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

BETWEEN:

FRANK DORSEY and GHASSAN SALAH

APPELLANTS

- and -

ATTORNEY GENERAL

RESPONDENT

- and -

JOHN HOWARD SOCIETY OF CANADA, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, CANADIAN COUNCIL FOR REFUGEES, ALBERTA PRISON JUSTICE SOCIETY, ABORIGINAL LEGAL SERVICES, WEST COAST PRISON JUSTICE SOCIETY, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, BLACK LEGAL ACTION CENTRE, PIVOT LEGAL SOCIETY, MARGARET LEE COLE, CANADIAN CIVIL LIBERTIES ASSOCIATION and CANADIAN PRISON LAW ASSOICATION

INTERVENERS

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Frances Mahon
Pender Litigation
Suite 1175 - 510 Burrard Street
Vancouver, BC V6C 3A8
Tel: 604-669-6699
Fax: 604-681-0652
Email: fdm@penderlitigation.com

Ga Grant
BC Civil Liberties Association
Suite 306 - 268 Keefer Street
Vancouver, BC V6A 1X5
Tel: 604-687-2919
Fax: 604-687-3045
Email: ga@bccla.org

Counsel for the Intervener, British Columbia Civil Liberties Association

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0K1

COPIES TO:

Goldblatt Partners LLP
20 Dundas Street West
Suite 1039
Toronto, Ontario
M5G 2C2
Jessica Orkin
Adriel Weaver
Telephone: (416) 977-6070
Email: jorkin@goldblattpartners.com

Borys Law
11 Princess Street, Suite 301
Kingston, ON K7L 1A1

Simon Borys
Phone: (613) 777-6262
Fax: (613) 777-6263
Email: simon@boryslaw.ca

Kate Mitchell
Barrister & Solicitor
Falconer Hall, Office 304
University of Toronto
84 Queens Park
Toronto, ON M5S 2C5
Phone: (236) 334-6034
Email:
kate.cameron.mitchell@gmail.com

COUNSEL FOR THE APPELLANTS

Goldblatt Partners LLP
500 - 30 rue Metcalfe St
Ottawa, ON K1P 5L4
Colleen Bauman
Phone: (613) 482-2459
Email:
jbell@goldblattpartners.com

AGENT FOR COUNSEL FOR THE APPELLANTS

John Provart / Wendy Wright
Attorney General of Canada
Department of Justice Canada
Ontario Regional Office
National Litigation Sector

Christopher M. Rupar
Attorney General of Canada
50 O’Connor Street, 5th Floor
Ottawa, ON K1A 0H8
Phone: (613) 670-6290

120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1
Phone: (647) 256-0784 / (647) 256-0577
Fax: (416) 954-8982
Email: john.provart@justice.gc.ca
wendy.wright@justice.gc.ca

COUNSEL FOR THE RESPONDENTS

Fax: (613) 954-1920
Email:
Christopher.rupar@justice.gc.ca
deborah.mayo@justice.gc.ca

AGENT FOR COUNSEL FOR THE RESPONDENTS

Queen's Prison Law Clinic
500 - 303 Bagot Street
Kingston, ON K7K 5W7

Paul Quick
Phone: (613) 929-4092
Fax: (613) 533-3172
Email: p.quick@queensu.ca

COUNSEL FOR THE INTERVENER, JOHN HOWARD SOCIETY OF CANADA

Goldblatt Partners LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Geetha Philipupillai
Tel: (416) 979-4252
Email: gphilipupillai@goldblattpartners.com

Saneliso Moyo
T: (416) 979-4641
E: smoyo@goldblattpartners.com

COUNSEL FOR THE INTERVENOR, BLACK LEGAL ACTION CENTRE

Path Legal
85 Queen Street
Dartmouth, NS B2Y 1G7
Jessica D. Rose
Email: j.rose@pathlegal.ca
Tel: (902) 240-8774

COUNSEL FOR THE INTERVENOR, CANADIAN ASSOCIATION OF ELIXABETH FRY SOCIETIES

Stockwoods LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Allen / McMillan Litigation Counsel
1625 – 1185 West Georgia Street
Vancouver, BC V6E 4E6

Alina Chekh
John Trueman
Danielle Wierenga

Tel: (604) 569-2652
Fax: (604) 628-3832
Email: service@amlc.ca
alina@amlc.ca
john@amlc.ca
dwierenga@amlc.ca

COUNSEL FOR THE INTERVENOR, WEST COAST PRISON JUSTICE SOCIETY

Nader R. Hasan
Tel: (416) 593-1668
Email: naderh@stockwoods.ca

Dan Goudge
Tel: (416) 593-2497
Email: dang@stockwoods.ca

COUNSEL FOR THE INTERVENOR, CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I – OVERVIEW

1. Illegal detentions must be swiftly and robustly reviewed to ensure the rule of law is upheld inside prisons. Ousting denials of security reclassification from *habeas corpus* review is out-of-sync with this Court's modern jurisprudence, which has incrementally expanded the availability of the writ to prisoners facing deprivations of their residual liberty in different contexts.

2. This is not a passing trend. It is an approach grounded in the ancient rationale for *habeas corpus* – to hold the state to account – infused with the right to liberty guaranteed by section 7 of the *Charter*. Consonant with this Court's recent and repeated urging to not unduly restrict the availability of the writ, horizontal *stare decisis* justifies revisiting the third category outlined by this Court in *Dumas v. Leclerq Institution*[1] ["*Dumas*"], giving it a broad interpretation and one that is alive to the realities prisoners face while incarcerated.

PART II – POSITION ON QUESTION IN ISSUE

3. The BCCLA takes no position on the facts or outcome of this case, but makes the following submissions:

a. Recent *habeas corpus* decisions demonstrate a shift towards increasing the availability of the writ for prisoners, in keeping with the guarantees protected by sections 7 and 10(c) of the *Charter*; and

b. The doctrine of horizontal *stare decisis* permits this Court to broadly interpret the third *Dumas* category to include security reclassification denials.

PART III – STATEMENT OF ARGUMENT

A. The gradual *Charter*-based reinvigoration of *habeas corpus*

4. The writ of *habeas corpus* has been one of the most forceful checks on state abuses of power since its inception. The fundamental nature of the writ has only expanded in the modern *Charter* era to account for the growth and increasing complexity of the administrative state as an arbiter of detention. The revived recognition of the liberty right for prisoners in different contexts

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[1] *Dumas v Leclerq Institution*, [1986] 2 SCR 459, 1986 CanLII 38 (SCC).

ensures the rule of law is upheld by limiting procedural hurdles and accounting for the reality prisoners face. There is no rational reason to oust the concept of restrictions of liberty from denials of security reclassification.

5. *Khela*[2] and *Chhina*[3], relatively recent *habeas corpus* decisions of this Court, address distinct factual scenarios but signal this Court's movement away from restrictive interpretations and unavailability of *habeas corpus* by grounding its decisions in sections 7 and 10(c) of the *Charter*. *Chhina* in particular acts as a lighthouse in the murky setting of administrative reviews of detention. In *Chhina*, this Court concluded that, properly framed, *habeas corpus* is an ancient writ protected by *Charter* section 10(c), and a broad right with minimal exceptions.[4] While some administrative schemes (in that case, the *Immigration and Refugee Protection Act*) may sufficiently safeguard interests protected by *habeas corpus*, they must be re-examined on a case-by-case basis to ensure decisions are consistent with the rationales for the writ and the *Charter* guarantees in sections 7 and 10(c).[5] Ultimately, provincial superior court jurisdiction was considered a necessary complement to the *IRPA's* statutory scheme in order to protect the constitutional right to *habeas corpus*.[6]

6. As in *Chhina*, *habeas corpus* law has been reinvigorated in other administrative settings. The BCCLA's position is that all detainees who experience illegal detention must be able to choose between administrative review procedures and superior court *habeas corpus* review based on their particular circumstances and their fundamental section 7 and 10(c) rights. This includes prisoners who are denied security reclassification.

7. Prisoners are an extremely vulnerable population. The status of being already detained subjects them to greater chances of further illegal deprivations of liberty. This greater potential for infringements of their liberty right is concomitant with the extraordinary hurdles they face, which arise purely because of their incarceration.

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[2] *Mission Institution v Khela*, 2014 SCC 24 ["*Khela*"].
[3] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*"Chhina"*].
[4] *Chhina,* paras 1-2, 21.
[5] *Chhina*, para 40.
[6] *Chhina*, para 37.

8. While there are mixed and evolving areas of the law across different jurisdictions, there is a clear overall trend of expanding availability of the writ because of the real-life experiences of incarcerated persons. This includes in cases of solitary confinement and lockdowns as prisons within prisons, parole board decisions, prison intake assessments which can land prisoners in solitary confinement pending a security placement, restrictive house arrest conditions, and mental health detention.

9. Courts have demonstrated increased willingness to robustly apply the factors from *May v. Ferndale*,[7] which narrowly limit exceptions to *habeas corpus* review, to justify expanding the availability of the writ in a number of settings, based on a greater understanding of the reasons why administrative review schemes can be inaccessible to detained persons. This includes:

a. An appreciation of the benefits of *habeas corpus* applications to prisoners, where the onus is on the state to justify illegal detention and the courts' reception of fresh evidence is very valuable, compared to the onus placed on the applicant through administrative processes or at Federal Court;[8]

b. Ensuring fairness to all detainees by increasing local access to the writ;[9] and

c. Understanding that Federal Court rules and procedures can make detention review less accessible to incarcerated people, particularly given that they are often without legal representation.[10]

10. The real-life experiences of incarcerated persons have resulted in a more attentive analysis for why *habeas corpus* must be available when the length and/or uncertainty of their detention can render it unlawful, such as in *Chhina*,[11] *Ogiamen*,[12] and *Chaudhary*.[13]

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[7] *May v Ferndale Institution*, 2005 SCC 82.
[8] See *Chhina* at paras 59-63; *Chaudhary v Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700 ("*Chaudhary*") at para 91; and *DG v Bowden Institution*, 2016 ABCA 52 (*"DG v Bowden Institution*") at paras 31 and 39 with Wakeling JA concurring.
[9] *Chaudhary,* para 105.
[10] *DG v Bowden Institution,* para 40.
[11] *Chhina*, *supra* note 3.
[12] *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839.
[13] *Chaudhary*, *supra* note 8.

11. There has also been a demonstrated more acute appreciation for the real-life experiences of detained people when assessing whether a change in circumstances constitutes a further deprivation of liberty, including situations where:

a. A prisoner was placed initially directly into solitary confinement [*Wilcox*][14];

b. A prisoner was placed in solitary confinement before transfer to higher security [*Gogan*][15];

c. A prisoner was moved into a unit with less liberty was entitled to procedural fairness. In the court's words, "From the inmate's perspective, more than double the time locked alone in a separate cell is a significantly more serious denial of liberty" [*Mercredi*];[16]

d. A prisoner was subject to daily lockdowns, in comparison to the conditions of the general population in reasonable circumstances [*Diggs*].[17]

12. Finally, there has been an expansion of reasonableness review for parole revocation in some circumstances,[18] and terms and conditions of house arrest, rather than custodial detention alone,[19] alongside an expansion of procedural fairness duties in new areas of the law, including unit transfers[20] and security reclassification.[21]

13. What these decisions have in common is a reinvigorated recognition of a prisoner's rights to liberty and *habeas corpus* review under sections 7 and 10(c) of the *Charter*. Both rights – and *Charter* review more broadly – are distinctive features of Canadian democracy which can only be interfered with when sanctioned by law.

14. The interpretation of the third *Dumas* category must also be grounded in section 7 to account for the reality prisoners face when denied security reclassification to a lower security

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[14] *Wilcox v Alberta*, 2020 ABCA 104.
[15] *Gogan v Canada (Attorney General)*, 2017 NSCA 4.
[16] *Mercredi v Saskatoon Provincial Correctional Centre*, 2019 SKCA 86 ["*Mercredi*"].
[17] *Diggs v Nova Scotia (Attorney General)*, 2024 NSSC 11 ["*Diggs*"].
[18] *DG v Bowden Institution*, *supra* note 8.
[19] *Wang v Canada*, 2018 ONCA 798.
[20] *Mercredi*, *supra* note 16.
[21] *R v Shoemaker*, 2019 ABCA 266.

placement. In essence, the majority of the Ontario Court of Appeal in the case at bar concluded that the denial of security reclassification was not taking anything *away* from prisoners but simply maintaining the *status quo*.

15. With respect, the rationale behind the lower court's decision is a surface-level conclusion divorced from what a denial of security reclassification means for the actual prisoner. The purposive approach to the availability of *habeas corpus* taken by this Court in *Khela* and *Chhina* is harmonious with the sections 7 and 10(c) *Charter* rights *habeas corpus* is meant to protect, and ought to be applied in this case.

16. A purposive approach breathes life into the writ and gives it real meaning. Consider the recent decision of the Nova Scotia Supreme Court in *Diggs*.[22] Multiple earlier decisions had concluded that lockdowns arising because of "staffing issues" did not rise to the level of a deprivation of liberty compared to the rest of the prison population – as in the current case, it was considered merely a maintenance of the *status quo*.

17. In *Diggs*, the applicant was under total or partial lockdown on a daily basis during the 51 days of his confinement. The court found that (1) daily lockdowns are a substantial and material deprivation of liberty which had not been shown to be reasonable or remedied by correctional management; and (2) it was not a question of whether the applicant was *different* than the general population, but whether his daily treatment was a deprivation of residual liberty compared to the general population under reasonable circumstances. Critically, the court held that when applying the "prison within a prison" caselaw, the "*Gamble* rule" must not be technically or narrowly applied. Rather, a purposive approach to *habeas corpus* must be taken.[23]

18. Although *Diggs* involved a more obvious restriction of liberty than denial of security reclassification to a lower-security institution, this Court can draw a similar conclusion here: a technical or narrow interpretation to the availability of *habeas corpus* must be rejected in favour of a *Charter*-infused purposive approach.

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[22] *Diggs, supra* note 17. While the declarations were overturned in *Nova Scotia (Attorney General) v Diggs and Wilband*, 2025 NSCA 20, due to the manner in which the judge conducted the *habeas corpus* applications, the finding that lockdowns constituted a deprivation of liberty was not disturbed.
[23] *Chhina*, para 56.

19. The question is not whether a decision maintains the *status quo* compared to all other prisoners, but whether a denial of security reclassification, at its heart, constitutes a deprivation of liberty compared to other prisoners in similar circumstances. In this case, the correct comparator group (to borrow language from section 15 of the *Charter*) is a prisoner who has not experienced a deprivation of liberty arising from a security reclassification decision because the decision was made in reasonable circumstances.

20. The individual, real-life circumstances of the prisoner must be considered and given significant weight in the analysis. It is not about an "entitlement" to placement in minimum security institutions – that would arbitrarily compare prisoners who are illegally detained and experiencing a deprivation of liberty because of a denial of security reclassification to the general prison population, none of whom, of course, are entitled to minimum security. Treating all prisoners alike in security reclassification decisions results in an impoverished understanding of the relationship between sections 7 and 10(c) and *habeas corpus* review.

21. This Court in *Chhina* made it clear that *habeas corpus* is "entrenched" in section 10(c) of the *Charter* which "permits those in detention to go before a provincial superior court and demand to know whether the detention is justified in law … [i]f the relevant authority cannot provide sufficient justification, the person must be released".[24]

22. This is a powerful and properly sweeping statement which perfectly encapsulates the rationale for the writ and erodes the rationale behind an overly strict interpretation of the third *Dumas* category.

B. Horizontal *stare decisis* requires expanding the third *Dumas* category

23. The doctrine of horizontal *stare decisis* justifies this Court advancing the third *Dumas* category beyond the factual circumstances of that case and subsequent security reclassification decisions. As developed above, the respect for section 7 evident through the gradual expansion of the availability of *habeas corpus* has fundamentally eroded the rationale behind an overly

[24] *Chhina,* para 1.

restrictive interpretation of the third *Dumas* category. Instead, the meaning of "continued deprivation of liberty" must be consistent with this Court's modern *habeas corpus* jurisprudence.

24. Respect for the rule of law requires both certainty and assurances to the public that our courts are not stuck in time, as long as changes are made on a principled basis. While the law cannot be allowed to grow without restraint, nor can it be bound by facts and legal principles which are no longer relevant. Public confidence in the justice system will be lost when binding decisions become meaningless because they are divorced from reality. In this way, principled changes to legal rules can promote the rule of law.

25. As held by this Court in *Sullivan*,[25] "*stare decisis* brings important benefits to constitutional adjudication that balance predictability and consistency with changing social circumstances and the need for correctness".[26] Advances in the law must therefore mirror changing but proven social and legal realities to parties seeking relief.

26. Departing from legal precedent can reinforce respect for the rule of law by rejecting arbitrary judicial decision-making. An evidence-based philosophy allows advances in the law while simultaneously respecting prior precedent. For this reason, the exceptions to vertical and horizontal *stare decisis* are narrow. Parties cannot simply assert that things have changed. Precedents may only be overturned by factually proving changing social circumstances at the trial level, or grounding change in legal principles that have emerged from other cases decided in related but different contexts.

27. Vertical *stare decisis* achieves predictability by requiring lower courts to follow decisions of higher courts, while also allowing for necessary momentum in the law. These two values are balanced by limiting changes to circumstances where a new legal issue is raised because of significant developments in the law, or there is a change in the circumstances or evidence which "fundamentally shifts the parameters of the debate".[27]

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[25] *R v Sullivan*, 2022 SCC 19 ["*Sullivan*"].
[26] At para 66.
[27] *Bedford v Canada*, 2013 SCC 72 at para 42; *Carter v Canada*, 2015 SCC 5 at para 44; *R v Comeau*, 2018 SCC 15 at paras 30-31.

28. Horizontal *stare decisis* promotes stability by binding sister courts of coordinate jurisdiction to established legal principles, with limited exceptions. As cases move up the appellate ladder, judges have more latitude to depart from precedents through their duty to develop legal principles in accordance with the parameters governing appellate review. In particular, this Court has the most freedom to depart from its prior rulings.[28]

29. In *Kirkpatrick*, the dissenting justices of this Court issued reasons formulating, for the first time, a workable framework for revisiting prior precedents. After analyzing forty years of jurisprudence, this Court identified three areas which had consistently justified overturning prior decisions: (1) a decision is rendered *per incuriam*; (2) a decision is proven to be unworkable; and (3) the rationale underlying the decision has "been eroded by significant societal or legal change".[29] It is the last category – "foundational erosion" – which justifies the expansion of the third *Dumas* category to include security reclassification decisions within the meaning of "continued deprivation of liberty".

30. Foundational erosion may happen in two ways: (1) societal change, e.g. social, economic, or technological changes; or (2) legal change, such as constitutional amendments, or incremental legal changes where "subsequent jurisprudence 'attenuates' a precedent".[30] The BCCLA argues that both concepts are engaged by this case.

31. First, there has been significant societal change in the makeup of Canada's prisons justifying overturning prior precedent. This Court's modern jurisprudence requires it to consider the impacts of classification decisions on marginalized groups to account for relevant changing social circumstances. The application of horizontal *stare decisis* requires this Court to analyze the third deprivation of liberty identified in *Dumas* in a manner that is alive to the systemic and sometimes discriminatory deprivations of liberty experienced by incarcerated people. For example, *Gladue*,[31] *Ipeelee*,[32] and *Le*[33] – all of which centre around detention – support a

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[28] *R v Kirkpatrick,* 2022 SCC 33 at para 181, *per* Côté, Brown and Rowe JJ, dissenting but not on this point ["*Kirkpatrick*"].
[29] *Kirkpatrick* at para 202.
[30] *Kirkpatrick* at para 219.
[31] *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC).
[32] *R v Ipeelee*, 2012 SCC 13.
[33] *R v Le*, 2019 SCC 34.

conclusion that the experiences of Indigenous and Black people must be accounted for when applying the *Dumas* categories in security classification decisions.

32. Second, the robust and functional investiture of section 7 into the availability of *habeas corpus* for prisoners has eroded the rationale behind the restrictive third *Dumas* category. As developed above, this Court has repeatedly emphasized not unduly restricting the availability of *habeas corpus*. This must be accomplished through a consistent application of *Charter* principles, and accounting for the real experiences of incarcerated people.

33. This Court made it clear that "passing trends or temporary shifts will not suffice…the change must arise *after* the precedent was decided". [34] *Dumas* was decided in 1986, well before *Khela* and its progeny. In the case at bar, Simmons JA, dissenting, held that *Dumas* did not establish "a general rule concerning the point at which an initially valid deprivation of liberty becomes unlawful, thereby potentially crystallizing it into a deprivation of liberty reviewable by way of *habeas corpus*".[35] Rather, there is:

> no reason why a decision to maintain an initially valid security classification should not be considered a deprivation of liberty reviewable by *habeas corpus* where the reasons for the decision show a legitimate ground for concluding that the only basis for withholding a lower security classification may be arbitrary or unreasonable and therefore unlawful. The decision to withhold a lower security classification in such circumstances crystallizes the deprivation of liberty.[36]

34. Simmons JA's interpretation of the third *Dumas* category is harmonious with the *Charter* principles emerging from this Court's modern *habeas corpus* jurisprudence and lower-level court decisions which employ the same robust analysis. As in *Diggs*, and as outlined above, this is an interpretation using the correct comparator group: those who have not experienced a potential deprivation of liberty because of arbitrary or unreasonable decision-making. By not framing the decision as merely a maintenance of the *status quo*, Simmons JA correctly applied a similar purposive approach to the availability of *habeas corpus*, infused by a robust understanding of section 7 of the *Charter* and an understanding of the reality prisoners face.

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[34] *Kirkpatrick* at para 220.
[35] *Dorsey v Canada (Attorney Genera)*, 2023 ONCA 843 ["*Dorsey ONCA*"] at para 106.
[36] *Dorsey ONCA* at para 112.

35. The cases reviewed above are not a passing trend or temporary shifts. They are grounded in the bedrock of sections 7 and 10(c) of the *Charter* and the ancient rationale for the writ: to promote the rule of law and protect prisoners from arbitrary state abuses of power. The more recent jurisprudence reveals common themes justifying departure from precedent. In this case, a restrictive interpretation of *Dumas* "relies on principles or gives effect to purposes inconsistent with those underlying the Court's subsequent decisions."[37] By applying a modern interpretative lens to the third *Dumas* category, this Court's *habeas corpus* jurisprudence is made harmonious by balancing predictability and consistency with changing social circumstances and the need for correctness in the law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of April, 2025.

FRANCES MAHON
GA GRANT
Counsel for the Intervener, British Columbia Civil Liberties Association

[37] *Kirkpatrick* at para 235.

PART IV – TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s)**
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