Court of Appeal File No. CA45092

COURT OF APPEAL

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
THE JOHN HOWARD SOCIETY OF CANADA

Respondents
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

Appellant
(Defendant)

MEMORANDUM OF ARGUMENT ON AN APPLICATION FOR LEAVE TO INTERVENE

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OPENING STATEMENT

At trial, the Respondents were granted declaratory relief under section 52(1) of the *Constitution Act, 1982* for *Charter* infringements resulting from the Correctional Service of Canada's statutory framework around administrative segregation. This determination prevented the trial judge from having to consider the Respondents' alternative argument on remedies, which sought the same relief pursuant to section 24(1) of the *Charter*.

On appeal, the Attorney General of Canada ("**Canada**") argues that the Respondents are not entitled to section 52(1) relief, and that neither are they entitled to an alternative remedy under section 24(1). Canada contends that since the Respondents "are corporate plaintiffs seeking to vindicate the rights of third parties," they cannot receive any form of relief under section 24(1) of the *Charter*.[1]

The Respondents state that if Canada is successful in establishing that they are not entitled to a remedy pursuant to section 52(1), then they should be granted the same relief under section 24(1). The Respondents claim that "there is no principled reason to deny a corporate party with public interest standing the ability to challenge state action rather than legislation," that the jurisprudence in British Columbia has rejected Canada's position on the limits of section 24(1) relief, and that courts have implicitly recognized that section 24(1) remedies can be granted to public interest standing litigants on behalf of others directly affected by the impugned state conduct.[2]

The Respondents argue further that section 24(1) relief has been, or in the alternative should be, granted to public interest standing litigants in circumstances where section 52(1) relief is not available and the claimants have made out systemic *Charter* breaches resulting from the state's maladministration of lawful statutes.

The Canadian Prison Law Association ("**CPLA**") submits that public interest standing litigants should be entitled to section 24(1) *Charter* relief. However, access to a section 24(1) *Charter* remedy should not be limited to cases involving systemic *Charter* violations. Public interest standing litigants should be entitled to the same remedies that are available to parties who directly challenge *Charter* infringing state conduct.

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[1] Factum of the Appellant ("**Canada's Factum**"), at ¶137.
[2] Factum of the Respondents ("**Respondents' Factum**"), at ¶153.

PART 1 - STATEMENT OF FACTS

1. This appeal provides an opportunity to clarify whether section 24(1) *Charter* relief is available to public interest standing litigants.

2. *Charter* remedies are found at section 52(1) of the *Constitution Act, 1982* and section 24(1) of the *Charter of Rights and Freedoms*. The status of a claimant and nature of the unconstitutional state action determines the availability of either remedy.

3. Section 52(1) of the *Constitution Act, 1982* provides remedies for legislation that is found to be unconstitutional, while section 24(1) of the *Charter* targets state conduct that deprives an individual of their rights and liberties as protected under the *Charter*. Relief under section 24(1) of the *Charter* can only be accessed by individuals seeking remedies for personal *Charter* breaches that arise from government conduct.

4. Public interest standing litigants are not personally subject to the *Charter* infringements they seek to remedy: they stand in the place of individuals adversely impacted by government action but who face major obstacles in bringing lawsuits to challenge its legality. On this basis, Canada argues, public interest standing litigants like the Respondents are unable to access section 24(1) *Charter* relief.

5. However, this understanding of *Charter* remedies developed prior to the emergence of public interest standing litigation in the *Charter* context. The initial interpreters of the *Charter* appear to have not foreseen the emergence of public interest standing litigants commencing *Charter* claims against state conduct.

6. The CPLA submits that public interest standing litigants should be entitled to section 24(1) *Charter* relief. The jurisdictional limitation on the status of a party that can seek a section 24(1) *Charter* remedy cannot be maintained. The law of *Charter* remedies must adapt to accommodate *Charter* litigation commenced by public interest standing litigants against unconstitutional state action.

PART 2 – QUESTION IN ISSUE

7. The CPLA submits that section 24(1) *Charter* relief should be available to public interest standing litigants, and that the law around Charter remedies must adapt to accommodate the modern approach to the law of public interest standing.

PART 3 - ARGUMENT

A. Charter Remedies: Sources and Limitations

8. There are two sets of limitations imposed on *Charter* remedies:

	Limitation	Section 52	Section 24
A.	Source of State Action	Legislation.	State Conduct.
B.	Nature of Relief	Declarations of invalidity against *Charter* infringing legislation.	Any personal *Charter* remedy that is appropriate in the circumstances.

9. Section 52(1) relief is confined to *Charter* infringing laws, with declarations of invalidity being the only available remedy.[3] The claimant itself does not have to suffer the harm complained of to obtain a section 52(1) remedy: a remedy under the provision can be sought on behalf of other parties.[4]

10. Section 24(1) provides remedies "not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional."[5] A claimant can be granted *any* remedy that "the court considers appropriate and just in the circumstances": there is no limitation on the type of remedy that can be granted under the provision.[6]

11. However, in 1985, the Court in *R v Big M Drug Mart Ltd.*[7] ("***Big M***") imposed an additional limitation on section 24(1) *Charter* remedies:[8]

> Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the *Charter* have been infringed.

12. As such, section 24(1) of the *Charter* became exclusively "a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights."[9]

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[3] *R v Ferguson*, 2008 SCC 6, at ¶59 and ¶61.
[4] *Ibid*.
[5] *Ibid*, at ¶60.
[6] *Ibid*, at ¶¶61-62.
[7] [1985] 1 SCR 295.
[8] *Ibid*, at page 313.
[9] *R v Ferguson*, 2008 SCC 6, at ¶61.

13. For public interest standing litigants, who commence public law actions that seek to vindicate the rights of *others*, this means that they cannot access any form of section 24(1) *Charter* relief:

***Charter* Remedies**		
	Public Interest Standing Litigant	**Directly Impacted Litigant**
***Charter* Infringing Legislation**	Section 52(1), *Constitution Act, 1982*.	Section 52(1), *Constitution Act, 1982*.
***Charter* Infringing State Conduct**	None.	Section 24(1), *Charter*.

14. Section 24(1) *Charter* relief is the only source for remedies that target state conduct that infringes the *Charter*.

15. Public interest standing litigants are therefore barred from challenging state conduct that breaches the *Charter*, as they are unable to seek the relief needed to remedy such an infringement.

16. Declarations of invalidity under section 52(1) are available to public interest standing litigants. However, section 52(1) cannot be used to remedy state conduct that breaches the *Charter,* as it can only invalidate unconstitutional laws, not *Charter* infringing state conduct.

17. Public interest standing litigants have no remedy to address *Charter* infringing state conduct. There is a gap in the law of *Charter* remedies when it comes to the relief available to public interest standing litigants who challenge state conduct.

18. Clearly, this conception of section 24(1) *Charter* relief creates serious barriers for public interest standing litigants; it restricts the *Charter* claims they can bring to only those that seek to challenge government legislation. This approach is at odds with the doctrine of public interest standing in Canada.

B. The Public Interest Standing Doctrine and the *Charter*

19. The public interest standing doctrine in Canada predates the *Charter*.[10] The doctrine was developed in recognition of the significant barriers individuals may face in directly challenging the legality of state action[11]. This includes obstacles resulting from a lack of resources, logistical and practical difficulties, and a range of other factors.

20. With the enactment of the *Charter*, the public interest standing doctrine acquired greater significance, leading the Supreme Court of Canada to adopt a generous and liberal approach to the law of public interest standing:[12]

> In 1982 with the passage of the *Charter* there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. The *Charter* enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those *Charter* rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the *Charter*. By its terms the *Charter* indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, *Charter* rights might be unenforced and *Charter* freedoms shackled. The *Constitution Act, 1982* does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with the law.

21. Since then, the public interest standing doctrine has been interpreted and applied in a purposive manner, which has expanded the ability of public interest standing litigants to test the *Charter* compliance of government action.

22. For instance, in *Canada v Downtown Eastside Sex Workers United Against Violence Society*[13] ("***Downtown Eastside***"), the court entrenched the principle of legality as central to the development of the public interest standing doctrine in Canada. "The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action."[14] Greater emphasis on the principle of

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[10] See: *Thorson v Attorney General of Canada*, [1975] 1 SCR 138, *Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265, and *Minister of Justice of Canada v Borowski*, [1981] 2 SCR 575.
[11] *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, at pages 248-252.
[12] *Ibid*, at page 250.
[13] 2012 SCC 45.
[14] *Ibid*, at ¶31.

legality led the court to adopt a much more flexible approach to the public interest standing doctrine, significantly enlarging the scope of *Charter* claims that public interest standing litigants could advance.[15]

23. Unfortunately, the law around *Charter* remedies has not developed in tandem with the increased importance placed on the principle of legality under the public interest standing doctrine and the broader scope of *Charter* claims that can now be brought by public interest standing litigants.

C. Revisiting a Binding Precedent

24. In *(Canada) Attorney General v Bedford*[16] ("***Bedford***), the Supreme Court of Canada established that a matter bound by precedent may be revisited by a lower court if:[17]

a. new legal issues are raised as a consequence of significant developments in the law, or

b. there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

25. In Mounted *Police Association of Ontario v Canada (Attorney General)*[18] ("***Mounted Police***"), significant developments in the law concerning section 2(d) of the *Charter* led the Supreme Court of Canada to overturn an earlier decision of that court that denied RCMP officers the right to unionize. The court determined that changes to the approach to freedom of association since *Delisle*, the earlier authority, permitted it to depart from the precedent.

26. The court adopted a "purposive and generous" approach to freedom of association after *Delisle*, and in the process, recognized collective bargaining as a facet of section 2(d) of the *Charter*.[19]

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[15] *Ibid*, at ¶¶37-52.
[16] 2013 SCC 72.
[17] *Ibid*, at ¶42.
[18] 2015 SCC 1.
[19] *Ibid*, at ¶¶125-127.

27. *Delisle* also examined a different question than what the court was asked to consider in *Mounted Police*. In *Delisle*, only a portion of the statutory scheme that governed the labour relations of RCMP officers was before the court; in *Mounted Police*, the complete framework was under review.[20] Consideration of the entire statutory framework was another factor that led the court to depart from the ruling in *Delisle*.

28. The new purposive and generous approach to freedom of association, and the fact that the exact question before the Court in *Mounted Police* was not before it in *Delisle*, met the threshold in *Bedford* of a significant development in the law that raised a new legal issue and allowed the court to reconsider the earlier precedent.[21]

29. Similar to *Mounted Police*, the CPLA submits that the shift towards a purposive and liberal approach to the public interest standing doctrine since *Big M* represents a significant change in the law that raises the novel issue of whether public interest standing litigants are able to access section 24(1) *Charter* relief.

30. As the decision in *Big M* was made without contemplation of this type of public interest standing litigant, and has left a gap that denies such litigants relief from *Charter* infringing state conduct, the CPLA submits that this shift represents a significant development of the law sufficient to justify revisiting the limitations imposed on section 24(1) *Charter* remedies.

D. Significant Changes to the Doctrine of Public Interest Standing Since *Big M*

i. A Generous and Liberal Approach to the Law of Public Interest Standing

31. *Big M* was released in 1985 and did not involve a public interest standing litigant. Big M Drug Mart Ltd. was charged with violating the *Lord's Day Act* for selling goods on a Sunday, and defended its conduct by challenging the constitutionality of the statute.

32. In *Big M,* the court acknowledged that the action would have proceeded differently had it commenced as "public interest litigation," requiring Big M Drug Mart Ltd. to "fulfill the status requirements laid down by this Court in the trilogy of 'standing'

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[20] *Ibid*.
[21] *Ibid*, at ¶127.

cases."[22] The trilogy referenced relates to a number of pre-*Charter* decisions that at the time set out the law of public interest standing.

33. The doctrine of public interest standing had not been considered in the *Charter* context at the time of *Big M*. This would change with *Finlay v Canada*,[23] a decision released in 1986, and then more substantively in 1992 with *Canadian Council of Churches v Canada*[24] ("***Canadian Council***"). In *Canadian Council*, the Supreme Court of Canada acknowledged that public interest standing litigants play a vital role in ensuring that state action complies with the *Charter*, and in the preservation and enhancement of *Charter* rights and freedoms.[25]

34. To fulfill this purpose, the Court in *Canadian Council* adopted a liberal and generous approach to determining public interest standing issues.[26] The liberal and generous approach is also the lens through which the *Charter* is to be interpreted, including remedies at section 24(1), providing consistency between these two areas of law.[27]

35. The doctrine was developed further in *Downtown Eastside*, with the court embedding the principle of legality into the law of public interest standing:[28]

> The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication"

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[22] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at page 313.
[23] [1986] 2 SCR 607.
[24] [1992] 1 SCR 236.
[25] *Ibid*, at pages 250–253.
[26] *Ibid*, at pages 252-253.
[27] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, at ¶¶23-25.
[28] *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at ¶31.

36. In *Downtown Eastside*, the court drew on the principle of legality to revise the law around public interest standing, allowing it to be applied in a flexible manner and broader set of circumstances.[29]

37. The law of public interest standing has developed significantly since the enactment of the *Charter*. The Court in *Big M* did not have the benefit of understanding the role public interest litigants serve in furthering the principle of legality when it developed jurisdictional limits on the type of claimant that could apply for section 24(1) *Charter* relief.

38. Had the Court in *Big M* been aware of the liberal and generous approach to public interest standing, and that the doctrine would be applied in a purposive and flexible manner to expand the scope of public interest standing in Canada to ensure state action complied with the *Charter*, it is unlikely that section 24(1) *Charter* relief would have been interpreted in such a restrictive manner.

39. Limiting the availability of section 24(1) *Charter* relief to parties who have been directly impacted by *Charter* infringing state conduct runs counter to the liberal, generous, and purposive approach to the law of public interest standing. This drastically reduces the scope of state action that public interest standing litigants can challenge.

40. Public interest standing litigants can only challenge government legislation for *Charter* compliance if *Big M*'s conception of *Charter* remedies is upheld; they would not be able to challenge state conduct that breaches the *Charter*.

41. There is no authority to suggest that public interest standing litigants are limited to only challenging the constitutionality of government legislation. The opposite is true: in *Downtown Eastside*, the principle of legality, which animates the law of public interest standing, seeks to confirm the constitutionality of "state action," and provides a practical basis to challenge the legality of "state action."[30] The definition of the concept at the core of the doctrine is not confined to government legislation. This suggests that the *Charter* era conception of the public interest standing doctrine was not intended to

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[29] *Ibid*, at ¶¶37-52.
[30] *Ibid*, at ¶31.

preclude public interest standing litigants from advancing *Charter* claims against state conduct.

ii. The Availability of Section 24(1) Relief to Public Interest Standing Litigants is a Novel Issue

42. The disconnect between the law of *Charter* remedies, and the development and expansion of the public interest standing doctrine, is likely the result of courts never having directly considered the availability of section 24(1) *Charter* relief to public interest standing litigants.

43. In this province, courts have addressed this question indirectly. On an application to strike a claim brought by a public interest standing litigant seeking section 24(1) *Charter* relief, the British Columbia Supreme Court, and then this Court, found that it was not plain and obvious that:[31]

> a court cannot grant a s. 24(1) remedy in favour of persons who are not themselves parties to the action. The case law does not firmly decide that s. 24(1) remedies may only be claimed and enforced by individuals.

44. The court expressed doubt towards the claim that public interest standing litigants were barred from commencing action against state conduct, but fell short of finding that these parties could obtain section 24(1) *Charter* relief.

45. In *Abbotsford v Shantz*, Chief Justice C.E. Hinkson provided clearer guidance on the availability of section 24(1) *Charter* relief to public interest standing litigants:[32]

> Section 24(1) is a provision that exists to provide remedies. There is no principled basis upon which a litigant with public interest standing must necessarily be foreclosed from relief for state action under s. 24(1).

46. Ultimately, Chief Justice Hinkson did not order any relief pursuant section 24(1), instead concluding that the appropriate remedy in the circumstances could be found under section 52(1) of the *Constitution Act, 1982*.

47. There are a number of decisions where Canadian courts seem to have implicitly provided public interest standing litigants section 24(1) *Charter* relief. As the

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[31] *British Columbia/Yukon Association of Drug War Survivors v Abbotsford (City)*, 2015 BCCA 142, at ¶17.
[32] *Abbotsford (City) v Shantz*, 2015 BCSC 1909, at ¶265.

Respondents note in their factum, the Supreme Court of Canada's decision in *Carter #2* could only be granted pursuant to section 24(1).[33]

48. However, this can only be read into the decision based on the remaining claimants at the time of the hearing and the nature of the relief sought. The court did not explicitly acknowledge the source of the remedy granted or even the party that was granted the remedy.

49. There is no clear guidance on the availability of section 24(1) *Charter* relief to public interest standing litigants. This question has never been directly addressed by a court.

50. The lack of clear guidance on this issue, apparent inconsistency between the law of *Charter* remedies and purposive approach to the public interest standing doctrine, and growth in public interest standing *Charter* litigation requires this Court to clarify whether section 24(1) *Charter* relief is available to public interest standing litigants.

51. For this reason, the CPLA kindly requests that this Court clarify this issue, even if it finds that section 52(1) of the *Constitution Act, 1982* provides an appropriate remedy in the circumstances.

PART 4 - NATURE OF ORDER SOUGHT

52. The CPLA respectfully requests permission to present oral argument at the hearing of this appeal.

Dated at the City of Vancouver, Province of British Columbia, this July 25th of 2018.

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AVNISH NANDA

Counsel for the Canadian Prison Law Association

[33] Respondents' Factum, at ¶152.

APPENDIX: ENACTMENTS

CONSTITUTION ACT, 1982

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
Abbotsford (City) v Shantz, 2015 BCSC 1909	10	44
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R v Big M Drug Mart Ltd., [1985] 1 SCR 295	2, 7	11, 32
R v Ferguson, 2008 SCC 6	1, 2	9, 10, 12