



**SUPREME COURT OF CANADA**

**CITATION:** British Columbia  
(Attorney General) v. Council of  
Canadians with Disabilities, 2022  
SCC 27

**APPEAL HEARD:** January 12 and  
13, 2022  
**JUDGMENT RENDERED:** June 23,  
2022  
**DOCKET:** 39430

**BETWEEN:**

**Attorney General of British Columbia**  
Appellant/Respondent on cross-appeal

and

**Council of Canadians with Disabilities**  
Respondent/Appellant on cross-appeal

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of Saskatchewan, Attorney General of Alberta, West Coast Prison Justice Society, Empowerment Council, Systemic Advocates in Addictions and Mental Health, Canadian Civil Liberties Association, Advocacy Centre for Tenants Ontario, ARCH Disability Law Centre, Canadian Environmental Law Association, Chinese and Southeast Asian Legal Clinic, HIV & AIDS Legal Clinic Ontario, South Asian Legal Clinic Ontario, David Asper Centre for Constitutional Rights, Ecojustice Canada Society, Trial Lawyers Association of British Columbia, National Council of Canadian Muslims, Mental Health Legal Committee, British Columbia Civil Liberties Association, Canadian Association of Refugee Lawyers, West Coast Legal Education and Action Fund, Centre for Free Expression, Federation of Asian Canadian Lawyers, Canadian Muslim Lawyers Association, John Howard Society of Canada, Queen's Prison Law Clinic, Animal Justice, Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal**

**Council of Winnipeg Inc., End Homelessness Winnipeg Inc. and Canadian  
Constitution Foundation**  
Intervenors

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,  
Kasirer and Jamal JJ.

**REASONS FOR** Wagner C.J. (Moldaver, Karakatsanis, Côté, Brown, Rowe,  
**JUDGMENT:** Martin, Kasirer and Jamal JJ. concurring)  
(paras. 1 to 124)

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**Attorney General of British Columbia**

*Appellant/Respondent on cross-appeal*

v.

**Council of Canadians with Disabilities**

*Respondent/Appellant on cross-appeal*

and

**Attorney General of Canada,  
Attorney General of Ontario,  
Attorney General of Saskatchewan,  
Attorney General of Alberta,  
West Coast Prison Justice Society,  
Empowerment Council,  
Systemic Advocates in Addictions and Mental Health,  
Canadian Civil Liberties Association,  
Advocacy Centre for Tenants Ontario,  
ARCH Disability Law Centre,  
Canadian Environmental Law Association,  
Chinese and Southeast Asian Legal Clinic,  
HIV & AIDS Legal Clinic Ontario,  
South Asian Legal Clinic Ontario,  
David Asper Centre for Constitutional Rights,  
Ecojustice Canada Society,  
Trial Lawyers Association of British Columbia,  
National Council of Canadian Muslims,  
Mental Health Legal Committee,  
British Columbia Civil Liberties Association,  
Canadian Association of Refugee Lawyers,  
West Coast Legal Education and Action Fund,  
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Federation of Asian Canadian Lawyers,  
Canadian Muslim Lawyers Association,  
John Howard Society of Canada,  
Queen's Prison Law Clinic,  
Animal Justice,  
Canadian Mental Health Association (National),  
Canada Without Poverty,  
Aboriginal Council of Winnipeg Inc.,**

**End Homelessness Winnipeg Inc. and  
Canadian Constitution Foundation**

*Interveners*

**Indexed as: British Columbia (Attorney General) v. Council of Canadians with  
Disabilities**

**2022 SCC 27**

File No.: 39430.

2022: January 12, 13; 2022: June 23.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer  
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Civil procedure — Parties — Standing — Public interest standing —  
Legality — Access to justice — Sufficient factual setting for trial — Organization  
working on behalf of persons with disabilities initiating constitutional challenge to  
certain provisions of provincial mental health legislation — Attorney General  
successfully applying to have claim dismissed for lack of standing — Court of Appeal  
remitting matter for fresh consideration of public interest standing in view of its holding  
that principles of legality and access to justice merit particular weight in standing  
analysis and that application judge erred in finding that particular factual context of  
individual case was required — Whether legality and access to justice merit particular*

*weight in framework governing public interest standing — Whether individual plaintiff necessary for sufficient factual setting to exist at trial — Whether organization should be granted public interest standing.*

A not-for-profit organization working for the rights of people living with disabilities in Canada, together with two individual plaintiffs, filed a claim challenging the constitutionality of certain provisions of British Columbia's mental health legislation. The claim asserts that the impugned provisions violate ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* by permitting physicians to administer psychiatric treatment to involuntary patients with mental disabilities without their consent and without the consent of a substitute decision-maker. The two individual plaintiffs, who were involuntary patients affected by the impugned provisions, eventually withdrew from the litigation, leaving the organization as the sole remaining plaintiff. The organization filed an amended claim shortly thereafter seeking, among other things, public interest standing to continue the action.

The Attorney General applied to have the action dismissed on the basis that the organization lacked standing. The chambers judge allowed the application and dismissed the claim. In his view, the organization failed to satisfy the test for public interest standing set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524. The organization appealed. The Court of Appeal determined that the principles of legality and of access to justice merit particular weight in the *Downtown Eastside* framework,

and held that the chambers judge erred in finding that the claim lacked a particular factual context of an individual's case or an individual plaintiff. The Court of Appeal allowed the appeal, set aside the order dismissing the action, and remitted the matter to the court of first instance for fresh consideration. The Attorney General appeals to the Court and the organization seeks leave to cross-appeal to be granted public interest standing.

*Held:* The appeal should be dismissed, leave to cross appeal granted, the cross-appeal allowed and the organization granted public interest standing.

The principles of legality and of access to justice do not merit particular weight in the *Downtown Eastside* analysis. The flexible, discretionary approach to public interest standing must be guided by all the underlying purposes of standing, and no one purpose, principle or factor takes precedence in the analysis. Furthermore, a directly affected co-plaintiff is not required for a public interest litigant to be granted standing, as long as the latter can establish a concrete and well-developed factual setting. In the circumstances of the instant case, the interests of justice mandate that the question of standing be ruled upon by the Court; remitting the matter for reconsideration would only cause further delay. Weighing all of the *Downtown Eastside* factors cumulatively, flexibly and purposively, public interest standing should be granted to the organization.

The decision to grant or deny public interest standing is discretionary. The *Downtown Eastside* framework mandates that in exercising its discretion, a court must

assess and weigh three factors: (i) whether the case raises a serious justiciable issue; (ii) whether the party bringing the action has a genuine interest in the matter; and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court. Under this framework, courts flexibly and purposively weigh the factors in light of the particular circumstances and in a liberal and generous manner. Each factor is to be weighed in light of the underlying purposes of limiting standing, which consist of efficiently allocating scarce judicial resources and screening out busybody litigants, ensuring that courts have the benefit of the contending points of view of those most directly affected by the issues, and ensuring that courts play their proper role within our democratic system of government. Courts must also consider the purposes that justify granting standing in their analyses, that is, giving effect to the principle of legality and ensuring access to justice. The goal in every case is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it.

Legality and access to justice have played a pivotal role in the development of public interest standing. The legality principle encompasses the ideas that state action must conform to the law and that there must be practical and effective ways to challenge the legality of state action. Legality derives from the rule of law — if people cannot challenge government actions in court, individuals cannot hold the state to account and the government will be or be seen to be above the law. Access to justice is also fundamental to the rule of law. There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall

and who shall not have access to justice. Access to justice is symbiotically linked to public interest standing: it provides an avenue to litigate the legality of government action in spite of social, economic or psychological barriers which may preclude individuals from pursuing their legal rights.

Legality and access to justice are primarily considered in relation to the third *Downtown Eastside* factor, which asks whether a proposed suit is a reasonable and effective means of bringing an issue before the court. To answer the question, courts may consider the plaintiff's capacity to bring the claim forward, whether the case is of public interest, whether there are alternative means to bring the claim forward, and the potential impact of the proceedings on others. Because legality and access to justice feature most prominently in relation to the third factor, attaching particular weight to them would effectively transform this factor into a determinative one. Though courts are encouraged to take access to justice and legality into account, they should not turn these considerations into hard and fast requirements or freestanding, independently operating tests.

The third factor also requires courts to consider the plaintiff's capacity to bring forward the claim. To evaluate this capacity, courts should examine the plaintiff's resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting. Though courts cannot decide constitutional issues in a factual vacuum, public interest litigation may proceed without a directly affected plaintiff. A statute's very existence, for instance, or the manner in which it was enacted,



can be challenged on the basis of legislative facts alone. A concrete and well-developed factual setting can also be established by calling affected, or otherwise knowledgeable, non-plaintiff witnesses. A strict requirement for a directly affected plaintiff would pose obstacles to access to justice and would undermine the principle of legality. It would also raise procedural hurdles that would deplete judicial resources. The participation of directly affected litigants is accordingly not a separate legal and evidentiary hurdle in the discretionary balancing.

What will suffice to show that a sufficiently concrete and well-developed factual setting will be forthcoming at trial depends on the circumstances. What may satisfy the court at an early stage of the litigation may not suffice at a later stage. Likewise, the significance of a lack of evidence will vary with the nature of the claim and the pleadings. Some cases may not be heavily dependent on individual facts, but where a case is so dependent, an evidentiary basis will weigh more heavily in the balance. In assessing whether a sufficiently concrete and well-developed factual setting will be produced at trial, a court may consider the stage of the proceedings, the pleadings, the nature of the public interest litigant, the undertakings given, and the actual evidence tendered. If standing is challenged at a preliminary stage, the plaintiff should not be required to provide trial evidence; that would be procedurally unfair, as it would permit the defendant to obtain evidence before discovery. However, a mere undertaking or intention to adduce evidence will generally not be enough to persuade a court that an evidentiary basis will be forthcoming.

Courts retain the ability to reconsider standing, even where it was initially granted at a preliminary stage. The ability to revisit standing acts as a fail-safe to ensure that the plaintiff does not rest on its laurels when it has undertaken to produce a sufficient evidentiary record at trial. A defendant wishing for standing to be revisited may apply to do so if a material change has occurred that raises a serious doubt about the forthcoming nature of a sufficiently concrete and well-developed factual setting, and where alternative litigation management strategies are inadequate to address the deficiency. A material change of this scope is most likely to occur when the parties exchange pleadings or complete the discovery stage. Material changes occurring outside of these stages will be rare. With the importance of the factual setting increasing at each step of the litigation process, the lack of a factual setting will carry more weight at the close of the discovery stage than after the exchange of pleadings. Like the initial decision on standing, a decision to revisit standing turns on the particular circumstances of the case.

Applying the *Downtown Eastside* framework to the facts in the instant case, the organization raises a serious issue: the constitutionality of laws that implicate the *Charter* rights of people with mental disabilities. Though the organization's case is still at the pleadings stage, the issue is justiciable. Material facts are pleaded which, if proven, could support a constitutional claim. The organization has a genuine interest in the issues, and in the challenges faced by people with mental disabilities. The claim is also a reasonable and effective means of bringing the matter before the courts. The case does not turn on individual facts, and it can be inferred that a sufficiently concrete and

well-developed factual setting will be forthcoming. The organization's claim undoubtedly raises issues of public importance that transcend its immediate interests. Granting public interest standing in this case will promote access to justice for a disadvantaged group who has historically faced serious barriers to litigating before the courts.

### **Cases Cited**

**Applied:** *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; **considered:** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; **referred to:** *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Mackay v. Manitoba*, [1989] 2 S.C.R. 357; *Manitoba (Attorney General)*

*v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Morgentaler v. New Brunswick*, 2009 NBCA 26, 344 N.B.R. (2d) 39; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543.

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 15(1).

*Class Proceedings Act*, R.S.B.C. 1996, c. 50.

*Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, s. 2(b), (c).

*Mental Health Act*, R.S.B.C. 1996, c. 288, s. 31(1).

*Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 11(1)(b), (c).

### **Authors Cited**

Kennedy, Gerard J., and Lorne Sossin. “Justiciability, Access to Justice and the Development of Constitutional Law in Canada” (2017), 45 *Fed. L. Rev.* 707.

Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online: [https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/mm/BC-Code\\_2016-06.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/mm/BC-Code_2016-06.pdf); archived version: [https://www.scc-csc.ca/cso-dce/2022SCC-CSC27\\_1\\_eng.pdf](https://www.scc-csc.ca/cso-dce/2022SCC-CSC27_1_eng.pdf)).

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Frankel, Dickson and DeWitt-Van Oosten JJ.A.), 2020 BCCA 241,

41 B.C.L.R. (6th) 47, 451 D.L.R. (4th) 225, 56 C.P.C. (8th) 231, [2020] B.C.J. No. 1326 (QL), 2020 CarswellBC 2078 (WL), setting aside a decision of Hinkson C.J., 2018 BCSC 1753, [2018] B.C.J. No. 3387 (QL), 2018 CarswellBC 2723 (WL), and remitting the matter for fresh consideration. Appeal dismissed and cross-appeal allowed.

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*Anthony Navaneelan and Naseem Mithoowani*, for the intervener the Canadian Association of Refugee Lawyers.

*Jason Harman and Tim Dickson*, for the intervener the West Coast Legal Education and Action Fund.

*Faisal Bhabha and Madison Pearlman*, for the intervener the Centre for Free Expression.

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*Kaitlyn Mitchell and Scott Tinney*, for the intervener Animal Justice.

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*Mark Sheeley and Lipi Mishra*, for the intervener the Canadian Constitution Foundation.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

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## I. Overview

[1] Access to justice depends on the efficient and responsible use of court resources. Frivolous lawsuits, endless procedural delays, and unnecessary appeals increase the time and expense of litigation and waste these resources. To preserve meaningful access, courts must ensure that their resources remain available to the litigants who need them most — namely, those who advance meritorious and justiciable claims that warrant judicial attention.

[2] Public interest standing — an aspect of the law of standing — offers one route by which courts can promote access to justice and simultaneously ensure that judicial resources are put to good use (see, e.g., *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45,

[2012] 2 S.C.R. 524, at para. 23). Public interest standing allows individuals or organizations to bring cases of public interest before the courts even though they are not directly involved in the matter and even though their own rights are not infringed. It can therefore play a pivotal role in litigation concerning the *Canadian Charter of Rights and Freedoms*, where issues may have a broad effect on society as a whole as opposed to a narrow impact on a single individual.

[3] In this appeal, the Council of Canadians with Disabilities (“CCD”) seeks public interest standing to challenge the constitutionality of certain provisions of British Columbia’s mental health legislation. CCD originally filed its claim alongside two individual plaintiffs who were directly affected by the impugned provisions. The individual plaintiffs discontinued their claims, leaving CCD as the sole plaintiff. CCD sought public interest standing to continue the action on its own.

[4] The Attorney General of British Columbia (“AGBC”) applied for dismissal of CCD’s action on a summary trial. He argued that the lack of an individual plaintiff was fatal to CCD’s claim for public interest standing because, without such a plaintiff, CCD could not adduce a sufficient factual setting to resolve the constitutional issue. In response, CCD filed an affidavit in which it promised to adduce sufficient facts at trial. The Supreme Court of British Columbia granted the AGBC’s application, declined to grant CCD public interest standing, and dismissed CCD’s claim. The Court of Appeal allowed CCD’s appeal and remitted the matter to the Supreme Court of British Columbia for fresh consideration. The AGBC appeals that decision.

[5] For the reasons that follow, I would dismiss the appeal, but grant CCD public interest standing, with special costs in this Court and in the courts below.

## II. Facts

### A. *Council of Canadians with Disabilities*

[6] CCD is a national not-for-profit organization established “to ensure that the voices of persons with disabilities are heard and to advocate for Canadians with disabilities” (A.R., at p. 88). During the underlying proceedings, it had 17 national or provincial member organizations, which themselves boasted several hundred thousand members.

[7] CCD’s mandate is threefold: it promotes the equality, autonomy, and rights of people living with physical and mental disabilities in Canada. It advances this mandate through advocacy, policy development, and rights advancement work (including litigation) on behalf of people with disabilities.

### B. *Underlying Action*

[8] On September 12, 2016, CCD and two individual plaintiffs (Mary Louise MacLaren and D.C.) filed a notice of civil claim in which they challenged the constitutionality of British Columbia’s mental health legislation. In the notice of civil claim, they alleged that certain provisions in three interrelated statutes — s. 31(1) of

the *Mental Health Act*, R.S.B.C. 1996, c. 288, s. 2(b) and (c) of the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, and s. 11(1)(b) and (c) of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405 — violate ss. 7 and 15(1) of the *Charter*. Together, these provisions permit physicians to administer psychiatric treatment to involuntary patients with mental disabilities without their consent and without the consent of a substitute or supportive decision-maker under certain circumstances.

[9] Ms. MacLaren and D.C. were involuntary patients affected by the impugned provisions. In the notice of civil claim, they alleged that they had suffered harm from forced psychiatric treatment, including psychotropic medication and electroconvulsive therapy.

C. *Withdrawal of the Individual Plaintiffs and Amended Notice of Civil Claim*

[10] On October 25, 2017, Ms. MacLaren and D.C. discontinued their claims and withdrew from the litigation, leaving CCD as the sole remaining plaintiff. CCD filed an amended notice of civil claim shortly afterward. In the amended notice, it removed all factual allegations relating to Ms. MacLaren and D.C. and replaced them with similar allegations regarding the nature, administration, and impacts of forced psychiatric treatment on involuntary patients generally. It also added a section in which it pled that it should be granted public interest standing.

D. *Notice of Application to Dismiss Filed by Attorney General of British Columbia*

[11] On January 31, 2018, the AGBC filed an amended response in which he claimed that CCD did not meet the test for public interest standing and could not pursue its *Charter* claims without an individual plaintiff. Approximately six months later, the AGBC filed a notice of application in which he sought an order dismissing CCD's action on the basis that CCD lacked standing to continue the action.

[12] CCD responded by filing an affidavit by Melanie Benard, the Chair of CCD's Mental Health Committee. Ms. Benard deposed that:

1. throughout her career as a lawyer specializing in mental health law, she gained direct experience with people who have or have had mental health-related disabilities;
2. CCD is an established advocate for the rights of people with disabilities, including mental disabilities, and has brought or intervened in over 35 court cases dealing with the rights of people with disabilities, including 24 cases at the Supreme Court of Canada;
3. *Charter* litigation is complex, often protracted, and stressful, and it is not reasonable to expect individuals who have mental disabilities to bring and see through a constitutional challenge; and

4. CCD “intends to lead evidence from both fact and expert witnesses, including from people with direct experience” of the impact of the impugned provisions (A.R., at p. 236).

[13] Ms. Benard was not cross-examined on her affidavit.

E. *Subsequent Class Action and Personal Injury Claim*

[14] In October 2019 — after the Court of Appeal for British Columbia heard the appeal in the case at bar but before it rendered its decision — three private litigants commenced a class action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, in which they challenge the same statutory provisions at issue in this appeal. Ms. MacLaren and another plaintiff brought a similar action for constitutional and personal injury relief, but later discontinued that claim.

[15] At present, the proposed class action has not yet been certified. The AGBC opposes certification; on October 30, 2020, he filed a response asserting that the action fails to meet the criteria for certification.

III. Judgments of the Courts Below

A. *Supreme Court of British Columbia, 2018 BCSC 1753 (Hinkson C.J.)*

[16] The chambers judge granted the AGBC's summary trial application, denied CCD standing, and dismissed CCD's claim. In his view, CCD failed to satisfy the three-part test for granting public interest standing set out by this Court in *Downtown Eastside*: (i) whether the claimant has advanced a serious justiciable issue, (ii) whether the claimant has a genuine interest in the issue and (iii) whether, in light of all the circumstances, the proposed suit is a reasonable and effective means of bringing the issue before the courts.

(1) Serious Justiciable Issue

[17] The chambers judge determined that CCD failed to raise a justiciable issue because its claim lacked "the indispensable factual foundation that particularizes the claim and permits the enquiry and relief sought" (para. 38 (CanLII)). He remarked that the "fundamental difficulty" with CCD's claim was "the lack of a particular factual context of an individual's case" (para. 37).

(2) Genuine Interest

[18] The chambers judge held that CCD's interest "only weakly" met the "genuine interest" criterion, because CCD's work was "more focussed on disability (particularly physical disability) and far less focussed on mental health" (paras. 44 and 53).

(3) Reasonable and Effective Means



[19] The chambers judge determined that granting CCD public interest standing would not be a reasonable and effective means of bringing the issue before the courts. He agreed that CCD had the expertise and resources to advance the claim, but remained unpersuaded of its ability to satisfy the “reasonable and effective means” factor for several reasons:

1. CCD’s undertaking to provide a robust record at trial failed to satisfy its onus to meet the test for public interest standing on summary trial, and the chambers judge doubted that CCD could put forward “a sufficiently concrete and well-developed factual setting” upon which to decide the question it had raised (para. 69);
2. CCD failed to persuade the chambers judge that it could fairly represent the interests of everyone affected by the impugned provisions, let alone “all residents of British Columbia”, to whom it referred in its amended notice of civil claim (para. 76);
3. CCD’s advocacy efforts over the last 40 years did not necessarily commend it as an advocate for those with mental health-related disabilities, given that its engagement in advocacy for mental health-related disabilities, as opposed to physical health-related disabilities, had been relatively limited; and

4. the Benard affidavit did not explain why it was unrealistic to expect individual plaintiffs who have mental disabilities and who have experienced the impacts of the impugned legislation to bring and see through a challenge to that legislation.

[20] Cumulatively weighing the three factors, the chambers judge declined to exercise his discretion to grant public interest standing and dismissed CCD's action.

B. *Court of Appeal for British Columbia, 2020 BCCA 241, 41 B.C.L.R. (6th) 47 (Frankel, Dickson and DeWitt-Van Oosten J.J.A.)*

[21] The Court of Appeal for British Columbia allowed the appeal, set aside the order dismissing the action, and remitted the matter to the Supreme Court of British Columbia for fresh consideration.

(1) Access to Justice and the Principle of Legality

[22] In its analysis, the Court of Appeal began by commenting on two principles that *Downtown Eastside* highlighted as important features of standing law: (i) the importance of courts upholding the legality principle — the idea that state action must conform to the Constitution and must not be immunized from judicial review — and (ii) the practical realities of providing access to justice for vulnerable and marginalized citizens who are broadly affected by legislation of questionable constitutional validity.

[23] In the Court of Appeal’s view, these principles “merit particular weight in the balancing exercise a judge must undertake when deciding whether to grant or refuse public interest standing” (para. 79). While other concerns “must also be accounted for”, legality and access to justice are “the key components of the flexible and purposive approach mandated in *Downtown Eastside*” (para. 79).

(2) Serious Justiciable Issue

[24] The Court of Appeal held that the chambers judge had erred in requiring “a particular factual context of an individual case” or an individual plaintiff for the serious justiciable issue factor (para. 114). It described CCD’s claim as a “comprehensive and systemic constitutional challenge to specific legislation that directly affects all members of a defined and identifiable group in a serious, specific and broadly-based manner regardless of the individual attributes or experiences of any particular member of the group” (para. 112). For this reason, the Court of Appeal concluded, it would be possible for CCD to establish its claim by adducing evidence from directly affected non-plaintiff and expert witnesses instead of from an individual co-plaintiff.

(3) Reasonable and Effective Means

[25] Given its conclusion on the serious justiciable issue factor, the Court of Appeal did not review the other *Downtown Eastside* factors. It did note, however, that the chambers judge’s analysis on the third factor did not comport with the flexible,

purposive approach to standing mandated in *Downtown Eastside*. Specifically, it disagreed with any suggestion on the chambers judge's part that, "if possible, it is always preferable for a public interest organization to assist an individual party in the background rather than seek public interest standing" (C.A. reasons, at para. 115 (emphasis deleted)).

(4) Prospect of Duplicative Proceeding

[26] The Court of Appeal also commented on the proposed class action. It acknowledged that the prospect of duplicative *Charter* challenges are relevant to — but not determinative of — applications for public interest standing. The Court of Appeal concluded that the Supreme Court of British Columbia was best placed to assess CCD's application for public interest standing upon review of a revised record containing this new information.

IV. Issues

[27] This appeal raises three issues:

1. What role do the principles of access to justice and of legality play in the test for public interest standing, and do they merit "particular weight" in the balancing exercise a judge must undertake to grant public interest standing?

2. Without an individual co-plaintiff, how can a litigant seeking public interest standing show that its claim will be presented in a “sufficiently concrete and well-developed factual setting”? If revisiting the issue of standing at a later stage of a proceeding is necessary to ensure this setting is present, under what conditions should parties be permitted to do so?
  
3. Applying these principles, should CCD be granted public interest standing?

## V. Analysis

### A. *Legality and Access to Justice in the Law of Public Interest Standing*

[28] The decision to grant or deny public interest standing is discretionary (*Downtown Eastside*, at para. 20). In exercising its discretion, a court must cumulatively assess and weigh three factors purposively and with regard to the circumstances. These factors are: (i) whether the case raises a serious justiciable issue, (ii) whether the party bringing the action has a genuine interest in the matter, and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court (para. 2).

[29] In *Downtown Eastside*, this Court explained that each factor is to be “weighed . . . in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes” (para. 20). These purposes are threefold: (i) efficiently allocating scarce judicial resources and

screening out “busybody” litigants; (ii) ensuring that courts have the benefit of the contending points of view of those most directly affected by the issues; and (iii) ensuring that courts play their proper role within our democratic system of government (para. 1).

[30] Courts must also consider the purposes that justify *granting* standing in their analyses (*Downtown Eastside*, at paras. 20, 23, 36, 39-43, 49-50 and 76). These purposes are twofold: (i) giving effect to the principle of legality and (ii) ensuring access to the courts, or more broadly, access to justice (paras. 20, 39-43 and 49). The goal, in every case, is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it (para. 23).

[31] *Downtown Eastside* remains the governing authority. Courts should strive to balance *all* of the purposes in light of the circumstances and in the “wise application of judicial discretion” (para. 21). It follows that they should not, as a general rule, attach “particular weight” to any one purpose, including legality and access to justice. Legality and access to justice are important — indeed, they played a pivotal role in the development of public interest standing — but they are two of many concerns that inform the *Downtown Eastside* analysis.

[32] To demonstrate this, I will define legality and access to justice, review their role in the development of public interest standing, and situate them in the *Downtown Eastside* framework. I conclude that the Court of Appeal was wrong to attach “particular weight” to these principles in its analysis.

(1) Defining the Legality Principle and Access to Justice

[33] The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: “[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law” (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40).

[34] Access to justice, like legality, is “fundamental to the rule of law” (*Trial Lawyers*, at para. 39). As Dickson C.J. put it, “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice” (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230).

[35] Access to justice means many things, such as knowing one’s rights, and how our legal system works; being able to secure legal assistance and access legal remedies; and breaking down barriers that often prevent prospective litigants from ensuring that their legal rights are respected. For the purposes of this appeal, however, access to justice refers broadly to “access to courts” (see, e.g., G. J. Kennedy and L. Sossin, “Justiciability, Access to Justice and the Development of Constitutional Law in Canada” (2017), 45 *Fed. L. Rev.* 707, at p. 710).

[36] In *Downtown Eastside*, this Court recognized that access to justice is symbiotically linked to public interest standing: the judicial discretion to grant or deny standing plays a gatekeeping role that has a direct impact on access (para. 51). Public interest standing provides an avenue to litigate the legality of government action in spite of social, economic or psychological barriers to access which may preclude individuals from pursuing their legal rights.

(2) Role of Legality and Access to Justice in Developing Public Interest Standing

[37] Legality and access to justice are woven throughout the history of public interest standing. In *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, for example, the Court relied primarily on the principle of legality to recognize the judicial discretion to grant public interest standing (p. 163). In that case, the Court granted a litigant standing to challenge a law that did not directly affect him, reasoning that a constitutional question should not “be immunized from judicial review by denying standing to anyone to challenge the impugned statute” (p. 145).

[38] Legality was again at issue in *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, a case in which the Court granted standing even though it would have been possible for someone more directly affected by the law to initiate private litigation. In that case, the Court permitted a newspaper editor — a member of the public — to challenge censorial powers granted to an administrative body. Theatre owners and operators were more directly affected by the legislation than the general



public, but the Court reasoned that challenges from those individuals were unlikely. Since there was “no other way, practically speaking, to subject the challenged Act to judicial review,” the Court granted a member of the public standing to seek a declaration that the legislation was constitutionally invalid (p. 271).

[39] Access to justice featured alongside the principle of legality in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, this Court’s first post-*Charter* case on public interest standing. There, the Court granted standing and emphasized “the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation” (p. 627). It also observed that the rationale behind discretionary standing was the public interest in maintaining respect for “the limits of statutory authority” (pp. 631-32).

[40] Finally, in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, this Court relied on legality to deny public interest standing. The Court underscored “the fundamental right of the public to government in accordance with the law” and acknowledged that the “whole purpose” of public interest standing is “to prevent the immunization of legislation or public acts from any challenge” (pp. 250 and 252). Because the measure had already been “subject to attack” by private litigants, granting public interest standing was “not required” (pp. 252-53).

### (3) Current Framework Addresses Legality and Access to Justice

[41] The current framework for public interest standing stems from *Downtown Eastside*. Under this framework, courts flexibly and purposively weigh the three *Downtown Eastside* factors in light of the “particular circumstances” and in a “liberal and generous manner” (para. 2, citing *Canadian Council of Churches*, at p. 253).

[42] The *Downtown Eastside* framework addresses a number of concerns that underlie standing law. Legality and access to justice are two of these concerns. But the framework also accommodates traditional concerns related to the expansion of public interest standing, including allocating scarce judicial resources and screening out “busybodies”, ensuring that courts have the benefit of contending points of view of those most directly affected by the issues, and ensuring that courts play their proper role in our constitutional democracy.

[43] It will be helpful to briefly trace each of these concerns, and their place in the *Downtown Eastside* framework. Legality and access to justice are primarily considered in relation to the third factor, but it is useful to review all three.

(a) *Traditional Concerns of Standing Law*

[44] The need to carefully allocate scarce judicial resources relates to the effective operation of the justice system as a whole. As this Court held in *Canadian Council of Churches*, “[i]t would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular

cases” (p. 252). This concern also relates to a possible multiplicity of suits by “mere busybod[ies]”, that is, plaintiffs who seek to use the courts to advance personal agendas and who may undermine other challenges by plaintiffs with a real stake in a matter (*Finlay*, at p. 631).

[45] In *Downtown Eastside*, the Court noted that the concern about “busybodies” may be overstated: “[f]ew people, after all, bring cases to court in which they have no interest and which serve no proper purpose” (para. 28). The denial of standing “is not the only, or necessarily the most appropriate means of guarding against these dangers”: courts can also screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may avert a multiplicity of suits from “busybodies” (para. 28).

[46] Hearing contending points of view from those most affected by the issues enables the courts to do their job: courts “depend on the parties to present the evidence and relevant arguments fully and skillfully” (*Downtown Eastside*, at para. 29). Without specific facts and argument from affected parties, “both the Court’s ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised” (*Hy and Zel’s Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 694).

[47] In conformity with the proper role of the courts and with their constitutional relationship to the other branches of state, parties to litigation must raise a question that is appropriate for judicial determination — that is, a justiciable question. A court might

not, for example, “have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding” (*Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 35).

(b) *Serious Justiciable Issue*

[48] The first of the *Downtown Eastside* factors, whether there is a serious justiciable issue, relates to two of the traditional concerns. Justiciability is linked to the concern about the proper role of the courts and their constitutional relationship to the other branches of state. By insisting on the existence of a justiciable issue, the courts ensure that the exercise of their discretion with respect to standing is consistent with their proper constitutional role. Seriousness, by contrast, addresses the concern about the allocation of scarce judicial resources and the need to screen out the “mere busybody”. This factor also broadly promotes access to justice by ensuring that judicial resources remain available to those who need them most (see, e.g., *Trial Lawyers*, at para. 47).

[49] A serious issue will arise when the question raised is “far from frivolous” (*Downtown Eastside*, at para. 42, citing *Finlay*, at p. 633). Courts should assess a claim in a “preliminary manner” to determine whether “some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation” (*Downtown Eastside*, at para. 42, citing *Canadian Council of Churches*, at p. 254).

Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually be unnecessary to minutely examine every pleaded claim to assess standing (*Downtown Eastside*, at para. 42).

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

(c) *Genuine Interest*

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

(d) *Reasonable and Effective Means*

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

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

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

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

1. *The plaintiff's capacity to bring the claim forward:* What resources and expertise can the plaintiff provide? Will the issue be presented in a sufficiently concrete and well-developed factual setting?
2. *Whether the case is of public interest:* Does the case transcend the interests of those most directly affected by the challenged law or action? Courts should take into account that one of the ideas animating public interest litigation is that it may provide access to justice for disadvantaged persons whose legal rights are affected.
3. *Whether there are alternative means:* Are there realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination? If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues?
4. *The potential impact of the proceedings on others:* What impact, if any, will the proceedings have on the rights of others who are equally or more directly affected? Could "the failure of a diffuse challenge" prejudice subsequent challenges by parties with specific and factually established

complaints? (para. 51, citing *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093).

(4) Conclusion on Access to Justice and Legality in Public Interest Standing Law

[56] The Court of Appeal was wrong to conclude that the principles of legality and access to justice merit “particular weight” in the *Downtown Eastside* analysis. This Court’s case law, and in particular the existing *Downtown Eastside* framework, already addresses these factors in both implicit and explicit fashion. However, it does not assign them a place of principal importance in the analysis.

[57] Legality, for example, is taken into account in the context of the “reasonable and effective means” factor (*Downtown Eastside*, at para. 49), and may also be considered in relation to the “interrelated matters” that can assist a court in assessing that factor (para. 51). As for access to justice, it too is taken into consideration in assessing whether a suit is a reasonable and effective means of bringing an issue before the courts. And it is also accounted for in the context of the “serious justiciable issue” factor, which allows courts to screen out unmeritorious claims and ensure that judicial resources remain available to those who need them most.

[58] Because legality and access to justice feature most prominently in relation to the third factor, attaching “particular weight” to them would effectively transform the “reasonable and effective means” factor into a determinative one. This Court



explicitly warned against such an outcome in *Downtown Eastside*. It encouraged courts to take access to justice and legality into account, but specified that “this should not be equated with a license to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized” (para. 51).

[59] In *Downtown Eastside*, the Court endorsed a flexible, discretionary approach to public interest standing. This approach must be guided by *all* the underlying purposes of limiting standing, as well as by legality and access to justice. While access to justice and, in particular, legality were central to the development of the law of public interest standing, and while they are important considerations, they are not the only concerns to take into account. Put another way, no one purpose, principle or factor takes precedence in the analysis.

#### B. *Sufficient Factual Setting For Trial*

[60] The third *Downtown Eastside* factor requires courts to consider whether, in all the circumstances, a proposed suit is a reasonable and effective means of bringing an issue before the courts. One of the many matters a court is to consider when assessing this factor is “the plaintiff’s capacity to bring forward [the] claim” (para. 51). To evaluate the plaintiff’s capacity to do so, the court “should examine, amongst other things, the plaintiff’s resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting” (para. 51).

[61] The dispute in this appeal revolves around this last question: “. . . whether the issue will be presented in a sufficiently concrete and well-developed factual setting”. The AGBC argues that CCD did not — and cannot — adduce a sufficient factual setting because it lacks an individual co-plaintiff, and that standing should therefore be denied.

[62] The AGBC’s argument invites this Court to consider how public interest litigants can satisfy a court that a sufficient factual setting will exist at trial. Is an individual plaintiff necessary in circumstances like those on appeal? If not, how can a plaintiff satisfy the court that such a setting will be forthcoming where, as here, standing is challenged at a preliminary stage of litigation? And, if it becomes necessary to revisit the issue of standing to ensure that this factual setting exists, under what circumstances should a party be permitted to do so?

(1) Individual Co-plaintiff Not Required

[63] At the outset, both parties rightly acknowledge that public interest litigation may proceed in some cases without a directly affected plaintiff (see, e.g., A.F., at para. 59). A statute’s very existence, for example, or the manner in which it was enacted can be challenged on the basis of legislative facts alone (see, e.g., *Danson*, at pp. 1100-1101).

[64] The AGBC, however, submits that where the impacts of legislation are at issue, evidence from a directly affected plaintiff is *vital* to “ensuring that a factual

context suitable for judicial determination is present” before standing is granted (A.F., at para. 60). In such cases, the AGBC maintains, an applicant for public interest standing should be required to (i) explain the absence of an individual plaintiff, (ii) show how it is a suitable proxy for the rights and interests of directly affected plaintiffs, and (iii) demonstrate, “with some specificity”, how it will provide a well-developed factual context that compensates for the absence of a directly affected plaintiff (paras. 40 and 66).

[65] I would not impose such rigid requirements, for two reasons.

[66] First, a directly affected *plaintiff* is not vital to establish a “concrete and well-developed factual setting”. Public interest litigants can establish such a setting by calling affected (or otherwise knowledgeable) non-plaintiff *witnesses* (see, e.g., *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 14-16, 22 and 110; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 15 and 54; *Downtown Eastside*, at para. 74). As long as such a setting exists, a directly affected co-plaintiff or a suitable proxy is not required for a public interest litigant to be granted standing. If a directly affected co-plaintiff is not required, then would-be public interest litigants should not have to justify — or compensate for — the absence of one.

[67] Second, the AGBC’s proposed requirements would thwart many of the traditional purposes underlying standing law. A strict requirement for a directly affected co-plaintiff would pose obstacles to access to justice and would undermine the

principle of legality. Constitutional litigation is already fraught with formidable obstacles for litigants. These proposed requirements would also raise unnecessary procedural hurdles that would needlessly deplete judicial resources. Given these concerns, the Court was correct in *Downtown Eastside* to retain the presence of directly affected litigants as a *factor* — rather than a separate legal and evidentiary hurdle — in the discretionary balancing, to be weighed on a case-by-case basis. I would not disturb that conclusion here.

(2) Satisfying a Court on this Factor Will Be Context-Specific

[68] The question remains: In the absence of a directly affected co-plaintiff, how might a would-be public interest litigant demonstrate that the issues “will be presented in a sufficiently concrete and well-developed factual setting” (*Downtown Eastside*, at para. 51 (emphasis added))? And, in particular, how might such a litigant do so where (as here) standing is challenged at a *preliminary* stage of the litigation?

[69] To begin, a few clarifications are in order. As the Court explained in *Downtown Eastside*, none of the factors it identified are “hard and fast requirements” or “free-standing, independently operating tests” (*Downtown Eastside*, at para. 20). Rather, they are to be assessed and weighed cumulatively, in light of all the circumstances. It follows that, where standing is challenged *at a preliminary stage*, whether a “sufficiently concrete and well-developed factual setting” *will* exist at trial may not be dispositive. The trial judge retains the discretion to determine the

significance of this consideration at a preliminary stage by taking the particular circumstances into account.

[70] That said, *the absence of such a setting will in principle be dispositive at trial*. A court cannot decide constitutional issues in a factual vacuum (*Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). Evidence is key in constitutional litigation unless, in exceptional circumstances, a claim may be proven on the face of the legislation at issue as a question of law alone (see, e.g., *Danson*, at pp. 1100-1101, citing *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 133). Standing may therefore be revisited where it becomes apparent, after discoveries, that the plaintiff has not adduced sufficient facts to resolve the claim. As I will explain below, however, parties should consider other litigation management strategies before revisiting the issue of standing, given that such strategies may provide a more appropriate route to address the traditional concerns that underlie standing law (*Downtown Eastside*, at para. 64). For example, summary dismissal may be open to a defendant where there is no evidence to support an element of the claim (as in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 93).

[71] With these clarifications in mind, I will now return to the question at hand: What suffices to show that a sufficiently concrete and well-developed factual setting will be forthcoming at trial? The answer to this question necessarily depends on the circumstances, including (i) the stage of litigation at which standing is challenged, and (ii) the nature of the case and the issues before the court. On the first point, what may,

for example, satisfy the court at an early stage may not suffice at a later stage. Likewise, the significance of a lack of evidence will vary with the nature of the claim and the pleadings. Some cases may not be heavily dependent on individual facts — where, for example, the claim can be argued largely on the face of the legislation. In such cases, an absence of concrete evidence at the pleadings stage may not be fatal to a claim for standing. Where a case turns to a greater extent on individual facts, however, an evidentiary basis will weigh more heavily in the balance, even at a preliminary stage of the proceedings.

[72] When standing is challenged at a preliminary stage, the plaintiff should not be required to provide trial evidence. That would be procedurally unfair, as it would permit the defendant to obtain evidence before discovery. Generally, however, a mere undertaking or intention to adduce evidence will *not* be enough to persuade a court that an evidentiary basis will be forthcoming. It may be helpful to give some examples of the considerations a court may find relevant when assessing whether a sufficiently concrete and well-developed factual setting will be produced at trial. As was the case in *Downtown Eastside*, for the purposes of its assessment of the “reasonable and effective means” factor, this list is not exhaustive, but illustrative.

1. *Stage of the proceedings*: The court should take account of the stage of the proceedings at which standing is challenged. At a preliminary stage, a concrete factual basis may not be pivotal in the *Downtown Eastside* framework — the specific weight to be attached to this consideration will

depend on the circumstances, and ultimately lies within the trial judge's discretion. At trial, however, the absence of a factual basis should generally preclude a grant of public interest standing.

2. *Pleadings*: The court should consider the nature of the pleadings and what material facts are pled. Are there concrete facts with respect to how legislation has been applied that can be proven at trial? Or are there merely hypothetical facts with respect to how legislation might be interpreted or applied? Do the pleadings reveal that the case can be argued largely on the face of the legislation, such that individual facts may not be pivotal? Or does the case turn more heavily on individualized facts?
3. *The nature of the public interest litigant*: The court may also consider whether the litigant — if it is an organization — is composed of or works directly with individuals who are affected by the impugned legislation. If that is the case, it would be reasonable to infer that the litigant has the capacity to produce evidence from directly affected individuals.
4. *Undertakings*: Courts rigorously enforce undertakings, which must be “strictly and scrupulously carried out” (see, e.g., Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-6). An undertaking by a lawyer to provide evidence might help to persuade a court that a sufficient factual setting will exist at trial, but an undertaking alone will seldom suffice.

5. *Actual evidence*: Though a party is not required to do so, providing actual evidence — or a list of potential witnesses and the evidence they will provide — is a clear and compelling way to respond to a challenge to standing at a preliminary stage. As I explained above, the significance of a lack of evidence will depend on the stage of the litigation, the nature and context of the case, and the pleadings.

(3) Ability to Revisit Standing

[73] In *Downtown Eastside*, this Court cautioned against using the “blunt instrument of a denial of standing” where other well-established litigation management strategies could ensure the efficient and effective use of judicial resources (para. 64). For example, courts can screen claims for merit at an early stage by intervening to prevent abuse, and have the power to award costs. A court hearing a preliminary challenge to standing may also defer consideration of the issue to trial (*Finlay*, at pp. 616-17). Any of these tools may provide a more appropriate route to address the traditional concerns that underlie standing law, and courts should take these tools into account when exercising their discretion to grant or deny standing (*Downtown Eastside*, at para. 64). Likewise, parties should generally pursue alternative litigation management strategies first, before seeking to revisit the issue of standing.

[74] Courts, however, retain the ability to reconsider standing, even where it was initially granted at a preliminary stage (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). The ability to revisit standing depends on a plaintiff’s continued



efforts to demonstrate that a sufficiently concrete and well-developed factual setting will be put forward at trial. In this sense, the ability to revisit standing acts as a fail-safe to ensure that the plaintiff does not rest on its laurels.

[75] To be clear, the courts' ability to revisit standing is not an open invitation to defendants to challenge standing at every available opportunity. Litigants must not waste judicial resources or unduly hinder the litigation process. For that reason, a defendant wishing to revisit standing may apply to do so only if a material change has occurred that raises a serious doubt that the public interest litigant will be able to put forward a sufficiently concrete and well-developed factual setting, and alternative litigation management strategies are inadequate to address the deficiency. One example of such a material change would be where the plaintiff undertook to provide evidence in response to a previous challenge to standing but failed to do so. By contrast, moving from one stage of the litigation to another does not, by itself, correspond to a material change that would merit revisiting standing.

[76] A material change that raises a serious doubt that a plaintiff will be able to put forward a sufficiently concrete and well-developed factual setting is most likely to occur when the parties exchange pleadings or complete the discovery stage. These are the steps in the litigation process at which the factual setting is most likely to emerge. Unsurprisingly, the importance of the factual setting increases at each step of the process as the litigation progresses. This means that a plaintiff's inability to demonstrate that it will put forward a sufficiently concrete and well-developed factual

setting will carry more weight at the close of the discovery stage than after the exchange of pleadings, at which point the absence of concrete evidence would be less significant. Like the initial decision on standing, a decision to revisit standing turns on the particular circumstances of the case (*Downtown Eastside*, at para. 2).

[77] While I do not foreclose the possibility of a material change occurring other than at the pleadings and discovery stages, such an occurrence would be rare. One example of an appropriate case would be where the original basis for the plaintiff's standing has been called into question or becomes moot. The latter situation arose in the *Borowski* saga. In 1981, this Court granted Mr. Borowski public interest standing to challenge the prohibition against abortion in the *Criminal Code*, R.S.C. 1970, c. C-34 (see *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575), but the impugned provisions were subsequently struck down in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In 1989, this Court held that Mr. Borowski lacked standing to continue the case, because he was now asking the court to address a "purely abstract question" about the rights of a foetus, which meant that his challenge now amounted to a "private reference" (*Borowski* (1989), at pp. 365-68).

### C. *Application to the Facts*

[78] At the oral hearing, CCD requested leave to cross-appeal the Court of Appeal's order, and urged this Court to rule on the issue of standing. It argued that remitting the matter for reconsideration would only cause further delay. I agree. In my view, it is in the interests of justice to grant leave to cross-appeal in the circumstances,

and address the standing issue. Courts may grant public interest standing in the exercise of their inherent jurisdiction whenever it is just to do so (*Morgentaler v. New Brunswick*, 2009 NBCA 26, 344 N.B.R. (2d) 39, at para. 51).

[79] I note that rulings on standing are discretionary, and are thus “entitled to deference on appeal” (*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 39). In the case at bar, however, there are errors in the decisions of the courts below that justify our intervention.

[80] My analysis in this regard will proceed in two parts. First, I will outline the errors made by the courts below. Second, I will apply and weigh each of the *Downtown Eastside* factors before concluding that, cumulatively, these factors favour granting public interest standing in the circumstances.

(1) Errors in the Courts Below

(a) *Chambers Judge*

[81] The chambers judge made a number of errors in his interpretation and application of the *Downtown Eastside* factors.

(i) Errors With Respect to the Serious Justiciable Issue Factor

[82] The chambers judge concluded that CCD failed to raise a justiciable issue, but his analysis on this point was insufficient. He (and the Court of Appeal) reduced the inquiry to whether it was necessary for the plaintiff to plead facts relating to specific individuals: the chambers judge held that it was, while the Court of Appeal held that it was not.

[83] This approach misses the point of the “justiciability” inquiry, which is directed at maintaining an appropriate boundary between an impermissible “private reference” and a proper grant of public interest standing (see, e.g., *Borowski* (1989), at p. 367). Whether facts relative to specific individuals are or are not pleaded *may* be a relevant factor, but it is not, in itself, the point to be decided, nor is it determinative.

[84] As I will explain below, while it is true that purely hypothetical claims are not justiciable, there is an undisputed cause of action here. CCD has alleged facts which, if proven, could support a constitutional claim.

(ii) Errors With Respect to the Genuine Interest Factor

[85] The chambers judge also erred in his assessment on the existence of a genuine interest. He found that CCD’s interest only “weakly” met the genuine interest criterion, because its work is focused primarily on “disabilities” and not on “mental disabilities”. With respect, this distinction between “mental disabilities” and “disabilities” is unhelpful, and unfounded. Mental disabilities are disabilities (*Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at paras. 2 and 35).

(iii) Errors With Respect to the Reasonable and Effective Means Factor

[86] The chambers judge concluded that CCD failed to establish that its suit was a reasonable and effective means of bringing the issues forward. He voiced four concerns in this regard:

1. CCD failed to lead adequate evidence of a “sufficiently concrete and well-developed factual setting” upon which the action could be tried (para. 69);
2. CCD failed to persuade the chambers judge that it could fairly represent the interests of everyone affected by the impugned provisions (para. 76);
3. CCD had engaged in “little advocacy for mental illness” in comparison with its advocacy efforts regarding physical disability (para. 74); and
4. CCD failed to explain why it was unrealistic for individuals who have experienced the impacts of the impugned provisions to bring and see through a challenge themselves (paras. 77-95).

[87] It was not open to the chambers judge to afford these concerns the decisive weight he did. I will address each concern in turn.

[88] The first concern relates to the concrete factual setting needed to resolve constitutional claims. As I noted above, this consideration is one of many a court may

take into account when deciding whether a suit is *a* reasonable and effective means of advancing the claim. The chambers judge, however, attached determinative weight, at several points in his reasons, to the alleged absence of a robust factual setting (paras. 37-39, 61, 67 and 69).

[89] The chambers judge's approach contradicts *Downtown Eastside*, in which this Court affirmed that *none* of the factors are "hard and fast requirements" or "freestanding, independently operating tests" (para. 20). They are instead to be assessed and weighed cumulatively. It follows that at this early stage, where the question is simply whether a sufficient factual setting *will* exist, this consideration is not determinative on its own.

[90] The second concern relates to the interests of others who are affected by the impugned legislation. The chambers judge surmised that CCD was not in a position to "fairly represent" everyone's interests. But public interest standing has never depended on whether the plaintiff represents the interests of all, or even a majority of, directly affected individuals. What matters is whether there is a serious justiciable issue, whether the plaintiff has *a* genuine interest, and whether the suit is *a* reasonable and effective means of litigating the issue.

[91] The third concern expressed by the chambers judge relates to CCD's status as an advocate for people with mental disabilities. The chambers judge questioned whether CCD's advocacy efforts "commend[ed] it as an advocate for those with mental health-related disabilities", and mentioned that its argument seemed to focus on "the

extent to which mental illness should be considered a disability” (para. 74). This concern rests on the unfounded distinction between mental and physical disabilities which I discussed above.

[92] The fourth concern relates to the availability of other individuals who might have direct standing to challenge the claim. The chambers judge considered that some individuals affected by the impugned provisions might be willing or able to participate in CCD’s constitutional challenge “if funded and supported by the CCD”, and that there were therefore “other reasonable and effective ways to bring the issues” forward (paras. 95 and 97).

[93] This final concern is problematic for two reasons. First, *Downtown Eastside* instructs courts to take a “practical” and “pragmatic” approach to the existence of potential plaintiffs. The “practical prospects” of such plaintiffs bringing the matter to court “should be considered in light of the practical realities, not theoretical possibilities” (para. 51). There was no analysis in this regard in the chambers judge’s reasons. Although other plaintiffs have advanced constitutional challenges to these provisions, none of them were able to see their challenges through to completion.

[94] Second, the chambers judge’s fourth concern attaches undue weight to the importance of an individual plaintiff. But as I explained above, *Downtown Eastside* sets out *no requirement* for such a plaintiff. Instead, it directs courts to consider whether the plaintiff’s claim is *a* reasonable and effective means of bringing the case to court, regardless of whether other reasonable and effective means exist (para. 44).

(b) *Court of Appeal*

[95] The Court of Appeal's analysis was limited to a review of the chambers judge's conclusion on the question whether CCD's case raised a serious justiciable issue. The Court of Appeal did not apply *Downtown Eastside* to determine whether, in all the circumstances, the chambers judge's decision to deny standing was justified. Instead, it identified an error with regard to one factor and remitted the matter to the Supreme Court of British Columbia for fresh consideration.

[96] This itself was an error. The Court of Appeal dealt with the first *Downtown Eastside* factor individually but did not consider it in conjunction with the other two factors. This approach contradicts *Downtown Eastside*, which requires a court to weigh the three factors cumulatively. In short, the Court of Appeal determined that the trial judge had made a palpable error, but it did not go on to weigh all the factors cumulatively in order to determine whether that error was *overriding*.

(2) *Downtown Eastside Framework Favours Granting Standing in the Instant Case*

[97] These errors require this Court to do what the Court of Appeal did not: weigh *all* of the *Downtown Eastside* factors cumulatively, flexibly and purposively.

(a) *Serious Justiciable Issue*



[98] CCD's pleadings are well drafted, and they raise a serious issue: the constitutionality of laws that implicate — and allegedly violate — the *Charter* rights of people with mental disabilities. This issue is “far from frivolous”, “important”, and “substantial” (*Downtown Eastside*, at para. 42, citing *Finlay*, at p. 633, *Borowski* (1981), at p. 589, and *McNeil*, at p. 268).

[99] Bearing in mind that CCD's case is still at the pleadings stage, I also find that the issue is justiciable. The amended notice of civil claim sets out material facts outlining the core of the case. These include the following:

1. the impugned provisions permit health care providers to forcibly administer psychotropic medication, electroconvulsive therapy and psychosurgery to involuntary patients even though these treatments carry a number of serious risks and potentially fatal side-effects;
2. health care providers administer these treatments by, among other things, demanding patients' cooperation, using physical force and threatening physical restraint or detention when patients are uncooperative or refuse consent, even where patients are capable of making decisions regarding psychiatric treatment; and
3. the use and threatened use of forced psychiatric treatment can cause physical harm and severe psychological pain and stress.

[100] CCD's pleadings reveal an undisputed cause of action. CCD alleges facts which, if proven, could support a constitutional claim: "Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim" (*Downtown Eastside*, at para. 56).

(b) *Genuine Interest*

[101] It is clear to me from the uncontested Bernard affidavit that CCD has a genuine interest in the issues, and in the challenges faced by people with mental disabilities:

1. CCD's work is directed "by and for people with disabilities", including mental disabilities.
2. CCD has a long history of engagement in social, legal, and policy reform initiatives aimed at reducing stereotyping and discrimination and promoting the fundamental equality and human rights of people with disabilities. For example, it acts as a consultant to the Government of Canada on issues relating to disabilities.
3. CCD has repeatedly been recognized by international bodies, governments, and courts as an authoritative and respected voice regarding the rights,

autonomy, and equality of people with disabilities, including people with mental disabilities.

4. CCD's board of directors conducts most of its work through committees with special mandates, including the Mental Health Committee, whose members have specific mental health-related expertise and which is responsible for the litigation in the instant case.
5. CCD has participated as a plaintiff or as an intervener in other cases relating to human rights and equality issues under the *Charter*, all of which involved the rights of people with disabilities.

[102] The AGBC argues that CCD's work does not focus narrowly on people with "mental illness" (A.F., at paras. 4, 92 and 98). This argument misses the point: a plaintiff seeking public interest standing has never been required to show that its interests are precisely as narrow as the litigation it seeks to bring. Instead, it must demonstrate a "link with the claim" and an "interest in the issues" (*Downtown Eastside*, at para. 43 (emphasis added)).

[103] I am therefore satisfied that CCD has "a real stake in the proceedings", "is engaged with the issues" and is no "mere busybody" (*Downtown Eastside*, at para. 43).

(c) *Reasonable and Effective Means*

[104] *Downtown Eastside* invites courts to consider a series of “interrelated matters” when assessing the reasonable and effective means factor, including (i) the plaintiff’s capacity to bring the claim forward; (ii) whether the case is of public interest and what impact it will have on access to justice; (iii) whether there are alternative means to bring the claim forward, including parallel proceedings; and (iv) the potential impact of the proceedings on the rights of others.

(i) Plaintiff’s Capacity to Bring the Claim Forward

[105] CCD boasts impressive resources and expertise. It is a sizeable, highly reputable public interest organization represented by excellent pro bono counsel and backed by a law firm that has already committed significant resources to this litigation. There is no doubt that CCD commands the necessary resources and expertise to advance the claim it asserts.

[106] Furthermore, I am satisfied that a “sufficiently concrete and well-developed factual setting” will be forthcoming. CCD’s work is directed “by and for” people with disabilities, including mental disabilities. It is therefore reasonable to infer that CCD has the capacity to adduce evidence from directly affected individuals. Moreover, the pleadings reveal that this case does not turn on individual facts. Much of the case can be argued on the basis that the legislation is unconstitutional on its face because it authorizes, under certain circumstances, forced psychiatric treatment without the consent of the patient or of a substitute decision-maker. Expert evidence regarding how health care providers treat involuntary patients and evidence with respect to

particular patients may provide helpful insight into how the legislation is applied. At this early stage of the litigation, however, information about individual plaintiffs would not add much value.

[107] The representations of counsel and Ms. Benard's sworn statement that CCD will adduce evidence, while insufficient on their own, also help to assure this Court that the issues will be litigated in a sufficient factual setting. Counsel for CCD also made an undertaking at the hearing to provide evidence of the concrete circumstances of specific patients. This undertaking helps to alleviate any lingering concerns about the forthcoming nature of a sufficient factual background.

[108] Finally, I note that it will still be open to the AGBC to challenge CCD's standing should CCD fail to adduce the factual setting it undertook to adduce. It would make sense in this case to limit such a challenge to the stage following discovery.

[109] I would pause to observe that standing is fact- and context-specific. This is an appropriate result in this case; it may not be appropriate in other cases. Rather than using the "blunt instrument" of denying standing, it is appropriate here to use various litigation management tools — like the possibility of revisiting standing — to ensure that the evidence in question is in fact tendered promptly.

(ii) Whether the Case is of Public Interest

[110] CCD's claim undoubtedly raises issues of public importance that transcend its immediate interests (see, e.g., *Downtown Eastside*, at para. 73). The litigation has the potential of affecting a large group of people, namely people with mental disabilities. Moreover, granting public interest standing in this case will promote access to justice for a disadvantaged group who has historically faced serious barriers to bringing such litigation before the courts.

(iii) Realistic Alternative Means

[111] I must also consider whether there are *realistic* alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination (*Downtown Eastside*, at para. 51). In this regard, the Court of Appeal took notice of an action that has been commenced under the *Class Proceedings Act*, to challenge the same statutory provisions that are at issue in this appeal. As of now, that class action has not yet been certified.

[112] The AGBC points to the class action as a better vehicle for bringing these issues to court, but he argues in the class action itself that the action is statute-barred and should therefore not be certified.

[113] Although the class action is relevant, it is not determinative (*Downtown Eastside*, at para. 67). In my view, CCD provides two compelling reasons to support its argument that its claim is a reasonable and effective means of bringing the issue before the court despite this parallel proceeding.

[114] First, the class action is rife with unknowns: the record does not confirm that the proceeding has been certified. Even if it *is* certified, the certified common issues may not address the constitutionality of the impugned provisions. There is *no* information about the evidence that is to be adduced in the proposed class proceeding. In any case, the primary focus of such proceedings is to obtain damages, which often leads to settlements rather than to rulings on alleged *Charter* violations. As a result, I cannot conclude that the class action represents a more efficient and effective means of resolving the *Charter* issues raised by CCD.

[115] Second, the uncontested evidence from the Benard affidavit is that individuals directly affected by the impugned provisions face significant barriers to commencing constitutional litigation and seeing it through. In this case, directly affected individuals suffer from mental disabilities that could affect their capacity to bring lengthy, complex litigation and to stay its course. Some may fear reprisals from health care providers who, under the legislation at issue, control their psychiatric treatment. Or they may hesitate to expose themselves to the unfortunate stigma that can accompany public disclosure of their private health information. CCD taking on the role as plaintiff in this litigation alleviates those significant barriers.

[116] Though fully capable of advancing litigation, individuals with mental disabilities must overcome significant personal and institutional hurdles to do so. Mindful of this, I would not attach determinative weight to the parallel claim in balancing the factors.

(iv) Potential Impact of the Proceeding on the Rights of Others

[117] The AGBC argues that CCD's claim may prejudice people who *support* the impugned provisions. I would attach little weight to this concern. Support for a law should not immunize it from constitutional challenge. If the impugned provisions are unconstitutional, they should be struck down.

(3) Cumulative Weighing

[118] Having cumulatively weighed each of the *Downtown Eastside* factors, I would exercise my discretion in favour of granting CCD public interest standing. If CCD fails to promptly adduce the promised factual setting, the AGBC can apply to have the issue of standing reconsidered at the conclusion of the discovery stage. I would again stress that while this result is appropriate in the specific context of this case, it may not be appropriate in others.

D. *Special Costs*

[119] CCD seeks an award of special costs on a full indemnity basis throughout. Special costs are exceptional and discretionary (*Carter*, at paras. 137 and 140). To award special costs, two criteria must be met:



1. the case must involve matters of public interest that have a “significant and widespread societal impact” and are “truly exceptional” (*Carter*, at para. 140); and
2. the plaintiff must show that it has no personal, proprietary or pecuniary interest that would justify the proceedings on economic grounds, and that it would not have been possible to effectively pursue the litigation in question with private funding (*Carter*, at para. 140).

[120] CCD’s case satisfies both of these criteria. Regarding the first criterion, the scope of public interest standing and the circumstances in which organizations may pursue public interest litigation without an individual plaintiff is a matter of public interest that has a significant and widespread societal impact. The participation of over 20 interveners from across the country representing a range of interests and perspectives with respect to this appeal is a testament to this fact.

[121] As for the second criterion, CCD is a not-for-profit organization whose mandate is to promote the equality, autonomy and rights of people with disabilities. It has no personal, proprietary or pecuniary interest in this litigation. Moreover, it would not have been possible for CCD to pursue the litigation effectively with private funding; it has relied upon pro bono counsel to argue its case.

[122] CCD has sought to advance the litigation for nearly six years. The substantive issues have yet to be addressed. In such circumstances, having regard to

the strict criteria for special costs, it would be “contrary to the interests of justice to ask [CCD and its pro bono counsel] to bear the majority of the financial burden associated with pursuing the claim” (*Carter*, at para. 140).

[123] In these exceptional circumstances, and in the exercise of my discretion, I would grant special costs in this Court and in the courts below to place CCD — as far as it is possible to do so financially — in the position it was in when the AGBC called its standing into question.

#### VI. Disposition

[124] For these reasons, I would dismiss the AGBC’s appeal. I would grant leave to cross-appeal to CCD, allow its cross-appeal, set aside the order of the Court of Appeal remitting the question of CCD’s public interest standing to the Supreme Court of British Columbia, and grant CCD public interest standing. Special costs on a full indemnity basis are awarded to CCD throughout.

*Appeal dismissed and cross-appeal allowed.*

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*Solicitors for the respondent/appellant on cross-appeal: McCarthy  
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*Solicitor for the intervener the Attorney General of Canada: Attorney  
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*Solicitor for the intervener the Attorney General of Alberta: Justice and  
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*Solicitors for the intervener the West Coast Prison Justice Society:  
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*Solicitors for the intervener the Canadian Civil Liberties Association:  
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*Solicitor for the intervener the David Asper Centre for Constitutional Rights: David Asper Centre for Constitutional Rights, Toronto.*

*Solicitor for the intervener the Ecojustice Canada Society: Ecojustice Canada Society, Vancouver.*

*Solicitors for the intervener the Trial Lawyers Association of British Columbia: Hunter Litigation Chambers, Vancouver.*

*Solicitor for the intervener the National Council of Canadian Muslims: National Council of Canadian Muslims, Ottawa.*

*Solicitors for the intervener the Mental Health Legal Committee: Karen R. Spector, Barrister & Solicitor, Toronto; Perez Bryan Procope, Toronto; University of Windsor — Faculty of Law, Windsor.*

*Solicitors for the intervener the British Columbia Civil Liberties Association: Mandell Pinder, Vancouver; Ethos Law Group, Vancouver.*

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*Solicitors for the intervener the Centre for Free Expression: PooranLaw  
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*Solicitors for the interveners the Federation of Asian Canadian Lawyers  
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*Solicitor for the interveners the John Howard Society of Canada and the  
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