

Federal Court



Cour fédérale

Date: 20260514

Docket: T-1146-25

Ottawa, Ontario, May 14, 2026

PRESENT: Case Management Judge Catharine Moore

BETWEEN:

CANADIAN WOMEN'S SEX-BASED RIGHTS

Applicant

and

HIS MAJESTY THE KING

Respondent

ORDER AND REASONS

[1] The Plaintiff, Canadian Women's Sex-Based Rights ("CAWSBAR") brings this motion seeking public interest standing to commence and maintain this proceeding. The Defendant, His Majesty the King in right of Canada ("the Crown") opposes the motion although it chose to neither tender substantive evidence nor to challenge CAWSBAR's evidence through cross-examination.

[2] For the reasons that follow, considering the relevant factors both cumulatively and purposively, I find that the Plaintiff satisfies the test for public interest standing.

[3] I have previously described the Statement of Claim in this file in my decision regarding the Crown's motion to strike it out.

[4] CAWSBAR relies on the Affidavit of Heather Mason, one of its founding members and a member of its steering committee. Ms. Mason also serves as a Director and chairs the Board of Directors. She describes CAWSBAR and its objectives as well as her own lived experience in the criminal justice system. The document exhibits many attachments, including media appearances and podcasts. At the outset of the hearing, the parties agreed that I was able to rely on these exhibits as evidence on the motion.

[5] After several provincial incarcerations, Ms. Mason was incarcerated federally in 2017 in Grand Valley Institution. She recounts an incident in a provincial facility in 2015 where a "biological male inmate" observed her during a strip search.

[6] Her federal incarceration in 2017/2018 coincided with the introduction of a policy which she describes as permitting pre-operative trans-identifying male inmates into female institutions. "Trans-identifying" is defined in the claim as "a person who identifies with a Gender that does not correspond with their Biological Sex." Prior to this time, trans-identifying males were required to undergo surgery prior to being transferred into a female institution. She recounts an experience with one trans-identifying male who made derogatory comments toward her and other female inmates and who had allegedly sexually assaulted several female inmates and been sent to segregation as a result.

[7] Prior to founding CAWSBAR, Ms. Mason volunteered with the Canadian Association of Elizabeth Fry Societies. However, her opposition to the transfer of trans-identifying male inmates into female correctional institutions placed her at odds with the association. She recounts a final incident at the 2019 annual general meeting, during which a formerly incarcerated woman spoke about her experience of victimization by a trans-identifying male and was labelled as transphobic. This prompted Ms. Mason to resign from her volunteer position with the organization.

[8] Ms. Mason recounts the founding of CAWSBAR in 2019 and its advocacy for women's sex-based rights and protections in the context of venues traditionally reserved for biological females. She explains that CAWSBAR publishes a newsletter, holds annual conferences, maintains active social media accounts and frequently appears on podcasts and in the media. It has a network of 200 associates, is a signatory to an international declaration on women's sex-based rights and participates in and supports international actions which align with its mission.

[9] On the issue of the policy of transferring trans-identifying male inmates to women's prisons, which is at issue in this litigation, CAWSBAR holds regular protests, banner drops, appears on podcasts and news programs, writes regularly, and in June of 2021, submitted a written brief to the Standing Committee on Public Safety and National Security.

[10] Ms. Mason states that she is in regular contact with past and present female inmates and receives, on average, one call per week from female inmates who have concerns about the transfer of trans-identifying male inmates into their institutions. In addition, she has conducted a survey of

incarcerated women about their interactions with trans-identifying male inmates and obtained documentary evidence about these interactions.

[11] She recounts that CAWSBAR has neither the resources nor expertise to bring this claim on its own and that their counsel has accepted to work on the claim on a *pro bono* basis. She further advises that CAWSBAR will be able to present to the Court a sufficiently concrete and well-developed factual setting to advance the claim. She understands that from the contact information she provided to her counsel, dozens of statements have been taken from female inmates detailing the harms alleged in the lawsuit.

[12] Ms. Mason says that there is no viable alternative method of proceeding because:

- 1) Due to the policies and procedures in place, the ability of an inmate to interact with other inmates and the outside world is limited;
- 2) Inmates are unable to communicate with inmates in other security classifications or other institutions;
- 3) Most of the female inmates she has spoken with have expressed a fear of reprisal were they to speak out or file a grievance and worry that they will be labelled as discriminatory or transphobic and that this will impact their ability to obtain parole;
- 4) Other nonprofit advocacy groups do not take a sex-based rights approach.

[13] She is unaware of any other individuals or organizations who have brought or are contemplating a similar proceeding.

[14] CAWSBAR also relies upon the Affidavit of Marty Moore, who describes Charter Advocates Canada (CAC) and their experience in litigation and constitutional law. He indicates

that four counsel are assigned to this case, that CAC receives grant funding to support its activities, and that it possesses the financial and legal resources to advance the Claim.

[15] CAWSBAR argues that the discretionary three-part test set out by the Supreme Court of Canada in *AG v Downtown Eastside Sex Workers Against Violence Society* is met in this case. It submits that the case involves a serious justiciable issue, that CAWSBAR has a genuine interest in the proceedings, and that the claim is a reasonable and effective means of bringing the issue to Court.

[16] For its part, the Crown relies on the Affidavit of Daren Mendonca, which exhibits the request for particulars, the particulars themselves, and a civil claim brought in the Supreme Court of British Columbia (*Kim Rothgordt and West Coast Prison Justice Society v. AGC and Commissioner of Corrections* CFN: VLC-S-S-260210). The Crown did not put forward any substantive evidence nor challenge that of Ms. Mason through cross-examination.

[17] The Crown argues that the test in *Downtown Eastside* is not met. It relies on its submissions advanced in support of its motion to strike to negate a serious justiciable issue, although it concedes that a genuine and properly pleaded constitutional challenge to policy raises such a serious issue.

[18] In *Parkdale Community Legal Services v. Canada* 2025 FC 912, Justice Turley outlined the test for public interest standing. I reproduce her summary here:

[49] Courts must cumulatively assess and weigh three factors to determine whether to exercise their discretion to grant public interest standing: (i) whether the action raises a serious justiciable issue; (ii) whether the party bringing the action has a genuine interest

in the matter; and (iii) whether the proposed action is a reasonable and effective means of bringing the case to Court: *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 28 [CCD]; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 18, 20 [Downtown Eastside].

[50] In considering these three factors, a meaningful balance must be struck between the purposes that favour granting standing and those that militate against it: *CCD* at para 30; *Downtown Eastside* at para 23.

[51] The underlying purposes of limiting standing are to guide the efficient allocation of judicial resources, ensuring that the courts have the benefit of contending points of view of those directly affected and the proper role of courts within our democracy: *CCD* at para 29. On the other hand, the purposes that justify granting standing are giving effect to the principle of legality and ensuring access to the courts and access to justice broadly: *CCD* at para 30.

[19] With respect to the first question, that is, whether there is a serious justiciable issue, *CCD* indicates that:

[49] A serious issue will arise when the question raised is “far from frivolous” (*Downtown Eastside*, at para. 42, citing *Finlay*, at p. 633). Courts should assess a claim in a “preliminary manner” to determine whether “some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation” (*Downtown Eastside*, at para. 42, citing *Canadian Council of Churches*, at p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually be unnecessary to minutely examine every pleaded claim to assess standing (*Downtown Eastside*, at para. 42).

[50] To be justiciable, an issue must be one that is appropriate for a court to decide, that is, the court must have the institutional capacity and legitimacy to adjudicate the matter (*Highwood Congregation*, at paras. 32-34). Public interest standing hinges on the existence of a justiciable question (*Downtown Eastside*, at para. 30). Unless an issue is justiciable in the sense that it is suitable for judicial determination, it should not be heard and decided no matter who the parties are (*Highwood Congregation*, at para. 33, citing L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7).

[20] Here, the Crown concedes that a properly pleaded constitutional challenge would satisfy this first element of the test. Having dismissed the motion to strike, I find that there is, indeed, a serious justiciable issue within the meaning of the jurisprudence.

[21] With respect to the second issue, *CCD* indicates that:

[51] The second factor, being whether the plaintiff has a genuine interest in the issues, also reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody. This factor asks, “whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise” (*Downtown Eastside*, at para. 43). To determine whether a genuine interest exists, a court may refer, among other things, to the plaintiff’s reputation and to whether the plaintiff has a continuing interest in and link to the claim (see, e.g., *Canadian Council of Churches*, at p. 254).

[22] The Crown argues that CAWSBAR does not have a genuine interest in the case, as any connection to the female inmate population, whether through protests, non-mainstream media appearances, or submissions to a standing committee, was undertaken by Ms. Mason in her personal capacity and not on behalf of CAWSBAR. They also argue, among other things, that CAWSBAR does not work “by and for” female inmates; they do not have a long history and have not acted as a consultant; they are not recognized by international bodies and are not oriented towards deep engagement.

[23] I find that much of this argument is contradicted by the evidence, which the Crown chose not to challenge. Ms. Mason is the Chair of the Board of Directors, so when the organization is engaging with media, she would be likely to take a leading role. In her media appearances, see for example #35, #34 and #33 listed in Exhibit I to her affidavit, Ms. Mason is identified as

representing CAWSBAR. Further, Ms. Mason leads the prison team for CAWSBAR, so I am prepared to infer that the organization has established something like committees with special mandates. Furthermore, the evidence demonstrates that CAWSBAR is a signatory to an international declaration on women's sex-based rights and participates in and supports international actions and initiatives which align with its mission.

[24] I find that CAWSBAR does indeed have a genuine interest in the litigation.

[25] As to the third and final issue, *CCD* provides the following guidance:

[52] The third factor, reasonable and effective means, implicates both legality and access to justice. It is "closely linked" to legality, since it involves asking whether granting standing is desirable to ensure lawful action by government actors (*Downtown Eastside*, at para. 49). It also requires courts to consider whether granting standing will promote access to justice "for disadvantaged persons in society whose legal rights are affected" by the challenged law or action (para. 51).

[53] This factor also relates to the concern about needlessly overburdening the justice system, because "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (*Hy and Zel's*, at p. 692). And it addresses the concern that courts should have the benefit of contending views of the person's most directly affected by the issues (*Finlay*, at p. 633).

[54] To determine whether, in light of all the circumstances, a proposed suit is a reasonable and effective means of bringing an issue before the court, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting, and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality (*Downtown Eastside*, at para.50). Like the other factors, this one should be applied purposively, and from a "practical and pragmatic point of view" (para.47).

[55] The following non-exhaustive list outlines certain “interrelated matters” a court may find useful when assessing the third factor (*Downtown Eastside*, at para.51):

1.*The plaintiff’s capacity to bring the claim forward*: What resources and expertise can the plaintiff provide? Will the issue be presented in a sufficiently concrete and well-developed factual setting?

2.*Whether the case is of public interest*: Does the case transcend the interests of those most directly affected by the challenged law or action? Courts should take into account that one of the ideas animating public interest litigation is that it may provide access to justice for disadvantaged persons whose legal rights are affected.

3.*Whether there are alternative means*: Are there realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination? If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues?

4.*The potential impact of the proceedings on others*: What impact, if any, will the proceedings have on the rights of others who are equally or more directly affected? Could “the failure of a diffuse challenge” prejudice subsequent challenges by parties with specific and factually established complaints? (citing *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086, at p.1093).

[26] The Plaintiff argues that the affidavit of Mr. Moore illustrates that there is capacity to take on this litigation and the Crown does not contest this argument. Indeed, CAWSBAR’s connection with the female inmate community through Ms. Mason and Ms. Mason’s lived experience will assist with the provision of instructions to counsel.

[27] It also appears to me that the case is in the public interest. The Brief submitted to the Standing Committee on Public Safety and National Security contains the following passage, taken from the Annual Report of the Office of the Correctional Investigator 2014-2015:

At least 68% of federally imprisoned women have a history of sexual assault, and at least 86% of them have been physically abused.

[28] I find that this litigation has the potential to provide access to justice for a traditionally disadvantaged group.

[29] I find that there are no realistic alternative means of advancing this case. Neither party has identified any similar cases alleging this type of discrimination from this policy or any similar policy that are currently or have previously been decided by the court, indicating it is not a duplicative proceeding.

[30] I also find that relying on individuals to bring these claims would not be a realistic alternative in advancing this case. The evidence from Ms. Mason is, to paraphrase, that it is unrealistic to expect federally incarcerated women to bring their own litigation for fear of reprisals; specifically, a concern that their chances of parole may be prejudiced by taking action against trans-identifying males incarcerated with them, as well as significant practical hurdles in managing such litigation while incarcerated. The Crown argued that if, as the evidence demonstrates, federally incarcerated women were prepared to act as witnesses, they could bring litigation forward on their own. However, a similar argument in *Downtown Eastside* was dismissed as follows:

[71] The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the *Downtown Eastside* neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional lawsuit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

[31] Additionally, the evidence is that no other organization would be prepared to advance this claim.

[32] Accordingly, I find that there is no realistic alternative means to bring forward this issue.

[33] Finally, I find that, by limiting the claim to declaratory relief as it has, CAWSBAR has limited its potential to negatively affect others. Private remedies would still be available to affected individuals; for example, should an individual wish to advance a tort claim in connection with a specific incident or incidents, this case would not bar their recovery.

[34] Having carefully considered the evidence and the arguments of the parties along with the relevant jurisprudence, I grant CAWSBAR public interest standing.

THIS COURT ORDERS that:

1. The motion is granted.
2. The Plaintiff shall have its costs in any event of the cause.

"Catharine Moore"
Associate Judge