2021 **Yar No. 510031**

Supreme Court of Nova Scotia

Between:

Citizens Alliance of Nova Scotia

Applicant

and

Robert Strang acting as Chief Medical Officer of Health of Nova Scotia and Michelle Thompson acting as Minister of Health and Wellness of Nova Scotia and the Attorney General of Nova Scotia representing His Majesty the King in Right of the Province of Nova Scotia

Respondents

APPLICANT'S BOOK OF AUTHORITIES

MOTION FOR THE OBSERVANCE OF PUBLIC INTEREST STANDING

William Ray
Agent for CANS
91 – 3045 Robie St., Unit 5
Halifax, NS B3K 4P5

Email: secretary@thecans.ca

AGENT FOR THE APPLICANT

Daniel Boyle
Barrister & Solicitor
Department of Justice (NS)
8th flr, 1690 Hollis St., PO Box 7
Halifax, NS B3J 1T0

Phone: 902-266-4255
Fax: 902-424-1730
Email: daniel.boyle@novascotia.ca

COUNSEL FOR THE RESPONDENTS

Index Tab

TAB 1

Attorney General of Canada *Appellant*

v.

Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach *Respondents*

and

Attorney General of Ontario, Community Legal Assistance Society, British Columbia Civil Liberties Association, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and Positive Living Society of British Columbia *Interveners*

Procureur général du Canada *Appelant*

c.

Downtown Eastside Sex Workers United Against Violence Society et Sheryl Kiselbach *Intimées*

et

Procureur général de l'Ontario, Community Legal Assistance Society, Association des libertés civiles de la Colombie-Britannique, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Association canadienne des libertés civiles, Association canadienne des avocats et avocates en droit des réfugiés, Conseil canadien pour les réfugiés, Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario et Positive Living Society of British Columbia *Intervenants*

Indexed as: Canada (Attorney General) *v.* Downtown Eastside Sex Workers United Against Violence Society

2012 SCC 45

File No.: 33981.

2012: January 19; 2012: September 21.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Parties — Standing — Public interest standing — Public interest group and individual working on behalf of sex workers initiating constitutional

Répertorié : Canada (Procureur général) *c.* Downtown Eastside Sex Workers United Against Violence Society

2012 CSC 45

N° du greffe : 33981.

2012 : 19 janvier; 2012 : 21 septembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Parties — Qualité pour agir — Qualité pour agir dans l'intérêt public — Groupe de défense de l'intérêt public et individu œuvrant pour

challenge to prostitution provisions of Criminal Code — Whether constitutional challenge constituting a reasonable and effective means to bring case to court — Whether public interest group and individual should be granted public interest standing.

A Society whose objects include improving conditions for female sex workers in the Downtown Eastside of Vancouver and K, who worked as such for 30 years, launched a *Charter* challenge to the prostitution provisions of the *Criminal Code*. The chambers judge found that they should not be granted either public or private interest standing to pursue their challenge; the British Columbia Court of Appeal, however, granted them both public interest standing.

Held: The appeal should be dismissed.

In determining whether to grant standing in a public law case, courts must consider three factors: whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

In this case, the issue that separates the parties relates to the formulation and application of the third factor. This factor has often been expressed as a strict requirement that a party seeking standing persuade the court that there is *no* other reasonable and effective manner in which the issue may be brought before the court. While this factor has often been expressed as a strict requirement, this Court has not done so consistently and in fact has rarely applied the factor restrictively. Thus, it would be better expressed as requiring that the proposed suit be, in all of the circumstances and in light of a number of considerations, *a* reasonable and effective means to bring the case to court.

les travailleuses du sexe à l'origine d'une contestation constitutionnelle des dispositions du Code criminel relatives à la prostitution — La contestation constitutionnelle constitue-t-elle une manière raisonnable et efficace de soumettre la cause à la cour? — Le groupe de défense de l'intérêt public et l'individu devraient-ils se voir reconnaître la qualité pour agir dans l'intérêt public?

Une Société dont l'objet consiste notamment à améliorer les conditions de travail des travailleuses du sexe dans le quartier Downtown Eastside de Vancouver et K, qui a exercé ce métier durant 30 ans, ont lancé une contestation fondée sur la *Charte* des dispositions du *Code criminel* relatives à la prostitution. Le juge en cabinet a conclu qu'elles ne devraient ni l'une ni l'autre se voir reconnaître la qualité pour agir que ce soit dans l'intérêt public ou privé afin de poursuivre leur action; la Cour d'appel de la Colombie-Britannique leur a toutefois reconnu à toutes les deux la qualité pour agir dans l'intérêt public.

Arrêt : Le pourvoi est rejeté.

Lorsqu'il s'agit de décider s'il est justifié de reconnaître la qualité pour agir dans une cause de droit public, les tribunaux doivent soupeser trois facteurs. Ils doivent se demander si l'affaire soulève une question justiciable sérieuse; si la partie qui a intenté la poursuite a un intérêt réel dans les procédures ou est engagée quant aux questions qu'elles soulèvent; et si la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations, constitue une manière raisonnable et efficace de soumettre la question à la cour. Le demandeur qui souhaite se voir reconnaître la qualité pour agir dans l'intérêt public doit convaincre la cour que ces facteurs, appliqués d'une manière souple et téléologique, militent en faveur de la reconnaissance de cette qualité. Toutes les autres considérations étant égales par ailleurs, un demandeur qui possède de plein droit la qualité pour agir sera généralement préféré.

La question qui oppose les parties en l'espèce a trait à la formulation et à l'application du troisième de ces facteurs. Ce facteur a longtemps été qualifié d'exigence stricte que la personne demandant la reconnaissance de sa qualité pour agir devait démontrer qu'il *n*'y a *pas* d'autre manière raisonnable et efficace de soumettre la question à la cour. Il n'empêche que la Cour ne l'a pas formulé systématiquement de cette façon et l'a même rarement appliqué restrictivement. Ainsi, il serait préférable de formuler ce facteur comme exigeant que la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations, constitue *une* manière raisonnable et efficace de soumettre la question à la cour.

By taking a purposive approach to the issue, 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. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible. Whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

En abordant la question sous l'angle téléologique, les tribunaux doivent se demander si l'action envisagée constitue une utilisation efficiente des ressources judiciaires, si les questions sont justiciables dans un contexte accusatoire, et si le fait d'autoriser la poursuite de l'action envisagée favorise le respect du principe de la légalité. Une approche souple et discrétionnaire est de mise pour juger de l'effet de ces considérations sur la décision ultime de reconnaître ou non la qualité pour agir. Une analyse dichotomique répondant par un oui ou par un non n'est pas envisageable. Les questions visant à déterminer si une manière de procéder est raisonnable, si elle est efficace et si elle favorise le renforcement du principe de la légalité sont des questions de degré et elles doivent être analysées en fonction de solutions de rechange pratiques, compte tenu de toutes les circonstances.

In this case, all three factors, applied purposively and flexibly, favour granting public interest standing to the respondents. In fact, there is no dispute that the first and second factors are met: the respondents' action raises serious justiciable issues and the respondents have an interest in the outcome of the action and are fully engaged with the issues that they seek to raise. Indeed, the constitutionality of the prostitution provisions of the *Criminal Code* constitutes a serious justiciable issue and the respondents, given their work, have a strong engagement with the issue.

En l'espèce, appliqués selon une approche téléologique et souple, les trois facteurs militent pour la reconnaissance de la qualité pour agir dans l'intérêt public des intimées. En fait, il n'y a guère de désaccord quant au fait qu'il a été satisfait aux deux premiers facteurs : la poursuite des intimées soulève des questions justiciables sérieuses et les intimées ont un intérêt dans l'issue de l'action et sont totalement engagées au regard des questions qu'elles souhaitent soulever. En effet, la constitutionnalité des dispositions du *Code criminel* relatives à la prostitution constitue une question justiciable sérieuse et les intimées, compte tenu de leur travail, ont un solide engagement à l'égard de l'enjeu en cause.

In this case, the third factor is also met. The existence of a civil case in another province is certainly a highly relevant consideration that will often support denying standing. However, the existence of parallel litigation — even litigation that raises many of the same issues — is not necessarily a sufficient basis for denying standing. Given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. Further, the issues raised are not the same as those in the other case. The court must also examine not only the precise legal issue, but the perspective from which it is made. In the other case, the perspective is very different. The claimants in that case were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. A stay of proceedings pending resolution of other litigation is

En l'espèce, il est également satisfait au troisième facteur. L'existence d'une cause civile dans une autre province constitue certainement un facteur hautement pertinent qui milite souvent contre la reconnaissance de la qualité pour agir. Toutefois, l'existence d'une instance parallèle, même si elle soulève beaucoup de questions identiques, n'est pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir. Compte tenu de l'organisation provinciale de nos cours supérieures, les décisions rendues par celles d'une province ne lient pas les cours des autres provinces. Ainsi, une instance dans une province n'apporte pas nécessairement une réponse complète au demandeur qui désire intenter une poursuite sur des questions semblables dans une autre province. En outre, les questions soulevées dans l'autre cause ne sont pas identiques à celles soulevées en l'espèce. Le tribunal doit examiner non seulement la question juridique précise posée, mais aussi le contexte dans lequel elle l'est. Or, les contextes qui sont à l'origine des contestations dans l'autre cause et dans la présente affaire sont très différents. Les demanderesses dans l'autre cause n'étaient pas principalement

one possibility that should be taken into account in exercising the discretion as to standing.

Taking these points into account here, the existence of other litigation, in the circumstances of this case, does not seem to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward.

Moreover, the existence of other potential plaintiffs, while relevant, should be considered in light of practical realities, which are such that it is very unlikely that persons charged under the prostitution provisions would bring a claim similar to the respondents'. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance.

In this case, also, the record shows that there were no sex workers in the Downtown Eastside willing to bring a challenge forward. The willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge in their own names.

Other considerations should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim.

des travailleuses de l'industrie du sexe qui exercent leur métier dans la rue, tandis que, en l'espèce, ce sont elles qui sont au cœur du débat. Finalement, mise à part la mesure radicale qui consiste à ne pas reconnaître la qualité pour agir, il pourrait y avoir d'autres stratégies en matière de gestion des litiges visant à assurer l'utilisation efficiente et efficace des ressources judiciaires. La suspension des procédures jusqu'au règlement d'autres instances est, de fait, une possibilité qui devrait être prise en compte lors de l'exercice du pouvoir discrétionnaire de reconnaître ou non la qualité pour agir.

En tenant compte de ce qui précède, l'existence de l'autre instance, dans les circonstances de la présente affaire, ne semble pas peser très lourd contre les intimées lorsqu'il s'agit de déterminer si la poursuite qu'elles ont intentée constitue une manière raisonnable et efficace de soumettre les allégations formulées à l'intention de la cour.

De plus, l'existence de demandeurs potentiels, bien qu'il s'agisse d'un facteur pertinent, ne devrait être prise en compte qu'en fonction de considérations d'ordre pratique qui sont telles qu'il est très peu probable que des personnes accusées en application des dispositions relatives à la prostitution engageraient une action semblable à celle des intimées. De plus, le caractère imprévisible inhérent aux procès criminels rend les choses encore plus difficiles pour une partie soulevant une contestation de la nature de celle engagée en l'espèce.

En outre, en l'espèce, il appert du dossier qu'aucun travailleur de l'industrie du sexe du quartier Downtown Eastside de Vancouver n'était prêt à engager une contestation exhaustive. La volonté de bon nombre de ces personnes de souscrire des affidavits ou de comparaître pour témoigner n'affecte en rien la crédibilité de leur témoignage voulant qu'elles ne soient pas prêtes ou capables d'engager en leurs propres noms une contestation de cette nature.

D'autres considérations devraient être prises en compte lors de l'examen du facteur relatif aux manières plus raisonnables et efficaces. La présente affaire constitue un litige d'intérêt public : les intimées ont soulevé des questions d'importance pour le public, des questions qui transcendent leurs intérêts immédiats. Leur contestation est exhaustive en ce qu'elle vise la presque totalité du régime législatif. Elle fournit l'occasion d'évaluer, du point de vue du droit constitutionnel, l'effet global de ce régime sur les personnes les plus touchées par ses dispositions. Une contestation de cette nature est susceptible de prévenir une multiplicité de contestations individuelles engagées dans le cadre de poursuites criminelles. Il n'y a aucun risque de porter

It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of K, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

Having found that the respondents have public interest standing to pursue their action, it is not necessary to address the issue of whether K has private interest standing.

Cases Cited

Applied: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; **discussed:** *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; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *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; **referred to:** *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331; *Baker v. Carr*, 369 U.S. 186 (1962); *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *R. v. Smith* (1988), 44 C.C.C. (3d) 385; *R. v. Gagne*, [1988] O.J. No. 2518 (QL); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111; *R. v. Kazelman*, [1987] O.J. No. 1931 (QL); *R. v. Bavington*, [1987] O.J. No. 2728 (QL); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. v. Bailey*, [1986] O.J. No. 2795 (QL); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL); *R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

atteinte aux droits d'autres individus ayant un intérêt plus personnel ou plus direct dans la question du fait d'une action trop générale ou mal présentée. Il est évident que la demande est plaidée avec rigueur et habileté. Rien ne laisse croire que d'autres personnes touchées de façon plus directe ou personnelle aient choisi de plein gré de ne pas contester ces dispositions. La présence de K, de même que celle de la Société, garantira que le litige aura une dimension à la fois individuelle et collective.

Ayant conclu que les intimées ont la qualité pour agir dans l'intérêt public afin de poursuivre leur action, il n'est pas nécessaire d'aborder la question de savoir si K a la qualité pour agir dans l'intérêt privé.

Jurisprudence

Arrêt appliqué : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263; **arrêts analysés :** *Finlay c. Canada (Ministre des Finances)*, [1986] 2 R.C.S. 607; *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236; *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575; *Hy and Zel's Inc. c. Ontario (Procureur général)*, [1993] 3 R.C.S. 675; *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265; **arrêts mentionnés :** *Bedford c. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, inf. en partie par 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791; *Smith c. Attorney General of Ontario*, [1924] R.C.S. 331; *Baker c. Carr*, 369 U.S. 186 (1962); *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *R. c. Skinner*, [1990] 1 R.C.S. 1235; *R. c. Stagnitta*, [1990] 1 R.C.S. 1226; *R. c. Smith* (1988), 44 C.C.C. (3d) 385; *R. c. Gagne*, [1988] O.J. No. 2518 (QL); *R. c. Jahelka* (1987), 43 D.L.R. (4th) 111; *R. c. Kazelman*, [1987] O.J. No. 1931 (QL); *R. c. Bavington*, [1987] O.J. No. 2728 (QL); *R. c. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. c. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. c. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. c. Bailey*, [1986] O.J. No. 2795 (QL); *R. c. Cheeseman*, C. prov. Sask., 19 juin 1986; *R. c. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Boston*, [1988] B.C.J. No. 1185 (QL); *R. c. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(*b*), (*d*), 7, 15.
Constitution Act, 1982.
Criminal Code, R.S.C. 1985, c. C-46, ss. 210 to 213.
Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], r. 19(24).

Authors Cited

Fiss, Owen M. "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav.* 121.
Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated December 2011, release 17).
Scott, Kenneth E. "Standing in the Supreme Court — A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645.
Sossin, Lorne. "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 *U.B.C. L. Rev.* 727.
Sossin, Lorne M. *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. Toronto: Carswell, 2012.

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Neilson and Groberman JJ.A.), 2010 BCCA 439, 10 B.C.L.R. (5th) 33, 294 B.C.A.C. 70, 498 W.A.C. 70, 324 D.L.R. (4th) 1, 260 C.C.C. (3d) 95, 219 C.R.R. (2d) 171, [2011] 1 W.W.R. 628, [2010] B.C.J. No. 1983 (QL), 2010 CarswellBC 2729, setting aside in part a decision of Ehrcke J., 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, 305 D.L.R. (4th) 713, 182 C.R.R. (2d) 262, [2009] 5 W.W.R. 696, [2008] B.C.J. No. 2447 (QL), 2008 CarswellBC 2709. Appeal dismissed.

Cheryl J. Tobias, *Q.C.*, and *Donnaree Nygard*, for the appellant.

Joseph J. Arvay, *Q.C.*, *Elin R. S. Sigurdson* and *Katrina Pacey*, for the respondents.

Janet E. Minor and *Courtney J. Harris*, for the intervener the Attorney General of Ontario.

David W. Mossop, *Q.C.*, and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 2*b*), *d*), 7, 15.
Code criminel, L.R.C. 1985, ch. C-46, art. 210 à 213.
Loi constitutionnelle de 1982.
Supreme Court Rules, B.C. Reg. 221/90 [abr. 168/2009], règle 19(24).

Doctrine et autres documents cités

Fiss, Owen M. « The Social and Political Foundations of Adjudication » (1982), 6 *Law & Hum. Behav.* 121.
Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont. : Canada Law Book, 1994 (loose-leaf updated December 2011, release 17).
Scott, Kenneth E. « Standing in the Supreme Court — A Functional Analysis » (1973), 86 *Harv. L. Rev.* 645.
Sossin, Lorne. « The Justice of Access : Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid? » (2007), 40 *U.B.C. L. Rev.* 727.
Sossin, Lorne M. *Boundaries of Judicial Review : The Law of Justiciability in Canada*, 2nd ed. Toronto : Carswell, 2012.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Saunders, Neilson et Groberman), 2010 BCCA 439, 10 B.C.L.R. (5th) 33, 294 B.C.A.C. 70, 498 W.A.C. 70, 324 D.L.R. (4th) 1, 260 C.C.C. (3d) 95, 219 C.R.R. (2d) 171, [2011] 1 W.W.R. 628, [2010] B.C.J. No. 1983 (QL), 2010 CarswellBC 2729, qui a infirmé en partie une décision du juge Ehrcke, 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, 305 D.L.R. (4th) 713, 182 C.R.R. (2d) 262, [2009] 5 W.W.R. 696, [2008] B.C.J. No. 2447 (QL), 2008 CarswellBC 2709. Pourvoi rejeté.

Cheryl J. Tobias, *c.r.*, et *Donnaree Nygard*, pour l'appelant.

Joseph J. Arvay, *c.r.*, *Elin R. S. Sigurdson* et *Katrina Pacey*, pour les intimées.

Janet E. Minor et *Courtney J. Harris*, pour l'intervenant le procureur général de l'Ontario.

David W. Mossop, *c.r.*, et *Diane Nielsen*, pour l'intervenante Community Legal Assistance Society.

Jason B. Gratl and *Megan Vis-Dunbar*, for the intervener the British Columbia Civil Liberties Association.

Justin Duncan and *Kaitlyn Mitchell*, for the intervener Ecojustice Canada.

C. Tess Sheldon, *Niamh Harraher* and *Kasari Govender*, for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and the ARCH Disability Law Centre.

Written submissions only by *Mark C. Power* and *Jean-Pierre Hachey*, for the intervener Conseil scolaire francophone de la Colombie-Britannique.

Kent Roach and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Written submissions only by *Cara Faith Zwibel*, for the intervener the Canadian Civil Liberties Association.

Lorne Waldman, *Clare Crummey* and *Tamara Morgenthau*, for the interveners the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees.

Written submissions only by *Michael A. Feder*, *Alexandra E. Cocks* and *Jordanna Cytrynbaum*, for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled

Jason B. Gratl et *Megan Vis-Dunbar*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Justin Duncan et *Kaitlyn Mitchell*, pour l'intervenant Ecojustice Canada.

C. Tess Sheldon, *Niamh Harraher* et *Kasari Govender*, pour les intervenants Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth et ARCH Disability Law Centre.

Argumentation écrite seulement par *Mark C. Power* et *Jean-Pierre Hachey*, pour l'intervenant le Conseil scolaire francophone de la Colombie-Britannique.

Kent Roach et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Argumentation écrite seulement par *Cara Faith Zwibel*, pour l'intervenante l'Association canadienne des libertés civiles.

Lorne Waldman, *Clare Crummey* et *Tamara Morgenthau*, pour les intervenants l'Association canadienne des avocats et avocates en droit des réfugiés et le Conseil canadien pour les réfugiés.

Argumentation écrite seulement par *Michael A. Feder*, *Alexandra E. Cocks* et *Jordanna Cytrynbaum*, pour les intervenants le Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario et Positive Living Society of British Columbia.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Le présent pourvoi porte sur les règles de droit relatives à la qualité pour agir dans l'intérêt public dans les causes en matière constitutionnelle. Ces

to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

règles déterminent qui peut soumettre une affaire aux tribunaux. Bien entendu, la situation serait insoutenable si tous avaient la qualité pour engager des poursuites à tout propos, aussi ténu leur intérêt personnel soit-il dans la cause. Des restrictions s'imposent donc en matière de qualité pour agir afin d'assurer que les tribunaux ne deviennent pas complètement submergés par des poursuites insignifiantes ou redondantes, d'écarter les trouble-fête et de s'assurer que les tribunaux entendent les principaux intéressés faire valoir contradictoirement leurs points de vue et jouent le rôle qui leur est propre dans le cadre de notre système démocratique de gouvernement : *Finlay c. Canada (Ministre des Finances)*, [1986] 2 R.C.S. 607, p. 631. Selon l'approche traditionnellement retenue, la qualité pour agir était limitée aux personnes dont les intérêts privés étaient en jeu ou pour qui l'issue des procédures avait des incidences particulières. Dans les causes de droit public, les tribunaux canadiens ont toutefois tempéré ces limites et adopté une approche souple et discrétionnaire quant à la question de la qualité pour agir dans l'intérêt public, guidés en cela par les objectifs qui étaient sous-jacents aux limites traditionnelles.

[2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[2] Lorsqu'ils exercent leur pouvoir discrétionnaire en matière de qualité pour agir, les tribunaux soupèsent trois facteurs à la lumière de ces objectifs sous-jacents et des circonstances particulières de chaque cas. Ils se demandent si l'affaire soulève une question justiciable sérieuse, si la partie qui a intenté la poursuite a un intérêt réel ou véritable dans son issue et, en tenant compte d'un grand nombre de facteurs, si la poursuite proposée constitue une manière raisonnable et efficace de soumettre la question à la cour : *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236, p. 253. Les tribunaux exercent ce pouvoir discrétionnaire de reconnaître ou non la qualité pour agir de façon « libérale et souple » (p. 253).

[3] In this case, the respondents the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers,

[3] En l'espèce, les intimées Downtown Eastside Sex Workers United Against Violence Society (« Société ») — dont l'objet consiste notamment à améliorer les conditions de travail

and Ms. Kiselbach, have launched a broad constitutional challenge to the prostitution provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. The British Columbia Court of Appeal found that they should be granted public interest standing to pursue this challenge; the Attorney General of Canada appeals. The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. Applying it here, my view is that the Society and Ms. Kiselbach should be granted public interest standing. I would therefore dismiss the appeal.

II. Issues

[4] The issues as framed by the parties are whether the respondents should be granted public interest standing and whether Ms. Kiselbach should be granted private interest standing. In my view, this case is best resolved by considering the discretion to grant public interest standing and standing should be granted to the respondents on that basis.

III. Overview of Facts and Proceedings

A. *Facts*

[5] The respondent Society is a registered British Columbia society whose objects include improving working conditions for female sex workers. It is run "by and for" current and former sex workers living in the Vancouver Downtown Eastside. The Society's members are women, the majority of whom are Aboriginal, living with addiction issues, health challenges, disabilities, and poverty; almost

des travailleuses du sexe — et M^me^ Kiselbach ont lancé une vaste contestation constitutionnelle des dispositions du *Code criminel*, L.R.C. 1985, ch. C-46, relatives à la prostitution. La Cour d'appel de la Colombie-Britannique a jugé qu'il y avait lieu de leur reconnaître la qualité pour agir dans l'intérêt public pour qu'elles puissent faire valoir cette contestation. Le procureur général du Canada interjette appel de cette décision. Le pourvoi porte principalement sur la question de savoir si les trois facteurs que les tribunaux doivent prendre en compte afin de juger de la qualité pour agir doivent être considérés comme des éléments d'une liste de contrôle rigide ou s'ils doivent être pris en compte et soupesés dans l'exercice du pouvoir discrétionnaire judiciaire en vue de servir les principes sous-jacents des règles de droit applicables à ce sujet. À mon avis, la dernière approche est la bonne et, en l'appliquant en l'espèce, j'estime qu'il y a lieu de reconnaître à la Société et à M^me^ Kiselbach la qualité pour agir dans l'intérêt public. Je suis donc d'avis de rejeter le pourvoi.

II. Questions en litige

[4] Les questions en litige telles qu'elles sont exposées par les parties sont celles de savoir si la Cour devrait reconnaître aux intimées la qualité pour agir dans l'intérêt public et à M^me^ Kiselbach la qualité pour agir dans l'intérêt privé. À mon avis, la meilleure façon de régler la présente affaire consiste à procéder à l'examen du pouvoir discrétionnaire de reconnaître la qualité pour agir dans l'intérêt public et, sur cette base, de la reconnaître aux intimées.

III. Aperçu des faits et des procédures

A. *Les faits*

[5] La Société intimée est une entreprise enregistrée de la Colombie-Britannique qui a notamment pour objet d'améliorer les conditions de travail des travailleuses du sexe. Elle est administrée « par et pour » des travailleuses du sexe actives et retirées vivant dans le quartier Downtown Eastside de Vancouver. Les membres de la Société sont des femmes, la plupart autochtones, vivant avec des

all have been victims of physical and/or sexual violence.

[6] Sheryl Kiselbach is a former sex worker currently working as a violence prevention coordinator in the Downtown Eastside. For approximately 30 years, Ms. Kiselbach engaged in a number of forms of sex work, including exotic dancing, live sex shows, work in massage parlours and street-level free-lance prostitution. During the course of this time, she was convicted of several prostitution-related offences. Ms. Kiselbach left the sex industry in 2001. She claims to have been unable to participate in a court challenge to prostitution laws when working as a sex worker because of risk of public exposure, fear for her personal safety, and the potential loss of social services, income assistance, clientele and employment opportunities (chambers judge's reasons, 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, at paras. 29 and 44).

[7] The respondents commenced an action challenging the constitutional validity of sections of the *Criminal Code* that deal with different aspects of prostitution. They seek a declaration that these provisions violate the rights of free expression and association, to equality before the law and to life, liberty and security of the person guaranteed by ss. 2(*b*), 2(*d*), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The challenged provisions are what I will refer to as the "prostitution provisions", the "bawdy house provisions", the "procurement provision" and the "communication provision". Prostitution provisions is the generic term to refer to the provisions in the *Criminal Code* relating to the criminalization of activities related to prostitution (ss. 210 to 213). Within these provisions can be found the bawdy house provisions, which include those relating to keeping and being within a common bawdy house (s. 210), and transporting a person to a common bawdy house (s. 211). The procurement provision refers to the act of procuring and living on the avails of prostitution (s. 212,

problèmes de toxicomanie, de santé, d'incapacités et de pauvreté; elles ont presque toutes été victimes de violence physique ou sexuelle, ou des deux.

[6] Sheryl Kiselbach est une ancienne travailleuse du sexe qui occupe actuellement un emploi de coordonnatrice en prévention de la violence dans le quartier Downtown Eastside. Pendant environ 30 ans, elle a exercé diverses activités dans l'industrie du sexe dont la danse exotique, les spectacles érotiques en direct, les séances en salons de massage et la prostitution de rue en tant que travailleuse autonome. Durant cette période, elle a été déclarée coupable de plusieurs infractions relatives à la prostitution. Elle a quitté cette industrie en 2001. Elle soutient avoir été incapable de participer à une contestation judiciaire des lois relatives à la prostitution pendant qu'elle était active comme travailleuse du sexe en raison des risques liés à une exposition publique, de la crainte pour sa sécurité personnelle et de la perte éventuelle de services sociaux, d'aide au revenu, de clientèle et de possibilités d'emploi (motifs du juge en cabinet, 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, par. 29 et 44).

[7] Les intimées ont intenté une action contestant la validité constitutionnelle de certains articles du *Code criminel* qui traitent de différents aspects de la prostitution. Elles sollicitent un jugement déclaratoire portant que ces dispositions enfreignent les droits à la liberté d'expression et d'association, ainsi que les droits à l'égalité devant la loi, à la vie, à la liberté et à la sécurité de la personne garantis par les al. 2*b*) et 2*d*) ainsi que par les art. 7 et 15 de la *Charte canadienne des droits et libertés*. Les dispositions contestées sont ce que j'appellerai les « dispositions relatives à la prostitution », les « dispositions relatives aux maisons de débauche », la « disposition relative au proxénétisme » et la « disposition relative à la communication ». Le premier de ces termes, soit « dispositions relatives à la prostitution », constitue l'expression générique pour désigner l'ensemble des dispositions du *Code criminel* portant sur la criminalisation des activités relatives à la prostitution (art. 210 à 213). Parmi elles, on retrouve les dispositions relatives aux maisons de débauche qui créent notamment les

except for s. 212(1)(*g*) and (*i*)), while the communication provision refers to the act of soliciting in a public place (s. 213(1)(*c*)). Neither respondent is currently charged with any of the offences challenged.

[8] The respondents' position is that the prostitution provisions (ss. 210 to 213) infringe s. 2(*d*) freedom of association rights because these provisions prevent prostitutes from joining together to increase their personal safety; s. 7 security of the person rights due to the possibility of arrest and imprisonment and because the provisions prevent prostitutes from taking steps to improve the health and safety conditions of their work; s. 15 equality rights because the provisions discriminate against members of a disadvantaged group; and s. 2(*b*) freedom of expression rights by making illegal communication which could serve to increase safety and security.

B. *Proceedings*

(1) British Columbia Supreme Court (Ehrcke J.), 2008 BCSC 1726, 90 B.C.L.R. (4th) 177

[9] The Attorney General of Canada applied in British Columbia Supreme Court Chambers to dismiss the respondents' action on the ground that they lacked standing to bring it. In the alternative, he applied under Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by *Supreme Court Civil Rules*, B.C. Reg. 168/2009, effective July 1, 2010), to have portions of the statement of claim struck out and part of the action stayed on the basis that the pleadings disclosed no reasonable

infractions que constitue le fait de tenir une maison de débauche, de se trouver dans une telle maison (art. 210), ainsi que d'y transporter une personne (art. 211); la disposition relative au proxénétisme qui vise l'acte d'induire à avoir des rapports sexuels et de vivre des produits de la prostitution (art. 212, sauf les al. 212(1)*g*) et *i*)), et la disposition relative à la communication qui vise l'acte de sollicitation dans un endroit public (al. 213(1)*c*)). Aucune des intimées n'est actuellement accusée de l'une ou l'autre des infractions décrites par les dispositions contestées.

[8] Selon les intimées, les dispositions relatives à la prostitution (art. 210 à 213) portent atteinte au droit à la liberté d'association garanti par l'al. 2*d*) parce qu'elles empêchent les prostituées de se regrouper afin d'accroître leur sécurité personnelle. Elles soutiennent que ces dispositions portent également atteinte au droit à la sécurité de la personne garanti par l'art. 7 parce que les prostituées courent le risque d'être arrêtées et détenues et parce que ces dispositions les empêchent de prendre des mesures pour améliorer leurs conditions de santé et de sécurité au travail; au droit à l'égalité garanti par l'art. 15 parce que ces dispositions sont discriminatoires à l'égard des membres d'un groupe défavorisé; et au droit à la liberté d'expression garanti par l'al. 2*b*) puisque des communications qui pourraient servir à accroître leur sécurité sont rendues illégales.

B. *Historique des procédures*

(1) Cour suprême de la Colombie-Britannique (le juge Ehrcke), 2008 BCSC 1726, 90 B.C.L.R. (4th) 177

[9] Le Procureur général du Canada a demandé à la Cour suprême de la Colombie-Britannique siégeant en cabinet de rejeter la poursuite des intimées au motif qu'elles n'avaient pas la qualité pour l'intenter. Subsidiairement, au titre de la règle 19(24) des *Supreme Court Rules*, B.C. Reg. 221/90 (remplacées par les *Supreme Court Civil Rules*, B.C. Reg. 168/2009, entrées en vigueur le 1er juillet 2010), il a demandé la radiation de certaines parties de la déclaration et la suspension d'une partie

claim. In the further alternative, he applied for particulars which he said were necessary in order to know the case to be met (chambers judge's reasons, at para. 2). The chambers judge dismissed the action, holding that neither respondent had private interest standing and that discretionary public interest standing should not be granted to them. In light of this conclusion, the chambers judge found it unnecessary to consider the Attorney General's applications under Rule 19(24) and for particulars (para. 88).

[10] The chambers judge reasoned that neither the Society nor Ms. Kiselbach was charged with any of the impugned provisions or was a defendant in an action brought by a government agency relying upon the legislation. Further, the Society is a separate entity with rights distinct from those of its members. Ms. Kiselbach, he determined, was not entitled to private interest standing because she was not currently engaged in sex work and the continued stigma associated with her past convictions could not give rise to private interest standing because that would amount to a collateral attack on her previous convictions.

[11] The chambers judge turned to public interest standing and found that he should not exercise his discretion to grant standing to either respondent. He reviewed what he described as the three "requirements" for public interest standing as set out in *Canadian Council of Churches* and concluded that the respondents' action raised serious constitutional issues and they had a genuine interest in the validity of the provisions. Thus, the judge held that the first and second "requirements" for public interest standing were established. He then turned to the third part of the test, "whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court" (para.

de la poursuite au motif que les actes de procédures ne révélaient aucune cause d'action raisonnable. Subsidiairement encore, il a demandé des précisions qui, selon lui, étaient nécessaires pour connaître les éléments invoqués dans la poursuite et les réfuter (motifs du juge en cabinet, par. 2). Le juge en cabinet a rejeté l'action statuant que ni l'une ni l'autre des intimées n'avaient la qualité pour agir dans l'intérêt privé et que la qualité pour agir dans l'intérêt public qui est tributaire de l'exercice d'un pouvoir discrétionnaire ne devait pas leur être reconnue. Compte tenu de cette décision, le juge en cabinet a conclu qu'il n'était pas nécessaire d'examiner la demande présentée par le procureur général au titre de la règle 19(24), ni celle sollicitant des précisions (par. 88).

[10] Le juge en cabinet a noté que ni la Société ni M^me^ Kiselbach n'étaient accusées des infractions prévues aux dispositions contestées ou n'étaient défenderesses à une action engagée par un organisme gouvernemental, toujours en application des dispositions en question. En outre, il a précisé que la Société est une entité séparée dont les droits sont distincts de ceux de ses membres. Il a aussi jugé que M^me^ Kiselbach ne pouvait pas se voir reconnaître la qualité pour agir dans l'intérêt privé, d'une part parce qu'elle ne travaillait pas actuellement dans l'industrie du sexe et, d'autre part parce que le stigmate persistant associé à ses condamnations antérieures ne pouvait lui donner cette qualité, puisque cela équivaudrait à les contester de façon indirecte.

[11] Le juge en cabinet s'est ensuite penché sur la question de la qualité pour agir dans l'intérêt public et il ne devrait pas exercer son pouvoir discrétionnaire pour reconnaître cette qualité ni à l'une ni à l'autre des intimées. Il a examiné ce qu'il a décrit comme étant les trois « exigences » pour se voir reconnaître la qualité pour agir dans l'intérêt public tel qu'elles sont énoncées dans l'arrêt *Conseil canadien des Églises*. Il a conclu que la poursuite des intimées soulevait des questions constitutionnelles sérieuses et que les intimées avaient un intérêt véritable quant à la validité des dispositions. Le juge a donc estimé qu'il avait été satisfait aux première et deuxième « exigences » relatives à la qualité pour

70). This, in the judge's view, was where the respondents' claim for standing faltered.

[12] He agreed with the Attorney General's argument that the provisions could be challenged by litigants charged under them. The fact that members of the Society were "particularly vulnerable" and allegedly unable to come forward could not give rise to public interest standing (para. 76). Members of the Society would likely have to come forward as witnesses should the matter proceed to trial and if they were willing to testify as witnesses, they were able to come forward as plaintiffs. The chambers judge noted that there was litigation underway in Ontario raising many of the same issues: *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1. He reasoned that, while the existence of this litigation was not necessarily a sufficient reason for denying standing, it tended to show that there "may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75). He also referred to the fact that there had been a number of cases in British Columbia and elsewhere where the impugned legislation had been challenged and that there are hundreds of criminal prosecutions every year in British Columbia in each of which the accused "would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77).

[13] The judge concluded that he was bound to apply the test of whether there is no other reasonable and effective way to bring the issue before the court and that the respondents did not meet that test (para. 85).

agir dans l'intérêt public. Il a ensuite examiné le troisième élément du test, soit [TRADUCTION] « la question de savoir si, dans la mesure où la qualité n'était pas reconnue, il existait une autre manière raisonnable et efficace de soumettre la question à la cour » (par. 70). Selon le juge, c'est à cet égard que la demande des intimées présentait des faiblesses.

[12] Il a souscrit à l'argument du procureur général selon lequel les dispositions pouvaient être contestées par les justiciables accusés en vertu d'elles. À son avis, le fait que des membres de la Société soient [TRADUCTION] « particulièrement vulnérables » et soi-disant incapables de se manifester ne pouvait justifier la reconnaissance de la qualité pour agir dans l'intérêt public (par. 76). Si l'affaire avait été instruite, des membres de la Société auraient probablement eu à témoigner, et si elles étaient prêtes à faire cela, elles étaient aussi en mesure de se présenter à titre de demanderesses. Le juge en cabinet a aussi souligné qu'il y avait une poursuite en cours en Ontario qui soulevait bon nombre des mêmes questions : *Bedford c. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, inf. en partie par 2012 ONCA 186, 109 O.R. (3d) 1. Il a expliqué que, même si l'existence de ce litige ne constituait pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir, elle tendait à démontrer qu'« il pourrait néanmoins y avoir des demandeurs éventuels ayant qualité pour agir dans l'intérêt privé qui pourraient, s'ils choisissaient de le faire, soumettre l'ensemble de ces questions à la cour » (par. 75). Il a également mentionné qu'il y avait eu un certain nombre de causes en Colombie-Britannique et ailleurs dans le cadre desquelles les dispositions législatives contestées en l'espèce avaient fait l'objet de contestations et qu'il y a chaque année en Colombie-Britannique des centaines de procès au criminel durant lesquels l'accusé « pourrait soulever, de plein droit, les questions constitutionnelles que les demanderesses tentent de soulever en l'espèce » (par. 77).

[13] Le juge a conclu qu'il était tenu d'appliquer le critère visant à déterminer s'il n'y a pas une autre manière raisonnable et efficace de soumettre la question à la cour et que les intimées n'avaient pas satisfait à ce critère (par. 85).

(2) British Columbia Court of Appeal, 2010 BCCA 439, 10 B.C.L.R. (5th) 33

[14] The respondents appealed, submitting that the chambers judge had erred by rejecting private interest standing for Ms. Kiselbach and public interest standing for both respondents. The chambers judge's finding that the Society did not have private interest standing was not appealed (para. 3). The majority of the Court of Appeal upheld the chambers judge's decision to deny Ms. Kiselbach's private interest standing, but concluded that both respondents ought to have been granted public interest standing. The only issue on which the Court of Appeal divided was with respect to the third factor, that is, whether standing should be denied because there were other ways the issues raised in the respondents' proceedings could be brought before the courts.

[15] Saunders J.A. (Neilson J.A. concurring), writing for the majority, found no reason for denying public interest standing. She held that this Court has made it clear that the discretion to grant standing must not be exercised mechanistically but rather in a broad and liberal manner to achieve the objective of ensuring that impugned laws are not immunized from review. The majority read the dissenting reasons for judgment of Binnie and LeBel JJ. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, as characterizing the *Charter* challenge in that case as a "systemic" challenge, which differs in scope from an individual's challenge addressing a discrete issue. To the majority, *Chaoulli* recognized that any problems arising from the difference in scope of the challenge may be resolved by taking "a more relaxed view of standing in the right case" (para. 59).

(2) Cour d'appel de la Colombie-Britannique, 2010 BCCA 439, 10 B.C.L.R. (5th) 33

[14] Les intimées ont interjeté appel, faisant valoir que le juge en cabinet avait commis une erreur en refusant de reconnaître à M^me^ Kiselbach la qualité pour agir dans l'intérêt privé et aux deux intimées la qualité pour agir dans l'intérêt public. La conclusion du juge en cabinet selon laquelle la Société n'avait pas qualité pour agir dans l'intérêt privé n'a pas été portée en appel (par. 3). La Cour d'appel, à la majorité, a maintenu la décision du juge en cabinet de refuser de reconnaître à M^me^ Kiselbach la qualité pour agir dans l'intérêt privé, mais elle a conclu que la qualité pour agir dans l'intérêt public des deux intimées aurait dû être reconnue. Une seule question a donné lieu à une dissidence en Cour d'appel, soit celle relative au troisième facteur de l'analyse qui vise à déterminer si la cour devait refuser de reconnaître la qualité pour agir parce qu'il y avait d'autres manières de saisir les tribunaux des questions soulevées par les intimées dans le cadre de leurs procédures.

[15] La juge Saunders de la Cour d'appel, avec l'accord de la juge Neilson et rédigeant au nom des juges majoritaires, n'a trouvé aucune raison de refuser de reconnaître la qualité pour agir dans l'intérêt public. Selon elle, la Cour avait énoncé clairement que le pouvoir discrétionnaire de reconnaître la qualité pour agir ne doit pas être exercé mécaniquement, mais plutôt de manière large et libérale afin d'assurer que les dispositions législatives contestées n'échappent pas à tout examen. Selon les juges majoritaires, les motifs dissidents exprimés par les juges Binnie et LeBel dans l'arrêt *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791, qualifiaient la contestation fondée sur des dispositions de la *Charte* dans cette instance de contestation « systémique » dont la portée différait de celle d'une contestation engagée par un individu et touchant une question particulière. Pour les juges majoritaires, l'arrêt *Chaoulli* a reconnu que les problèmes soulevés par des contestations dont la portée diffère peuvent être réglés en adoptant [TRADUCTION] « une conception plus large de la qualité pour agir lorsqu'il y a lieu de le faire » (par. 59).

[16] Applying this approach, the majority considered this case to fall closer on the spectrum to *Chaoulli* than to *Canadian Council of Churches.* Saunders J.A. took the view that the chambers judge had stripped the action of its central thesis by likening it to cases in which prostitution-related charges were laid. Saunders J.A. focused on the multi-faceted nature of the proposed challenge and felt that the respondents were seeking to challenge the *Criminal Code* provisions with reference to their cumulative effect on sex trade workers. In the majority judges' view, public interest standing ought to be granted in this case because the essence of the complaint was that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities and exacerbates their vulnerability.

[16] Appliquant cette approche, les juges majoritaires ont estimé que la présente instance se rapprochait davantage de l'affaire *Chaoulli* que de celle du *Conseil canadien des Églises*. Selon la juge Saunders, le juge en cabinet a dépouillé la poursuite de la thèse sur laquelle elle reposait en l'assimilant aux poursuites où avaient été déposées des accusations relatives à la prostitution. La juge Saunders s'est concentrée sur la nature multidimensionnelle de la contestation envisagée et a conclu que les intimées cherchaient à contester les dispositions du *Code criminel* en fonction de leur effet cumulatif sur les travailleurs de l'industrie du sexe. Dans l'opinion des juges majoritaires, la qualité pour agir dans l'intérêt public devait être reconnue en l'espèce puisque l'essence de la plainte était que ces dispositions législatives rendent vulnérables de façon inacceptable des personnes s'adonnant à des activités par ailleurs licites et aggravent leur vulnérabilité.

[17] In dissent, Groberman J.A. agreed with the chambers judge's reasoning. In his view, this case did not raise any challenges that could not be advanced by persons with private interest standing. He accepted the respondents' position that it was unlikely that a case would arise in which a multi-pronged attack on all of the impugned provisions could take place. However, he did not consider that the lack of such an opportunity established a valid basis for public interest standing. He took the view that a very broad-ranging challenge such as the one in this case required extensive evidence on a multitude of issues and he did not find it clear that the litigation process would deal fairly and effectively with such a challenge in a reasonable amount of time. Interpreting the judgment in *Chaoulli*, Groberman J.A. held that the Court had not broadened the basis for public interest standing. In his view, *Chaoulli* did not establish that public interest standing should be granted preferentially for wide and sweeping attacks on legislation.

[17] Le juge Groberman, dissident, a souscrit au raisonnement du juge en cabinet. À son avis, la présente affaire ne soulève aucune contestation qui n'aurait pas pu être engagée par quiconque ayant la qualité pour agir dans l'intérêt privé. Il a accepté la position des intimées selon laquelle il était peu probable qu'une affaire soit engagée dans laquelle il serait possible d'attaquer sous plusieurs aspects la validité de toutes les dispositions contestées. Il n'a cependant pas considéré que l'absence d'une telle possibilité justifie la reconnaissance de la qualité pour agir dans l'intérêt public. Il a estimé qu'une contestation dont la portée est très large, comme celle en l'espèce, exige une preuve considérable sur une multitude d'aspects et il ne lui a pas semblé manifeste que le processus judiciaire traiterait de façon équitable et efficace une telle contestation dans un délai raisonnable. Suivant son interprétation de l'arrêt *Chaoulli*, le juge Groberman a conclu que la Cour n'avait pas élargi le fondement de la qualité pour agir dans l'intérêt public. À son avis, cet arrêt n'a pas établi que la qualité pour agir dans l'intérêt public devait être reconnue de façon préférentielle dans le contexte de contestations de portée vaste et générale visant des dispositions législatives.

IV. Analysis

A. *Public Interest Standing*

(1) The Central Issue

[18] In *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, the majority of the Court summed up the law of standing to seek a declaration that legislation is invalid as follows: if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598). At the root of this appeal is how this approach to standing should be applied.

[19] The chambers judge, supported by quotations from the leading cases, was of the view that the law sets out three requirements — something in the nature of a checklist — which a person seeking discretionary public interest standing must establish in order to succeed. The respondents, on the other hand, contend for a more flexible approach, emphasizing the discretionary nature of the standing decision. The debate focuses on the third factor as it was expressed in *Borowski* — that there is no other reasonable and effective manner in which the issue may be brought to the court — and concerns how strictly this factor should be defined and how it should be applied.

[20] My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a

IV. Analyse

A. *La qualité pour agir dans l'intérêt public*

(1) La principale question en litige

[18] Dans l'arrêt *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575, les juges majoritaires ont résumé comme suit le droit applicable à la qualité pour agir dans une poursuite visant à faire invalider une loi : si une question justiciable sérieuse se pose quant à l'invalidité de la loi, « il suffit qu'une personne démontre qu'elle est directement touchée ou qu'elle a, à titre de citoyen, un intérêt véritable quant à la validité de la loi, et qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour » (p. 598). La manière dont cette conception de la qualité pour agir devrait s'appliquer est à l'origine du présent pourvoi.

[19] S'appuyant sur des citations tirées des arrêts de principe, le juge en cabinet a estimé que le droit établit trois conditions — une méthode rappelant l'utilisation d'une liste de contrôle — auxquelles une personne sollicitant l'exercice du pouvoir discrétionnaire judiciaire pour se voir accorder la qualité pour agir dans l'intérêt public doit satisfaire pour avoir gain de cause. Les intimées plaident cependant pour une approche plus souple, mettant l'accent sur le caractère discrétionnaire des décisions relatives à la qualité pour agir. Le débat porte sur le troisième facteur tel qu'il a été énoncé dans l'arrêt *Borowski* — soit celui qui consiste à se demander s'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour — et consiste à déterminer la rigueur avec laquelle ce facteur devrait être défini et la façon dont il devrait être appliqué.

[20] À mon avis, les trois éléments énoncés dans l'arrêt *Borowski* sont intimement liés et doivent être considérés dans l'exercice du pouvoir discrétionnaire de reconnaître ou non la qualité pour agir. Ces facteurs, et plus particulièrement le troisième, ne devraient pas être considérés comme des exigences inflexibles ou comme des critères autonomes sans aucun lien de dépendance les uns avec les autres. Ils devraient plutôt être appréciés et

flexible and generous manner that best serves those underlying purposes.

[21] I do not propose to lead a forced march through all of the Court's case law on public interest standing. However, I will highlight some key aspects of the Court's standing jurisprudence: its purposive approach, its underlying concern with the principle of legality and its emphasis on the wise application of judicial discretion. I will then explain that, in my view, the proper consideration of these factors supports the Court of Appeal's conclusion that the respondents ought to be granted public interest standing.

(2) The Purposes of Standing Law

[22] The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches*, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav.* 121. The Court has recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

[23] This Court has taken a purposive approach to the development of the law of standing in public

soupesés de façon cumulative — à la lumière des objectifs qui sous-tendent les restrictions à la qualité pour agir — et appliqués d'une manière souple et libérale de façon à favoriser la mise en œuvre de ces objectifs sous-jacents.

[21] Je n'ai pas l'intention d'entreprendre l'examen exhaustif de la jurisprudence de la Cour en matière de qualité pour agir dans l'intérêt public. Je vais cependant en souligner certains aspects clés : l'approche téléologique, la préoccupation sous-jacente envers le principe de la légalité et l'importance de l'exercice judicieux du pouvoir judiciaire discrétionnaire. Ensuite, je vais expliquer que, à mon avis, l'examen qu'il convient d'appliquer à ces facteurs confirme la conclusion de la Cour d'appel selon laquelle il y a lieu de reconnaître aux intimées la qualité pour agir dans l'intérêt public.

(2) Les objectifs des règles de droit relatives à la qualité pour agir

[22] Les tribunaux ont reconnu depuis longtemps la nécessité de restreindre la qualité pour agir. En effet, ce ne sont pas toutes les personnes voulant débattre d'une question, sans tenir compte du fait qu'elles soient touchées par l'issue du débat ou pas, qui devraient être autorisées à le faire : *Conseil canadien des Églises*, p. 252. Cela étant dit, l'augmentation de la réglementation gouvernementale et l'entrée en vigueur de la *Charte* ont incité les tribunaux à s'éloigner d'une conception de leur rôle fondée strictement sur le droit privé, comme en témoigne l'observation d'un certain relâchement des règles traditionnelles de droit privé en ce qui concerne la qualité pour engager une poursuite : *Conseil canadien des Églises*, p. 249, et voir aussi généralement O. M. Fiss, « The Social and Political Foundations of Adjudication » (1982), 6 *Law & Hum. Behav.* 121. La Cour a reconnu que, dans le cadre d'une démocratie constitutionnelle comme celle du Canada qui est doté d'une *Charte des droits et libertés*, il existe des occasions où un litige d'intérêt public constitue la façon appropriée de procéder pour saisir les tribunaux de questions d'intérêt public d'importance.

[23] Dans les affaires de droit public, la Cour a adopté une approche téléologique pour l'élaboration

law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches*, at p. 252.

[24] It will be helpful to trace, briefly, the underlying purposes of standing law which the Court has identified and how they are considered.

[25] The most comprehensive discussion of the reasons underlying limitations on standing may be found in *Finlay*, at pp. 631-34. The following traditional concerns, which are seen as justifying limitations on standing, were identified: properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government. A brief word about each of these traditional concerns is in order.

(a) *Scarce Judicial Resources and "Busybodies"*

[26] The concern about the need to carefully allocate scarce judicial resources is in part based on the well-known "floodgates" argument. Relaxing standing rules may result in many persons having the right to bring similar claims and "grave inconvenience" could be the result: see, e.g., *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331, at p. 337. Cory J. put the point cogently on behalf of the Court in *Canadian Council of Churches*, at

des règles de droit applicables à la question de la qualité pour agir. Lorsqu'il s'agit de décider s'il est justifié de reconnaître cette qualité, les tribunaux doivent exercer leur pouvoir discrétionnaire et mettre en balance, d'une part, le raisonnement qui sous-tend les restrictions à cette reconnaissance et, d'autre part, le rôle important qu'ils jouent lorsqu'ils se prononcent sur la validité des mesures prises par le gouvernement. En somme, les règles de droit relatives à la qualité pour agir tirent leur origine de la nécessité d'établir un équilibre « entre l'accès aux tribunaux et la nécessité d'économiser les ressources judiciaires » : *Conseil canadien des Églises*, p. 252.

[24] Il est utile de rappeler ici succinctement les objectifs sous-jacents que visent les règles de droit relatives à la qualité pour agir formulées par la Cour ainsi que la manière dont ils sont pris en compte.

[25] C'est dans l'arrêt *Finlay*, aux p. 631-634, qu'on trouve l'examen le plus exhaustif du raisonnement qui sous-tend les restrictions à la reconnaissance de la qualité pour agir. En effet, la Cour y a décrit les préoccupations qui, traditionnellement, ont servi à expliquer ces restrictions : l'affectation appropriée des ressources judiciaires limitées et la nécessité d'écarter les trouble-fête; l'assurance que les tribunaux entendront les principaux intéressés faire valoir contradictoirement leurs points de vue; et la sauvegarde du rôle propre aux tribunaux et de leur relation constitutionnelle avec les autres branches du gouvernement. Quelques mots sont de mise concernant chacune de ces préoccupations traditionnelles.

a) *Les ressources judiciaires limitées et les « trouble-fête »*

[26] La préoccupation au regard de l'affectation appropriée des ressources judiciaires limitées est en partie fondée sur l'argument bien connu du « raz de marée ». Le relâchement des règles concernant la qualité pour agir pourrait avoir comme résultat de conférer à plusieurs personnes le droit d'intenter des actions de nature semblable et il pourrait en résulter de [TRADUCTION] « graves inconvénients » : voir, p. ex., *Smith c. Attorney General of Ontario*,

p. 252: "It 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 certain in the knowledge that their cause is all important." This factor is not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole.

[27] The concern about screening out "mere busybodies" relates not only to the issue of a possible multiplicity of actions but, in addition, to the consideration that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other challenges by parties with "specific and factually established complaints": *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 694.

[28] These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court — A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the

[1924] R.C.S. 331, p. 337. Le juge Cory a présenté la chose de façon convaincante au nom de la Cour dans l'arrêt *Conseil canadien des Églises* : « Ce serait désastreux si les tribunaux devenaient complètement submergés en raison d'une prolifération inutile de poursuites insignifiantes ou redondantes intentées par des organismes bien intentionnés dans le cadre de la réalisation de leurs objectifs, convaincus que leur cause est fort importante » (p. 252). Ce facteur ne vise pas les questions de commodités ni celles relatives à la charge de travail des juges, mais bien celle du fonctionnement efficace du système judiciaire dans son ensemble.

[27] La préoccupation alimentée par la volonté d'écarter les trouble-fête découle, pour sa part, non seulement de la question de la multiplicité possible des actions, mais également de la thèse selon laquelle les demandeurs qui ont un intérêt personnel dans l'issue d'une affaire devraient bénéficier d'une affectation prioritaire des ressources judiciaires. Les tribunaux doivent aussi prendre en compte l'effet que peut avoir sur les autres la décision de reconnaître la qualité pour agir dans l'intérêt public. Par exemple, une telle décision pourrait ébranler celle de ne pas intenter de poursuite prise par les personnes ayant un intérêt personnel dans une affaire. En outre, le fait de reconnaître la qualité pour agir dans le cadre d'une contestation qui est ultimement rejetée pourrait faire obstacle à des contestations engagées par des parties qui auraient « des plaintes précises fondées sur des faits » : *Hy and Zel's Inc. c. Ontario (Procureur général)*, [1993] 3 R.C.S. 675, p. 694.

[28] Ces préoccupations concernant la multiplicité des poursuites et des demandes présentées par des « trouble-fête » sont reconnues depuis longtemps. Toutefois, il a également été reconnu qu'elles pourraient avoir été exagérées. Après tout, bien peu de gens saisiront les tribunaux d'une affaire dans laquelle ils n'ont aucun intérêt et qui, en soi, ne laisse entrevoir aucune fin légitime. Selon les mots du professeur K. E. Scott, [TRADUCTION] « [l]e demandeur passif et capricieux, le dilettante qui plaide pour le plaisir est un spectre qui hante la littérature juridique, non les salles d'audience » : « Standing in the Supreme Court — A Functional

most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see, e.g., *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 145.

(b) *Ensuring Contending Points of View*

[29] The second underlying purpose of limiting standing relates to the need for courts to have the benefit of contending points of view of the persons most directly affected by the issue. Courts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skillfully. "[C]oncrete adverseness" sharpens the debate of the issues and the parties' personal stake in the outcome helps ensure that the arguments are presented thoroughly and diligently: see, e.g., *Baker v. Carr*, 369 U.S. 186 (1962), at p. 204.

(c) *The Proper Judicial Role*

[30] The third concern relates to the proper role of the courts and their constitutional relationship to the other branches of government. The premise of our discretionary approach to public interest standing is that the proceedings raise a justiciable question, that is, a question that is appropriate for judicial determination: *Finlay*, at p. 632; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91; see also L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Analysis* » (1973), 86 *Harv. L. Rev.* 645, p. 674. De plus, le déni catégorique de la reconnaissance de la qualité pour agir n'est pas la seule manière, ni nécessairement la plus appropriée, pour se prémunir contre ces périls. Les tribunaux peuvent vérifier le bien-fondé des demandes dès le stade préliminaire des procédures, ils peuvent intervenir afin de prévenir les abus et ils disposent du pouvoir d'adjuger des dépens. Ces avenues peuvent toutes constituer des manières plus appropriées pour remédier aux dangers de la multiplicité des poursuites ou des demandes présentées par de simples trouble-fête : voir, p. ex., *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, p. 145.

b) *L'assurance que les principaux intéressés feront valoir contradictoirement leurs points de vue*

[29] La deuxième raison sous-jacente à la restriction de la reconnaissance de la qualité pour agir a trait à la nécessité pour les tribunaux d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vue. En effet, les tribunaux agissent comme des arbitres impartiaux dans le cadre d'un système accusatoire. Ils dépendent des parties quant à la présentation complète et adroite des éléments de preuve et des arguments. Or, [TRADUCTION] « une opposition réelle » stimule les débats sur les questions en litige et l'intérêt personnel des parties dans l'issue de l'affaire contribue à la formulation exhaustive et diligente des arguments : voir, p. ex., *Baker c. Carr*, 369 U.S. 186 (1962), p. 204.

c) *Le rôle propre aux tribunaux*

[30] La troisième préoccupation a trait au rôle propre aux tribunaux et à la relation constitutionnelle qu'ils doivent entretenir avec les autres branches du gouvernement. Notre approche discrétionnaire de la qualité pour agir dans l'intérêt public est fondée sur la prémisse selon laquelle l'instance soulève une question justiciable, c'est-à-dire une question dont les tribunaux peuvent être saisis : *Finlay*, p. 632; *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49, p. 90-91; voir aussi,

Canada (2nd ed. 2012), at pp. 6-10. This concern engages consideration of the nature of the issue and the institutional capacity of the courts to address it.

(3) The Principle of Legality

[31] The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication" (p. 145 (emphasis added)).

[32] The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).

L. M. Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada* (2e éd. 2012), p. 6-10. Cette préoccupation commande un examen de la nature de la question et de la capacité institutionnelle des tribunaux à considérer la question.

(3) Le principe de la légalité

[31] Le principe de la légalité renvoie à deux concepts : d'abord, le fait que les actes de l'État doivent être conformes à la Constitution et au pouvoir conféré par la loi, et qu'il doit exister des manières pratiques et efficaces de contester la légalité des actions de l'État. Ce principe a été au cœur de l'évolution de la notion de qualité pour agir dans l'intérêt public au Canada. Par exemple, dans l'arrêt de principe *Thorson*, le juge Laskin a écrit que « le droit des citoyens au respect de la Constitution par le Parlement » (p. 163) milite pour la reconnaissance de la qualité pour agir et qu'une question de constitutionnalité ne devrait pas être « mise à l'abri d'un examen judiciaire en niant qualité pour agir à quiconque tente d'attaquer la loi contestée » (p. 145). Il a conclu qu'« il serait étrange et même alarmant qu'il n'y ait aucun moyen par lequel une question d'abus de pouvoir législatif, matière traditionnellement de la compétence des cours de justice, puisse être soumise à une décision de justice » (p. 145 (je souligne)).

[32] Le principe de la légalité a été analysé plus en profondeur dans l'arrêt *Finlay*. La Cour y a souligné l'« insistance répétée dans l'arrêt *Thorson* sur l'importance dans un État fédéral de pouvoir s'adresser aux tribunaux pour contester la constitutionnalité d'une loi » (p. 627). Selon le juge Le Dain, cet énoncé constituait « la considération dominante du principe dans l'arrêt *Thorson* » (*Finlay*, p. 627). Au terme d'un examen de la jurisprudence relative à la qualité pour agir dans l'intérêt public, la Cour a étendu, dans l'arrêt *Finlay*, la portée du pouvoir discrétionnaire de reconnaître la qualité pour agir dans l'intérêt public aux contestations visant des pouvoirs administratifs conférés par une loi. Cette étape a été franchie en partie parce que les contestations de cette nature étaient motivées par le souci d'assurer le respect des « limites [du] pouvoir légal » (p. 631).

[33] The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the *Charter* and the courts' new concomitant constitutional role called for a "generous and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

[33] L'importance du principe de la légalité a été renforcée dans l'arrêt *Conseil canadien des Églises* où la Cour en a reconnu les deux volets : soit, qu'aucune loi ne doit être à l'abri d'une contestation, et que les dispositions législatives inconstitutionnelles doivent être invalidées. Selon le juge Cory, la *Loi constitutionnelle de 1982* « constitutionnalise le droit fondamental du public d'être gouverné conformément aux règles de droit » (p. 250). Ainsi, il est nécessaire que les tribunaux exercent leur pouvoir discrétionnaire de reconnaître la qualité pour agir « dans les cas où ils doivent [en décider ainsi] pour s'assurer que la loi en question est compatible avec la Constitution et la *Charte* » (p. 251). Le juge Cory a souligné que l'entrée en vigueur de la *Charte* et le nouveau rôle constitutionnel qui en a découlé pour les tribunaux commandaient l'adoption d'une interprétation « souple et libérale » de la question de la qualité pour agir (p. 250). Il a en outre souligné que la décision ne devrait pas découler d'une « application mécaniste d'une exigence technique. On doit plutôt se rappeler que l'objet fondamental de la reconnaissance de la qualité pour agir dans l'intérêt public est de garantir qu'une loi n'est pas à l'abri de la contestation » (p. 256).

[34] In *Hy and Zel's*, Major J. commented on the underlying rationale for restricting standing and the balance that needs to be struck between limiting standing and giving due effect to the principle of legality:

> If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations. [p. 692]

[34] Dans l'arrêt *Hy and Zel's*, le juge Major a expliqué plus en détail le raisonnement sous-jacent justifiant les restrictions à la qualité pour agir et l'équilibre qu'il faut établir entre l'application de ces restrictions et la nécessité de donner plein effet au principe de la légalité :

> S'il existe d'autres manières de soumettre la question aux tribunaux, les ressources judiciaires limitées peuvent être mieux utilisées. Ce même critère empêche toutefois les lois d'échapper au contrôle judiciaire, comme cela se serait produit dans les circonstances des affaires *Thorson* et *Borowski*. [p. 692]

(4) Discretion

[35] From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147

(4) Le pouvoir discrétionnaire

[35] Depuis les premières décisions modernes concernant la qualité pour agir dans l'intérêt public, la question de la qualité pour agir a été considérée comme une question dont la solution est tributaire de l'exercice avisé du pouvoir discrétionnaire judiciaire. Comme l'a affirmé le juge Laskin dans *Thorson*, la qualité pour agir dans l'intérêt public « est une matière qui relève particulièrement

and 163; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

[36] It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

(5) A Purposive and Flexible Approach to Applying the Three Factors

[37] In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

de l'exercice du pouvoir discrétionnaire des cours de justice, puisqu'elle se rapporte à l'efficacité du recours » (p. 161); voir aussi p. 147 et 163; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265, p. 269 et 271; *Borowski*, p. 593; *Finlay*, p. 631-632 et 635. La décision de reconnaître ou non la qualité pour agir nécessite l'exercice minutieux du pouvoir discrétionnaire judiciaire par la mise en balance des trois facteurs (une question justiciable sérieuse, la nature de l'intérêt du demandeur et les autres manières raisonnables et efficaces). Le juge Cory a insisté sur ce point dans *Conseil canadien des Églises* où il a souligné que les facteurs à prendre en compte dans l'exercice de ce pouvoir discrétionnaire ne devaient pas être considérés comme des exigences techniques et que les principes qui s'y appliquent devraient être interprétés d'une façon libérale et souple (p. 256 et 253).

[36] En conséquence, les trois facteurs ne doivent pas être perçus comme des points figurant sur une liste de contrôle ou comme des exigences techniques. Ils doivent plutôt être vus comme des considérations connexes devant être appréciées ensemble, plutôt que séparément, et de manière téléologique.

(5) L'application des trois facteurs par une approche téléologique et souple

[37] Lorsqu'ils exercent le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir dans l'intérêt public, les tribunaux doivent prendre en compte trois facteurs : (1) une question justiciable sérieuse est-elle soulevée? (2) le demandeur a-t-il un intérêt réel ou véritable dans l'issue de cette question? et (3) compte tenu de toutes les circonstances, la poursuite proposée constitue-t-elle une manière raisonnable et efficace de soumettre la question aux tribunaux? : *Borowski*, p. 598; *Finlay*, p. 626; *Conseil canadien des Églises*, p. 253; *Hy and Zel's*, p. 690; *Chaoulli*, par. 35 et 188. Le demandeur qui souhaite se voir reconnaître la qualité pour agir doit convaincre la cour que ces facteurs, appliqués d'une manière souple et téléologique, militent en faveur de la reconnaissance de cette qualité. Toutes les autres considérations étant égales par ailleurs, un demandeur qui possède de plein droit la qualité pour agir sera généralement préféré.

[38] The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) *Serious Justiciable Issue*

[39] This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

[40] By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 *U.B.C. L. Rev.* 727, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.

[41] This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody:

[38] La principale question qui oppose les parties en l'espèce a trait à la formulation et à l'application du troisième de ces facteurs. Cependant, comme ils sont tous les trois intimement liés et qu'il existe un différend entre les parties en ce qui concerne au moins un d'entre eux, je vais exposer brièvement certaines des considérations pertinentes quant à chacun de ces facteurs et j'analyserai, par la suite, le rôle qu'ils jouent en l'espèce.

a) *Question justiciable sérieuse*

[39] Ce facteur concerne deux des préoccupations qui sous-tendent les restrictions traditionnelles imposées à la qualité pour agir. Dans *Finlay*, le juge Le Dain a lié la justiciabilité d'une question à la « préoccupation relative au rôle propre des tribunaux et à leur relation constitutionnelle avec les autres branches du gouvernement » et son caractère sérieux à la préoccupation relative à l'utilisation des ressources judiciaires limitées (p. 631); voir aussi, la juge L'Heureux-Dubé, dissidente, dans *Hy and Zel's*, p. 702-703.

[40] En insistant sur l'existence d'une question justiciable, les tribunaux s'assurent d'exercer leur pouvoir discrétionnaire de reconnaître la qualité pour agir d'une façon qui est cohérente avec l'objectif de demeurer dans les limites du rôle constitutionnel qui leur est propre (*Finlay*, p. 632). Dans *Finlay*, le juge Le Dain a cité l'arrêt *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, et a écrit que « lorsqu'est en cause un litige que les tribunaux peuvent trancher, ceux-ci ne devraient pas refuser de statuer au motif qu'à cause de ses incidences ou de son contexte politiques, il vaudrait mieux en laisser l'examen et le règlement au législatif ou à l'exécutif » : p. 632-633; voir aussi L. Sossin, « The Justice of Access : Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid? » (2007), 40 *U.B.C. L. Rev.* 727, p. 733-734; Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada*, p. 27.

[41] Ce facteur traduit aussi la préoccupation quant au risque que les tribunaux soient submergés en raison d'une « prolifération inutile de poursuites insignifiantes ou redondantes » et la nécessité

Canadian Council of Churches, at p. 252; *Finlay*, at pp. 631-33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

[42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) *The Nature of the Plaintiff's Interest*

[43] In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned

d'écarter les simples trouble-fête : *Conseil canadien des Églises*, p. 252; *Finlay*, p. 631-633. Comme je l'ai exposé précédemment, ces préoccupations peuvent être exagérées et doivent être appréciées en pratique en fonction des circonstances de chaque affaire plutôt que dans l'abstrait ou de façon hypothétique. Il conviendrait aussi d'examiner d'autres façons possibles de se prémunir contre ces dangers.

[42] Pour être considérée comme une « question sérieuse », la question soulevée doit constituer un « point constitutionnel important » (*McNeil*, p. 268) ou constituer une « question [. . .] importante » (*Borowski*, p. 589). L'action doit être « loin d'être futil[e] » (*Finlay*, p. 633), bien que les tribunaux ne doivent pas examiner le bien-fondé d'une affaire autrement que de façon préliminaire. Par exemple, dans l'arrêt *Hy and Zel's*, le juge Major s'est appuyé sur la norme applicable aux cas où il est tellement peu probable que l'action soit accueillie qu'on pourrait considérer son issue comme une conclusion qui « soit [. . .] assurée » (p. 690). Il a adopté cette position en dépit du fait que la Cour avait déclaré sept ans auparavant que la même Loi était constitutionnelle : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713. Le juge Major a statué qu'il était « prêt à tenir pour acquis que les nombreuses modifications apportées au cours des sept années qui ont suivi l'arrêt *Edwards Books* ont suffisamment changé la Loi pour que sa validité ne soit plus assurée » (*Hy and Zel's*, p. 690). Dans *Conseil canadien des Églises*, la Cour avait de nombreuses réserves quant à la nature de l'action envisagée, mais elle a ultimement accepté que « certains aspects de la déclaration soulev[aient] une question sérieuse quant à la validité de la loi » (p. 254). En outre, dès qu'il devient évident qu'une déclaration fait état d'au moins une question sérieuse, il ne sera généralement pas nécessaire d'examiner minutieusement chacun des arguments plaidés pour trancher la question de la qualité pour agir.

b) *La nature de l'intérêt du demandeur*

[43] Dans l'arrêt *Finlay*, la Cour a écrit que ce facteur traduisait la préoccupation de conserver les ressources judiciaires limitées et la nécessité d'écarter les simples trouble-fête (p. 633). À mon

with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. Roach, *Constitutional Remedies in Canada* (looseleaf), at ¶5.120).

avis, ce facteur concerne la question de savoir si le demandeur a un intérêt réel dans les procédures ou est engagé quant aux questions qu'elles soulèvent. Ce point est illustré dans la jurisprudence de la Cour. Dans *Finlay*, par exemple, même si, selon la Cour, le demandeur n'avait pas la qualité pour agir de plein droit, il avait néanmoins un intérêt direct et personnel quant aux questions qu'il souhaitait soulever. Dans *Borowski*, la Cour a conclu que le demandeur avait un intérêt véritable dans la contestation des dispositions disculpatoires concernant l'avortement. Il était un citoyen inquiet et un contribuable, et il avait tenté sans succès d'obtenir une décision sur la question par d'autres moyens (p. 597). La Cour a donc évalué l'engagement de M. Borowski relativement à l'objet du litige en examinant s'il avait un intérêt véritable quant à la question qu'il désirait soulever. En outre, dans l'arrêt *Conseil canadien des Églises*, il était évident pour la Cour que le demandeur avait un « intérêt véritable », vu qu'il jouissait « de la meilleure réputation possible et [qu']il a[vait] démontré un intérêt réel et constant dans les problèmes des réfugiés et des immigrants » (p. 254). En examinant la réputation du demandeur, son intérêt continu et son lien avec l'action, la Cour a ainsi évalué son « engagement », de façon à assurer une utilisation efficiente des ressources judiciaires limitées (voir K. Roach, *Constitutional Remedies in Canada* (feuilles mobiles), ¶5.120).

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

[44] This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show . . . that there is no other reasonable and effective manner in which the issue may be brought before the Court": p. 598 (emphasis added); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring

c) *Manières raisonnables et efficaces de soumettre la question à la Cour*

[44] Ce facteur a longtemps été qualifié d'exigence stricte. Par exemple, dans *Borowski*, les juges majoritaires de la Cour ont déclaré que la personne demandant l'exercice du pouvoir discrétionnaire pour se voir reconnaître la qualité pour agir doit « démontre[r] qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour » : p. 598 (je souligne); voir aussi *Finlay*, p. 626; *Hy and Zel's*, p. 690. Ce facteur n'a cependant pas toujours été exprimé de façon aussi restrictive et a rarement été appliqué de la sorte. J'estime que nous devrions maintenant indiquer clairement qu'il s'agit d'un des trois facteurs qui doivent être analysés et soupesés par les tribunaux lors de l'exercice

consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

de leur pouvoir discrétionnaire. À mon humble avis, il serait préférable de formuler ce troisième facteur comme étant celui exigeant l'examen de la question de savoir si la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations dont je vais traiter sous peu, constitue une manière raisonnable et efficace de soumettre la question à la cour. Cette approche quant au troisième facteur correspond davantage à l'interprétation souple, discrétionnaire et téléologique de la qualité pour agir dans l'intérêt public qui sous-tend toutes les décisions prononcées par la Cour dans ce domaine.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

[45] A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

[46] The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: see *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] another reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

[47] A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of

(i) La Cour n'a pas toujours exprimé ce facteur de façon rigide et l'a rarement appliqué de la sorte

[45] À mon avis, une lecture attentive des décisions rendues par la Cour permet de déceler que même si ce facteur a souvent été qualifié d'exigence stricte, la Cour ne l'a pas appliqué avec rigidité de façon constante et, en fait, n'a pas non plus examiné son application de cette manière.

[46] La formulation rigide du troisième facteur telle qu'elle a été énoncée dans l'arrêt *Borowski* n'a pas été retenue dans les deux principales affaires concernant la qualité pour agir dans l'intérêt public : voir *Thorson*, p. 161, et *McNeil*, p. 271. En outre, dans l'arrêt *Conseil canadien des Églises*, le troisième facteur a été formulé comme étant la question de savoir s'« il [y avait] une autre manière raisonnable et efficace de soumettre la question à la cour » (p. 253 (je souligne)).

[47] En outre, un grand nombre de décisions illustre que ce troisième facteur n'a pas été appliqué de façon rigide, quelle qu'ait été sa formulation. Par exemple, dans l'arrêt *McNeil*, la question en litige concernait la constitutionnalité de dispositions législatives conférant à une commission provinciale le pouvoir d'autoriser ou d'interdire la projection de films pour le public. Il était évident qu'il y avait des personnes touchées plus directement par ce régime réglementaire que ne l'était le demandeur, notamment les propriétaires de cinémas et d'autres personnes visées par ces dispositions législatives. La

the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff (pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

[48] Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) This Factor Must Be Applied Purposively

[49] This third factor should be applied in light of the need to ensure full and complete adversarial

Cour, au terme de l'exercice de son pouvoir discrétionnaire, a tout de même confirmé la reconnaissance de la qualité pour agir dans l'intérêt public aux motifs que le demandeur, en tant que membre du public, avait un intérêt différent de celui des propriétaires de cinémas et qu'il n'y avait « pratiquement » aucune autre manière de saisir la cour d'une contestation de cette nature (p. 270-271). De même, dans l'arrêt *Borowski*, bien que plusieurs personnes fussent davantage touchées par la loi en cause, il était peu probable en pratique que ces gens puissent soumettre au tribunal une contestation de la nature de celle engagée par le demandeur (p. 597-598). Dans les deux cas, la question de savoir s'il n'y avait pas d'autres manières raisonnables et efficaces de soumettre la question à la cour a été traitée d'un point de vue pratique et pragmatique, et en fonction de la nature précise de la contestation que le demandeur avait l'intention d'engager.

[48] Même dans les cas où la qualité pour agir n'a pas été reconnue par suite de l'application de ce facteur, la Cour a insisté sur la nécessité d'exercer le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir plutôt qu'en appliquant les facteurs de façon mécanique. Le meilleur exemple de cette approche se trouve dans l'arrêt *Conseil canadien des Églises*. La Cour a déclaré d'une part que l'exercice par le tribunal de son pouvoir discrétionnaire pour reconnaître la qualité pour agir dans l'intérêt public « n'est pas nécessaire [. . .] lorsque, selon une prépondérance des probabilités, on peut établir qu'un particulier contestera la mesure » (p. 252). Toutefois, la Cour a souligné d'autre part que la décision de reconnaître ou non la qualité pour agir dans l'intérêt public relève d'un pouvoir discrétionnaire, que les principes applicables devraient être interprétés « d'une façon libérale et souple » et que le facteur relatif aux autres manières raisonnables et efficaces ne doit pas être interprété comme le résultat d'une application mécaniste d'une « exigence technique » (p. 253 et 256).

(ii) Ce facteur doit être appliqué de manière téléologique

[49] Ce troisième facteur doit être appliqué au regard de la nécessité d'assurer un exposé complet

presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at ¶5.120. In *Hy and Zel's*, Major J. linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

[50] The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, 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. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

des positions contradictoires des parties et de ménager les ressources judiciaires. Dans l'arrêt *Finlay*, la Cour a associé ce facteur à la préoccupation du « tribunal [. . .] d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vue » (p. 633); voir aussi Roach, ¶5.120. Dans l'arrêt *Hy and Zel's*, le juge Major a lié ce facteur à la préoccupation de ne pas surcharger inutilement les tribunaux, soulignant que « [s]'il existe d'autres manières de soumettre la question aux tribunaux, les ressources judiciaires limitées peuvent être mieux utilisées » (p. 692). Ce facteur est aussi étroitement lié au principe de la légalité, puisque les tribunaux doivent déterminer s'il est souhaitable de reconnaître la qualité pour agir en fonction de la nécessité d'assurer la légalité des mesures prises par les acteurs gouvernementaux. Pour appliquer ce facteur de manière téléologique, il est donc nécessaire que le tribunal prenne en compte ces préoccupations sous-jacentes.

(iii) Il est nécessaire d'adopter une approche souple pour évaluer le facteur relatif aux manières « raisonnables et efficaces »

[50] La jurisprudence de la Cour n'est pas très riche en enseignement sur la façon de juger du caractère « raisonnable et efficace » ou non d'une manière donnée de soumettre une question à la cour. Toutefois, en abordant la question sous l'angle téléologique, les tribunaux doivent se demander si l'action envisagée constitue une utilisation efficiente des ressources judiciaires, si les questions sont justiciables dans un contexte accusatoire, et si le fait d'autoriser la poursuite de l'action envisagée favorise le respect du principe de la légalité. Une approche souple et discrétionnaire est de mise pour juger de l'effet de ces considérations sur la décision ultime de reconnaître ou non la qualité pour agir. Par ailleurs, une analyse dichotomique répondant par un oui ou par un non à la question à l'étude n'est pas envisageable : les questions visant à déterminer si une façon de procéder est raisonnable, si elle est efficace et si elle favorise le renforcement du principe de la légalité sont des questions de degré et elles doivent être analysées en fonction de solutions de rechange pratiques, compte tenu de toutes les circonstances.

[51] It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it 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.

- The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

- The court should turn its mind to 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. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained

[51] Il pourrait être utile de donner des exemples de certaines questions interdépendantes que les tribunaux pourraient trouver utile de prendre en compte au moment de se pencher sur le troisième facteur discrétionnaire. La liste qui suit n'est naturellement pas exhaustive et ne comprend que quelques exemples.

- Le tribunal devrait tenir compte de la capacité du demandeur d'engager une poursuite. Ce faisant, il devrait examiner notamment ses ressources et son expertise ainsi que la question de savoir si l'objet du litige sera présenté dans un contexte factuel suffisamment concret et élaboré.

- Le tribunal devrait déterminer si la cause est d'intérêt public en ce sens qu'elle transcende les intérêts des parties qui sont le plus directement touchées par les dispositions législatives ou par les mesures contestées. Les tribunaux devraient tenir compte du fait qu'une des idées associées aux poursuites d'intérêt public est que ces poursuites peuvent assurer un accès à la justice aux personnes défavorisées de la société dont les droits reconnus par la loi sont touchés. Ceci ne devrait naturellement pas être assimilé à une permission de reconnaître la qualité pour agir à quiconque décide de s'afficher comme le représentant des personnes pauvres et marginalisées.

- Le tribunal devrait se pencher sur la question de savoir s'il y a d'autres manières réalistes de trancher la question qui favoriseraient une utilisation plus efficace et efficiente des ressources judiciaires et qui offriraient un contexte plus favorable à ce qu'une décision soit rendue dans le cadre du système contradictoire. Les tribunaux devraient adopter une approche pratique et pragmatique. L'existence d'autres demandeurs potentiels, notamment ceux qui possèdent de plein droit la qualité pour agir, est pertinente, mais les chances en pratique qu'ils soumettent la question aux tribunaux ou que des manières aussi ou plus raisonnables et efficaces soient utilisées pour le faire devraient être prises en compte en fonction des réalités pratiques et non des possibilités théoriques. Lorsqu'il y a

by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

- The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

[52] I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of

d'autres demandeurs, en ce sens que d'autres actions ont été engagées relativement à la question, le tribunal devrait évaluer d'un point de vue pratique les avantages, le cas échéant, d'avoir des recours parallèles et se demander si ces autres actions vont résoudre les questions de manière aussi ou plus raisonnable et efficace. En procédant ainsi, le tribunal ne devrait pas uniquement prendre en compte les questions juridiques précises ou les points soulevés, mais plutôt chercher à savoir si le demandeur apporte une perspective particulièrement utile ou distincte en vue de régler ces points. À la lecture de l'arrêt *McNeil* par exemple, on voit que même lorsque des personnes peuvent avoir un intérêt plus direct dans la question, le demandeur peut avoir un intérêt distinct et important qui diffère de celui des autres, ce qui peut justifier que le tribunal exerce son pouvoir discrétionnaire pour lui reconnaître la qualité pour agir.

- L'incidence éventuelle des procédures sur les droits d'autres personnes dont les intérêts sont aussi, sinon plus touchés devrait être prise en compte. En effet, les tribunaux devraient porter une attention particulière aux situations où les intérêts privés et publics seraient susceptibles d'entrer en conflit. Comme il est indiqué dans l'arrêt *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, p. 1093, le tribunal devrait se demander, par exemple, si « l'échec d'une contestation trop diffuse pourrait faire obstacle à des contestations ultérieures des règles en question, par certaines parties qui auraient des plaintes précises fondées sur des faits ». L'inverse est également vrai. Ainsi, que les personnes ayant des intérêts plus directs et personnels dans la cause se soient abstenues volontairement d'engager une poursuite pourrait militer pour le refus par la cour d'exercer son pouvoir discrétionnaire de reconnaître la qualité pour agir.

(iv) Conclusion

[52] Je conclus que le troisième facteur de l'analyse de la qualité pour agir dans l'intérêt public devrait être formulé comme ceci : la poursuite proposée constitue-t-elle, compte tenu de toutes les

bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.

(6) Weighing the Three Factors

[53] I return to the circumstances of this case in light of the three factors which must be considered: whether the case raises a serious justiciable issue, whether the respondents have a real stake or a genuine interest in the issue(s) and the suit is a reasonable and effective means of bringing the issues before the courts in all of the circumstances. Although there is little dispute that the first two factors favour granting standing, I will review all three as in my view they must be weighed cumulatively rather than individually. I conclude that when all three factors are considered in a purposive, flexible and generous manner, the Court of Appeal was right to grant public interest standing to the Society and Ms. Kiselbach.

(a) *Serious Justiciable Issue*

[54] As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. The constitutionality of the prostitution laws certainly constitutes a "substantial constitutional issue" and an "important one" that is "far from frivolous": see *McNeil*, at p. 268; *Borowski*, at p. 589; *Finlay*, at p. 633. Indeed, the respondents argue that the impugned *Criminal Code* provisions, by criminalizing many of the activities surrounding prostitution, adversely affect a great number of women. These issues are also clearly justiciable ones, as they concern the constitutionality of the challenged provisions. Consideration of this factor unequivocally supports exercising discretion in favour of standing.

[55] The appellant submits, however, that the respondents' action does not disclose a serious

circonstances, une manière raisonnable et efficace de soumettre la question à la cour. Ce facteur, comme les deux autres, doit être apprécié d'une manière souple et téléologique en plus d'être soupesé à la lumière des autres facteurs.

(6) Appréciation des trois facteurs

[53] Je reviens aux circonstances de l'espèce pour y appliquer les trois facteurs qui doivent être pris en compte : l'affaire soulève-t-elle une question justiciable sérieuse? Les intimées ont-elles un intérêt réel ou véritable dans la question ou les questions? La poursuite constitue-t-elle, compte tenu de toutes les circonstances, une manière raisonnable et efficace de soumettre les questions à la cour? Bien qu'il n'y ait guère de désaccord quant au fait que les deux premiers facteurs favorisent la reconnaissance de la qualité pour agir, je vais les examiner tous les trois, car, à mon avis, ils doivent être appréciés cumulativement plutôt qu'individuellement. Après avoir examiné les trois facteurs suivant une approche téléologique, souple et libérale, je conclus que la Cour d'appel était justifiée de reconnaître la qualité pour agir dans l'intérêt public à la Société et à M^me^ Kiselbach.

a) *Une question justiciable sérieuse*

[54] Comme je l'ai déjà indiqué, à une exception près, nul ne conteste que l'action des intimées soulève des questions sérieuses et justiciables. La constitutionnalité des lois relatives à la prostitution constitue certainement un « point constitutionnel important » (*McNeil*, p. 268) et une « question [. . .] importante » (*Borowski*, p. 589) qui est « loin d'être futil[e] » (*Finlay*, p. 633). De fait, les intimées soutiennent que les dispositions contestées du *Code criminel* en criminalisant plusieurs des activités entourant la prostitution, nuisent à un grand nombre de femmes. Ces questions sont aussi clairement justiciables, en ce qu'elles concernent la constitutionnalité des dispositions contestées. L'examen de ce facteur appuie sans équivoque l'exercice du pouvoir discrétionnaire dont jouissent les tribunaux afin de reconnaître la qualité pour agir.

[55] L'appelant fait cependant valoir que l'action des intimées ne soulève pas de question

issue with respect to the constitutionality of s. 213(1)(*c*) (formerly s. 195.1(1)(*c*)) because this Court has upheld that provision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *R. v. Skinner*, [1990] 1 S.C.R. 1235.

[56] On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects of the statement of claim raise serious issues as to the invalidity of the legislation. 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. They can be assessed using other appropriate procedural vehicles.

(b) *The Proposed Plaintiff's Interest*

[57] Applying the purposive approach outlined earlier, there is no doubt, as the appellant accepts that this factor favours granting public interest standing. The Society has a genuine interest in the current claim. It is fully engaged with the issues it seeks to raise.

[58] As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run "by and for" current and former sex

sérieuse au regard de la constitutionnalité de l'al. 213(1)*c*) (anciennement l'al. 195.1(1)*c*)) parce que la Cour a confirmé la validité de cette disposition dans le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, et dans *R. c. Skinner*, [1990] 1 R.C.S. 1235.

[56] Sur ce point, je suis tout à fait d'accord avec le juge en cabinet. Il a conclu que, dans les circonstances de la présente contestation vaste et à multiples facettes, il n'était pas nécessaire, aux fins de disposer de la question de la qualité pour agir, de déterminer si le principe du *stare decisis* permet aux intimées de soulever cet aspect particulier de leur action qui est par ailleurs beaucoup plus vaste. On peut dire de façon plus pragmatique, comme l'ont fait le juge Cory dans l'arrêt *Conseil canadien des Églises* et le juge siégeant en cabinet en l'espèce, que certains éléments de la déclaration soulèvent des questions sérieuses au regard de l'invalidité des dispositions législatives. Lorsqu'il est évident que certains aspects de l'action soulèvent des questions justiciables sérieuses, il est préférable dans le cadre de l'analyse de la question de la qualité pour agir de ne pas se livrer à un examen en profondeur du bien-fondé des aspects distincts et particuliers de l'action. Ces derniers peuvent être examinés au moyen d'autres véhicules procéduraux appropriés.

b) *L'intérêt que devrait avoir le demandeur*

[57] En appliquant l'approche téléologique déjà exposée, il ne subsiste aucun doute, d'ailleurs l'appelant en convient lui-même, que ce facteur joue en faveur de la reconnaissance de la qualité pour agir dans l'intérêt public. La Société a un intérêt véritable dans la présente demande. Elle est totalement engagée au regard des questions qu'elle souhaite soulever.

[58] Comme le soulignent les intimées, la Société n'agit pas en trouble-fête et a démontré un solide engagement à l'égard de l'enjeu en cause. Elle a une expérience considérable relativement aux travailleurs de l'industrie du sexe du quartier Downtown Eastside de Vancouver et elle connaît bien leurs intérêts. Il s'agit d'un organisme sans but

workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the needs of street-based sex workers and its objects include working toward better health and safety for sex workers, working against all forms of violence against sex workers and lobbying for policy and legal changes that will improve the lives and working conditions of the sex workers (R.F., at para. 8).

[59] From Sheryl Kiselbach's affidavit, it is clear that she is deeply engaged with the issues raised. Not only does she claim that the prostitution laws have directly and significantly affected her for 30 years (A.R., vol. IV, at pp. 15-17), but also she notes that she is now employed as a violence prevention coordinator.

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

[60] Understandably, the chambers judge treated the traditional formulation of this factor as a requirement of a strict test. He rejected the respondents' submission that they ought to have standing because their action was "[t]he most reasonable and effective way" to bring this challenge to court. The judge noted that this submission misstated the test set down by this Court and that he was "bound to apply" the test requiring the respondents to show that "there is no other reasonable and effective way to bring the issue before the court" (paras. 84-85). However, for the reasons I set out earlier, approaching the third factor in this way should be considered an error in principle. We must therefore reassess the weight to be given to this consideration when it is applied in a purposive and flexible manner.

[61] The learned chambers judge had three related concerns which he thought militated strongly

lucratif enregistré qui est administré « par et pour » des travailleurs qui exercent un métier dans l'industrie du sexe, ou qui en ont déjà exercé un, et qui habitent ou travaillent dans ce quartier de Vancouver. L'objet de cet organisme est fondé sur la vision et les besoins des travailleurs de la rue de l'industrie du sexe et ses objets visent notamment à améliorer leur santé et leur sécurité, à s'opposer à toutes les formes de violence à leur égard et à exercer des pressions pour obtenir des modifications aux politiques et aux lois afin d'améliorer les conditions de vie et de travail des travailleurs du sexe (m.i., par. 8).

[59] D'après l'affidavit de Sheryl Kiselbach, il est évident qu'elle est fortement engagée dans les questions soulevées. Non seulement soutient-elle que les lois relatives à la prostitution l'ont directement et considérablement affectée durant 30 ans (d.a., vol. IV, p. 15-17), mais elle souligne également qu'elle est maintenant employée comme coordonnatrice de la prévention de la violence.

c) *Les manières raisonnables et efficaces de soumettre la question à la cour*

[60] Pour des raisons faciles à comprendre, le juge en cabinet a considéré la formulation traditionnelle de ce facteur comme une exigence d'un test d'application stricte. Il a rejeté l'argument des intimées selon lequel la qualité pour agir aurait dû leur être reconnue parce que leur action était [TRADUCTION] « [l]a manière la plus raisonnable et efficace » de soumettre la présente contestation à la cour. Le juge a souligné que cet argument dénaturait le critère formulé par la Cour et qu'il était « tenu d'appliquer » le critère exigeant que les intimées démontrent qu'« il n'y a pas d'autres manières raisonnables et efficaces de soumettre la question à la cour » (par. 84-85). Toutefois, pour les motifs que j'ai déjà formulés, un tel examen du troisième facteur devrait être considéré comme une erreur de principe. Nous devons donc réévaluer le poids qu'il convient de donner à ce facteur lorsqu'il est pris en compte de manière téléologique et souple.

[61] Le juge en cabinet était préoccupé par trois questions connexes qui, selon lui, militaient

against granting public interest standing. First, he thought that the existence of the *Bedford* litigation in Ontario showed that there could be other potential plaintiffs to raise many of the same issues. Second, he noted that there were many criminal prosecutions under the challenged provisions and that the accused in each one of them could raise constitutional issues as of right. Finally, he was not persuaded that individual sex workers could not bring the challenge forward as private litigants. I will discuss each of these concerns in turn.

[62] The judge was first concerned by the related *Bedford* litigation underway in Ontario. The judge noted that the fact that there is another civil case in another province which raises many of the same issues "would not necessarily be sufficient reason for concluding that the present case . . . should not proceed", it nonetheless "illustrates that if public interest standing is not granted . . . there may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75).

[63] The existence of parallel litigation is certainly a highly relevant consideration that will often support denying standing. However, I agree with the chambers judge that the existence of a civil case in another province — even one that raises many of the same issues — is not necessarily a sufficient basis for denying standing. There are several reasons for this.

[64] One is that, given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. What is needed is a

fortement contre la reconnaissance de la qualité pour agir dans l'intérêt public. Premièrement, il croyait que l'existence de l'affaire *Bedford* en Ontario démontrait qu'il pourrait y avoir de nombreux autres demandeurs susceptibles de soulever en grand nombre les mêmes points. Deuxièmement, il a remarqué que de nombreuses poursuites criminelles avaient été engagées en application des dispositions contestées et que l'accusé dans chacune de ces poursuites pouvait de plein droit soulever des questions constitutionnelles. Enfin, il n'était pas convaincu que des travailleurs du sexe ne pouvaient pas, de leur propre chef, faire valoir la contestation en tant que parties privées. Je vais examiner chacune de ces préoccupations successivement.

[62] Le juge était d'abord préoccupé par le litige connexe en cours en Ontario, soit l'affaire *Bedford*. Il a souligné que le fait qu'il y ait une autre affaire en matière civile dans une autre province et dans laquelle plusieurs des mêmes questions sont soulevées [TRADUCTION] « ne constituerait pas nécessairement un motif suffisant pour conclure que la présente instance [. . .] ne devrait pas procéder », mais cela « illustre que si la qualité pour agir n'est pas accordée [. . .], il pourrait tout de même y avoir des demandeurs ayant la qualité pour agir qui pourraient, s'ils décidaient de le faire, soumettre à la cour l'ensemble de ces questions » (par. 75).

[63] L'existence d'une instance parallèle constitue certainement un facteur hautement pertinent qui milite souvent contre la reconnaissance de la qualité pour agir. Je conviens cependant avec le juge en cabinet que l'existence d'une affaire civile dans une autre province — même si elle soulève beaucoup de questions identiques — n'est pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir. Cela s'explique de plusieurs façons.

[64] Premièrement, compte tenu de l'organisation provinciale de nos cours supérieures, les décisions rendues par celles d'une province ne lient pas les cours des autres provinces. Ainsi, une instance dans une province n'apporte pas nécessairement une réponse complète au demandeur qui désire

practical and pragmatic assessment of whether having parallel proceedings in different provinces is a reasonable and effective approach in the particular circumstances of the case. Another point is that the issues raised in the *Bedford* case are not identical to those raised in this one. Unlike in the present case, the *Bedford* litigation does not challenge ss. 211, 212(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*h*) or (3) of the *Code* and does not challenge any provisions on the basis of ss. 2(*d*) or 15 of the *Charter.* A further point is that, as discussed earlier, the court must examine not only the precise legal issue, but the perspective from which it is raised. The perspectives from which the challenges in *Bedford* and in this case come are very different. The claimants in *Bedford* were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. As the claim of unconstitutionality of the prostitution laws revolves mainly around the effects it has on street-level sex workers, the respondents in this action ground their challenges in a distinctive context. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. We were told, for example, that the respondents proposed that their appeal to this Court should be stayed awaiting the results of the *Bedford* litigation. A stay of proceedings pending resolution of other litigation is one possibility that should be taken into account in exercising the discretion as to standing.

[65] Taking these points into account, the existence of the *Bedford* litigation in Ontario, in the circumstances of this case, does not seem to me to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward. The *Bedford* litigation, in my view, has not

intenter une poursuite sur des questions semblables dans une autre province. Il faut donc évaluer de façon pratique et pragmatique si le fait d'avoir des instances parallèles dans des provinces différentes constitue une approche raisonnable et efficace dans les circonstances particulières de l'espèce. Deuxièmement, les questions soulevées dans l'affaire *Bedford* ne sont pas identiques à celles soulevées en l'espèce. En effet, contrairement à la présente affaire, l'affaire *Bedford* ne vise pas la contestation de l'art. 211, des al. 212(1)*a*), *b*), *c*), *d*), *e*), *f*) et *h*) et du par. 212(3) du *Code criminel* et ne conteste aucune disposition sur le fondement de l'al. 2*d*) ou sur l'art. 15 de la *Charte*. En outre, comme nous l'avons vu, le tribunal doit examiner non seulement la question juridique précise posée, mais aussi le contexte dans lequel elle l'est. Or, les contextes qui sont à l'origine des contestations dans l'affaire *Bedford* et dans la présente affaire sont très différents. Les demanderesses dans l'affaire *Bedford* n'étaient pas principalement des travailleuses de l'industrie du sexe qui exerçait leur métier dans la rue, tandis que, en l'espèce, ce sont elles qui sont au cœur du débat. Comme l'argument d'inconstitutionnalité des lois relatives à la prostitution porte principalement sur les effets qu'elles ont sur ces travailleurs, les intimées en l'espèce fondent leurs contestations dans un contexte distinctif. Troisièmement, mise à part la mesure radicale qui consiste à ne pas reconnaître la qualité pour agir, il pourrait y avoir d'autres stratégies en matière de gestion des litiges visant à assurer l'utilisation efficiente et efficace des ressources judiciaires. Par exemple, les intimées auraient suggéré que leur pourvoi devant la Cour soit suspendu dans l'attente de l'issue de l'affaire *Bedford*. La suspension des procédures jusqu'au règlement d'autres instances est, de fait, une possibilité qui devrait être prise en compte lors de l'exercice du pouvoir discrétionnaire de reconnaître ou non la qualité pour agir.

[65] En tenant compte de ce qui précède, l'existence de l'affaire *Bedford* en Ontario, dans les circonstances de la présente affaire, ne me semble pas peser très lourd contre les intimées lorsqu'il s'agit de déterminer si la poursuite qu'elles ont intentée constitue une manière raisonnable et efficace de soumettre à la cour les allégations formulées. À

been shown to be a more reasonable and effective means of doing so.

[66] The second concern identified by the chambers judge was that there are hundreds of prosecutions under the impugned provisions every year in British Columbia. In light of this, he reasoned that "the accused in each one of those cases would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77). He noted, in addition, that such challenges have been mounted by accused persons in numerous prostitution-related criminal trials (paras. 78-79). In my view, however, there are a number of points in the circumstances of this case that considerably reduce the weight that should properly be given this concern here.

[67] To begin, the importance of a purposive approach to standing makes clear that the existence of a parallel claim, either potential or actual, is not conclusive. Moreover, the existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.

[68] The cases to which we have been referred did not challenge nearly the entire legislative scheme as the respondents do. As the respondents point out, almost all the cases referred to were challenges to the communication law alone: *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *Skinner*; *R. v. Smith* (1988), 44 C.C.C. (3d) 385 (Ont. H.C.J.); *R. v. Gagne*, [1988] O.J. No. 2518 (QL) (Prov. Ct.); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111 (Alta. C.A.); *R.*

mon avis, il n'a pas été démontré que cette autre affaire constituait une manière plus raisonnable et efficace d'y arriver.

[66] Le deuxième point dont le juge en cabinet était préoccupé concernait les centaines de poursuites engagées chaque année en Colombie-Britannique en application des dispositions contestées. Il en a conclu que [TRADUCTION] « l'accusé dans chacune de ces causes pourrait de plein droit soulever les questions constitutionnelles que les demanderesses tentent de soulever en l'espèce » (par. 77). En outre, il a souligné que de telles contestations avaient été formulées par des accusés dans de nombreux procès criminels en matière de prostitution (par. 78-79). À mon avis, il y a cependant un certain nombre de facteurs qui, dans les circonstances de la présente instance, réduisent considérablement l'importance qu'il convient d'accorder à cette préoccupation.

[67] Tout d'abord, compte tenu de l'importance d'adopter une approche téléologique au regard de la qualité pour agir, il est évident que l'existence d'une action parallèle, qu'elle soit éventuelle ou réelle, n'est pas déterminante. De plus, l'existence de demandeurs potentiels, bien qu'évidemment un facteur pertinent, ne devrait être prise en compte qu'en fonction de considérations d'ordre pratique. Comme je l'expliquerai plus loin, les considérations d'ordre pratique, en l'espèce, sont telles qu'il est très peu probable que des personnes accusées en application de ces dispositions engageraient une action semblable à celle des demanderesses. Enfin, le fait que certaines contestations aient été formulées par des accusés dans le cadre de nombreux procès criminels en matière de prostitution n'est pas non plus très révélateur.

[68] Les causes qui ont été portées à notre attention étaient loin de contester la validité de l'ensemble du régime législatif comme les intimées le font en l'espèce. Comme celles-ci l'ont d'ailleurs souligné, la presque totalité de la jurisprudence citée renvoie à des contestations qui visaient uniquement les infractions relatives à la communication : *R. c. Stagnitta*, [1990] 1 R.C.S. 1226; *Skinner*; *R. c. Smith* (1988), 44 C.C.C. (3d) 385 (H.C.J. Ont.); *R.*

v. Kazelman, [1987] O.J. No. 1931 (QL) (Prov. Ct.); *R. v. Bavington*, 1987 [1987] O.J. No. 2728 (QL) (Prov. Ct.); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.); *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255 (Prov. Ct.); *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232 (S.C.); *R. v. Bailey*, [1986] O.J. No. 2795 (QL) (Prov. Ct.); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464. Most of the other cases challenged one provision only, either the procurement provision (*R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL) (C.A.)), or the bawdy house provision (*R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (Ont. C.A.)). From the record, the only criminal cases that challenge more than one section of the prostitution provisions were commenced *after* this case (Affidavit of Karen Howden, June 24, 2011, at para. 10 (*R. v. Mangat*) (A.R., vol. V, at p. 102; vol. IX, at pp. 31-36); paras. 4-5 (*R. v. Cho*) (A.R., vol. V, at p. 102; vol. VIII, at p. 163); paras. 2 and 11 (*R. v. To*) (A.R., vol. V, at pp. 101-3 and 104-12)). At the time of writing these reasons, one case had been dismissed, the other held in abeyance pending the outcome of this case and the last one was set for a preliminary inquiry.

c. Gagne, [1988] O.J. No. 2518 (QL) (C. prov.); *R. c. Jahelka* (1987), 43 D.L.R. (4th) 111 (C.A. Alb.); *R. c. Kazelman*, [1987] O.J. No. 1931 (QL) (C. prov.); *R. c. Bavington*, [1987] O.J. No. 2728 (QL) (C. prov.); *R. c. Cunningham* (1986), 31 C.C.C. (3d) 223 (C. prov. Man.); *R. c. Bear* (1986), 47 Alta. L.R. (2d) 255 (C. prov.); *R. c. McLean* (1986), 2 B.C.L.R. (2d) 232 (C.S.); *R. c. Bailey*, [1986] O.J. No. 2795 (QL) (C. prov.); *R. c. Cheeseman*, C. prov. Sask., 19 juin 1986; *R. c. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464. La majorité des autres causes ne contestaient qu'une disposition, soit celle relative au proxénétisme (*R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Boston*, [1988] B.C.J. No. 1185 (QL) (C.A.)), ou celle relative aux maisons de débauche (*R. c. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (C.A. Ont.)). Il appert du dossier que les seules causes criminelles dont la contestation porte sur plus d'une disposition relative à la prostitution ont été intentées *après* la présente affaire (affidavit de Karen Howden, 24 juin 2011, par. 10 (*R. c. Mangat*) (d.a., vol. V, p. 102; d.a., vol. IX, p. 31-36); par. 4-5 (*R. c. Cho*) (d.a., vol. V, p. 102; d.a., vol. VIII, p. 163); par. 2 et 11 (*R. c. To*) (d.a., vol. V, p. 101-103 et 104-112). Au moment de rédiger les présents motifs, une affaire avait été rejetée, une autre avait été suspendue en attendant l'issue de la présente affaire et, dans la dernière, une date avait été fixée pour la tenue de l'enquête préliminaire.

[69] Of course, an accused in a criminal case will always be able to raise a constitutional challenge to the provisions under which he or she is charged. But that does not mean that this will necessarily constitute a more reasonable and effective alternative way to bring the issue to court. The case of *Blais* illustrates this point. In that case, the accused, a client, raised a constitutional challenge to the communication provision without any evidentiary support. The result was that the Provincial Court of British Columbia dismissed the constitutional claim, without examining it in detail. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance. For instance, in *R. v. Hamilton* (Affidavit of Elizabeth Campbell, September 17, 2008, at para. 6 (A.R., vol. II, at pp. 34-35)), the Crown, for

[69] Il va de soi qu'une personne accusée dans une instance en matière criminelle peut toujours soulever une contestation constitutionnelle des dispositions en application desquelles elle est accusée. Mais, cela ne signifie pas que cette éventualité constituera nécessairement une manière plus raisonnable et efficace de soumettre la question à la cour. L'affaire *Blais* illustre ce point. Dans cette affaire, l'accusé, un client, a soulevé une contestation constitutionnelle à l'encontre de la disposition relative à la communication, et ce, sans aucune preuve à l'appui. La Cour provinciale de la Colombie-Britannique a donc rejeté la revendication constitutionnelle sans l'examiner en détail. De plus, le caractère imprévisible inhérent aux procès criminels rend les choses encore plus difficiles pour une partie soulevant une contestation de la nature de celle engagée en l'espèce. Par exemple,

unrelated reasons, entered a stay of proceedings after the accused filed a constitutional challenge to a bawdy house provision. Thus, the challenge could not proceed.

[70] Moreover, the fact that many challenges could be or have been brought in the context of criminal prosecutions may in fact support the view that a comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised. There could be a multitude of similar challenges in the context of a host of criminal prosecutions. Encouraging that approach does not serve the goal of preserving scarce judicial resources. Moreover, a summary conviction proceeding may not necessarily be a more appropriate setting for a complex constitutional challenge.

[71] The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)).

dans l'affaire *R. c. Hamilton* (affidavit d'Elizabeth Campbell, 17 septembre 2008, par. 6 (d.a., vol. II, p. 34-35)), le ministère public a demandé, pour des raisons distinctes, la suspension des procédures à la suite du dépôt par l'accusé d'une contestation constitutionnelle de la disposition concernant les maisons de débauche. La contestation n'a donc pas pu suivre son cours.

[70] En outre, le fait que de nombreuses contestations pourraient être ou aient été engagées, ou l'ont été, dans le cadre de poursuites en matière criminelle pourrait en fait corroborer la thèse selon laquelle une demande exhaustive de jugement déclaratoire est en fait une manière plus raisonnable et efficace d'en arriver à un règlement définitif des questions soulevées. Il pourrait y avoir une multitude de contestations semblables engagées dans le cadre d'une myriade de poursuites criminelles. En favorisant cette approche, on ne satisferait pas à l'objectif visant à préserver les ressources judiciaires limitées. En outre, une procédure par voie de déclaration sommaire de culpabilité ne constitue pas nécessairement un cadre plus approprié pour le traitement d'une contestation constitutionnelle complexe.

[71] La troisième préoccupation exposée par le juge en cabinet portait sur le fait qu'il ne pouvait pas s'expliquer comment la vulnérabilité des membres de la Société les empêchait de comparaître en qualité de demanderesses, étant donné qu'elles étaient prêtes à témoigner au procès (par. 76). Or, être témoin et être partie à une action sont deux choses bien différentes. Il appert du dossier en l'espèce qu'aucun travailleur de l'industrie du sexe du quartier Downtown Eastside de Vancouver n'était prêt à intenter une contestation exhaustive. Ils craignent une atteinte à leur vie privée et à leur sécurité ainsi qu'un accroissement des actes de violence de la part des clients. De plus, leurs conjoints, leurs amis, les membres de leur famille ou de leur collectivité pourraient ne pas savoir qu'ils travaillent ou ont travaillé dans l'industrie du sexe et qu'ils consomment ou ont consommé des drogues. Ils craignent que leurs enfants leur soient retirés par les autorités responsables de la protection des enfants. Enfin, en engageant une contestation de cette

As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

[72] I conclude, therefore, that these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them.

[73] I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will

nature, ils craignent de nuire à leurs perspectives, actuelles ou futures, d'études et d'emploi (affidavit de Jill Chettiar, 26 septembre 2008, par. 16-18 (d.a., vol. IV, p. 184-185)). Selon moi, la volonté de bon nombre de ces personnes de souscrire des affidavits ou de comparaître pour témoigner n'affecte en rien la crédibilité de leur témoignage voulant qu'elles ne soient pas prêtes ou capables d'engager en leurs propres noms une contestation de cette nature. La conduite d'une importante poursuite judiciaire en matière constitutionnelle comporte également des aspects pratiques. Les avocats doivent être en mesure de communiquer avec leurs clients, et ces derniers doivent être en mesure de fournir en temps opportun des instructions ponctuelles et appropriées. En outre, dans le cadre de contestations individuelles, de nombreuses difficultés pourraient surgir compte tenu des éléments de preuve relatifs à la situation de plusieurs des personnes les plus directement touchées par les dispositions contestées.

[72] Par conséquent, je conclus que ces trois préoccupations décrites par le juge en cabinet ne justifiaient pas qu'il leur accorde le poids déterminant qu'il leur a accordé.

[73] Je vais maintenant aborder d'autres considérations qui devraient être prises en compte lors de l'examen du facteur relatif aux manières plus raisonnables et efficaces. La présente affaire constitue un litige d'intérêt public : les intimées ont soulevé des questions d'importance pour le public, des questions qui transcendent leurs intérêts immédiats. Leur contestation est exhaustive en ce qu'elle vise la presque totalité du régime législatif. Elle fournit l'occasion d'évaluer, du point de vue du droit constitutionnel, l'effet global de ce régime sur les personnes les plus touchées par ses dispositions. Une contestation de cette nature est susceptible de prévenir une multiplicité de contestations individuelles engagées dans le cadre de poursuites criminelles. Il n'y a aucun risque de porter atteinte aux droits d'autres individus ayant un intérêt plus personnel ou plus direct dans la question du fait d'une action trop générale ou mal présentée. Il est évident que la demande est plaidée avec rigueur et habileté. Rien ne laisse croire que d'autres personnes

ensure that there is both an individual and collective dimension to the litigation.

[74] The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (R.F., at para. 20). Further, the Society is represented by experienced human rights lawyers, as well as by the Pivot Legal Society, a non-profit legal advocacy group working in Vancouver's Downtown Eastside and focusing predominantly on the legal issues that affect this community (Affidavit of Peter Wrinch, January 30, 2011, at para. 3 (A.R., vol. V, at p. 137)). It has conducted research on the subject, generated various reports and presented the evidence it has gathered before government officials and committees (see Wrinch Affidavit, at paras. 6-21 (A.R., vol. V, at pp. 137-44)). This in turn, suggests that the present litigation constitutes an effective means of bringing the issue to court in that it will be presented in a context suitable for adversarial determination.

[75] Finally, other litigation management tools and strategies may be alternatives to a complete denial of standing, and may be used to ensure that the proposed litigation is a reasonable and effective way of getting the issues before the court.

touchées de façon plus directe ou personnelle aient choisi de plein gré de ne pas contester ces dispositions. La présence de l'intimée qui agit à titre individuel de même que de la Société garantira que le litige aura une dimension à la fois individuelle et collective.

[74] Le dossier appuie la position des intimées selon laquelle elles ont la capacité d'engager la présente action. La Société est bien organisée et dotée d'une expertise considérable en ce qui concerne les travailleurs de l'industrie du sexe qui exercent leur métier dans le quartier Downtown Eastside, et M^{me} Kiselbach, une ancienne travailleuse du sexe dans ce quartier, est soutenue par les ressources de la Société. Elles apportent un contexte factuel concret et représentent les personnes qui sont le plus directement touchées par les dispositions législatives contestées. À titre d'exemple, la preuve des intimées comprend des affidavits de plus de 90 travailleurs du sexe, actifs ou retirés, du quartier Downtown Eastside de Vancouver (m.i., par. 20). De plus, la Société est représentée par des avocats expérimentés en droit de la personne, ainsi que par la Pivot Legal Society, un organisme sans but lucratif d'intervention juridique qui travaille dans le quartier en cause et dont les activités sont principalement centrées sur les questions juridiques touchant cette collectivité (affidavit de Peter Wrinch, 30 janvier 2011, par. 3 (d.a., vol. V, p. 137)). Cet organisme a effectué des recherches sur le sujet, a produit divers rapports et a présenté les éléments de preuve qu'elle a recueillis à des représentants et à des comités gouvernementaux (voir l'affidavit de Peter Wrinch, par. 6-21 (d.a., vol. V, p. 137-144)). Cela laisse entendre que la présente instance constitue une manière efficace de soumettre la question à la cour en ce sens qu'elle sera présentée dans un contexte qui permettra sa détermination dans un système contradictoire.

[75] Enfin, d'autres outils de gestion des litiges et d'autres solutions moins catégoriques qu'un déni total de la qualité pour agir peuvent être utilisés pour faire en sorte que le litige projeté constitue une manière raisonnable et efficace de soumettre les questions à la cour.

(7) Conclusion With Respect to Public Interest Standing

[76] All three factors, applied purposively, favour exercising discretion to grant public interest standing to the respondents to bring their claim. Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society, but it will also promote the economical use of scarce judicial resources: *Canadian Council of Churches*, at p. 252.

B. *Private Interest Standing*

[77] Having found that the respondents have public interest standing to pursue their claims, it is not necessary to address the issue of whether Ms. Kiselbach has private interest standing.

V. Disposition

[78] I would dismiss the appeal with costs. However, I would not grant special costs to the respondents. The Court of Appeal declined to do so (2011 BCCA 515, 314 B.C.A.C. 137) and we ought not to interfere with that exercise of discretion unless there are clear and compelling reasons to do so which in my view do not exist here: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 77.

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondents: Arvay Finlay, Vancouver; Pivot Legal, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Community Legal Assistance Society: Community Legal Assistance Society, Vancouver.

(7) Conclusion en ce qui concerne la qualité pour agir dans l'intérêt public

[76] Appliqués selon une approche téléologique, les trois facteurs militent en faveur de l'exercice du pouvoir discrétionnaire pour reconnaître aux intimées la qualité pour agir dans l'intérêt public afin qu'elles présentent leur demande. La reconnaissance de cette qualité servira non seulement à renforcer le principe de la légalité en ce qui concerne des questions sérieuses touchant directement certains des membres les plus marginalisés de la société, mais aussi à faire la promotion d'une utilisation efficiente des ressources judiciaires limitées : *Conseil canadien des Églises*, p. 252.

B. *Qualité pour agir dans l'intérêt privé*

[77] Ayant conclu que les intimées ont la qualité pour agir dans l'intérêt public afin de poursuivre leur action, il n'est pas nécessaire d'aborder la question de savoir si M^me^ Kiselbach a la qualité pour agir dans l'intérêt privé.

V. Dispositif

[78] Je suis d'avis de rejeter le pourvoi avec dépens. Toutefois, je n'accorderai pas de dépens spéciaux aux intimées. La Cour d'appel a refusé de le faire (2011 BCCA 515, 314 B.C.A.C. 137) et nous ne devrions pas nous immiscer dans l'exercice de ce pouvoir discrétionnaire à moins d'avoir des motifs clairs et impérieux de le faire, ce qui, à mon avis, n'est pas le cas en l'espèce : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263, par. 77.

Pourvoi rejeté avec dépens.

Procureur de l'appelant : Procureur général du Canada, Vancouver.

Procureurs des intimées : Arvay Finlay, Vancouver; Pivot Legal, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenante Community Legal Assistance Society : Community Legal Assistance Society, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Gratl & Company, Vancouver; Megan Vis-Dunbar, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Gratl & Company, Vancouver; Megan Vis-Dunbar, Vancouver.

Solicitor for the intervener Ecojustice Canada: Ecojustice Canada, Toronto.

Procureur de l'intervenant Ecojustice Canada : Ecojustice Canada, Toronto.

Solicitors for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and the ARCH Disability Law Centre: West Coast Women's Legal Education and Action Fund (West Coast LEAF), Vancouver; Justice for Children and Youth, Toronto; ARCH Disability Law Centre, Toronto.

Procureurs des intervenants Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth et ARCH Disability Law Centre : West Coast Women's Legal Education and Action Fund (West Coast LEAF), Vancouver; Justice for Children and Youth, Toronto; ARCH Disability Law Centre, Toronto.

Solicitors for the intervener Conseil scolaire francophone de la Colombie-Britannique: Heenan Blaikie, Ottawa.

Procureurs de l'intervenant le Conseil scolaire francophone de la Colombie-Britannique : Heenan Blaikie, Ottawa.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Procureur de l'intervenant David Asper Centre for Constitutional Rights : Université de Toronto, Toronto.

Solicitor for the intervener the Canadian Civil Liberties Association: Canadian Civil Liberties Association, Toronto.

Procureur de l'intervenante l'Association canadienne des libertés civiles : Association canadienne des libertés civiles, Toronto.

Solicitors for the interveners the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees: Waldman & Associates, Toronto.

Procureurs des intervenants l'Association canadienne des avocats et avocates en droit des réfugiés et le Conseil canadien pour les réfugiés : Waldman & Associates, Toronto.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia: McCarthy Tétrault, Vancouver.

Procureurs des intervenants le Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario et Positive Living Society of British Columbia : McCarthy Tétrault, Vancouver.

TAB 2

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
Interveners

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

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

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,
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 *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; archived version: 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.

Mark Witten and *Emily Lapper*, for the appellant/respondent on cross-appeal.

Michael A. Feder, Q.C., *Katherine Booth*, *Connor Bildfell* and *Kevin Love*, for the respondent/appellant on cross-appeal.

Christine Mohr, for the intervener the Attorney General of Canada.

Yashoda Ranganathan and *David Tortell*, for the intervener the Attorney General of Ontario.

Sharon H. Pratchler, Q.C., and *Jeffrey Crawford*, for the intervener the Attorney General of Saskatchewan.

Leah M. McDaniel, for the intervener the Attorney General of Alberta.

Greg J. Allen and *Nojan Kamoosi*, for the intervener the West Coast Prison Justice Society.

Sarah Rankin, *Anita Szigeti*, *Ruby Dhand* and *Maya Kotob*, for the intervener the Empowerment Council, Systemic Advocates in Addictions and Mental Health.

Andrew Bernstein and *Alexandra Shelley*, for the intervener the Canadian Civil Liberties Association.

Roberto Lattanzio and *Gabriel Reznick*, for the interveners the Advocacy Centre for Tenants Ontario, the ARCH Disability Law Centre, the Canadian Environmental Law Association, the Chinese and Southeast Asian Legal Clinic, the HIV & AIDS Legal Clinic Ontario and the South Asian Legal Clinic Ontario.

Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Daniel Cheater and *Margot Venton*, for the intervener the Ecojustice Canada Society.

Aubin Calvert, for the intervener the Trial Lawyers Association of British Columbia.

Sameha Omer, for the intervener the National Council of Canadian Muslims.

Karen R. Spector, *Kelley Bryan* and *C. Tess Sheldon*, for the intervener the Mental Health Legal Committee.

Elin Sigurdson and *Monique Pongracic-Speier*, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

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.

Fahad Siddiqui, for the interveners the Federation of Asian Canadian Lawyers and the Canadian Muslim Lawyers Association.

Alison M. Latimer, *Q.C.*, for the interveners the John Howard Society of Canada and the Queen's Prison Law Clinic.

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

Joëlle Pastora Sala and *Allison Fenske*, for the interveners the Canadian Mental Health Association (National), Canada Without Poverty, the Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

TABLE OF CONTENTS

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 JJ.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 individua[l] 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.

Solicitor for the appellant/respondent on cross-appeal: Attorney General of British Columbia, Vancouver.

Solicitors for the respondent/appellant on cross-appeal: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Edmonton.

Solicitors for the intervener the West Coast Prison Justice Society: Allen/McMillan Litigation Counsel, Vancouver.

Solicitors for the intervener the Empowerment Council, Systemic Advocates in Addictions and Mental Health: McKay Ferg, Calgary; Anita Szigeti Advocates, Toronto; Thompson Rivers University — Law Faculty, Kamloops.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

Solicitor for the interveners the Advocacy Centre for Tenants Ontario, the ARCH Disability Law Centre, the Canadian Environmental Law Association, the Chinese and Southeast Asian Legal Clinic, the HIV & AIDS Legal Clinic Ontario and the South Asian Legal Clinic Ontario: ARCH Disability Law Centre, Toronto.

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.

Solicitor for the intervener the Canadian Association of Refugee Lawyers: Legal Aid Ontario — Refugee Law Office, Toronto; Mithoowani Waldman Immigration Law Group, Toronto.

Solicitors for the intervener the West Coast Legal Education and Action Fund: JFK Law Corporation, Vancouver.

Solicitors for the intervener the Centre for Free Expression: PooranLaw Professional Corporation, Toronto.

Solicitors for the interveners the Federation of Asian Canadian Lawyers and the Canadian Muslim Lawyers Association: Norton Rose Fulbright Canada, Toronto.

Solicitor for the interveners the John Howard Society of Canada and the Queen's Prison Law Clinic: Alison M. Latimer, Q.C., Vancouver.

Solicitor for the intervener Animal Justice: Animal Justice, Toronto.

Solicitor for the interveners the Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc. and End Homelessness Winnipeg Inc.: Public Interest Law Centre, Winnipeg.

Solicitors for the intervener the Canadian Constitution Foundation: Osler, Hoskin & Harcourt, Toronto.

TAB 3

NOVA SCOTIA COURT OF APPEAL

Citation: *Ecology Action Centre v. Nova Scotia (Environment and Climate Change)*, 2023 NSCA 12

Date: 20230222
Docket: CA 515123
Registry: Halifax

Between:

Ecology Action Centre and New Brunswick Anti-Shale Alliance

Appellants

v.

Nova Scotia Department of the Environment and Climate Change and the Minister of Environment and Climate Change

Respondents

Judge: The Honourable Justice Joel Fichaud

Appeal Heard: December 6, 2022, in Halifax, Nova Scotia

Subject: Public interest standing

Summary: On April 29, 2021, under Part IV of the *Environment Act*, S.N.S. 1994-95, c. 1, the Minister of the Environment and Climate Change gave conditional environmental assessment approval to a highway re-alignment. The highway re-alignment would facilitate a liquid natural gas project in Goldboro, Guysborough County.

The Ecology Action Centre and New Brunswick Anti-Shale Gas Alliance ("Appellants") sought judicial review by *certiorari* of the Minister's Decision to approve. On the Minister's motion, a judge of the Supreme Court of Nova Scotia held the Appellants would not be granted public interest standing. The judge held the Appellants' contentions did not raise a sufficiently "serious issue" for standing. Absent standing, the judge dismissed their application for judicial review.

The Appellants appeal from the dismissal of their application for judicial review.

Issues: Did the judge err by ruling the Appellants would not be granted public interest standing?

Result: The Court of Appeal allowed the appeal and ordered that the Appellants be granted public interest standing to seek judicial review of the Minister's Decision of April 29, 2021.

Public interest standing will be granted when three factors, weighed cumulatively and analyzed purposively, justify standing. The factors are: (1) there is a "serious justiciable issue", (2) the applicant has a "real stake or genuine interest" in the issue, and (3) the proposed litigation "is a reasonable and effective way to bring the issue before the courts". Here, the second and third factors favored standing, as the motions judge acknowledged. On the first factor, the motions judge erred in principle in her analysis and ruling that there was no "serious issue". Under the criteria for whether there is a "serious issue": the Appellants' proposed contentions were "far from frivolous" and not "marginal", their failure was not a "foregone conclusion", and their substance was sufficiently "important" to justify a merits hearing.

Having determined the motions judge erred in principle, the Court of Appeal re-assessed the factors and held the cumulative weight supported public interest standing.

NOVA SCOTIA COURT OF APPEAL

Citation: *Ecology Action Centre v. Nova Scotia (Environment and Climate Change)*, 2023 NSCA 12

Date: 20230222
Docket: CA 515123
Registry: Halifax

Between:

Ecology Action Centre and New Brunswick Anti-Shale Gas Alliance, Inc.

Appellants

v.

Nova Scotia Department of the Environment and Climate Change and the Minister of Environment and Climate Change

Respondents

Judges:	Wood C.J.N.S., Fichaud and Van den Eynden, JJ.A.
Appeal Heard:	December 6, 2022, in Halifax, Nova Scotia
Decision released:	February 22, 2023
H**eld:**	Appeal allowed with costs, per reasons for judgment of Fichaud J.A., Wood C.J.N.S. and Van den Eynden J.A. concurring
Counsel:	James Gunvaldsen Klaassen and Danielle Gallant for the Appellants Myles H. Thompson for the Respondents

Reasons for judgment:

[1] The Ecology Action Centre was incorporated as a society in Nova Scotia in 1973 and operates as a charity with over 4,000 members. The New Brunswick Anti-Shale Gas Alliance Inc. ("NB Alliance") was incorporated in New Brunswick and has members across that Province. Both promote environmental goals which include conversion to sources of energy other than fossil fuels.

[2] Pieridae Energy (Canada) Ltd. develops energy infrastructure and focuses on liquified natural gas. In early 2013, Pieridae proposed to develop a facility at an industrial park in Goldboro, Guysborough County to export liquefied natural gas ("LNG Project"). The LNG Project initially envisaged a pipeline, liquefaction trains, storage tanks, a power supply from a natural gas-fired power plant, and a marine terminal for ocean carriers. It aimed to produce 10 million tonnes of liquified natural gas annually.

[3] Under the *Environment Act*, S.N.S. 1994-95, c. 1 ("*Act*") the Minister of Environment and Climate Change ("Minister") decides whether to approve an undertaking with a significant adverse environmental impact, such as the LNG Project. The statutory process has two stages. The first, termed an "Environmental Assessment Approval", culminates in approval of the environmental impact, subject to any conditions required to mitigate the significant adverse effect. This is followed, at the second stage, by industrial approval of the overall undertaking.

[4] At the first stage, in 2013 and 2014, Nova Scotia's Department of the Environment and Climate Change ("Department") conducted an environmental assessment of the LNG Project. The Ecology Action Centre participated. In March 2014, the Minister issued a conditional Environmental Assessment Approval for the LNG Project. Work was to start by 2016. The conditions required Pieridae to prepare and submit for further approval plans to mitigate various environmental concerns. The required plans were to include a Greenhouse Gas Management Plan.

[5] To date, Pieridae has not submitted the Greenhouse Gas Management Plan.

[6] In March 2021, Pieridae requested the Minister's environmental approval for a highway re-alignment that was necessary for the LNG Project. The Ecology Action Centre and NB Alliance objected. Their brief to the Minister cited two concerns: (1) Pieridae should not construct the LNG Project's infrastructure

without the approved Greenhouse Gas Management Plan that was required by the March 2014 conditions, and (2) the excavation for the highway re-alignment would expose toxic chemicals, contaminants and tailings from the abandoned gold mines in the area. On April 29, 2021, the Minister issued a conditional Environmental Assessment Approval of the highway re-alignment.

[7] The Ecology Action Centre and NB Alliance applied to the Supreme Court of Nova Scotia for judicial review of the Minister's Decision of April 29, 2021.

[8] On the Minister's preliminary motion, a judge of the Supreme Court of Nova Scotia ruled the Ecology Action Centre and NB Alliance lacked public interest standing. The test for public interest standing includes whether there is a "serious issue" to be litigated. The motions judge said the issues raised by the Ecology Action Centre and NB Alliance were not "serious" and this deficiency outweighed the other factors that favoured standing. As they lacked standing, the judge dismissed their application for judicial review.

[9] The Ecology Action Centre and NB Alliance appeal. The question is – did the motions judge commit an appealable error by denying public interest standing to the Ecology Action Centre and NB Alliance to apply for judicial review by *certiorari* of the Minister's Environmental Assessment Approval of the highway re-alignment dated April 29, 2021?

The Approval Process under the Environment Act

[10] The proponent of an undertaking with a significant adverse environmental effect must obtain the Minister's approval under Part IV of the *Act*. Under Regulation 3 and Schedule A of the *Environmental Assessment Regulations*, N.S. Reg. 26/1995 as amended, under the *Act*, such projects are designated as either Class I or Class II undertakings.

[11] First, the proponent registers the undertaking with the Department (*Act*, s. 33). The Minister may request an environmental assessment report (s. 34). The Minister releases the report to interested persons and the public for comment and may refer the matter to a review panel (ss. 38-39). Then the Minister decides whether to give environmental approval and whether to impose conditions:

> Powers of the Minister
>
> 40(1) Upon receiving information under Section 34, a focus report under Section 35, an environmental-assessment report under Section 38, a recommendation

> from a review panel under Section 39 or from a referral to alternate dispute resolution, the Minister may
>
> (a) approve the undertaking;
>
> (b) approve the undertaking, subject to any conditions the Minister deems appropriate; or
>
> (c) reject the undertaking.
>
> (2) The Minister shall notify the proponent, in writing, of the decision pursuant to subsection (1), together with reasons for the decision, within the time period prescribed by the regulations.

[12] A conditional environmental assessment approval means, but for the mitigative conditions, the undertaking would cause a significant adverse environmental effect. The *Environmental Assessment Regulations* say:

> 13(1) No later than 50 days following the date of registration, the Minister shall advise the proponent in writing of the decision under subsection 34(2) of the Act
>
> …
>
> (b) that a review of the information indicates that there are no adverse effects or significant environmental effects which may be caused by the undertaking or that such effects are mitigable and the undertaking is approved subject to specified terms and conditions and any other approvals required by statute or regulation;

Regulation 2(1) defines a "significant" effect as an "adverse" environmental effect.

[13] Regulation 27 says, unless the Minister grants a written extension, the proponent "shall within 2 years of the approval [under s. 40 of the *Act*] commence work on the undertaking".

[14] After an environmental assessment approval, the next stage is approval of the industrial undertaking under Part V:

- Without the Minister's approval the activity is prohibited, subject to specified exceptions (*Act*, ss. 50-51).
- The proponent applies for approval (s. 53).
- The Minister may deny approval if, in the Minister's opinion, "it is not in the public interest having regard to the purpose of this Act", the activity "contravenes a policy of the Government or the Department,

whether the location of the proposed activity is unacceptable or adverse effects from the proposed activity are unacceptable" (s. 52).

- The Minister has 60 days to decide unless the Minister notifies the applicant otherwise (s. 54).

- The Minister "may issue or refuse to issue an approval" and "may issue an approval subject to any terms and conditions the Minister considers appropriate to prevent an adverse effect" (s. 56).

[15] The *Act* permits the Minister to delegate the Minister's powers of approval, under Parts IV or V, to an administrator:

> 7 Such administrators and employees as are necessary for the administration of this Act shall be appointed in accordance with the *Civil Service Act*.
>
> …
>
> 17 The Minister may, in writing, delegate to
>
> (a) any employee of the Government or a Government agency …
>
> who has the qualifications and experience, any power or duty conferred or imposed on the Minister pursuant to this Act.
>
> …
>
> 21(1) The Minister may appoint as an administrator a person who has the qualifications and experience to be an administrator for the purpose of all or part of this Act.

[16] The *Act* permits anyone, not just the proponent, to obtain the reasons for a decision by the Minister or administrator under ss. 40 (environmental assessment approval) and ss. 54 and 56 (industrial approval):

> 10(4) Where the Minister, administrator or delegated agent makes a decision under Section 34, 35, 40, 52, 54 or 56, any person who asks for a reason for the decision shall, within thirty days, and subject to the *Freedom of Information and Protection of Privacy Act*, be furnished with a written statement of the decision, setting out the findings of fact upon which it is based and the reasons for the decision.

[17] Section 141 says "nothing in this Act shall be construed so as to repeal, remove or reduce any remedy available to any person under any enactment, at common law or under any Act of Parliament or of a provincial legislature". Hence, the applications in the nature of *certiorari* and *mandamus* in this case.

2014 Approval of the LNG Project Under Part IV

[18] On February 18, 2013, under s. 33 of the *Act*, Pieridae registered the LNG Project as a Class II undertaking. The Department appointed an environmental assessment review panel which performed a Class II assessment. The Department invited public consultation and received comments which included input from the Ecology Action Centre.

[19] Under s. 40(1)(b) of the *Act* and Regulation 13(1)(b), the Minister issued a conditional environmental assessment approval for the LNG Project. The Minister's letter of March 21, 2014, to Pieridae said:

> Following a review of the information provided by Pieridae Energy (Canada) Ltd., and from comments received from agencies and persons that participated in this environmental assessment review, including recommendations provided by the Environmental Assessment Panel, **I have approved the above project with conditions** in accordance with Section 40 of the *Environment Act*, S.N.S. 1994-95 and subsection 26(1) of the Environmental Assessment Regulations, N.S. Reg. 348/2008, made under the *Act*.
>
> This approval is subject to any other approvals required by statute or regulation, including but not limited to, approvals under Part V of the Nova Scotia *Environment Act* (Approvals and Certificates section).
>
> [bolding added]

[20] The Minister's letter attached a list of conditions that included:

> **This approval is subject to the following conditions** and obtaining all other necessary approvals, permits or authorizations required by municipal, provincial and federal acts, regulations and by-laws before commencing work on the Undertaking. It is the responsibility of the Approval Holder to ensure that all such approvals, permits or authorizations are obtained before commencing work on the Undertaking.
>
> …
>
> 2.0 Phase I – Studies, Inventory, Analysis
>
> Prior to application for Part V approval under the *Environment Act* **the Approval Holder must provide for review and approval:**
>
> …
>
> 2.2 **A Greenhouse Gas (GHG) Management Plan.** The plan will include a full accounting of all anticipated GHG emissions based on detailed facility design, explanation of how major technology choices in

> the facility design are best-available technology for GHG mitigation, and demonstration of how the facility achieves an overall carbon intensity in line with best-in-class. The plan will also include details on GHG emissions monitoring and reporting, and ongoing GHG management and abatement practices. The GHG Management Plan must include an independent technical review of GHG analysis and estimates. Following the approval of the initial plan, the Approval Holder will then be required to submit an updated GHG Management Plan on or before March 31 of each year to NSE [Nova Scotia Environment] for approval.
>
> [bolding added]

[21] Article 2 of the conditions also required Pieridae to prepare and submit for approval the following mitigative plans: (1) an Air Emissions Management Plan, (2) modelling to predict the assimilative capacity of all receiving environments for all chemical parameters that would enter the environment as a result of the project activities, (3) a Wetland Management Plan, (4) a plan to mitigate the human health and environmental impacts of abandoned mine openings, contaminated mine tailings and/or soils and sediments on the Project site, (5) an Environmental Monitoring Plan for the Project and (6) a Contingency Plan to address discharges, emissions, escapes, leaks or spills of dangerous waste.

[22] Article 1.3 of the conditions said Pieridae "must, within two years of the date of issuance of this Approval, commence work on the Undertaking unless granted a written extension by the Minister". This reiterated Regulation 27, quoted earlier.

[23] The Minister's Decision of March 21, 2014 was made public. The Ecology Action Centre did not apply for judicial review.

[24] The *Act* permits the Minister to delegate approval powers to an administrator employed by the Department. The Minister appointed Mr. Jeremy Higgins, an Environmental Assessment Officer with the Department, as the administrator for the LNG Project.

[25] The Minister's 2014 conditions left the content of the mitigative plans to Pieridae, subject to approval by the administrator.

[26] Pieridae has not submitted the Greenhouse Gas Management Plan that was required by article 2.2. Any mitigative plans that have been submitted by Pieridae and the terms of any approvals by the administrator are not in evidence. In oral submissions to this Court, the Minister's counsel advised that the information

would be made public with the eventual industrial approval of the LNG Project under Part V of the *Act*.

[27] There has been no approval of the LNG Project under Part V.

2021 Approval of the Highway Re-alignment Under Part IV

[28] On March 10, 2021, under s. 33 of the *Act*, Pieridae registered (*i.e.* submitted to the Department) the highway re-alignment proposal. Pieridae's registration submission said, in the Executive Summary:

> Pieridae Energy (Canada) Limited (Pieridae) is the Proponent of the realignment of approximately 3.5 km of the existing Marine Drive (Highway 316) in Goldboro, Nova Scotia (the Realignment; the Project). The Realignment will convey traffic along an approximately 5.6 km new road segment around the site for the planned Goldboro LNG facility.

[29] The highway re-alignment would disrupt significant wetland and excavate an area formerly used for gold mining. The disruption meant the project was designated as a Class I undertaking under Schedule A, item F -2, of the *Environmental Assessment Regulations*. This designation triggered the requirement for an environmental assessment under Part IV of the *Act*.

[30] The body of Pieridae's submission explained how the highway re-alignment would serve the LNG Project:

> Pieridae is the Proponent of the Goldboro LNG Project, which entails the development and operation of a natural gas liquification plant, an LNG tanker terminal, marine facilities, a power plant, and a freshwater supply pipeline. During construction, the LNG development also requires extensive temporary laydown areas, as well as a temporary work camp for up to 5,000 workers. The proposed development is the reason behind the planned Realignment to provide the LNG facility with unobstructed access to its marine infrastructure and a safe public transport route around the LNG site (Figure 1.3-1). …

[31] Pieridae's registration of the proposal was followed by a public notice and comments from government sources, members of the public and Mi'kmaq representatives.

[32] The texts of the public comments are in evidence. Most were short missives that either objected to the environmental impact or supported the economic impact of the LNG Project.

[33] The Ecology Action Centre and the NB Alliance, with the Sierra Club Canada Foundation, submitted to the Department a detailed "Submission on Environmental Assessment of Realignment of Marine Drive (Highway 316)", dated April 9, 2021. Their submission advanced two distinct contentions that: (1) infrastructure dedicated to the LNG Project should not move forward without the Greenhouse Gas Management Plan, to mitigate adverse climate impact, that was required by the 2014 conditions, and (2) the highway re-alignment posed a direct risk to the environment from toxic contaminants left by historic gold mining in the area.

[34] On this appeal, the question is whether the Ecology Action Centre and NB Alliance would raise a "serious issue". As a resource for the answer, I will quote at length from their submission to the Minister of April 9, 2021.

[35] Their first contention to the Minister was:

> **2.0 Climate Impacts**
>
> Nova Scotia has committed to follow a pathway to net-zero by 2050, which includes interlinking economics and environmental policies. …
>
> The Environmental Assessment conducted for the Pieridae Goldboro project in 2013 estimated that the overall project would increase Nova Scotia's emissions of CO2 by 15% and increase Canada's emissions by 0.5%, based on 2010 emission estimates. The Ecology Action Centre did its own calculations and estimated that the project would increase Nova Scotia's emissions by 18% based on 2010 emission estimates. This is considered a significant adverse effect which cannot be mitigated effectively, and will cancel emission reductions achieved thus far by the Province of Nova Scotia. …
>
> The provincial Environmental Assessment conducted in 2014 left virtually all analysis of climate impacts and associated adverse environmental effects up to the proponent within the requirement to produce a Greenhouse Gas (GHG) Management Plan. Neither the public, nor the Minister, has seen or approved this plan, creating an unacceptable and grossly inadequate response to the climate crisis. Without a concrete and realistic plan, or any determination as to how the plan will enable full compliance with the GHG emission caps, this project simply cannot be permitted to move forward.
>
> Understandably, the larger Goldboro LNG project is not directly within the scope of the current Environmental Assessment regarding highway realignment. However, approval of this related highway project is essential to enable the larger project as currently designed. Each successive component furthers the pathway for the larger project, which combined with incomplete information on the latest

trends of GHG emissions would effectively set emission achievements in Nova Scotia back by half a decade and deepen the climate crisis.

[36] Then the second contention to the Minister:

3.0 Abandoned Gold Mines and Risk to Project, Community and Environment

As noted by the Proponent the Goldboro area is the site of extensive gold mining activity. See Figure 5.1-4. Disruption of these abandoned gold mines, because of old mine openings and toxic mine wastes, poses significant risks to the project, project personnel, adjacent residences and the environment, and is likely to create significant adverse impacts for which no effective mitigation is proposed.

3.1 Inadequate Consideration of Literature and Expertise on Gold Mining in Nova Scotia

University and government experts have compiled an extensive body of work identifying abandoned gold mine shafts and historical gold mining wastes in Nova Scotia, as well as researching the effects of both.

As a result of this research, we have the benefit of knowing the care that needs to be taken when contemplating the disturbance of this historical legacy, and the risk of harm that could ensue if proper care is not taken. [A footnote cites Appendix A to the Submission which attaches excerpts and detailed summary of the research from 14 historical gold mining districts in Nova Scotia.]

This knowledge base has been utilized since 2006 for the purpose of examining potential industrial development in Goldboro; a major centre of this historical gold mining. The expertise of federal and provincial government civil servants played a crucial role in the environmental assessment of the proposed Keltic Petrochemical complex, and then for Goldboro LNG, proposed for the same industrial site.

Nowhere in the current documents for the Road Re-Alignment Environmental Assessment Registration is there any evidence that the same government experts were consulted about how road construction would be impacted by these previously well identified concerns. …

In both the documents and the associated review processes of the earlier Keltic Petrochemical (2007) and Goldboro LNG (2014) Environmental Assessments, safety and contamination transmission risks posed by heavy construction through areas with abandoned gold mining shafts were noted at many points in the processes. Equal attention was paid to assessing the risks of disturbing prolific and dispersed deposits of mining wastes, both known and unknown. …

It is essential that a proponent contemplating the building of a Nova Scotia Department of Transportation and Infrastructure approved road through an area of

historical gold mining wastes and abandoned shafts should base their assessments on the province's digital database, *Nova Scotia Mine Tailings Data Base*. …

If the proponent has not demonstrated in detail how they have used the database to scope out their own investigation of potential hazards, the Minister can have no assurance that the impacts of the project approval have been properly and comprehensively assessed, and is unable to approve the project. And the public has a right to and a need to see this information to enable meaningful, informed comment on the proposal.

3.2 Inadequate Consideration of Safety and Contamination Risks Posed by Mine Shafts and Mine Wastes

The Environmental Assessment Registration materials contain many instances where information is omitted, and is not fully assessed.

There are highly elevated arsenic levels in sediment shown in SED 5 and SED 7 (right of way locations on shown an Figure 5.1-8), especially near Sable Road. … But since there is no evidence that experts in the field were consulted, it is impossible to assess the adequacy and comprehensiveness of soil sampling and whether any reliable conclusions can be drawn from the data that was gathered.

For a comparison of a minimum baseline of assessment required in these conditions, we refer to the consulting field work of Dr. Mike Parsons, Natural Resources Canada, and others for the Keltic Petrochemical Environmental Assessment. They identify and list areas of mine waste tailings, with a table of tailings sample results for arsenic and mercury contamination. …

…

The proponent in the current environmental assessment provided a map of Abandoned Mine Openings (Figure 5.1-4). This map includes AMOs identified on the two earlier plant site environmental assessments, with the addition of "Golder identified" locations. We conclude this to be Golder Associates …

As the Golder analysis is not provided, the Minister and the public were not provided with crucial information that would permit an informed determination as to the environmental effects and risks associated with abandoned mine openings on site. The geotechnical analysis may have included ground penetrating radar. These would be a crucial part of assessing risk, but have not made available such that a decision can be made in respect of this environmental assessment registration. If the work was performed and conclusions drawn, it must be included.

…

We also include pictures of the extensive mine waste rock field where the road right of way crosses Crusher Brook, and which correspond with one of the "Golder Identified" clusters of AMOs. …

At this Crusher Brook ROW crossing there are extensive underground abandoned mine shafts. The mine shafts are flooded and are connected with the watercourse and extensive wetland above. So as well as the already noted construction safety hazard of collapsing tunnels, there is the risk of contaminant transmission through the flooded mine shafts. A risk from both contaminants introduced during construction, and the construction mobilizing mine waste contaminants that presumably have not yet been mapped for this area. The proponent has not noted assessments of these risks or of the searches for evidence of significant deposits of mine wastes.

…

North of that cluster location, encompassing a road right of way length of about 200 metres, three footprints of historical mine buildings are shown on the same map sheet. Tailings deposits with high concentrations of arsenic and mercury are typically found in the immediate vicinity of these buildings.

As noted in the Keltic Petrochemical EA:

> *"Recent investigations by Parsons et al. (2005) just outside the proposed Keltic Site boundaries and at other sites in Nova Scotia have documented high concentrations of mercury (up to 350 mg/kg) and arsenic (up to 31% by weight) in mine wastes."* [Keltic Petrochemical Provincial Environmental Assessment p 8-143, *with the finding of the tailings by field researchers described pp 8 143-145*]

The north tail of the road right of way we refer to immediately above had the same historical gold mining use as the area just off the Goldboro LNG/Keltic site identified by Parsons et al.

The proponent did not note the presence of the old mine structures. Their presence would indicate that soil samples should have been taken for these locations due to the high likelihood of contaminants associated with the workings. …

Given these gaps and lack of analysis, there may well be other locations in the road right of way that also need further investigation. Having no proponent references, we have no way of knowing what protocol, if any, the proponent used to scope out locations in the right of way that might require investigation for AMO and/or mine wastes. …

The proponent has not shown that there is a formal assessment of soil and rock structure stability in the road right of way. This would appear to be an essential safety issue, both during construction and during years of road use, given the known extensive lacing of mine shaft cavities, and the uncertainty of where they are located. …

…

Finally, we see no protocol for identifying locations in the road right of way that might contain toxic gold mining tailing deposits. Nor do we see a protocol for when tailings are found, how to contain them and prevent them from mobilizing

> into the environment; and/or determining if re-locating them is the best course of action.
>
> Given the many unassessed risks and information gaps, the Minister is not in a position to make a decision based on the proponent's materials. Likewise, the public is prevented from making informed comments on what amounts to a partial environmental assessment. The missing and crucial information presents serious environmental risks and other hazards and makes it impossible to assess the adverse impacts of this project.

[37] As support for their second contention, the Ecology Action Centre's and NB Alliance's submission appended a Geological Survey prepared in 2012 by Natural Resources Canada titled "Environmental geochemistry of tailings, sediments and surface waters collected from 14 historical gold mining districts in Nova Scotia".

[38] Mr. Higgins' affidavit attaches the Department's written "Advice to Minister". That document summarized the comments from the public and the suggestions from government sources. It synopsized the Ecology Action Centre/NB Alliance's submissions as follows:

> Comments from the Ecology Action Centre, in a joint submission with Sierra Club of Canada and the New Brunswick Anti-Shale Alliance expressed concerns relating to the Goldboro LNG project in general, as well as the historic mining activity (AMOs) and potential for water quality impacts.

[39] On April 29, 2021, the Minister issued a written Decision giving conditional environmental assessment approval, under Part IV of the *Act*, to the highway realignment. The Decision, addressed to Pieridae, said:

> This is to advise that I have approved the above project in accordance with Section 40 of the Nova Scotia *Environment Act*, S.N.S. 1994-95 and subsection 13(1)(b) of the Environmental Assessment Regulations, N.S. Reg. 348/2008, made under the Act. Following a review of the information provided by Pieridae Energy (Canada) Ltd., and the information provided during the government and public consultation of the environmental assessment, I am satisfied that **any adverse effects or significant environmental effects of the undertaking can be** adequately **mitigated through compliance with the attached terms and conditions**.
>
> This approval is subject to other approvals required by statute or regulation, including but not limited to, approval under Part V of the *Environment Act* (Approvals and Certificates section).
>
> [bolding added]

[40] The Minister's approval attached the conditions. They required Pieridae to prepare and submit to the Department, for review and acceptance, mitigative plans respecting: (1) sulphide bearing material, for areas with potential acid rock drainage concerns; (2) erosion and sedimentation control and surface water management; (3) wetland management and monitoring; (4) groundwater resources, monitoring and management; (5) blasting; (6) saltwater management; (7) wildlife management; (8) dust suppression and air quality management; (9) noise management; (10) archeological and heritage resources; (11) complaint resolution and community liaison; (12) Mi'kmaq communication and (13) contingencies for accidental occurrences.

[41] As with the 2014 conditions, the 2021 conditions left the content of mitigative measures to Pieridae, subject to approval by the administrator.

[42] Neither Pieridae's mitigative plans, if any have been submitted, nor the administrator's terms of approval are in evidence. As noted earlier, according to the Minister's counsel, that information would be made public with the eventual industrial approval of the LNG Project under Part V of the *Act*.

[43] On April 30, 2021, the Ecology Action Centre and NB Alliance wrote to the Minister and requested full reasons as per s. 10(4) of the *Act*:

> Pursuant to subsection 10(4) of the Environment Act, we request that the Minister provide us with a written statement of the Minister's April 29, 2021 decision in the above-captioned matter, setting out the findings of fact upon which it is based and the reasons for the decision.

[44] On May 3, 2021, the Department emailed its response:

> The Minister's written statement of the decision can be found on our website at: https://www.nova scotia.ca/nse/ea/Realignment-of-Marine-Drive-Project/

The linked website displayed the Minister's Decision of April 29, 2021, quoted above, and its conditions that are extracted above.

The Litigation

[45] On July 12, 2021, the Ecology Action Centre and NB Alliance filed a Notice for Judicial Review in the Supreme Court of Nova Scotia. The Notice sought: (1) an order in the nature of *certiorari* to set aside the Minister's Decision of April 29,

2021, and (2) an order in the nature of *mandamus* to direct the Minister to provide fuller reasons further to s. 10(4) of the *Act*.

[46] Pieridae was notified of the Notice of Judicial Review, but did not participate.

[47] On July 21, 2021, the Minister filed a Notice of Participation.

[48] On January 10, 2022, the Minister filed a Notice of Motion for an order that the Ecology Action Centre and NB Alliance lacked standing for the *certiorari* claim. The Notice also sought a ruling that the sufficiency of the Minister's reasons was not justiciable.

[49] On March 2, 2022, Supreme Court Justice Darlene Jamieson heard the Minister's motions. The judge issued a Decision dated April 13, 2022 (2022 NSSC 104). She held the Ecology Action Centre and NB Alliance lacked public interest standing to seek *certiorari* review of the Minister's Decision of April 29, 2021.

[50] Justice Jamieson's Decision (paras. 51-53) referred to *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 45, per Cromwell J. for the Court. Justice Cromwell said someone seeking public interest standing must show that three factors, weighed cumulatively, favour standing. These are that: (1) "there is a serious justiciable issue raised", (2) the plaintiff has a "real stake or genuine interest in it", and (3) the proposed litigation "is a reasonable and effective way to bring the issue before the courts". Justice Cromwell said the court should exercise its discretion "purposively and flexibly" in a "liberal and generous manner". *Downtown Eastside*, paras. 2-3 and 37.

[51] Justice Jamieson applied the *Downtown Eastside* approach as follows:

- **First factor – serious and justiciable issue:** In the motions judge's view, the issue was justiciable, but not "serious":

> [56] The Department concedes that the issue of whether the Minister's Decision was reasonable is capable of being adjudicated and is, therefore, justiciable. … Clearly, there is a justiciable issue; the question is whether it is also serious. I, therefore, turn to the "serious issue" considerations.
>
> [57] As was noted by Brothers J. in *Bancroft v. Nova Scotia (Lands and Forestry)*, 2021 NSSC 234, at para. 125, this serious issue concept has two aspects to it: (1) the judicial review application must have some prospect

of succeeding on the merits, a requirement that is typically readily met, and it must not be premature; and (2) the issue must also be "serious" in the sense that it is of some public importance. …

[58] While the grounds of review raised by the Applicants in relation to the Decision of April 29, 2021, are not frivolous, I have considerable reservations as to whether they constitute a serious issue. First of all, **the application before the court relates to a decision to allow a highway realignment and not a decision to approve the overall LNG Project**. There are no significant constitutional or *Charter* issues at stake in this matter. The validity of the legislation under which the Decision was made is not challenged. This is a challenge to a discretionary decision, alleging:

> failure to provide internally coherent rationale within the context of the legal and factual constraints on the Minister when making his Decision under section 40

and

> failing to properly consider the comments received from the Applicants and other participants during the public consultation process, including comments received from the Applicants concerning greenhouse gas emissions and the risks of carrying out the project in an area already significantly impacted by historical gold-mining activity and contaminated by toxic gold mine tailing deposits.

[59] As the Department points out, **the Minister's Decision was a discretionary one**, made within the terms of his own statute, following an expert review of the submissions from the Project proponents, Federal and Provincial government reviewers, aboriginal groups, and the public at large. While cases involving discretionary decisions of a Minister, reviewable on a reasonableness standard, have been found to raise important issues grounding the granting of public interest standing, this is not such a case. **The reasonableness of the Minister's Decision in the context of this matter is not an issue of sufficient importance**. **Nor are there any broad or significant impacts to the challenged decision.**

…

[62] I am of the view, based on the record before me, that **the Applicants'** actual **primary concern is with the greenhouse gases that will be emitted by the LNG Project**. **The environmental impacts associated with the road realignment itself are of secondary concern**. While, as pointed out by the Applicants, the road realignment is necessary to enable the LNG Project to go forward, it must not be forgotten that **the decision to approve the LNG Project, notwithstanding the associated greenhouse gas emissions, was made in March 2014**. At that time, the Department of Transportation and Infrastructure Renewal planned to

> undertake the necessary road realignment (Higgins affidavit, para. 10). Although the EAC participated in the environmental assessment process, it did not seek judicial review of the Minister's 2014 decision to approve the LNG Project. **Attempting to attack the 2014 decision now**, **seven years later,** via judicial review of the Highway Realignment Project approval, **does not assist these Applicants with the serious issue question**.
>
> …
>
> [67] I am unable to conclude definitively, based on the Record before the court, that the proposed LNG Project will not be moving forward as originally envisioned. However, the evidence before me is **sufficient to raise a question**, and, while certainly not determinative of the serious issue analysis, **it is none the less a consideration**, along with the other items I have listed above.
>
> [68] In conclusion, in assessing all of the above considerations together, **I am not satisfied that the Applicants have raised a serious issue**. …
>
> [bolding added]

- **Second factor - genuine interest:** The Ecology Action Centre has participated in a number of federal and provincial environmental assessments. Justice Jamieson cited the background of the Ecology Action Centre and NB Alliance on environmental issues, and said (paras. 69-76) they have a "genuine interest" in the issue and "are certainly not mere busy bodies".

- **Third Factor – reasonable and effective manner to litigate:** Justice Jamieson held the considerations for this criterion "appear to favour" public interest standing. After citing the items pertaining to this factor, as set out in *Downtown Eastside* (paras. 50-51), she continued:

> [76] In relation to the above criteria for consideration, it would seem that the Applicants have sufficient resources and capacity to undertake this judicial review, as demonstrated through their involvement in other litigation, and they are represented by counsel who have experience with these issues. There are no realistic alternatives to the Applicants bringing the case via judicial review, as was acknowledged by the Department. The Department concedes that pursuant to s. 138(2) of the *Act*, a decision of the Minister to approve or reject an undertaking registered under Part IV of the *Act* may not be appealed to the Supreme Court of Nova Scotia. Therefore, judicial review appears to be the only mechanism for the Applicants to challenge the Minister's Decision.

> [77] The Applicants bring a perspective to the issues which is distinct from those more directly affected, and such perspective is likely to be only brought forward by public interest applicants. There is no indication that any other individuals or groups were interested in, or deliberately refrained from, bringing a similar challenge. The case is of some public interest given the noted submissions during the public comment period of the environmental assessment from the Applicants and other interest groups and individuals.
>
> [78] A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. While these considerations appear to favour granting public interest standing, I will return to them when the factors are weighed cumulatively.

- **Cumulative analysis:** Justice Jamieson held that the absence of a "serious issue" outweighed the positive aspects of the other two factors. Consequently, she ruled the Ecology Action Centre and NB Alliance would not be granted public interest standing. Absent standing, the judge dismissed their application for *certiorari*:

> [79] When assessing all three factors cumulatively and purposively, I cannot conclude that they support granting public interest standing to the Applicants. I accept that climate change and the environmental impacts from natural gas production are important issues, but **this Decision is not about the approval of the LNG Project; it is about a highway realignment.** While the decision to approve the LNG Project arguably has broad or significant impacts, the same cannot be said of the decision to approve the Highway Realignment Project.
>
> [80] Although it is true that this case is of some public interest and the Applicants bring a distinct perspective to the issues which is likely only to be brought forward by public interest litigants, these considerations do not justify the use of court resources to adjudicate **issues that are not sufficiently serious.** While I make no comment on whether public interest standing will ever be granted where the serious issue requirement is clearly not met, I decline to grant it in the specific circumstances of this case. As the Court of Appeal said in *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80:
>
> > In the broadest sense, this is an access to justice issue. Entertaining **marginal cases** plainly compromises access to justice for more meritorious claims. (para. 65)
>
> [bolding added]

[52] On the separate issue of entitlement to reasons, Justice Jamieson held the request was justiciable and, under s. 10(4) of the *Act*, the Ecology Action Centre and NB Alliance had private interest standing to seek fuller reasons. She directed their *mandamus* application would proceed to a merits hearing.

[53] On May 27, 2022, the Ecology Action Centre and NB Alliance filed a Notice of Application for Leave to Appeal and Notice of Appeal to the Court of Appeal. They challenge the judge's ruling that they lacked public interest standing for the application in the nature of *certiorari*. The Department and Minister have not filed a Notice of Cross-Appeal or Notice of Contention. The issues of justiciability and standing for the *mandamus* application are not appealed.

[54] Pieridae has not participated in the appeal though its counsel attended the hearing in this Court as an observer with a watching brief.

Leave to Appeal

[55] Civil Procedure Rule 90.09 requires leave for an interlocutory appeal. The Ecology Action Centre and NB Alliance applied for leave to appeal.

[56] The motions judge dismissed the Ecology Action Centre's and NB Alliance's application for judicial review by *certiorari*. An appeal from a final order that dismisses a claim does not require leave, despite that the notice of motion was interlocutory. See: *Raymond v. Brauer*, 2015 NSCA 37, paras. 17-18, per Beveridge J.A.; *Van de Wiel v. Blaikie*, 2005 NSCA 14, paras. 12-13, per Cromwell J.A.; *Irving Oil Ltd. v. Sydney Engineering Inc.* (1996), 150 N.S.R. (2d) 29 (S.C.A.D.), at paras. 11-12, per Bateman J.A.

[57] Leave to appeal is unnecessary.

Fresh Evidence

[58] At the hearing before the motions judge, Mr. Higgins' affidavit attached a press statement from Pieridae which said: Pieridae has "made the decision to move Goldboro LNG in a new direction"; "[t]he Project's fundamentals remain strong"; but "cost pressures and time constraints due to COVID-19 have made building the current version of the LNG Project impractical"; and Pieridae will "assess our options and analyze strategic alternatives that could make an LNG Project more compatible with the current environment".

[59] Based on this evidence, Justice Jamieson (para. 67) said the possibility the project would not proceed was "a consideration" that assisted her to conclude there was no "serious issue" to be litigated.

[60] In the Court of Appeal, the Ecology Action Centre and NB Alliance tendered an affidavit dated September 27, 2022, by Genevieve Rondeau, a legal assistant with the Appellants' counsel. Ms. Rondeau's affidavit attached five reports from the media to the effect that the LNG project would proceed, though with some alteration to the original format. The Ecology Action Centre and NB Alliance move for the acceptance of this material as fresh evidence.

[61] The Minister opposes the admission of the tendered fresh evidence as hearsay, among other points. Alternatively, if the Ecology Action Centre's and NB Alliance's fresh evidence is admitted, the Minister moves to add a rebuttal affidavit dated October 31, 2022, by Mr. Higgins. Mr. Higgins' affidavit attaches media reports that reflect a pessimistic outlook for the progress of the LNG Project.

[62] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for special grounds derives from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Admission is governed by: (1) whether there was due diligence to offer the evidence at the initial hearing, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence and (4) whether the fresh evidence could reasonably have affected the outcome. Further, the fresh evidence must be in admissible form. The last point is a subset of the fourth – *i.e.* inadmissible evidence cannot affect the outcome. *Armoyan v. Armoyan*, 2013 NSCA 99, para. 131, leave to appeal denied February 6, 2014 (S.C.C.).

[63] Subject to one exception, I would dismiss both the Ecology Action Centre's and NB Alliance's' motion and the Minister's counter-motion, for two reasons:

- The fresh evidence is irrelevant under *Palmer*'s second test. Mootness is not an issue. Pieridae's applications for the highway re-alignment and for the LNG Project are not withdrawn, remain intact, and have unrevoked ministerial approval under Part IV of the *Act*. If mootness is to be an issue, then the Minister should plead it, and the parties and judge should address the tests for mootness. The Minister's factum (para. 70) acknowledges "mootness was not before the motions judge". Neither the parties nor the judge cited the tests for mootness from *Borowski v. Canada (Attorney*

General), [1989] 1 S.C.R. 342, at 353 or later authorities. I will re-visit this point later (paras. 98-100).

- The motion and cross-motion would submit the media statements for truth of their contents. Unless it is admitted for an exceptional reason, hearsay on a disputed fact is not in admissible form. Inadmissible evidence cannot affect the outcome under *Palmer*'s fourth test. Here, there is no exceptional reason to receive hearsay on this contested fact. Pieridae's evidence is accessible: Pieridae filed the application to the Minister, received the Minister's decision, had notice of the judicial proceedings to challenge it, and its counsel attended the Court of Appeal hearing. Either party could submit an affidavit from a Pieridae deponent or subpoena a Pieridae witness to speak of Pieridae's intention from personal knowledge and respond to cross-examination.

[64] The exception is this. Paragraph 19 of Mr. Higgins' affidavit of October 31, 2022 lists the plans that Pieridae was required to submit by the conditions of the Minister's 2014 and 2021 Decisions, states whether or not each plan has been submitted and, if submitted, whether or not the plan has been approved. Neither the contents of any plan nor the terms of any approval are set out in the Affidavit. Nonetheless, the information in para. 19 is useful for the analysis of the issues on appeal, as I will discuss. I would admit Mr. Higgins' para. 19 as fresh evidence.

Issue

[65] Did the judge err, under the standard of review, by ruling that the Ecology Action Centre and NB Alliance lacked public interest standing to seek judicial review, in the nature of *certiorari*, of the Minister's Decision of April 29, 2021?

Standard of Review

[66] Whether a judge should grant public interest standing is discretionary and attracts deference on appeal: *Downtown Eastside*, para. 20; *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, para. 79. However, the mischaracterization of the legal tests, in their definition or application, is an extractable legal error that is reviewable for correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 26-28, 30-34, 36.

[67] The Supreme Court of Canada has held that an initial denial of public interest standing by a judge or tribunal may be overturned on appeal if, in the application of the tests, the judge or tribunal mischaracterized the legal principles:

- The judge at first instance must assess and cumulatively weigh the factors "in light of the underlying purposes of limiting standing" and "in a flexible and generous manner that best serves those underlying purposes". As the chambers judge in *Downtown Eastside* did not do so, "these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them". *Downtown Eastside*, paras. 20 and 72. See also paras. 21, 23, 26-30, 42, 52-53, 56, 60, 67 and 76 for the application of that standard.

- The denial of public interest standing by the tribunal at first instance was overturned because the tribunal did not apply the required "flexible, discretionary approach", which Chief Justice McLachlin, for the majority, described as follows:

> The whole point is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door.

Delta Air Lines Inc. v. Lukacs, [2018] 1 S.C.R. 6, paras. 16 and 18.

- The judge at first instance must weigh the factors "in light of the underlying purposes of limiting standing … applied in a flexible and generous manner that best serves those underlying purposes" [following *Downtown Eastside*], and also in light of "the purposes that justify *granting* standing" [Chief Justice Wagner's italics]. As the chambers judge had not done so, "it was not open to the chambers judge to afford these concerns the decisive weight he did." *Council of Canadians with Disabilities*, paras. 28-30 and 87. See also paras. 37-40, 48-50, 59, 79, 82-83, 85, 88-94 and 96-97 for the application of that standard.

Public Interest Standing – Legal Principles

[68] In *Downtown Eastside*, Justice Cromwell set out the test:

> [1] … The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out

> the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [2] In exercising their discretion with respect to standing, the **courts weigh three factors in light of these underlying purposes and of the particular circumstances.** The courts consider whether the case raises a **serious justiciable issue**, whether the party bringing the action has a **real stake or a genuine interest** in its outcome and whether, having regard to a number of factors, the proposed suit is **a reasonable and effective means to bring the case to court:** *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. **The courts exercise this discretion** to grant or refuse standing **in a "liberal and generous manner"** (p. 253).
>
> [3] … The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and **weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing**. In my view, **the latter approach is the right one**. ….
>
> [bolding added]

[69] Ten years later, in *Council of Canadians with Disabilities*, Chief Justice Wagner for the Court reiterated and expanded on the purposes and principles that inform *Downtown Eastside*'s three factors:

> [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*** [Chief Justice Wagner's italics] **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* [Chief Justice Wagner's italics] of the purposes in light of the circumstances and 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. …

(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).

[bolding added]

[70] This appeal focuses on whether there is a "serious issue" under the first factor.

[71] In *Downtown Eastside*, Justice Cromwell elaborated on the meaning of "serious issue":

(a) Serious Justiciable Issue

[39] This factor relates to two concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the "seriousness of the issue to the concern about allocation of scarce judicial resources [citation omitted].

…

> [41] This factor also reflects the concern about overburdening the courts with the "**unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody**: *Canadian Council of Churches*, at p. 252; *Finlay*, at pp. 631-33. As discussed earlier, **these concerns can be overplayed and must be assessed practically in light of the particular circumstances** rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.
>
> [42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil* [*Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265], at p. 268) or **an "important one**" (*Borowski*, at p. 589). The claim must be **"far from frivolous"** (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's* [*Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 365], Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a **"foregone conclusion"** (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the purported action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). **Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing issue.**
>
> [bolding added]

[72] Later, Justice Cromwell illustrated how the "serious issue" factor weighed in the cumulative analysis:

> (6) Weighing the Three Factors
>
> …
>
> (a) *Serious Justiciable issue*
>
> [54] As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. …
>
> [55] The appellant submits, however, that the respondents' action does not disclose a serious issue with respect to the constitutionality of s. 213(1)(c) (formerly s. 195.1(1)(c)) because the Court has upheld that provision in

> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *R. v. Skinner*, [1990] 1 S.C.R. 1235.
>
> [56] On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects of the statement of claim raise serious issues as to the invalidity of the legislation. **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. They can be assessed using other appropriate procedural vehicles.**
>
> [bolding added]

[73] In *Council of Canadians with Disabilities*, Chief Justice Wagner summarized "seriousness":

> (b) *Serious Justiciable Issue*
>
> [48] … 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).
>
> [bolding added]

[74] In *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80, at para. 65, Justice Bryson said "marginal cases" were insufficiently serious for public interest standing. Justice Jamieson's Decision, para. 80, adopted this passage.

Application of the Principles

[75] The Ecology Action Centre's and NB Alliance's submission to the Minister made two contentions respecting (1) climate impact and (2) risk to the environment from former gold mining contaminants. These are quoted above (paras. 35-36). The motions judge said neither was "serious" and denied public interest standing. In my respectful view, the analysis of the judge for each contention demonstrates an error in principle, for the following reasons.

First Contention – Climate Impact

[76] Justice Jamieson said (para. 62) "the decision to approve the LNG Project, notwithstanding the greenhouse gas emissions, was made in March 2014" and "[a]ttempting to attack the 2014 decision now, seven years later, via judicial review of the Highway Realignment Project approval, does not assist these Applicants with the serious issue question". The judge did not cite issue estoppel or its criteria. Nor was issue estoppel cited to the judge in argument. Nonetheless, she effectively treated the Ecology Action Centre's and NB Alliance's 2021 submission as subject to issue estoppel by the Minister's 2014 Decision.

[77] Issue estoppel involves a two-step analysis. It applies when:

> (1) the "same question" has been "distinctly put in issue and directly determined" by an earlier final "judicial" decision between the same parties or their privies (a "judicial" decision may include a decision by an administrative decision-maker who is required to act judicially); and
>
> (2) the court declines to exercise its residual discretion to consider the issue in the interests of justice.

Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, at paras. 24-25, 33, 35-42, 54-60, 62-67, per Binnie J. for the Court.

[78] I will leave aside the questions of whether the Minister's 2014 Decision is "judicial" and whether there is a basis to exercise the residual discretion. Issue estoppel does not apply because the Ecology Action Centre's and NB Alliance's 2021 submission did not raise the "same question" that was determined in 2014.

[79] The contention in the Ecology Action Centre's and NB Alliance's 2021 submission to the Minister was: (1) the 2014 Approval "left virtually all analysis of

climate impacts … up to the proponent within the requirement to produce a Greenhouse Gas (GHG) Management Plan", (2) "[n]either the public, nor the Minister, has seen or approved this plan", and (3) "[w]ithout a concrete and realistic plan, or any determination as to how the plan will enable full compliance with the GHG emission caps, this project simply cannot be permitted to move forward" (full passage quoted above, para. 35). The Ecology Action Centre's and NB Alliance's brief to the motions judge (paras. 15 and 46) cited their submission to the Minister as a platform for the proposed judicial review.

[80] The 2021 contention did not "attack" the 2014 Decision, as the motions judge characterized it. Rather, it relied on the 2014 Decision. The point was that one of the 2014 Decision's mandatory conditions had not been met and, absent the fulfillment of that condition, the construction of permanent capital infrastructure dedicated to the LNG Project would be inconsistent with the 2014 Decision. That contention does not generate an issue estoppel by the 2014 Decision. It suggests an interpretation of the 2014 Decision, and the main question will be whether that interpretation is correct.

[81] Is the contention frivolous or marginal, and is its failure a foregone conclusion? Pertaining to this contention are the following:

- The 2014 Decision said the Approval was "subject to" the conditions, including, in article 2.0, that Pieridae "must provide for review and approval … A Greenhouse Gas (GHG) Management Plan" with a "full accounting of all anticipated GHG emissions … and demonstration of how the facility achieves an overall carbon intensity in line with best-in-class" and "an independent technical review" (article 2.2).

- Article 2.0 says the Greenhouse Gas Management Plan must be submitted "[p]rior to application for Part V approval". Part V approval would precede construction of the permanent infrastructure for the LNG Project.

- Further to article 1.3 of the 2014 conditions and Regulation 27 of the *Environmental Assessment Regulations*, work on the undertaking was to commence within two years of the approval, *i.e.* by March 21, 2016, unless the Minister approved an extension in writing. There is no evidence of a ministerial written extension.

- Stringing this together, the Ecology Action Centre and NB Alliance would contend the 2014 Decision and conditions reasonably showed an

> intent that the Greenhouse Gas Management Plan was to be submitted and approved by March 21, 2016, as a basis for later activity on the LNG Project.
>
> - However, by 2021, there was no Greenhouse Gas Management Plan, either submitted by Pieridae or approved by the Minister or administrator.
>
> - Yet, in 2021, the Minister gave environmental approval to permanent infrastructure (the highway re-alignment) dedicated to the LNG Project.

[82] On the judicial review, the Ecology Action Centre and NB Alliance would contend that the Minister's 2021 Decision was inconsistent with the 2014 Decision, and would offend the reasonableness standard, as explained in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653.

[83] I am merely reciting the proposition to assess its "seriousness". Nothing in my reasons should be taken as commenting on ultimate merit, which is for the reviewing judge. All that need be said now is that, under the formulations of the "serious issue" test for public interest standing, the contention is "far from frivolous", not "marginal" and its failure is not a "foregone conclusion". Further, the concern about climate change is sufficiently "important" for public interest standing. On the latter point see *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, paras. 2, 7 and 12.

[84] As the motions judge's reasons mistook the matter of issue estoppel, her analysis did not address the Ecology Action Centre's and NB Alliance's submission to the Minister. This was an error of legal principle.

Second Contention – Contaminants

[85] The Ecology Action Centre's and NB Alliance's submission to the Minister on this point is quoted earlier (para. 36). The motions judge held it was not "serious" for several reasons. I will address each.

[86] **First – "Highway re-alignment":** Justice Jamieson said:

> [58] While the grounds of review raised by the Applicants in relation to the Decision of April 29, 2021, are not frivolous, I have considerable reservations as to whether they constitute a serious issue. First of all, the application before the court **relates to a decision to allow a highway realignment** and not a decision to approve the overall LNG project.

> [59] As the Department points out, the Minister's Decision was a discretionary one, made within the terms of his own statute, following an expert review of the submissions from Project proponents, Federal and Provincial government reviewers, aboriginal groups, and the public at large. While cases involving discretionary decisions of a Minister, reviewable on a reasonableness standard, have been found to raise important issues grounding the granting of public interest standing, **this is not such a case**. The reasonableness of the Minster's Decision in the context of this matter is **not an issue of sufficient importance.**
>
> …
>
> [79] … I accept that climate change and the environmental impacts from natural gas production are important issues, but the Decision is not about the approval of the LNG project; **it is about a highway realignment.** …
>
> [bolding added]

[87] The judge held the issue was not serious because it involved only a highway re-alignment, not climate change.

[88] With respect, the 2021 Decision involves a highway re-alignment just as the 2014 Decision involved construction work in an industrial park. In neither case is the location or architecture the relevant target of analysis. We are dealing with the *Environment Act*. The focus should be on the environmental effect.

[89] **Second – "Secondary concern":** Addressing the environmental effect, the motions judge said:

> …
>
> 62 … the Applicants primary concern is with the greenhouse gases that will be emitted by the LNG Project. The environmental impacts associated with the road realignment itself are of **secondary concern**.
>
> [bolding added]

[90] Whether a submission may be triaged as subjectively primary or secondary to the applicant is irrelevant to the applicant's standing. The applicant is entitled to advance more than one submission and have each analyzed before standing is denied. The question, for either submission, is whether the potential environmental effect is "serious", as that term was explained in *Downtown Eastside* and *Council of Canadians with Disabilities*.

[91] **Third – Assessment of the actual submission:** In *Downtown Eastside*, para. 41, Justice Cromwell cautioned that the concern about "marginal or

redundant suits … can be overplayed" and "must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically".

[92] The Ecology Action Centre's and NB Alliance's submission to the Minister explained in detail, with supporting material, that disturbance of soils in this area of abandoned gold mines posed significant risks from toxic mine wastes and tailings and elevated arsenic and mercury levels (above, para. 36). The Department's "Advice to Minister" compressed the submission into one generic sentence (above, para. 38). The Ecology Action Centre's and NB Alliance's brief to the motions judge (para. 46) cited their submissions to the Minister and said the judicial review would consider whether the Minister, as decision maker, sufficiently addressed their submissions under *Vavilov*'s criteria. *Vavilov*, paras. 127-28, explained how reasons are to address the submissions.

[93] The motions judge's analysis did not address the Ecology Action Centre's and NB Alliance's submission to the Minister, except to say it related to a highway re-alignment and was secondary to climate change.

[94] The denial of public interest standing because the standing-applicant's proposed contentions are not "serious" requires a practical assessment of the contentions. A peremptory disposition does not suffice. With respect, that assessment is absent from the motions judge's reasons.

[95] **Fourth – Statutory benchmarks:** The judicial review would apply the reasonableness standard. *Vavilov* discussed the factors that may assist the determination of whether an administrative decision is, or is not reasonable. The majority's ruling said the "most salient" factor is "the governing statutory scheme":

> [106] … However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: the governing statutory scheme; …
>
> …
>
> (a) *Governing Statutory Scheme*
>
> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. …
>
> …

> [110] … What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. …

[96] In our case, the scheme of the *Environment Act* offers a qualitative appraisal of "seriousness":

- Section 2 states the *Act*'s purposes as including "maintaining environmental protection as essential to the integrity of ecosystems, human health and socio-economic well-being of society" among other broad objectives. Clearly the statute's purposive ambit extends beyond neighbourhood nuisances. The *Environmental Assessment Regulations* implement those purposes.

- According to Regulations 3 and 11 and Schedule A (Class I - item F 2), the highway re-alignment, if unmitigated, would cause what Reg. 13(1)(b) terms as "adverse" and "significant environmental effects". Regulation 2(1) defines "significant" as an "adverse" effect resulting from the effect's magnitude, geographic extent, duration, frequency, degree of reversibility or possibility of occurrence.

- The Minister's Decision of April 29, 2021 prescribed conditions to mitigate those significant adverse effects. Of course, the Minister's statutory discretion affects the application of reasonableness. But, as the majority noted in *Vavilov* (para. 108), "there is no such thing as absolute and untrammelled 'discretion' ", and "any exercise of discretion must accord with the purposes for which it was given". The judicial review would consider whether the mitigative measures were reasonably consistent, under *Vavilov*'s approach to reasonableness, with the *Environment Act*'s purpose to mitigate significant adverse environmental effects.

[97] The designation of the highway re-alignment as having a "significant" and "adverse" environmental effect informs the assessment of "seriousness". The motions judge's analysis does not mention the statutory benchmark.

Potential Mootness as a "Consideration"

[98] At the hearing in the Supreme Court, Mr. Higgins' affidavit attached a press statement of July 2, 2021 from Pieridae. The statement included:

> While Pieridae has made tremendous progress in advancing the Goldboro LNG Project, as of June 30, 2021, we have not been able to meet all the key conditions necessary to make a final investment decision. Following consultation with our Board, we have made the decision to move Goldboro LNG in a new direction. The Project's fundamentals remain strong; robust LNG demand from Europe and high global LNG prices, Indigenous participation, a net-zero emissions pathway forward, and support from jurisdictions across Canada. This speaks to our ongoing efforts to find a partner to take advantage of these opportunities.
>
> That said, it became apparent that cost pressures and time constraints due to COVID-19 have made building the current version of the LNG Project impractical.
>
> We will now assess our options and analyze strategic alternatives that could make an LNG Project more compatible with the current environment. …

[99] Justice Jamieson (para. 64) cited the Minister's proposition that the matter was "potentially … moot". As referenced earlier, the judge said Pieridae's press statement was "sufficient to raise a question", which was "a consideration" in her ruling that there was no "serious issue". For convenience, I restate her finding:

> [67] I am unable to conclude definitively, based on the Record before the court, that the proposed LNG Project will not be moving forward as originally envisioned. However, the evidence before me is sufficient to raise a question, and, while certainly not determinative of the serious issue analysis**, it is none the less a consideration**, along with the other items I have listed above.
>
> [68] In conclusion, **in assessing all of the above considerations** together, I am not satisfied that the Applicants have raised a serious issue. …
>
> [bolding added]

[100] With respect, to treat this as a negative consideration was an error in principle, for the following reasons:

- In April 2021, on Pieidae's application, the Minister gave environmental assessment approval of the highway re-alignment. Pieridae has not withdrawn its application and the Minister has not revoked the approval. For judicial purposes, the issue is alive. There is no doctrine of "potential mootness".

- Mootness was not before the motions judge. The Minister's factum to this Court (para. 70) acknowledges:

  > The issue of mootness was also not before the Motions Judge and therefore the Respondents submit that she was never asked or required to

> carry out a mootness analysis pursuant to the decision in *Borowski v. Canada (Attorney General)*, [1989] S.C.R. 342. …

- If mootness is to be an issue, the Minster should plead it. The "blunt instrument of standing denial" should not replace other well-established litigation strategies: *Downtown Eastside*, para. 64; *Council of Canadians with Disabilities*, para. 73.

- Then the Minister should support this pleading with admissible evidence. That means an affidavit or oral testimony, by subpoena if necessary, from a Pieridae witness who could speak from personal knowledge and be cross-examined. It does not mean unsworn evidence from Pieridae, exhibited as untestable hearsay to the affidavit of the Department's Mr. Higgins, immunizing it from meaningful cross-examination.

- Finally, if mootness is to be a consideration, the judge's reasons should apply the tests for mootness. The judge's reasons did not cite the layered tests from *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at 353, *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3, paras. 17-23, or any other authority on mootness.

Sufficiency of Reasons as a "Serious" issue

[101] Section 10(4) of the *Environment Act* says:

> 10(4) Where the Minister, administrator or delegated agent makes a decision under Section 34, 35, 40, 52, 54 or 56, any person who asks for a reason for the decision shall, within thirty days, and subject to the *Freedom of Information and Protection of Privacy Act*, be furnished with a written statement of the decision, setting out the findings of fact upon which it is based and the reasons for the decision.

[102] Literally, this requirement applies to a decision by the Minister or by an administrator as the Minister's delegate. It applies to decisions under s. 40, including an approval of Pieridae's mitigative plans according to the conditions of the Minister's 2014 Decision or 2021 Decision, both issued under s. 40. The words "any person" include the Ecology Action Centre and NB Alliance.

[103] The broad scope of section 10(4) affirms that the environment is a matter of general public interest. This follows also from s. 2, stating the *Act*'s purpose as including "maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society".

[104] The Minister's 2014 and 2021 Decisions left the terms of any mitigative measures to Pieridae, subject to approval by the administrator. The terms or contents of those plans and approvals are not in evidence. As I have mentioned, the Minister's counsel informed the Court that the information would become publicly available with the Minister's eventual industrial approval under Part V of the *Act*. However, by then, the LNG Project would have moved past Part IV's environmental assessment, which generated the requirement for the mitigative plans, to be overtaken by the Minister's industrial approval.

[105] The Ecology Action Centre and NB Alliance submit that the Minister's reasons are inadequate and that itself is a serious issue worthy of public interest standing. They cite *Vavilov*, where the majority explained how the decision maker's reasons are instrumental to the application of reasonableness standard (*Vavilov*, paras. 79-81, 84-86, 95, 102 and 127). They say it makes no sense to send their motion for fuller reasons to a merits hearing while dismissing their underlying application for judicial review, to which the fuller reasons would pertain.

[106] Citing s. 10(4), the Ecology Action Centre and NB Alliance applied for fuller reasons. The Department declined. The adequacy of the Minister's reasons will be litigated in the upcoming *mandamus* hearing. I prefer not to make a comment that might influence the merits judge on that application.

[107] For this appeal, it is unnecessary to address the adequacy of the Minister's reasons. As I have discussed, the Ecology Action Centre's and NB Alliance's two contentions, on climate change and contaminants, are each "serious". As I will discuss next, that suffices for public interest standing. An application for standing is not a motion to strike pleadings or for summary judgment. It need not assess every pleaded argument. Nor does it pre-empt other procedural mechanisms to screen discrete issues or the merits judge's function to rule on each argument raised. See *Downtown Eastside,* paras. 42 and 56 and *Council of Canadians with Disabilities*, para. 49.

Re-assessment of Public Interest Standing

[108] Once an appeal court determines that the motions judge erred in principle, that appeal court should re-assess and cumulatively weigh the three factors purposively and determine whether the error was material or overriding: *Council of Canadians with Disabilities*, paras. 95-97; *Downtown Eastside*, para. 53.

[109] Under the first factor, the issues on judicial review are justiciable. The exercise of a Minister's statutory discretion is reviewable for reasonableness as explained in *Vavilov*, paras. 88-90 and 108-110.

[110] Still with the first factor, the two issues raised by the Ecology Action Centre and NB Alliance are "serious". For the reasons I have expressed, the Ecology Action Centre's and NB Alliance's contentions on climate change and contaminants are far from frivolous, not marginal, their failure is not a foregone conclusion and their importance is worthy of a merits analysis.

[111] The motions judge held *Downtown Eastside*'s second and third factors favoured standing. I adopt her views:

- The Ecology Action Centre and NB Alliance are not "busybodies". Their affidavits show a significant track record and a genuine interest, on behalf of their thousands of members, in the environmental issues at play.
- This judicial review is a reasonable and effective way to litigate the matter. The Ecology Action Centre and NB Alliance have the resources and capacity, with experienced counsel, to assist the court. The court will hear an opposing view. As Justice Jamieson said (para. 76), "there are no realistic alternatives to the Applicants bringing the case via judicial review, as was acknowledged by the Department".

[112] Each of *Downtown Eastside*'s three factors, analyzed in tandem with the underlying purposes for and against standing as explained by Justice Cromwell and Chief Justice Wagner, supports public interest standing. Consequently, so does the cumulative weighing.

[113] It follows that the motions judge's treatment of the "serious issue" criterion as a decisive negative factor was an overriding or material error (*Council of Canadians with Disabilities*, para. 96).

Conclusion

[114] I would admit Mr. Higgins' para. 19, but otherwise dismiss the motion and counter-motion to admit fresh evidence.

[115] I would allow the appeal and order that the Ecology Action Centre and New Brunswick Anti-Shale Gas Alliance Inc. have public interest standing to seek judicial review, in the nature of *certiorari*, of the Minister of Environment and

Climate Change's environmental assessment approval of the highway re-alignment, dated April 29, 2021, under Part IV of the *Environment Act*.

[116] Justice Jamieson's Order recites that the parties agreed they would bear their own costs of the proceeding in the Supreme Court of Nova Scotia. I would not disturb that outcome. In this Court, the parties sought costs from each other. I would order the Respondents to pay a single amount of $2,500 for both Appellants jointly, all inclusive, as costs of the appeal.

Fichaud, J.A.

Concurred: Wood, C.J.N.S.

Van den Eynden, J.A.

TAB 4

IN THE COURT OF APPEAL.

THE KING v. ELECTRICITY COMMISSIONERS.

Ex parte LONDON ELECTRICITY JOINT COMMITTEE COMPANY (1920), LIMITED, AND OTHERS.

[1924] 1 K.B. 171

COUNSEL: Talbot K.C., Tyldesley Jones K.C., W. S. Kennedy, T. R. Harker and A. Tylor for the appellants.

Sir Douglas Hogg A.-G., Macmorran K.C. and Bowsteadfor the respondents.

SOLICITORS: For appellants: Sydney Morse; Ashurst, Morris, Crisp & Co.; Sherwood & Co.; Slaughter & May.

For respondents: The Solicitor to the Treasury.

JUDGES: Bankes, Atkin, and Younger L.JJ.

DATES: 1923 July 9, 10, 11, 12, 27.

Prohibition – Certiorari – Electricity Commissioners – Scheme – Electricity District – Joint Electricity Authority – Delegation of Powers – Separate Committees – Draft Order – Operation subject to Confirmation and Approval – Minister of Transport – Resolutions of Parliament – Electricity (Supply) Act, 1919 (9 & 10 Geo. 5, c. 100), ss. 5, 6, 7.

The Electricity Commissioners, a body established by s. 1 of the Electricity (Supply) Act, 1919, are empowered by that Act to constitute provisionally separate electricity districts and in certain events to formulate schemes for effecting improvements in the existing organization for the supply of electricity in any electricity district so constituted, and are directed to hold local inquiries upon the schemes. A scheme so formulated may provide for the incorporation of a joint electricity authority representative of authorized undertakers within the electricity district.

By s. 6, sub-s. 2, of the Act a scheme may provide for enabling the [*172] joint electricity authority to delegate, with or without restriction, to committees of the authority any of the powers or duties of the

authority. By s. 7, sub-s. 1, the Commissioners may make an order giving effect to a scheme embodying the decisions they arrive at after holding a local inquiry, and present the order for confirmation by the Minister of Transport. By s. 7, sub-s. 2, the order after confirmation is to be laid before each House of Parliament and is not to come into operation until approved, with or without modification, by a resolution passed by each House, and when so approved is to have effect as if enacted in the Act of 1919.

The Commissioners constituted an electricity district and formulated a scheme providing for the incorporation of a joint electricity authority which purported to be representative of the authorized undertakers, both local authorities and electricity companies, in the district so constituted. The scheme provided that the joint authority should at its first meeting appoint two committees, namely a local authority committee and a company committee, and assigned to each of these committees definite and separate portions of the electricity district, and delegated separate powers and duties to each committee in respect of the portion assigned. The Commissioners began to hold a local inquiry with a view to making an order embodying the scheme.

Certain companies affected by the scheme applied for writs of prohibition and certiorari on the ground that the scheme was ultra vires in so far as it compelled the joint authority to appoint the two committees and delegate to them powers and duties of the joint authority:–

Held, that the scheme was ultra vires, and that a writ of prohibition should issue prohibiting the Commissioners from proceeding with the further consideration of the scheme, notwithstanding that an order embodying the scheme could not come into operation until confirmed by the Minister of Transport and approved by resolutions of the Houses of Parliament.

Church v. Inclosure Commissioners (1862) 11 C. B. (N. S.) 664 approved and followed.

Reg. v. Hastings Local Board (1865) 6 B. & S. 401 distinguished.

Order of Divisional Court reversed.

APPEALS from orders of a Divisional Court discharging a rule nisi for a prohibition and a rule nisi for a certiorari, which rules had been granted on the motion of the London Electricity Joint Committee Company (1920), Ld., hereinafter called the Joint Committee Company, the City of London Electric Lighting Company, Ld., the County of London Electric Supply Company, Ld., the Lotting Hill Electric Lighting Company, Ld., the South London Electric Supply Corporation, Ld., the South Metropolitan Electric Light and Power Company, Ld., and the West Kent Electric Company, Ld., hereinafter called the relators. [*173] The Electricity Commissioners were established by s. 1, sub-s. 1, of the Electricity (Supply) Act, 1919, to promote, regulate, and supervise the supply of electricity and to exercise and perform the powers and duties conferred and imposed upon them by the Act, and subject thereto to act under the general directions of the Board of Trade. (1) By sub-s. 2 they are not to exceed five in number, of whom one is to be chairman, and are to be appointed by the Board of Trade. (1)

By s. 5, sub-s. 1, of the Act they may provisionally determine that any district in the United Kingdom shall be constituted a separate electricity district for the purposes of the Act, and, in considering what areas are to be included in a district, areas shall be grouped in such manner as may seem to the Commissioners most conducive to the efficiency and economy of the supply of electricity and to

convenience of administration. Before finally determining the area of the district, they are to publish notice of their intention so to do and of the area proposed to be included in the district, and also to give notice thereof to all county councils, local authorities, and authorized undertakings any part of whose county district or area of supply is proposed to be included in the district, and, if any objection or representation is made on account of the inclusion in or the exclusion from the proposed district of any area, the Commissioners are to hold a local inquiry with reference to the area to be included in the proposed district.

By sub-s. 2 where it appears to the Commissioners with respect to any electricity district so provisionally determined that the existing organization for the supply of electricity therein should be improved, they are to give notice of their intention to hold a local inquiry into the matter, and to give to authorized undertakers, county councils, local authorities, railway companies using or proposing to use electricity for traction purposes, large consumers of electricity, and other

(1) Now the Minister of Transport, by virtue of the Ministry of Transport (Electricity Supply) Order, 1920 (Statutory Rules and Orders, 1920, No. 58), made under s. 39 of the Electricity Supply Act, 1919. [*174] associations or bodies within the district which appear to the Commissioners to be interested, an opportunity to submit, within such time as the Commissioners may allow, a scheme or schemes for effecting the improvement, including proposals for altering or adjusting the boundaries of the district and, where necessary, the formation of a joint electricity authority for the district. By sub-s. 3 if no scheme is submitted within the time so allowed, or if no scheme submitted is approved by the Commissioners, they may themselves formulate a scheme. By sub-s. 4 the Commissioners are to publish, in such manner as they think best adapted for ensuring publicity, any scheme which they have approved, with or without modifications, or which they have themselves formulated, and are to hold a local inquiry thereon.

By s. 6, sub-s. 1, a scheme under s. 5 may provide for the establishment and (where desirable) the incorporation with power to hold land without licence in mortmain, of a joint electricity authority representative of authorized undertakers within the electricity district, either with or without the addition of representatives of the council of any county situate wholly or partly within the district, local authorities, large consumers of electricity, and other interests within the district, and, subject as later in the Act provided, for the exercise by that authority of all or any of the powers of the authorized undertakers within the district, and for the transfer to the authority of the whole or any part of the undertakings of any of those undertakers, upon such terms as may be provided by the scheme, and the scheme may contain any consequential, incidental, and supplemental provisions which appear to be expedient or proper for the purpose of the scheme, including provisions determining the area included in the electricity district: Provided that no such scheme shall provide for the transfer to the authority of any part of an undertaking except with the consent of the owners thereof.

The Act contains the following provisions: Sect. 6, sub-s. 2, "The scheme may provide for enabling the joint electricity authority to delegate, with or without restrictions, to [*175] committees of the authority any of the powers or duties of the authority." …. Sect. 7, sub-s. 1, "The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the order for confirmation by the Board of Trade (1), who may confirm the order either without modification or subject to such modifications as they think fit." Sub-s. 2, "Any such order shall be laid, as soon as may be after it is confirmed, before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act." ….

It appeared that the London County Council was unwilling to transfer its powers of purchase unless there were one electricity authority only for the whole district, and that the electric lighting companies

were unwilling to transfer their generating stations unless there were two authorities for the district. In order to get rid of this difficulty the Electricity Commissioners in February, 1923, in pursuance of s. 7 of the Act of 1919 and of all other powers enabling them in that behalf, published a document which they described as a "Draft Order under s. 7 of the Electricity (Supply) Act, 1919, constituting the London and Home Counties Electricity District and establishing and incorporating the London and Home Counties Joint Electricity Authority." It proposed as its short title "The London and Home Counties Electricity District Order, 1923." After defining "The Joint Authority" as the London and Home Counties Joint Electricity Authority established under the scheme set out in the schedule to the order; "The District" as the London and Home Counties Electricity District constituted under the said scheme, and "Constituent Body" as any authorized undertaker, county council, or other body entitled under the said scheme to appoint or elect or participate in the election of members of the joint authority, the order provided as follows:–

(1) See note (1) ante, p. 173. [*176]

> "3. The scheme set out in the schedule to this order shall operate and have effect, and accordingly the London and Home Counties Electricity District shall be and is hereby finally determined and the London and Home Counties Joint Electricity Authority shall be and is hereby established and incorporated."
>
> "6. This order shall come into operation as soon as it has been approved by a resolution passed by each House of Parliament."

The scheme set out in the schedule to the above order was formulated by the Electricity Commissioners and published by them on February 8, 1923, under s. 5 of the Electricity (Supply) Act, 1919, for effecting an improvement in the existing organization for the supply of electricity in a district comprising London and Middlesex, and portions of Berkshire, Buckinghamshire, Essex, Hertfordshire, Kent, and Surrey, which was to be constituted a separate electricity district and to be called the London and Home Counties Electricity District.

Sect. 2 of the scheme provided that there should be established a joint electricity authority under the name of the London and Home Counties Joint Electricity Authority, a body corporate with a perpetual succession and a common seal and power to hold land without licence in mortmain.

Sect. 3, sub-s. 1, provided that the joint authority should consist of the members specified in the first annex to the scheme, which annex should be deemed to form part of the scheme and have effect accordingly. Sect. 4 provided that the joint authority might appoint such officers and servants at such salaries, wages, or remuneration as the joint authority might determine.

The scheme contained the following sections:–

> "7. – (1.) The Joint Authority shall, at their first meeting, appoint two Committees of the Joint Authority, and thereafter keep such Committees appointed until such time as they have exercised and performed the powers and duties conferred upon them under this Scheme. The said Committees shall be constituted in the style and manner following:– [*177]
> "(a) A Committee of Local Authority Undertakers (hereinafter called 'the Local Authority Committee') consisting of eight members appointed or elected by the Local Authority undertakers as set out in Part II. of the First Annex hereto.

"(b) A Committee of Company undertakers (hereinafter called 'the Company Committee') consisting of the six members appointed or elected by the Company undertakers within the administrative county of London as set out in Part II. of the First Annex hereto. …."

"9. – (1.) The Joint Authority shall delegate to the Local Authority Committee and to the Company Committee respectively such of the powers and duties of the Joint Authority as are specified in the Third Annex to this Scheme, which Annex shall be deemed to form part of this Scheme and shall have effect accordingly: ….

"(2.) Subject as hereinafter provided, the delegated powers and duties specified in the Third Annex shall be exercised and performed by the Local Authority Committee and the Company Committee respectively within the portions of the District specified in the Fourth Annex to this Scheme, which Annex shall be deemed part of this Scheme and shall have effect accordingly. ….

"(3.) The Local Authority Committee and the Company Committee respectively shall, in the name and on behalf of the Joint Authority, exercise or perform any delegated power or duty in accordance with the provisions of this Scheme in like manner as the Joint Authority could have exercised or performed such power or duty if the said power or duty had not been delegated to the aforesaid Committees."

By Part I. of the first annex to the scheme it was provided that the members of the joint authority should be appointed by:–

(a) Local authorities supplying electricity within the district under statutory powers, therein called "local authority undertakers";

(b) companies or persons supplying electricity within [*178] the Administrative County of London under statutory powers, therein called "company undertakers inside London";

(c) companies or persons supplying electricity within the district but outside the Administrative County of London under statutory powers, therein called "company undertakers outside London";

(d) power companies supplying electricity within the district under statutory powers, therein called "power companies";

(e) county councils whose counties were wholly or partly within the district;

(f) the Railway Companies' Association to represent the railway companies operating in the district.

The members of the joint authority were to be appointed or elected by the constituent bodies in the following proportions: eight by the local authority undertakers; six by the company undertakers inside London; one by the company undertakers outside London; one by the power companies; six by the London County Council; three by the other county councils, and two by the Railway Companies' Association.

Part II. of the first annex was headed "Members to be appointed or elected by Constituent Bodies," and was as follows:–

	Members.
1. Authorized undertakers supplying electricity:–	
(a) Local authority undertakers	8
(b) Company undertakers within the Administrative County of London	6
(c) Company undertakers outside the the Administrative County of London..	1
(d) Power companies	1
2. County councils:–	
The London County Council	6
The County Council of Middlesex } ,, ,, Buckingham }	1

[*179]

	Members.
The County Council of Essex } ,, ,, Hertford }	1
,, ,, Surrey } ,, ,, Kent }	1
3. Railway companies:–	
The Railway Companies' Association	2
Total ..	27

The third annex to the scheme was headed "Powers and duties of the Joint Authority to be delegated to the Local Authority Committee and the Company Committee respectively in accordance with the provisions of s. 9 of the Scheme." It contained: 1. Powers and duties relating to the generation and transmission of electricity and to the supply of electricity in bulk to authorized undertakers; 5. The carrying out of negotiations for bulk supplies on behalf of authorized distributors outside the Administrative County of London if so required by such distributors with any authorized undertakers empowered to give bulk supplies; 6. "Power to incur expenditure on capital account within the limits of estimates submitted by the aforesaid Committees to the Joint Authority and approved by the Commissioners from time to time: Provided that for the purposes of s. 17 of the Electricity (Supply) Act, 1919, but without prejudice to the provisions of s. 1 of the Electricity (Supply) Act, 1922, the prior approval of the Commissioners shall not be required to capital expenditure not exceeding 5000/."; 7. Power to incur expenditure on revenue account; 9. Powers under s. 4 of the scheme (relating to the

appointment and remuneration of officers and servants) in so far as relates to the officers and servants of the Local Authority Committee and the Company Committee respectively.

The fourth annex specified the portions of the district within which the Local Authority Committee and the Company Committee respectively were to exercise and perform the powers and duties delegated to the aforesaid committees by the .joint authority in accordance with the provisions of s. 9 of the scheme. Shortly, the areas of supply of thirty-nine [*180] local authorities as defined by the same number of Electric Lighting Orders were assigned to the Local Authority Committee, and the areas of supply of thirty-two electricity companies as defined by thirty-two other Orders were assigned to the Company Committee.

On March 12, 1923, the Electricity Commissioners opened a local inquiry into the scheme so published. Objection was taken by counsel for the relators and for a number of other companies that the scheme was ultra vires. On March 16, 1923, the relators obtained rules nisi:–

(1.) For a writ of prohibition to prohibit the Electricity Commissioners from proceeding with the further consideration of the scheme published on February 8 and from making an Order giving effect thereto, and

(2.) for a writ of certiorari directed to the said Commissioners ordering them to remove the said scheme into the King's Bench Division. The grounds for the rule in each case were that the provisions of the scheme:–

(a) compelling the Joint Electricity Authority at their first meeting to appoint and keep appointed two committees of the authority, and

(b) compelling the authority to delegate to the aforesaid two committees the powers and duties of the authority mentioned in the third annex to the scheme,

were ultra vires of the Electricity Commissioners and contrary to the provisions of the Electricity (Supply) Acts, 1919 and 1922.

On April 12, 1923, the Divisional Court (Lord Hewart C.J. and Avory and Roche JJ.), without deciding whether a writ of certiorari or prohibition would lie to the Electricity Commissioners, or whether the scheme was ultra vires or not, discharged the rules on the ground that the scheme did not become operative until it had been approved by the Minister of Transport and by a resolution of each House of Parliament, and consequently that at the present stage neither rule ought to be granted.

The relators appealed. [*181] Talbot K.C., Tyldesley Jones K.C., W. S. Kennedy, T. R. Harker and A. Tylor for the appellants. The objection of the appellants is not directed to the merits of the scheme, but to its validity. Before proceeding to act in accordance with its terms they desire to be assured that it may not hereafter be declared ultra vires and void. They contend that it is ultra vires for the following reasons: By s. 6 the Act of 1919 a joint electricity authority is to be representative of authorized undertakers within the district and it may accept a transfer of the undertakings with the consent of the owners thereof. By s. 8 the joint authority must provide or secure the provision of a cheap and abundant supply of electricity within their district and for that purpose may exercise powers

and duties, conferred upon them by a scheme, of constructing generating stations, main transmission lines, and other works required for the purpose, and of acquiring undertakings; and the authority may with the approval of the Commissioners establish a scheme for payment of superannuation allowances and gratuities to officers and servants who become incapable. The authority may acquire generating stations or main transmission lines or land for the purpose of any generating station. By s. 12 the authority is empowered to supply electricity within their district with certain immaterial exceptions. By s. 13 the authority may take a transfer of the undertaking of any local authority. By s. 15 it may be authorized to abstract water from rivers and canals. By s. 1 of the Electricity (Supply) Act, 1922, it may with the consent and subject to the regulations therein mentioned borrow money for the purpose of paying for generating stations or main transmission lines or other permanent work or of providing working capital, and any money so borrowed may be charged on the undertaking and revenues of the joint authority. By s. 3 a joint authority may be authorized to issue stock to be charged on its undertaking and revenues. By s. 10 a joint authority may dispose of works or property no longer required. Other powers and duties are conferred and imposed by these statutes upon joint electricity authorities; but enough has been said to [*182] show that wide powers have been indicated by the Legislature as exercisable by joint bodies representative of the authorized undertakers, whether companies or local authorities, in their districts. The scheme does not carry out, on the contrary it obviates, the intention of the Legislature. By s. 7, sub-s. 1, the first act of the joint authority is to put itself out of action, to constitute two separate authorities instead of one joint authority; and its second act is by s. 9, sub-s. 1, to delegate to these separate authorities, or committees as they are called, the powers specified in the third annex to the scheme; so that if the local authority undertakers in a district are minded to incur a capital expenditure, the company undertakers in the district are to have no voice in the matter; and the local authority undertakers will no longer have any concern in the remuneration the company undertakers allow their officers and servants; whereas by the Act of 1919 both sets of undertakers are entitled to have a voice in each of these matters. By s. 39 of the scheme it shall be the duty of the joint authority to provide all sums of money required for the purpose of meeting such capital expenditure as is approved by the Commissioners. By s. 43 the joint authority shall allocate all moneys borrowed or raised by them to meet the requirements of the Local Authority Committee or the Company Committee to those committees respectively. By s. 45 all moneys arising from the disposal of lands acquired by the joint authority for the purpose of the scheme and all other capital moneys received by them in respect of their undertaking shall be applied in the reduction of the capital moneys borrowed or raised by them. By s. 46, save as thereinbefore provided, all moneys received by the joint authority in respect of their undertaking shall be applied by them in manner in the order following:– (a) in payment of the working and establishment expenses; (b) in payment of any pensions or gratuities granted under any scheme established under s. 8 of the Act of 1919; (c) in payment of the interest or dividend on any stock or other securities issued by the joint authority in respect of money borrowed; (d) in providing any instalments [*183] or sinking fund required to be provided in respect of money borrowed. In short the scheme provides for a complete financial separation between the Company Committee and the Local Authority Committee.

The Divisional Court only decided that at this stage the application for the writs was premature. That decision would prevent the validity of a scheme or order embodying a scheme from ever being questioned until it had become a statutory enactment, as it will when approved by a resolution of each House of Parliament: *Institute of Patent Agents v. Lockwood*. (1) Each House will assume that the Commissioners have acted within their powers, and so the legality of the scheme will never be called in question. And surely if a body is acting ultra vires a writ of prohibition cannot be applied for too early; it ought to be applied for at the earliest possible moment so that unnecessary expense may not be incurred.

Both certiorari and prohibition lie to a body like the Electricity Commissioners: "This Court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to encroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see, that they keep themselves within their jurisdiction; and if they exceed it, to restrain them": *Rex v. Inhabitants in Glamorganshire*. (2) So a certiorari will lie to the Poor Law Commissioners: *Rex v. Poor Law Commissioners* (3); a prohibition will lie to Tithe Commissioners: *In re Ystradgunglais Commutation* (4); *In re Appledore Commutation* (5); *In re Crosby Tithes* (6); to the Commissioners of

Woods and Forests: *Chabot v. Lord Morpeth* (7); to Inclosure Commissioners: *Church v. Inclosure Commissioners* (8); to Income Tax Commissioners *Rex v. Clerkenwell Commissioners*

(1) [1894] A. C. 347.

(2) (1701) 1 Ld. Raym. 580.

(3) (1837) 6 Ad. & E. 1.

(4) (1844) 8 Q. B. 32.

(5) (1845) 8 Q. B. 139.

(6) (1849) 13 Q. B. 761.

(7) (1850) 15 Q. B. 446.

(8) 11 C. B. (N.S.) 664. [*184]

of Taxes. (1) Certiorari or prohibition will lie to the Commissioners of Light Railways: *Rex v. Light Railway Commissioners* (2); and certiorari to licensing justices: *Rex v. Woodhouse* (3); to the Board of Education: *Board of Education v. Rice*. (4) And to put it generally, "Wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament": per Brett L.J., *Reg. v. Local Government Board*. (5)

The fact that the act prohibited or the order sought to be quashed is not an effective act or order until confirmed or approved by some other authority is no reason why the Court should hold its hand. In *In re Crosby Tithes* (6) a prohibition issued against the Commissioners of Tithes prohibiting them from making an award, although the award had no effect until it had been confirmed by the Commissioners after hearing any objections thereto. In *Church v. Inclosure Commissioners* (7) a prohibition issued to prohibit the Inclosure Commissioners from acting on the report of an assistant Commissioner under s. 27 of the Inclosure Act, 1845, and from certifying that the inclosure of part of a common would be expedient, although their certificate had no operation without the sanction of Parliament. Orders of the Light Railway Commissioners are provisional only and have no effect till confirmed by the Board of Trade as provided by the Light Railways Act, 1896. Yet prohibition and certiorari lie to the Light Railway Commissioners if their orders are irregular: *Rex v. Light Railway Commissioners*. (2)

The Divisional Court relied upon *Reg. v. Hastings Local Board* (8), where it was held that a certiorari would not lie to bring up a provisional order of the Secretary of State

(1) [1901] 2 K. B. 879.

(2) [1915] 3 K. B. 536.

(3) [1906] 2 K. B. 501.

(4) [1911] A. C. 179.

(5) (1882) 10 Q. B. D. 309, 321.

(6) (1849) 13 Q. B. 761.

(7) 11 C. B. (N. S.) 664.

(8) 6 B. & S. 401. [*185]

empowering the local board to put in force the compulsory powers of the Lands Clauses Consolidation Act, 1845, as having been made without jurisdiction. That decision can only be supported, if at all, on the ground that the Local Government Act, 1858, under which the provisional order was made, provided that the order should "be of no validity" unless confirmed by Act of Parliament; and that, whatever may be said of a prohibition, a certiorari would not lie to bring up an order which was "of no validity." The provisional order in that case was regarded as a stage in legislation, and not as a judicial act.

[*Reg. v. London County Council* (1) was also cited.]

Sir Douglas Hogg A.-G., Macmorran K.C. and Bowsteadfor the respondents. The scheme is within the powers which may be conferred on a joint electricity authority by s. 6, sub-s. 2, of the Act of 1919. The power of delegation is very extensive, "with or without restrictions."

But even if the respondents were conferring greater powers than authorized by the Act, the Court has no jurisdiction to entertain these applications. To found an application for a prohibition it must be shown that the persons sought to be prohibited are a body of persons who claim to exercise judicial powers and profess to do acts judicially determining rights or imposing obligations. The same applies to certiorari, with the addition that the body in question must have made an order.

"The writ of prohibition is a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it is not legally vested or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction." (2) This passage, which was cited with approval by Lord Cave

L.C. in *In re Clifford and O'Sullivan* (3), defines the scope of the writ of prohibition in terms

(1) [1893] 2 Q. B. 454.

(2) Short and Mellor, Practice of the Crown Office, 2nd ed. (1908), p. 252.

(3) [1921] 2 A. C. 570, 582. [*186]

much more restricted than those of Brett L.J. in *Reg. v. Local Government Board* (1) in the passage cited by the appellants. In *In re Clifford and O'Sullivan* (2) the Lord Chancellor referred to a number of cases in support of the rule that the writ only lies to bodies exercising judicial functions, but does not lie to bodies charged with the duty of inquiring and advising. For examples, in *Rex v. Inhabitants in Glamorganshire* (3) justices authorizing a rate for the repair of a bridge were acting judicially; so were the Tithe Commissioners in *In re Crosby Tithes* (4) in certifying that a proposed inclosure of common land would be expedient; and the duties of the licensing justices in *Rex v. Woodhouse* (5) were also judicial. The order of the respondents in this case is not a judicial act. It binds no one. It is merely a stage in legislation, a method of furnishing information upon which the Legislature may or may not act after it has been considered by the Minister of Transport. In these circumstances the Courts of Law will not interfere, for that would be to trespass on the domain of the Legislature: *Reg. v. Hastings Local Board*. (6) That case has been followed in Ireland in *Ex parte Kingstown Commissioners* (7), and in Scotland in *Glasgow Insurance Committee v. Scottish Insurance Commissioners*. (8) In the latter case the National Insurance Act, 1911, having authorized the Insurance Commissioners to make regulations for carrying into effect Part I. of the Act, and having provided that the regulations should be laid before both Houses of Parliament and should have effect as if enacted in the Act unless annulled by His Majesty in Council on an address presented by either House; it was held that regulations made by the Commissioners but not yet laid before Parliament could not be challenged by an action of interdict (the Scottish equivalent of a prohibition) as being ultra vires provided they dealt with matters within the scope of Part I. of the Act. That case is indistinguishable from

(1) 10 Q. B. D. 309, 321.

(2) [1921] 2 A. C. 570.

(3) 1 Ld. Raym. 580.

(4) 13 Q. B. 761.

(5) [1906] 2 K. B. 501.

(6) 6 B. & S. 401.

(7) (1885) 16 L. R. Ir. 150; (1886) 18 ibid. 509.

(8) 1915 S. C. 504. [*187]

the present. The attention of the Court in *Rex v. Board of Trade* (1) was not directed to the crucial difference between advisory and judicial orders.

Talbot K.C. in reply. *Reg. v. Hastings Local Board* (2) and the cases which followed it are inconsistent with *Church v. Inclosure Commissioners*. (3) If it be true to say that the order of the Secretary of State in the *Hastings Case* (2) was merely advisory and not judicial, it is certainly not true to say the same of the order of the respondents in this case.

Cur. adv. vult.

July 27. The following written judgments were delivered.

BANKES L.J. These appeals are from two orders of the Divisional Court discharging two rules nisi, one for certiorari and the other for prohibition, obtained at the instance of the London Electricity Joint Committee (1920) Ld., and directed to the Electricity Commissioners. The object of the application was to test the validity of a proposed scheme published by the Commissioners on or about February 8, 1923, for effecting an improvement of the existing organization for the supply of electricity in the London and Home Counties Electricity District. The Electricity Commissioners are a statutory body set up by the Electricity (Supply) Act, 1919, as the authority to whom a reorganization of supply of electricity is entrusted. The Act contemplates the division of England, Scotland and Wales, or parts of them, into separate electricity districts with joint electricity authorities who are to exercise full powers within their respective districts. The Electricity Commissioners are the authority to approve, or to themselves formulate schemes for the formation of electricity districts, and the setting up of joint electricity authorities. Sect. 7 of the statute provides as follows: "(1.) The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the

(1) [1915] 3 K. B. 536.

(2) 6 B. & S. 401.

(3) 11 C. B. (N.S.) 664. [*188]

order for confirmation by the Board of Trade, who may confirm the order either without modification or subject to such modifications as they think fit. (2.) Any such order shall be laid, as soon as may be after it is confirmed before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act."

The scheme to which objection is taken appears at the present stage of its existence as a "Draft Order under s. 7 of the Electricity (Supply) Act, 1919, constituting the London and Home Counties Electricity District, and establishing and incorporating the London and Home Counties Joint Electricity Authority." The objection to this draft order is that the Electricity Commissioners are travelling outside their parliamentary powers, and are acting without jurisdiction in putting forward for adoption this scheme in its present form. Whether there are any good and sufficient reasons from the point of view of the business interests of the objectors for taking the objection it is not for this Court to determine. The materials upon which to form any opinion upon that question are not before us. The only question on this part of the case is whether the objection as to want of jurisdiction is made out. In my opinion it is, and on this short ground: Sects. 5 and 6 of the Act of 1919 enable the Electricity Commissioners to formulate, or to approve schemes, which contain provisions enabling the joint electricity authority to delegate to committees of the authority any powers of the authority. In order to get over objections made by the London County Council to having more than one district, and more than one electricity authority for the London and Home Counties, and the objections of the authorized undertakers within the district to having only one, the Electricity Commissioners have propounded this scheme, which, while in name providing for one electricity authority, and one district, in fact provides for two. The way in which this is proposed to be done is this: The scheme provides for the creation of a joint electricity authority under the name of the London and Home Counties Joint [*189] Electricity Authority. It then provides that the joint committee at their first meeting shall appoint two committees of the joint committee, one to be called the Local Authority Committee, the other the Company Committee. In order to create the two authorities under the one name the scheme goes on to provide (cl. 9) that the joint authority shall delegate to the Local Authority Committee, and to the Company Committee respectively, such of the powers and duties of the joint authority as are specified in the third annex to the scheme, and it assigns to each committee a separate portion of the joint electricity district. The effect of this provision is to set up within the one joint electricity district, which the scheme purports to create, two joint electricity authorities, each with its separate district, and its independent powers. This is not, in my opinion, authorized by the Act of 1919.

A further objection to the validity of the proposed scheme is that the power of delegation which, by the statute, may be vested by a scheme in a joint electricity authority, is, by this scheme, exercised by the Electricity Commissioners themselves. My view of the construction of the Act of 1919 on this point is that the Electricity Commissioners have the statutory right of determining whether a power of delegation to committees shall be conferred by a scheme upon a joint electricity authority, and that the statutory right of exercising that power, if conferred, is vested in the joint authority alone. Without going into other questions I am of opinion that upon the grounds I have mentioned the scheme proposed by the Electricity Commissioners is, to some extent, ultra vires. On the point raised as to the effect of s. 26 of the Act of 1919, it is sufficient to say that I do not think that the section can be read as giving the Electricity Commissioners wider powers on the particular matters which I have dealt with than those conferred upon them by the Act itself.

The important part of the appeal has reference to the jurisdiction of the Court to make any order either for prohibition or certiorari. The first objection taken was that any application was premature, the matter being still only [*190] in its opening stage. The Commissioners, it was said, have decided nothing, they have merely published the scheme preparatory to holding the local inquiry thereon which they are directed by s. 5, sub-s. 4, of the Act of 1919 to hold before making any order. This objection may be a valid objection to the granting of a writ of certiorari, but as it is not necessary to decide the point I express no opinion upon it. With regard to prohibition, if the writ lies at all I do not think that the objection is a sound one. The point was raised in the case of *Byerley v. Windus*. (1) Bayley J. deals with it in this way. He says: "And this brings me to the second question, whether the proceedings are in such a state in the Court below as to warrant a prohibition at present"; and he proceeds: "But when once it appears by the proceedings in the spiritual court, that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the Courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once; and it was upon this principle that the prohibitions were granted in *Darby v. Cosens* (2) and in *French v. Trask*." (3) The statement of what occurred at the local inquiry, as set out in para. 15 of Mr. Fladgate's affidavit (4), brings this case, in my opinion, well within the principle laid down by Bayley J., and I think that this objection fails.

The other objections to the granting of any writ were much more serious, and they raise difficult and important questions, constitutional as well as legal. In substance, the objections come to this. (a) that the proceedings of the Electricity Commissioners are of an executive, and not a judicial, character; (b) that whether that be so or not, their proceedings in reference to the preparation of schemes, as directed

(1) (1826) 5 B. & C. 1, 21.

(2) (1787) 1 T. R. 552.

(3) (1808) 10 East, 348.

(4) This paragraph stated that the Electricity Commissioners at the local inquiry invited discussion of the scheme on the assumption that it was intra vires, but that counsel for the companies objected to this course and the inquiry was thereupon adjourned. [*191]

by the Electricity Act, 1919, are controllable by Parliament, and by Parliament alone, and are such that there is no moment of time at which the Court can intervene to inquire whether the proceedings are ultra vires or not. The argument on this second contention is presented in the following way: Sect. 7 of the Act, it is said, provides that the Commissioners may make an order giving effect to a scheme, but that order has no force or effect in itself. It is merely a suggestion or advice to be passed on to the Minister of Transport, who may confirm or modify the scheme. Even then the order has no force. It must first be approved by resolution passed by each House of Parliament, and then, and not till then, has the order any force or effect. As soon as the order has been approved by both Houses of Parliament the section provides that it shall have effect as if enacted in the Act. The result, according to the respondents, is that any application to the Courts for a writ of prohibition or certiorari must be either premature or too late; premature if made before the order of the Commissioners becomes an Act of Parliament, too late if made after it has attained that status. This argument has only become possible since the Legislature has adopted the practice of providing that resolutions or orders which are directed to lie on the table for a certain period before becoming effective, or which have to be approved by resolution of the Houses of Parliament, are, when approved, to have effect as if they were themselves Acts of Parliament. The effect of legislation in this form was discussed in the case of *Institute of Patent Agents v. Lockwood* (1), where Lord Watson concludes his speech by saying: "Such rules are to be as effectual as if they were part of the statute itself." The effect of accepting the argument of the Attorney-General on this point would be very far reaching. It would amount to a decision that the subject has no longer the right in cases like the present, where this form of legislation is adopted, to come to a Court of law and demand an inquiry whether the action, or decision, of which he is complaining is ultra vires or not. I question very much whether Parliament had

(1) [1894] A. C. 347, 365. [*192]

any deliberate intention of producing this result by adopting this particular form of legislation.

I pass now to consider the contention that if the Court makes an order in the present case for the issue of a writ of prohibition it will be trespassing on ground reserved by Parliament to itself. I cannot

see why this action of the Court should be so regarded. By the Act of 1919 Parliament laid down the limits of the jurisdiction of the Electricity Commissioners. It did so presumably because it considered that those limits were the proper ones, and the ones which the Commissioners should observe. Why should Parliament object to a Court of law, if appealed to, using its powers to keep the Commissioners within those limits? Parliament no doubt has, as between itself and the Commissioners, provided that no order of the Commissioners shall have effect unless first approved by Parliament. This reservation must, I consider, be treated as a reservation for the purposes of control, and does not in my opinion exclude the jurisdiction of the Courts of law. If any decision of a Court of law in the opinion of Parliament unduly fetters the action of the Commissioners it is always open to Parliament to extend the limits of that jurisdiction.

I have so far only dealt in a general way with the arguments addressed to the Court by the Attorney-General. The real question is whether the principles already laid down in reference to the power and duty of the Courts to issue writs of prohibition apply to the present case. There can, of course, be no exact precedent, as the Electricity Commissioners are a body of quite recent creation. It has, however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances. A study of the decisions of the Courts in relation to writs of prohibition illustrates how true this is. In the case of *In re Clifford and O'Sullivan* (1) the Lord Chancellor quotes with approval the description of a writ of prohibition given in Short and Mellor (2) as "a judicial writ, issuing out of a Court of superior jurisdiction

(1) [1921] 2 A. C. 570, 582.

(2) 2nd ed. (1908), p. 252. [*193]

and directed to an inferior Court for the purpose of preventing the inferior from usurping a jurisdiction with which it is not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction." Originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word "Court." As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. There are numerous instances of this in the books, commencing in quite early times. In the case of *Rex v. Inhabitants in Glamorganshire* (1), the Court expressed the general opinion that it would examine the proceedings of all jurisdictions erected by Act of Parliament, and if under pretence of such an Act they proceeded to encroach jurisdiction to themselves greater than the Act warrants the Court could send a certiorari to them to have their proceedings returned to the Court, to the end that the Court might see that they keep themselves within their jurisdiction, and if they exceed it to restrain them. It would appear from the judgments in *In re Ystradgunlais Commutation* (2) and *In re Appledore Commutation* (3) that in both those cases the Court was willing to assume that a writ of prohibition would lie against the Tithe Commissioners. In *Chabot v. Lord Morpeth* (4) the Court certainly proceeded upon the assumption that a writ of prohibition might be issued to the Commissioners of Woods and Forests. The same was the case in *Rex v. Clerkenwell Commissioners of Taxes* (5) in reference to those Commissioners. In the cases of *In re Hall* (6) and of *Rex v. Light Railway Commissioners* (7) writs were ordered to be issued to the Comptroller-General of Patents, and to the Light Railway Commissioners respectively. In *Board of Education v. Rice* (8) a writ of certiorari was directed to the Board of Education. In *Reg. v. London County Council* (9)

(1) 1 Ld. Raym. 580.

(2) 8 Q. B. 32.

(3) 8 Q. B. 139.

(4) 15 Q. B. 446.

(5) [1901] 2 K. B. 879.

(6) (1888) 21 Q. B. D. 137.

(7) [1915] 3 K. B. 536.

(8) [1911] A. C. 179.

(9) [1893] 2 Q. B. 454. [*194]

this Court doubted, but did not decide, whether prohibition would lie against the County Council. Kay L.J. expressed his doubt as being whether the County Council would be exercising any judicial function in determining whether a churchyard, which is now disused, shall be considered as part of one parish or another parish. In *In re Grosvenor Hotel Co.* (1) the Court refused to issue a writ of prohibition to the Board of Trade and to their inspector, upon the ground that the examination and report of an inspector under s. 56 of the Companies Act, 1882, was not a judicial proceeding in any proper sense of the term. These authorities are, I think, conclusive to show that the Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court. There are, I think, three dicta of learned judges which may usefully be borne in mind in approaching an examination of the decisions which bear most closely upon the present case. There is the dictum of Brett L.J., as he then was, in *Reg. v. Local Government Board* (2) where he says: "My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." There is the dictum of Lord Sumner in *In re Clifford and O'Sullivan* (3), where he says: "It is agreed also that, old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all." Lastly there is the dictum of Fletcher Moulton L.J. in *Rex v. Woodhouse* (4), where he is discussing what, in his opinion, constitutes a judicial act. He there says: "Other instances could

(1) (1897) 76 L. T. 337.

(2) 10 Q. B. D. 309, 321.

(3) [1921] 2 A. C. 570, 589.

(4) [1906] 2 K. B. 501, 535. [*195]

be given, but these suffice to show that the procedure of certiorari applies in many cases in which the body whose acts are criticized would not ordinarily be called a Court, nor would its acts be ordinarily termed 'judicial acts.' The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law." In that case the Lord Justice was dealing with an application for a writ of certiorari, but his observations here quoted apply in my opinion equally to prohibition. The authorities which require a close consideration are in order of date: *In re Crosby Tithes* (1); *Church v. Inclosure Commissioners* (2); *Reg. v. Hastings Local Board* (3); *In re Local Government Board; Ex parte Kingstown Commissioners* (4); *Glasgow Insurance Committee v. Scottish Insurance Commissioners*. (5) In the first of these cases a rule was made absolute for a writ of prohibition directed to the Tithe Commissioners of England, and to one of the Assistant Tithe Commissioners, prohibiting them from making their award as to the tithes of a parish until the decision of a suit then pending in the Court of Chancery. The application was based on the provisions of s. 50 of the Tithe Act of 1836, which directs that when all the suits and differences referred in the section have been decided the Commissioners or Assistant Commissioner shall proceed to frame the draft of an award. This draft cannot become effective until after the opportunity has been given for dealing with objections to its provisions, and until the Commissioners themselves have finally approved it. The application for prohibition was made because the Assistant Commissioner refused to stay his hand in framing the draft of his award until after

(1) 13 Q. B. 761.

(2) 11 C. B. (N. S.) 664.

(3) 6 B. & S. 401.

(4) 16 L. R. Ir. 150; 18 ibid. 509.

(5) 1915 S. C. 504. [*196]

the suit had been determined. In that case the Court saw no objection to the issue of the writ, although the matter was only in an initial stage, and no draft of an award had been made. The case of *Church v. Inclosure Commissioners* (1) is the one which requires the closest consideration of any of the cases cited during the argument. It was a case in which the Court granted a writ of prohibition directed to the Inclosure Commissioners prohibiting them from reporting the proposed inclosure of a certain common for the sanction of Parliament, or from taking any further steps towards the inclosure of the said common without first obtaining the consent of the complainant. In order to realize the importance of the decision it is necessary to call attention to the material provisions of the Inclosure Act of 1845 in reference to the procedure to be followed. It appears from the provisions of s. 27 that some lands might be inclosed by order of the Commissioners without the previous consent of Parliament, and some might not. The common in question in this case was one that could not be inclosed without the previous direction of Parliament. The course to be followed to secure inclosure in this case therefore was first the report of the Assistant Commissioner to the Commissioners, followed by their report to Parliament, in which they certify their opinion as to the expediency of the proposed inclosure, which report Parliament might or might not adopt, or which Parliament could alter or vary,

and which as adopted is included in an Act of Parliament. The objection on which the application to the Court was made was that the Assistant Commissioner refused to consider a claim which was properly brought to his attention. Objection was made to the Court making the rule absolute on very much the same grounds as are advanced by the Attorney-General in the present case. It was argued that the matter was not the subject of prohibition, as the question was left by the statute to the Commissioners, who if satisfied then made a provisional order which after hearing objections they reported to Parliament,

(1) 11 C. B. (N. S.) 664. [*197]

who might or might not act upon it. In its essential features this case appears to me undistinguishable from the case with which the Court is dealing. Reliance was placed by the Attorney-General upon the decision in *Reg. v. Hastings Local Board*. (1) If I could take the same view of the position of the Electricity Commissioners under the Act of 1919 as was taken by the Court in that case of the position of the Secretary of State under the Local Government Act, 1858, I should consider that case a guide as to what course this Court should adopt in the present appeal. It is only necessary to refer to the reasons which led Mellor J. to take the view upon which he acted to see what a very different case the present one is from that. I cannot look upon it cither as a guide or as an authority. The case in the Irish Courts of *In re Local Government Board; Ex parte Kingstown Commissioners* (2) requires serious consideration. If the view of Palles C.B. is to be accepted, that the proceedings of the Local Government Board which were questioned in that case were neither ministerial nor judicial but "quasi legislative – that is, a proceeding towards legislation," the decision goes far to support the argument of the Attorney-General. In the Court of Appeal this view was not the one upon which the Court acted. Much that was said by Fitzgibbon L.J. is in favour of the argument of the appellants. The Scotch case of the *Glasgow Insurance Committee v. Scottish Insurance Commissioners* (3) needs consideration. By s. 65 of the National Insurance Act, 1911, the Insurance Commissioners are empowered to make regulations which must be laid before both Houses of Parliament as soon as may be after they are made, and which are to have effect as if enacted in the Act. The Insurance Commissioners had made regulations the validity of which was challenged, and application was made to the Court to restrain the Commissioners from proceeding to lay the regulations before Parliament. The Lord Ordinary granted the application. On appeal his decision was reversed by a majority of the Court, who laid stress on the special

(1) 6 B. & S. 401.

(2) 16 L. R. Ir. 150; 18 ibid. 509.

(3) 1915 S. C. 504. [*198]

provision of the statute in reference to the regulations having the force of statute law.

The conclusion I have come to in reference to the whole matter is that there is abundant precedent for the Court taking action at the present stage of the proceedings of the Electricity Commissioners, provided it is satisfied that the Commissioners are proceeding judicially in making their report, even though that report needs the confirmation of the Minister of Transport and of both Houses of Parliament before it becomes effective. In coming to a conclusion on this latter point it is necessary to deal with this case on its own particular circumstances. The Electricity Act of 1919 imposes upon the Electricity Commissioners very wide and very responsible duties and powers in reference to the approval or formulation of schemes. At every stage they are required to hold local inquiries for the

purpose of giving interested parties the opportunity of being heard. Their authority extends to the creation of bodies who may exercise all or any of the powers of the authorized undertakers within the electricity district, and to whom the undertakings themselves may be transferred on terms settled by the Commissioners. On principle and on authority it is in my opinion open to this Court to hold, and I consider that it should hold, that powers so far reaching, affecting as they do individuals as well as property, are powers to be exercised judicially, and not ministerially or merely, to use the language of Palles C.B., as proceedings towards legislation, On these grounds I consider that the appeal against the order of the Divisional Court discharging the rule nisi for a prohibition must be allowed with costs here and below, and the rule for prohibition in the terms of the rule nisi must be made absolute. The appeal against the order refusing to make the rule nisi for a certiorari absolute is dismissed without costs.

ATKIN L.J. This is an appeal from orders of the Divisional Court discharging rules for writs of prohibition and certiorari addressed to the Electricity Commissioners. The rules were obtained for the purpose of preventing the Commissioners [*199] from proceeding with a scheme published by the Commissioners in February, 1923, under the Electricity Supply Acts, 1919-1922, providing for the appointment of a joint electricity authority in the London area defined in the scheme. The objection taken to the scheme is that it is beyond the powers of the Commissioners. The Divisional Court have not decided this point, but discharged the rules on the ground that at the present stage of the proceedings of the Commissioners there should not be prohibition or certiorari. It appears to me to be necessary to decide what the Commissioners' powers are, and whether the proposed scheme is within those powers, before deciding whether the stage at which prohibition should be granted has been reached. Indeed if the Commissioners are a body to whom prohibition will lie, and are in fact purporting to exercise a jurisdiction which they do not possess, I find it difficult to see how prohibition can be applied for at too early a stage. This, however, must be considered later.

The Electricity Commissioners are a body constituted by the Electricity (Supply) Act, 1919. By s. 1, sub-s. 1, "For promoting, regulating, and supervising the supply of electricity there shall be established as soon as may be after the passing of this Act, a body to be called the Electricity Commissioners, who shall have such powers and duties as are conferred on them by or under this Act, and, subject thereto, shall act under the general directions" of the Minister of Transport. By s. 1, sub-s. 2, the Commissioners, not exceeding five in number, are to be appointed by the Minister of Transport. It will be seen therefore that the Commissioners are not a representative body: they are appointed by a Government department, their powers and duties are expressly limited to those conferred by or under the Act, and subject thereto, which I take to mean within the limits of such powers and duties, they are to act under the general directions of the department that appoints them. By the remaining sections of the Act they are given very considerable powers for the purpose of organizing the supply of electricity throughout the country. The Act is divided into [*200] groups of sections headed "Reorganization of Supply of Electricity," ss. 5 to 8; "Generating stations," ss. 9 to 11; "Powers of Joint Electricity Authorities," ss. 12 to 17; "Transitory Provisions," ss. 18 and 19; "Amendments of Electric Lighting Acts," ss. 20 to 27; "Financial Provisions," ss. 28 to 30; and "General," ss. 31 to 40. They have power to constitute and incorporate joint electricity authorities within areas defined by the Commissioners, to provide for the exercise by such authorities of any of the powers of authorized undertakers within the district, and for the transfer to such authorities of the undertakings of any of those undertakers. By s. 11 no new generating station may be established or existing generating station extended without their consent. By s. 13 they may transfer to a joint electricity authority any right existing in a local authority to purchase the undertaking of an authorized distributor. By s. 15 they may make representations to the Board of Trade on which the Board of Trade may by order give a joint electricity authority or an authorized undertaking rights of taking water. And by s. 19, before the establishment of a joint electricity authority the Commissioners may require authorized undertakers to render mutual assistance to one another in respect of giving and distributing supplies of electricity, the management and working of generating stations, and the provision of capital for the purpose of such assistance. By s. 26 "Anything which under the Electric Lighting Acts may be effected by a provisional order confirmed by Parliament may be effected by a special order made by the Electricity Commissioners and confirmed by" the Minister of Transport, or by an order establishing a joint electricity authority under the Act, provided that such special order be approved by a resolution passed by each House of Parliament. By s. 33 the Commissioners have

powers to hold inquiries and by order to require any person to attend and give evidence on oath, and produce documents at the inquiry, and any person failing to comply with such order is liable on conviction to a fine not exceeding 5l. Further powers are given by the Electricity (Supply) Act, [*201] 1922, of which I need only notice the power to suspend the powers of a joint authority or local authority to purchase an undertaking, but only with the consent of the authority in whom the right to purchase is vested. These are considerable powers, but there are corresponding considerable restrictions. The Commissioners may not define an electricity district, should there be any objection, without holding an inquiry, nor may they approve or publish a scheme for improving an electricity district without holding a local inquiry, nor make an order embodying the scheme without such an inquiry. The joint electricity authority is to be representative of authorized undertakers within the district, and no scheme is to provide for transfer to the joint electricity authority of any part of an undertaking except with the consent of the owners thereof: s. 6 of the Act of 1919. By s. 12 the joint electricity authority have power to supply electricity within their district, but not in the area of supply of an authorized distributor or of a power company without their consent, with certain exceptions, subject to provisoes for appeal to the Electricity Commissioners. By s. 13 the powers of transfer to a joint authority of a local authority's rights of purchase can only be conferred on a joint authority on which the local authority is adequately represented. There are other limiting provisions as to consents and agreements which it is unnecessary to detail. The effect of the Act is to give the Commissioners power to act within limits, wide indeed but strictly defined by statute, and designed to give a large measure of protection to rights already vested in undertakers and private persons.

The question now immediately at issue is the validity of a scheme for the constitution of a joint electricity authority for the London and Home Counties Electricity District as defined in the scheme. The scheme is published by the Commissioners pursuant to s. 5, sub-s. 4, of the Act of 1919, and the Commissioners have given notice of and commenced to hold an inquiry thereon in pursuance of the said sub-section. The scheme by s. 2 of the schedule constitutes and incorporates a joint electricity authority for the district [*202] representative of the authorized undertakers within the district, and also of local authorities and large consumers of electricity within the district, giving eight representatives to local authority undertakers, six to company undertakers within the County of London, one to company undertakers outside the County of London, one to power companies, six to the London County Council, three to six other county councils, and two to the Railway Companies' Association. But the scheme also provides by s. 7, sub-s. 1, that the joint authority shall appoint and keep appointed two committees of the joint authority – namely, a committee of local authority undertakers consisting of the eight members appointed by the local authority undertakers, and a committee of company undertakers consisting of the six members appointed by company undertakers within the County of London; and by s. 9, sub-s. 1, provides that the joint authority shall delegate to the two respective committees the powers and duties mentioned in the third annex to the scheme, which powers and duties shall continue to be exercised and performed by such committees within their respective areas until the event mentioned in the section. The powers and duties mentioned in the annex include powers and duties relating to the generation and transmission of electricity and to the supply of electricity in bulk to authorized distributors, and include powers to incur expenditure on capital account within the limits of estimates submitted to the joint authority and approved by the Commissioners. The scheme by s. 9, sub-s. 3, provides that the two committees shall exercise and perform any delegated power or duty in the name and on behalf of the joint authority in like manner as the joint authority could have exercised or performed such power or duty if the said power or duty had not been delegated to the committees. There is no dispute, and indeed it is of the essence of the scheme, that by the above provisions the powers and duties in question are for the specified period taken away from the joint authority and confided to the committees without any power of resumption by the joint authority.

These provisions appear to me a plain violation of the [*203] provisions of the Act of 1919. The joint authority in whom powers are vested under the Act is to be joint and representative. It must be representative of authorized undertakers within the district (which I take to mean all authorized undertakers), and it may also, if the Commissioners think fit, be representative of local authorities and large consumers. In the present case the Commissioners have decided that the joint authority should be representative of both these classes. It is to such a body, joint and representative, that the statute has confided such powers and duties as it gives direct to a joint authority, and that the Commissioners

are empowered to confide such powers and duties as they have authority to give. The two committees to whom the powers in question are given under the scheme are neither joint nor representative, either in their constitution or by inheritance from those who in fact appoint them. In truth and in fact the joint authority are never intended to possess or exercise the powers which they are said to delegate, and they have no voice in the selection of the committees. It is but a play upon words to style the two bodies committees of the joint authority. They are in fact in respect of their powers separate authorities independent for the most part of the joint authority and operating each in its own district.

It was sought to justify the provisions by reference to s. 6, sub-s. 2, of the Act, which enacts that the scheme may provide for enabling the joint authority to delegate with or without restrictions to committees of the authority any of the powers or duties of the authority. It is difficult to imagine two things more different than enabling a representative body to delegate powers and duties to a committee of its own choosing and compelling the representative body to transfer from itself to a named few of its constituent members such powers and duties. If the enabling power alone had been exercised it seems to me impossible to suppose that the authority so enabled could divest itself of the powers in question without control or power of resumption.

It was further sought to justify the provisions by reference to s. 26 of the Act. Anything which can be done by [*204] provisional order under the Electric Lighting Acts can be done by an order establishing a joint electricity authority, which this is. By the joint effect of s. 3, sub-s. 8, and s. 4 of the Electric Lighting Act, 1882, a provisional order may contain such regulations and conditions as the Board of Trade – now the Minister of Transport – may think expedient, and therefore the Electricity Commissioners may put into their order constituting the authority any regulations and conditions they may think expedient. The answer seems to be first that the granting and imposing of these powers and duties are not things which could be effected under the Electric Lighting Acts by provisional order, for these orders relate to powers to supply electricity which in the case of joint electricity authorities are specially provided for under special conditions by s. 12 of the Act of 1919; and, secondly, that the regulations and conditions mentioned in s. 3, sub-s. 8, of the Act of 1882 are clearly regulations and conditions ancillary to the principal object of the licence or order mentioned, and in any case could not include conditions in contravention of the express statutory checks and restrictions imposed by the principal Act of 1919. I think that it is proved by the affidavits and exhibits in this case that the Commissioners consider this provision as to the two committees an essential part of their scheme, and that they determined to hold their inquiry into the scheme after hearing counsel on the point of its invalidity.

The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, [*205] to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. Thus certiorari lies to justices of the peace of a county in respect of statutory duty to fix a rate for the repair of a county bridge: *Rex v. Inhabitants in Glamorganshire* (1); and to Poor Law Commissioners acting under the Poor Law Amendment Act, 1834, in prescribing the constitution of a board of guardians in a parish where there was an existing poor law authority: *Rex v. Poor Law Commissioners*. (2) In that case it may be noted that the Attorney-General had obtained a rule for a

mandamus to the new board of guardians to obey the order of the Commissioners, and Sir Frederick Pollock subsequently obtained a rule for a certiorari to bring up the order to be quashed; and by agreement the question was argued on the rule for a certiorari. So certiorari has gone to the Board of Education to bring up and quash their determination under s. 7, sub-s. 3, of the Education Act, 1902, on a question arising between the local education authority and the managers of a non-provided school: *Board of Education v. Rice*. (3) Also to justices acting under the Licensing Act, and not in the strict sense as a court: *Rex v. Woodhouse*. (4) Similarly prohibition has gone to the Tithe Commissioners, and an assistant Tithe Commissioner, to prevent them from making an award as to the tithes in a particular parish: *In re Crosby Tithes* (5), and to the Inclosure

(1) 1 Ld. Raym. 580.

(2) 6 Ad. & E. 1.

(3) [1911] A. C. 179.

(4) [1906] 2 K. B. 501.

(5) 13 Q. B. 761. [*206]

Commissioners from reporting the proposed inclosure of a common in the parish of Acton, and from taking any further step towards the inclosure of the common: *Church v. Inclosure Commissioners*. (1) So it has gone against the Light Railway Commissioners to restrain them from proceeding with an inquiry remitted to them by the Board of Trade after an appeal which it was held did not lie: *Rex v. Board of Trade*. (2) Here the right to prohibition was not raised by counsel, as a decision was desired on the point as to the validity of the appeal, but the point was raised in the dissenting judgment of Phillimore L.J., and must, I think, have been present to the minds of the majority of the Court. I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction. Reference was made to the case of *In re Clifford and O'Sullivan* (3), where an attempt was made to prohibit the proceedings of so-called military courts of the Army in Ireland acting under proclamations which had placed certain Irish districts in a time of armed disturbance under martial law. Prohibition, it was held in the House of Lords, would not lie because the so-called courts were not claiming any legal authority other than the right to put down force by force, and because the so-called courts were funct¾ officio. I am satisfied that the observations of the Lord Chancellor in that case were directed to the first point, and that he had no intention of overruling, or indeed questioning, the long line of authority which has extended the writs in question to bodies other than those who possess legal authority to try cases, and pass judgments in the strictest sense.

In the present case the Electricity Commissioners have to decide whether they will constitute a joint authority in a

(1) 11 C. B. (N. S.) 664.

(2) [1915] 3 K. B. 536.

(3) [1921] 2 A. C. 570. [*207]

district in accordance with law, and with what powers they will invest that body. The question necessarily involves the withdrawal from existing bodies of undertakers of some of their existing rights, and imposing upon them of new duties, including their subjection to the control of the new body, and new financial obligations. It also provides in the new body a person to whom may be transferred rights of purchase which at present are vested in another authority. The Commissioners are proposing to create such a new body in violation of the Act of Parliament, and are proposing to hold a possibly long and expensive inquiry into the expediency of such a scheme, in respect of which they have the power to compel representatives of the prosecutors to attend and produce papers. I think that in deciding upon the scheme, and in holding the inquiry, they are acting judicially in the sense of the authorities I have cited, and that as they are proposing to act in excess of their jurisdiction they are liable to have the writ of prohibition issued against them.

It is necessary, however, to deal with what I think was the main objection of the Attorney-General. In this case he said the Commissioners come to no decision at all. They act merely as advisers. They recommend an order embodying a scheme to the Minister of Transport, who may confirm it with or without modifications. Similarly the Minister of Transport comes to no decision. He submits the order to the Houses of Parliament, who may approve it with or without modifications. The Houses of Parliament may put anything into the order they please, whether consistent with the Act of 1919, or not. Until they have approved, nothing is decided. and in truth the whole procedure, draft scheme, inquiry, order, confirmation, approval, is only part of a process by which Parliament is expressing its will, and at no stage is subject to any control by the Courts. It is unnecessary to emphasize the constitutional importance of this contention. Given its full effect, it means that the checks and safeguards which have been imposed by Act of Parliament, including the freedom from compulsory taking, can be removed, and new and onerous and inconsistent obligations imposed without an [*208] Act of Parliament, and by simple resolution of both Houses of Parliament. I do not find it necessary to determine whether, on the proper construction of the statute, resolutions of the two Houses of Parliament could have the effect claimed. In the provision that the final decision of the Commissioners is not to be operative until it has been approved by the two Houses of Parliament I find nothing inconsistent with the view that in arriving at that decision the Commissioners themselves are to act judicially and within the limits prescribed by Act of Parliament, and that the Courts have power to keep them within those limits. It is to be noted that it is the order of the Commissioners that eventually takes effect; neither the Minister of Transport who confirms, nor the Houses of Parliament who approve, can under the statute make an order which in respect of the matters in question has any operation. I know of no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament. The authorities are to the contrary.

In *In re Crosby Tithes* (1), where prohibition went to the Tithe Commissioners, the Assistant Commissioner, with a view to commutation of tithes, had held an inquiry into the value of certain disputed tithes, and had declared his intention of awarding a particular amount to the vicar. By the Tithe Commutation Act of 1836, s. 50, the Commissioner was not empowered to draft his award until certain pending suits were decided, and there being such a suit pending, prohibition went to the Commissioners and the Assistant Commissioner. It is to be noted that when the writ was granted the Assistant Commissioner had not even drafted his award, but had merely stated his intention so to do, and to ignore the pending suit, and that his award, when drafted, was subject to objection, and to amendment after a further hearing of such objections (s. 51), and was then subject to confirmation by the Commissioners. In *Church v. Inclosure Commissioners* (2), the writ of prohibition was issued to prohibit the Commissioners from

(1) 13 Q. B. 761.

(2) 11 C. B. (N. S.) 664. [*209]

reporting the proposed inclosure of Old Oak Common in the parish of Acton for the sanction of Parliament, and from taking any further steps towards the inclosure of the said common, without first obtaining certain consents. An Assistant Commissioner had held an inquiry and made a report to the Commissioners, who had made a provisional order providing for inclosure. The Assistant Commissioner had wrongly estimated the values of the interests in question, which was the ground of the invalidity relied on. The inclosure in question, being within fifteen miles of the City of London, could not be made without the authority of Parliament under s. 14 of the Commons Inclosure Act, 1845. By s. 27 of the Act, in such a case, after making the provisional order, it was the duty of the Commissioners to publish it, to verify consents, and to certify in their annual report the expediency of the inclosure, and by s. 32 the provisional order would only become operative when enacted in an Act of Parliament. It is noteworthy that the Court (Erle C.J. and Vaughan Williams, Willes and Keating JJ.) thought the matter so clear that they refused the request of counsel for the Commissioners that the prosecutor should declare in prohibition to give an opportunity of questioning whether prohibition would lie in such a case. (1) I cannot distinguish that case from the present.

The case of *Reg. v. Hastings Local Board* (2), which was relied on by the Divisional Court, seems to me to be of little assistance. The application was for a writ of certiorari to bring up to be quashed a provisional order of the Secretary of State made pursuant to the Local Government Act of 1858, whereby the Hastings Local Board was empowered to put in force the powers of the Lands Clauses Act in respect of certain land required for widening a road. The material section expressly provided that the order of the Secretary of State should not be of any validity unless the same had been confirmed by Act of Parliament, and at the time of the application no confirming Act of Parliament had been obtained. It seems quite clear that there was no order in

(1) See 11 C. B. (N. S.) 682, note a.

(2) 6 B. & S. 401. [*210]

existence in respect of which certiorari could be granted, and all the judges were of opinion that the Secretary of State was in the same position as a Select Committee to whom a Bill for such a purpose might be referred. Blackburn J. stated that the order was not a judicial one. No authorities were cited to the Court. I cannot consider this case, or the Irish case cited which followed it (1), to be inconsistent with the principles on which is based the decision *in Church v. Inclosure Commissioners*. (2) If there were any inconsistency I prefer the authority of the latter case.

In coming to the conclusion that prohibition should go we are not in my opinion in any degree affecting, as was suggested, any of the powers of Parliament. If the above construction of the Act is correct the Electricity Commissioners are themselves exceeding the limits imposed upon them by the Legislature, and so far from seeking to diminish the authority of Parliament we are performing the ordinary duty of the Courts in upholding the enactments which it has passed. Nothing we do or say could in any degree affect the complete power of the Legislature by Act of Parliament to carry out the present scheme, or any other scheme. All we say is that it is not a scheme within the provisions of the Act of 1919. That it is convenient to have the point of law decided before further expense and trouble are incurred seems beyond controversy. I think therefore that the appeal should be allowed, so far as the writ of prohibition is concerned, and that the rule for the issue of the writ should be made

absolute.

So far as the writ of certiorari is concerned, the matter becomes unimportant. I have considerable doubt whether there is any such definite order as could be made the subject of certiorari, and in this respect I think that the appeal should be dismissed without costs.

YOUNGER L.J. I concur so entirely in the judgment just delivered that I hesitate to add anything to it. I permit

(1) *In re Local Government Board; Ex parte Kingstown Commissioners*, 16 L. R. Ir. 150; 18 ibid. 509.

(2) 11 C. B. (N. S.) 664. [*211]

to myself the privilege of observing only upon two of the matters discussed before us. The first is this: In the proposed scheme, immediately after cl. 7, which requires the joint authority to appoint and keep appointed the Local Authority Committee and the Company Committee, and cl. 9, which requires the authority to delegate to these committees respectively the extensive powers of the authority set forth in the third annex to the scheme, there comes cl. 10, by which it is provided that the Local Authority Committee may delegate, subject to such restrictions or conditions as they may think fit, any of their powers or duties to any other committees appointed by them, with a proviso not for the moment material. I find in the contrast between this clause and clauses 7 and 9 a notable confirmation of the view we take of these two clauses. Clause 10 is the legitimate exercise by the Commissioners of their power under s. 6, sub-s. 2, of the Act of 1919 to provide by a scheme "for enabling the joint electricity authority to delegate with or without restrictions to committees of the authority any of the powers or duties of the authority," and its very presence in the scheme throws into striking relief the difficulty – the impossibility, as I think – of finding on reference to s. 6, sub-s. 2, of the Act any justification for the insertion in the scheme of such directions as are here contained in clauses 7 and 9. I feel quite satisfied that a scheme containing such clauses is not such a scheme as Parliament by the Act of 1919 empowered the Commissioners to make or formulate or the Board of Trade to confirm.

If then this Court be satisfied as it is that it has power to prohibit the Commissioners from further proceeding with such a scheme, ought it to hesitate to exercise that power in the present circumstances of this case? The Attorney-General presented to us a very weighty argument that it should – namely, that the Court, if it were now to intervene here, would be usurping the function of Parliament, which by the Act of 1919 has reserved to itself alone the privilege of expressing effective approval or disapproval of any scheme whether authorized by the Act or not, if brought before it after [*212] being made by the Commissioners and confirmed by the Minister of Transport. This important contention of the Attorney-General is the second matter upon which I wish to observe.

If I thought that Parliament by s. 7, sub-s. 2, of the Act of 1919 had so enacted, I would myself at once accept the contention of the Attorney-General. I would conclude that by the terms of the statute the Court had been dispensed from all responsibility in relation to the action either of the Commissioners in making, or of the Minister of Transport in confirming, any scheme under it. In such circumstances any interference by the Court at any stage would, I agree, be in the legal sense of the word an impertinence.

But I do not so read s. 7, sub-s. 2, of the Act of 1919. That Act in my judgment contemplates that the

Commissioners' order, which, when approved by a resolution passed by each House of Parliament, is to have effect as if enacted in the Act, embodies only a scheme which under the Act the Commissioners are given power either to approve or formulate. Every scheme under the Act remains the scheme of the Commissioners even after it is confirmed by the Minister of Transport and approved by Parliament. The modifications in a scheme inserted either by the Minister of Transport or by Parliament are limited to modifications, as I read the Act, which might have been lawfully made under the powers of the Act by the Commissioners themselves had they been so minded. Parliament has not by the Act conferred upon the Minister of Transport, nor has it in terms reserved to itself by a mere resolution of both Houses power, under the name of modifications in a scheme of the Commissioners, to insert in a scheme provisions which would under the Act be beyond the powers of the Commissioners if inserted in the scheme by them in the first instance. So, at any rate, I read the Act. Fortunately, however, it is not necessary in this case to decide the very serious question whether, if at any time Parliament should approve by resolution of each House a scheme which, adopting if I may the language of Lord Robertson in *Russell v.* [*213] *Magistrates of Hamilton* (1), could in fact be shown to be "an abuse" of the statute, the scheme so approved would nevertheless by virtue of s. 7, sub-s. 2, "have effect as if enacted in this Act," and would have to be given statutory force by every Court in which its terms were canvassed. To suggest that such a question is one which may in view of the terms of this sub-section arise, is not of course to suggest that Parliament cannot sanction and give the effect of statute law to any scheme it likes. It is only to suggest that it may not have in this Act reserved to itself the power by a mere resolution of each House to give statutory effect to a scheme the formulation of which it has not by the statute authorized. No such serious question however arises for decision now. For the moment it is, I think, enough to say that, whatever may be the effect of such a joint resolution when once it is passed, Parliament in this statute contemplates that no such resolution will approve, except possibly by inadvertence, a scheme which it would under the Act be beyond the powers of the Commissioners to formulate or of the Minister of Transport to confirm. If that be the true view of the statute the interference of the Court in such a case as this, and at this stage, so far from being even in the most diluted sense of the words a challenge to its supremacy, will be an assistance to Parliament. It will relieve each House to some extent at least from the risk of having presented to it for approval by resolution schemes which go beyond the powers committed by the statute to the Commissioners who made them or the Minister of Transport who confirmed them. It will leave each House to a great extent untrammelled by any apprehensions of this kind, to devote itself to the consideration of the question the Act has undoubtedly reserved to it – namely, whether in the particular case the scheme should be approved or not. For these reasons I am of opinion that if we have the power in this case to interfere, we are rendering a service not only to the parties concerned but to each House of Parliament itself by exercising that power as we propose to do.

(1) (1897) 25 R. 350, 357. [*214]

BANKES L.J. So far as it relates to the prohibition the appeal will be allowed and the rule will be made absolute for a prohibition in the form of the rule nisi. So far as it relates to the certiorari the appeal will be dismissed without costs.

Appeal allowed.

TAB 5

Annex I — Constitutionality of the Canadian Armed Forces COVID-19 vaccination policy

Date: 18 July 2023

Issues

The aim of this Annex is to determine if portions of the Canadian Armed Forces (CAF) Vaccination Policy pursuant to Chief of the Defence Staff (CDS) COVID-19 directives deprive CAF members of their rights under the *Canadian Charter of Rights and Freedoms* (the Charter), Section 7 - Life, liberty and security of person, which states: [1]

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

If section 7 is engaged, then this Annex will also examine whether the CAF has shown that the limitation of the rights guaranteed by section 7 is justified in a free and democratic society under section 1 of the Charter, which states: [2]

> 1.The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Context and applicable policies

On January 25, 2020, the first case of the COVID-19 virus was identified in Canada. Due to the highly contagious nature of the virus, other cases were quickly identified. The Government of Canada implemented public health measures to limit the impact of the virus on Canadians.

On 11 March 2020, the World Health Organization (WHO) assessed the situation related to the spread and severity of illness caused by the COVID-19 virus and declared it a pandemic. [3] In the first months of the pandemic, CAF members were deployed to long-term care facilities in Québec and Ontario under Operation LASER, [4] supported northern and remote communities, assisted the Public Health Agency of Canada (PHAC) in managing and distributing personal protective equipment, and helped Public Health Ontario with contact-tracing efforts. The CAF also provided support for the distribution of COVID-19 vaccines through Operation VECTOR. [5]

In May 2020, the CAF and Department of National Defence (DND) issued the Deputy Minister (DM)/CDS joint

directive – DND/CAF COVID-19 public health measures and personal protection, [6] and the Joint CDS/DM Directive for the Resumption of Activities. [7] The intent was to maintain a level of readiness commensurate with the CAF's mandate while ensuring the safety of all CAF members.

On 9 December 2020, Health Canada authorized the first vaccine against COVID-19 and mass vaccination efforts began across Canada later that month. [8]

On 6 January 2021, the CAF launched a vaccination campaign where the priority was afforded to CAF members serving in higher-risk settings given their occupation and duties. [9] In the roll-out message, the CAF Surgeon General stated that:

> Like other vaccines provided to CAF members, the COVID-19 vaccine will not be mandatory; this remains a voluntary option for all. Whether or not a vaccine will be made a requirement for an operation or a position is a decision to be made by operational commanders, in consultation with their medical advisors. However, CAF members may require proof of a COVID-19 vaccination in order to operate in certain high-risk environments or with vulnerable populations. The intent remains to protect ourselves, and protect others to maintain operational effectiveness as we serve Canada and Canadians at home and abroad.

Between April and June 2021, the CAF completed its first COVID-19 Immunization Campaign for all individuals entitled to CAF medical care.

On 6 October 2021, the Treasury Board Secretariat announced the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police (RCMP). The policy applied to DND employees, but not CAF members. It required all public servants regardless of their place of work and on-site contractors to be fully vaccinated. It also directed that non-compliant employees be placed on leave without pay. Accommodation measures were available to employees who could demonstrate that they were unable to get vaccinated for reasons related to protected grounds of discrimination. [10]

On 8 October 2021, the CDS issued the first directive on CAF Covid-19 vaccination. [11] It introduced mandatory vaccination as a requirement for all CAF members to perform work-related duties. It explained that vaccines are effective at preventing severe illness, hospitalization, and death from COVID-19, and that the number of outbreaks decreases with increased vaccination coverage in the population. The directive announced that DND and the CAF implemented a layered risk mitigation strategy relying on public health measures such as physical distancing, mask-wearing, hand-washing, and work from home. The directive stated that the early implementation of this strategy enabled a safe workplace with minimal transmission of the virus.

The directive affirmed that the CAF's voluntary vaccination campaign was "highly successful" with 91% of all members being fully vaccinated with two doses. It explained that vaccination is not a substitute for following public health measures; rather, it adds an additional layer of protection. The directive explained that, at the time, the Canadian population had not achieved sufficient vaccination uptake and that the need for public health measures would be ongoing until sufficient widespread immunity is attained in Canada. It stated there were indications that "vaccine mandates" may be effective in increasing vaccine coverage rates in the population, and that the Government of Canada announced its intent to require vaccination across the federal public service. The directive also stated that,

to demonstrate leadership, the CAF abides by the general spirit of the federal policy.

The directive divided members into three groups: the "fully vaccinated," the "unable" to get vaccinated and the "unwilling" to get vaccinated. Members had to attest to their vaccination status in the Monitor Military Administrative Support System (Monitor MASS) by 15 November 2021. The directive stated that accommodation under the *Canadian Human Rights Act* (CHRA) [12] forthose individuals who were unable to be vaccinated should not be punitive and should be provided up to the point of undue hardship. The directive provided that those accommodation measures include remote work/ telework arrangement if operationally feasible, testing if access to the workplace was required and alternative workplace or work schedule. [13] It stated that a CAF member's unvaccinated status may have additional career implications, including loss of opportunities contributing to promotion, such as inability to attend career courses, deployments, domestic and international travel restrictions. It stated that CAF members unwilling to disclose their vaccination status or those who are not accommodated under the CHRA may be subject to remedial or alternative administrative measures. The directive also stated that it was a "temporary measure" that "will be terminated once the domestic transmission rate of COVID-19 in Canada no longer poses a risk to the national healthcare system." [14]

On 3 November 2021, the CDS issued a second directive on the CAF COVID-19 vaccination policy. It set out the requirements for requestingan exemption or accommodation on medical, religious or other protected grounds of discrimination. [15] Directive 002 reiterated the CAF's engagement to abide by the Government of Canada's policy on vaccination. It stated that adherence to the policy was an expected behaviour applicable to all CAF members and those who do not comply are considered to be in breach of the DND and CAF Code of Values and Ethics. It also provided that unvaccinated members -unless exempted for operational reasons or accommodated where feasible - would not be employed or undergo training on Royal Canadian Navy vessels, Royal Canadian Air Force aircraft or a Canadian Army fighting or field vehicle; be posted outside Canada, be deployed on international or domestic operations; or participate in in-person collective training.

Directive 002 emphasized the chain of command's (CoC)obligation to initiate administrative action towards members who refusevaccination or refuse to disclose their vaccination status. CAF members that have not complied will be placed on recorded warning and counselling and probation for misconduct for a period of 14 days, to allow them to "overcome their conduct deficiency" by getting vaccinated.Members who remained unwilling to be vaccinated would be subject to administrative action. Directive 002 explained that members cannot request leave without pay, and clarified that it also applied to membersauthorized to work remotely.

On 8 November 2021, the Director Military Career - Administration issued the "Aide-Memoire - CDS Directive 002 on CAF COVID-19 Vaccination Implementation of Accommodations and Administrative Action, providing direction and templates to the CoC for the issuance of remedial measures and release procedures for non-compliance with the CDS directives. [16]

On 22 December 2021, the CDS issued CDS Directive 002 - Amendment 1 that reiterated the Directive 002 provisions, albeit with a few modifications and clarifications. [17] The directive stated that unvaccinated members could elect to initiate arelease on a voluntary basis or transfer to the supplemental reserve. [18] These members were not exempt from remedial measures until they were released from the CAF (paragraph 13(f)(5)). The directive also

applied to members in the process of being released for medical or other reason, including to members on periods of retention and undertaking the vocational rehabilitation program for serving members. The directive stated that unvaccinated members in those situations were not exempt from remedial measures and administrative review for non-compliance with CAF's vaccination policy and could see their release be expedited under *Queen's Regulations and Orders for the Canadian Forces* (QR&O), Section 15.01, item 5(f) of the Table, Unsuitable for further service [19] (paragraph 13(f)(4)).

In February 2022, the Chief Military Personnel issued [Canadian Forces General Message (CANFORGEN)] 012/22 - APPLICATION OF [Defence Administrative Orders and Directives (DAOD)] 5019-2 - ADMINISTRATIVE REVIEW IN RESPONSE TO CDS DIRECTIVES ON CAF COVID-19 VACCINATION. It reinforced CDS Directive 002, reiterating the direction to the CoC to initiate administrative reviews towards all members who remain non-compliant. It states that the requirement of DAOD 5019-2, Administrative Review to consider the totality of the member's career and other criteria do not apply to administrative reviews where a member is being released solely as a result of non-compliance with CDS Directive on CAF vaccination.

On 21 March 2022, the CAF issued the [Canadian Forces Military Personnel Instruction] 01/22 - Changing a Place of Duty and the Use of Postings to Enable Remote Work Options [20] that establishes CAF's framework for authorizing postings to remote work and telework for periods of up to two years. [21]

On 14 June 2022, the Government of Canada announced that the vaccination requirement for the Core Public Administration, including the RCMP, was suspended effective 20 June 2022. During the suspension, employees were not required to be vaccinated as a condition of employment. Employees who were placed on administrative leave without pay for non-compliance with the Policy were returned to regular work duties. [22]

On 16 June 2022, the CAF acknowledged the suspension of the vaccination policy for the public service and stated that the CAF was assessing the need for an amendment to the CDS directives on COVID-19 Vaccination. The message also stated that the CDS Directives remain in effect until further notice.

On 11 October 2022, the CDS issued CDS Directive 003. [23] It supersedes all previous directives on vaccination and ends the requirement that all CAF members be vaccinated, unless accommodated, effective as of 11 October 2022. It provides that the requirement to be vaccinated against COVID-19 is now driven by operational necessity. Vaccination is required for employment in certain positions and on certain operations. The requirements focus on high- readiness, deployable, or core missions or tasks where an illness would create risk to an individual and/or the mission. The directive states that best scientific evidence has indicated that a COVID-19 primary series vaccination protects against severe illness and hospitalization, and limits the likelihood of operationally high impact events requiring medical evacuation. It mentions that vaccination is no longer a prerequisite for enrollment. Attestation of vaccination status via Monitor Mass remains a requirement under Directive 003.

Directive 003 states that members who have not received the primary vaccine series no longer require accommodation, but may not be eligible to perform certain duties. It encourages all CAF members to be fully vaccinated and current. Directive 003 requires members assigned to specific units or positions to be vaccinated: members assigned to high readiness units and members that could be employed in isolated areas where access to medical care is limited or where vaccination is a prerequisite of entry. Vaccination against COVID-19 is no longer

required for all other personnel.

Directive 003 states that the change in CAF vaccination policy is not retroactive. The administrative reviews for which a release decision was rendered will still be actioned; those not yet completed will be closed. Any remedial measures will remain on files as a record of non- compliance with a lawful order, but monitoring periods are to be concluded. Members employed in positions or functions requiring vaccination who have not completed their primary vaccination series and choose not to, shall be reassigned to roles or units designated as not requiring a vaccination (para 14(d)). It states that the policy will be reviewed and updated as the pandemic situation evolves. It also directs the review and consideration of cancellation of CANFORGEN 012/22 stating that the provisions of DAOD 5019-2, Administrative Review do not apply to CAF members being released under the CAF's vaccination policy.

Position of the CAF

The Vice Chief of the Defence Staff

In order to assess the constitutionality of the disputed provisions of the CDS directives, the Military Grievances External Review Committee (Committee) sought input from the CAF, to understand what information and considerations played a role in developing its approach, particularly in respect of members who refused vaccination. The Committee explained that it received several grievances from CAF members, disputing the constitutionality of the CDS Directives on COVID-19 Vaccination, particularly the portions concerning members "unwilling" to be vaccinated. The Committee also explained that several grievors contend that the requirement to be vaccinated in order to remain employed without further consideration, infringed on their rights to life, liberty and security of the person. In response, the Vice Chief of the Defence Staff (VCDS), who was identified as the Office of Primary Interest in the CDS Directive 002, explained to the Committee that no CAF member was forced to receive medical treatment. She stated that the CAF maintained the members' right to refuse medical treatment, but that their right is distinct from the potential loss of employment for failure to comply with the CDS orders to be vaccinated. She explained that the purpose and intent of [Director Medical Policy Instructions] 4030-57 (MSI 4030-57, Consent to Medical Treatment) is to allow members to freely choose whether they receive medical treatment, but that "This does not mean that there are no consequences for refusing." [24]

In her comments, the VCDS referred the Committee to the Attorney General's memorandum in *Wojdan* concerning the Government of Canada's vaccination policy, [25] including all the experts' affidavits that were presented from the CAF and public health officials. The Committee compiled all of those documents as forming part of the CAF's position. [26] The Attorney General in *Wojdan* argued that the federal policy did not engage the public servants' security of the person interest because it did not force them to get vaccinated. He made the distinction that "[r]ather, it requires them to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other." The Attorney General also argued that property or economic rights are not generally protected under section 7 of the Charter, stating that the protection does not apply to the economic consequences the appellants faced if they chose not to get vaccinated. [27]

The VCDS explained that the CAF was directed to impose a vaccination mandate equivalent to the Government of

Canada's policy for the public service and the RCMP. The VCDS explained that the CAF was unable to place non-compliant members on leave without pay. She explains that the CAF leave policy manual, at chapter 8, precludes the CDS from directing members on leave without pay. She explained that there was no time for the CAF to amend its leave manual in time to follow the timelines in the Government of Canada's vaccination policy. She also said that relieving members from duty in accordance with QR&O 19.75 would require the CAF to keep paying the members, "which would defeat the intended purpose of the [leave without pay] option in the public service."

The VCDS explained that "the CAF considered all possible avenues when determining the most effective method of complying with the government of Canada direction regarding public servants [sic throughout]." She noted that all public servants who did not comply with the directive were to be placed on leave without pay, with the intent that their employment would eventually be terminated. The VCDS stated that until such time as amendments are made, the CAF would remain compliant with the direction from the Government of Canada. She noted that any amendments to the policy should not be expected to apply retroactively and the consequences of non-compliance with the CAF COVID-19 vaccination policy would remain in effect until and if any future amendments should be issued.

Strategic Joint Staff Director General, Plans

The Committee also sought clarification from the Strategic Joint Staff Director General of Plans, responsible for the development and implementation of the CDS directives, to assess whether the CAF considered other options than ordering all CAF members to get vaccinated in order to remain employed. The Committee asked whether the CAF considered the possibility of employing the "unwilling" members under alternatives and restrictions, as allowed for unvaccinated members who were accommodated. He answered: [28]

> No. CDS made it clear in his policy that the importance of being vaccinated in order to protect the Force was based on solid medical grounds that justified the mandatory aspect of this policy to all CAF members without any exceptions. As with every policy, accommodation process has been put in place for those members who had pre-accepted conditions that would not allow them to comply even if willing to. That said, being unwilling was never an option and the policy even made COVID-19 vax a permanent condition of employment to be enrolled in the CAF.

In the affidavit filed in *Neri*, [29] the Director General, Plans also explained the content of the CDS directives on COVID-19 for which he is responsible. He explained that the CAF has enabled a safe workplace with minimal transmission of the virus through the diligent application of public health measures prior to vaccination being made available in Canada. The CAF's strategy relied heavily on public health measures, such as physical distancing, wearing nonmedical masks, hand-washing, and dispersed (mix of home and workplace) or work from home postures where operationally feasible. With respect to the latter measure, the Director General explained that the pandemic has demonstrated how much can be accomplished through a dispersed and remote workplace. However, he also explained that many CAF tasks cannot be successfully accomplished this way. He specified that CAF members completing critical missions or working in situations where physical distancing is not possible may be required to take additional safety measures, such as operational testing for COVID-19. He finally noted the CAF's contribution to the Government of Canada's COVID-19 response and vaccine roll-out operations.

Concerning vaccination, he explained that the CAF encouraged vaccination of its members once Health Canada approved four COVID-19 vaccines for use in Canada. He explained that the CAF's healthcare system was allocated a quantity of COVID-19 vaccines in April-June 2021 to vaccinate all individuals entitled to CAF medical care. The CAF COVID-19 Immunization Campaign was successful as the CAF reached a 91% vaccination rate (with an additional 2% of members partially vaccinated) by the beginning of October 2021. This uptake rate provided an important level of force protection to CAF members, enabling the relaxation of public health measures in some locations, as well as facilitating the commencement of the reconstitution of the CAF. The Director General Plans, Strategic Joint Staff explained that the CAF has a general duty to ensure, where possible, the health and safety of all its members in the workplace. He explained that the CAF vaccination policy development process was informed by the scientific evidence provided by PHAC, and that it was an evergreen document. He explained that vaccination is an important complement, not a substitute, to the recommended public health measures. [30]

Public Health Agency of Canada

The PHAC advised that COVID-19 vaccines are critical to improving the functioning of society and to achieving widespread immunity. The evidence indicates that the vaccines are very effective at preventing severe illness, hospitalization and death from COVID-19 and that the number of outbreaks decreases with increased vaccination coverage in the population.

The PHAC's draft report dated 17 August 2021 indicates: [31]

> Most recent modelling and forecasting studies indicate that with the current vaccination coverage levels, although very good, the healthcare capacity could be exceeded during this [fourth] wave. To minimize this possibility, 80% or more of all eligible age groups would need to be fully vaccinated. However, overall 2-dose coverage for the eligible general population in Canada is 71.3% and much lower in the lower age groups (51% in the 18-29 year olds) as of mid-August 2021…"
>
> …
>
> Being unvaccinated has become an important risk factor for hospitalization. Since May 1, 2021 the COVID-19 hospitalization rates among unvaccinated populations are considerably higher than the hospitalization rates for both partially and fully vaccinated populations.
>
> …
>
> Presently, those who are unvaccinated are at greatest risk of infection and severe outcomes. Spread in areas with low vaccination coverage presents an ongoing risk for emergence of, and replacement by, new variants.

Regarding the risks of transmission of the virus, the report notes that earlier studies had shown that vaccination helped reduce transmission, as vaccinated persons were "less infectious". [32] However, the affidavit refers to more recent studies pertaining to the Delta variant, showing that "the possibility of high viral loads in some breakthrough cases in fully vaccinated people which can be as high as in unvaccinated people." The report also explains that the benefits of vaccination outweigh any safety risks when compared to the possible side effects. The agency strongly recommends that all eligible Canadians receive a full course of vaccines as soon as possible. The PHAC's report also

explains that workplaces have been a frequent setting for outbreaks, mostly in settings where physical distancing was difficult, working remotely not possible and public health measures challenging to implement. It also notes that several workplace settings have succeeded in minimizing transmission with proper infection control measures in place. The PHAC explains that vaccines, when paired with other measures such as wearing masks, hand-washing, ensuring good ventilation indoors, physically distancing and avoiding crowds, can protect the health and wellbeing of employees.

Concerning the implementation of vaccine mandates, PHAC's draft report referenced by the CAF in their response to the Committee stated that:

> Vaccine uptake has plateaued and other countries are facing this challenge. To stimulate uptake, an increasing number of countries as well as provinces and territories are implementing or contemplating vaccine mandates or passports for specific sectors. The impact of these vaccine policies on vaccine uptake will be better known as they roll out.
>
> For non COVID-19 vaccines, vaccine mandates exist and they can be effective to increase uptake. This strategy is mostly effective for individuals that are complacent or not prioritizing vaccination in their day to day life. Other strategies that are more dialogue based are effective to motivate vaccine hesitant individuals. Combination of strategies are most effective to optimize uptake.
>
> …
>
> This highlights the importance of continuing efforts to increase vaccine uptake in Canada, with at least 80% of the all eligible age groups fully vaccinated, given that the Delta variant is much more contagious than previous strains/variants circulating in Canada and a complete two-dose series of COVID-19 vaccine provides substantial protection against the variant.

At the time of the report, it was expected that only 51.3% to 73.1% of the federal public service employees would be fully vaccinated. The report explains that vaccine requirements in daycare settings, schools and colleges/universities could increase vaccine coverage by 18%. It stated that the effectiveness of these requirements is impacted by the ease of obtaining exemptions, the consistency of the enforcement and "is less clear when the baseline immunization rate is already high". The report also noted that vaccine mandates generally have exemptions and don't require the exclusion of the unvaccinated, unless there is an outbreak.

Health Canada

In another affidavit filed in the *Neri* injunction case, the Director General, Biologic and Radiopharmaceutical Drugs Directorate, Health Products and Food Branch, Health Canada presented information about the COVID-19 vaccination development and approval process. [33] She explained the functioning of mRNA vaccines and reiterated that the benefits associated with the authorized vaccines outweigh the risks of reported side effects. [34] She also explained that studies have revealed that the virus is most frequently transmitted when people are in close contact with others who are infected (either with or without symptoms) and that most transmissions occur indoors. Individual, social and occupational factors affect vulnerability to the COVID-19 illness, for individuals such as healthcare workers, emergency workers who have a high degree of social contact, and for international business

travellers. [35] She explained that the goal of Canada's COVID-19 pandemic response and recovery was to minimize serious illness and overall deaths, while minimizing societal disruption using a risk management approach. To maximize mitigation efforts, a layered approach should be used by applying multiple measures together aimed at reducing the risk of COVID-19 spread.

In her affidavit, the Director General also explained that it is reasonable to take active measures to control the spread. For example, by reducing the potential for the spread of the COVID-19 virus in Government of Canada's facilities, Canada will protect Canadians, including those in the employment of the Government of Canada. This will help reduce the burden that individuals infected with COVID-19 place on the provincial acute and emergency care medical systems.

Additionally, Canada will help ensure continued operation of those facilities despite continued public transmission of COVID-19 and its variants by reducing the likelihood of transmission at those facilities among staff.

Analysis

The Committee has received numerous grievances in which the grievors challenge the legality of the CDS directives on CAF COVID-19 vaccination and their application. As noted above, the CDS earlier directives were superseded by directive 003 on 11 October 2022, significantly narrowing the scope of the CAF's vaccination policy. To clarify, the content of the CDS directive 003 is not under review by the Committee at this time. Rather, the Committee is reviewing the constitutionality of the previous CDS directives - the first directive, directive 002 and directive 002 amended - since their consequences are still applicable and valid for most grievors. As such, remedial measures already issued remain in place and the release processes initiated are still proceeding. The following analysis is relevant to the majority of similar grievances before the Committee. Therefore, the use of this Annex, addressing a common issue, is intended for consistency, clarity and streamlining of the review process for all relevant cases.

CDS Jurisdiction to Address Questions Pertaining to the Charter and Constitutionality

The Charter at paragraph 24(1) provides that anyone whose guaranteed rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain appropriate and just remedy. A court of competent jurisdiction is one that has jurisdiction to grant redress. [36] The underlying principle is that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts." [37]

The Committee and the Final Authority addressed questions pertaining to CAF members' fundamental rights protected by the Charter in prior grievances. [38] Subsection 18(1) of the *National Defence Act* (NDA) states that the CDS is "charged with the control and administration of the Canadian Forces."

CAF members who believe they are aggrieved can submit grievances against "any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act." The courts noted that the scope of section 29 of the NDA is "the broadest possible wording that accommodates any and [39]

every wording, phrasing, expression of injustice, unfairness, discrimination, what-not." The Federal Court also explained that an order from the CDS has to be consistent with the Constitution to be legal. [40] Although the CDS directives are not "regulations" per se [41], the Charter and its values apply to binding policies of a general application and to individual administrative decisions. [42]

Recently, the Federal Court reiterated the principle that members of the CAF must exhaust the grievance process. It stated that the grievance process can address the CAF members' Charter claims against the CDS directives on CAF COVID-19 vaccination. [43] While his authority to grant financial compensation is limited, the CDS has the authority to cancel and modify the directives on vaccination, as directed by paragraph 52(1) of the Constitution [44], if he finds that they are unconstitutional. The CDS can also cancel remedial measures, overturn decisions to release CAF members and direct re-enrolment when feasible. Therefore, I find that the CDS has jurisdiction to determine whether the CAF's vaccination policy is constitutional.

Protected Interests under Section 7 of the *Charter of Rights and Freedoms*

To show an infringement to the right to liberty and security of the person, the grievors must satisfy two criteria. They must show that: (1) one of the three protected interests (life, liberty, and security of the person) is engaged and (2) that the deprivation is not in accordance with the principles of fundamental justice. [45]

As explained in the following analysis, the CDS' order that all CAF members must be vaccinated to remain employed in the CAF engages the grievors' right to liberty and security of the person, as protected by section 7 of the Charter.

The Right to Liberty

The right to liberty protects the freedom of all capable adults to make their own choices concerning their medical care and treatment, including decisions to refuse vaccination. The Charter does not protect all activities that a person defines as central to his or her lifestyle. [46] The protection of the right to liberty under section 7 commonly applies to criminal and immigration matters where the state can physically restrain individuals through imprisonment or deportation. [47] However, the right to liberty is not restricted to mere freedom from physical restraint. [48] The right to liberty also protects personal autonomy and dignity that includes the right to make inherently private choices such as accepting or refusing medical treatment. [49] Courts have recognized a common law right of patients to refuse consent to medical treatment, or to demand that treatment, once commenced, be withdrawn or discontinued. This freedom was found to be protected even in cases where the medical care or treatment could have been beneficial to the person's health and when the refusal was likely to lead to death. [50]

The CDS orders and directives impose vaccination against COVID-19 as a service requirement for all members of the CAF, unless they can demonstrate that they are "unable" to get vaccinated based on one of the prohibited grounds of discrimination. The members who do not comply are considered in breach of the CAF and DND Code of Ethics for refusing to follow an order. In those cases, the directives direct the CoC to issue remedial measures and use release procedures without any other consideration than the member's refusal to get vaccinated, despite being placed under remedial measures for 14 days.

In L*avergne-Poitras*, the Court found "some authority for the proposition on that engaging a liberty or a security of the person interest as a condition of employment may constitute a deprivation of that right for the purposes of the section 7 analysis." [51] In a recent Court decision, the Cour supérieure du Québec also found that the vaccination requirement imposed by the Minister of Transport engaged the employees' right to liberty and security of the person. The Court did not accept the Attorney General's argument that the employees were not forced to being vaccinated stating "[translation] Admittedly, the treatment is not imposed on them and they theoretically retain the choice to accept it or not. But the consequences of a refusal are such that this choice is not really a choice." [52] Arbitration decisions also recognized that a requirement to be vaccinated in order to remain employed engages the employees' bodily autonomy including the right to make decisions regarding medical treatment. [53] Accordingly, I find that the vaccination requirement ordered through the CDS Directives to remain employed by the CAF engages the grievors' right to liberty to make their own decisions towards medical treatment.

The Right to Security of the Person

The right to security of the person protects physical and psychological integrity. Like the right to liberty, the right to security of the person protects bodily integrity, dignity and autonomy that can also include interruption or refusal of medical care. [54] The right to security of the person is engaged by state interference with a person's physical or psychological integrity. Section 7 does not protect the right to practice a regulated profession or exploit commerce described as "purely economic interest". The courts rejected claims that the application of the regulations caused anxiety and stress to the point where they threatened the right to the security of the person. The courts found that the interests involved in those cases were purely economic and not protected by the Charter. [55]

The courts recognized the stress and anxiety related to the possibility of losing one's career in a chosen profession, but found that it was not the type of suffering protected under the right to the security of the person. Having said this, the Supreme Court of Canada stated that: "This is not to declare, however, that no right with an economic component can fall within "security of the person". [56] In that decision, the Supreme Court suggested that the right to the security of the person may protect against the deprivation of economic rights fundamental to human survival. The distinction is that the regulation of economic activity that can have the effect of limiting profit or earnings will not engage section 7 whereas the complete deprivation of a person's livelihood may engage the right to the security of the person. [57]

In *Syndicat des métallos* concerning constitutionality of Transport Canada's vaccination policies, the Court states that the employees' statements showed the seriousness of the infringement and that "[translation] It would be wrong to minimize or trivialize the pressure thus caused" by the threat of termination. [58] The Court found that the vaccination requirement engaged the employees' right to the security of the person. Of note, imminent harm is sufficient for a claim under section 7. [59]

The consequences for CAF members who are "unwilling" to be vaccinated can impact their livelihood, physical and psychological integrity and therefore engage the grievors' right to the security of the person. The CDS directives apply to members who are in the process of being released for medical reasons and who are no longer deployable, including members serving in a period of transition. Some grievors in that situation alleged that they were abruptly left without a residence and without medical care as a result of being expeditiously released for not wanting to be

vaccinated against COVID-19. Therefore, I find that the grievors' right to the security of the person is also engaged in some cases.

Conclusion

Following the review of precedent court cases, I conclude that two of the three protected interests under section 7 of the Charter are engaged, which is sufficient to pursue further analysis under section 7. The requirement to be vaccinated in order to remain employed by the CAF engages the grievors' right to liberty and the consequences of non-compliance can also engage some grievors' right to the security of the person. This deprivation is only permissible if it is in accordance with the principles of fundamental justice.

Principles of Fundamental Justice under Section 7 of the *Charter of Rights and Freedoms*

The rights protected by section 7 of the Charter are not absolute and can be limited in accordance with the principles of fundamental justice, notably in a manner that is not either arbitrary, overly broad or disproportionate. Courts have noted that these principles consider whether there is a rational connection between the disputed policy or rule, and its impact on the person. Arbitrariness, overbreadth and gross disproportionality can all be established based upon the impact on a single person and a finding that at least one of these principles is infringed leads to the analysis under section 1 of the Charter. [60]

Arbitrariness

An arbitrary policy or rule is one that has no rational connection to its purpose. The implementation of a CAF vaccination policy is not in itself arbitrary in the context of the global COVID-19 pandemic. The science shows that the COVID-19 vaccines are effective at reducing the likelihood of becoming seriously ill or dying from this disease. In the context of the pandemic, the Federal Court stated that "… previous case law suggests the mere existence of a policy, such as the CAF vaccination policy, in itself is not sufficient to ground a challenge under section 7 of the Charter." [61] Considering the severity of the COVID-19 pandemic, the possible consequences of infection from the virus, the social and economic impacts, the conditions of military service and the role of vaccination in preventing severe illness, there is clearly a rational connection between the implementation of a vaccination policy and its objective to ensure health and safety. There is no doubt that CAF members can be called upon to serve in various conditions and locations, including in settings with high risks of transmission and infection from COVID-19. In that context, it is justified to implement a vaccination policy. Thus, the issues before the Committee are whether some aspects of the CDS directives impose limits and measures that are carefully tailored and proportionate to their objective, or not.

The Federal Court recently explained that a policy can be arbitrary if it treats two groups of people who pose similar risks differently, by subjecting them to different restrictions on their liberty. [62] In that case, the Court found that the difference in treatment was justified by scientific information showing that the two groups of travellers posed different levels of risks regarding the transmission of the COVID-19 virus. The Court considered evidence showing that air

travellers were more inclined to use public transportation that augments the risks of transmission, whereas land travellers were more often using their personal vehicles and were going straight home with limited contacts.

The CDS directives also treat two groups of unvaccinated members differently (the "unable" and the "unwilling"). Members unwilling to be vaccinated receive administrative actions leading to release, while members deemed unable to be vaccinated are provided with alternatives (remote work, telework, testing, alternative workplace, alternative work schedule). The CDS directives and the CAF do not explain why these alternatives could not be made available to the unwilling and were limited to members who could show that their decision to refuse vaccination was based on a protected ground of discrimination. It is insufficient to say the CAF abides by its obligation to accommodate under the CHRA and that being unwilling was not an option because it does not show how the distinction is connected to the objective of the vaccination policy. There is no scientific evidence or operational considerations showing how the division of unvaccinated members into two groups is connected to the objectives of the vaccination policy or why the CAF had to limit the accommodations to the "unable". Therefore, while I find the CAF vaccination policy itself not arbitrary, I find the distinction in its implementation between "unable" and "unwilling" to vaccinate to be arbitrary.

Overbreadth

To avoid overbreadth, policies must be tailored using the least restrictive reasonable means to achieve their purposes, selecting amongst the reasonable options available. A policy is overbroad when it includes some conduct that bears no relation to its purpose, making it arbitrary in part.

Overbreadth addresses the situation where there is lack of rational connection between the purpose of the policy and some, but not all, of its impacts. This can happen when the state uses means that are broader than is necessary to achieve the objective, when only some effects of the policy are arbitrary. [63]

For instance, what explanation did the CAF provide for the requirement that all CAF members be vaccinated within 14 days in order to remain employed, regardless of the tasks, location and occupation in which they serve? In a labour arbitration case, the basic framework for analysis regarding the reasonableness of vaccination policies is described as "a highly contextual matter involving the balancing of interests that will vary from workplace to workplace, and will be fluid, potentially changing as circumstances change." [64] In some arbitration cases, arbitrators found that mandatory vaccination was reasonable where it was required to reduce the risks of absenteeism and its impact on essential operations where employers showed significant disruption to their operations caused by outbreaks and infection among employees in high risk settings, such as schools and long term care homes. [65] On the other hand, arbitrators found that the requirement to be fully vaccinated was unreasonable in cases where employees were mainly teleworking, working outside and in an environment with little transmission and infection in the workplace. [66] The information from Health Canada and PHAC relied upon by the CAF in the development of the vaccination policy also shows that the virus is most frequently transmitted when people are in close contact with others who are infected (either with or without symptoms), that most transmission occurs indoors and that individual, social and occupational factors affect vulnerability to the COVID-19 disease, such as for healthcare workers and emergency workers who have a high degree of social contact.

The challenge in the CAF is that depending on their occupation, locations and duties, CAF members could be

exposed to all or some of these settings to various degrees at different times in their military careers. In this context, a 'one size fits all' approach to vaccination would seem like an overly simple option. As the jurisprudence explains, overbreadth cannot be justified on the basis that it makes enforcement more practical should the rule deprive the liberty of even one person in a way that does not serve its purpose. [67] Since the CAF members serve in a broad range of occupations, location and circumstances, the order that all members get vaccinated within 14 days to remain employed affected some members in a way where there was no rational connection to the objective of the policy. For example, not all CAF members, such as members with temporary medical employment limitations, are deployable at any given time, despite the members' overall obligation to be deployable. The CAF is a very large employer that provides various accommodation measures and work alternatives to its members prior to considering a release when a member no longer complies with the Universality of Service principle. This is reflected in the content of the CDS directives, showing that unvaccinated members "unable" to vaccinate were accommodated and remained employed under certain restrictions and arrangements, while respecting the health and safety of other members and the public. Given the high rate of vaccination within the CAF and within Canada, it is not clear why the members "unwilling" to vaccinate could not be similarly accommodated when exercising their protected right to refuse a medical treatment.

When the CAF launched its voluntary vaccination campaign, [68] the CAF's Surgeon General anticipated that vaccination could be made a requirement for an operation or a position by operational commanders in consultation with their medical advisors, in order to operate in certain high-risk environments or with vulnerable populations to protect CAF members and others and maintain operational effectiveness. In an affidavit filed in *Neri*, the Director General – Plans, Strategic Joint Staff of the Canadian Armed Forces explained that the CAF has enabled a safe workplace with minimal transmission of the virus through the diligent application of public health measures prior to vaccination being made available in Canada. The CAF's strategy relied heavily on public health measures, such as physical distancing, wearing nonmedical masks, hand-washing, and dispersed (mix of home and workplace) or work from home postures where operationally feasible. I note that the October 2022 CDS Directive 003 now aligns the CAF COVID-19 vaccination policy with the January 2021 Surgeon General's vaccine rollout message. However, when the CAF implemented its vaccination policy in 2021, vaccination was made a requirement for all CAF members, regardless of the settings in which they serve.

The order that all CAF members get vaccinated to remain employed was too broad because, for example, it applied to members who were already successfully performing their duties through remote work/telework arrangements where it was operationally feasible. It also applied to members serving in settings allowing other unvaccinated members to undergo weekly rapid testing to access the workplace. The mandatory vaccination requirement similarly applied to members who were deemed non deployable and in the process of being released for medical reason. In those cases, it is difficult to see a rational connection between the requirement to vaccinate and the policy's objective to limit the spread of COVID-19 virus, reduce its transmission and minimize negative effects caused by the pandemic on public health, the society and the economy. Having carefully reviewed the interpretations provided by the courts and with full appreciation of the complexity of challenges presented by the pandemic, I cannot lose sight of the notion that to avoid overbreadth, a policy should be tailored and use the least restrictive option in achieving its purpose. Since the CAF vaccination policy applied to all members, even those in the process of release for medical reasons, I conclude

that it was overly broad and not using the least restrictive option in its implementation.

Disproportional

The rights protected by section 7 of the Charter can be limited in a manner that is not arbitrary, overly broad or disproportionate. According to the CAF vaccination policy, members were given 14 days to comply and receive the vaccine against COVID-19 or arrange for vaccination. Those who remained "unwilling" to comply were subject to remedial measures for misconduct, starting with a Recorded Warning and progressing to a Counselling and Probation in case of continued non-compliance. Members who remained unvaccinated despite the remedial measures were subject to an administrative review for the purpose of release from the CAF. Recognizing that CAF members could not be ordered on leave without pay under the existing policies, as the public servants, the question still remains whether termination of their service was a proportionate response to their non-compliance with the vaccination policy. The fact that a vaccination policy foresees a possibility of termination of employment or military service does not automatically make it disproportionate in itself. For example, arbitrators have found that vaccination policies directing that unvaccinated employees who refused to comply with reasonable alternatives such as testing be terminated were reasonable. [69] They also found that the vaccination policies "where discipline or termination is a possible but not inevitable outcome of non-compliance" after a period of leave without pay were reasonable. [70] However, arbitrators found that policies directing the inevitable termination of unvaccinated employees were unreasonable in light of the constantly changing and evolving situation with COVID-19 pandemic. They noted the lack of evidence as to the necessity of expedited termination when compared to alternatives such as teleworking, alternative testing where feasible or a period of leave without pay. [71] The arbitrators stated that employers had to demonstrate "just cause" for termination in every case based on the particular circumstances of each case. The simple fact that an employee is unvaccinated does not automatically justify termination and it does not justify termination in every case. In my view, this is also relevant when analyzing the proportionality of a vaccination policy under the Charter.

Similarly, the fact that the CDS directives instruct the CoC to issue remedial measures and initiate release procedures after 14 days towards all unvaccinated members who are "unwilling" to comply, without further consideration, is a disproportionate response, in my view. In the administrative context, a release from the CAF is the most serious administrative action that the CoC can take in response to a perceived shortcoming. While a release for non-compliance with the vaccination policy could be justified in some cases, it does not necessarily justify a release for misconduct in every single case on this basis alone. The CAF must still show that the decision to release is reasonable, justified and in accordance with policies in every case.

As explained above, section 7 of the Charter guarantees individuals the right to make decisions regarding their medical treatment. The characterization that members who are "unwilling" to get vaccinated are displaying misconduct is in contradiction with the CAF's own pre-existing policies and statements that also guarantee their members' choice towards medical treatment. [72] Despite all this, the CAF vaccination policy prescribes the release of members who exercise their protected right to refuse medical treatment and declares them in contravention of the Code of values and ethics. It is understood that CAF members are expected to follow orders given by the CoC but such orders are also expected to be in-line with the rights guaranteed and protected by the Charter.

In the analysis of proportionality, I acknowledge the reality that from the start, it was understood that public health measures will remain in place while the COVID-19 pandemic continued to challenge the capacity of the health care system and present a real threat to the health and safety of Canadians. It was also understood that some public health measures would be temporary and would be relaxed once the situation improved. While the CAF vaccination policy reflects this understanding to some extent, relaxing the requirements pursuant to CDS directive 003, it remained inflexible with regards to members unwilling to vaccinate, releasing them from the CAF with practically permanent impact on their lives and livelihoods. Based on this analysis, I find that termination of service for some members was a disproportionate response to their non- compliance with the vaccination policy.

Conclusion

In light of the analysis detailed above, I conclude that the limitation of the grievors' right to liberty and security of the person by the CAF vaccination policy is not in accordance with the principles of fundamental justice because the policy, in some aspects, is arbitrary, overly broad and disproportionate. Therefore, I conclude that the grievors' rights protected under section 7 were infringed.

Is the Deprivation of Grievors' Rights under Section 7 of the Charter justified under Section 1?

As we saw in the analysis of section 7 of the Charter, section 1 also recognizes that fundamental rights are not absolute and that the Government can limit them when necessary to achieve an important objective, as long as the limits are proportionate. [73] The onus of proof under section 1 is on the government entity and requires persuasive evidence. Under this analysis, the CAF have an opportunity to demonstrate that the limitations imposed under section 7 are justified. The purpose of the infringing rules must be of significant importance and be consistent with the principles integral to a free and democratic society.

The applicable test was set out in the Oakes decision. Section 1 applies to limits on rights or freedoms that are "prescribed by law". Under section 1, the "law" includes government entities' policies that are not acts or regulations when they establish a norm or standard of general application enacted pursuant to a rule-making authority. The Supreme Court explained that "[where] a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law". [74] The CDS directives are "orders and instructions to the Canadian Forces" issued under his authority provided for at subsection 18(2) of the NDA. They are not "acts or regulations". [75] However, they set out a general standard for members of the CAF and, as such, are considered to be legislative in nature under the section 1 analysis.

The constitutionality test asks two questions: first, whether the policy's goal is "pressing and substantial" and whether there is "proportionality between the objective and the means used to achieve it". The second part has three elements: rational connection, minimal impairment and final balancing. The test should be applied with flexibly and considering the factual and social context. The analysis is similar to the analysis under section 7. Under section 1, however, the CAF must show that the broader public interest justified the infringement of individual rights. [76]

The causal relationship between the limit and the objective should be demonstrated, where possible, by scientific evidence. Minimal impairment asks whether the government entity carefully tailored the restrictions on the fundamental rights and freedoms. The deprivation must impair the right or freedom "as little as possible". Having said this, the government is not held to a standard of perfection and can show that the measures adopted fall within a range of reasonable options. [77] The test for minimal impairment is whether the government can demonstrate that among the range of reasonable alternatives available, there is no other less-impairing means of achieving the objective in a real and substantial manner. The limitation must impair the right no more than reasonably necessary, having regard to the practical difficulties. There should be evidence as to why less intrusive and equally effective measures were not chosen. In determining whether a scheme is reasonably minimally impairing, courts may also look to laws and practices in other jurisdictions. [78] Minimal impairment imposes similar obligations on the CAF as the duty to accommodate up to the point of undue hardship. [79]

Application to the Facts

In other contexts, the Courts have found that public health measures aiming at reducing the risks of infection and transmission of the COVID-19 serve a pressing and substantial objective. [80] I agree and note that the parties do not dispute that the CDS directives serve a pressing and substantial objective to ensure the health and safety of CAF members and the public they serve in the context of a pandemic. The main issue with the disputed measures of the CAF vaccination policy concerns its proportionality, more specifically, whether it constitutes minimal impairment on the grievors' right to liberty and security of the person. As stated above, the Committee sought representations from the CAF on these questions.

I have found that the broad order for all members of the CAF to be vaccinated within 14 days in order to remain employed and the direction to issue remedial measures up to release for misconduct of all the members who were deemed "unwilling", without further considerations, infringed upon the members' rights to liberty and security in an overly broad and disproportionate manner. Under section 1, I must consider whether the broad public interest justifies this infringement on the fundamental individual rights protected under section 7. On this aspect, the CAF referred the Committee to evidence from the PHAC and Health Canada.

The PHAC, in its report dated August 2021, anticipated that the healthcare capacity could be exceeded during the fourth wave. To minimize this possibility, it was stated that 80% or more of all eligible general population in Canada would need to be fully vaccinated; whereas the overall 2-doses coverage for the general population in Canada was 71.3% and lower in certain age groups. At the time of the report, it was expected that only 51.3% to 73.1% of the federal public service employees would be fully vaccinated. The document stated that unvaccinated persons were at greater risk of infection and severe outcomes. The report also explained that workplaces have been a frequent setting for outbreaks, mostly in settings where physical distancing was difficult, working remotely not possible and public health measures challenging to implement. It also noted that several workplace settings have succeeded in minimizing transmission with proper infection control measures in place. The PHAC explained that some provinces and territories were contemplating or implementing vaccine mandates to stimulate vaccination uptake in the general population since it had plateaued. It stated that the effectiveness of vaccine mandates is impacted by the ease of obtaining exemptions, the consistency of the enforcement and "is less clear when the baseline immunization rate is

already high". The PHAC's report also noted that vaccine mandates generally have exemptions and don't require the exclusion of the unvaccinated unless there is an outbreak.

In my view, the consideration of the public interest as depicted does not justify the overbroad and disproportionate response from the CAF. As stated above, the CDS directives and affidavit from the Director General, Plans, Strategic Joint Staff (DG Plans, SJS) explained that the CAF has enabled a safe workplace with minimal transmission of the virus through the diligent application of public health measures prior to vaccination being made available in Canada. The CAF's strategy relied heavily on public health measures, such as physical distancing, wearing nonmedical masks, hand-washing, and dispersed (mix of home and workplace) or work from home postures where operationally feasible. The PHAC stated that the effectiveness of vaccine mandates was less clear in such context and that they were mainly useful to increase vaccination uptake. Therefore, it is difficult to understand why the CAF determined that it was necessary to impose such requirement on all of its members when it knew that 91% of members were voluntarily vaccinated. The CAF also reported having been successful at mitigating transmission and infection in the workplace. In *Syndicat des métallos*, the Cour supérieure du Québec observed that an infringement to the rights protected under section 7 could be justified under section 1 in a context where a sector was seriously impacted by infection and transmission of the virus and where the employer could not know how many workers were vaccinated. This was not the case for the CAF.

The CAF did not demonstrate that the broad order for all members to get vaccinated and the blanket exclusion of all the "unwilling" members from the CAF is the less impairing measure to achieve the objective of the CAF vaccination policy. The CDS directives show that the CAF has possibilities to provide alternative work arrangements and allow one group of unvaccinated members to serve under restrictions. The VCDS explained that the CAF sought an equivalent to the Government of Canada's policy. [81] She explains, however, that ordering non-compliant members on leave without pay or to relieve them from duty were not considered viable options for the CAF given that they would have to amend their policy. The VCDS explained that the CAF considered all possible avenues to determine the most effective method of complying with Treasury Board's vaccination policy. However, the federal policy does not apply to the CAF and does not exempt the CAF of their obligations under the Charter. As the content of the CDS directives show, including the most recent CDS directive 003, the CAF has more options available to minimize the risks of infection and transmission among members who are not vaccinated. Leave without pay under QR&O 16.25 and relief from performance of military duty under QR&O 19.75 were not the only reasonable and less impairing options. Also, QR&O 16.25 gives the authority to the CDS to prescribe the circumstances under which leave without pay may be granted.

The Committee also asked the DG Plans, SJS, responsible for the development and implementation of the CDS directives, whether the CAF considered other options. He answered that the CAF did not consider the feasibility of employing the "unwilling" members under alternatives and restrictions, as allowed for unvaccinated members who were accommodated, because the CAF determined that "being unwilling was never an option". These statements do not show that the disputed measures imposed by the CAF vaccination policy were carefully tailored and constituted minimal impairment. The CAF did not invoke practical difficulties in explaining why less intrusive and effective measures were not chosen.

The CDS directives provide less impairing measures in the form of accommodation limited to the members who are "unable" to get vaccinated. However, the CAF did not justify why these measures were limited to only one group of unvaccinated members. Nor did the CAF invoke operational concerns with the health and safety of the remainder of the workforce and the public.

It is pertinent to note here that the October 2022 CDS Directive 003 only requires the vaccination of specific CAF members based on operational requirements, which is what was envisioned by the CAF Surgeon General in January 2021. I have difficulty seeing the reason why such a policy could not have been promulgated from the start. Even in anticipation of a new possible variant, the release of unvaccinated members for non-compliance, regardless of their occupation, duties and place of work, was not always necessary or minimally impairing.

Conclusion

The obligation to limit fundamental rights only when necessary and within proportional limits rests with the CAF. The CAF has the obligation to ensure minimal impairment in the implementation of its vaccination policy, demonstrating that there are no less impairing measures to attain the objective than releasing the members. Similar to the duty to accommodate, minimal impairment requires the CAF to demonstrate that among the range of reasonable alternatives available, there is no other less-impairing means of achieving the objective in a real and substantial manner. I conclude that the CAF has not met its obligation to ensure minimal impairment.

Adequate Remedy

The appropriate remedy for an unconstitutional rule is a declaration of invalidity. The CAF mandatory vaccination policy has been amended when CDS directives 001 and 002 were superseded on 11 October 2022 by the CDS directive 003. The requirement that all CAF members be vaccinated in order to remain employed was cancelled and vaccination is no longer a condition of enrolment. Therefore, the remedy sought by several grievors - the cancellation of the CAF's vaccination policy as stated in the first CDS directive and subsequent directives 002 and 002 amended - has already been implemented, at least in part. The cancellation of the previous versions of the policy constitutes partial remedy considering my finding that portions of the policy were unconstitutional. However, CDS directive 003 maintains the administrative actions issued under CDS directive 002. Given my finding that portions of the policy were unconstitutional, all administrative actions taken against members as a result of the application of the first CDS directive and directives 002 and 002 amended on COVID-19 vaccination should be rescinded.

Some grievors also request apologies from the CDS for the infringement on their fundamental rights. I note that the Committee cannot compel the CDS, or anyone else, to apologize to a grievor given that the issuance of apologies is linked to freedom of expression and cannot be forced. Having said this, it is left to the CDS to issue such apology, if he believes it is appropriate to do so.

Finding

I find that the disputed provisions of the CAF vaccination policy are unconstitutional and, therefore, invalid.

Dated at Ottawa, this 18th day of July 2023

---

1 *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

2 Ibid.

3 Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020.

4 CDS Tasking Order - OP LASER 20-01.

5 Military response to COVID-19 - Canada.ca

6 DM/CDS joint directive - Canada.ca

7 Joint CDS/DM Directive for the Resumption of Activities - Canada.ca

8 Health Canada authorizes first COVID-19 vaccine - Canada.ca

9 Surgeon General CAF Vaccine Rollout Message - Canada.ca

10 Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police (tbs-sct.gc.ca)

11 CDS Directive on CAF COVID-19 Vaccination - Canada.ca

12 RSC 1985, c H-6.

13 The directive applies to members employed under telework arrangements (para 20(b)(7)), 20(c)(3)(a).

14 Paragraph 17(a) of the first CDS directive (October 2021).

15 CDS directive 002 on CAF COVID-19 vaccination – Implementation of Accommodations and Administrative Action - Canada.ca. The CHRA makes it illegal to discriminate on a wide range of grounds including but not limited to race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics.

16 Available at http://roryfowlerlaw.com/wp-content/uploads/2021/12/DMCA-2-Aide-Memoire-.COVID_.Final_.pdf.

17 CDS Directive 02 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action – Amendment 1 - Canada.ca

18 Paragraph 2.034(b) of the QR&O explains that the Supplementary Reserve consists of officers and non-commissioned members who are not required to perform military or any other form of duty or training, unless placed on active service by the Governor in Council under section 31(1) of the *National Defence*

Act (NDA).

19 The item applies to "the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within his control, develops personal weakness or behaviour or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces" as provided in the version of the QR&O that applied at the time.

20 Appendix 5: CF Mil Pers Instr 01/22 - Changing a Place of Duty and the Use of Postings to Enable Remote Work Options.

21 Also see Defence Team COVID-19 - Working remotely - Canada.ca

22 COVID-19 vaccination requirement for federal public servants - Canada.ca

23 CDS Directive 003 on CAF COVID-19 Vaccination for Operations and Readiness – Canada.ca

24 Appendix 1: Comments from the VCDS to the Committee - 15 March 2022.

25 The Federal Court of Appeal found that the appeal was moot given the Government of Canada's decision to suspend the effects of the policy, in ***Wojdan v Canada (Attorney General)***, 2022 FCA 120 (***Wojdan***).

26 Appendix 3: Motion Record of the Respondent, the Attorney General of Canada, in Response to Applicants' Motion for Interlocutory Injunction and Appendix 4: Memorandum of Fact and Law of the Respondent, the Attorney General of Canada.

27 Referring to ***Irwin Toy Ltd v Quebec (Attorney General)***, [1989] 1 SCR 927 and ***Canadian Constitution Foundation v Attorney General of Canada***, 2021 ONSC 2117 and 2021 ONSC 4744 concerning the requirement that air travellers quarantine at a government-approved hotel at their own expense while awaiting COVID-19 tests results.

28 Appendix 2: Comments from the Director General, Plans, Strategic Joint Staff to the Committee - 12 May 2022.

29 ***Neri v Canada***, 2021 FC 1443.

30 Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Brigadier-General Erick Simoneau, affirmed December 9, 2021, referring to "Exhibit A - Draft PHAC public health rationale for a Federal COVID-19 Vaccination Policy, August 17, 2021".

31 Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Brigadier-General Erick Simoneau, affirmed December 9, 2021, at "Exhibit A - Draft PHAC public health rationale for a Federal COVID-19 Vaccination Policy, August 17, 2021".

32 A 30% lower risk of transmission by vaccinated healthcare workers was reported at the time.

33 Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Celia Lourenco, affirmed December 7, 2021.

34 She explains that more than 58 million vaccine doses were administered in Canada and that 22,231 people reported mild and serious side effects. The rate of adverse side effects reports is different among different age groups and sexes. Possible side effects include thrombosis, Guillain-Barré Syndrome; capillary leak syndrome, inflammation of the heart, facial paralysis and reported deaths that were still under investigation at the time.

35 Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Celia Lourenco, affirmed 7 December 2021, at Exhibit H - *Regulations Amending the Food and Drug Regulations (Interim Order Respecting the Importation, Sale and Advertising of Drugs for Use in Relation to COVID-19): SOR/2021-45*.

36 *R v Hynes* [2001] 3 SCR 623 and *Mills v The Queen* [1986] 1 SCR 863.

37 *Nova Scotia (Workers' Compensation Board) v Laseur,* [2003] 2 SCR 504, at para 29; and *Canada (Attorney General) v Telbani*, 2012 FC 474 at para 15.

38 In *McBain v Canada (Attorney General)*, 2011 FC 745, at paras 42, 50, 94; G*iolla Chainnigh v Canada (Attorney General)*, 2008 FC 69, at paras 16, 26, 45; *Canada (Attorney General) v Buffett*, 2007 FC 1061, at para 19; and *Liebmann v Canada (Minister of National Defence)* 2001 FCA 243, at para 10.

39 J*ones v Canada*, 2022, CanLII, FC 1106 and *Bernath v Canada*, 2005 FC 1232.

40 In *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*, 2020 FC 330, at para 129.

41 The NDA grants the authority to make regulations to the Governor in Council, the Minister and Treasury Board at section 12. The CDS directives are "orders and instructions to the Canadian Forces" issued under his authority provided for at subsection 18(2) of the NDA.

42 *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*, 2020 FC 330 and *Doré v Barreau du Québec*, 2012 SCC 12 where the Court explained that the tests as to whether an administrative decision respects the Charter or as to whether a policy (or some of its provisions) respects the Charter are not the same although they are similar and compatible. In both cases, the question is whether there is an appropriate balance between rights and objectives to ensure that the rights at issue are not unreasonably limited. Also *Canada (Attorney General) v Robinson*, 2022 FCA 59, at paras 16-17.

43 *Neri v Canada*, 2021 FC 1443 at para 42. See also *Jones v Canada (Chief of Defence Staff)*, 2022 FC 1106.

44 *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

45 Charterpedia – Section 7 – Life liberty and security of the person (justice.gc.ca).

46 "As examples … a taste for fatty foods, an obsessive interest in golf and a gambling addiction are not afforded constitutional protection…. By analogy, the ability of the lawyers — for two to three weeks per year — to attend operas or piano lessons, or to train for a triathlon without having to keep a pager nearby are not protected by s.7" in *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55, at para 50.

47 For example, in *R. v Smith*, 2015 SCC 34, the Supreme Court found that the prohibition on possession of certain forms of medical marijuana infringed upon the rights protected under section 7 of the Charter.

48 *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, cited in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, concerning the parents' right to choose medical treatment for their children; *R. v Morgentaler*, [1988] 1 SCR 30 concerning women's right to abortion; and *Godbout v Longueuil (City)*, [1997] 3 SCR 844, in which a minority of judges found that a person's right to choose where to establish a home is a personal choice protected under section 7. In a case concerning freedom of conscience and religion, the Court Martial cited Zylberberg v *Sudbury Board of Education*, 1988 CanLII 189 (ON CA) as quoting para 95 of *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295: "Freedom in a broad sense embraces both the absence of coercion and constraint …" in *R. v Scott G.D. (Lieutenant(N))*, 2003 CM 290.

49 *Carter v Canada (Attorney General)* 2015 SCC 5, in a decision pertaining to the *Criminal Code* provisions prohibiting physician-assisted dying. Also see *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, concerning the refusal of a minor to receive blood transfusions due to religious beliefs.

50 In *AC v Manitoba (Director of Child and Family Services)*, *ibid.* The right to accept or refuse medical treatment is also recognized in Québec - Consentir à des soins de santé ou les refuser | Éducaloi (educaloi.qc.ca).

51 *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232 (*Lavergne-Poitras*), at para 61.

52 *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455, at para 174 (Syndicat des métallos).

53 In *Power Workers' Union v Elexicon Energy Inc.,* 2022 CanLII 7228 (ON LA) at paragraphs 92-94 and *Electrical Safety Authority v Power Workers' Union*, 2022 CanLII 343 (ON LA) (*Electrical Safety Authority*) at paragraph 64.

54 In *Carter*, *supra* note 49 and *Morgentaler, supra note 48.*

55 *Tanase v College of Dental Hygienists of Ontario*, 2021 ONCA 482, at para 40; *Walker v Prince Edward Island*, [1995] 2 SCR 407 at para 1, concerning the condition to be a member of a provincial institute of chartered accountants; *Siemens v Manitoba (Attorney General)*, [2003] 1 SCR 6, at paras 45-46, concerning the alleged right to operate video lottery terminals at a particular place of business.

56 In *Irwin Toy Ltd. V Quebec (Attorney General)*, [1989] 1 SCR 927, 1989 CanLII 87 (SCC).

57 Charterpedia – Section 7 – Life, liberty and security of the person (justice.gc.ca) referring to *Irwin Toy Ltd. and Gosselin v Québec (Attorney General)*, 2002 SCC 84. Of note, courts also stated that work is a fundamental aspect of a person's life and pertains to a person's dignity In Reference Re *Public Service Employee Relations Act* (Alta), [1987] 1 SCR 313, concerning to the right to association, the Supreme Court noted that "Work is one of the most fundamental aspects in a person's life". Also see *Chapman v Canada (Attorney General)*, 2019 FC 975, at para 33, *Adair v Canada (Canadian Armed Forces)*, 2004 CHRT 28, at para 23, and *El-Helou v Courts Administration Service*, 2012 FC 1111, at para 68.

58 *Syndicats des métallos, supra* note 52 at para 178.

59 *Association of Justice Counsel v Canada (Attorney General)*, 2022 FC 1090.

60 *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770, at para 86.

61 *Neri*, *supra* note 29 at para 55.

62 *Spencer v Canada (Attorney General)*, 2021 FC 361, at paragraphs 72 and 73.

63 *Canada (Attorney General) v Bedford*, 2013 SCC 72, at paras 112-113; *R. v Gayme*, [1991] 2 SCR 577; *R v Appulonappa*, 2015 SCC 59, at paras 26-27, 36; *Carter v Canada (Attorney General)* 2015 SCC 5, at para 85; and *R v Ndhlovu*, 2022 SCC 38, at paras 77-78, 98-99, 103-108.

64 In *Power Workers' Union v Elexicon Energy Inc*, 2022 CanLII 7228 (ON LA) (*Elexicon Energy Inc*).

65 *Canada Post Corporation and Canadian Union of Postal Workers* (unreported decision of T. Joliffe dated April 27, 2022) and *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA) (*Chartwell Housing Reit*).

66 *Electrical Safety Authority*, 2022 CanLII 343 (ON LA), at para 81, and *Elexicon Energy Inc, supra* note 64, at para 8.

67 *R v Ndhlovu*, 2022 SCC 38, at paras 103-108.

68 Surgeon General CAF Vaccine Rollout Message – Canada.ca

69 For example, *Canadian Union of Public Employees v Allan Klippenstein,* 2022 CanLII 44759 (SK LRB), at paras 38-39.

70 *Unifor Local 973 v Coca-Cola Canada Bottling Limited*, 2022 CanLII 25769 (ON LA), at para 41, and *Electrical Safety Authority, supra* note 66.

71 *Electrical Safety Authority supra* note 66 and *Chartwell Housing Reit, supra* note 65.

72 Sections 83 and 126 of the NDA provide that a member who "willfully and without reasonable excuse" disobeys an order to submit to vaccination commits an offence under the Code of Service Discipline and is potentially liable to imprisonment or a lesser punishment. In *R v Kipling*, 2002 CMAC 1, at para 3, the member was repatriated for not being vaccinated. The Notes to QR&O 103.58 explain that "The main purpose of [section 126] is to ensure that members of the Canadian Forces will not evade important service by refusing to submit to inoculation, etc., when failure to be inoculated would mean that they could not be sent on duty to a particular area." Also see Appendix 6: MSI 4030-57, Consent to Medical Treatment.

73 *R. v Oakes*, [1986] 1 SCR 103 and Charterpedia - Section 1 – Reasonable limits (justice.gc.ca).

74 In *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, at para 53.

75 The NDA grants the authority to make regulations to the Governor in Council, the Minister and Treasury Board at section 12.

76 Charterpedia - Section 1 – Reasonable limits (justice.gc.ca) and *R. v. Ndhlovu*, 2022 SCC 38.

77 *Oakes, supra* note 73 *; R v Sharpe*, 2001 SCC 2; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (*Hutterian Brethren*); and *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1.

78 Charterpedia - Section 1 – Reasonable limits (justice.gc.ca) referring to *Carter supra* note 49 and *JTI-MacDonald, supra* note 77; and *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9.

79 *Hutterian Brethren, supra* note 77.

80 *Spencer v Canada (Health)*, 2021 FC 621, at para 210, and *Syndicats des métallos, supra* note 52.

81 In *Wojdan*, *supra* note 25 at para 19, departments reported approximately 90 grievances. The constitutionality of the policy was also challenged in an injunction request in *Lavergne-Poitras, supra* note 51. The Federal Public Sector Labour Relations and Employment Board (FPSLREB) denied a grievance concerning a union's refusal to file a policy grievance against the Government of Canada's policy based on the Charter in *Musolino v Professional Institute of the Public Service of Canada*, 2022 FPSLREB 46.

Date modified: 2023-08-01