

In the Court of Appeal of Alberta

Citation: Brown v Alberta, 2026 ABCA 93

Date: 20260323
Docket: 2501-0254AC
Registry: Calgary

Between:

Aaron Brown

Respondent

- and -

**His Majesty the King in right of Alberta and
Recovery Alberta: Mental Health and Addiction Services**

Respondents

- and -

**The Canadian Drug Policy Coalition, The HIV Legal Network, British Columbia Civil
Liberties Association, The Charter Committee on Poverty Issues, The Canadian Health
Coalition, and the Friends of Medicare (Alberta)**

Applicants

**Oral Reasons for Decision of
The Honourable Justice Jolaine Antonio**

Application for Permission to Intervene

**Oral Reasons for Decision of
The Honourable Justice Jolaine Antonio**

[1] Yesterday I heard three applications to intervene in *Brown v HMTK*. All three applications were well argued, and I have been left with a set of difficult decisions to make.

[2] The appeal involves the cessation of government funding to an overdose prevention site. It is scheduled for hearing on May 8. Both parties' factums have been filed.

[3] I have some concerns about the timing of these applications. I do not say that to cast blame; I understand why the applications have been brought on this timeline. The fact remains that we are close to the appeal hearing date. Yesterday I raised the possibility of adjourning the hearing date. For practical reasons, I am not satisfied it would be appropriate to do so.

[4] Permitting an intervenor or intervenors to file factums, and possibly allowing for reply factums, has the potential to cause inconvenience and expense to the parties and to impinge on the panel's preparation time. While timing is by no means the primary factor on an application to intervene, it is open to me to consider whether allowing the applications would enhance or impede the panel's ability to handle this case as it deserves to be handled.

[5] Of greater import is whether the intervenors will make submissions that will assist the court in reaching a just and considered decision. Interventions are most helpful when they find the sliver of daylight between repeating the parties' arguments and expanding the *lis* between the parties. Here, the respondents have argued that the applicants would only repeat the appellant's arguments. As I will explain, I am concerned that some of the proposed arguments would in fact expand the *lis*.

[6] I will first address the application of the British Columbia Civil Liberties Association. It proposes to make three arguments which it admits are intertwined.

[7] First, it proposes to argue that the threshold question for engaging s 7 of the *Charter* is whether there has been a state action. Its counsel suggests, without support, that governments have increasingly been attempting to evade *Charter* scrutiny by arguing there is a distinction between actively discontinuing programs and passively allowing program funding to lapse.

[8] The chambers judge found the decision to let funding lapse was a state action and was capable of engaging *Charter* scrutiny: *Brown v Alberta*, 2025 ABKB 495 at para 42. Throughout, the appellant's position was premised on this decision being a state action. Below, the respondents opposed that position, essentially saying that allowing the funding to lapse was passive, not active, and therefore there was no decision that could be impugned on *Charter* grounds.

[9] On appeal, while there are some competing indications, overall it appears the respondents do not intend to argue that the decision did not constitute a state action. In their factum, the respondents assert that “Whether or not Alberta made a formal decision ... is, respectfully, irrelevant to the legal issues in this case” (para 33); “The state action at issue is thus the *non*-provision of funding” (para 35); and “The ‘action’ in this case was that Alberta took no action regarding the [overdose prevention site] and allowed the grant agreement to expire” (para 62).

[10] In short, it appears there is no longer a live issue between the parties as to whether the respondents’ decision to allow the funding to lapse constituted a state action for purposes of *Charter* review. I appreciate that the BCCLA seeks appellate authority on this point, but I am not prepared to widen a gap that the parties seem to have closed. In more familiar words, I find the BCCLA’s proposed submissions on this point would expand the *lis* between the parties as it currently stands.

[11] The BCCLA proposes to advance two additional, related arguments: (1) that funding decisions, including those with policy foundations, are not *per se* immune from *Charter* scrutiny; and (2) that the absence of a pre-existing constitutional entitlement to this type of health care service does not immunize the government’s withdrawal of that service from *Charter* scrutiny. It submits these arguments are two facets of one theme, stated by its affiant in these terms: “The constitutional question is not whether individuals had an entitlement to such services to begin with, but whether the government’s decision to eliminate them – once established and relied upon – constitutes state action that deprives individuals of life, liberty, or security of the person or that is discriminatory.”

[12] This theme has not been expressly addressed by the appellant. In their factum, however, the respondents, have submitted that the chambers judge was correct to find that “in the absence of a constitutional right requiring the government to act in the first place (that is, to fund specific health services), there can be no constitutional right to the continuation of measures that were voluntarily taken” (para 51). Therefore, I find the BCCLA’s proposed submissions on this point would not widen the issues between the parties and would be of assistance to the Court.

[13] The BCCLA’s application to intervene is granted. However, given my concerns about timing, potential prejudice, and potential expansion of the *lis*, I impose the following conditions:

- 1) The BCCLA shall make submissions only on whether the government’s decision to eliminate a particular health care service — once established and relied upon — can constitute an action that deprives individuals of life, liberty, or security of the person or that is discriminatory.
- 2) Its factum shall not exceed eight pages, shall comply with all relevant formatting rules, and shall be filed no later than noon on Monday, March 30, 2026.

- 3) Counsel for the BCCLA shall have ten minutes to make oral submissions, subject to any further direction by the panel.
- 4) No costs shall be awarded to or against the BCCLA.

[14] The second application is a joint application by the HIV Legal Network and the Canadian Drug Policy Coalition; I will refer to these applicants as the HIV Coalition. It proposes to make three arguments, which I set out in abbreviated form:

- 1) The adjudication of claims of harm under section 7 of the *Charter* should be free from stereotype and assumption, and should be based on evidence;
- 2) Established law on government decision-making, section 7 and health care should continue to apply; reframing this argument in my own words, the chambers judge erred in applying certain precedents and those errors should be corrected; and
- 3) The principle of presumed conformance with international human rights law should inform the interpretation of section 7.

[15] In my view, the first proposed submission, as a legal principle, is not contentious and does not require elaboration. If the intent of the submission is to target factual inferences, it is outside the scope of an intervention. The second and third proposed submissions do not stem from the HIV Coalition's particular expertise and would not assist the panel at a level that would justify intervention.

[16] The application of the HIV Coalition is denied.

[17] The final application for intervention is brought jointly by the Charter Committee on Poverty, the Canadian Health Coalition, and Friends of Medicare (Alberta). I will refer to these applicants as the Charter Coalition. It proposes to advance two arguments.

[18] The first is "whether the absence of a freestanding *Charter* right to health care forecloses the application of section 7 in cases like the present one, where state action or inaction exposes individuals to serious and foreseeable risk to life and security of the person". In my view, this argument would duplicate submissions that have been made by the appellant and will be made by the BCCLA.

[19] The Charter Coalition also proposes to address "whether section 15 claims by persons with disabilities must be analyzed through the well-established duty-to-accommodate framework including where accommodation may require provision or continuation of meaningful access to necessary health care services." The duty to accommodate has not been raised in these proceedings to date, to my knowledge. In my view, permitting an intervention on this point would unduly expand the *lis* between the parties.

[20] The application of the Charter Coalition is denied.

[21] If the respondents wish, they may file a factum in reply to the BCCLA's factum, not to exceed eight pages, by noon on April 9, 2026. Given the general alignment of the positions of the BCCLA and the appellant, the appellant will not be permitted to file a reply factum.

[22] No party to these applications has requested costs. None are awarded.

Application heard on March 18 and 19, 2026

Reasons filed at Calgary, Alberta
this 23rd day of March, 2026



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line. The signature is written in a cursive style.

Antonio J.A.

Appearances:

A. Nanda

for the Respondent, Aaron Brown

N. Gartke

for the Respondent, His Majesty the King in right of Alberta

S.A. Kushnerick

for the Respondent, Recovery Alberta: Mental Health and Addiction Services

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for the Applicants, The Canadian Drug Policy Coalition and The HIV Legal Network,

R. Agarwal

A. Galizia

for the Applicant, British Columbia Civil Liberties Association,

M. Jackman

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for the Applicants, The Charter Committee on Poverty Issues, The Canadian Health Coalition, and the Friends of Medicare (Alberta)