITISH COLUMBIA**

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
Fax: (613) 788-3433
E-mail: henry.brown@gowlings.com
**HENRY S. BROWN, Q.C.**

**COUNSEL FOR ATTORNEY GENERAL OF CANADA**

ATTORNEY GENERAL OF CANADA
900 – 840 Howe Street
Vancouver, British Columbia V6Z 2S9
Telephone: (604) 666-0110
Fax: (604) 666-1585
Email: cheryl.tobias@justice.gc.ca
**CHERYL J. TOBIAS, Q.C.**

**OTTAWA AGENT FOR ATTORNEY GENERAL OF CANADA**

ATTORNEY GENERAL OF CANADA
Bank of Canada Building – East Tower
234 Wellington Street, Room 1212
Ottawa, Ontario K1A 0H8
Telephone: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca
**CHRISTOPHER M. RUPAR**

**COUNSEL FOR DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY**

ARVAY FINLAY
1350 – 355 Burrard Street
Vancouver, British Columbia V6C 2G8
Telephone: (604) 689-4421
Fax: (604) 687-1941
E-mail: jarvay@arvayfinlay.com
**JOSEPH J. ARVAY, Q.C.**
**ELIN SIGURDSON**

**OTTAWA AGENT FOR DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY**

McMILLAN LLP
50 O'Connor Street, Suite 300
Ottawa, Ontario K1P 6L2
Telephone: (613) 232-7171
Fax: (613) 231-3191
E-mail: jeff.beedell@mcmillan.ca
**JEFFREY W. BEEDELL**

**COUNSEL FOR SHERYL KISELBACH**

PIVOT LEGAL LLP
687 East Hastings Street
Vancouver, British Columbia V6A 1R1
Telephone: (604) 255-9700
Fax: (604) 255-1552
Email: kpacey@pivotlegal.com
**KATRINA PACEY**

**OTTAWA AGENT FOR SHERYL KISELBACH**

McMILLAN LLP
50 O'Connor Street, Suite 300
Ottawa, Ontario K1P 6L2
Telephone: (613) 232-7171
Fax: (613) 231-3191
E-mail: jeff.beedell@mcmillan.ca
**JEFFREY W. BEEDELL**

**COUNSEL FOR ATTORNEY GENERAL OF ONTARIO**

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 4th Floor
Toronto, Ontario M5G 2K1
Telephone: (416) 326-4137
Fax: (416) 326-4015
E-mail: janet.minor@jus.gov.on.ca
**JANET E. MINOR**
**ARIF VIRANI**
**COURTNEY HARRIS**

**OTTAWA AGENT FOR ATTORNEY GENERAL OF ONTARIO**

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario K2P 0A2
Telephone: (613) 566-2058
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com
**ROBERT E. HOUSTON, Q.C.**

**COUNSEL FOR COMMUNITY LEGAL ASSISTANCE SOCIETY**

COMMUNITY LEGAL ASSISTANCE SOCIETY
300 – 1140 West Pender Street
Vancouver, British Columbia V6E 4G1
Telephone: (604) 685-3425
Fax: (604) 685-7611
E-mail: dmossop@clasbc.net
**DAVID W. MOSSOP, Q.C.**
**DIANE NIELSEN**

**OTTAWA AGENT FOR COMMUNITY LEGAL ASSISTANCE SOCIETY**

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, Ontario K1R 7Y6
Telephone: (613) 787-1009
Fax: (613) 235-2867
E-mail: pwilson@osler.com
**PATRICIA J. WILSON**

**COUNSEL FOR BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

GRATL & COMPANY
302 – 560 Beatty Street
Vancouver, British Columbia V6B 2L3
Telephone: (604) 694-1919
Fax: (604) 608-1919
**JASON B. GRATL**

**OTTAWA AGENT FOR BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
Fax: (613) 563-9869
E-mail: brian.crane@gowlings.com
**BRIAN A. CRANE, Q.C.**

**COUNSEL FOR ECOJUSTICE CANADA**

ECOJUSTICE CANADA
401 – 550 Bayview Avenue
Toronto, Ontario M4W 3X8
Telephone: (416) 368-7533 Ext: 22
Fax: (416) 363-2746
**JUSTIN SINCLAIR DUNCAN**
**KAITLYN MITCHELL**

**OTTAWA AGENT FOR ECOJUSTICE CANADA**

ECOJUSTICE CANADA
35, rue Copernicus, Salle 110
Université d'Ottawa
Ottawa, Ontario K1N 6N5
Telephone: (613) 562-5800 Ext: 3378
Fax: (613) 562-5319
E-mail: wamos@ecojustice.ca
**WILLIAM AMOS**

**COUNSEL FOR COALITION OF WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND (WEST COAST LEAF), JUSTICE FOR CHILDREN AND YOUTH AND ARCH DISABILITY LAW CENTRE**

ARCH DISABILITY LAW CENTRE
110 – 425 Bloor Street East
Toronto, Ontario M4W 3R5
Telephone: (416) 482-8255
Fax: (416) 482-2981
**CHRISTINA TESS LARA SHELDON**
**KASARI GOVENDER**
**NIAMH HARRAHER**

**OTTAWA AGENT FOR COALITION OF WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND (WEST COAST LEAF), JUSTICE FOR CHILDREN AND YOUTH AND ARCH DISABILITY LAW CENTRE**

COMMUNITY LEGAL SERVICES – OTTAWA CARLETON
1 Nicholas Street, Suite 422
Ottawa, Ontario K1N 7B7
Telephone: (613) 241-7008
Fax: (613) 241-8680
**MICHAEL BOSSIN**

**COUNSEL FOR CONSEIL SCOLAIRE FRANCOPHONE DE LA COLOMBIE-BRITANNIQUE**

HEENAN BLAIKIE LLP
55 Metcalfe Street, Suite 300
Ottawa, Ontario K1P 6L5
Telephone: (613) 236-7908
Fax: (866) 296-8395
E-mail: mpower@heenan.ca
**MARK C. POWER**
**JEAN-PIERRE HACHEY**

**COUNSEL FOR DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

UNIVERSITY OF TORONTO
39 Queen's Park Crescent East
Toronto, Ontario M5S 2C3
Telephone: (416) 978-0092
Fax: (416) 978-8894
E-mail: cheryl.milne@utoronto.ca
**CHERYL MILNE**
**KENT ROACH**

**OTTAWA AGENT FOR DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

NORTON ROSE OR LLP
45 O'Connor Street
Ottawa, Ontario K1P 1A4
Telephone: (613) 780-8638
Fax: (613) 230-5459
E-mail: martha.healey@nortonrose.com
**MARTHA A. HEALEY**

**COUNSEL FOR CANADIAN CIVIL LIBERTIES ASSOCIATION**

CANADIAN CIVIL LIBERTIES ASSOCIATION
506 – 360 Bloor Street West
Toronto, Ontario M5S 1X1
Telephone: (416) 363-0321 Ext: 255
Fax: (416) 861-1291
**CARA FAITH ZWIBEL**

**OTTAWA AGENT FOR CANADIAN CIVIL LIBERTIES ASSOCIATION**

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, Ontario K1P 1J9
Telephone: (613) 237-5160
Fax: (613) 230-8842
**NADIA EFFENDI**

**COUNSEL FOR CANADIAN ASSOCIATION OF REFUGEE LAWYERS AND CANADIAN COUNCIL FOR REFUGEES**

WALDMAN & ASSOCIATES
281 Eglinton Avenue East
Toronto, Ontario  M4P 1L3
Telephone: (416) 482-6501
Fax: (416) 489-9618
E-mail: lawald@web.apc.org
**LORNE WALDMAN**

**OTTAWA AGENT FOR CANADIAN ASSOCIATION OF REFUGEE LAWYERS AND CANADIAN COUNCIL FOR REFUGEES**

WEST END LEGAL SERVICES
1301 Richmond Road
Ottawa, Ontario  K2B 7Y4
Telephone: (613) 596-1641
Fax: (613) 596-3364
**LAURIE JOE**

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## PART I – OVERVIEW

1. These interveners are public interest organizations dedicated to defending and advancing the rights of people living with HIV and communities affected by HIV, including through litigation. These people and communities face various forms of socio-economic marginalization, which results in both special vulnerability to constitutional violations and difficulty in accessing the courts to seek protection and redress.

2. The position of these interveners is that the third part of the test for public interest standing set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 should be liberalized. Instead of requiring a claimant to prove that there is no other reasonable and effective way to litigate the constitutionality of the law or state action in question, the court should ask whether the claimant can effectively represent the interests of some or all people directly affected by that law or state action.

3. This incremental change to the *Canadian Council of Churches* test would not open the floodgates to constitutional cases brought by public interest claimants or even favour such cases over those brought by directly affected people. It would, however, moderate the existing blanket preference for cases brought by directly affected people, recognizing that it is at least *sometimes* most fair, efficient and practical to hear from representatives of those people, especially if they are disadvantaged or vulnerable, even if they may be theoretically capable of bringing cases themselves.

4. These interveners make three main points in favour of their proposed liberalization.

5. First, constitutional cases brought by directly affected people are not necessarily any more specific, concrete or tidy than those brought by public interest claimants. Many constitutional cases brought by directly affected people concern the effect of a law on *other* people, and an analysis under s. 1 of the *Charter* invariably involves regard to a law's broader context and effects. Indeed, in some instances, there will be such a tenuous connection between a person directly affected by a law and the facts and interests relevant to his or her constitutional challenge that it might well be preferable to hear from a public interest claimant instead.

6. Second, even when the relevant facts and interests are theirs, it is wrong automatically to assume that directly affected people are best able to present the court with the necessary factual record and legal arguments in a constitutional case. Litigation is expensive, time-consuming and

stressful. It involves publicity and the potential for adverse cost consequences. Constitutional litigation can be especially complex. It is unrealistic to suggest that people who are socio-economically marginalized will marshal a stronger or more complete case than expert and well resourced public interest organizations devoted to championing their interests. In any event, the proposed liberalization of the *Canadian Council of Churches* test and ordinary motions for summary judgment are sufficient to dispose of constitutional cases in which public interest claimants respectively cannot or do not present an adequate record.

7. Third, as a practical matter, public interest organizations are *already* orchestrating many constitutional cases nominally brought by directly affected people. This is a cumbersome process, by which some of society's most marginalized members are asked to "take one for the team" to overcome the constraints of the *Canadian Council of Churches* test. Liberalizing the third part of the test would not open the floodgates, but simply eliminate the need for this contrivance.

## PART II –ARGUMENT

8. Three major rationales are said to underlie restrictions on standing: (i) relatively scarce judicial resources must be allocated fairly and efficiently; (ii) vexatious or purely hypothetical claims by mere busybodies should not be entertained; and (iii) in an adversarial system, there is a practical need for the parties to present a complete factual record and well developed, competing arguments.[1]

9. Rationale (ii) is adequately addressed by the first and second parts of the *Canadian Council of Churches* test and by the doctrine of mootness. The third part of the test should therefore serve rationales (i) and (iii). However, the existing blanket preference for claims by directly affected people with private interest standing is in fact inconsistent with those rationales; denying standing to a public interest claimant because of the mere spectre of a case brought by a private interest claimant will often be *contrary* to concerns about fairness, efficiency and practicality, for the reasons set out below.

10. These interveners accordingly propose a liberalization of the third part of the *Canadian Council of Churches* test: instead of requiring a public interest claimant to prove that there is no other

[1] *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General),* [1993] 3 S.C.R. 675, at pp. 702-703, *per* L'Heureux-Dubé (in dissent, but not on this point).

reasonable and effective way to litigate the constitutionality of the law or state action in issue, the court should ask whether the claimant can effectively represent the interests of some or all people directly affected by that law or state action. Relevant considerations would include the claimant's expertise, resources and track record of advocacy work and, in the case of a public interest organization, its mandate, governance structure, membership and constituents.

11. This incremental change would mitigate any concerns about public interest claimants litigating cases to the exclusion or prejudice of the people directly affected, while recognizing that a case brought by a public interest claimant is sometimes the best vehicle for resolving a constitutional issue from the perspective of both directly affected people, especially marginalized ones, and the courts.

### *A. Private interest claimants do not litigate constitutional claims based only on their own circumstances.*

12. Underlying the third part of the *Canadian Council of Churches* test, and much of the appellant's argument, is the assumption that private interest claimants who are directly affected by a law or state action will raise only "specific" or "concrete" factual situations related to their own interests for the courts' consideration.[2] However, a private interest claimant is not required, and often not permitted, to confine a constitutional challenge to his or her unique facts and interests. Indeed, in some instances, a private interest claimant's connection to the facts and interests entrained by the challenge will be so tenuous that it might well be preferable to hear instead from a public interest claimant with a pertinent perspective.

13. In terms of the strength of the relationship between the claimant and the relevant facts and interests, constitutional challenges fall on a spectrum. At one end of the spectrum are challenges in which the claimant's particular circumstances are crucial – *e.g.*, challenges to an administrative decision,[3] search warrant[4] or search[5] that affects only the claimant. At the far end of the spectrum are challenges where the claimant's circumstances are totally irrelevant. The following diagram illustrates this spectrum:

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[2] Appellant's Factum, at paras. 5, 44, 69 and 72-73.
[3] See, *e.g.*, *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.
[4] See, *e.g.*, *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253.
[5] See, *e.g.*, *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725.

**BASIS OF CHALLENGE**

**STATE ACTION**

- Executive action or administrative decision affecting claimant only
- Pattern of executive action affecting claimant and others

**LAW**

- Effects of law on claimant only
- Effects of law on claimant and others
- Effects of law *only* on others
- Effects of law *only* on interests of government (division of powers cases)

**STRENGTH OF CONNECTION BETWEEN CLAIMANT AND RELEVANT FACTS AND INTERESTS**

- *R v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 72
- *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 82
- *R v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432
- *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199
- *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519
- *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
- *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 285
- *R. v. Smith*, [1987] 1 S.C.R. 1045
- *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188

14. The cases at the far end of this spectrum are partly a result of s. 52 of the *Constitution Act, 1982*, which provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect", and of the related rule that an accused may allege that a law under which he is to be convicted or sentenced is unconstitutional by reason of its effect *either* on him or her, *or* on others "under reasonable hypothetical circumstances" or in "imaginable circumstances which could commonly arise in day-to-day life".[6]

15. For example, in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 285, this Court held that a Sunday-closing law was invalid because it unjustifiably infringed the freedom of religion not of Big M, which had no religion, but of others who did. And in *R. v. Smith*, [1987] 1 S.C.R. 1045, this Court struck down a law imposing a mandatory minimum sentence for narcotics importation. It did so because the sentence would constitute cruel and unusual punishment not for the accused, who had imported nearly half a pound of cocaine from Bolivia, but instead for the very different and imaginary "young person who, while driving back into Canada from a winter break in the U.S.A., is caught with … his or her first 'joint of grass'".[7] In these cases, it would arguably have been preferable to hear from a public interest claimant representing religious people, or advocating on behalf of youth, than from the drugstore and cocaine dealer who brought the challenges.

16. The freedom to challenge a law based on the circumstances of others is not restricted to the accused in criminal cases, however, as the spectrum reflects. All division of powers-based challenges brought by a private party concern the impact of legislation not on that party, but instead on the interests of one or the other level of government.[8] All aboriginal rights-based challenges concern collective rights, enjoyed by a particular community *as a whole*.[9] Challenges brought by the media based on the "open court" principle revolve around the right *of members of the public* to receive information about our courts.[10] In advancing an equality rights-based challenge under *Charter* s. 15, a private interest claimant must show the distinction the law makes between *the group* to which he or she belongs *and others*, and that the distinction perpetuates prejudice or stereotypes *vis-à-vis that group*.[11]

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[6] *R. .v Mill*s, [1999] 3 S.C.R. 668, at para. 41, *per* McLachlin J. (as she then was) and Iacobucci J. and *R. v. Goltz*, [1991] 3 S.C.R. 485, at pp. 515-516, *per* Gonthier J.

[7] *R. v. Smith*, *supra*, at para. 2, *per* Lamer J. (as he then was).

[8] See, *e.g.*, *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188.

[9] See, *e.g.*, *R. v. Sundown*, [1999] 1 S.C.R. 393.

[10] See, *e.g.*, *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19.

[11] *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at paras. 61-67, *per* McLachlin C.J. and Abella J.

17. It is also common for private interest claimants to raise the impact of a law not only on them, but on others like them. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 was argued and decided with a view not merely to the circumstances of Sue Rodriguez, or even other people with Lou Gehrig's disease, but instead to the circumstances of *all* terminally ill people. Similarly, *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, a case spearheaded by Insite's operator and two of its users, was concerned with the circumstances of *all* people in the Downtown Eastside of Vancouver who inject illicit drugs.

18. In addition, *every* analysis under *Charter* s. 1 requires consideration of whether the objective of the *Charter*-infringing law or action relates to concerns that are pressing and substantial in a free and democratic society, of alternative means of achieving the same objective and of the proportionality between the effects and the objective. Thus, even where a private interest claimant is able to establish a *Charter* infringement with reference *solely* to his or her own circumstances, it will usually be necessary to deal extensively with complex social and policy matters that have nothing to do with him or her.[12]

19. Although they are not, strictly speaking, constitutional challenges, courts sometimes hear government-initiated references, in which constitutional questions are asked and answers are given largely or entirely in the hypothetical, "often divorced from any existing dispute or firm factual foundation".[13]

20. The existence and use of the reference power is significant in two respects. First, it signals that the legislative and executive branches of government consider the courts quite competent to address constitutional issues otherwise than at the instigation of, and without even participation by, a private interest claimant who is directly affected. Second, it creates a serious imbalance in access to the courts, being obviously the only forum in which constitutional disputes can be conclusively resolved. The government can frame constitutional issues as it chooses, on its own timetable, and, through its framing, even influence the arguments and evidence put before the court. By contrast, under the existing test for public interest standing, public interest organizations will be denied access to the courts to enforce the constitutional rights of the people whose interests they steadfastly protect

[12] See, *e.g.*, *R. v. Zundel*, [1992] 2 S.C.R. 731.

[13] Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), at p. 175. See, *e.g.*, *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 and *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

and promote as long as there is some other, theoretical means by which those rights might be directly asserted.

21. It can thus be seen that there is no plausible division of constitutional cases into tidy, concrete and claimant-specific challenges brought by private interest claimants and messy, sweeping and hypothetical challenges brought by public interest claimants. Accordingly, no preference for constitutional challenges brought by private interest claimants is justifiable on the theory of such a division. Some challenges by private interest claimants have little or nothing to do with them, and might indeed be better advanced by public interest claimants with more pertinent perspectives.

### *B. Many private interest claimants face significant practical barriers to litigating constitutional claims effectively.*

22. It is also wrong automatically to assume that directly affected people will be better positioned than a public interest claimant to present the court with the necessary factual record and legal arguments in a constitutional case, even when the analysis is focussed on their own circumstances. People directly affected by a law or state action, especially if they are vulnerable or marginalized, often face significant barriers to mounting an effective constitutional challenge.

23. Chief among the barriers are these:

(a) *The expense of legal representation.* Legal representation is costly. Because of a lack of free or affordable legal representation, many people cannot obtain even their basic and incontrovertible legal benefits,[14] let alone effectively assert their constitutional rights to invalidate existing laws. Moreover, the adversary in constitutional litigation is the state, which has practically unlimited financial resources upon which to draw.

(b) *The stress and potential cost consequences of litigation.* Constitutional litigation is adversarial and stressful. For example, for people struggling with addictions or to find their next meal or even basic shelter, or in prison – all populations disproportionately affected by HIV – the demands associated with initiating and sustaining a constitutional challenge can be

[14] See Leonard T. Doust, Q.C., *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: Public Commission on Legal Aid, 2011), at p. 7.

overwhelming. The possibility of a crippling adverse costs award if the challenge is unsuccessful acts as a further source of stress and deterrence.[15]

(c) *Unfamiliarity with constitutional rights.* People directly affected by a law or state action may not even be *aware* that they have a viable constitutional challenge, or of its potential scope. A law or action that is unfair may not be unconstitutional, and even those that are unconstitutional may be only subtly so.

(d) *The complexity of constitutional cases.* Constitutional litigation can be exceedingly complex, especially in relatively nascent areas of the law, such as positive rights, and evolving areas of the law, such as equality rights. In addition, as explained above, a *Charter* s. 1 analysis invariably entails dealing with an array of complex social and policy matters that can be overwhelming to many people.

(e) *The publicity associated with litigation.* A person who brings constitutional litigation in his or her own name faces major publicity – much more so than if he or she were merely a witness. This is a particular problem for people already facing stigma and discrimination because of their circumstances. It is also a particular problem for those in prison or otherwise at the hands of the state, as they may fear retaliation.

24. Accordingly, if the goal is to ensure high-quality factual records and legal arguments for the courts' consideration, the existing blanket preference for cases brought by directly affected people does not make sense. It is unrealistic to suggest that people who are homeless or have mental health and addiction issues or have very low levels of education and comprehension will bring better cases than the expert and well resourced public interest organizations who would seek public interest standing in order to champion those people's interests. This is especially so considering that such organizations represent the interests of *groups* of people, meaning they have access to a much wider body of relevant evidence than any single person is likely to bring to bear.

25. In any event, these interveners' proposed liberalization of the third part of the *Canadian Council of Churches* test will weed out public interest claimants that do not effectively represent people directly affected by the challenged law or state action, meaning that they likely *cannot*

[15] In a criminal case, there is no potential liability for a costs award, but other factors – *e.g.*, incentives to plead guilty and the risk of cross-examination at large if the accused chooses to testify – may hamper the effective litigation of a constitutional issue.

assemble the necessary factual record. And where a public interest claimant for some reason *does not* assemble the evidence to show a genuine issue requiring trial, it is always open to the state to bring a motion for summary judgment.[16]

### *C. Public interest organizations are already litigating from behind the scenes.*

26. Public interest organizations are already orchestrating constitutional cases nominally brought by private interest claimants. This is a practical reason for moderating the existing blanket preference for cases brought by private interest claimants.

27. Strategic litigation has become a necessary component of the advocacy mandate of many public interest organizations. This is a result of, among other things, increased sophistication and expertise on their parts; a growing regulatory state that does not, at all times an in all quarters, take a conciliatory approach to constitutional rights;[17] and *Charter* jurisprudence that shows a growing array of contexts in which those rights will be recognized.[18]

28. However, for public interest organizations, bringing litigation in their own names has become either a non-starter or a long and expensive battle to establish standing within the constraints of the current test, as this case amply demonstrates. As a result, they have been forced to search out nominal claimants with private interest standing who are prepared to "take one for the team" by exposing themselves to the aggravation, publicity and risks of litigation.

29. This is a cumbersome way of litigating. Nominal private interest claimants can be reluctant to step forward and be singled out, especially when the alleged constitutional violation affects everyone in a broader community similarly. Once a private interest claimant does step forward, it is his or her instructions that ultimately govern the conduct of the litigation, even if it is the public interest organization that must fund it. In the case of organizations that defend and advance the rights of marginalized people, it is not hard to imagine the difficulties that can arise when instructions must be

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[16] See also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 for an example of a successful motion to quash an application for a declaration of invalidity that had been brought without evidence.

[17] Consider, *e.g.*, the federal government's unrelenting stance regarding Insite, which this Court unanimously characterized as "arbitrary" and as "threatening the health and indeed the lives" of Insite's clients: *Canada (Attorney General) v. PHS Community Services Society*, *supra*, at para. 136, *per* McLachlin C.J.

[18] Consider, *e.g.*, the emergence in the last few years of cases holding that the government must have a rational and evidentiary basis for impeding or denying access to health services: *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 and *Canada (Attorney General) v. PHS Community Services Society*, *supra*.

taken from a claimant who is homeless, mentally ill or addicted to drugs, and the impact such difficulties can have on the effective presentation of a case.

30. Viewed in this light, liberalizing the third part of the *Canadian Council of Churches* test would not open the floodgates to litigation by public interest claimants. It would simply eliminate needless complexity and contrivance in the litigation they are already organizing.

## PART III – ORDER REQUESTED

31. These interveners seek permission to make oral submissions for 10 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 3rd day of January, 2012.

**MICHAEL A. FEDER**

**ALEXANDRA E. COCKS**

for **JORDANNA CYTRYNBAUM**

## PART IV – TABLE OF AUTHORITIES