

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Respondent)

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

- and -

THE CENTRE FOR FREE EXPRESSION

APPLICANT/PROPOSED INTERVENER

MOTION RECORD OF THE PROPOSED INTERVENER,
THE CENTRE FOR FREE EXPRESSION
(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

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TAB 1

IN THE SUPREME COURT OF CANADA
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(Appellant)

- and -

THE CENTRE FOR FREE OF EXPRESSION

APPLICANT/PROPOSED INTERVENER

**NOTICE OF MOTION OF THE PROPOSED INTERVENER, THE CENTRE FOR
FREE EXPRESSION**

MOTION FOR LEAVE TO INTERVENE

(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that the Centre for Free Expression (hereinafter “CFE”) applies to this Court under Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, for an order:

1. granting CFE leave to intervene in the above appeal on a without costs basis;

2. granting CFE leave to file a factum of no greater length than 10 pages;
3. permitting counsel for CFE to present oral arguments for 10 minutes at the hearing of the above appeal; and
4. such further and other relief as CFE may request or this Honourable Court may grant.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion:

1. The affidavit of James Turk, affirmed on July 22, 2021;
2. Such further and other material as counsel may advise and this Court may permit.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. CFE is a non-partisan research, public education, and advocacy centre that is based in the Faculty of Communication and Design at Ryerson University in Toronto. The objects of CFE include serving as a hub for public education, research and advocacy on free expression and the public's right to seek, receive and share information. It works collaboratively with other academic and national and provincial organizations to promote better understanding of the importance of freedom of expression in democratic society and to advance expressive freedom rights in Canada, and internationally.
2. The present appeal raises important issues that will impact multiple aspects of the right to freedom of expression protected under the *Canadian Charter of Rights and Freedoms*, including the public's right to know, and the promotion of government accountability by ensuring the public's ability to access the courts.

3. CFE is uniquely positioned to provide this Court with a perspective on the meaning and importance of the test for public interest standing, as set out in *Downtown Eastside*,¹ informed by its expertise and advocacy on free expression rights and meaningful civic engagement. CFE has a proven track record as an intervener providing the courts with a distinct and useful perspective on matters relating to free expression and access to justice.
4. CFE has a special and direct interest in the issues raised on this appeal arising from its mandate. In particular, CFE has a demonstrated interest in the broader implications of shifting, narrowing or clarifying the test for public interest standing in public interest litigation.
5. CFE believes that the existing test for public interest standing works to enable members of the public to claim fundamental rights in a “practical and effective way.”²
6. Constitutional interpretation occurs through dialogue between the courts and the legislature. For this to occur, litigants are needed to bring cases forward. Litigation is the primary lever available to members of the public, especially where constitutional compliance by government is contrary to political interests.
7. CFE believes that it is not fair or reasonable to download onto individuals alone the responsibility to challenge government when not all individuals have the means or resources to pursue litigation.

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

² *Downtown Eastside*, at para 31.

8. Public interest litigation promotes civic engagement, democratic accountability, and respect for constitutional rights. It can be used not only to advance individual rights, but also to facilitate the public's right to know, which is an element of freedom of expression under the *Charter*.
9. If granted leave to intervene, CFE proposes to contextualize the test for public interest standing within the established jurisprudence upholding freedom of expression as both a fundamental *Charter* right and an indispensable value in a democratic society. CFE will argue that:
 - a. The test for public interest standing has a direct nexus to free expression in that public interest litigation is a critical tool for promoting and protecting the public's right to equal access to knowledge and to participating and engaging in matters of public importance, including challenging the constitutionality of legislation, pursuing accountability for human rights violations, and obtaining equal access to justice for those whose voices may not otherwise be heard;
 - b. The test for public interest standing should be given a broad and liberal interpretation when a claim pertains to state action and the protection of fundamental rights, given weak internal mechanisms for constitutional accountability; and
 - c. There should be no presumptive preference for individual claims over public interest claims under the third stage of the governing test. A public interest claim is no less valid by virtue of being a public interest claim rather than an individual claim.

10. CFE seeks leave to intervene for the sole purpose of assisting this Court to decide the issues on appeal.
11. The proposed intervention will not cause delay or prejudice to the parties.
12. CFE does not seek costs and asks that it not be liable for costs to any other party in the event it is granted leave to intervene in this appeal.
13. Rules 47 and 55, 56, 57, 59 of the *Rules of the Supreme Court of Canada*.
14. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied upon on the motion:

- i. The Affidavit of James Turk, affirmed on July 22, 2021
- ii. Memorandum of Argument; and
- iii. Such further and other material as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of July, 2021.

for Faisal Bhabha LSO #48232B
Madison Pearlman LSO #78566E

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**Agent for the Respondent,
Council of Canadians with Disabilities**

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

TAB 2

IN THE SUPREME COURT OF CANADA
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COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

AFFIDAVIT OF JAMES L. TURK

(In support of the Motion for Leave to Intervene of the Proposed Intervener, the Centre for Free Expression at Ryerson University)

I, JAMES L. TURK, of the City of Toronto, AFFIRM THAT:

1. I am Director of the Centre for Free Expression at Ryerson University (“CFE”), and as such have personal knowledge of the facts and matters set out in this affidavit.
2. I make this affidavit in support of the motion for leave to intervene in these proceedings brought by CFE.

A. My Background

3. I have been a Distinguished Visiting Scholar at Ryerson University since September 2014 and Director of CFE since March 2015. Prior to that, I was the Executive Director of the Canadian Association of University Teachers (“CAUT”). In that role, I represented the interests of university

faculty and staff and advocated for the protection of academic freedom. Prior to that, I had a lengthy career in the labour movement, having served, among other roles, as executive assistant to the National President of the Canadian Union of Public Employees (“CUPE”), the director of education for the Ontario Federation of Labour, research director for the United Electrical Workers Union of Canada and chair of the Ontario Coalition for Social Justice. For nearly two decades prior to that, I was a sociology professor at the University of Toronto.

4. Throughout my career, I have conducted research about and advocated for all forms of freedom of thought and expression. I have published a number of essays and books on the subject, including:

- Turk, James L., “Universities, the *Charter*, Doug Ford and Campus Free Speech.” *Constitutional Forum* 29, no. 2 (2020): 31-44
- “A manufactured crisis: the Ford government’s troubling free speech mandate” *Academic Matters* (Fall 2018)
- “Suppressing Speech Does Not Lead to Social Justice” *Canadian Diversity* 14, no. 4 (2018) 47-51
- *Academic Freedom in Conflict: The Struggle Over Speech Rights in the University* (Toronto: Lorimer, 2014)
- *Free Speech in Fearful Times: After 9/11 in Canada, the U.S., Australia and Europe*, co-edited with Allan Manson (Toronto: Lorimer, 2007)
- *Disciplining Dissent: The Curbing of Free Expression in Academia and the Media*, co-edited with William Bruneau (Toronto, Lorimer, 2004)

B. The Centre for Free Expression: Background and Mandate

5. CFE was established in 2015. It is a non-partisan research, public education, and advocacy centre that is based in the Faculty of Communication and Design at Ryerson University. The objects of CFE include serving as a hub for public education, research and advocacy on free expression and the public’s right to seek, receive and share information. We maintain a website that is accessible to all and provides a variety of resources on current and ongoing issues relating to free expression. We work collaboratively with other academic, national and provincial organizations to promote better understanding of the importance of freedom of expression in a democratic society and to advance expressive freedom rights in Canada and internationally.

6. CFE is guided by an Advisory Board made up of fifteen prominent Canadians: Faisal Bhabha, Associate Professor, Osgoode Hall Law School; Jamie Cameron, Professor Emeritus, Osgoode Hall Law School; Andrew Clement, Professor Emeritus & Co-Founder, Identity Privacy and Security Institute, Faculty of Information, University of Toronto; Brendan De Caires, Executive Director, PEN Canada; Ryder Gilliland, Founding Partner, DMG Advocates LLP and Past President, Canadian Media Lawyers' Association; David Hughes, Executive Producer, CTV National News; Peter Jacobsen, Partner, WeirFoulds LLP; Meghan McDermott, Senior Staff Counsel and Interim Policy Director, British Columbia Civil Liberties Association; Shelagh Paterson, Executive Director, Ontario Library Association; Toni Samek, Chair at the School of Library and Information Studies, University of Alberta; Robin Sokoloski, Director of Organizational Development, Mass Culture/Mobilisation culturelle; Laura Tribe, Executive Director, OpenMedia; David Walmsley, Editor-in-Chief, *The Globe and Mail*; Vershawn Young, Professor, English Languages & Literature, Communications Arts, University of Waterloo; and Cara Zwibel, Director, Fundamental Freedoms Program, Canadian Civil Liberties Association.

C. CFE's interest in the issues raised by this appeal

7. The Attorney General for British Columbia ("Attorney General") sought this appeal in part because an appropriate understanding of the public interest standing test is a matter of public importance. In particular, the Attorney General has argued that the Court should clarify whether the principles of legality and access to justice are considerations that bear a heavy weight in the analysis of the test. Further, the Attorney General has asked the Court to affirm the importance of there being a concrete factual foundation for the Court to consider when determining public interest standing in cases without an individual plaintiff.

8. The Respondent Council of Canadians with Disabilities ("CCD") asks the Court to uphold the decision of the court below and not to restrict or otherwise interfere with the test for public interest standing established in *Downtown Eastside*.

9. CFE views the *Downtown Eastside* test as protecting interests that align with the mandate of the Centre. We believe that the public interest standing test has a direct nexus to freedom expression. CFE adopts a robust and purposive definition of free expression, which includes the

right of the public to equally access knowledge and participate in public discourse. In turn, access to knowledge and participation in deliberation on matters of public importance include the right to bring matters before courts. Accessing justice – claiming fundamental rights through litigation – is a form of expression.

10. At the same time, we know that access to justice is not enjoyed equally. Not all members of society have the same ability to engage in litigation. CFE believes that public interest standing is an important tool to help mitigate inequality in access to justice. A public interest litigant provides a service to society by taking on a case in which the litigant has no direct, personal stake or interest, but the matter raised will benefit others. For reasons of accessibility and justice, we believe that such a tool should be as broad, robust and flexible as possible. We do not wish to see the Court develop any additional restrictions, or to limit the broadest scope possible under the well-established test.

11. CFE is seeking intervener status in this case as it regards public interest standing as a point of convergence between free expression, equality, and access to justice. Ensuring the public's ability to engage in democratic deliberation through the advancement of constitutional challenges in the courts is a core element of CFE's mandate and advocacy efforts to protect and promote free expression. As such, CFE is keen on ensuring that organizations remain able to advance constitutional challenges to any legislation or state action that threatens fundamental rights and freedoms on behalf of affected members of the public.

12. As an *amicus* of the court, CFE is invested in shedding light on the fact that if the test for public interest standing is to become more stringent, the ability of the public to bring crucial matters to the courts will be inhibited. Free expression in the form of public participation, accountability, and access to justice will be jeopardized.

D. CFE's submissions if allowed to intervene

13. The Constitution declares important – essential – human rights in the *Charter*. However, the protection of *Charter* rights does not naturally flow from our system of political majoritarianism.

14. The government has weak internal mechanisms for constitutional accountability. When the state breaks the law (or exceeds the scope of its constitutional authority), whether through executive action or legislation, the burden of seeking accountability falls not to the courts directly, but to affected individuals and the concerned public to bring the matter to the courts.

15. Courts generally take on a passive role; they do not create cases. Judges do not commence litigation against unjust laws. Registrars do not invite victims to plead their stories. Remedies for constitutional violation are neither self-executing nor delivered without due process. Victims of constitutional human rights violations must *seek* justice to obtain justice. Rights need courts, but Courts, meanwhile, need litigants.

16. The burden of seeking justice for state action that breaches the *Charter* rests with citizens, individually and collectively. Yet not all individuals have the resources or ability to bear this burden on their own. Given this reality, public interest standing is an essential tool for ensuring democratic accountability, by enabling fundamental rights cases that might not otherwise be heard to be litigated.

17. If granted leave to intervene, CFE would make the following submissions:

- (a) The test for public interest standing has a direct nexus to free expression in that public interest litigation is a critical tool for promoting and protecting the public's right to equal access to knowledge and to participating and engaging in matters of public importance, including challenging the constitutionality of legislation, pursuing accountability for human rights violations, and obtaining equal access to justice for those whose voices may not otherwise be heard;
- (b) The test for public interest standing should be given a broad and liberal interpretation when a claim pertains to state action and the protection of

fundamental rights, given weak internal mechanisms for constitutional accountability; and

- (c) There should be no presumptive preference for individual claims over public interest claims under the third stage of the governing test. A public interest claim is no less valid by virtue of being a public interest claim rather than an individual claim.

E. CFE's expertise and contribution to freedom of expression issues

18. Through public education and advocacy, CFE promotes freedom of expression as well as freedom of thought, belief, opinion, and conscience in a variety of forms. In particular, CFE has:

- (a) provided periodic updates on cases related to the interpretation of constitutional expressive freedoms on the CFE blog (www.cfe.ryerson.ca/blog);
- (b) created a searchable, online database; "Freedom of Expression at Work." It contains legal decisions and related interpretative blog posts concerning freedom of expression of employees in the workplace and outside of work;
- (c) published a report, *Chilling Free Expression in Canada* that is based on the results of a survey CFE conducted of 129 Canadian writers and journalists regarding mass surveillance and censorship of activities;
- (d) disseminated a submission on protecting the free expression rights of charities involving extensive research and comprehensive recommendations for policy reform;
- (e) hosted dozens of public events to promote a more informed understanding of free expression and its importance. These events have included, among others:
 - (i) A live teleconference with Edward Snowden, moderated by Anna Maria Tremonti, followed by a panel discussion of journalists' on free expression in the era of mass surveillance
 - (ii) A public talk by Andrew Clement titled "Our State is Watching Us: Mass Surveillance and Free Expression in Canada after Snowden"

- (iii) A public conference titled “Flying Blind – Limits on the Public’s Ability to Know” in which a dozen experts addressed interference with the creation of information, limitations on access to information, restrictions on the dissemination of information, and what can be done to enhance the public’s right to know. Speakers included the Information Commissioner of Canada, the former Chief Statistician of Canada, several of Canada’s top investigative journalists and one of Canada’s leading media lawyers, as well as myself.
- (iv) A public panel discussion on the implications of Bill C-51 for freedom of expression and civil liberties in Canada which I moderated, and the speakers were John Ralston Saul and Monia Mazigh.
- (v) A showing and public discussion of the film, “Guantanamo’s Child: Omar Khadr” led by journalist Michelle Shephard and moderated by Bernie Lucht focusing on issues of free expression in an era of terrorism.
- (vi) A public talk by Len Findlay on the response to the terrorist attacks in Paris and the implications for free expression.
- (vii) A public panel discussion on secrecy and the public’s right to know about reports of investigations of police behaviour. Speakers included Pascale Diverlus, Julian Falconer, David Goodis, Joanne Mulcahy and the panel was moderated by Mark Kelley.
- (viii) A public panel discussion on how corruption, impunity and censorship from both drug cartels and the government eroded press freedom and freedom of expression in Mexico. Speakers were Luis Horacio Nájera and James Cullingham.
- (ix) A public panel discussion on the importance of whistleblowing and what can be done to protect whistleblowers and the public interest. Speakers were Sandy Boucher, David Hutton, and Anna Myers. The moderator was Paul Kennedy.
- (x) A public talk by Evan Light on the current state of surveillance research and reform movements in Canada. Discussants were Andrew Clement and Brenda McPhail.
- (xi) A public talk by Ken Rubin on access to information rights, what barriers journalists and the public face, and how to overcome them.

- (xii) A public panel discussion on the censorship in the arts. Panelists were Tim Edler, Anielika Sykes, and Hooley McLaughlin, and it was moderated by Paul Kennedy and broadcast subsequently on CBC's *Ideas*.
- (xiii) A public panel discussion on the importance of full labelling of consumer personal care and cleaning products. Panelists were Bruce Lanphear, Muhannad Malas, Jamie McConnell, and it was moderated by Adria Vasil.
- (xiv) A public panel discussion on the future of investigative journalism. Panelists were Rob Cribb and Patti Sonntag, and it was moderated by Lisa Taylor.
- (xv) A public panel discussion on police surveillance and civil liberties. Panelists were Bill Dunphy, Evan Light, and Brenda McPhail. I was the moderator.
- (xvi) A public talk on the defunding of campus student organizations and the implications for free expression. The speaker was Len Findlay.
- (xvii) A public talk on the free expression rights of children by Danielle S. McLaughlin. The discussant was Cara Zwibel.

19. CFE's many initiatives and resources relating to expressive freedom are available on the CFE website. Among other things, CFE:

- (a) undertook and published a national survey of writers and journalists on the impact of mass surveillance on their work (November 2016);
- (b) publishes a curated bulletin of news reports and commentary on free expression, as selected by the Book and Periodical Council's Freedom of Expression Committee;
- (c) maintains a public searchable database on cases related to the freedom of expression at work;
- (d) provides an online resource guide on civil liberties and individual rights;
- (e) made presentations to the House of Commons Committee on Justice and Human Rights (Bill C-51, October 23, 2017); the Senate Committee on Legal and Constitutional Affairs (Bill C-51, June 14, 2018); and the House of Commons Committee on Government Operations and Estimates (*The Public Servants Disclosure Protection Act*, February 9, 2017); and participated in the Consultation Panel on the Political Activities of Charities (December 7, 2016);

F. CFE's experience as an intervener

20. CFE has been actively involved in issues concerning the protection and promotion of free expression rights. For example, CFE has been granted intervener status, as part of a coalition or alone, in recent cases on important s. 2(b) issues, including:

- (a) *R. v. Vice Media Canada Inc.*, 2017 ONCA 231 (freedom of the press);
- (b) *R v. Vice Media Canada Inc.*, 2018 SCC 53 (freedom of the press);
- (c) *17044604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 (Ontario Anti-SLAPP legislation);
- (d) *Attorney General for Ontario v. Information and Privacy Commissioner and Canadian Broadcasting Corporation (2020)* (Ontario Superior Court of Justice) (Court File No. 456/19) (access to information);
- (e) *Canadian Broadcasting Corporation v. Her Majesty the Queen, et al.* SCC (Court Docket No. 38992) (publication ban)
- (f) *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2020 ONCA 842 (freedom of expression)

G. CFE will make unique and useful submissions

21. If granted leave to intervene, CFE will work with counsel for the parties and counsel for the other interveners (if any) to ensure that our respective submissions are not duplicative.

22. I believe that CFE's submissions, as outlined in CFE's memorandum of argument, will be of assistance to this Court in deciding the issues raised by this appeal. CFE's submissions will explain the important links between public interest standing, freedom of expression and access to justice.

23. CFE does not seek leave to file any new evidence and would rely entirely on the record as it has been created by the parties.

24. CFE would seek no costs and would ask that no costs be awarded against it.

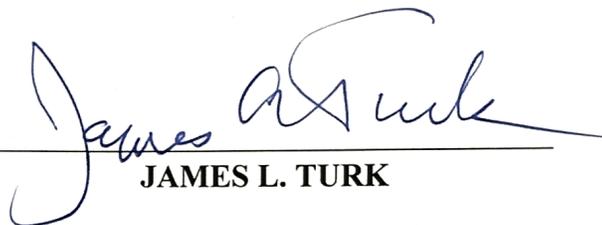
25. The members of CFE have consistently endeavoured to provide this Court (and others) with helpful and distinct submissions when granted intervener status in the past. This affidavit is made in support of a motion by CFE for leave to intervene in this appeal and to file written submissions and present oral arguments through counsel at the hearing of this appeal.

AFFIRMED remotely by **JAMES L. TURK**
of the City of Toronto, in the Province of
Ontario, **BEFORE ME** at the city of Toronto,
in the province of Ontario, this 22 day of July,
2021, in accordance with O. Reg. 431/20,
Administering Oath or Declaration Remotely.



LSO #: 78566E

A Commissioner for taking affidavits



JAMES L. TURK

TAB 3

SCC File No. 39430

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

BETWEEN:

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- and -

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RESPONDENT
(Appellant)

- and -

THE CENTRE FOR FREE OF EXPRESSION

APPLICANT/PROPOSED INTERVENER

**MEMORANDUM OF ARGUMENT OF PROPOSED INTERVENER,
THE CENTRE FOR FREE OF EXPRESSION**

MOTION FOR LEAVE TO INTERVENE
(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

PART I – OVERVIEW

Nature of this Motion

1. The Centre for Free Expression (“CFE”) seeks leave to intervene in this Appeal to provide this Court with a unique perspective on the issues on appeal. CFE is an organization housed within Ryerson University in Toronto that is engaged in research and advocacy in support of freedom of expression.¹

2. CFE seeks to intervene to provide this Court with information regarding the freedom of expression interests that are at stake in the Court’s consideration of the test for public interest standing. CFE’s perspective is informed by a concern that any modification to the standing test could make it less likely that cases dealing with fundamental rights will get before the courts. CFE views public interest standing as a vehicle for the advancement of democratic values, including freedom of expression.²

Description and expertise of the Proposed Intervener

3. CFE engages in non-partisan research, public education and advocacy related to freedom of expression.³ Based in the Faculty of Communication and Design and supported by Ryerson University, CFE’s objectives include serving as a hub for a wide range of activities related to free expression and the public’s right to seek, receive, and share information.⁴

4. CFE works to promote a better understanding of the importance of freedom of expression to nurturing a free and democratic society in Canada, and abroad. CFE has been

¹ Affidavit of James L. Turk, Motion Record, Tab 2, at para 5.

² Affidavit of James L. Turk, Motion Record, Tab 2, at para 9.

³ Affidavit of James L. Turk, Motion Record, Tab 2, at para 5.

⁴ Affidavit of James L. Turk, Motion Record, Tab 2, at paras 18-19.

granted intervener status at this Court in the past, based on its recognized expertise in non-partisan education and advocacy regarding expressive freedoms.⁵

5. CFE has contributed significantly to public discourse about expressive freedom by promoting citizens' access to truthful and accurate information as a matter of democracy and human rights.⁶ CFE advocates for greater openness, transparency and access to information in multiple contexts.

6. Among the many public lectures CFE has organized are included:⁷

- (i) A live teleconference with Edward Snowden, moderated by Anna Maria Tremonti, followed by a panel discussion on free expression in the era of mass surveillance;
- (ii) A public talk by Andrew Clement titled "Our State is Watching Us: Mass Surveillance and Free Expression in Canada after Snowden";
- (iii) A public conference titled "Flying Blind – Limits on the Public's Ability to Know" at which a dozen experts addressed interference with the creation of information, limitations on access to information, restrictions on the dissemination of information, and what can be done to enhance the public's right to know. Speakers included the Information Commissioner of Canada, the former Chief Statistician of Canada, several of Canada's top investigative journalists, Jim Turk, and one of Canada's leading media lawyers;

⁵ Affidavit of James L. Turk, Motion Record, Tab 2, at para 20.

⁶ Affidavit of James L. Turk, Motion Record, Tab 2, at paras 18-19.

⁷ A complete list of activities and events can be found in the Affidavit of James L. Turk, Motion Record, Tab 2, at paras 18-19.

- (iv) A public panel discussion on secrecy and the public's right to know about reports of investigations of police behaviour. Speakers included Pascale Diverlus, Julian Falconer, David Goodis, Joanne Mulcahy. The panel was moderated by Mark Kelley;
- (v) A public panel discussion on the importance of whistleblowing and what can be done to protect whistleblowers and the public interest. Speakers were Sandy Boucher, David Hutton, and Anna Myers. The moderator was Paul Kennedy;
- (vi) A public talk by Ken Rubin on access to information rights, what barriers journalists and the public face, and how to overcome them;
- (vii) A public talk on the defunding of campus student organizations and the implications for free expression. The speaker was Len Findlay;
- (viii) A public talk on the free expression rights of children by Danielle S. McLaughlin. The discussant was Cara Zwibel.

7. The specific issue of interest to CFE in this Appeal pertains to the Court of Appeal's application of the *Downtown Eastside*⁸ test for public interest standing. CFE understands public interest standing to be, among other things, a means of ensuring legality and state accountability for the protection of fundamental rights and freedoms.

⁸ *Canada (Attorney General) v Downtown Eastside Sex Workers*, 2012 SCC 45.

Proposed Submission

8. If granted leave to intervene, CFE will make submissions that are unique and helpful to the Court and that are restricted to CFE's expertise and mandate.⁹ CFE does not intend to comment on the merits of the appeal itself. Rather, it will provide the Court with information about the importance of public interest standing to ensuring government accountability for the protection of fundamental rights and freedoms.

9. The granting of the motion will not delay or complicate the hearing or cause any prejudice to any party. Meanwhile, the proposed intervention will promote the interests of justice by allowing the useful participation of a credible research, education and advocacy organization with a genuine interest in the issues on appeal.

10. CFE intends to file a Memorandum of Fact and Law not exceeding 10 pages and to make submissions not exceeding 10 minutes, which will be relevant, useful and different from those made by the parties and other potential interveners.¹⁰ CFE will make three arguments:

- a. The test for public interest standing has a direct nexus to free expression in that public interest litigation is a critical tool for promoting and protecting the public's right to equal access to knowledge and to participating and engaging in matters of public importance, including challenging the constitutionality of legislation, pursuing accountability for human rights violations, and obtaining equal access to justice for those whose voices may not otherwise be heard;

⁹ Affidavit of James L. Turk, Motion Record, Tab 2, at paras 5, 9, 17-20.

¹⁰ Affidavit of James L. Turk, Motion Record, Tab 2, at para 21.

- b. The test for public interest standing should be given a broad and liberal interpretation when a claim pertains to state action and the protection of fundamental rights and freedoms, given weak internal mechanisms for constitutional accountability; and
- c. There should be no presumptive preference for individual claims over public interest claims under the third stage of the governing test. A public interest claim is no less valid by virtue of being a public interest claim rather than an individual claim.

PART II – QUESTIONS IN ISSUE

- 11. Should CFE be granted leave to intervene in this Appeal and on what terms?

PART III – ARGUMENT

The test for leave to intervene

- 12. It is well recognized that the test for leave to intervene in an appeal before this Court is:
 - a) whether the proposed intervener has a real interest in the subject of the appeal;
and
 - b) whether the proposed intervener can provide submissions that are useful and different from those of the other parties.¹¹
- 13. This Court has acknowledged the unique value that public interest organizations like CFE can bring to an appellate hearing:

Public interest organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts.¹²

¹¹ *Reference re Workers' Compensation Act*, 1983 (Nfld.) (Application to intervene), [1989] 2 SCR 335, at 339 1989 CanLII 23 (SCC); *R. v Finta*, [1993] 1 SCR 1138.

¹² *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR, 88 at para 43 [*Canadian Council of Churches*].

An organization that has a history of involvement in the relevant issues, and expertise that will enable it to make submissions that are both useful and different from those of the other parties, should easily satisfy this element of the test.

(i) Real interest

14. CFE has a genuine interest in the issues on appeal. In particular, the issue of access to justice to protect fundamental rights and freedoms falls squarely within CFE's mandate to research, educate and advocate on expressive freedom issues.¹³ While access to justice has not, doctrinally, been linked to expressive freedom, CFE considers access to public adjudication to have a key freedom of expression component.¹⁴

15. The judiciary is the institution charged with upholding the rule of law and holding the government to account for respecting fundamental rights and freedoms. Courts are passive: they do not create cases. While the *Charter* proclaims baseline guarantees, remedies for constitutional violation are neither self-executing nor delivered without due process. Victims of constitutional human rights violations must *seek* justice to obtain justice. Rights need courts.

16. The burden of bringing matters of constitutional importance forward for public adjudication cannot fall on individuals alone. Not only is it unfair to affected individuals, it harms all of society because it reduces the likelihood that issues pertaining to fundamental rights and freedoms will get to court.

¹³ Affidavit of James L. Turk, Motion Record, Tab 2, at para 11.

¹⁴ Affidavit of James L. Turk, Motion Record, Tab 2, at para 9.

17. In the judgment below, the Court of Appeal cited affirmatively Cory J. in *Canadian Council of Churches*¹⁵ in stating that “the main purpose of granting public interest standing is to prevent public acts or legislation from being immunized from challenge and to enable courts to scrutinize the legality of government action and strike down unconstitutional laws.”¹⁶

18. CFE has a real interest in preserving the ability of organizations to bring challenges to legislation and government action that undermine fundamental rights and freedoms.¹⁷ Limiting the ability of the public to challenge government would work contrary to CFE’s mission, which includes enhancing the ability of the public to hold the government accountable through public interest litigation. CFE therefore has an interest in the issues on appeal.

(ii) Useful and distinct submissions

19. In addition to having a real and genuine interest in the subject of the appeal, CFE will make submissions that are distinct from those that will be made by the parties or any other prospective interveners. CFE is uniquely positioned to assist the Court in understanding the potentially significant implications of the issues raised in this appeal as they relate to freedom of expression, which is protected under section 2(b) of the *Charter*.

20. If granted leave, CFE will provide an important and unique public interest perspective to the issues raised in this appeal. In a case such as this, which will have a broad impact, the value to the Court of having a fuller picture is well established. As an impartial research, educational and advocacy organization that does not speak for any particular group or community, CFE is seen to offer a credible, informed, and balanced perspective.

¹⁵ *Canadian Council of Churches*, *supra* note 12.

¹⁶ *Council of Canadians with Disabilities v Attorney General of British Columbia*, 2020 BCCA 241 at para 73.

¹⁷ Affidavit of James L. Turk, Motion Record, Tab 2, at para 11.

21. It is not CFE's intention to duplicate submissions by the parties or other interveners. CFE will comply with any restriction regarding the length of written submissions and oral presentation that the Court sees fit to impose.

22. CFE submits that the interests of justice militate in favour of granting it leave to intervene in the present appeal, as the subject matter of this appeal raises important issues about access to justice and the rule of law which could have implications for *Charter* rights, including freedom of expression. CFE brings a unique and relevant perspective that will benefit the Court.

PART IV – SUBMISSION ON COSTS

23. CFE proposes that there be no costs on this motion.

PART V – ORDER SOUGHT

24. CFE requests an Order:

- a) Granting it leave to intervene in this Appeal pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*;
- b) Permitting it to file a Memorandum of Fact and Law of no more than 10 pages, or such length as the Court may deem appropriate;
- c) Granting it leave to present 10 minutes (or such other amount of time as this Court deems appropriate) of oral argument at the hearing of this Appeal; and
- d) Setting out such other directions on the procedure for and extent of the proposed intervention as this Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of July 2021.

for Faisal Bhabha
Madison Pearlman

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PART VI - TABLE OF AUTHORITIES

CASE LAW

Authority	Reference in Argument
<i>Canada (Attorney General) v Downtown Eastside Sex Workers</i> , 2012 SCC 45 .	7
<i>Canadian Council of Churches v Canada (Minister of Employment and Immigration)</i> , [1992] 1 SCR 236 .	13, 17
<i>Council of Canadians with Disabilities v Attorney General of British Columbia</i> , 2020 BCCA 241 .	16
<i>Reference re Workers' Compensation Act</i> , 1983 (Nfld.) (Application to intervene), [1989] 2 SCR 335 .	12
<i>R v Finta</i> [1993] 1 SCR 1138 .	12

STATUTES, REGULATIONS, RULES

Statute	Reference in Argument
Canadian Charter of Rights and Freedoms, The Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 2(b) (English).	19
Canadian Charter of Rights and Freedoms, The Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s.2(b) (French).	19
Rules of the Supreme Court of Canada, SOR/2002-156, s 55 .	24