

2022

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Citation Information

Roach, Kent. "Joe's Justice: Substantive, Procedural and Remedial Equality." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 104. (2022).

DOI: <https://doi.org/10.60082/2563-8505.1431>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol104/iss1/9>

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Joe's Justice: Substantive, Procedural and Remedial Equality

Kent Roach*

I. INTRODUCTION

The first day I ever spoke to Joseph J. Arvay Q.C., I ended up on a plane that evening heading to Victoria to assist him on a case. What happened to me was typical of his collaborative approach. When I refer to “Joe”,¹ it was Joe and company. Joe was assisted by other talented lawyers, including female, Indigenous and racialized colleagues. He listened to and was influenced by his clients.

Joe demanded equality and effective remedies. Now. And with advanced and enhanced costs if you please. His concerns about access for justice for disadvantaged Canadians was not the stuff of after-dinner speeches. Joe put his money where his mouth and his heart was. In doing so, he greatly improved Canadian law. For Joe, access to justice and meaningful remedies was simply a matter of respecting the humanity, agency and dignity of those he represented, many of whom were disadvantaged.

Joe's sudden and unexpected death hit many of us very hard. So many lawyers and organizations had come to rely on him as the living embodiment of access to justice and equality. It is very difficult to imagine a world without him. The reliance that we all placed on Joe and the inspiration that he provided to so many have made me rethink how I approach the issues I discuss in this essay. As an academic, I have seen public interest litigation, access to justice, equality and remedies as matters of institutions, doctrine and social context. But the great loss of Joe has made me see that they also require people — heroes if you will — who will demand them.

In this essay, I will quote liberally from Joe's factums because they are examples of excellent writing and advocacy.² Joe was a great lawyer, but it would be a mistake to think that he did not have a “theory” of the Charter. The first section will suggest that Joe pursued substantive equality starting with the position he took as counsel for the Attorney General of British Columbia in *Andrews v. Law Society of British*

* Faculty of Law, University of Toronto. I thank my colleague Cheryl Milne for helpful comments on an earlier draft.

¹ Joe was a rock star among lawyers and as you will hopefully see from quotes from some of his factums, a poet. Thus, he deserves the same treatment as Bruce (Springsteen).

² The recent factums are available on the Supreme Court of Canada's web site and many of the older ones are available on the website of the David Asper Centre for Constitutional Rights, online: <https://aspercentre.ca/constitutional-cases/supreme-court-case-materials/alphabetical-list-of-cases/> I secured other of Joe's factums by requests to the Supreme Court.

Columbia.³ He continued this approach with his forward and “living tree” understanding of Indigenous rights and his commitment to use public interest law litigation as a means to amplify the voices of the most disadvantaged. In the second section, I will discuss Joe’s commitment to procedural equality as reflected in the positions he took over with respect to public interest standing, court fees, advanced costs, special costs and statute of limitations. Finally, I will discuss Joe’s arguments against suspended declarations of invalidity and declarations on the basis that they denied the disadvantaged immediate and effective remedies. Substantive equality always came first for Joe. But the road to that promised land went through the more mundane and too frequently neglected worlds of procedure and remedies.

1. Joe’s Commitment to Substantive Equality

(a) Equality for the “Underdog”⁴

In *Andrews v. Law Society of British Columbia*, Joe conceded for the British Columbia Attorney General that citizenship was protected as an analogous ground of discrimination. He argued that section 15 should target “prejudice against discrete and insular minorities”. It should not allow judicial scrutiny of the reasonableness of all legislative distinctions.⁵ His scholarly factum discussed John Hart Ely’s equality-based theories of judicial review. It influenced the Court in its approach to its first and in many respects best equality case.⁶

Look at the people Joe represented in private practice — those suffering in pain, survival sex workers, people addicted to heroin, LGBTQ people, owners of a small and struggling LGBTQ book store, victims of national security abuse and Indigenous peoples. Joe was for the underdog. He consistently invoked equality rights

³ *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

⁴ This was Joe’s description of Little Sisters Book Store in his factum for Little Sisters in *Little Sisters II*, at para. 143.

⁵ Attorney General of British Columbia Factum in *Andrews*, at paras. 30-31, online: <https://aspercentre.ca/wp-content/uploads/2017/06/Appellant-Attorney-General-of-British-Columbia.pdf> citing *US v. Carolene Products Co*, 304 U.S. 144 at 152-153 fn 4 and John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980). Joe also cited Andrew Petter and Patrick Monahan’s warnings about the Charter being used to protect the advantaged. Although he defended the citizenship requirement for lawyers, Joe’s arguments were very different than those offered by counsel for the Law Society of British Columbia who argued that the legislative classification was rational and proportionate.

⁶ For example, Wilson J. reflected Joe’s argument when she stated: “while legislatures must inevitably draw distinctions among the governed”, they should not do so to disadvantage groups “lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated . . . the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances.” *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 152 (S.C.C.).

even though the courts were much comfortable with fundamental justice.⁷

Joe's passion for equality were often revealed in the first paragraph of his factums. He was a great believer in getting off to a big start. Take the first paragraph of his *Carter* factum:

This case is about those so unfortunate as to have grievous and irremediable conditions that cause intolerable suffering. It is about those who know there are states of being literally worse than death and wish to embrace the latter in the time and manner of their choosing. It is about those who are — because their disability prevents them from acting alone — denied the autonomy and respect accorded to able-bodied people and, instead, categorically labeled incapable of judging their own best interests, and either driven to end their lives pre-emptively while able or abandoned to their suffering. But it is also about a broader group who need and deserve the peace of mind and improved quality of life that comes with knowing that should their suffering become intolerable, a peaceful and dignified physician-assisted death will be an available choice.⁸

Joe was telling the Court that the assisted dying case was ultimately about equality. The demand for equality was a central underlying theme in most of Joe's cases and in most of his arguments whether they were directed at rights violations, procedural or remedial issues.

(b) Indigenous Rights for the Future

Indigenous people today suffer systemic and colonial inequalities, but the litigation of the Indigenous rights focuses on the past. Joe represented the Assembly of First Nations in a number of cases, including in the landmark *Tsilhqot'in* land claim case.⁹ His opening paragraph in that case captures John Borrows' warnings that while the courts may be obsessed with European contact and sovereignty and take an originalist approach to section 35¹⁰, Indigenous people are looking to a future where they enjoy the equality necessary for their societies and laws to thrive:

The promise of the law of Aboriginal title is the recognition of First Nations, both at the time of the assertion of sovereignty and in the present, as legal, political and

⁷ For arguments that s. 15 better captures the concerns articulated in *Bedford*, *Carter* and other criminal cases see Jonathan Rudin "Tell it Like it Is: An Argument for the Use of Section 15 Over Section 7 to Challenge Discriminatory Criminal Legislation" (2017) 64 C.L.Q. 317. Jonathan is also a rock star lawyer and thus also merits first name treatment. I have been very fortunate to have known and learned from both Joe and Jonathan.

⁸ Factum for Lee Carter *et al.* in *Carter I*, online: https://aspercentre.ca/wp-content/uploads/2017/06/FM010_Appellants_Lee-Carter-et-al.pdf, at para. 1.

⁹ *Tsilhqot'in Nation v. British Columbia*, [2024] S.C.J. No. 44, 2014 SCC 44 (S.C.C.).

¹⁰ John Borrows "(Ab)originalism and Canada's Constitutionalism" (2012) 58 Sup. Ct. L. Rev. (2d) 351. For a case where Joe argued that the duty to consult case should be informed by the United Nations Declaration on the Rights of Indigenous Peoples see *Snuneymuxw First Nation v. Board of Education – School District #68*, [2014] B.C.J. No. 1343, 2014 BCSC 1173 (B.C.S.C.).

cultural nations with a right to self-determination. These indigenous legal orders occupied, used and treated the land as their own . . . Aboriginal title must be conceived in a way which recognizes the continuing role of First Nations, as holders of title, to be able to exercise their collective will over how to use and benefit from that land, *into the future*. . . .¹¹

Although they were grounded in the past, Indigenous rights should be interpreted in a manner that gave First Nations self-determination, substantive equality and meaningful remedies in the future.

Acting for Yukon First Nations in *Beckman v. Little Salmon/Carmacks First Nation*,¹² Joe argued that the duty to consult was a constitutional right that continued after treaties and land claims agreement were signed. Treaties were part of the “living tree” of the Canadian constitution. In this way Joe recognized that substantive equality required courts to update rights to reflect modern circumstances and needs.

Joe also recognized that Indigenous people were not simply another disadvantaged group. He astutely argued that Treaty and other section 35 rights were analogous to federalism as one of the central constructs of Canada’s Constitution.¹³ He argued that the nation-to-nation Treaty relationship was “an organic one with the potential for change and evolution. Only with true partnership and trust, grounded in honourable conduct, can long-term certainty be achieved.”¹⁴ Indigenous rights were not frozen artifacts of the past. Like substantive equality, they would evolve and respond to conditions as they developed in the future.

Joe did not pull his punches about Canada’s unjust past. In *Grassy Narrows First Nation v. Ontario (Natural Resources)*¹⁵ he argued that “[e]xtinguishment is a ‘relic of colonialism’ and had been ‘used to ensure state domination of indigenous peoples’ . . . Such wholesale disposessions of Indigenous peoples undermine present and future generations and are incompatible with the duty to uphold the honour of the Crown.”¹⁶ Indigenous rights, like substantive equality, required full

¹¹ Factum for Assembly of First Nations in *Tsilhqot’n First Nation*, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/34986/FM130_Intervener_Assembly-of-First-Nations.pdf, at paras. 3-4 [emphasis added].

¹² *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, [2010] 3 S.C.R. 103 (S.C.C.).

¹³ Factum for Assembly of First Nations in *Tsilhqot’n First Nation*, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/34986/FM130_Intervener_Assembly-of-First-Nations.pdf, at paras. 29-30.

¹⁴ Factum of the Intervenor Kwanlin Dun First Nation in *Beckman v. Little Salmon/Carmacks First Nation*, at para. 45.

¹⁵ *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] 2 S.C.J. No. 48, 2014 SCC 48 (S.C.C.).

¹⁶ Assembly of First Nations Factum in *Grassy Narrows*, online: <https://www.scc-csc.ca/>

recognition and amelioration of past injustices.

(c) *The Need for Authentic Public Interest Litigation that Respects the Disadvantaged*

Joe was Canada's leading advocate for public interest litigation that would allow Charter claims to be brought on behalf of larger groups and would require the judiciary to fashion meaningful remedies. Public interest standing and complex remedies raise complex and contested issues of representation. Derrick Bell Jr., one of the founders of critical race theory, worried whether he had been attentive enough to the aspirations of Black families when he acted as a lawyer for the NAACP for school desegregation and busing.¹⁷ He raised the difficult and often under-examined question of precisely whom did the public interest litigator represent.

Joe confronted Bell's concerns about inauthentic and lawyer or interest group dominated public law litigation directly in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*.¹⁸ He argued that the *Canada (Attorney General) v. Bedford*¹⁹ individual applicants — former escorts who largely worked from their own establishments or their homes — were not necessarily more representative than the group he represented of current and former street sex workers working on Vancouver's downtown eastside, the majority of whom were Indigenous. Joe asked the Court whether it would prefer “to hear a case brought by those most directly at risk by the Prostitution Laws, even if it is brought forward by an organization rather than a single affected individual”.²⁰ Derrick Bell's warnings about inauthentic public interest litigation were prophetic. In the United States and India, serious concerns have been articulated that public interest litigation has at times served the interests of the lawyers involved more than the disadvantaged.²¹ In contrast, Joe was committed to listening and learning from the disadvantaged persons he represented.

Public law litigation in Joe's hand was authentic because of Joe's respect for and willingness to listen to those he represented. In addition to his claim for public

WebDocuments-DocumentsWeb/35379/FM140_Intervener_Assembly-of-First-Nations-et-al.pdf, at para. 33.

¹⁷ Derrick A. Bell Jr. “Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation” (1976) 85 Yale. L.J. 470.

¹⁸ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, 2012 SCC 45 (S.C.C.) [hereinafter “*Downtown Eastside*”].

¹⁹ *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) [hereinafter “*Bedford*”].

²⁰ Factum for *Downtown Sex Workers United Against Violence*, at para. 85.

²¹ Ross Sandler & David Schoenbrod, *Democracy by Decree* (New Haven: Yale University Press, 2003); Anuj Bhunia *Courting the People* (Cambridge: Cambridge University Press, 2017).

interest standing, he sought individual standing for a former sex worker in *Downtown Eastside* on the basis that the “violence and injury” she had suffered was caused by the prostitution laws. Joe was not amused at the government’s argument that the woman did not have individual standing. He argued that it would be “unconscionable” for the government to require her to “go to the Downtown Eastside, and stand outside to solicit potential clients for sex and put herself in harm’s way”.²² Joe knew that passion and even anger could be part of good advocacy.

Joe listened to his clients, but he was also a social justice advocate and a social justice entrepreneur. He knew how to put large Charter cases together often financing them on a shoe string. For Joe:

litigation brought by an organization in the public interest may be best positioned to locate lay witnesses, attract superior expert witnesses, retain *pro bono* counsel, raise funds, explore evidence comprehensively, and achieve a relatively quick and final legal outcome. A public interest litigant will almost always be a more reasonable and effective means of advancing public interest litigation than a private litigant. It will, at the very least and in the vast majority of cases, be no less reasonable and effective than litigation commenced by persons with private interest standing.²³

Joe had an instinctive ability to see the world through the eyes of the less advantaged. He warned in *Downtown Eastside* that “[t]o require individual litigation against the state in these circumstances is not to pit David against Goliath, but to close the ring to the Davids that wait at the gate.”²⁴ Public interest litigators should follow Joe’s example and attempt, as best they can, to truly understand and faithfully represent those for whom they act.

The more immediate fear in Canada is that without Joe, public interest litigation will struggle even more. Canada should have public law litigation over our prison conditions and failures to prevent solitary confinement, but we do not. One of many reasons²⁵ is that the Supreme Court seems to be retreating from *Doucet-Boudreau v. Nova Scotia (Minister of Education)*²⁶ and not allowing judges to retain

²² *Downtown Eastside* Factum, at para. 127.

²³ *Downtown Eastside* Factum, at para. 112.

²⁴ *Downtown Eastside* Factum, at para. 99.

²⁵ Other reasons include limits of legal aid funding, the willingness of government lawyers and courts to invoke procedural hurdles such as challenging standing, cause of actions, the impartiality of experts and applications for advanced costs. As Amar Khoday suggested too in an earlier draft, such preliminary arguments can be seen as a theft or tax of the limited time that civil society groups and pro and low bono litigators can devote to public law litigation. See Amar Khoday “Every Moment Counts” (2021) 69 C.L.Q. (forthcoming).

²⁶ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62 (S.C.C.). A related issue is discussed by Alison Latimer in this volume: namely a strange and technical reluctance by the courts seen in *Little Sisters* to combine remedies under

jurisdiction. Another reason is that class action lawyers have occupied much of the space with respect to repetitive and mass Charter violations in prison, policing, social welfare and other contexts.²⁷ The class action lawyers may be able to make the government pay, but that may not be enough to make it stop violating rights. Although Joe asked for Charter damages in his second round battling the customs bureaucracy in the *Little Sisters* case, he stated in his factum that his claim for a structural injunction and retention of jurisdiction was more important.²⁸ This was a principled position that could have worked to Joe's own economic disadvantage given the over \$200,000 his small law firm was owed by the small LGBTQ book store.²⁹ Joe's legacy suggests that public interest litigation should be about achieving equality and not largely about large damage awards and contingency fees.

2. Joe's Commitment to Procedural Equality

(a) *The Interconnection of Substantive and Procedural Equality*

Joe's impact on constitutional law is reflected throughout the constitutional law casebook, but the casebook only devotes six pages to procedure. With some exceptions, the law schools assume that every intellectual issue worth discussing magically and costlessly ends up in the Supreme Court. A more insidious side of the neglect of the importance of procedure and practice is the University of Toronto's position that those who direct legal clinics and teach clinical courses are not "academic staff" who enjoy the full protections of academic freedom.³⁰

ss. 24 and 52 that encourages litigation over such matters and can fail to provide comprehensive relief.

²⁷ In the prison context see *Francis v. Ontario*, [2021] O.J. No. 1629, 2021 ONCA 197 (Ont. C.A.); *Hamm v. Canada (Attorney General)*, [2021] A.J. No. 692, 2021 ABCA 190 (Alta. C.A.); *Brazeau v. Canada (Attorney General)*, [2020] O.J. No. 1062, 2020 ONCA 184 (Ont. C.A.). Other numerous Charter class actions include: *Capital District Health Authority v. Murray*, [2017] N.S.J. No. 117, 2017 NSCA 28 (N.S.C.A.); *King & Dawson v. Government of P.E.I.*, [2020] P.E.I.J. No. 43, 2020 PECA 13 (P.E.I.C.A.); *Cirillo v. Ontario*, [2021] O.J. No. 2886, 2021 ONCA 353 (Ont. C.A.); *Elder Advocates of Alberta Society v. Alberta Health Services*, [2021] A.J. No. 245, 2021 ABCA 67 (Alta. C.A.); *Canada v. John Doe*, [2016] F.C.J. No. 695, 2016 FCA 191 (F.C.A.); *Good v. Toronto (Police Services Board)*, [2016] O.J. No. 1748, 2016 ONCA 250 (Ont. C.A.), leave to appeal refused [2016] S.C.C.A. No. 255 (S.C.C.); *Neufeld v. Manitoba*, [2002] M.J. No. 374, 2002 MBCA 123 (Man. C.A.).

²⁸ Factum for *Little Sisters* in *Little Sisters II*, at para. 122.

²⁹ Factum for *Little Sisters* in *Little Sisters II*, at para. 48

³⁰ The University of Toronto classified clinical directors at its International Human Rights Program (and by implication its Asper Centre for Constitutional Rights where Joe served as its first constitutional litigator in residence) as having a "managerial staff position" who are not entitled to the same academic freedom as more highly paid professors such as myself even though they teach classes, engage in research and take controversial positions. See statements by U of T Vice President of Human Resources and Equity, Kelly Hannah-Moffat and Dean of Law, Edward Iacobucci, online: <http://ultravires.ca/wp/wp-content/uploads/2020/09/Dean->

Iacobucci-VP-Human-Resources-Equity-Statements.pdf and statements by President, Meric Gertler, online: <http://ultravires.ca/2021/07/governing-council-discusses-the-future-of-the-ihrp/>.

The Cromwell report on the controversy over the aborted search affirms that the “conventional thinking” at the University of Toronto “that existing formal protections” do not apply to clinical instructors who are in “the professional/managerial classification”: Hon. Thomas Cromwell, *Independent Review of the Search Process for the Directorship of the International Human Rights at the University of Toronto* (March 15, 2021), at 57, online: <https://www.president.utoronto.ca/secure-content/uploads/2021/03/Report-of-the-Hon-Thomas-A-Cromwell-CC---March-15-2021.pdf>. Disappointedly, Cromwell concluded it would not be “prudent” for him to offer advice about whether clinical faculty should be protected by formal and enforceable measures of academic freedom even though he was presented with a submission detailing threats to academic freedom of clinical faculty. Justice Cromwell only offered a vague suggestion that “the University examine the protections for clinical instructors and similar positions whose duties require them to tackle topics likely to arouse controversy and to take steps to ensure that their efforts will be supported so long as they meet the highest professional standards” (at 74). It is not clear what Cromwell means by “support” or “the highest professional standards”.

In its unsuccessful defence against a unanimous censure by the Canadian Association of University Teachers (“CAUT”), the University of Toronto argued as point one of its defence that clinical directors are not only “managerial” but not even “academic staff” under the broad definition in CAUT’s bylaws. See online: <https://www.president.utoronto.ca/secure-content/uploads/2021/04/Presidents-Letter-Plus-Appendix-to-CAUT-April-20-2021.pdf>. In response to this defence, I resigned in protest as Chair of the Faculty Advisory Committee for the Asper Centre for Constitutional Rights where Joe served as its first litigator in residence. The University’s position that clinical faculty are not “academic staff” in my view denied them their equality as a key component of the law faculty. Online: https://drive.google.com/file/d/1AilEUh6e9PuDFqf1a__Gw1cOe9zcLcIU/view.

The University of Toronto has committed to implement the Cromwell report but given the vagueness of Cromwell’s advice, it is doubtful whether clinical faculty will be able to have formal protections of academic freedom that could trigger a grievance or other legal proceeding. Consistent with the thesis of this article, these are not mere procedural matters. Rather, they are necessary to protect the substance of academic freedom and the equality of clinical instructors. In short, it will be cold comfort if clinical directors and instructors have the “support” of a University that has deliberately and repeatedly stressed that clinical faculty are “managerial” and “non-academic”. The issue that exists at the University of Toronto may also exist at other Canadian law schools which tend to sharply differentiate between faculty and those lawyers who interact with clients as part of often much heralded clinical programs.

There is increased recognition of the need for clinical instructors to have the benefits of academic freedom in American law schools. The Association of American Law Schools has stated: “The resolve of the Association has been reflected in the public positions that it has taken in support of clinics at member schools that have been the subject of external pressure. The Association reaffirms that academic freedom is critical to achieving the objectives of clinical legal education and that the principle of academic freedom applies equally to clinical law faculty.” The Association of American Law Schools *Support of Academic Freedom for*

(b) Public Interest Standing

Joe represented the Downtown Eastside Sex Workers United Against Violence³¹, a group of survival sex workers who lived and worked in Pickton's killing fields on Vancouver's Downtown Eastside. The old sex work provisions in the *Criminal Code* were struck down in *Bedford* on the basis of overbreadth and gross disproportionality under section 7 of the Charter and with a suspended declaration of invalidity.³² Joe did assist in *Bedford* by arguing for the Asper Centre for Constitutional Rights that "the judiciary must prune and nurture the living tree that is the *Constitution*." He also stressed that ignoring changing social facts will delay and deny justice to missing and murdered women many whom were Indigenous.³³ If *Downtown Eastside* had reached the Supreme Court first, section 15 would have been a central issue. Joe would also have strongly resisted a suspended declaration of invalidity.

But *Downtown Eastside* ended up as a less high-profile standing case that takes up less than a page of the Constitutional Law casebook. Joe's factum and argument in the Supreme Court laid the basis for the Court's decision to modify the law of

Clinical Faculty (January 3, 2001), online: <https://www.aals.org/about/handbook/good-practices/academic-freedom/>. Similarly the American Bar Association accredits law school on the basis that "A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members." Standard 405(c), online: https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter4.auth-checkdam.pdf. Even these more robust standards have not avoided interference with the academic freedom of clinical programs which have also occurred at the University of Toronto's International Human Rights Program apart from the contested allegations over the candidacy of Valentina Azarova as Director. See Robert R. Kuehn & Bridget M. McCormack, "Lessons from Forty Years of Interference in Law School Clinics" (2011) 24:1 *Geo J. Legal Ethics* 59, at 77-78.

It is odd that the University of Toronto's Faculty of Law which emulates top American law schools in its tuition, publication and guest speaking practices should reject American standards with respect to the academic freedom of "non-academic" clinical directors that it employs full time and expects to deliver a key component of its academic program.

³¹ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, 2012 SCC 45 (S.C.C.).

³² *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

³³ He elaborated: "constitutional litigation affects the people of Canada, not merely the parties to the litigation. One of the main and most injurious problems of adhering to precedent in the face of materially different legislative and social facts is that it results in a long delay in accessing justice . . . Often in Charter cases, justice delayed is justice denied. This case presents stark illustrations of this point in the well-publicized example of the missing and murdered women of Vancouver's notorious 'downtown eastside'". Factum of the David Asper Centre in *Bedford*, online: <https://aspercentre.ca/wp-content/uploads/2017/04/Bedford-Factum.pdf>, at paras. 29, 33.

public interest standing to avoid a mechanical and often unrealistic preference for litigation by the directly affected. As Joe argued:

The present law evinces an overwhelming preference for private interest standing, at the cost of appropriate public interest cases proceeding, by asking the question “whether there is another reasonable and effective way to bring the issue before the court.” The law should be reformulated to ask instead whether *this* litigation *with this plaintiff* is a reasonable and effective way of bringing the issues before the court. In asking and answering this question, public interest litigation will occupy the place it deserves given the importance it plays in advancing the rights and freedoms of all members of Canadian society.³⁴

Joe stressed “Individual active sex workers are unlikely to have the ability to raise or sustain a comprehensive constitutional challenge such as the one in issue.”³⁵ The Supreme Court largely accepted his argument thus expanding public interest standing.

Many of the customers of sex workers targeted by the Harper government’s reply legislation — The *Protection of Communities and Exploited Persons Act*³⁶ enacted in 2014 — are also unlikely to challenge the new law governing the exchange of sex for money. The customers targeted by the new soliciting law would not have much incentive to make their identities more public by challenging it. Many customers would not have the financial means or the incentive to call expert witnesses to demonstrate how street sex workers may still be endangered even though not directly targeted by the new offences. The reality of lack of access to justice helps explain why the new law has not yet made its way back to the Supreme Court in the seventh year of its existence even while it continues to endanger the lives of sex workers.³⁷ Another grant of public interest standing may be necessary if Parliament’s aggressive reply legislation to *Bedford* is not to remain practically immune from subsequent judicial review.

(c) Court Fees and the “Public Good of Adjudication”

Joe represented the Advocates Society in arguing against court fees in *Trial*

³⁴ Downtown Eastside Sex Workers United Against Violence factum, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/33981/FM020_Respondents_Downtown-Eastside-Sex-Workers-United-Against-Violence-Society-and-Sheryl-Kiselbach.pdf, at para. 3.

³⁵ Downtown Eastside Sex Workers United Against Violence factum, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/33981/FM020_Respondents_Downtown-Eastside-Sex-Workers-United-Against-Violence-Society-and-Sheryl-Kiselbach.pdf, at para. 68.

³⁶ *Protection of Communities and Exploited Persons Act*, S.C. 2014 c. 25.

³⁷ Most of the relatively few Charter challenges of the new law have been brought by those accused of activities that involve some form of ownership or organization of a sex work/escort business. See, for example, *R. v. Boodhoo*, [2018] O.J. No. 6413, 2018 ONSC 7205 (Ont. S.C.J.); *R. v. Anwar*, [2020] O.J. No. 820, 2020 ONCJ 103 (Ont. C.J.).

Lawyers Assn. v. British Columbia.³⁸ He argued (and the Supreme Court accepted) that the fees should be struck down for all without relying on exceptions for the impecunious. With attention to the plight of the many Canadians who have to resort to family law courts, Joe maintained that “adjudication is a public good” and “critical to a functioning democracy”:

Just as each adult has the right to an equal vote, each individual has equal standing to have her claims and defences heard in court through a process that is fair, open, independent and accessible. Adjudication gives reality to the democratic promise that each of us is equal under the law and equally entitled to the enforcement of our rights, regardless of whether the opposing party is wealthy or held in high esteem, or is even the state itself. Indeed, judicial review on administrative and constitutional grounds ensures that the lawmakers we vote into office and the officials that they appoint do not trespass the bounds of their authority.³⁹

Joe’s defence of adjudication as an instrument of democracy was based on his pragmatic sense that the most disadvantaged and unpopular would often not get a fair shake with the legislature and the executive. Resort to the courts would often be necessary for the disadvantaged or even those who are middle class to be heard.

(d) Advance Costs and Access to Justice

One way of getting to court was to make the government pay advance costs to help finance the litigation. Joe understood that “there are limits to how many or what kind of cases counsel can take on *pro bono* speculating that his or her services would be compensated in an award of costs.”⁴⁰

Joe represented Chief Roger William in *Okanagan Indian Band*⁴¹ where the Supreme Court first affirmed the judicial power to award advance costs in cases where litigation of public importance could not go forward without such an award. Joe had a comprehensive, coherent and radical “theory” of costs. He deftly argued that concerns that granting advance costs would pre-judge a case were meritless because some public interest litigants should receive costs regardless of whether they won or lost. He argued:

The public importance of constitutional litigation is not dependent on the outcome. . . The importance of the Constitution for the marginalized in our society and without political power or resources cannot be gainsaid. The Constitution,

³⁸ *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.).

³⁹ *Advocates Society Factum in Trial Lawyers Assn v. B.C.*, at para. 20, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/35315/FM080_Intervener_Advocats-Society.pdf.

⁴⁰ Joe Arvay & Alison Latimer “Cost Strategies for Litigants: The Significance of R. v. Caron” (2011) 54 Sup. Ct. L. Rev. (2d) 427, at 428.

⁴¹ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76, 2003 SCC 71 (S.C.C.).

especially the Charter and s.35, becomes a rather hollow instrument if it is inaccessible for those for whom it is most essential. It must not become the preserve of the wealthy litigant.⁴²

Joe's approach to costs was rooted in his approach to substantive equality for the disadvantaged.

Like good lawyers generally, Joe was cautious about the danger of pushing victories into defeats. He rejected many advance costs cases because they were not "the right" cases. He concluded that the Little Sister's second round of being "once again harassed by Canada Customs notwithstanding that we had barely left the Supreme Court of Canada after an arduous, 10-year odyssey to that Court"⁴³ was the right case. As he explained:

it seemed very wrong to me that they would have to finance another challenge to the Customs practices that they thought they had more or less already demonstrated were unconstitutional. Surely, I thought, if Customs wanted to have another court battle, it should be required to finance it and not my clients.⁴⁴

Joe's factum in *Little Sisters II* noted that the bookstore which was owned by two individuals never profited more than \$25,000 a year and often less. Little Sisters had tried to raise funds, but many potential donors had reasonably assumed that after "an epic ten year struggle, all the way to the Supreme Court of Canada, the issue had been resolved and there is no need for further litigation. But, sadly, this is not the case."⁴⁵

Although customs banned 68,000 items between 1998 and 2003 affecting the rights of "hundreds of thousands Canadians", only Little Sisters was prepared to take on customs in court.⁴⁶ The federal government pulled out all the stops to defend its decision to ban the "meatman" comics. As Joe pointed out in his factum, this included paying an American expert who had served on the Meese Commission that condemned pornography \$600 an hour.⁴⁷ Joe did not have the same luxury. When the British Columbia Court of Appeal had criticized Little Sisters as a self-appointed watchdog of customs, Joe replied that it was an "underdog, bravely fighting to keep Customs at bay and within its constitutional and statutory powers".⁴⁸ Joe lost the case and took it hard. Little Sisters was not able to continue to litigate. Litigators need their ego, but they know what it is like to lose.

⁴² Factum for the Intervener Chief Robert William in *Okanagan Indian Band*, at para. 47.

⁴³ Joe Arvay & Alison Latimer "Cost Strategies for Litigants: The Significance of R. v. Caron" (2011) 54 Sup. Ct. L. Rev. (2d) 427, at 428.

⁴⁴ Joe Arvay & Alison Latimer "Cost Strategies for Litigants: The Significance of R. v. Caron" (2011) 54 Sup. Ct. L. Rev. (2d) 427.

⁴⁵ Factum for Little Sisters in *Little Sisters II*, at para. 141.

⁴⁶ Factum for Little Sisters in *Little Sisters II*, at paras. 92, 94.

⁴⁷ Factum for Little Sisters in *Little Sisters II*, at paras. 41, 48, 62.

⁴⁸ Factum for Little Sisters in *Little Sisters II* at para. 143.

Joe did not abandon the fight for advance costs. Representing the Canadian Civil Liberties Association in *R. v. Caron*,⁴⁹ he related advanced costs to the rule of law and preventing “the complicity of the judiciary in preventing the ordinary citizen from vindicating constitutional rights and addressing matters of substantial public importance”.⁵⁰ He reminded the Court that “much constitutional and other public interest litigation is far beyond the means of the ordinary citizen”. The impecuniosity requirement for advance costs should not require “destitution”, “crippling debt” or the litigant’s community “to collectively empty its pockets”.⁵¹

Joe saw costs as part of a David and Goliath struggle against the government. His many years as the Attorney General of British Columbia’s leading constitutional lawyer and his continued representation of British Columbia in some important cases meant that he was keenly aware that there is no equality of arms in constitutional litigation. As he wrote:

we have asked the Court, on occasion, to simply order that the plaintiff receive the same budget and rates as the government defendant’s counsel — a request that is always vigorously opposed by those same lawyers. Having been a government lawyer, I know just how spoiled and privileged I was, given the resources at my command in comparison to those available to lawyers on the other side acting for poor or even middle-class individuals.⁵²

Joe could have been “spoiled and privileged” as a lawyer for governments or large corporation, a professor or as a judge. Thankfully that was not the road he chose to take.

(e) Special Cost Awards for Public Interest Litigants

Joe financed many of his cases out of his own pocket. Given the fact that the justice system is not affordable to “ordinary Canadians”, this did not distinguish him from other lawyers. What did distinguish Joe, however, was his willingness to take on equality cases in an era where Charter damages were either not available or trivial compared to the costs of litigation. Joe tried to compensate for this by his relentless efforts to persuade judges to award special costs to public interest litigants.

We do not spend much time on costs in the law schools. Indeed, we too often assume a costless world. Legal educators including myself do not live in the real world of rent, payroll and expenses. Joe did. Few academics (with some exceptions)⁵³

⁴⁹ *R. v. Caron*, [2011] S.C.J. No. 5, [2011] 1 S.C.R. 78 (S.C.C.).

⁵⁰ Canadian Civil Liberties Association factum in *R. v. Caron*, at para. 25

⁵¹ Canadian Civil Liberties Association factum in *R. v. Caron*, at para. 28.

⁵² Joe Arvay & Alison Latimer “Cost Strategies for Litigants: The Significance of *R. v. Caron*” (2011) 54 Sup. Ct. L. Rev. (2d) 427, at 449 fn 66.

⁵³ Chris Tollefson, Darlene Gilliland & Jerry DeMarco “Towards A Costs Jurisprudence in Public Law Litigation” (2004) 83 Can. Bar Rev. 473; Benjamin Berger “Putting a Price on

examine costs because, like remedies, they often depend on the discretionary decisions of trial judges. Joe knew this, but he sought to bring principles and with that greater transparency to the exercise of that discretion. He sought to avoid the excesses of strong “flip a coin” discretion that can undermine the rule of law or rigid and narrow rules defining public interest and impecuniosity that are not sufficiently attentive to context including the fact that even the middle class and small corporations cannot afford to engage in litigation.

The culmination of Joe’s attempts to make a principled case for special costs came in the *Carter* assisted dying case. He argued that “It is in the public interest that this Court endorse the test for special costs”⁵⁴ articulated by the British Columbia Court of Appeal in *Adams*.⁵⁵ He then elegantly boiled down that four-part test to “whether the public interest in resolving a legal issue of broad importance, which would otherwise not be resolved, justifies the exceptional measure of awarding special costs to a successful litigant”.⁵⁶

The Supreme Court largely endorsed Joe’s argument about the awarding of special costs. Few law professors and law students read that part of *Carter*. That is a shame. Joe was a role model for generations of lawyers. But if you want to be like Joe, you need to worry about the economics of litigation and about trying to achieve procedural as well as substantive equality.

Joe sought to bring principles to the award of costs, but like all good litigators he also recognized that the facts sometimes should speak for themselves. To borrow from another rock star, “sometimes the poets down here don’t say nothing at all, they just stand back and let it all be”.⁵⁷ This was Joe’s “stand back and let it all be” argument in the Insite Safe injection site case:⁵⁸

The Respondents, a non-profit society and two indigent injection drug users, brought the litigation in the B.C. Supreme Court, without financial assistance and with *pro bono* counsel, to “preserv[e] the operations of a publicly-funded facility” in one of Vancouver’s most downtrodden and drug-ridden neighbourhoods. The Respondents now find themselves in this Court so that the federal and provincial Ministers of Health can know “with certainty what their legal authority is with respect to the operation of Insite”. If any case qualifies as public interest litigation

Dignity: The Problem of Costs in Charter Litigation” (2002) 26 Advocates Q. 235. Joe cited both of these works in his advance costs factums.

⁵⁴ Factum for Lee Carter *et al.* in *Carter I*, at para. 166.

⁵⁵ *Faculty Assn. of the University of British Columbia v. University of British Columbia*, [2009] B.C.J. No. 220, 2009 BCCA 56 (B.C.C.A.).

⁵⁶ Factum for Lee Carter *et al.* in *Carter I*, at para. 166.

⁵⁷ Bruce Springsteen, “Jungleland”, online: <https://www.songfacts.com/lyrics/bruce-springsteen/jungleland>.

⁵⁸ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.).

warranting costs on a full indemnity basis and in any event of the cause, this is it.⁵⁹

In *Carter*, Joe similarly reminded the judges that the case was “a massive undertaking spanning numerous jurisdictions and multiple fields of expertise. . . . The Court is in a position to know that the group of persons being represented were, in fact, tremendously disabled and disadvantaged persons who needed someone to speak on their behalf and that, in fact, many of the individuals who provided lay evidence at trial did not survive to see the final outcome.”⁶⁰ In both cases, the Supreme Court upheld the special cost awards that the British Columbia courts had awarded to Joe.

(f) Statutes of Limitations and Limits on Access to Justice

Another practical and important topic in the real world that can be overlooked or view as uninteresting black letter law by many legal academics is statutes of limitations. Statutes of limitations can apply to defeat applications for damages and other remedies under section 24(1) of the Charter⁶¹ despite the fact that one would think that an ordinary statute should not defeat one’s Charter’s entitlement to seek a remedy. Legislatures can also limit the ability of all bodies except superior courts to apply the Charter or award Charter remedies. Joe fought such restriction on access to Charter justice. In *R. v. Conway*,⁶² he argued for the British Columbia Review Board that “the principle of constitutional supremacy”⁶³ meant that such boards should be able to award Charter remedies. He recognized that the board was “the only realistic forum”⁶⁴ for those found not criminally responsible by reason of mental disorder.

Acting for the Assembly of First Nations, Joe successfully argued in the *Manitoba Metis Federation Inc. v. Canada (Attorney General)* case⁶⁵ that neither statutes of limitations nor laches should prevent the Métis from obtaining a declaration that the government had failed in implementing land grants required by section 31 of the *Manitoba Act, 1870*. He noted:

It is well-settled that statutory limitation periods cannot apply to bar a declaration of constitutional invalidity, such as a declaration that legislation contravenes s.35(1) of the *Constitution Act, 1982*. This Court should confirm that, likewise, statutory

⁵⁹ Insite/PHS Community Services Society Factum in *Canada v. PHS Community Services Society*, at para. 158, online: https://aspercentre.ca/wp-content/uploads/2017/06/FM030_Respondents_PHS-Community-Services-Society-et-al.pdf.

⁶⁰ Factum for Lee Carter *et al.* in *Carter I*, at para. 177.

⁶¹ *Rahvandal v. Saskatchewan*, [2009] S.C.J. No. 7, 2009 SCC 7 (S.C.C.).

⁶² *R. v. Conway*, [2010] S.C.J. No. 22, 2010 SCC 22 (S.C.C.).

⁶³ Factum for B.C. Review Mental Health Review Board in *R. v. Conway*, at para. 21.

⁶⁴ Factum for B.C. Review Mental Health Review Board in *R. v. Conway*, at para. 34.

⁶⁵ *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14 (S.C.C.).

limitation periods do not apply to bar a declaration that the Crown acted dishonourably or in breach of fiduciary duty.⁶⁶

The Court accepted this argument. Joe recognized that Canada must confront its unjust past before moving to a future that respects Indigenous self-determination and substantive equality.

Joe educated the Court about the human dimensions of the procedural issue of precluding litigation by laches or as statute-barred by arguing:

In its previous judgments, this Court has commented on the way in which Aboriginal rights and interests have historically been vulnerable to governmental disrespect. The process of reconciliation has been bedevilled by government delay and inaction. Now the government seeks to rely on the passage of time to preclude access to justice. A purposive approach consistent with the honour of the Crown suggests that declaratory relief should remain available to Aboriginal people in appropriate cases, despite the expiry of a limitation period that might bar a cause of action.⁶⁷

Joe knew Canada should not use procedure to avoid recognizing injustices and that recognition of an unjust past was necessary to move toward justice and equality in the future.

3. Joe's Commitment to Remedial Equality

(a) *The Interconnection of Substantive and Remedial Equality*

Joe knew that litigation on behalf of the disadvantaged required not only procedural equality to ensure that cases could be litigated on the merits, but also remedial equality that produced effective remedies for the litigants. He knew from hard experience that you could “win” a case like *Little Sisters*, the Omar Khadr cases or the *Carter* assisted dying cases but still lose because of ineffective remedies from courts or legislatures.

Like procedure, remedies are often neglected in much thinking about the Charter. Joe was the driving force behind many of the remedies cases included in the constitutional casebook, but honestly how many constitutional law professors get to remedies.⁶⁸ To be sure, some of this is my sour grapes. But I am in good company. As former Chief Justice McLachlin had to say when opening a conference:

The title of this conference - “Taking Remedies Seriously,” suggests that remedies

⁶⁶ Factum for Assembly of First Nations Factum in *Manitoba Metis Federation Inc.*, at para. 28, online: <https://aspercentre.ca/wp-content/uploads/2017/06/Manitoba-Metis-Federation-Inc.-v.pdf>.

⁶⁷ Factum for Assembly of First Nations Factum in *Manitoba Metis Federation Inc.*, at para. 32, online: <https://aspercentre.ca/wp-content/uploads/2017/06/Manitoba-Metis-Federation-Inc.-v.pdf>.

⁶⁸ The Constitutional Law Group *Canadian Constitutional Law* (Toronto: Emond Montgomery, 2017), at 46-51. I am responsible for the remedies chapter in this casebook.

have received too little attention. . . . This raises the question - why have remedies - the basic stuff of the common law - been so neglected as of late? Has the 300-year old Latin phrase *ubi jus ibi remedium* - there is no right without a remedy - become antiquated, trite even? Indeed can you imagine a conference titled ‘Taking Torts Seriously’ or ‘Taking the Charter seriously’?⁶⁹

The Chief Justice, who like Joe was smart enough to stay in the legal academy only a short time, described how “big principle subjects like constitutional law and torts dominate core curricula”. Remedies viewed as “‘practical’ but not necessarily ‘exciting’ . . . are relegated to the ‘if I have room’ or ‘if I must’ categories of most student and teaching timetables”.⁷⁰ Because he cared so much for his clients, Joe also demanded that they receive effective and immediate remedies.

(b) Joe’s Fight against Suspended Declarations of Invalidity

In the first *Carter* case,⁷¹ Joe argued based on *Ferguson*⁷² that the assisted suicide offence should be struck down with immediate effect. He suggested that more limited remedies such as constitutional exemptions “create uncertainty, undermine the rule of law and have prejudicial effects in certain cases”.⁷³ He warned that “leaving the impugned laws in place leaves the grievously and irremediably ill at risk — to risks which violate their constitutional rights to life, liberty, security of the person and equality”.⁷⁴ Here Joe was swinging for the fences in a way that would produce both immediate individual and systemic remedies.

The Attorney General of Canada argued that “the public interest” supported the extension of the 12 month declaration of invalidity in *Carter*. Joe was not amused. He reminded the Court that public interest litigation was still about real people who were suffering. In a typically gangbuster first paragraph in his *Carter II* factum, Joe argued:

Canada’s invocation of the “public interest” is abstract and monolithic. Canada speaks of extending the period of suspension as though it were a mere theoretical construct. But what Canada is actually asking this Court to do is make an order that will have profound impact on individual Canadians. Section 7 rights are *reflected* in the *Charter*, but they *exist* in the real world, and they *belong* to real people. The rights at stake are the rights of individuals to control their suffering, exercise their

⁶⁹ Beverley McLachlin “Rights and Remedies - Remarks” in Robert J. Sharpe & Kent Roach *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010), at 21.

⁷⁰ Beverley McLachlin “Rights and Remedies - Remarks” in Robert J. Sharpe & Kent Roach *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010), at 22.

⁷¹ *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.).

⁷² *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.).

⁷³ Factum for Lee Carter *et al.* in *Carter I*, at para. 160.

⁷⁴ Factum for Lee Carter *et al.* in *Carter I*, at para. 162.

autonomy, and have a say in a defining aspect of their lives. When Canada asks you to extend the period of suspension, it is asking you just this: to suspend the rights of suffering individuals and do so at the risk of rendering the remedy initially granted to them on February 6, 2015 forever without meaning. Against profound personal suffering, it asks you to disregard prior dilatory conduct and give weight to considerations of Parliamentary procedure and scheduling. We ask that you do not.⁷⁵

Joe's arguments are an important reminder — one also made by academic critics of the suspended declaration of invalidity⁷⁶ — that there is a human cost to the use of suspended declarations of invalidity.

(c) *The Lost Promise of Dialogue through Provincial and Municipal Regulation as Opposed to Federal Criminal Law*

Joe was of the last generation of lawyers who came of constitutional age before the Charter. He argued many federalism cases. Although he argued for an immediate declaration of invalidity in *Carter*, he was aware of the reality of dialogue between courts and legislatures. He stressed that the provinces should regulate assisted dying. I think he would have taken the same position with respect to regulating and licensing sex work. In both the assisted dying and sex work contexts, provincial or municipal replies might have been more consistent with the Court's original decisions than Parliament's amendments to the *Criminal Code*. The federalism dimensions of dialogue that Joe was aware of should be better explored including in my own work.

Although the federal replies to *Carter* and *Bedford* affirm that dialogue is not dead,⁷⁷ they have made public interest litigation less appealing by underlining that hard-fought judicial victories may result only in both delayed remedies and legislative defeats. Such legislative defeats may require a second round of Charter litigation, if it can be afforded. The federal government will always have the deepest pockets in such a battle of attrition. Alas some of this reply litigation to the reply legislation has been successful.⁷⁸ This should disturb the congratulatory and complacent story that the Canadian judiciary tells itself about Canadian govern-

⁷⁵ Factum for Lee Carter *et al.* in *Carter II*, at para. 1, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/35591/FM280_Appellants_Lee-Carter-et-al_Response-Réponse_2015-12-09.pdf [emphasis in original].

⁷⁶ Bruce Ryder "Suspending the Charter" (2003) 21 Sup. Ct. L. Rev. (2d) 267; Robert Leckey "The Harms of Remedial Discretion" (2016) 14 I. Con. 584.

⁷⁷ See generally Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* rev ed. (Toronto: Irwin Law, 2016), c. 16.

⁷⁸ *Truchon c. Procureur général du Canada*, [2019] Q.J. No. 7750, 2019 QCCS 3792 (Que. S.C.) (finding requirement that death must be reasonably foreseeable unconstitutional). On Parliament's lack of respect for the record in *Carter* see Allison Latimer "Constitutional Conversations" (2019), 88 Sup. Ct. L. Rev. (2d) 231. Much the same could be said about Parliament's lack of respect for the record in *Bedford*.

ments always promptly and effectively responding to judicial declarations as a means to avoid the need for retention of supervisory jurisdiction, a subject to be examined below.

(d) Individual Remedies and Exemptions from Suspended Declarations of Invalidity

Although Joe asked for an immediate declaration of invalidity in *Carter*, he had too much concern for those he represented not to ask for exemptions as an alternative remedy. Joe asked not only for an exemption for his clients as Smith J. had ordered at trial, but also:

a mechanism whereby such individuals can seek recourse to the courts to have their right to seek to have physician assisted death provided to them by a physician who is satisfied it is appropriate treatment in the circumstances, vindicated on an individual basis pending expiration of the suspension. Smith J. articulated such a mechanism in respect of Ms. Taylor, which the appellants submit provides a useful template.⁷⁹

This again affirms Joe's commitment to public interest litigation. He respected, listened and cared deeply for his clients, but he also acted for the broader disadvantaged group of which they were a member.

A narrow 5-4 majority of the Court in *Carter II* accepted Joe's alternative individual remedial approach even while they rejected his argument that the suspended declaration of invalidity should not be extended. This allowed lower courts to order exemptions from the assisted suicide offence in over 30 reported cases.⁸⁰ These people were able to litigate the case and obtain individual remedies, but we do not know how many people who would have qualified for medical assistance in dying under *Carter* were unable or unwilling to litigate to receive an individual remedy.

As part of his argument in *Carter II*, Joe filed an affidavit from a person who had made plans to end her life with medical assistance. That person spoke with great eloquence and courage:

In addition to taking away the peace of mind granted to me by this Court's decision of February 2015, the effect of extending the suspension is to impose real and continuing suffering on me for another six months. Six months may not seem like a lot of time to some people – to me, every second of every day is weighted with suffering and six month feels like an eternity. Yet, I am at the same time well aware that six months may also exceed the length of my remaining life span. During those six months, I *will* suffer, but I may *also* die the kind of death that I dread, the kind of death that I have spent the last four years supporting the legal fight for the right to choose against.

⁷⁹ Factum for Lee Carter *et al.* in *Carter II*, at para. 164.

⁸⁰ See, for example, *Canada (Attorney General) v. F. (E.)*, [2016] A.J. No. 505, 2016 ABCA 155 (Alta. C.A.).

I – and all other Canadians – won that fight. A further suspension rips that victory from our hands. These are my constitutional rights. I meet all of the criteria that this Court outlined for being qualified to invoke those rights. I have qualified medical practitioners who have affirmed my eligibility and are willing to help me exercise those rights and make them meaningful.⁸¹

This is another example of Joe respecting the people he represented and allowing them to speak. It is difficult for me to fathom how after reading this affidavit, four judges on the Court would have sentenced the affiant to 4 more months of suffering because of theoretical concerns about combining individual remedies under section 24(1) of the Charter with systemic remedies under section 52(1) of the *Constitution Act* and about allowing temporary exemptions from a law that violated the Charter.⁸²

Fortunately, the entire Court in *Ontario (Attorney General) v. G.*⁸³ has now accepted that individual remedies can be justified during a suspended declaration of invalidity. This is also the path followed in the second round of successful litigation against the restrictive assisted dying legislation enacted after *Carter*.⁸⁴

Individual remedies do not achieve systemic justice, but they are something. The foundation for what I have called this “two-track” approach⁸⁵ to suspended declarations of invalidity was actually laid by Joe as a second-best alternative to his preferred remedy of an immediate declaration of invalidity that would obtain individual and systemic equality at the same time. I wish I had had a chance to tell

⁸¹ Factum for Lee Carter *et al.* in *Carter II*, Tab B.

⁸² *Carter v. Canada (Attorney General)*, [2016] S.C.J. No. 4, 2016 SCC 4 (S.C.C.).

⁸³ *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.). Even the most restrictive judges in dissent would allow exemptions to prevent “irreparable harm” (at para. 274). Joe had similarly argued in 2016:

it is clear that Canadians will experience irreparable harm if the suspension is extended. For many currently grievously and irremediably ill persons. . . , an extension of any length may forever remove all possibility of a meaningful remedy for the breach of their constitutional rights. This is one of those cases where the ancient maxim of “justice delayed is justice denied” could not be more true and compelling.

Factum for Lee Carter *et al.* in *Carter II*, at para. 55, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/35591/FM280_Appellants_Lee-Carter-et-al_Response-Réponse_2015-12-09.pdf.

⁸⁴ Eventually the Attorney General of Canada agreed to pay the costs of those who litigated to achieve individual remedies and exemptions from the unconstitutional law subject to a suspended declaration of invalidity. *Truchon c. Procureur général du Canada*, [2021] J.Q. no 1584, 2021 QCCS 590 (Que. S.C.); *Truchon c. Procureur général du Canada*, [2020] J.Q. no 12586, 2020 QCCS 4388 (Que. S.C.).

⁸⁵ Kent Roach “Remedies for Laws that Violate Human Rights” in John Bell *et al.*, *Public Law Adjudication in Common Law Systems* (Oxford: Hart, 2016), at 269-300; Kent Roach “Dialogic Remedies” (2019) 19 I. Con. 860; Kent Roach *Remedies for Human Rights Violations* (Cambridge: Cambridge University Press, 2021), c. 2.

Joe how much I learned from him on that issue even though we did not agree about suspended declarations of invalidity.

(e) *The Need for Both Individual and Systemic Remedies to Achieve Remedial Equality*

In *Egan v. Canada*⁸⁶ Joe argued for an immediate extension of spousal benefits that would benefit both his clients, James Egan and John Nesbit, and other same sex couples. He applied the then recent *Schachter*⁸⁷ test to argue that both the nature of the legislation and the Charter supported an extension of the legislation to cover same sex couples. Acting for EGALE in the same sex marriage reference, Joe defended the systemic remedy of same sex marriage. He also successfully argued that the Court should not decide whether common law definitions of marriage were consistent with the Charter because the issue was *res judicata*.⁸⁸ Both individual and systemic remedies were important to Joe as part of his commitment to equality and effective remedies.

In *Withler*,⁸⁹ Joe argued for an immediate and retroactive remedy for his clients who claimed discrimination on the basis of the age of their widows. Although Parliament may “have a range of options ‘moving forward’, one option it does not have is to enact retroactive legislation denying the appellants their remedy as that would simply be to re-enact what the Court has declared to be an unconstitutional law”.⁹⁰ Joe understood how governments worked. His clients’ “remedial claim is grounded in their spouses’ employment relationship and is supported by the self-described ‘exorbitant’ surpluses” in the pension plans. Retroactive remedies were “the only means of achieving a victory that is not merely ‘hollow’ or ‘Pyrrhic’”.⁹¹ Joe lost both *Egan* and *Withler*, but he was ahead of his time in his demands for both substantive equality and substantive remedies.

(f) *The Limits of Declarations in Little Sisters, Khadr and Insite*

Joe recognized that remedial equality and effective remedies would often require both individual remedies for the clients he represented and systemic remedies to ensure that Charter rights did not continue to be violated in the future. In the first round of the Little Sisters litigation, he sought a systemic remedy in the form of

⁸⁶ *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.).

⁸⁷ *Schachter v. Canada*, [1991] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

⁸⁸ Factum for EGALE in *Same Sex Marriage Reference*, at paras. 26-41, online: <https://aspercentre.ca/wp-content/uploads/2017/06/Reference-re-Same-Sex-Intervener-EGALE-Canada-Inc-et-al.pdf>.

⁸⁹ *Canada v. PHS Community Service*, [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.).

⁹⁰ Factum for *Withler*, at para. 125, online: <https://aspercentre.ca/wp-content/uploads/2017/06/Appellant-in-Withler.compressed.1-2.pdf>.

⁹¹ Factum for *Withler*, at paras. 126-127, online: <https://aspercentre.ca/wp-content/uploads/2017/06/Appellant-in-Withler.compressed.1-2.pdf>.

declaration that customs legislation was invalid and more individual remedies in the form of a declaration that customs had targeted the small bookstore in violation of equality and expressive rights.

Less than two months after receiving the latter declaration, Joe returned to the same trial judge. He sought an injunction with retention of jurisdiction because Little Sister's erotica imports were still being detained by customs. He proposed both an immediate preventive injunction and that the court retain supervisory jurisdiction with customs submitting a detailed plan about how it proposed to deal with its structural problems. The trial judge ordered essentially a limited injunction to prevent customs from continuing to impose a "look-out" on Little Sisters' imports and adjourned the request for structural relief.⁹²

Joe started his Supreme Court factum in this case with what he acknowledged was an "unconventional" discussion of remedy. He stressed it would be an "error not to provide a remedy that will ensure that the unconstitutional behaviour will be corrected".⁹³ He argued:

By granting only the declaration of unconstitutional administration rather than a section 52 remedy (or an injunction) the Court has put the Appellants in an impossible position. . . even if Customs purported to provide an extra few days of training or wipe its data base clean or issue a new Memorandum with new procedures to be followed, it will take years and many new expensive and lengthy lawsuits before anyone determines whether anything has changed in fact and as a matter of substance.⁹⁴

Joe recognized the importance of effective remedies both for his clients but also in producing equality for sexual minorities.

The Supreme Court refused to strike customs legislation down or to issue an injunction or to remand the case to a trial judge to decide whether an injunction and retention of jurisdiction was necessary. Instead, the Court issued a detailed declaration about how customs had violated sections 2 and 15 of the Charter in the past. It relied on declaratory relief despite Iacobucci J.'s warning in dissent that declarations would prove to be inadequate.⁹⁵ He warned that declarations are not

⁹² *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 670, 134 D.L.R.(4th) 293 (B.C.S.C.). For additional discussion See Kent Roach *Constitutional Remedies in Canada*, 2d ed. at 13.1020-13.1090.

⁹³ Factum for Little Sisters in *Little Sisters I*, at para. 17, online: <https://bccla.org/wp-content/uploads/2012/04/1999-BCCLA-Argument-Little-Sisters.pdf>.

⁹⁴ Factum for Little Sisters in *Little Sisters I*, online: <https://bccla.org/wp-content/uploads/2012/04/1999-BCCLA-Argument-Little-Sisters.pdf>, at para. 26.

⁹⁵ *Little Sister Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, at para. 156, [2000] 2 S.C.R. 1120 (S.C.C.). Justice Binnie for the majority stressed that six years had passed since the trial and the findings in the judgment "should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary".

effective remedies in cases where administrators “have proven themselves unworthy of trust”. Having to start new litigation to get an effective remedy would place a “heavy” and “unfair” burden⁹⁶ on the small bookstore. Justice Iacobucci also embraced an argument that Joe made in *Kingstreet Investments*,⁹⁷ namely that superior courts have a “scheme making power” as part of their broad equitable powers. If courts were prepared to retain jurisdiction to administer constructive trusts and bankruptcies, they should also be prepared to retain jurisdiction when necessary to enforce Charter rights.⁹⁸ Remedial activism should be able to help the less powerful as well as the powerful.

Even Iacobucci J., however, preferred the more traditional remedy of a declaration of invalidity with suggestions to Parliament about various reform options than the retention of supervisory jurisdiction. Three years later, however, he would co-author a judgment upholding retention of jurisdiction in a minority language school case⁹⁹ but over dissents that now are more frequently invoked than the majority opinion. Canadian courts remain reluctant to retain jurisdiction, especially outside of the minority language context.¹⁰⁰ The result is too often a failure to achieve effective systemic remedies and remedial equality.

As Joe warned, Little Sisters continued to have problems with customs and it had to undertake expensive new litigation. Joe won an advance costs awards in a decision that recognized that if customs was misapplying obscenity law “that issue transcends the interests of Little Sisters and touches all book importers, both commercial and private. It is of public importance and has not been decided by other cases.”¹⁰¹ Unfortunately, a majority of the Supreme Court reversed on the basis that the case did not raise issues of sufficient public importance.¹⁰² The majority of the Court reached this very questionable conclusion in the face of Joe’s argument that an appeal about the banning of four books was tied to broader systemic issues and

⁹⁶ *Little Sisters v. Canada*, [2000] S.C.J. No. 66, at paras. 257, 261, 2000 SCC 69 (S.C.C.).

⁹⁷ *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, 2007 SCC 1 (S.C.C.).

⁹⁸ *Factum of Consumers Association of Canada in Kingstreet Investments*, at para. 70.

⁹⁹ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.).

¹⁰⁰ For my arguments that remedial exceptionalism for s. 23 of the Charter cannot be justified see Kent Roach “Principled versus Rule or Text-Based Remedial Discretion” (2022) N.J.C.L. [forthcoming].

¹⁰¹ *Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue*, [2004] B.C.J. No. 1241, at para. 43, 2004 BCSC 823 (B.C.S.C.).

¹⁰² *Little Sisters Book and Art Emporium v. Canada (Justice)*, [2007] S.C.J. No. 2, 2007 SCC 2 (S.C.C.).

that “systemic problems call for systemic remedies”.¹⁰³ The majority’s approach ignored the value of test case public interest litigation. Despite the breadth of section 24(1) of the Charter and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, Canada continues to lag behind many democracies in using supervisory jurisdiction as a means of ensuring that large state bureaucracies such as prisons, police and customs do not continue to repetitively violate the rights of the disadvantaged.

Joe requested damages in *Little Sisters II* but noted in his factum that “more importantly” he sought “injunctive (structural) relief”.¹⁰⁴ Alas most Canadian courts continue to shy away from retention of jurisdiction and structural injunctions. They continue to tell themselves a complacent story that Canadian governments will simply comply with declarations. The bar is also at fault. Even in the midst of COVID-19, it often focuses on individual remedies such as damages and *habeas corpus*. As discussed in the first part of this article, the bar is also increasingly investing in Charter damage class actions in the hope and in some cases the payoff of judgments of many millions. Joe placed his concerns that customs must respect the expressive and equality rights of sexual minorities before his own economic interests in *Little Sisters*. Unfortunately, the courts failed Joe and his clients and they continue to fail the most disadvantaged people like prisoners and those subject to police abuse whose rights are repeatedly violated by large state bureaucracies.

In the two Omar Khadr cases, Joe representing the British Columbia Civil Liberties Association insisted on effective and meaningful remedies. In the first *Khadr* case,¹⁰⁵ Joe argued that Canada should ensure that the fruits of Omar Khadr’s interrogation by Canadian officials at Guantanamo Bay after he was subject to sleep deprivation was never used against Khadr. Two years later,¹⁰⁶ Joe defended a trial judge’s mandatory order that Canada request Khadr’s repatriation. Given the history of the case “the Court should proceed direct to mandatory relief to sanction such conduct and ensure the claimant is not further denied a timely and effective remedy”.¹⁰⁷

Joe’s two interventions for the BC Civil Liberties Association in the *Khadr* cases are also noteworthy because he developed a theory of “constitutional complicity” based on *Burns and Rafay*¹⁰⁸ and *Suresh*.¹⁰⁹ The argument was that Canada’s failure to act to protect those who were vulnerable in the hands of foreign states would

¹⁰³ Factum for Little Sisters in *Little Sisters II*, at para. 74. This echoed Iacobucci J.’s dissent in the first Little Sisters case. *Little Sister Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, at para. 253, [2000] 2 S.C.R. 1120 (S.C.C.).

¹⁰⁴ Factum for Little Sisters in *Little Sisters II*, at para. 122.

¹⁰⁵ *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 28, 2008 SCC 28 (S.C.C.).

¹⁰⁶ *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3 (S.C.C.).

¹⁰⁷ British Columbia Civil Liberties Association Factum in *Khadr II*, at para. 24, online: <https://aspercentre.ca/wp-content/uploads/2017/06/2010-SCC-3-BCCLA-Factum.pdf>.

¹⁰⁸ *United States of American v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7 (S.C.C.).

result in a section 7 violation.¹¹⁰ This demonstrates how both rights and remedies under the Charter can require the government to take positive actions.

The Supreme Court's patience with using declarations reached its limit in its 2011 decision when it ordered then Minister of Health Tony Clement to issue an exemption to allow the successful INSITE safer drug injection site to continue to operate.¹¹¹ The Court finally recognized "a bare declaration" was not acceptable in part because "[I]tigation may break anew".¹¹² This reflected Joe's argument for INSITE about the need to continue providing potentially life-saving treatment for the over 4,600 injection drug users living on Vancouver's Downtown Eastside. Joe stressed what was at stake in his factum by noting that many of the addicts had HIV, most with Hepatitis C. In addition:

[m]ost have been incarcerated for their drug use; most are living in poverty; and many are homeless, have no or poor access to transportation, and limited access to primary health care. A significant number of injection drug users in the Downtown Eastside are urban Aboriginals with tenuous, if any, links to their home communities; many have histories of sexual and physical abuse; and many have resorted to the survival sex trade or other criminal activity.¹¹³

Joe was finally able to achieve an effective remedy and with that some measure of remedial equality for some of the most disadvantaged people in Canada.

After initially opposing a suspended declaration of invalidity with respect to correctional legislation that authorized solitary confinement, Joe was able to convince the British Columbia Court of Appeal to place more stringent conditions on a suspended declaration of invalidity as a means to limit the continued violation of rights against cruel and unusual treatment.¹¹⁴ This was a means of introducing

¹⁰⁹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1 (S.C.C.).

¹¹⁰ Joe argued in *Khadr I*: "Canada can also be constitutionally complicit if it *cooperated with* . . . human rights abuses of a foreign government. In this appeal, Canada has both co-operated with, and profited from, the abuse of the Respondent's human rights at the hands of the American government." Factum of British Columbia Civil Liberties Assn. in *Khadr II*, at para. 12, online: <https://aspercentre.ca/wp-content/uploads/2017/06/Khadr-BCCLA.pdf>.

¹¹¹ *PHS Community Services v. Canada*, [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.).

¹¹² *PHS Community Services v. Canada*, [2011] S.C.J. No. 44, at para. 148, 2011 SCC 44 (S.C.C.).

¹¹³ Factum of Insite/ PHS Community Services, at para. 6, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/33556/FM030_Respondents_PHS-Community-Services-Society-et-al.pdf.

¹¹⁴ *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, [2019] B.C.J. No. 8, 2019 BCCA 5 (B.C.C.A.); *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, [2019] B.C.J. No. 896, 2019 BCCA 177 (B.C.C.A.). On Joe's concerns that the full range of s. 24(1) remedies might not be available in other public interest standing cases see Allison Latimer and Benjamin Berger "A Plumber with Words" in this volume. The

some components of a systemic remedy through the back door. Canadian courts remain too reluctant to contemplate that effective remedies for disadvantaged people who are at the mercy of the executive may require courts to retain supervisory jurisdiction.

(g) Damages

One final case reflects Joe's commitment to effective remedies and his ability to obtain them. In the Ivan Henry wrongful conviction case, Joe fought hard to avoid the Court imposing qualified immunity standards that would require Mr. Henry to establish prosecutorial fault in addition to a Charter violation stemming from his wrongful conviction that resulted in 27 years of imprisonment. As always, Joe laid out what was at stake from the start:

There are few wrongs that the state can inflict on its people worse than a wrongful conviction followed by a lengthy period of imprisonment; *a fortiori* when the wrongful conviction was due to the Crown's failure to comply with its *obligation* to disclose relevant evidence. There must be a just and appropriate remedy for such a terrible wrong. Where the wrongfully convicted person has spent almost 27 years in a federal prison, it is fundamentally unjust that there be *no remedy* for the *Charter* breaches and that the convicted person is instead entitled only to the appellate remedy allowed for by the *Criminal Code* — in this case quashing the convictions and entering acquittals. There must be a *Charter* remedy, namely, a substantial compensatory award that recognises the egregious nature of the *Charter* violation.¹¹⁵

Joe also noted the important difference between the tort of malicious prosecution brought against individual prosecutors and the direct liability of governments for Charter violations. Direct liability is the norm in much of the world, with the exception of the United States where prosecutors are protected by absolute immunity and police are protected by qualified immunity. Despite these compelling arguments, Joe lost on the issue of qualified immunity.¹¹⁶ Chief Justice McLachlin's

additional remedies added in this case were not ordered under s. 24(1) and did not amount to an enforceable injunction. Nevertheless, they resemble what I have described as a "declaration plus" where the court issues general declarations but retains jurisdiction. Kent Roach *Remedies for Human Rights Violations* (Cambridge: Cambridge University Press, 2021), at 384-95.

¹¹⁵ Factum of the David Asper Centre in *Henry v. British Columbia*, at para. 2, online: https://aspercentre.ca/wp-content/uploads/2017/06/FM010_Appellant_Ivan-William-Mervin-Henry.pdf [emphasis in original].

¹¹⁶ Joe, however, successfully argued for the Consumers Association of Canada in *Kingstreet Investments* that courts should not give governments immunity from having to return unconstitutional taxes to the taxpayer. He acknowledged that governments could enact legislation to recoup the money paid under unconstitutional taxes. After a scholarly and sophisticated discussion of the roles of courts and legislatures, Joe explained: "the 'ballot box' remedy is rendered ineffective if a government avoids legislating (or fails to legislate clearly) and instead imposes on the courts to enact its preferred rule. This would be to

and Karakatsanis J.'s strong dissent, however, rejected qualified immunity. They also adopted Joe's pithy argument that: "The Crown possesses no discretion to breach the *Charter* rights of an accused."¹¹⁷

Despite having to prove fault in addition to a violation of section 7 rights under the Charter, Joe was part of team of lawyers that subsequently convinced a trial judge to award Ivan Henry almost \$8 million in damages, most of it justified as necessary to vindicate Charter rights and deter violations in the future.¹¹⁸ This decision means that as Joe originally argued for the David Asper Centre in the Supreme Court of Canada:

When a wrongful conviction arising from breach of an individual's *Charter* rights comes to light, it demands a just and appropriate remedy. Rather than relying on the whim of the state to provide an *ex gratia* payment, the appellant should be entitled to a remedy in damages for such a breach. Such a remedy is properly grounded in s. 24 of the *Charter*, which must be interpreted in a way that achieves its purpose of upholding *Charter* rights by providing full, effective, responsive and meaningful remedies for their breach.¹¹⁹

The Henry litigation has changed the way we compensate people for wrongful convictions. It has provided the wrongfully convicted with a credible threat of litigation and court ordered damages. Remedies may not be exciting, but Joe knew they are critical to the lives of real and disadvantaged people who have been harmed by the state.

II. CONCLUSION

People matter. For those of you who never had the profound honour to work with Joe or be in a courtroom with him, you missed something very special and powerful. Canada is a more just society because of Joe's hard work and his recognition that you cannot have substantive equality without both procedural and remedial equality. Joe will continue to inspire even as he is dearly missed.

side-step the democratic process of debate and deliberation that occurs in the representative houses, and thus to deprive the citizenry of the benefits of the process." Factum of the Consumers Association of Canada in *Kingstreet Investments*, at para. 11.

¹¹⁷ *Henry v. British Columbia (Attorney General)*, [2015] S.C.J. No. 24, at para. 93, 2015 SCC 24 (S.C.C.).

¹¹⁸ *Henry v. British Columbia (Attorney General)*, [2016] B.C.J. No. 1160, 2016 BCSC 1038 (B.C.S.C.).

¹¹⁹ Factum of the David Asper Centre in *Henry v. British Columbia*, at para. 4.