SCC File No. 39430

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPLICANT
(Respondent)

-and-

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT, COUNCIL OF CANADIANS WITH DISABILITIES

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The AGBC's proposed interlocutory appeal raises no issue of public importance. The Court of Appeal unanimously applied settled law—the *Downtown Eastside*[1] framework—to conclude that the chambers judge had erred in analyzing one of the factors governing public interest standing. Rather than determining the standing question itself, the Court of Appeal remitted the question to the chambers judge for his reconsideration. Nothing about that pedestrian and restrained exercise in appellate review could warrant this Court's consideration. Leave should be denied.

2. To try to get this Court's attention, the AGBC asserts that the Court of Appeal took a "new approach",[2] "dispensed" with elements of the *Downtown Eastside* framework,[3] and somehow simultaneously "expand[ed]" and "strip[ped]" the test for public interest standing.[4] All of this is imagined. The Court of Appeal did not even criticize *Downtown Eastside*—it just followed it, as it knew it had to. The chambers judge can now apply it.

3. The Court of Appeal never held that constitutional challenges can be adjudicated "in a factual vacuum" or "without any factual foundation" based on "reasonable hypotheticals".[5] The AGBC's assertions that it did are alarmist nonsense. The Court of Appeal went no further than to observe that CCD could "*seek* to establish its claim *by adducing evidence* from directly-affected non-plaintiff and expert witnesses rather than through a personal co-plaintiff".[6] That observation is unimpeachable: a plaintiff with public interest standing—who is by definition not directly affected by the challenged law—will always need to prove its case through testimony from and about others. The phrase "reasonable hypotheticals" does not appear even once in the Court of Appeal's decision.

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[1] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45 [*Downtown Eastside*].
[2] Applicant's Memorandum of Argument at paras. 2, 4, 26, 32, 40.
[3] Applicant's Memorandum of Argument at paras. 2, 45.
[4] Applicant's Memorandum of Argument at paras. 4, 26, 55–56.
[5] Applicant's Memorandum of Argument at paras. 4, 32, 52, 57.
[6] *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para. 113 [BCCA Reasons] [emphasis added].

4. None of the usual circumstances warranting leave exist here. The proposed appeal does not address the constitutional validity or applicability of any law. It does not concern the interpretation of a federal statute or a provincial statute with corresponding statutes in other provinces. It does not deal with a conflict in provincial and federal authority over a subject matter. It does not address a novel point of law. There are no relevant conflicting decisions in provincial courts of appeal—or, indeed, conflicting decisions at all. The AGBC's leave application should be dismissed, with costs.

B. Facts

5. CCD's underlying action challenges the constitutional validity of three provisions in British Columbia's mental health legislation. Those provisions permit psychiatric treatment to be administered to an involuntary patient without their consent. They do so regardless of the patient's capacity and, for patients who actually lack capacity, regardless of the availability of a substitute decision-maker.[7] CCD alleges that the impugned provisions unjustifiably infringe the rights of people with mental disabilities under ss. 7 and 15 of the *Charter*.

6. The action was initially prosecuted by CCD and two individual plaintiffs who had been subject to psychiatric treatment as involuntary patients. However, after a year of litigating, the individual plaintiffs became unable or unwilling to fulfil their roles and responsibilities as plaintiffs.[8] They discontinued their claims, leaving CCD as the sole plaintiff.[9]

7. The discontinuances did not substantively change the allegations in the action or the AGBC's response to them.[10] Allegations about the individual plaintiffs specifically were amended to describe similarly situated patients generally.[11]

8. After several months, the AGBC applied for a summary trial on the sole issue of public interest standing. By then, the parties had agreed to a four-week trial estimate.[12] Discussions were

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[7] Amended Notice of Civil Claim, Applicant's Application Record, Tab 4D at para. 1.
[8] Affidavit #1 of Melanie Benard made on August 15, 2018, Applicant's Application Record, Tab 4J at para. 55 [Benard Affidavit]; BCCA Reasons at para. 30.
[9] BCCA Reasons at paras. 21, 30.
[10] Except for a new allegation by CCD about psychosurgeries and a new denial by the AGBC of CCD's public interest standing.
[11] BCCA Reasons at para. 22.
[12] BCCA Reasons at para. 24.

pending about whether the trial would involve *viva voce* testimony or affidavits or both. Document production was incomplete, no examinations for discovery had been conducted, and deadlines for the delivery of expert reports were distant.

9. The AGBC's application was supported by only a clerk's affidavit. The AGBC did not identify a single individual or organization who would be willing to bring the constitutional challenge, let alone one more suited than CCD.[13]

10. In defence of the application, CCD relied on the affidavit of Melanie Benard. Ms. Benard is the Chair of CCD's Mental Health Committee and previously practiced as a lawyer specializing in mental health law.[14] Ms. Benard attested to the stereotypes and significant barriers people with mental disabilities face, and explained that the experience of this case—in which both individual plaintiffs became unable or unwilling to continue the litigation—was an example of those barriers operating in the context of protracted, complex litigation.[15]

11. Although there were no longer individual plaintiffs, Ms. Benard deposed that CCD intended at trial to tender both lay and expert evidence addressing the nature of mental disabilities; the stereotypes and barriers people with mental disabilities face; the lived experiences of people who receive forced psychiatric treatment; and the impact of the impugned provisions on the people they affect.[16]

12. Despite this, the AGBC asserts that CCD intended "to prove constitutional infirmity by way of 'reasonable hypotheticals'", and plucks a few tangential sentences from CCD's application response to support its assertion.[17] The AGBC's assertion is false, and its selective quote is deceptive. CCD never once stated that it intended to rely on reasonable hypotheticals. Rather, it stated—repeatedly—that it intended to prove its case with evidence from individuals directly affected by the impugned provisions, as well as expert evidence.[18] CCD's only mention of

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[13] Affidavit #1 of Heather Lewis made on July 13, 2018, Applicant's Application Record, Tab 4H.
[14] Benard Affidavit at para. 4; BCCA Reasons at para. 27.
[15] Benard Affidavit at paras. 54–55; BCCA Reasons at para. 29.
[16] Benard Affidavit at paras. 56, 58; BCCA Reasons at para. 30.
[17] Applicant's Memorandum of Argument at para. 12; see also paras. 47–49.
[18] See Schedule "A".

reasonable hypotheticals was a passing observation that they can be a legitimate aspect of constitutional litigation.

13. After summarising the law on public interest standing set out by this Court in *Borowski*[19] and *Downtown Eastside*, the chambers judge concluded that CCD lacked public interest standing and dismissed the action.[20]

14. On the first factor for public interest standing—serious justiciable issue—the chambers judge found that the action lacked an "indispensable factual foundation" and "a particular factual context of an individual's case", and was thus incapable of raising a serious justiciable issue.[21]

15. On the second factor—genuine interest—the chambers judge found that while CCD did indeed have "some genuine interest in the issues that it wishes to raise in these proceedings",[22] it "only weakly meets the second criterion for public interest standing".[23] He reasoned that CCD was "more focussed on disability (particularly physical disability) and far less focussed on mental health."[24]

16. On the third and final factor—reasonable and effective means to bring the challenge to court—the chambers judge held CCD did not represent the interests of everyone whom the impugned provisions affected,[25] stated that there must be a directly affected individual who would be willing and able to bring a similar claim,[26] and found that, absent an individual co-plaintiff, the action was bound to have "an insufficient factual matrix" to be tried.[27]

17. Writing through Dickson J.A. (Frankel and DeWitt-Van Oosten JJ.A. concurring), the Court of Appeal for British Columbia unanimously allowed CCD's appeal. The Court of Appeal focused on the first factor governing public interest standing: serious justiciable issue. The Court of Appeal

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[19] *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575 [*Borowski*].
[20] *MacLaren v. British Columbia (Attorney General)*, 2018 BCSC 1753 at para. 98 [BCSC Reasons].
[21] BCSC Reasons at para. 35–38.
[22] BCSC Reasons at paras. 43, 53.
[23] BCSC Reasons at paras. 44, 53.
[24] BCSC Reasons at para. 44.
[25] BCSC Reasons at para. 72.
[26] BCSC Reasons at para. 95.
[27] BCSC Reasons at paras. 68–69.

held that the chambers judge erred in principle by concluding that an individual plaintiff, or a specific individual's factual context, was needed to raise a serious justiciable issue.[28]

18. In identifying the chambers judge's error, the Court of Appeal summarised and applied *Downtown Eastside* and other case law on public interest standing. A challenge to the constitutional validity of specific legislation always raises a justiciable issue.[29] And because CCD's action is a systemic challenge to the constitutionality of the impugned provisions—meaning those provisions allegedly affect all members of a defined and identifiable group (involuntary patients) in the same way—a particular individual's factual context was not needed to raise a serious justiciable issue.[30]

19. Having found that the chambers judge erred in his approach to the first factor, the Court of Appeal considered it unnecessary to analyse the remainder of the chambers judge's approach. In *obiter*, however, Dickson J.A. commented briefly that the chambers judge's approach to the third factor did not align with the flexible, purposive approach required by *Downtown Eastside*.[31]

20. The Court of Appeal also found that fresh evidence filed after the appeal was argued—of overlapping constitutional challenges in a new proposed class proceeding and a discontinued action commenced by an individual plaintiff—might have been relevant to the chambers judge's standing analysis.[32] The Court of Appeal remitted the AGBC's application for fresh consideration.

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[28] BCCA Reasons at para. 114.
[29] BCCA Reasons at para. 105.
[30] BCCA Reasons at para. 112.
[31] BCCA Reasons at para. 115.
[32] BCCA Reasons at paras. 122–123.

PART II - QUESTIONS IN ISSUE

21. The AGBC asserts that its proposed appeal raises two issues: (i) are legality and access to justice the primary considerations in the *Downtown Eastside* test for public interest standing? and (ii) can reasonable hypotheticals provide a sufficient evidentiary basis for public interest litigation in cases without an individual plaintiff?[33] Neither of these issues arises from the Court of Appeal's decision.

22. The Court of Appeal never held that legality and access to justice are the primary considerations in determining public interest standing. It stated, at most, that they "merit particular weight in the balancing exercise" that a court must undertake to determine whether public interest standing should be granted.[34] That is consistent with *Downtown Eastside*, which the Court of Appeal extensively cited, and with the very concept of public interest standing: if ensuring legality and access to justice were not important goals, there would be no reason ever to grant standing to challenge laws to people not directly affected by them.

23. The Court of Appeal also never held that reasonable hypotheticals provide a sufficient evidentiary basis for constitutional litigation in cases without an individual plaintiff. Nor did CCD ever argue it. Nor does CCD wish to. The AGBC has fabricated this issue to try to make its proposed appeal interesting. But the issue simply does not arise—neither of the judgments below mentions it. This issue will not be presented in an adversarial setting if this Court grants leave; CCD will not argue that reasonable hypotheticals are sufficient.

24. In short, the Court of Appeal said and decided nothing new. It merely applied settled law to identify an error in how the chambers judge analyzed one of the factors governing public interest standing, and left it to him to conduct a proper analysis. The Court of Appeal's decision gives rise to no issues of public importance. Leave should be denied.

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[33] Applicant's Memorandum of Argument at para. 25.
[34] BCCA Reasons at paras. 79, 86.

PART III - STATEMENT OF ARGUMENT

A. No New Approach to Public Interest Standing

25. The AGBC's primary argument is that the Court of Appeal adopted a new approach to public interest standing by placing new, undue weight on legality and access to justice.[35] This ignores what the Court of Appeal actually did: summarize this Court's decisions in *Downtown Eastside*,[36] *Borowski*,[37] and *Canadian Council of Churches*[38] to confirm that the prescribed framework should be applied in a "flexible and purposive manner"[39] and "judges must balance access to justice with the preservation of judicial resources, with a particular view to upholding the legality principle".[40] The Court of Appeal neither made new law nor criticized existing law. It broke no new ground.

26. The AGBC's argument that the Court of Appeal established a new approach appears to arise from a single passage in the decision:

> The goals of upholding the legality principle and facilitating access to justice merit particular weight in the balancing exercise a judge must undertake when deciding whether to grant or refuse public interest standing. While other concerns must also be accounted for, these goals are the key components of the flexible and purposive approach mandated in *Downtown Eastside*.[41]

27. These comments do not "disturb"[42] the established balancing exercise or "assign extra weight"[43] to legality and access to justice. They are but two sentences in the Court of Appeal's 21-paragraph background overview of public interest standing and its explanation of the concept's *raison d'être*. They should be uncontroversial: as this Court confirmed nearly 20 years ago in *Canadian Council of Churches*, "the *main purpose* of granting public interest standing is to prevent

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[35] Applicant's Memorandum of Argument at para. 37.
[36] *Downtown Eastside* at paras. 20, 23, 36, 52–53.
[37] *Borowski* at p. 598.
[38] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at pp. 250, 252, 253, 255–56 [*Canadian Council of Churches*].
[39] BCCA Reasons at para. 86.
[40] BCCA Reasons at para. 86.
[41] BCCA Reasons at para. 79.
[42] Applicant's Memorandum of Argument at para. 36.
[43] Applicant's Memorandum of Argument at para. 37.

public acts or legislation from being immunized from challenge and to enable courts to scrutinize the legality of government action and strike down unconstitutional laws".[44]

28. The critical part of the Court of Appeal's judgment concerns the chambers judge's analysis of the first factor governing public interest standing.

29. The Court of Appeal reiterated settled law that (i) "[a]n issue is 'justiciable' if [it] is appropriate for judicial determination and 'serious' if it raises a substantial question that is 'far from frivolous'" and (ii) "a challenge to the constitutionality of legislation is always justiciable".[45] It then observed that CCD had pleaded "concrete and detailed material facts" in support of its allegations that "specific legislation" breached the *Charter* rights of a "defined and identifiable" group. It also observed that the alleged breaches "are manifestly serious and the claim is 'far from frivolous'".[46]

30. On that basis, the Court of Appeal found that the chambers judge had erred by concluding that CCD's action was incapable of raising a serious justiciable issue without an individual plaintiff or an individual's specific factual context.[47]

31. The Court of Appeal did not fault the chambers judge for giving insufficient weight to legality or access to justice when considering the first standing factor. Instead, the Court of Appeal highlighted the very concerns the AGBC has articulated in this leave application: the granting of public interest standing must always be subject to appropriate constraints. It explicitly acknowledged that courts are

> rightly concerned with the need to maintain limitations to ensure that the courts are not overburdened with marginal or redundant claims, that so-called "busybody litigants" are screened out, that the contending views of those most directly affected by an issue are presented and that the courts stay within their proper constitutional role.[48]

32. Again, no new law was made. Nothing was upended or reframed. Leave should be denied.

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[44] BCCA Reasons at para. 73 citing *Canadian Council of Churches* at 255–56 [emphasis added].
[45] BCCA Reasons at para. 90.
[46] BCCA Reasons at paras. 109, 111–112
[47] BCCA Reasons at para. 114.
[48] BCCA Reasons at para. 70.

B. No Endorsement of Trials Based on Reasonable Hypotheticals

33. The AGBC also argues that leave should be granted because the Court of Appeal supposedly accepted that reasonable hypotheticals could and would provide a "sufficient evidentiary basis for public interest litigation in cases without an individual plaintiff".[49] This is completely concocted.

34. CCD never argued that reasonable hypotheticals would constitute a sufficient evidentiary basis for its constitutional challenge. And the Court of Appeal never held that this or indeed any constitutional challenge could succeed without evidence or based on reasonable hypotheticals alone. The phrase "reasonable hypothetical" appears nowhere in the decision. The Court of Appeal did not even discuss the issue.

35. Instead, the Court of Appeal acknowledged the need for a "sufficiently concrete and well-developed factual setting".[50] It confirmed that, in a systemic challenge disputing the constitutionality of specific legislation that affects a defined group of people regardless of their individual characteristics, the factual setting required for trial could *potentially* be provided through means other than an individual co-plaintiff—*e.g.*, evidence from "directly-affected non-plaintiff and expert witnesses," as in *Thompson v. Ontario (Attorney General)*.[51]

36. On this basis, the Court of Appeal concluded that the chambers judge had erred in finding that a serious justiciable issue could not exist without an individual plaintiff's factual context.[52]

37. In coming to its conclusion, the Court of Appeal referred to other cases addressing public interest standing in systemic constitutional challenges, including *Association of Drug War Survivors*[53] and *British Columbia Civil Liberties Association*.[54]

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[49] Applicant's Memorandum of Argument at para. 41 (header).
[50] BCCA Reasons at para. 100, quoting *Downtown Eastside* at para. 51; see also BCCA Reasons at paras. 91, 97.
[51] *Thompson v. Ontario (Attorney General)*, 2011 ONSC 2023 at paras. 45–53, cited in BCCA Reasons at para. 113.
[52] BCCA Reasons at para. 114.
[53] *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817, rev'd in part on other grounds 2015 BCCA 142 [*Association of Drug War Survivors*].
[54] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228 [*British Columbia Civil Liberties Association*].

38. *British Columbia Civil Liberties Association* arose from a challenge by two non-profit organizations to the administrative segregation of inmates in federal penitentiaries. In its decision, the Court of Appeal confirmed that courts can "grant a public interest standing litigant declaratory relief that state conduct against a non-party violates the *Charter*".[55]

39. In *Association of Drug War Survivors*, the plaintiff organization challenged City of Abbotsford bylaws and actions that were said to violate the constitutional rights of people who are homeless. The court found a serious justiciable issue and granted public interest standing despite the absence of an individual co-plaintiff.[56]

40. The Court of Appeal did not make any new law or disturb existing law when it observed that these cases "affirm that an individual plaintiff and plaintiff-specific material facts are not always necessary for a serious justiciable issue to be raised" in a systemic constitutional challenge, and thus satisfy the first standing factor.[57] Only the AGBC finds that proposition controversial.

41. As there are no issues of public importance, the AGBC's leave application should be denied.

PART IV - SUBMISSIONS ON COSTS

42. This Court should follow its usual practice and award costs in the cause.

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[55] *British Columbia Civil Liberties Association* at para. 266.
[56] *Association of Drug War Survivors* at paras. 14, 38, 59–62.
[57] BCCA Reasons at para. 97.

PART V - ORDER SOUGHT

43. The application for leave to appeal should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 18th day of January, 2021.

MICHAEL A. FEDER, Q.C./
KATHERINE BOOTH/
KEVIN LOVE
Counsel for the respondent

PART VI - TABLE OF AUTHORITIES

CASE LAW

Authority	Paragraph (s)
British Columbia Civil Liberties Association v. Canada (Attorney General), 2019 BCCA 228.	37, 38
British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City), 2014 BCSC 1817, rev'd in part 2015 BCCA 142.	37, 39, 40
Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence, 2012 SCC 45.	1, 2, 13, 18, 19, 21, 22, 25, 35, 40
Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 (S.C.C.).	25, 27
Council of Canadians with Disabilities v. British Columbia (Attorney General), 2020 BCCA 241.	3, 6, 7, 8, 10, 11, 17, 18, 19, 20, 22, 25, 26, 27, 29, 30, 31, 35, 36, 40
MacLaren v. British Columbia (Attorney General), 2018 BCSC 1753.	13, 14, 15, 16
Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575 (S.C.C.).	13, 25
Thompson v. Ontario (Attorney General), 2011 ONSC 2023.	35

STATUTES, REGULATIONS, RULES, ETC.

Statute	Paragraph (s)
Canadian Charter of Rights and Freedoms, The Constitution Act 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11, ss. 7 and 15. (English)	5, 29, 38
Canadian Charter of Rights and Freedoms, The Constitution Act 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11, ss. 7 and 15. (French)	

SCHEDULE "A"

Excerpts from Application Response filed by Council of Canadians with Disabilities on August 15, 2018.[58]

> 7. At trial, [CCD] intends to lead expert evidence from both fact and expert witnesses, including from people who have directly experienced the impacts of the Impugned Provisions.
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> 31. No matter who might challenge the Impugned Provisions, there is every reason to expect that the most relevant evidence will come from witnesses other than the plaintiff. The litigation turns on complex questions about mental health, capacity, psychiatric treatments, and the effects of those treatments. Expert evidence on those questions is required.

Excerpts from Factum filed by Council of Canadians with Disabilities at the Court of Appeal for British Columbia on February 27, 2019.[59]

> 10. … At the trial, CCD intended to lead expert evidence from both lay and expert witnesses, including from witnesses who had directly experienced the impacts of the Impugned Provisions.
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> 15. … [A]t trial, CCD planned to lead both lay and expert evidence addressing the nature of mental disabilities; the stereotypes and barriers faced by people with mental disabilities; the lived experiences of people who receive forced psychiatric treatment; and the impact of the Impugned Provisions on the people whom they affect.
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> 33. … Third, the chambers judge's reasoning ignores the unchallenged evidence that CCD planned to call evidence from and about individuals affected by the Impugned Provisions at trial.

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[58] Applicant's Application Record, Tab 4I at paras. 7, 31.
[59] Respondent's Application Record, Tab B at paras. 10, 15, 33, 73, 87.

73. … [The chambers judge's] holding improperly ignores that both parties estimated 20 days would be required to try the action, as well as the uncontradicted evidence that, at trial, CCD would call individuals who have directly experienced the impacts of the Impugned Provisions as well as multiple expert witnesses.

87. … The uncontested evidence on the summary trial application was that CCD would call, at trial, evidence from individuals directly affected by the Impugned Provisions, as well as expert evidence.