Court File No. 21946

IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

B E T W E E N:

THE CANADIAN COUNCIL OF CHURCHES

Appellant
(Plaintiff)

- and -

HER MAJESTY THE QUEEN and
THE MINISTER OF EMPLOYMENT & IMMIGRATION

Respondents
(Defendants)

FACTUM OF THE INTERVENERS, WOMEN'S LEGAL EDUCATION AND ACTION (LEAF) and CANADIAN DISABILITY RIGHTS COUNCIL (CDRC)

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PART I - STATEMENT OF FACTS

1. LEAF and CDRC adopt the statements of the appellant concerning the nature of its appeal, its constitutional challenge, the decision of Mr. Justice Rouleau and the decision of the Federal Court of Appeal.

> Appellant's Factum, paragraphs 1-2 (p.1), 9-10 (pp. 3-4), 11-14 (pp. 5-6) and 15-19 (pp.6-8) and Appendix A

2. LEAF is a national, federally-incorporated, not-for-profit organization founded in 1985 to secure equality rights for Canadian women under the *Canadian Charter of Rights and Freedoms* and comparable instruments at the provincial territorial level. To this end, it engages in test case litigation, research and public education.

3. CDRC is a national federally-incorporated, not-for-profit, public interest advocacy organization founded on May 4, 1987 to secure equality rights for people with disabilities by means of strategic test case litigation under the *Charter* and human rights legislation, and to undertake related research and public consultation. CDRC is made up of member organizations from the national, provincial/territorial and local levels, all of which represent persons with various mental and physical disabilities.

4. The litigation experience of LEAF and CDRC includes:

(a) acting as public interest litigants, including interventions in the Supreme Court of Canada, provincial Courts of Appeal, and the Federal Court of Canada;

(b) sponsoring a public interest group that initiates litigation or acts as an intervener;

(c) sponsoring an individual who in a representative capacity makes group-based claims; and

(d) sponsoring the initiation of litigation by an individual who is a member of a disadvantaged group.

PART II - POINTS IN ISSUE

5. The appellant raises the question of whether the Federal Court of Appeal erred in holding that:

(a) the appellant should be denied standing to challenge certain provisions of the *Immigration Act*;

(b) certain claims contained in the amended Statement of Claim failed to disclose a reasonable cause of action; and

(c) certain claims described in the Statement of Claim were hypothetical or premature.

6. LEAF and CDRC address the issue of standing. Certain of their arguments in this regard necessarily and incidentally address the issue of prematurity. The issue of reasonableness of the cause of action is not addressed.

7. LEAF and CDRC propose a consideration of standing which is based on the *Charter*, and in particular, on the guarantees in section 15 thereof of equality before and under the law and of the right to the equal protection and equal benefit of the law. We explore in Part III how those guarantees affect the law of standing, both with respect to direct, "party" interests and also with respect to what has come to be known as "public interest" standing. These arguments relate primarily to standing to challenge legislation on the ground that it violates the *Charter*.

PART III - THE LAW

A. The Traditional Basis of Private and "Public Interest" Standing

8. The nature of the interest required by a private party who seeks standing to claim declaratory or injunctive relief where a question of public right or interest is raised was laid down in cases involving the private action for public nuisance. The interest required has thus been defined with respect to the role of the Attorney-General as the guardian of public rights. Only the Attorney-General has the standing to assert "a purely public right or interest" either on her or his own motion or at the instigation of another person. Consent of the Attorney-General must be given for these so-called "relator" proceedings, and the decision about consent is not subject to review. Absent such consent, a private party may proceed only upon showing either that interference with some public right interferes at the same time with some private right or that the plaintiff has suffered some special damage peculiar to herself or himself as a result of interference with a public right.

Finlay v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 617-620

9. In this formulation, the "private right" has been said to be a right the invasion of which gives rise to an actionable wrong within the categories of private law, for example, a breach of contract or trust or the commission of a tort, or a right created by statute for the benefit of a plaintiff.

Finlay, supra at 619

10. When these ideas have been applied to cases where the validity of legislation or government action is at issue, the requirement of a special interest has been construed to mean that the plaintiff must establish "some special interest in the operation of the legislation

beyond the general interest that is common to all members of the relevant society" or the general interest of the public in constitutional behaviour by government.

R. v. Borowski, [1981] 2 S.C.R. 575 at 576 (per Laskin C.J. dissenting)

11. Private interest standing is available as of right if the applicant can satisfy the requirements of the test. If there is insufficient private interest to support an action, then the plaintiff must seek "public interest" standing, the granting of which is within the discretion of the court.

Finlay, supra

12. For public interest standing, three criteria must be met: (1) there must be a serious issue; (2) the plaintiff must have a genuine interest as a citizen in the validity of the legislation; and (3) there must be no other reasonable and effective manner in which the issue may be brought before the court.

Canadian Council of Churches v. Canada, [1990] 2 F.C. 534, at 541

Borowski, supra at 598 (per Martland, J.)

13. LEAF and CDRC argue below that these two tests for standing constitute serious limitations on the right of access to the courts which is essential for disadvantaged persons fully to realize their rights under the *Charter*. The disadvantaged, because of their life circumstances, often do not have the kinds of proprietary or pecuniary interests that would entitle them to as of right private standing. Judicial interpretation of the public interest test has favoured those whose interests are most closely analogous to the rights underlying private interest standing. As a result of these restrictive interpretations, the very persons intended to benefit from the *Charter* lack the means to enforce its guarantees, a lack which compounds and exacerbates the effects of their exclusion from the legislative process. To deny access to justice to persons who are the most fragile, most marginalized, most isolated and most frightened is a profound denial of the equality before the law which underlies all of the *Charter's* guarantees, and is an essential foundation of the rule of law in a democratic society.

B. Equality Guarantees and Access to Justice

14. LEAF and CDRC propose that this Honourable Court review the basis upon which standing in public law matters has been granted, in light of the basic constitutional guarantees of equality which mandate equal access to justice. These guarantees are twofold: the specific provisions of the *Charter*, and the fundamental principles underlying the rule of law in a democratic society.

a) *Charter* Equality Guarantees

15. Decisions of this Court dealing with section 15 of the *Charter*, and with the human rights principles informing the *Charter's* equality guarantees, recognize that inequality has more than an individual dimension, adversely affecting members of historically disadvantaged groups through systemic practices, policies, and institutionalized barriers. Accordingly, remedies for inequality must also have a group dimension, and promote systemic equality, not just rectification of isolated individual harms. In establishing these principles, the Court is upholding the intention of the framers of the *Charter* and human rights codes.

> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 154, 168, 174
>
> *Janzen* v. *Platy Enterprises*, [1989] 1 S.C.R. 1252
>
> *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219
>
> *Action Travail des Femmes* v. *C.N.R.*, [1987] 1 S.C.R. 1114 at 1145
>
> *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1332-1333

16. An important aspect of this Court's approach to equality is its recognition that more than simply the immediate or linear consequences of conduct may be taken into account in determining whether a denial of equality, or discrimination, has occurred. This acknowledgement of indirect effects reflects an understanding that actions can have long-term group consequences which may, upon examination, prove discriminatory, whereas an examination of more short-term, or individual, consequences of those actions may show either no discrimination or may fail to reveal its actual extent. This approach also recognizes that rules of general application which are constitutional on their face can have disparate -- and disadvantaging -- effects on particular disadvantaged groups.

> *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536
>
> William Black and Lynn Smith, "The Equality Rights" in Beaudouin and Ratushny, *The Canadian Charter of Rights and Freedoms* (2d ed.) (Toronto: Carswell, 1989) at 564-67

17. The Court signalled in *Andrews* that it would adopt a purposive approach to the *Charter's* equality guarantees and in subsequent decisions has recognized the central importance of promoting the equality of those groups who suffer social, political and legal disadvantage. In so doing, the Court has exhibited a welcome sensitivity to the nature of those disadvantages.

Swain v. The Queen, Supreme Court of Canada, unreported, May 2, 1991 (Reasons of Lamer, C.J. at 24-25)

18. LEAF and CDRC submit that these principles of constitutional equality shaped in the context of substantive rights apply as well to the determination of standing to initiate litigation for the enforcement of those rights. This Court's purposive approach to section 15 of the *Charter* requires that the rules governing standing to seek relief under section 52 of the *Constitution Act, 1982* promote the equal benefit and protection of constitutional equality guarantees for disadvantaged groups and their members. This is so whether those rules relate to which persons or groups may have standing as of right, or to the exercise of judicial discretion to determine that an individual or group may have "public interest" standing.

b) <u>The Rule of Law in a Democratic Society</u>

19. There is, moreover, an even deeper constitutional foundation for the re-evaluation of standing in *Charter* cases that reaches the normative level on which equality is fundamental to the rule of law.

20. This Court has identified equality as one of the underlying principles of a free and democratic society:

> A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person.
>
> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 313-314

21. Equality, as one of the fundamentals of a democratic society, is an important standard against which to assess the reasonableness and justifiability of limits on *Charter* rights.

> *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136

22. This recognition of equality as a fundamental democratic value, underlying all *Charter* guarantees (including the specific guarantee of equality) has significant implications for the issue of standing. Equal access to justice must be regarded as an integral aspect of equality. Without access to court to defend -- or, just as importantly, to assert -- rights, citizens cannot be said to be truly equal. A right cannot be considered "inviolable" if it cannot be vindicated in court; a freedom is not "fundamental" if it may not be protected at the instigation of its holder.

23. Equal access to justice is also an essential foundation of the rule of law, to which the preamble of the *Charter* refers. If the rule of law is to be more than an utopian dream or an

unrealized judicial ideal, there must be standing rules that permit access to the process for determining what the legal rules are and how they are to be interpreted and applied. Such access cannot be restricted to the privileged, for judicial decision-making in a framework determined only by the privileged will reflect the perspectives and interests of only the privileged. Rather, the judge-made rules of access to the courts should strive to encompass the deprived, the excluded, the silenced, and the dispossessed, whether as individuals or in groups.

B.C.G.E.U. v. A.G.B.C., [1982] 2 S.C.R. 214 at 229

24. Equal access to justice also has critical implications for the development of the substance of the law. Courts decide the cases that are brought to them; the courts' caseload, as determined by litigants, determines what areas of the law will be developed. Precedent from areas actively litigated could well control decision making in areas that are not. A caseload that arises from the interests of the advantaged is very likely to create a body of law that privileges the interests of the advantaged, at the expense by omission or partiality of the disadvantaged.

Raoul Colinvaux, *The Law of Insurance* (5th ed.) (London: Sweet & Maxwell, 1984) at 11-12

25. Applying both the substantive norm of constitutional equality and the deeper systemic concerns about equality in a democratic society to the analysis of the standing issue resonates very well with this Court's view of the important relationship between equality and participatory democracy. Equal laws, produced by equal access to law, enhance democratic accountability rather than diminish it.

26. Although this Court has held that equality is an essential attribute of a democratic society, there are many disadvantaged groups whose access to the democratic system exists in name only. Although they have the right to vote and to hold office (for some, comparatively recent acquisitions), they have, in practice, almost no access to institutions of decision making. Representation of disadvantaged persons in legislative assemblies, for example, is very low, because of barriers which are just beginning to be identified.

Canadian Charter of Rights and Freedoms, ss. 3, 4

Peter Hogg *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 723

Provincial Elections Act, S.B.C. 1939, c. 16, ss. 2-5, as amended by S.B.C. 1945, c. 26, s. 2 and S.B.C. 1947, c. 28, ss. 5-14A

Canadian Disability Rights Council v. Canada (1988), 21 F.T.R. 268 (F.C.T.D.)

Sylvia B. Bashevkin, *Toeing the Lines: Women and Party Politics in English Canada* (University of Toronto Press, 1986), at 70-79

27. Exclusion from the legislative process is paralleled by exclusion from the judicial process. Barriers impairing access to justice in Canada include discrimination on the basis of disability, race, and gender. Taken singly, each of these factors can be very disadvantaging. Multiple disadvantages, experienced simultaneously, produce even graver limitations on participation.

Ontario, *Study of Access to Legal Services by the Disabled* (Commissioner: R.S. Abella) (Toronto: Queen's Printer, 1983), at 31-60

Dodds v. *Murphy* (July 11, 1989), Toronto 1566/89 (S.C. Ont.) [unreported] (Gray, J.), at 13-24

CDRC V. Canada, supra

Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution, Commissioners' Report: Finding and Recommendations, 1989*, Vol. 1 (Halifax: Queen's Printer, 1989) ("Marshall Report") at 275-97

Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Alberta: Queen's Printer, 1991) ("Justice on Trial"), Vol. 1 at 1-1 to 1-8

Alberta, *Policing in Relation to the Blood Tribe: Report of the Public Inquiry*, Vol. 2: Executive Summary (Alberta: Queen's Printer, 1991) at 7-13

Sheila L. Martin and Kathleen E. Mahoney (eds.), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at iii-v, 402-409

Sherene Razack, *Canadian Feminism and The Law* (Toronto: Second Story Press, 1991) at 133

Isabel Grant and Lynn Smith "Gender Representation in the Canadian Judiciary" in Law Reform Commission of Ontario, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Queen's Printer, 1991), at 60-63

Canada, Department of Justice Bureau of Review, *Evaluation of the Divorce Act*, Phase II: Monitoring and Evaluation (Ottawa: Queen's Printer, May 1990) ("Pask Report") at 43 and 136-37

28. There is evidence that this form of lack of access to justice is also occurring in the context of enforcement of *Charter* rights.

Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 130-144.

29. Effective exclusion of disadvantaged persons from a means of enforcing their *Charter* rights denies them what could be a remedy for action or inaction by a majoritarian legislature which deprives them of equality. This not only perpetuates their existing disadvantage; it compounds the harm of their exclusion from the democratic process and the alienating and disempowering effects of that exclusion.

30. The implicit obligation of legislatures to adhere to the *Charter* in framing legislation cannot by itself mean that the interests of the disadvantaged will be so effectively included in the legislative process that they need not be attended to in the judicial process. Much Canadian legislation pre-dates the coming into force of the *Charter*, and the three-year delay in bringing into force section 15 was not used, as had been intended by its framers, for an overhaul of legislation which offended the equality guarantees -- at least in part because governments took a narrow view of what those guarantees required.

> Saskatchewan, *Compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms: Discussion Paper* (Regina: Minister of Justice and Attorney-General of Saskatchewan, 1984)
>
> *Equality Rights Statute Law Amendment Act, 1986*, R.S.O. 1986, c. 64
>
> *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, R.S.C. 1985, c. 26
>
> Charter of Rights Educational Fund, *Report on the Statute Audit Project* (Toronto: CREF, 1985)
>
> Charter of Rights Coalition (B.C.), *Women's Equality and The Charter of Rights and Freedoms* (The Legal Services Society of British Columbia, 1984, 1985)

31. Moreover, the disadvantaged and the advantaged will often have quite different views and interests concerning what is necessary to achieve compliance with the *Charter* and there has been judicial recognition that it is necessary to adopt the perspective of the disadvantaged in order to understand the discriminatory impact of a law. Given the underrepresentation of the disadvantaged in legislative assemblies, they have no direct way of ensuring that their concerns are addressed when legislation is framed. The need for the courts to act as a countervail, to repair legislative omissions, thus remains; in performing this task, access to the perspective of the disadvantaged is essential.

> *Zylberberg v. Sudbury Board of Education (Director) (1988)*, 65 O.R. (2d) 641 at 654-55 (C.A.)
>
> *Andrews, supra*, 152-153

32. A right of access to the courts for the disadvantaged assumes particular importance in light of the fact that equality-promoting legislation directly affecting the rights of the majority or the powerful may confer private standing on already advantaged groups to challenge such legislation as a direct violation of their rights.

R. v. Hess, [1990] 2 S.C.R. 906

R. v. Keegstra, [1991] 2 W.W.R. 1

Phillips v. Nova Scotia (Social Assistance Appeal Board) (1986), 34 D.L.R. (4th) 633 (N.S.C.A.)

Athabasca Tribal Council v Amoco Canada Petroleum Company Ltd., [1981] 1 S.C.R. 699

Metropolitan Toronto Condominium Corporation Number 624 v. Ramdial and Salmon (January 29, 1988) Toronto M159582/88 (District Court, unreported)

33. Thus, unless the disadvantaged have comparable access to the courts to press their claims for equality, the *Charter* may effectively operate as an instrument for the powerful to roll back the few gains of the disadvantaged. Such an outcome would be inconsistent with both section 15 of the *Charter* and the holdings of this Court.

R. v. Edwards Books and Art, [1986] 2 S.C.R. 713 at 779

34. Access to court in order to bring a civil proceeding is markedly different from the kind of "access" to court inherent in defending a civil or criminal proceeding brought by another. A party originating an action has greater opportunity to control the timing of the case, the framing of the issues involved, and the resources that will be deployed than that party would have if defending a proceeding brought at a time and on grounds chosen by another.

35. While the opportunity for the disadvantaged to seek to intervene in challenges to equality-promoting legislation is of some assistance in addressing questions of access it is no substitute for the opportunity to initiate cases which address limitations or denials of equality. Intervener status also has some serious procedural limitations. Decisions denying or allowing standing may not be reported or reported with reasons. The principles upon which standing is awarded, or denied, may thus be inaccessible, either for purposes of information, or importantly, for purposes of enhancing courts' accountability for the exercise of their discretion.

36. Intervener status at the appellate level offers no opportunity to adduce evidence that would illuminate the extent and nature of the reasons for the legislation, or the disadvantage it addresses. It may come too late to put an individual claim of denial of equality in the proper

systemic context. The intervener at the appellate level has no control over the process, and cannot effectively address the issue of remedy.

37. Thus, LEAF and CDRC submit that a full right of access to justice will include the right of access to court to define and pursue rights and interests at a party's own initiative. Access which consists only of the "right" to defend oneself from the initiatives of others, or to seek a limited role in matters raised by others which may profoundly affect one's rights, is only a partial vindication of that access to justice which is an essential part of the rule of law in a democratic society.

C. The Traditional Means of Determining Standing: Substantive and Systemic Equality Concerns

38. According privileged access to the courts based on private, proprietary interests, as does the traditional standing test, reinforces the disparity in power between those who are advantaged and those who are not. The advantaged are more likely to have established, recognized interests. The documented poverty of many disadvantaged persons means that they are much less likely to be able to base their claims on proprietary interests. Moreover, the disadvantaged may be advancing newer interests and as yet untried claims, since their perspective has only lately, and still partially, been brought into the formulation of legal principles. To allow the advantaged access to court as of right, while the disadvantaged petition for discretionary standing, exhibits a systemic preference for established interests that may themselves play part in the creation of the disadvantage complained of.

Study of Access to Legal Services by the Disabled, supra at 31-32

Marshall Report, supra, Vol. 1 at 163-64

Justice on Trial, supra, Vol. 1 at 8-1 to 8-3

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), 1 O.R. (3d) 416 (Div. Ct.) (Leave to Appeal to C.A. denied, Feb. 4, 1991)

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 1003-04

Jones v. Van Zandt, 45 U.S. (5 How.) 215 (1847)

Ableman v. Booth, 62, U.S. (21 How.) 506 (1859)

Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813)

Scott v. Negro Ben, 10 U.S. (6 Cranch) 3 (1810)

Re Drummond Wren, [1945] O.R. 788 (Chambers)

39. In order to address this problem, LEAF and CDRC submit that this Court should re-evaluate the traditional basis of affording private (or as of right) standing. Because of the close conceptual relationship which now exists between as of right standing and public interest standing, such a re-evaluation of the former will inevitably influence the approach to the latter.

40. LEAF and CDRC propose that this re-evaluation proceed from a re-thinking of what interests merit or support access to the courts, particularly in *Charter* cases. The present narrow approach to this question fails to serve either the interests of those who depend on judicial remedies to actualize their *Charter* rights, or the institutional interest of the courts themselves in having the perspective of the disadvantaged to inform decision-making and effective use of judicial resources. The approach suggested by LEAF and CDRC is intended to broaden the category of those who receive standing as of right, so that the disadvantaged are no longer reliant largely on judicial discretion for access to the courts in *Charter* cases.

41. Whether or not this Honourable Court determines that equality concerns mandate a change to the basis for as of right standing, LEAF and CDRC argue that the principles governing the exercise of judicial discretion with respect to "public interest" standing are in need of re-evaluation. The present formulation fails to take into account the barriers to access which affect the disadvantaged, and the important public interest in ensuring real access to justice.

a) <u>Private, As of Right, Standing</u>

42. LEAF and CDRC submit that this Honourable Court should adopt an approach to "private" standing in constitutional cases which is more in keeping with the *Charter's* remedial purposes. What is necessary to arrive at such an interpretation may be seen by reviewing some of the elements of the present approach to "as of right" standing.

43. For example, it was held in *Finlay* that a strong, indirect, financial interest in the interrelationship between the Canada Assistance Plan and a provincial welfare program did not entitle a recipient under that provincial program to allege, as of right, that continued payments by Canada to the province were illegal because of the province's alleged breach of conditions under the Plan. He was required to seek "public interest" standing.

44. *Finlay* was not a constitutional case. However, the approach in *Finlay* may make it necessary to observe that, in the constitutional context, a test of private entitlement to sue that does not acknowledge the more extended or systemic effects of action or legislation is

inconsistent with jurisprudence holding that such effects of legislation or actions, including less direct effects, can give rise to a claim for a violation of equality rights.

45. Similarly, strict insistence on the violation of a private right of the sort that can be vindicated in a tort action is inappropriate in the equality and anti-discrimination context because of the decision of this Court that the remedy for discrimination lies not in tort but rather in complaints under human rights legislation.

Seneca College of Applied Arts & Technology v. *Bhadauria*, [1981] 2 S.C.R. 181

46. The criteria for determining whether a right is private, and not public, take as the paradigm of a private right one that accrues to an individual. They thus fail to accommodate the concept of a group right or a right with a systemic dimension, or an individual claim on a group-based ground. Such a right is broader than an individual right but is more specific than a general public interest. To use such criteria for standing to bring court actions contrasts with the approach of human rights legislation, which conceptually and procedurally accommodates the possibility of group wrongs, group complaints, and group remedies.

Action Travail des Femmes, supra

Saskatchewan Human Rights Code, Part IV, s. 27

47. It may thus be seen that the traditional test for as of right standing in a public law matter emphasizes the individual over the group or group-based right, and direct harm rather than indirect harm. This focus entails several consequences that are inimical to the full realization of *Charter* rights for the disadvantaged.

48. In order fully to understand the nature of the barriers to access which are imposed by a standing test based on direct individual harm, it is important to acknowledge that the circumstances of the disadvantaged include social, economic and physical vulnerability, isolation, and fear of persons in authority or of sustained public visibility. Those conditions make it all the more difficult for them to think of confronting in litigation a governmental authority upon whose goodwill they may depend for income, chances of improvement, or even (as in the case of refugees) their very lives. The ways in which people experience their disadvantage vary from person to person, depending on individual characteristics and circumstances, and on the number and range of disadvantaging characteristics to which each is subject. Yet to focus only on the individual may be to miss the fundamental systemic problems that affect all: to "privatize" systemic disadvantage, locating it in each individual and her or his ability to cope with disadvantaging conditions, may well be to put that systemic disadvantage beyond detection and cure.

49. These characteristics of the disadvantaged make individual standing, based on direct harm, particularly inappropriate as the sole approach to the determination of as of right standing in *Charter* cases, as is illustrated by the following points.

50. In order to obtain standing under the "private rights" test as presently interpreted, it is necessary for the individual to show that he or she possesses the characteristic of disadvantage relied upon. Self-identification, in itself, may pose significant risks. As well, individual members of disadvantaged groups who advance equality claims on behalf of the group may be subject to backlash based on bigotry toward the group as a whole. Group standing to reinforce the equality rights of the disadvantaged would reduce individual members' visibility and vulnerability to reprisal and would offer at the same time the support of others who share the same risks and collective interests. In this fashion, the sharing of the disadvantage and the action taken together about that disadvantage can provide a positive, empowering experience. It includes the individual rather than excludes her.

Action Travail des Femmes, supra

51. Even where an individual is prepared to come forward initially, the nature of the power relations in equality litigation suggests that the action may not proceed to the stage where there is a final articulation of principle grounded in the group-based nature of systemic inequality. Many *Charter* litigants may find the advantages of an individual settlement overwhelming and irresistible, given the precariousness of their social position. The government may find strong inducement to compromise an individual case (in order to save the cost of litigation and) avoid the determination of a constitutional issue. The discretionary nature of government action may allow it to compromise many individual cases in this manner without establishing a new norm or constitutional precedent.

Quebec Multi-Ethnic Association for the Integration of Handicapped People, *Minorité Invisible Minority*, (1990, Vol. 1, No. 4) at 5-12, 14-15

"Equality Rights: Three Years Later", *Annual Report of the Court Challenges Program*, 1987-88, at 19-20

52. An individual's case, pursued by an individual, may preclude the complex texture of the systemic harm which affects many individuals from being fully described to the court. While a court may be prepared to receive systemic arguments on the part of an individual, that person may not have the resources to make them, even if she sees the need to do so. Where a case is lost because the systemic arguments are not made, the loss affects all the disadvantaged, not just that individual. Even where an individual wins her own case on an individual basis, inattention to the systemic arguments may produce a decision that actually has a negative effect on the group.

53. Even a series of individual actions may fail to reflect all of the different ways in which a limitation or exclusion can disadvantage a group. Persons with different disabilities, or multiple disabilities, may be affected differently by any given instance of discrimination. For example, people who are blind and people who are deaf or hard of hearing experience differently their lack of access to government information services. Who can best address the barriers, an individual with a particular disability or a group of persons with various disabilities?

54. Persons identified by more than one of the grounds enumerated in section 15 or closely akin grounds (e.g. poverty) may suffer differential effects. It will be necessary for the court to consider what Razack calls "the indivisibility and simultaneity of disadvantages" (supra, paragraph 27).

55. Similarly, in terms of remedy, an individual action may fall short of addressing the real harm. An individual challenging a prohibition or limitation based on disability, for example, may be able to argue that the limitation should not apply to her individual circumstances rather than arguing that the limitation should be struck down because it discriminates generally against the group to which she belongs. The exceptional individual with a disability, who can bring herself very close to the norm of ability set out in the rule, thus achieves a remedy confined to exceptional circumstances. Even a series of such individual cases, producing solutions for exceptional individuals, would not address the general exclusion of disabled persons embodied in the law.

56. In any particular case, the identity and interest of the plaintiff may determine which of these approaches will be taken. In *Clark v. Clark*, for example, the father of a man with a mental disability sought a guardianship order to prevent his son from deciding where to live. Justin Clark resisted the application for guardianship by successfully demonstrating his own capacity to make decisions. While no *Charter* arguments were advanced, the case demonstrates how an individual approach may promote that person's interests while, at the same time, ignore a more general challenge to guardianship provisions that remove decision making capacity from all those with mental disability and are thus discriminatory. Who can initiate a case regarding the rights of people with mental disabilities can thus be seen to have a powerful impact on the way the issues are framed, and on the outcome.

Clark v. Clark (1982), 40 O.R. (2d) 383 (Co. Ct.)

57. For all these reasons, LEAF and CDRC outline below, at paragraphs 73 to 80, an approach that would extend as-of-right standing to groups as well as to individuals. This approach would acknowledge as an appropriate basis for standing not just direct harms, but also the extended or systemic effects of action or legislation. It is submitted that to

encompass the more diffuse causality characteristic of discrimination is appropriate in light of this Honourable Court's decision in *Andrews*.

b) "Public Interest" Standing

58. The three criteria for public interest standing are that (1) there must be a serious issue; (2) the plaintiff must have a genuine interest as a citizen in the validity of the legislation; and (3) there must be no other reasonable and effective manner in which the issue may be brought before the court. In *Canadian Council of Churches*, Mr. Justice MacGuigan observes that the first two of these criteria address policy concerns about allocation of scarce judicial resources and the need to screen out the mere busybody. The third criterion attends to the need to ensure that "the court should have the benefit of the contending points of view of those most directly affected" by the laws at issue. The policy consideration said to underlie all of the standing requirements is the maintenance of an appropriate role for the courts and their relationship to other branches of government - the issue of justiciability. Mr. Justice McGuigan did not regard justiciability as being at issue in this case, and indeed remarked that it is seldom in issue in constitutional cases.

supra, paragraph 12

Canadian Council of Churches, supra at 542

59. LEAF and CDRC urge that courts avoid the perspective of the advantaged when interpreting the requirement that there be a serious issue. The disadvantaged cannot take for granted that their citizenship and dignity will be respected; they are subject to deprivations of both that would seldom come to the notice of a person in a more advantaged position. For Michael Huck the ability to choose the place in the theatre from which he could view a movie in his wheelchair had an important bearing on his dignity and autonomy. As this Honourable Court has recognized, this respect for the disadvantaged would mean that the negative effects of hate propaganda, for example, would not be characterized as mere "psychological pinpricks", that exclusions of Roman Catholics and Jews from opportunities would not be described as "unamiable" and "undesirable" but not contrary to public policy, and that sexual assault would not be compared to "stealing a goodnight kiss".

Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission and Huck, [1985] 3 W.W.R. 717 (Sask. C.A.); Leave to appeal denied June 3, 1985, 60 N.R. 240 (S.C.C.) at 744-45

R. v. Keegstra (1988), 87 A.R. 177 at 193 (C.A.), reversed at [1991] 2 W.W.R. 1

The Canada Trust Company (Leonard Foundation) v. OHRC (1987), 61 O.R. (2d) 75 at 93 (H.C.)

Chase v. The Queen (1984), 40 C.R. (3d) 282 at 287 (N.B.C.A.), reversed at [1987] 2 S.C.R. 293

60. The application of the requirement to demonstrate that there is "no other reasonable and effective manner" in which the issue may be brought before the court is a major barrier to access to the courts on behalf of groups animated by the interests of the disadvantaged.

61. Application of this standard has involved a review of the impugned legislation to determine whose interests are affected by it. Those interests are then, notionally, arranged in concentric circles, at the centre of which are the interests that would give rise to private standing, namely direct harm to traditional interests. Radiating outward are interests which progressively decline in the degree to which they approximate the traditional test for as of right standing. A claimant to public interest standing located in one of the outer rings will fail if the court regards it as more appropriate, or possible, for one in an inner ring to prosecute the case, even if there is no evidence that such a case will come forward at the instigation of the preferred plaintiff.

62. This whole assessment is predicated on the "direct harm" model described above at paragraphs 8 to 11. It favours those whose claim to standing relies most clearly on direct harm in the sense of injuries of the sort traditionally acknowledged in the legal system, namely harm to property, risk of criminal prosecution, or deprivation of procedural legal rights. Those relying on more extended or complex causality of harm or on interests, however direct, more recently brought within the purview of legal analysis will fail to achieve public interest standing if a candidate with a more traditional profile is present, or can be envisioned. Whether such a preferred candidate will even be able to prosecute his or her case to a conclusion, and what arguments she or he is equipped to make concerning group aspects of the disadvantage, do not typically figure in the analysis.

63. Application of this approach works a hardship on the disadvantaged. For example, it has meant that a well-respected group with a long history of advocating women's procreative choice was denied standing to challenge provincial restrictions on the availability of abortion. Even though the majority of the Court acknowledged that CARAL had an "unquestioned direct interest" in the subject matter of the litigation, it concluded that litigation by an individual physician facing personal sanctions under the law would be a more "reasonable and effective manner" of bringing the constitutional challenge. This decision subsumed the adverse systemic effects on all women's equality of restrictions on access to abortion under an individual male accused's conception of the constitutional interests at stake. It thereby not only affirmed the traditional unequal power relations, often paternalistic, between a doctor (usually male) and patients or potential patients (in this case female), but also legitimated that

paternalism by which the privileged have so long presumed and been accorded standing to speak on behalf of the disadvantaged.

> *Candian Abortion Rights Action League (C.A.R.A.L.) v. A.-G. N.S.* (1990), 69 D.L.R. (4th) 241, at 251 (N.S.C.A)

64. In discounting the readiness and appropriateness of ensuring access of the disadvantaged to articulate and pursue their constitutional interests themselves, the Court failed to recognize and give effect to the democratic principles of self-determination which so many *Charter* guarantees promise to protect and promote. Relegating to the constitutional sidelines a group particularly well-situated to inform judicial decision making with the experience-based perspective of the disadvantaged not only undermines the community-building and autonomy interests essential to full equality before and under the law, it also deprives the Court of the most reasonable and effective voice and evidentiary basis for determining substantive equality claims.

65. It is important that the courts be aware of those factors which might keep disadvantaged individuals from initiating a case. While the court should show appropriate respect for the position of those disadvantaged who have a real capacity to pursue their rights in court, whether because of private means or group organization, it should not displace an appropriate claimant to public interest standing simply on the basis of assumptions or speculation concerning the ability of another individual or group to proceed.

66. In the CARAL case, the physician was at least prepared to bring the challenge for which the court had notionally given him responsibility. In the instant case, the Federal Court of Appeal has assigned to imaginary individual refugees (or to a "group" of refugee claimants it seems to assume exists but never describes) the responsibility for challenging most of the refugee provisions of the *Immigration Act*. It has done so without regard to any showing of their ability or readiness to do so, and on the assumption that a series of randomly-timed challenges to various provisions can effectively put before the Court the issues proposed to be canvassed by the Council, with a comparable evidentiary base. The Court's observation that there are challenges to certain (unspecified) provisions coming forward daily (at various unspecified stages of the review process) is no assurance that the cases will ever reach adjudication. LEAF and CDRC submit that it is unlikely that a vulnerable refugee claimant would refuse a settlement offered by the government simply in order to pursue the point of public law underlying the claim.

> *Canadian Council of Churches, supra* at 552-553

67. In his dissenting reasons in *CARAL*, the Chief Justice of Nova Scotia offers very important insights into why it is unsatisfactory to assume that the voice of the accused will invariably be the "reasonable and effective" way of bringing forward constitutional issues:

> Mr. Justice Matthews has placed much emphasis on the fact that between the decision in this matter, in chambers, and the hearing of this appeal, Dr. Morgentaler has been charged with contravening the Act. He is persuaded that Dr. Morgentaler is more directly affected by the legislation and that issues, identical to those which the appellant seeks to have decided, will be brought before the court. That the action against Dr. Morgentaler will not proceed is, in his opinion, a matter of pure speculation. With respect, I am unable to agree. There is always the possibility that Dr. Morgentaler will lose his interest in the abortion issue and plead guilty. It is possible that the Crown may not proceed with its case. It is possible that Dr. Morgentaler may die before the proceedings wind their way through the court system. It is possible that there may be a change of counsel so that no longer will there be the same counsel representing both C.A.R.A.L. and Dr. Morgentaler. If any of these events should come to pass, C.A.R.A.L. will be denied access, unnecessarily, to the judicial system.
>
> *CARAL, supra*, at 245-246

68. Nor does the usual way of applying the "no other reasonable and effective manner" test take adequate account of the fact that different potential claimants to standing may have interests that are opposed to one another. In the *Borowski* case, for example, Mr. Justice Martland stated that a doctor "protected" by section 251 and a woman desirous of obtaining an abortion would have no reason to attack the protections against criminal liability which Mr. Borowski sought to impugn. Yet a doctor, or a woman, may well have wished to challenge the protections for different reasons than those advanced by Mr. Borowski -- namely because they were too restrictive.

Borowski, supra at 596-597 (per Martland, J.)

69. The overall effect of a restrictive approach to public interest standing may be to extend the tenure of laws, or of aspects of laws, which are unconstitutional. In the instant case, for example, the sections of the *Immigration Act* which are left to be challenged by individual refugee claimants will endure until they are successfully challenged. There is no mechanism in our law for redressing the wrongs of those who suffer adverse consequences because of those laws in the meantime. The refugee case is a particularly serious example of this common problem, since unsuccessful refugee claimants will likely be lost to view once they are expelled from Canada. Nor, given the effective exclusion of the disadvantaged from representation in legislatures, is there a realistic hope of redressing denials of rights through the legislative approach.

70. A strict interpretation of public interest standing has proceeded, in large part, from the view that the Attorney-General is the appropriate guardian of public rights. This view originates in the law with respect to public nuisance and analogous areas. In the *Charter* context, this assumption is inappropriate, since the Attorney-General as a member of Cabinet is representative of majoritarian interests and is generally likely to uphold the legislation being

challenged. The Attorney-General may not always have an interest directly opposed to that of equality-seekers; in some cases Attorneys-General, while not bound to do so, may defend equality-promoting legislation. However, it cannot be said that there will necessarily be an identity of interest between the Attorney-General and the equality-seeker.

> Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto, 1989), at 39-51

71. *Charter* cases differ as well from division of powers cases, in which all the rights at issue are governmental rights distributed by sections 91 and 92 of the *Constitution Act, 1867* and comparable provisions. In that context, rights for individuals (or groups) arise derivatively, usually because the wrong level of government has purported to act in a particular situation or because no government is entitled to act. When dealing in this way with rights which are essentially governmental, it may be appropriate to canvass whether a government could, or should, be required to act before considering whether other interests may come forward. In the *Charter* context, it is not appropriate always to give priority to the possibility of governmental action, because the impugned legislation will likely represent an act of the state against the rights of the individual, or the attempt by the state to reconcile or compromise the competing rights of different groups. The only state interest which can be said to be at issue is the state's ability under section 1 of the *Charter* to limit or to balance rights. It cannot be expected that the state will have the same interest in the vindication of any particular *Charter* right as will the parties asserting that right.

> Hogg, *supra* at 635-38
>
> *Irwin Toy, supra* at 993-994

D. A New Approach to the Law of Standing in Constitutional Cases

72. LEAF and CDRC submit that the shortcomings of the traditional tests for both as of right and public interest standing do not survive scrutiny under the equality guarantees of the *Charter* and the equality principles inherent in the rule of law in a democratic society. The following new approaches are proposed.

a) As of Right Standing

73. As outlined above at paragraph 57, LEAF and CDRC propose that as of right standing to challenge violations of the *Charter* should be available to groups of disadvantaged persons on their collective representatives for remedies to address both the direct and more far-reaching systemic effects of legislation. In this way, access to the *Charter* for the disadvantaged would parallel access to the human rights codes with which the equality guarantees of the *Charter* are so closely allied. This approach to as of right standing would

also recognize the demonstrated capacity of such groups to mediate, mobilize, and give voice to the concerns of the disadvantaged themselves.

Andrews, supra at 175

Equality Rights Three Years Later, at 14-15

74. Under this approach, disadvantaged persons could sue on a group basis or through a collective representative to vindicate rights under the equality guarantees and other sections of the *Charter.* The interveners submit that existing case law concerning the standing of non-profit corporations in the context of the "public interest" standing test suggests that such group-oriented actions should be permitted to non-profit corporations established by the disadvantaged, as well as to unincorporated entities or groups of plaintiffs.

Energy Probe v. Canada (A.G.) (1989), 68 O.R. (2d) 449 (C.A.)

Canadian Council of Churches, supra

CARAL, supra, 244-45

Federated Anti-Poverty Groups of B.C., Karen Farrell et al. v. Attorney-General of B.C. (unreported, B.C.S.C. - 0713/91), May 31, 1991 (Parrett, J.) at 31-36

75. This approach would mean that a group of disadvantaged persons, or a non-profit corporation established by such a group, could proceed on the same footing vis-à-vis standing to sue as could an individual who is adversely affected, directly or indirectly, by a denial of equality or other *Charter* violation. In order to have such standing, the group would have to be comprised primarily of those characterized by historic and continuing social disadvantage, and have among its objects the promotion of their equality. In any particular case, the group must demonstrate a proximity of connection between the issues raised and the disadvantage(s) characterizing those for whom it speaks. This standard, which addresses the requirement of concreteness, would mean that those whose lives would, or could, be affected by the outcome of the litigation would secure standing as of right, while those with primarily an abstract, academic or general interest in an issue would require an exercise of judicial discretion to grant them standing.

76. A group approach to standing raises the question of whether, or how, to examine the question of whether the harm alleged is "speculative". The Federal Court of Appeal in this case refused to allow the plaintiff to proceed with several claims it regarded as too speculative. While respecting, and indeed proposing, a concreteness requirement in the context of actions to enforce equality rights, LEAF and CDRC point out that the issue of speculative harm poses special problems in this context. A requirement that all persons in the group have present damage, or (as in class actions) exactly the same damage, would

prevent the court from being able to grasp the true dimensions of the inequality. A requirement that only those in present danger may bring actions fails to recognize that this immediate peril may be affecting someone already so vulnerable that she or he simply does not have the resources to mount an emergency court action, with its short deadlines, procedural difficulties and high resource demands.

Brooks, supra, at 1248-49

Tremblay v. Daigle, [1989] 2 S.C.R. 530, at 537-538

77. In some cases now arising under the *Charter*, courts have recognized that there is no need for an applicant to await the actual violation of her or his *Charter* rights before taking action to protect them. Such an approach is particularly appropriate where legislation can have short- and long-term consequences that manifest its discriminatory effect in different ways, and where the persisting disadvantage of second class status is embedded in legislation in a way that makes it a concomitant of daily life at all times, not just when acute threat (e.g. deportation) presents itself. Only when the various effects of legislation may be encompassed in one action is it possible to access the depth and extent of the *Charter* violation. Only a matter brought in advance of imminent peril may afford an opportunity for the reflection and comprehensiveness needed to address the true nature of the violation.

R. v. Vermette, [1988] 1 S.C.R. 985 at 992

Operation Dismantle v. R., [1985] 1 S.C.R. 441

Re Praisoody (1990), 1 O.R. (3d) 606 (Gen. Div.) at 623-25

Tyler v. M.N.R. (1990), 91 D.T.C. 5022 at 5028-29 (F.C.A.)

Black and Smith, supra at 565-67

O'Malley, supra

Huck, supra

78. The case of *Evans v. the Queen* illustrates well the problems for the individual which arise when systemic inequality is left to manifest itself, and be challenged, in an individual case. The appellant, a young man with a mental disability, was arrested on a narcotics charge, denied his right to counsel, and interviewed at length about the circumstances of two murders. During the interrogation, the police falsely suggested to him that evidence linking him to one of the murders had been found at the site. Although he had initially told the officers he could not understand the warning about his rights, and protested his innocence on several occasions, he ultimately signed a confession because "they wouldn't give me a rest until I confessed". The confession was the sole basis of his conviction. Incarcerated for

several years, he was ultimately successful in having the conviction overturned by this Honourable Court. A prospective challenge to such discriminatory treatment of accused persons with mental disabilities might have spared this accused, and others, such an ordeal.

> *Evans v. The Queen*, Supreme Court of Canada, unreported, April 18, 1991 (Reasons of Madame Justice McLachlin)

79. It is important to the disadvantaged to be able to challenge such a law prospectively, before all of its potential harms have materialized. Any requirement to accumulate a record of abuses would work a terrible hardship on those whose experiences would form part of that record but who, because of legal and practical barriers, could never receive retroactive redress for the harm they have endured. This Court has recognized that a person or corporation charged with an offence may raise as a defence the constitutionality of the legislation, whether or not any of its interests are, or could be, directly harmed by the alleged constitutional violation. The interveners submit that the systemic concerns for the constitutionality of legislation which underlie this principle also direct that not all potential harms of a piece of legislation need have materialized before they can be involved in a challenge to the constitutional validity of such legislation.

> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295

80. Recognizing this new type of as of right standing in relation to *Charter* actions would have several consequences of benefit to the litigation process itself. For courts, group claims, by consolidating or supplanting piecemeal and discrete individual claims, would more efficiently allocate scarce judicial resources. Equally, consolidation would be less taxing on the scarce human and financial resources of equality-seeking groups who simply cannot afford to sponsor multiple individual claims. Finally, group claims would spare individual counsel "reinventing the wheel" for individual clients where resources have already been developed by groups advancing group claims.

b) <u>"Public Interest" Standing</u>

81. Broadening the approach to as of right standing in this fashion would ensure that groups advancing the claims of the disadvantaged would have more secure access to the courts; they would less frequently have to rely on judicial discretion for their standing to sue under the *Charter*.

82. It is nonetheless, necessary to re-examine the approach to public interest standing. There may well be groups or individuals who cannot satisfy the criteria set out above at paragraphs 73 to 75 for as of right standing. These will be advancing claims for "public interest" standing. If this Honourable Court declines to broaden direct access to court on

behalf of the disadvantaged, the re-examination of the so-called "public interest" standing test becomes all the more important. In this context in particular, it is crucial to bear in mind that there is a significant public interest, in the truest sense of that phrase, in promoting access to courts, and thus to the means to enforce their constitutional rights, on behalf of the disadvantaged. Without an avenue to seek judicial redress for violation of their rights, the disadvantaged have only paper rights, without remedy, a situation fundamentally at odds with our sense of justice.

83. It is accordingly submitted that this Honourable Court should take the following view of public interest standing. Firstly, it should include at the centre of its analysis not only the traditional private rights which may be claimed by individuals in the context of criminal or property law, but also the group rights concept elaborated above at paragraphs 74 to 79. In analyzing the standing of public interest claimants, the Court should examine the seriousness of the issues raised and the degree of connection between the issues raised by the group and the grounds of its disadvantage, as outlined in paragraph 75. However, the third branch of the test should address, not the question of "no other reasonable and effective alternative", as that is presently dealt with, but rather the policy issue said to underlie that question, namely, would the proposed standing ensure that the court has the benefit of the views of those affected by the law. In this connection, as in the area of "private" standing, we submit that the requirement of direct effect is too narrow; a public interest standing test should also take account of the systemic and less direct effects of legislation.

84. In applying the third branch of the test, this Court should consider the extent to which the claimant to public interest standing is animated by the concerns of the disadvantaged to advance their own interests, and the likelihood that the serious questions raised by the proposed litigation would be addressed, at all, or as well, by any other possible or present claimant. Where inquiry discloses that there is not at this point any other person or party realistically able, willing or present to proceed with the litigation, concern for the material likelihood that the serious questions raised will be addressed at all should incline the Court to the granting of standing, in view of the harm that could be done by prolongation of unconstitutional behaviour. In assessing whether it is realistic to expect alternative litigants, the limitations of individual litigants described above should be borne in mind. In this context, as in the case of our proposals for direct standing, the Court should exhibit reasonable tolerance for "speculative" issues as long as the stake in the outcome of the person advancing them is more than academic.

c) **Diversity**

85. In its reasons, the Federal Court of Appeal addressed the plaintiff's argument that its statement of claim constituted an "internally integrated attack on the legislation such as none of the directly affected parties would be able to mount", particularly since it is able to proceed by action rather than by administrative review and thus build a factual base for its assertions. The Court rejected the argument on the basis of a point-by-point examination of the statement of claim, holding that "far from being a tightly woven case of meritorious argument", the statement of claim was " a loosely assembled congeries of separate assertions, many entirely lacking in merit".

Canadian Council of Churches, supra at 553, 556

86. The interveners submit that any attempt to describe the effects of disadvantage will, of necessity, address different circumstances and situations, because legislation affects different disadvantaged persons in different ways depending on their circumstances. This was recognized by this Court in its landmark *Andrews* decision, and again in *Brooks* and *Janzen*, when it held that it was not necessary for all women to be affected in order to characterize something as sex discrimination. In assessing the validity of a claim to standing on either a group-based "private" basis, or a "public interest" basis, then, the court should recognize this diversity.

E. **Conclusion**

87. On the systemic level, the existing legal model of standing tacitly presupposes that interest groups will emerge, organize, articulate all valid interests, and balance each other, creating by their interplay "the public interest". Experience has shown that this dynamic as often magnifies the power of powerful and established interests, exaggerates the voice of the advantaged in agenda-setting and policy formulation, and thwarts the development of responsive law. The rectification of the role of standing proposed herein mobilizes emerging *Charter* values -- with emphasis on equality before the law under this Court's substantive interpretation of s. 15 -- with the aim of increasing the democratic accountability of government and enhancing the rule of law.

PART IV - NATURE OF RELIEF REQUESTED

88. LEAF and CDRC respectfully request that the order of the learned motions judge granting standing to the Canadian Council of Churches be restored, as that order is consistent both with the approach to as of right standing articulated above, and the view taken herein concerning public interest standing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Mary Eberts

Dulcie McCallum

Dulcie McCallum
Of counsel for the interveners

APPENDIX "A" - LIST OF CASES

1. *Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607
2. *R. v. Borowski*, [1981] 2 S.C.R. 575 at 576 (per Laskin C.J. dissenting)
3. *Canadian Council of Churches v. Canada*, [1990] 2 F.C. 534, at 541
4. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
5. *Janzen* v. *Platy Enterprises*, [1989] 1 S.C.R. 1252
6. *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219
7. *Action Travail des Femmes* v. *C.N.R.*, [1987] 1 S.C.R. 1114
8. *R.* v. *Turpin*, [1989] 1 S.C.R. 1296
9. *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536
10. *Swain v. The Queen* (S.C.C., unreported, May 2, 1991). Reasons of Lamer, C.J.
11. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
12. *R. v. Oakes*, [1986] 1 S.C.R. 103
13. *B.C.G.E.U. v. A.G.B.C.*, [1982] 2 S.C.R. 214
14. *Canadian Disability Rights Council v. Canada* (1988), 21 F.T.R. 268 (F.C.T.D.)
15. *Dodds* v. *Murphy* (July 11, 1989), Toronto 1566/89 (S.C. Ont.) [unreported] (Gray, J.)
16. *Zylberberg v. Sudbury Board of Education (Director) (1988)*, 65 O.R. (2d) (C.A.)
17. *R. v. Hess*, [1990] 2 S.C.R. 906
18. *R.* v. *Keegstra*, [1991] 2 W.W.R. 1

19. *Phillips v. Nova Scotia (Social Assistance Appeal Board)* (1986), 34 D.L.R. (4th) 633 (N.S.C.A.)

20. *Athabasca Tribal Council v. Amoco Canada Petroleum Company Ltd.*, [1981] 1 S.C.R. 699

21. *Metropolitan Toronto Condominium Corporation Number 624 v. Ramdial and Salmon* (January 29, 1988) Toronto M159582/88 (District Court, unreported)

22. *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713

23. *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 1 O.R. (3d) 416 (Div. Ct.) (Leave to Appeal to C.A. denied, Feb. 4, 1991)

24. *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927

25. *Jones v. Van Zandt*, 45 U.S. (5 How.) 215 (1847)

26. *Ableman v. Booth*, 62, U.S. (21 How.) 506 (1859)

27. *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813)

28. *Scott v. Negro Ben*, 10 U.S. (6 Cranch) 3 (1810)

29. *Re Drummond Wren*, [1945] O.R. 788 (Chambers)

30. *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181

31. *Clark v. Clark* (1982), 40 O.R. (2d) 383 (Co. Ct.)

32. *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission and Huck*, [1985] 3 W.W.R. 717 (Sask. C.A.); Leave to appeal denied June 3, 1985, 60 N.R. 240 (S.C.C.)

33. *R. v. Keegstra* (1988), 87 A.R. 177 at 193 (C.A.), reversed at [1991] 2W.W.R. 1

34. *The Canada Trust Company (Leonard Foundation) v. OHRC* (1987), 61 O.R. (2d) 75 (H.C.)

35. *Chase v. The Queen* (1984), 40 C.R. (3d) 282 at 287 (N.B.C.A.), reversed at [1987] 2 S.C.R. 293

36. *Candian Abortion Rights Action League (C.A.R.A.L.) v. A.-G. N.S.* (1990), 69 D.L.R. (4th) 241 (N.S.C.A)

37. *Energy Probe v. Canada (A.G.)* (1989), 68 O.R. (2d) 449 (C.A.)

38. *Federated Anti-Poverty Groups of B.C., Karen Farrell et al. v. Attorney-General of B.C.* (unreported, B.C.S.C. - 0713/91), May 31, 1991 (Parrett, J.)

39. *Tremblay v. Daigle*, [1989] 2 S.C.R. 530

40. *R. v. Vermette*, [1988] 1 S.C.R. 985

41. *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441

42. *Re Praisoody* (1990), 1 O.R. (3d) 606 (Gen. Div.)

43. *Tyler v. M.N.R.* (1990), 91 D.T.C. 5022 (F.C.A.)

44. *Evans v. The Queen*, Supreme Court of Canada, unreported, April 18, 1991 (Reasons of Madame Justice McLachlin)

45. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295

APPENDIX "B": LIST OF ARTICLES

1. William Black and Lynn Smith, "The Equality Rights" in Beaudouin and Ratushny, *The Canadian Charter of Rights and Freedoms* (2d ed.) (Toronto: Carswell, 1989)

2. Raoul Colinvaux, *The Law of Insurance* (5th ed.) London: (Sweet & Maxwell, 1984)

3. Peter Hogg *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985)

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STATUTES

Constitution Act, 1982:
Part I, Canadian Charter of Rights and Freedoms

Constitution Act, 1982

Schedule B to Canada Act 1982 (U.K.)

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit:

Garantie des droits et libertés

Droits et libertés au Canada

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Droits démocratiques

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Mandat maximal des assemblées

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.

Equality Rights

Droits à l'égalité

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Programmes de promotion sociale

Interpretation.

2. (1.) In this Act, unless the context otherwise requires:— Interpretation of expressions.

"Ballot" or "vote" means a ballot-paper which has been detached from the counterfoil, and has been furnished to a voter, and has been marked and deposited as a vote by the voter:

"Ballot-paper" means a ballot-paper as prepared in accordance with the provisions of this Act:

"Ballot-paper account" shall have the meaning assigned to that expression in subsection (8) of section 115:

"Cancelled ballot-paper" shall have the meaning assigned to that expression in section 104:

"Candidate" means any person elected to serve in the Legislature at an election, and any person who is nominated as a candidate at an election, pursuant to the provisions of section 57:

"Chinese" means any native of the Chinese Republic or its dependencies not born of British parents, and shall include any person of the Chinese race, naturalized or not:

"Corrupt practice" or "corrupt practices" means bribery, treating, illegal payments, and undue influence, or any of such offences as defined by this or any Act of the Legislature, or any other law in force in this Province:

"Court" means the Supreme Court:

"Election" means the election of a member or members to serve in the Legislative Assembly:

"Elector" or "voter" means any person who is, or who claims to be, registered as an elector in the list of voters for any electoral district; or who is, or claims to be, entitled to vote at any election:

"Final count" shall have the meaning assigned to that expression in section 116:

"Hindu" means any native of India not born of Anglo-Saxon parents, and shall include any such person whether a British subject or not:

"Indian" means any person of pure North American Indian blood, and any person of North American Indian extraction having his home upon or within the confines of an Indian reserve:

"Japanese" means any native of the Japanese Empire or its dependencies not born of British parents, and shall include any person wholly or partly of the Japanese race, even if British by birth or naturalization:

"List of votes marked by the Deputy Returning Officer" shall have the meaning assigned to that expression in section 103:

"Nomination-day" shall have the meaning assigned to that expression in section 37:

Amends s. 2.

5. Section 2 is amended by striking out the definitions of Chinese," " Hindu," and " personal expenses."

Further amends s. 2.

6. Section 2 is further amended by inserting after the definition of " candidate " the following definition:—

" ' Closing-day ' means the day that is twenty-one clear days before nomination-day."

Further amends s. 2.

7. Section 2 is further amended by inserting after the definition of " Court " the following definition:—

" ' Doukhobor,' ' Hutterite,' or ' Mennonite ' means a person, male or female, exempted or entitled to claim exemption or who on production of any certificate might have become or would now be entitled to claim exemption from military service by reason of the Order of the Governor in Council of August thirteenth, 1873, or the Order of the Governor in Council of December sixth, 1898, or the Order of the Governor in Council of August twelfth, 1899; and every descendant of any such person, whether born in the Province or elsewhere."

Further amends s. 2.

8. Section 2 is further amended by striking out the words " not born of British parents, and shall include " in the definition of " Japanese," and substituting " who is of Japanese blood, and includes."

Repeals s. 3.

9. Section 3 is repealed.

Amends s. 4.

10. Section 4 is amended by inserting after " natural-born," in the second line of clause (*b*) of subsection (1). the words " Canadian citizen or."

Further amends s. 4.

11. Section 4 is further amended by striking out clause (*c*) of subsection (1), and substituting the following as clauses (*c*) and (*d*):

"(*c.*) Has resided in the Dominion for twelve months, and in the Province for six months immediately preceding the date of his application for registration as a voter; and

"(*d.*) Is a resident of the electoral district in which he seeks registration as a voter at the date of his making application under this Act to be registered as a voter,—"

Further amends s. 4.

12. Section 4 is further amended by striking out the words " a Proclamation in Form 10 has been published by the Returning Officer for that electoral district " in the second and third lines of subsection (2), as enacted by section 2 of chapter 26 of the Statutes of 1945.

Saskatchewan Human Rights Code
Part IV, s. 27
(from C.H.R.R. Index and Statutes Volume)

PART IV

COMPLAINTS

Complaints

27(1) Any person who has reasonable grounds for believing that any person has contravened a provision of this Act, or any other Act administered by the commission, in respect of a person or class of persons, may file with the commission a complaint in the form prescribed by the commission. Amended May 19, 1981

27(2) Where a complaint is made by a person, other than the person who it is alleged was dealt with contrary to the provisions of this Act, or any other Act administered by the commission, the commission may refuse to act on the complaint unless the person alleged to be offended against consents.

27(3) Where the commission has reasonable grounds for believing that any person has contravened a provision of this Act, or any other Act administered by the commission, in respect of a person or class of persons, the commission may initiate a complaint.

27(4) Where, at any time, including during the course of any inquiry pursuant to this Act, the commission, or any person designated by the commission, is satisfied that a complaint is without merit, the commission or its designate may dismiss the complaint.

An Act to Amend the Provincial Elections Act, S.B.C. 1945, c-26, s. 2-3

2. Section 4 of the "Provincial Elections Act," being chapter 16 of the Statutes of 1939, is amended by renumbering the present section as subsection (1), and by adding the following as subsection (2):— Amends s. 4.

"(2.) Notwithstanding the provisions of subsection (1), where in any electoral district a Proclamation in Form 10 has been published by the Returning Officer for that electoral district, any person who will reach the full age of twenty-one years before the date set in the Proclamation for the holding of the poll shall, if he is in all respects other than that of age qualified in accordance with subsection (1) and is not disqualified by this Act or by any other law in force in the Province, be entitled to be registered as a voter and, being duly registered as a voter under this Act, shall be entitled to vote at any election."

3. Section 5 is amended by striking out the words "Japanese who served in the Naval, Military, or Air Force of Canada in the Great War" in the third, fourth, and fifth lines of clause (a), and substituting the words "person who has served in the Naval, Military, or Air Force of Canada in the Great War of 1914 to 1918 or in the present War." Amends s. 5.

13. Section 4 is further amended by striking out the words "in the Proclamation" in the fifth line of subsection (2), as enacted by section 2 of chapter 26 of the Statutes of 1945. Further amends s. 4.

14. Section 5 is amended by striking out clauses (*a*), (*b*), (*c*), (*d*) and (*e*), and substituting the following:— Amends s. 5.

"(*a.*) Every Japanese: Provided that the provisions of this clause shall not disqualify or render incompetent to vote any person who has served in the Naval, Military, or Air Force of Canada in any war, and who produces a discharge from such Naval, Military, or Air Force to the Registrar upon applying for registration under this Act and to the Deputy Returning Officer at the time of polling: