SCC File No. 40602

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

APPELLANT
(Appellant)

- and -

DIRECTRICE DE LA PROTECTION DE LA JEUNESSE DU CISSS A

RESPONDENTS
(Respondents)

- and -

A
B
X

INTERVENERS

- and -

ATTORNEY GENERAL OF QUEBEC
CANADIAN CIVIL LIBERTIES ASSOCIATION
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. If ever there was a queue for rights holders who required the strength of unity and collectivity to vindicate and protect their rights in the face of government institutions or policies, children under the care or protection of the state would be first in line.

2. The respondent is asking this Court to do nothing about the trier of fact's uncontested conclusions that policies of general application have led, and will lead, to the violation of particularly vulnerable children's rights.

3. Worry not, says the respondent, for any child whose rights are violated in the future can go to court to seek redress at that time.

4. How would such an individualistic conception of justice have fared in response to Canada's residential schools, or during the Sixties Scoop? These examples, though drastic, demonstrate that systemic issues call for systemic redress, as noted by this Court as far back as the 1980s.

5. The respondent's fundamental position reminds the BCCLA of the pre-*Meiorin* divide and conquer strategy used by employers to successfully keep discriminatory policies on their books.

6. The past success of this strategy relied on the disparity of resources in the hands of potential plaintiffs and defendants, the barriers in the way of access to justice, and courts endorsing individualistic notions of justice. When the immensity of state power is juxtaposed to the vulnerability of children requiring the protection of the *Youth Protection Act* (***YPA***), the consequence of the respondent's position is easily stated: more violations of children's rights by the state. More entirely **preventable** violations.

7. The respondent's position would have this Court adopt a reductionist and individualistic view of remedial statutes such as the *YPA*, and in doing so thwart the intention of the legislature.

8. The BCCLA intervenes in order to invite this Court to refrain from entrenching or encouraging a "systemic" vs. "individual" remedial dichotomy. This distinction does not reflect a modern understanding of remedial statutes and the rights they are designed to create and protect.

9. The question, rather, is whether the claim (as proven) and enabling law (interpreted generously and liberally) support the remedy being sought, regardless of its systemic impacts.

PART II – QUESTIONS IN ISSUE

10. In this intervention, the BCCLA takes position as follows:

i. Where it has been proven that the root cause of a violation of an individual's rights stems from systemic policies or practices, the distinction between the two forms of remedies is illusory and unhelpful. Failing to order a remedy addressing the identified harm would lead to a legitimization of that systemic issue by the courts, and a denial of access to justice for the group affected by the identified harm.

ii. This Court has, in the human rights context, proposed a form of "remoteness" test for determining whether a remedy is appropriately granted by a tribunal. The same test should apply in the case at bar. It is only where the scope of a claim and evidentiary record demonstrate that a violation is caused by a systemic issue that a remedy correcting such situation can be ordered. Proving the existence of a systemic issue and its causal link to a violation is no small feat. Thus, floodgate concerns are unwarranted. On the contrary, it would be a waste of precious resources if courts and tribunals refused to address systemic issues identified at the conclusion of expensive and time-consuming litigation.

iii. As a matter of principle, and in general this Court should favour a broad and generous interpretation of s.91 of the YPA and similar legislation. Given the pervasive presence of the administrative state in the lives of Canadians, flexible and meaningful remedies are required by the courts to ensure respect for the rule of law. An unduly restrictive interpretation of s.91 would deal a significant blow to access to justice and would lead to a multiplicity of proceedings. Such a restrictive interpretation would also represent a wait-and-see approach to rights violation which is contrary to the rule of law, as well as the approach taken by this Court in the *Charter* context.

11. To avoid duplication with the CCLA's submissions, the BCCLA will deal only with points i) and ii) in these written submissions.

PART III – STATEMENT OF ARGUMENT

A. An illusory distinction between systemic and individual remedies

12. In the BCCLA's submission, the distinction between "systemic" and "individual" remedies is fraught with peril and should – where possible – be avoided as unhelpful in the context of remedial statutes such as the *YPA* and human rights codes.

13. On the one hand, as this case demonstrates, and as the minority decision of the Quebec Court of Appeal noted, the distinction can be artificial and purely semantic.[1]

14. On the other hand, the remedial straitjacket proposed by the respondent places too great an emphasis on the individual and serves to legitimize systemic rights violations, thus operating as a collective denial of access to justice.

15. This legitimization is a natural consequence of the court or tribunal turning a blind eye to the identified root cause of a rights-infringing situation or violation.

A fig-leaf distinction

16. This case serves as a perfect illustration of the illusive distinction between a "systemic" and "individual" remedy. The trier of fact, having concluded[2] that the respondent's lack of policy concerning how to address spitting in its institutions resulted in a rights-infringing situation involving X, ordered the respondent to correct the situation by adopting a policy to deal with children that spit at staff at the particular institution having the care of X.

17. The Québec Superior Court allowed an appeal and ordered that the mandated policy was to be solely aimed at managing the spitting problem posed by X and X alone. The Superior Court's rigid adherence to an individualized remedy led it to make pronouncements that defy logic and reason, as observed by the minority decision of the Court of Appeal:

> *[45…] De plus, il n'est pas logique ou raisonnable qu'un protocole soit mis en place seulement pour traiter les situations où X crache. Est-ce qu'on peut supposer que lorsque X quittera l'établissement, le protocole pourra entièrement être mis de côté si on maintient l'ordonnance de la Cour supérieure? Par ailleurs, comment prévoir l'identité du préposé qui serait présent quand l'enfant crache?*

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[1] *Protection de la jeunesse — 226231*, 2022 QCCA 1653, paras. 45-46.
[2] *Protection de la jeunesse — 193763*, 2019 QCCQ 391, para. 307

> *[46] Il s'agit d'une situation où distinguer le cas de cette enfant et les mesures d'application générale devient un exercice sémantique dénué d'une possibilité d'application adéquate par la DPJ. Une ordonnance de portée générale est tout à fait justifiée dans ces circonstances et j'ajoute, qu'en l'espèce, cette mesure est en lien avec l'enfant dont les droits ont été lésés même si son nom n'est pas inclus dans la rédaction de l'ordonnance.*[3]

18. To put it differently, the distinction between an individual or systemic remedy is artificial where it has been shown that the cause of a rights-infringing situation is a general policy, or the absence thereof. This is consistent with the concept of *remoteness* put forward in *Moore v. British Columbia (Education),* to which the BCCLA will return below.

19. In such circumstances, as noted by Justice Schrager in the QCCA, the remedy is related to the individual through the proven causal link. In other words, correction of the general policy through an appropriate remedy will have both individual and systemic effects.

20. The respondent's submission that systemic litigation is contrary to the interests of an individual litigant represents a misplaced paternalism. Such an assertion ultimately suggests, without any evidentiary foundation in support, that individuals with the benefit of legal representation are making litigation decisions against their best interests. Perhaps even more problematic, the submission expressly concedes the flawed but inevitable terminus of individualistic justice: redress will belong only to the most vocal or fortunate members of a group whose rights have been infringed.

21. The BCCLA, familiar with litigation aimed at identifying systemic issues, agrees with the respondent that it is no small undertaking to build and present an evidentiary record that can causally trace a *Charter*, human rights or other violation to policy or other systemic issues.

22. The existence of a litigant with the time, energy, willingness and resources to conduct such extensive litigation should not be taken for granted or assumed to be common by the courts. In the context of systemic issues, a litigant demonstrating a violation of their rights is merely the vocal and fortunate tip of an iceberg composed of silent, unfortunate, or resigned victims.

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[3] *Protection de la jeunesse — 226231*, 2022 QCCA 1653.

23. One need look no further than the evidentiary record in this matter to support this commonsense proposition: it is clear that X was but one of many children who suffered harm by reason of the systemic issues identified by the Québec Court.[4]

24. Thus, the failure of a court or tribunal to actually address the identified root cause of a rights-infringing situation is more than just a semantic sleight of hand, it also leads to a denial of access to justice, and ultimately, to the legitimization of rights violations.

Legitimization of systemic rights violation

25. This Court previously reached a similar conclusion in the discrimination context. As Justice McLaughlin wrote in *Meiorin,* the pre-*Meiorin* insistence on drawing remedial distinctions in response to claims of direct versus systemic discrimination proved to be artificial and served to legitimize systemic discrimination.[5]

26. This Court's decision to bury such a remedial distinction in *Meiorin* has been pivotal in bringing Canada's understanding of discrimination and other systemic violations into the 21st century. Courts and the public now have come to terms with the systemic nature of certain rights-infringing phenomena, and the remedies required by courts to address such issues.

27. As this Court observed in *Moore, Grismer* and *Meiorin,* where the root cause of discrimination is a practice or standard, remedies should direct themselves to correcting such a practice or standard, rather than relieving a particular individual of its ill effects.[6]

28. As early as the 1980s, in the landmark decision of *CN,* this Court endorsed the view that "the prevention of systemic discrimination will reasonably be thought to require systemic remedies".[7]

29. The Court of Appeal's majority proposed remedial distinction is essentially asking this Court to apply pre-*Meiorin* type reasoning to the *YPA*, with predictable results. Such an approach

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[4] *Protection de la jeunesse — 193763*, 2019 QCCQ 391, paras 158, 207-211
[5] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, paras. 29, 39-42. (***Meiorin*, paras. 29, 39-42**)
[6] *Moore v. British Columbia (Education),* 2012 SCC 61, paras 61-62; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 SCR 868, paras 16-19; *Meiorin,*[1999] 3 S.C.R. 3 paras 30-31.
[7] *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, at p. 1145.

represents a misplaced trust in the proposition that individual claims and a multiplicity of legal proceedings is sufficient to correct systemic violations of legal rights.

30. Experience and common sense have debunked this myth. Again, even the evidentiary record in this matter demonstrates that there are no foundations for this trust in the individualistic and private-law centric model of justice.

31. In the *Charter* context, for example, experience has shown that the failure to grant remedies aimed at correcting the root cause of a *Charter* violation will ultimately lead to further violations, and potentially result in a denial of justice. Such was the fate of the *Little Sisters* bookshop, who despite showing the existence of a "grave systemic problem", was unable to obtain a remedy that effectively corrected this situation.[8]

32. Not much time after securing a victory, the *Little Sisters* bookshop, again found itself before the courts on allegations of further *Charter* violations, but ultimately had insufficient resources to follow through with litigation.[9] The war was lost to attrition, despite the resources at the disposal of this commercial enterprise.

33. The respondent points to the architecture of the *YPA* in order to suggest that courts must ignore systemic issues and leave resolution of these matters to the better judgment of government. This submission ignores that the *YPA* creates legal rights; to the extent that a court identifies a policy or lack thereof as leading to the violation of these legal rights, deference to the executive is uncalled for, and indeed contrary to the express wishes of the legislature.

34. Ultimately, the respondent is asking this Court to rely on the capacity of vulnerable children protected by the *YPA* to come to court later on if a rights-infringing situation reoccurs.

35. In doing so, the respondent is characterizing the *YPA* as a statute modelled on an individualistic conception of justice, despite conceding this legislation's remedial *raison d'être*.

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[8] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, para 253 (Justice Iacobucci in dissent); Kent Roach, Joe's Justice: Substantive, Procedural and Remedial Equality, 2022 104 Supreme Court Law Review 163, 2022, at 183-186, online: https://canlii.ca/t/7n3mv (**Roach, at 183-186**); Benjamin L Berger and Alison M Latimer, A Plumber with Words: Seeking Constitutional Responsibility and an End to the Little Sisters Problem, 2022 104 Supreme Court Law Review 143, 2022, online: https://canlii.ca/t/7n3mt

[9] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2; Roach at 174

36. The irony of this position is that the very existence of statutes such as the *YPA* and human rights codes is premised on the legislature's realization that models of justice centred around individual actions are insufficient to correct and guard against systemic social problems.

37. Even the common law, through mechanisms such as the class action and declaratory relief, has evolved to recognize that the collective and systemic vindication of rights is required to change the behaviour of large corporations, organizations, and government.

38. The law's evolution towards collective notions of justice, it is submitted, is the justification behind the generous and liberal interpretation given to remedial statutes such as the *YPA*.

39. Indeed, this Court has held that a generous interpretation of the remedies available under such statutes is key to ensuring that their aim can be pursued. In *Robichaud*, this Court observed as follows concerning the *Canadian Human Rights Act,* in light of its remedial purpose:

> *13. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.*[10]

40. In short, the Court of Appeal's insistence that remedies granted under the *YPA* must be centred solely and rigidly on the individual before the tribunal defies logic and common sense, and will legitimize systemic violations of rights.

Conclusion

41. Rather than drawing remedial distinctions and categories, the BCCLA proposes an approach to the question of remedy which is centred on:

i. A liberal and generous interpretation of the remedial statute at play;

ii. The scope of the claim; and

iii. The evidentiary record before the trier of fact and the conclusions drawn therefrom.

42. Such an approach reflects this Court's decision in *Moore*, where the concept of *remoteness* served to constrain the scope of remedies that can be ordered by human rights tribunals.

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[10] *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, para. 13.

B. Remoteness and remedies

43. In the simplest terms possible, and as this Court has observed in the abuse of process context, a remedy ought to be directed at a harm which has been identified by the Court.[11]

44. This Court noted in *Moore* that a remedy must flow from the claim. In the particular circumstances of *Moore*, a remedy directed at a wider systemic issue was found to be inappropriate as the evidence presented by Mr. Moore did not establish a causal link between the systemic issues and the ultimate discriminatory effect. As the Court observed in *Moore* (emphasis added):

> *[57] But the Tribunal's systemic remedies are so remote from the scope of the complaint, that in my view they reach the threshold set out in s. 59 of the* Administrative Tribunals Act*...*
>
> *[64] But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether Jeffrey was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.*
>
> *[65] The connection between the high incidence/low cost cap and the closure of the Diagnostic Centre is remote, given the range of factors that led to the District's budgetary crisis... In other words, while systemic evidence can be instrumental in establishing a human rights complaint, the evidence about the provincial funding regime, and the high incidence/low cost cap in particular, was too remote to demonstrate discrimination against Jeffrey.*

45. This reasoning has been applied by lower courts and human rights tribunals to support the proposition that a remedy directed at a systemic issue, such as a policy, is only appropriate where:

i. The complaint raises that systemic issue; and

ii. That systemic issue is not too remote from the ultimate right violation.

46. In *Disability Rights Coalition v. Nova Scotia (Attorney General)*, for example, the Nova Scotia Court of Appeal considered *Moore* and held that a broad-based inquiry into systemic issues

[11] *R. v. Babos,* 2014 SCC 16, para. 39

is only warranted where the complaint raises such issues.[12] A similar conclusion was reached by the British Columbia Court of Appeal in *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*.[13]

47. Human Rights tribunals have adopted a similar interpretation of *Moore*.[14]

48. Finally, this approach to remedies in the human rights context predates *Moore*. In *Crockford*, for example, the British Columbia Court of Appeal held that a tribunal must turn its mind to a complaint alleging that systemic issues and practices have led to discrimination.[15]

49. The idea that the violation of a right may appropriately be found to have its source in a system rather than an individual is not new. This Court endorsed the view multiple times, notably in *McKinney v. University of Guelph,* that the effect of a system on an individual or group may govern what remedy is justified:

> *At page 9 of that report, Judge Abella explains:*
>
> > *... Systemic discrimination requires systemic remedies... The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified.* [16]

50. In the BCCLA's respectful submission, this Court ought to draw on the above-cited cases and principles in answering the questions posed by the parties in this appeal. These cases all support the reasons given by Justice Schrager in the Court of Appeal in this matter.

51. In other words, these cases and principles all support the proposition that where a party is able to show that a rights violation is **caused** by a policy or lack thereof, it will be appropriate for a court or tribunal to issue a remedy directed at such a policy or situation.

52. In such circumstances, a tribunal may (but need not) conclude that the policy or lack thereof is not too remote from the alleged violation to be the subject of a remedy.

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[12] *Disability Rights Coalition v. Nova Scotia (Attorney General),* 2021 NSCA 70, para. 213.
[13] *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220, paras. 79-82.
[14] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39; *Northwest Territories v. Portman*, 84 CHRR 202 (2016 NWTHRPA)
[15] *British Columbia v. Crockford*, 2006 BCCA 360, paras. 39, 58, 59.
[16] *McKinney v. University of Guelph*, [1990] 3 SCR 229, p. 387 (citing *Equality in Employment* report)

53. As discussed above, the evidentiary record required to demonstrate sufficient proximity between a systemic cause and a rights-infringing consequence is already a significant barrier in the way of access to justice. This requirement already flows from *Moore* and does not appear to have led to a flood of systemic litigation.

54. Thus, courts need not impose additional obstacles in the form of a narrow and individualistic interpretation of remedial statutes, both of which would be contrary to this Court's established jurisprudence.

55. Indeed, it would be most unfortunate if courts – when the constellation of factors and fortune required to identify systemic issues materialized in a particular litigation – refused to respond on the basis that the next X can come to court seeking justice.

56. For, as Shakespeare could have predicted of government policies and practices that infringe on the rights of Canadians:

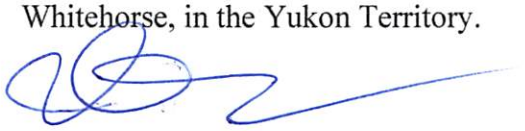
> *I am as like to call thee so again,*
> *To spit on thee again, to spurn thee too.*[17]

PART IV – COSTS

57. The BCCLA takes no position on the ultimate outcome of this appeal, nor on the application of the facts of this case to the legal principles put forward by the BCCLA.

58. The BCCLA seeks no costs and respectfully requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of February, 2024 at Whitehorse, in the Yukon Territory.



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[17] The Merchant of Venice, Act I, Scene III.

PART V – AUTHORITIES

Case law	Paragraph where cited
British Columbia v. Crockford, 2006 BCCA 360	48
British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite, 2014 BCCA 220	46
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