Court of Appeal File No. CA45711

COURT OF APPEAL

ON APPEAL FROM: the Order of the Honourable Chief Justice Hinkson of the Supreme Court of British Columbia pronounced on October 12, 2018

BETWEEN:

Council of Canadians with Disabilities

Appellant
(Plaintiff)

AND:

Attorney General of British Columbia

Respondent
(Defendant)

FACTUM OF THE RESPONDENT, ATTORNEY GENERAL OF BRITISH COLUMBIA

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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

September 12, 2016	The Council of Canadians with Disabilities (the "CCD") and two individual plaintiffs, Mary Louise MacLaren and D.C. file a Notice of Civil Claim. An order anonymizing the name of the plaintiff, D.C., is granted the same day, following an application made to the Court.
September 26, 2016	The plaintiffs serve a Notice of Constitutional Question setting out the constitutional challenge to s. 31(1) of the *Mental Health Act*, R.S.B.C. 1996, c. 288, ss. 2(b) and (c) of the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, and ss. 11(1)(b) and (c) of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, on the basis that these sections unjustifiably infringe ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.
November 10, 2016	The Attorney General of British Columbia (the "AGBC") files its Response to Civil Claim.
December 23, 2016	The plaintiffs file a Reply to the Response to Civil Claim filed by the Attorney General of British Columbia.
October 25, 2017	The individually named plaintiffs, Mary Louise MacLaren and D.C. file a Notice of Discontinuance.
December 11, 2017	The CCD files an Amended Notice of Civil Claim.
January 31, 2018	The AGBC files an Amended Response to Civil Claim.
February 21, 2018	The CCD files an Amended Reply to the Amended Response to Civil Claim.
July 13, 2018	The AGBC files a Notice of Application for summary trial seeking to have the claim dismissed on the basis that the CCD lacks the requisite standing.
August 15, 2018	The CCD files its Application Response.
August 23, 2018	The AGBC's summary trial application proceeds before Chief Justice Hinkson.
October 12, 2018	Chief Justice Hinkson releases his decision, declining to exercise his discretion to grant the CCD public interest standing. He dismisses the action.
November 8, 2018	The CCD files its Notice of Appeal.

OPENING STATEMENT

This appeal lies from a discretionary decision to deny the Council of Canadians with Disabilities ("CCD") public interest standing to challenge the constitutionality of British Columbia's *Mental Health Act* (*"MHA"*) and two related statutes.

After two individual co-plaintiffs discontinued their claims, the CCD reframed the action as a "systemic challenge" to the impugned provisions. The AGBC applied to dismiss the claim on the basis the CCD lacked public interest standing to pursue the challenge without an individual plaintiff or concrete adversarial context. The CCD argued that an individual factual matrix was unnecessary because it could rely on "reasonable hypotheticals". The CCD also said it intended to call unidentified witnesses at trial.

The chambers judge weighed the factors governing public interest standing and exercised his discretion to deny standing. He found: the CCD's claim lacked the "indispensable factual foundation" needed to ground a serious justiciable issue; the CCD's engagement with the issues raised weakly met the genuine interest factor; and its proposal to conduct the litigation without a concrete factual setting to illuminate the *Charter* issues was not a reasonable or effective means of bringing the challenge. The CCD's assertion that it was unrealistic to expect one of thousands of directly affected individuals to act as a co-plaintiff was deemed to be unsupported and contradicted by a lengthy line of past challenges to mental health laws involving individual claimants.

On appeal, the CCD says the chambers judge relied on arbitrary and legally irrelevant considerations. This is not the case. The judge properly applied well-settled law to the facts before him, and his discretionary decision is entitled to deference from this Court.

Granting an out-of-province human rights organization standing to litigate the rights of unrelated third parties without a plaintiff or adjudicative facts would push public interest litigation into uncharted territory. It would undermine the rationales for imposing limits on standing; encourage increasingly abstract *Charter* litigation; and strain the proper role of courts in a democratic system. The CCD's misplaced reliance on the criminal doctrine of "reasonable hypotheticals" and vague assurance that a record would eventually be provided were rightly dismissed as an insufficient basis for a grant of standing.

The facts of this case and unique design of the CCD's claim support the chambers judge's decision to deny standing. The limits on public interest standing are intended to prevent well-meaning advocacy groups like the CCD from using judicial resources to advance their policy agenda untethered from a concrete dispute or plaintiff. *Charter* litigation of individually held rights should not be conducted in the abstract. The law of public interest standing must not be transformed into a private reference power.

The Chief Justice did not err denying CCD standing. The appeal should be dismissed.

PART 1 – STATEMENT OF FACTS

1. In September 2016, Mary MacLaren, D.C., and the Council of Canadians with Disabilities ("CCD") filed a notice of civil claim (the "original claim"), challenging the constitutionality of the *Mental Health Act,* R.S.B.C. 1996, c. 288 (the "*MHA*") and two related provincial statutes. The plaintiffs alleged the impugned laws deprived involuntary patients of the right to refuse or revoke consent to psychiatric treatment, regardless of a patient's capability to do so, and thus violated ss. 7 and 15 of the *Charter.*

2. In late 2017, Ms. MacLaren and D.C. discontinued their claim, leaving the CCD as the only plaintiff. The CCD also amended the original claim. The Attorney General of British Columbia ("AGBC") then filed a summary trial application seeking to dismiss the claim on the basis that the CCD lacked public interest standing.

3. In October 2018, the chambers judge declined to grant the CCD public interest standing. He concluded: the CCD had failed to particularize a serious justiciable issue; the CCD had weakly met the genuine interest factor; and the CCD's plan to pursue a *Charter* claim without an individual plaintiff or a concrete factual setting was not a reasonable and effective means of bringing the challenge.

I. The Impugned Provisions

4. In its claim, the CCD asked the Court to declare provisions of three provincial statutes invalid (collectively, the "impugned provisions"):

   i. Section 31(1) of the *MHA* – authorizing the director of a provincial mental health facility to consent to treatment for involuntary patients.

   ii. Sections 2(b) and (c) of the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181 (the "*HCCA*") – providing that the *HCCA* does not apply to the provision of psychiatric treatment to involuntary patients under the *MHA.*

   iii. Sections 11(1)(b) and (c) of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405 – providing that an adult may not authorize a representative to refuse consent to the provision of care or treatment to an involuntary patient under the *MHA*.

The *Mental Health Act* and *Mental Health Regulation*

5. The *MHA* and *Mental Health Regulation*, B.C. Reg. 233/99 (the "Regulation"), create a legislative scheme that permits individuals to be involuntarily admitted and treated in a provincial mental health facility if the statutory requirements are met.

6. Under s. 22(1) of the *MHA*, the director of a provincial mental health facility may admit a person to the facility and detain the person for up to 48 hours for examination and treatment on receiving a medical certificate completed by a physician in accordance with ss. 22(3) and (5) of the *MHA*. Section 22(2) permits a longer period of admission if another physician completes a second medical certificate. Each medical certificate must include the physician's statement that the physician has examined the person or patient and is of the opinion that the person has a mental disorder.

7. Under s. 22(3)(c) the certificate must also state the physician's opinion that the person: (1) requires treatment in or through a designated facility; (2) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others; and (3) cannot suitably be admitted as a voluntary patient.

8. Persons detained under s. 22 of the *MHA* are entitled to have a panel review their detention at prescribed time intervals under s. 25 of the *MHA*. Sections 28, 29, 30 and 42 of the *MHA* are alternative means by which a patient may be involuntarily admitted to a health facility.

9. The powers and duties of a director of a provincial mental health facility are set out in s. 8 of the *MHA*. A director's duties include ensuring:

> (a) that each patient admitted to the designated facility is provided with professional service, care and treatment appropriate to the patient's condition and appropriate to the function of the designated facility and, for those purposes, a director may sign consent to treatment forms for a patient detained under section 22, 28, 29, 30 or 42.

10. Once involuntarily admitted, s. 31(1) of the *MHA* allows the director of a facility to authorize treatment recommended by a physician for patients with mental disorders whose conditions prevent them from recognizing their need for treatment.

11. Before an involuntary patient receives treatment, a physician must complete Form 5 (Consent for Treatment – Involuntary Patient) in accordance with s. 11(5) of the *Regulation*. A patient may sign Form 5, in which case a physician must attest the patient is "capable of understanding the nature of the above authorization". The physician alone may sign the Form 5 if the patient does not sign. In that event, Form 5 requires the physician to attest the patient is "incapable of appreciating the nature of treatment and/or his or her need for it, and is therefore incapable of giving consent".

Health Care (Consent) Act* and *Representation Agreement Act

12. The *HCCA* sets out how a health care provider must obtain informed consent to treatment from an adult before providing health care. The *HCCA* also provides that where an adult is incapable of providing consent to treatment, a temporary substitute decision-maker may give consent. Section 2(b) states that the *HCCA* does not apply to the provision of psychiatric care or treatment to involuntary patients under the *MHA.*

13. The *Representation Agreement Act* permits an adult to appoint a representative to make health and personal care decisions on behalf of the adult. Section 11(1)(b) of the *Representation Agreement Act* provides that an adult may not authorize a representative to refuse treatment for involuntary patients under the *MHA.*

14. In sum, the CCD objected to the existence of a separate legislative regime for consent to psychiatric treatment on behalf of involuntary patients under the *MHA*. The effect of the relief sought would have been to remove that separate legislative regime and replace it with the substitute decision-making model that applies to the provision of health care to adults who are not involuntarily detained.

II. Models in Other Jurisdictions

15. Every province has enacted legislation governing the involuntary admission of persons to mental health facilities, and their psychiatric treatment after admission. As a general concept, such legislation attempts to balance the right of a patient to self-determination in health care decision-making, and the potentially conflicting right to

effective treatment in circumstances where a mental disorder may prevent recognition of the need for treatment. The specific details of the legislation differ between provinces.

16. Individual provinces have adopted different approaches to treatment authorization for involuntary patients. Five provinces use an appointee of the state to authorize treatment for involuntary patients. In Saskatchewan and Newfoundland, the attending physician authorizes the treatment.[1] In British Columbia, the director of the psychiatric unit consents, on the recommendation of a physician. New Brunswick uses a tribunal for both mentally incompetent patients and competent patients who refuse.[2] Quebec uses the court to authorize treatment.[3] In all other Canadian jurisdictions, private substitute decision makers consent or refuse to consent in a similar manner as for a medical patient who is not capable of consenting.

III. History of the Litigation

17. In September 2016, Ms. MacLaren, D.C., and the CCD filed the original claim. The original claim included detailed factual allegations about the involuntary psychiatric treatment Ms. MacLaren and D.C. allegedly experienced. In particular, Ms. MacLaren alleged she had been involuntarily detained under the *MHA* and administered "forced psychiatric treatment, including electroconvulsive therapy … and psychotropic medications."[4] D.C. made similar allegations concerning "forced psychiatric treatment".[5]

18. In early 2017, the parties discussed the document production process. The AGBC requested the plaintiffs to produce their medical records that were relevant to the factual allegations pleaded in the original claim. The AGBC offered to consent to any necessary confidentiality terms, undertakings and sealing orders to address any privacy concerns.[6] The parties also canvassed the length and format of the trial. The plaintiffs initially recommended a five-day hearing. The AGBC proposed a four to six week trial.[7]

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[1] *Mental Health Services Act,* S.S. 1984-85-86, c. M-13.1; *Mental Health Care and Treatment Act,* S.N.L. 2006, c. M-9.1; *Involuntary Psychiatric Treatment Act,* S.N.S. 2005, c. 42.
[2] *Mental Health Act*, R.S.N.B. 1973, c.M-10., s.8.11(3).
[3] *Certain Personality Rights* 1991, C.C.Q. 1991, c. 64, art 16.
[4] Original Notice of Civil Claim, Part 1, para. 21; Appeal Record ("AR"), p. 5.
[5] Original Notice of Civil Claim, Part 1, para. 40; AR, p. 8.
[6] Affidavit #1 of Heather Lewis, Exhibits "B" and "C"; Appellant's Appeal Book ("AAB"), pp. 4-7.
[7] Affidavit #1 of Heather Lewis, Exhibit "C"; AAB, pp. 6-7.

19. On October 26, 2017, counsel for the plaintiffs served a notice of discontinuance by the individual plaintiffs. This left the CCD as the only remaining plaintiff.[8]

20. The CCD is a national association that was formed because people with disabilities "wanted an accessible and inclusive society; that is, a Canada where people with disabilities have the opportunity to go to school, work, volunteer, have a family, participate in recreational, sport and cultural activities".[9] The CCD is headquartered in Winnipeg, Manitoba. Melanie Benard, the CCD employee who chairs the committee directing the litigation, is a non-practising lawyer who resides in Quebec.[10]

21. On December 11, 2017, the CCD filed an amended notice of civil claim (the "amended claim"). The amended claim deleted all reference to the personal experiences of the individual plaintiffs and added a number of broad allegations relating to the use of threats, force, and restraints in connection with involuntary treatment. The amended claim also framed the claim as a "systemic challenge" to the impugned provisions.[11]

22. As well as deleting the individual experiences under the *MHA*, the amended claim added a hypothetical scenario in which patients might receive involuntary "psychosurgeries" (i.e. lobotomies).[12] The CCD also pleaded that it met the test for public interest standing. The AGBC disputes the CCD's assertion "that the original and amended pleadings alleged the same material facts".[13]

23. On January 31, 2018, the AGBC filed an amended response to civil claim. The AGBC does not agree with the CCD's assertion that the AGBC did not "raise any complaint about the adequacy of the CCD's amended notice of civil claim."[14] To the contrary, the AGBC denied that the CCD met the test for public interest standing and pleaded, *inter alia,* that an individual plaintiff was needed and that the impugned provisions "cannot be litigated in the abstract".[15]

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[8] Affidavit #1 of Heather Lewis, Exhibit "G"; AAB, pp. 11-12.
[9] Affidavit #1 of Heather Lewis, Exhibit "J"; AAB, p. 58.
[10] AAB, p. 62.
[11] Amended Notice of Civil Claim, para. 29; AR, p. 11.
[12] Amended Notice of Civil Claim, paras. 32, 37-38; AR, pp.11-12.
[13] Appellant's factum, para. 8.
[14] Appellant's factum, para. 9.
[15] Amended Response to Civil Claim, para. 47b; AR, p. 28. *See, also,* RAB, p. 29-30, para. 89.

24. On July 13, 2018, the AGBC served a notice of application seeking to dismiss the CCD's claim on the basis that it lacked standing. Shortly thereafter, on July 17, 2018, the CCD served a supplemental list of documents relating to the organization and stated purpose of the CCD. Between 2016 and 2018, the CCD did not produce any documents relevant to issues other than that of its own standing. Prior to the hearing, the CCD accepted the AGBC's trial length estimate of four weeks.

IV. The Summary Trial Application

25. On August 23, 2018, the chambers judge heard the AGBC's summary trial application. The AGBC argued: the systemic *Charter* challenge did not raise a serious justiciable issue; the CCD was not engaged with the specific issues raised in the litigation; and the proposed proceeding was not a reasonable and effective means of bringing the matter before the court given the insufficient factual and adversarial context.

26. On the application, the CCD tendered only the affidavit of Ms. Benard. She described the work of the CCD and some of its member organizations. She noted that some of CCD's members had experienced mental health issues. However, she did not claim that any of CCD's members had ever been involuntarily detained under the impugned provisions, or that the CCD's advocacy and research work had focused on the consent-to-treatment provisions of the British Columbia *MHA.*[16]

27. Ms. Benard also deposed that people with mental disabilities are often subjected to paternalistic practices and stereotyped as "not able to make decisions" or "express … their own beliefs."[17] Ms. Benard later opined that it was "not realistic" to expect an individual directly affected by the impugned provisions to act as a plaintiff.[18]

28. The AGBC does not agree with the CCD's assertion that "Ms. Benard's evidence was uncontradicted and unchallenged".[19] To the contrary, the AGBC submitted that "Ms. Benard's affidavit is composed in large part of legal argument, hearsay evidence, and

[16] Affidavit #1 of Melanie Benard, paras. 29-30; AAB, p. 70.
[17] Affidavit #1 of Melanie Benard, para. 36; AAB, pp. 72-73.
[18] Affidavit #1 of Melanie Benard paras. 36, 51; AAB, pp. 72-73, 77.
[19] Appellant's factum, para. 16.

inadmissible opinion evidence. Such evidence is objectionable and ought to be given no weight by the court on this application".[20]

29. The CCD did not tender any evidence from involuntary patients expressing either reluctance to act as a plaintiff or willingness to act as a witness and provide a documentary record to support the claim. The CCD alleges the AGBC did not tender an affidavit about a better suited prospective plaintiff. This is true and unremarkable. The CCD bore the onus to establish the criteria for public interest standing.

30. On October 12, 2018, the chambers judge granted the AGBC's application. He declined to exercise his discretion to grant the CCD public interest standing and dismissed its claim. The CCD's summary of the decision (at para. 18) is not a representative characterization of the chambers judge's reasoning. In applying the governing law on public interest standing, the chambers judge's key holdings may be paraphrased as follows:

a. The CCD's claim failed to establish a serious justiciable issue because it lacked the "indispensable factual foundation." In essence, the CCD sought to litigate the *Charter* rights of an amorphous group of unrelated, unnamed third parties.[21]
b. The CCD only weakly met the genuine interest factor. The CCD had a broad interest in disability, autonomy, and human rights but comparatively little experience advocating for mental health related disabilities and negligible involvement with British Columbia's mental health system.[22]
c. The CCD failed to prove that the litigation was a reasonable and effective means of bringing the constitutional challenge because:
    i. The CCD had failed to establish that the claim would be litigated in a sufficiently concrete and well-developed factual setting.[23]
    ii. Ms. Benard's intention to marshal unidentified witnesses for trial or the possibility of a pleadings amendment was not a satisfactory response to

[20] Respondent's Appeal Book ("RAB"), para. 71, p. 23.
[21] Reasons for Judgment ("Reasons"), paras. 38, 98; AR, pp. 74, 87.
[22] Reasons, paras. 43-44, 74; AR, pp. 75, 81.
[23] Reasons, para. 69; AR, p. 81.

the application. The CCD bore the onus to satisfy the public interest standing requirements at the time of the summary trial application.[24]

iii. There were thousands of potential plaintiffs with standing as of right, any one of which would have provided the evidentiary record necessary to decide the constitutional issues.[25]

iv. Ms. Benard's general statement disregarding the capacity of thousands of directly affected individuals to act as a plaintiff was unsupported and contradicted by a long line of challenges to mental health legislation involving individual plaintiffs.[26]

v. The CCD's proposed claim was distinct from other cases where public interest litigants had been granted standing to continue claims *after* an individual litigant had established the factual matrix.[27]

vi. The CCD did not appear to be supported by, or acting in a representative capacity for, individuals directly affected by the legislation.[28]

PART 2 – ISSUES ON APPEAL

31. The CCD alleges the chambers judge misapprehended the factors governing a grant of public interest standing and neglected to consider the CCD's alternate position that standing was not suitable for summary disposition. This framing of the issues ignores the discretionary nature of the chambers judge's decision to deny public interest standing and to decide the standing issue at a preliminary stage in the litigation.

32. The AGBC submits that the two issues arising on this appeal are:

a. First, was the chambers judge's discretionary decision to decline to grant public interest standing so clearly wrong as to amount to an injustice?

b. Second, was the chambers judge's discretionary decision to dismiss the CCD's claim on a preliminary basis under Rule 9-7(15) of the *Supreme Court Civil Rules* so clearly wrong as to amount to an injustice?

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[24] Reasons, paras. 58-61; AR, pp. 78-79.
[25] Reasons, paras. 94-95; AR, p. 86.
[26] Reasons, para. 82; AR, p. 83.
[27] Reasons, para. 67; AR, p. 80.

PART 3 – ARGUMENT

I. Standard of Review for this Appeal

33. The CCD mistakenly argues for a correctness standard of review. The chambers judge's decisions to deny public interest standing and to dismiss the claim under Rule 9-7(15) were both discretionary.[29] Discretionary decisions are entitled to a high degree of deference on appeal.[30] This Court may only interfere with a discretionary decision where it is so clearly wrong as to amount to an injustice or where it is manifest from the reasons that the judge misdirected himself.[31] The CCD's arguments fall well short of the high threshold required to justify interference with the chambers judge's decision.

II. The CCD Bore the Burden of Proof

34. Throughout its factum, the CCD repeatedly implies that the AGBC bore the onus of proof on the summary trial application.[32] On the contrary, the CCD bore the evidentiary burden on the AGBC's application under Rule 9-7. The law is well settled that a plaintiff seeking public interest standing bears the burden of persuading the court that standing ought to be granted.[33] While the AGBC put the issue of standing before the Court under Rule 9-7, this does not reverse the burden of proof.[34] The CCD's attempts to shift the onus must be rejected.

III. Public Interest Standing Framework

35. In *Downtown Eastside,* the Supreme Court of Canada refined the three-part test for public interest standing. In deciding whether to exercise its discretion to grant public interest standing the court must weigh – cumulatively, purposively, and flexibly – three factors: (i) whether there is a serious justiciable issue raised; (ii) whether the plaintiff has a real stake or a genuine interest in it; and (iii) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.[35]

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[28] Reasons, paras. 57, 72; AR, pp. 78 and 81.
[29] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*], para. 35; *Crest Realty Westside Ltd. v. W & W Parker Enterprises Ltd.,* 2015 BCCA 447, para. 30; *Gichuru v. Pallai,* 2013 BCCA 60 [*Gichuru*], para. 34.
[30] *Strickland v. Canada (Attorney General)*, 2015 SCC 37, paras. 37, 39.
[31] *Dhillon v. Pannu*, 2008 BCCA 514, paras. 26-28.
[32] Appellant's factum, paras. 9, 12, 16, 33, 40, 41, 52, 54, 59, 61, 76, and 77.
[33] *Downtown Eastside,* para. 37.
[34] *Gichuru*, para. 35.
[35] *Downtown Eastside,* para. 42.

36. To the extent *Downtown Eastside* shifted the law of public interest standing, it was only to clarify how a court should weigh the three factors. The factors are not "items on a checklist" or "technical requirements." Rather, they are "interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes."[36] There is no "old line" of cases, as the CCD says, that *Downtown Eastside* has rendered irrelevant. *Downtown Eastside* relied heavily on previous Supreme Court precedent.

37. The need to grant public interest standing in some circumstances does not amount to a blanket approval for "every well meaning organization pursuing their own particular case in the knowledge that their cause is all important."[37] In *Downtown Eastside*, the Court described the rationales for restrictions on a party's standing:

> [1] …. 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….

38. The chambers judge "cumulatively weighed"[38] the three factors and exercised his discretion to decline a grant of standing. He found: the CCD's claim lacked the indispensable factual foundation to ground a serious justiciable issue; the CCD's past engagement with the issues raised in the litigation only weakly met the genuine interest criterion; and the CCD's proposal to conduct litigation on behalf of unrelated third parties, without an individual plaintiff or concrete setting to illuminate the *Charter* issues, was not a reasonable or effective means of bringing the challenge.

39. The CCD's factum misrepresents the chambers judge's decision and exaggerates the consequences for plaintiffs who may seek public interest standing in the future. The judge did not impose "arbitrary, legally irrelevant" considerations.[39] He did not require the CCD to meet an "impossible evidentiary burden".[40] His decision does

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[36] *Downtown Eastside,* para. 36.
[37] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236, [*Canadian Council of Churches*], p. 252.
[38] Reasons, para. 98; AR, p. 87.
[39] Appellant's factum, para. 62.
[40] Appellant's factum, para. 64.

not "close the courthouse doors to all plaintiffs who have not yet prosecuted at least two cases."[41] He did not say that an individual plaintiff is required in every *Charter* action.[42]

40. Contrary to the CCD's contention, the chambers judge did not depart from the *Downtown Eastside* framework. He applied settled law to the unique facts before him, and his decision is consistent with the underlying policy rationales for limiting standing. The key aim of the law of standing is to strike a balance between access to the courts and preservation of judicial resources and the courts proper role in a constitutional democracy.[43] The chambers judge denied standing to an out-of-province human rights organization with minimal connection to the individuals most directly affected, when there was no individual plaintiff. To find that the chambers judge lacked the discretion to do so would be irreconcilable with any reasonable concept of balance.

IV. Serious Justiciable Issue

41. The serious justiciable issue factor relates to two traditional concerns underlying restrictions on standing: (1) the proper role of the courts and their constitutional relationship to other branches of government; and (2) the allocation of scarce judicial resources. The requirement for a serious justiciable issue ensures that the court stays within the bounds of its proper constitutional role.[44] The court may examine the merits of the pleaded claim in a preliminary fashion at this step of the analysis.[45]

42. Limits on standing reflect the "natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions."[46] Adjudicative facts and individual plaintiffs lend legitimacy to constitutional review and provide a path to the breach of individual *Charter* rights needed to ground a s. 52 remedy. Where an organization seeks to litigate the rights of unrelated third parties without the requisite factual matrix a claim may fail to raise a serious justiciable issue.

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[41] Appellant's factum, para. 71.
[42] Appellant's factum, para. 30.
[43] *Downtown Eastside,* para. 23.
[44] *Downtown Eastside,* paras. 39-40.
[45] *Downtown Eastside,* para. 42.
[46] *Larouche v. Alberta (Court of Queen's Bench, Chief Justice),* 2015 ABQB 25, para. 47.

43. The chambers judge held the CCD failed to satisfy the first *Downtown Eastside* factor because the claim "lacks the indispensable factual foundation that particularizes the claim and permits the enquiry and relief sought."[47] Simply put, the chambers judge required a factual context capable of proving a breach of individual ss. 7 or 15 *Charter* rights. Contrary to the CCD's suggestion,[48] he did not say that an individual co-plaintiff was required to raise a serious justiciable issue in every case.

44. The chambers judge's analysis under this first factor is supported by *The Canadian Bar Association v. HMTQ*, which concerned a systemic challenge to the provision of legal aid in British Columbia.[49] In that case, the Canadian Bar Association (the "Association") alleged that inadequate provision of legal aid amounted to a violation of unwritten constitutional principles, as well as ss. 7 and 15 of the *Charter.* The Court dismissed the action on the basis, *inter alia,* that the Association lacked standing.

45. In finding that the Association failed to meet the "serious justiciable issue" requirement, Brenner C.J.S.C. observed that the Association did not contend "any of its … members' *Charter* rights [were] at issue".[50] Rather, the Association attempted to bring a claim "on behalf of third parties with whom it stands at arm's length."[51] The Court concluded these third parties were "an amorphous group of individuals whose *Charter* rights may have been … breached".[52] The Court found that allowing the claim to proceed would push the court beyond its proper constitutional role, requiring an "answer [to] a purely abstract question which would in effect sanction a private reference".[53]

46. This Court dismissed the Association's appeal on related grounds. Noting the overlap between questions of standing, justiciability, and the sufficiency of pleadings, this Court found the claim "devoid of particulars of individuals, their cases, and their jeopardy" and therefore did not "raise a justiciable issue on s. 7."[54] This Court dismissed the Association's s. 15 claim for similar reasons.

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[47] Reasons, para. 38; AR, p. 74.
[48] Appellant's factum, para. 30.
[49] *The Canadian Bar Association v. HMTQ,* 2006 BCSC 1342 [*CBA*], aff'd 2008 BCCA 92.
[50] *CBA,* para. 56.
[51] *CBA*, para. 56.
[52] *CBA,* para. 54.
[53] *CBA,* para. 54, citing *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.
[54] *CBA,* para. 50.

47. With Ms. MacLaren and D.C. removed as plaintiffs, the CCD no longer alleged that ss. 7 or 15 *Charter* rights of any identifiable individual had been breached, but rather that the provisions deprived all "Involuntary Patients" of their ss. 7 and 15 rights. Much like *CBA*, therefore, CCD's claim was advanced entirely on the basis that the *Charter* rights of arms-length and unparticularized third parties had been infringed.

48. The unique design of the CCD's challenge compounds the problem. The CCD seeks a declaration of invalidity, in part, on the basis that the Legislature has not adopted one of several alternatives to the medical model for involuntary decision-making: the substitute decision maker model. In the absence of an individual patient making a concrete claim of a ss. 7 or 15 *Charter* breach, the CCD's claim invites the court into a legislative policy debate through the mechanism of a private reference.

An individual factual context is necessary

49. The CCD makes three main arguments on the serious justiciable issue factor: (1) an individual factual context is unnecessary; (2) if this context is necessary, the CCD should have had an opportunity to amend its pleadings; and (3) the chambers judge gave insufficient consideration to the CCD's plan to call evidence at trial.

50. In support of its argument that individual facts are optional, the CCD relies on *R. v. Nur*,[55] a challenge to a mandatory minimum sentencing provision under s. 12 of the *Charter*. In *Nur*, the Supreme Court supplemented *the accused's factual matrix* with consideration of "reasonable hypotheticals". The "reasonable hypothetical" doctrine, however, is confined to s. 12 challenges to criminal laws and has no application here.[56] In civil *Charter* cases, courts have repeatedly insisted on a proper factual record, including adjudicative facts.[57] The CCD's intended reliance[58] on "reasonable hypotheticals", in concert with its failure to plead individual facts or identify individual witnesses, only highlights the reasonableness of the chambers judge's concerns.

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[55] *R. v. Nur,* 2015 SCC 15.
[56] *R. v. Nur,* paras. 51-57. *See, also,* Rothstein, Moldaver, and Wagner JJ. dissenting.
[57] *Lamb v. Canada (Attorney General),* 2018 BCCA 266, paras. 88-89; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *Danson v. Ontario (AGBC)*, [1990] 2 S.C.R. 1086; *Thompson, infra.*
[58] Reasonable hypotheticals were also relied on in CCD's application response. AR, p 52, para. 30.

51. The CCD also argues that no one individual's circumstances would show all of the impacts of the impugned provisions.[59] It is true that a plaintiff *with standing* may rely on the effects of impugned legislation on third parties (the chambers judge did not say otherwise). However, this does not mean that an institutional litigant can "bootstrap" itself into having public interest standing based solely on the interests of unidentified third parties. As the Court reiterated in *Nur*, "[a] claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties".[60]

52. Finally, the CCD relies on *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City)*[61] to support its argument that a case does not need "an individual co-plaintiff or plead[ed] facts relating to any specific individual."[62] Whether individual-related facts were pleaded in *DWS* is not discernible from the reasons, which reproduce only select paragraphs. It *is* true that there was no individual plaintiff. However, the AGBC says this merely reveals that the chambers judge, who also authored *DWS* and heard submissions on it at the hearing, did not impose a strict co-plaintiff requirement, as the CCD suggests. He merely exercised his discretion differently on a different set of facts.

53. In particular, the claim and factual context in *DWS* is not comparable to the present case. *DWS* was not a systemic challenge based on abstract allegations, brought on behalf of an amorphous group of thousands of individuals by an arms-length association. The action targeted a specific by-law on behalf of a homeless population in a specific municipality. Critically, the plaintiff was a small organization of former and current drug users, many of whom themselves "lived on the streets" of Abbotsford and were affected by the bylaw.[63] Unlike the CCD*, DWS* served as a proxy for its individual members, whose rights *were* at issue and who provided the requisite factual context.

54. Ultimately, the chambers judge's conclusion on this factor did not depend upon his reference to comparator groups under *Charter* s. 15, a remark to which the CCD attaches great significance. His focus was on the absence of material facts that, if true,

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[59] Appellant's factum, para. 31.
[60] *R. v. Nur*, para. 51, citing *R. v. Ferguson*, 2008 SCC 6, para. 59 (emphasis added).
[61] *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City),* 2014 BCSC 1817 [*DWS*], aff'd 2015 BCCA 142.
[62] Appellant's factum, para. 32.

could establish a breach of individual rights.[64] Since *CBA,* many *Charter* cases have reiterated the necessity of the specific facts of an individual's case. Individuals, not amorphous groups such as "Involuntary Patients", hold rights under ss. 7 and 15 of the *Charter*. The s. 7 analysis requires a qualitative examination of the law's impact[65] and involves "a singular focus on the individual rights claimant".[66] Section 15 requires the court to consider the effects of the law, in context, from the perspective of the equality claimant.[67]

55. Indeed, in *Allen v. Alberta,* the Alberta Court of Appeal described s. 7 litigation as "notoriously open-ended" and, for this reason, deemed a full factual record critical. The Court went on to note that all of the leading decisions from the Supreme Court of Canada on s. 7 of the *Charter* were decided on records that showed how the "claimant" was deprived of their s. 7 rights.[68]

56. The CCD's alternative argument that it should have had an opportunity to rectify any pleadings deficiencies must also fail.[69] The serious justiciable inquiry requires a preliminary examination of the pleadings, including consideration of whether the outcome is a "foregone conclusion".[70] The absence of a proper factual matrix, in turn, is a fundamental defect. The chambers judge rightly characterized the CCD's suggestion that pleadings issues could be addressed through separate applications as an improper "attempt to shift the onus" to the AGBC—one that "misconstrue[d] the onus that the CCD face[d]" on the summary trial.[71]

57. The CCD further contends that, setting aside the lack of pleaded facts, the chambers judge "ignore[d]" its plan to call individual witnesses at trial.[72] The chambers

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[63] *DWS,* paras. 1-2.
[64] Reasons, para. 39; AR, p. 74.
[65] *Canada (Attorney General) v. Bedford,* 2013 SCC 72, para. 123. Section 7 refers to "Everyone".
[66] *R. v. Michaud,* 2015 ONCA 585, para. 63.
[67] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, para. 16; *Law v. Canada,* [1999] 1 S.C.R. 497 at paras. 61, 66. Section 15 refers to "every individual".
[68] *Allen v. Alberta,* 2015 ABCA 277, paras. 24, 31.
[69] Appellant's factum, para. 33.
[70] *Downtown Eastside,* para. 42; *Finlay v. Canada (Minister of Finance),* [1986] 2 SCR 607 [*Finlay*], para. 38. "… standing and reasonable cause of action are obviously closely related"; *Kitimat (District) v. Alcan Inc.,* [2006] B.C.J. No. 376.
[71] Reasons, paras. 60, 62; AR p. 79.
[72] Appellant's factum, para 33.

judge did not "ignore" this evidence; he found it "insufficient".[73] The time to assess the CCD's public interest standing was at the summary trial. At that time, the CCD was unable to plead, or even say, whose *Charter* rights it intended to litigate at trial.

58. Last, the CCD claims the serious justiciable issue analysis was tainted by an "erroneous pre-judgment of the merits", accomplished by a "wrong and unfair" adoption of the AGBC's "evidence-free argument" about the operation of Form 5.[74] The impugned paragraph merely reiterates the language of the *Regulation* and Form 5.[75] Reciting legislation in the legislative overview section can hardly be characterized as prejudging "disputed facts at the core of the case."[76]

59. In conclusion, the reasons demonstrate that the chambers judge did not err in his approach to this factor. He cited and applied the relevant passage from *Downtown Eastside*.[77] The CCD's plan to litigate individual rights in the abstract was flawed. This Court should not interfere with the chambers judge's conclusion.

V. Genuine Interest

60. The second factor in the *Downtown Eastside* public interest standing analysis is whether the plaintiff has a real stake in the proceedings and is engaged with the issues raised.[78] Thus, the question for the chambers judge was whether the CCD, a national organization focused on improving the status of persons with disabilities, had a genuine interest in the underlying constitutional challenge to the impugned provisions. In addressing this issue, the chambers judge considered the evidentiary record and concluded the CCD only "weakly meets" the second criteria. Contrary to the CCD's argument, the chambers judge did not misunderstand the law, mischaracterize the issues raised, or misapprehend the evidence about the nature or role of the CCD.

61. The chambers judge correctly set out the jurisprudence regarding the "genuine interest" factor.[79] He did not, as the CCD contends, impose a "legally irrelevant"

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[73] Reasons, para. 69; AR, p. 81.
[74] Appellant's factum, paras. 39-41.
[75] Regulation, s. 11(5) states that "A consent for treatment for a patient admitted under section 22, 28, 29 or 42 of the Act must be in Form 5." The chambers judge also quoted from Form 5.
[76] Appellant's factum, para. 40.
[77] Reasons, paras. 26-27; AR, pp. 68-69; *Downtown Eastside*, para. 42.
[78] *Downtown Eastside,* para. 43 .
[79] Reasons, paras. 28, 41; AR, p. 69, 75.

requirement to "have an exclusive or predominant focus on the particular issue it wishes to raise".[80] Rather, he considered the CCD's interest in the promotion of human rights, equality, and autonomy for those with disabilities, and found those interests could be affected by the impugned legislative scheme and could permit the CCD to assert a genuine interest in the litigation.

62. The chambers judge also considered the CCD's history of engagement and found that the CCD was less focused on the mental health issues that were central to the litigation. He concluded the CCD had some genuine interest in the issues raised in the proceedings and that this weakly met the second *Downtown Eastside* criterion. This nuanced application of the genuine interest factor illustrates how the chambers judge "cumulatively weighed" the factors and did not treat them as items on a checklist.

63. The CCD also criticizes the chambers judge's treatment of other cases where broadly-interested organizations pursued public interest litigation. The CCD argues he incorrectly found them "unpersuasive because of the involvement of individual co-plaintiffs". The CCD misunderstands the reasons. These decisions did not persuade the chambers judge because they did not expressly address standing or because the defendants had conceded that the plaintiffs should be granted public interest standing.

64. The CCD's focus on "co-plaintiffs" is misplaced. The chambers judge only refers to "co-plaintiffs" under the genuine interest factor at paragraphs 49 and 50 of his decision. There, after noting the defendant conceded genuine interest at trial in *Carter v. Canada (Attorney General),*[81] the chambers judge went on to highlight Smith J.'s *obiter* remark that, without an individual co-plaintiff, there would be a strong argument that the BCCLA lacked standing. This comment had bearing on the present case. Highlighting it was not an error. In any event, the fact that a genuine interest may have been recognized in other circumstances does not suggest that the chambers judge erred in concluding the CCD "weakly" met the second criterion.

65. The CCD also alleges the chambers judge concluded that its general disability experience was "irrelevant or unhelpful" and in doing so, misapprehended or ignored the

[80] Appellant's factum, paras. 47 and 48.
[81] *Carter v. Canada (Attorney General)*, 2012 BCSC 886, paras. 95-99.

uncontradicted evidence before him.[82] The CCD, again, mischaracterizes the chambers judge's decision. The chambers judge did not dispute that "mental health related disabilities" were a sub-set of disability.[83] However, he did find, based on the CCD's history of engagement, that the CCD was less focused on the specialized mental health related issues central to this case.[84] The chambers judge's conclusion was supported by the evidentiary record before him.

66. The CCD has seven organizational priorities. These priorities include "poverty alleviation", "disability-related supports", "increased employment for persons with disabilities", and the "promotion of human rights". None of the CCD's seven priorities focus on mental health or mental health law reform.[85]

67. As noted above, the CCD filed a single affidavit in support of its claim for public interest sanding. Ms. Benard's affidavit described individual CCD members' experience on issues related to mental health. However, the affidavit did not refer to the specific issues raised in the underlying action. The CCD did not produce any evidence establishing direct experience with the circumstances of those most directly impacted by the relief sought in this action – that is, patients who have been admitted to a provincial health facility on an involuntary basis under the *MHA,* and their family members.

68. Ms. Benard's affidavit also provided a list of cases in which the CCD had intervened. The cases covered a range of diverse topics, all unrelated to the deemed consent provision in British Columbia's *MHA.*[86] At the same time, the CCD did not participate, either as a party or intervenor, in two prior constitutional challenges to the *MHA's* admission and treatment provisions.[87] Notably, the BC Schizophrenia Society (a support organization for family and friends of people with schizophrenia) ("BCSS") intervened in *Mullins v. Levy* at both the trial and appellate levels to support the constitutional validity of the *MHA*. BCSS was denied intervenor status on this appeal.

69. Ultimately, the "genuine interest" factor focuses on the specific issues raised and

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[82] Appellant's factum, paras. 54-57.
[83] Reasons, paras. 44, 74; AR, pp. 75, 81.
[84] Reasons, para. 44, AR, p. 75.
[85] Affidavit #1 of Heather Lewis, Exhibit "J", p. 55; AAB, p. 57.
[86] See Appendix to Province's Written Submissions, RAB, pp. 33-36.

relief sought by the plaintiff in the action. No matter how well-resourced or well-meaning an organization is, the evidence must still demonstrate the organization's direct engagement in the issues raised in the claim. Unlike in *Downtown Eastside,* there was no evidence in the present case that the CCD "represents those most directly affected by the legislation" or that the CCD was directly engaged with the consent-to-treatment provisions of the *MHA*.[88]

70. The AGBC accepts that the CCD is genuine in its motives and has strongly held views about autonomy, disability, and equality. However, the limits on standing are designed for the very purpose of preventing well-meaning advocacy groups from using judicial resources to advance their policy agenda without the grounding of a concrete legal dispute.[89] The chambers judge did not err in concluding the CCD only weakly met the second *Downtown Eastside* factor.

VI. Reasonable and Effective Means to Bring the Challenge to Court

71. The third factor requires the court to consider whether the proposed suit is, in all of the circumstances, a reasonable and effective means to bring the challenge to court.[90] This factor lies "at the heart" of the test for public interest standing. Applicants that satisfy the first two factors may be denied standing largely on account of the third.[91]

72. The CCD seeks to reframe this question to ask whether it has been "shown"[92] (presumably by AGBC) that another challenge would proceed "so much more efficiently and effectively than CCD's case that CCD's case could no longer be seen as reasonable and effective".[93] The CCD says the AGBC could have led evidence that another "organization or individual would be better suited and willing to litigate" the claim.[94] This is not the *Downtown Eastside* test. This is another attempt to shift the onus to the AGBC.

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[87] *McCorkell v. Riverview Hospital (Director)*(1993), 81 B.C.L.R. (2d) 273 (S.C.); *Mullins v. Levy*, 2005 BCSC 1217 [*Mullins BCSC*], aff'd 2009 BCCA 6 [*Mullins BCCA*].
[88] *Downtown Eastside*, para. 74.
[89] *Downtown Eastside,* paras. 1 and 36.
[90] *Downtown Eastside,* para. 2.
[91] See, for example, *Canadian Council of Churches.*
[92] Appellant's factum, para. 61.
[93] Appellant's factum, para. 61.
[94] Appellant's factum, para. 77.

73. The third factor should be applied purposively considering the underlying concerns to ensure "full and complete adversarial presentation and to conserve judicial resources".[95] The Court in *Downtown Eastside* set out several sub-factors, including:

a. whether there are realistic alternative means that would favour a more efficient and effective use of judicial resources and that would present a context more suitable for adversarial determination;
b. whether the issue will be presented in a sufficiently concrete and well developed factual setting;
c. whether the issue is one of public importance that transcends the interest of the parties affected;
d. the existence of other potential parties which might have standing as of right; and
e. the potential impact of the proceeding on others, including those that have a more direct and personal interest but have refrained from suing.[96]

The chambers judge did not err in considering the third factor

74. Although the chambers judge expressly cited and applied the correct test, the CCD claims he erred in asking whether its claim was the "*only* reasonable and effective means" of challenging the impugned provisions. He did not. The chambers judge reasonably concluded he was not persuaded the claim "would be a reasonable and effective means",[97] for a number of reasons, including that:

a. The CCD had failed to establish that the claim would be litigated in a sufficiently concrete and well-developed factual setting;
b. The CCD did not appear to act in a representative capacity for those most directly affected by the legislation;
c. Past challenges to mental health legislation had involved individual plaintiffs;
d. There were thousands of potential individual plaintiffs with direct standing;
e. The CCD's dismissal of directly affected individuals' capacity to act as a plaintiff or co-plaintiff was unsupported and contradicted; and
f. The CCD's past litigation experience was almost exclusively as an intervenor in cases unrelated to mental health.[98]

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[95] *Downtown Eastside,* para. 49.
[96] *Downtown Eastside,* para. 51.
[97] Reasons, para. 96; AR, p. 79.
[98] Reasons, a. (para. 69), b. (paras. 74,76), c. (para. 82-92), d. (paras. 94-95.), e.(para. 82), f. (paras. 73-74)

75. These are not, as the CCD asserts, "arbitrary, legally irrelevant, and impossible-to-meet considerations".[99] They are relevant findings, grounded in the factors from *Downtown Eastside,* to which the chambers judge attached appropriate weight.

76. For example, the CCD's claim that it is irrelevant that "other reasonable and effective ways" to litigate exist (such as an action with an individual plaintiff) is incorrect.[100] Although the Court in *Downtown Eastside* said an applicant need not prove there was *no other possible way* to bring the claim, "realistic alternative means" and "other potential plaintiffs … [with] standing as of right" were still identified as important considerations.[101] Indeed, the Court held that all "other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred".[102]

77. Contrary to the CCD's assertion,[103] the chambers judge was also right to account for the likelihood that the issues the CCD wished to litigate would reappear in court without the CCD advancing them as a public standing litigant. The purpose of granting public interest standing is to ensure legislation is not immune to challenge.[104] In this vein, the Court in *Downtown Eastside* quoted *Canadian Council of Churches* for the principle that 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." The Court went on emphasize the importance of discretion, but did not suggest that the likelihood that a private litigant would challenge legislation was irrelevant.[105]

The chambers judge was right to reject Ms. Benard's opinion about capacity

78. The CCD argues, in the alternative, that even if the existence of realistic alternatives is relevant, the chambers judge should have deferred to Ms. Benard. She deposed (mirroring the language of *Downtown Eastside*) that "it is not realistic to expect" a former involuntary patient to serve as an individual plaintiff.[106]

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[99] Appellant's factum, para. 62.
[100] Appellant's factum, para. 76.
[101] *Downtown Eastside,* para. 51.
[102] *Downtown Eastside,* para. 37.
[103] Appellant's factum, para. 76.
[104] *Downtown Eastside,* para. 33; *Canadian Council of Churches,* p. 256.
[105] The Court in *Downtown Eastside* also endorsed Major J'.s comment from *Hy and Zel's Inc. v. Ontario (Attorney General),* [1993] 3 S.C.R. 675 [*Hy* and *Zel's Inc.*] 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).
[106] Appellant's factum, paras. 86-77. *See,* AAB, p. 77, for quote from Melanie Benard affidavit.

79. The chambers judge rightly rejected Ms. Benard's sweeping (and arguably stereotypical) characterization of the capacity of thousands of individuals who have been involuntarily detained. He found her opinion to be contradicted by a long list of cases in which such individuals had brought legal challenges pertaining to their admission, whether in the form of a constitutional challenge, judicial review, or civil action.[107] A number of these challenges were successful.

80. The chambers judge's reasoning on this point finds support in *Canadian Council of Churches.* In that case, the Supreme Court of Canada denied the Council public standing to challenge the *Immigration Act* because thousands of refugees had standing as of right to challenge the legislation, and the evidence showed that refugees had commenced various court proceedings in the past. On this basis the Court rejected the Council's argument that the disadvantages and barriers that refugees face precluded their effective access to the court, effectively immunizing the legislation from review.[108]

81. The CCD goes on to criticize the chambers judge's unwillingness to accept that former involuntary patients in British Columbia would all be unwilling or unable to participate in the constitutional challenge. The CCD claims the judge required it to "prove a negative"— an "impossible evidentiary burden".[109] This is not the case. The CCD could have tendered evidence from a sampling of former patients or, at minimum, detailed its failed efforts to find a plaintiff. Instead, the CCD failed to say if it had made any effort and did not explain the plaintiffs' discontinuance. Even if privacy concerns motivated this omission, the lack of evidence did not allow the chambers judge to infer that it was unrealistic to expect a directly-affected individual to act as a plaintiff.

82. The present case is thus not comparable to *Downtown Eastside,* where the record clearly demonstrated that no sex workers in the Downtown Eastside were willing to bring the challenge forward because they feared exposure to family members,

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[107] See for example: *Fleming v. Reid*, 82 D.L.R. (4th) 298 (Ont. C.A.); *Thwaites v. Health Sciences Centre Psychiatric Facility*, [1988] M.J. No. 107 (C.A.); *T. (S.M.) v. Abouelnasr*, 171 C.R.R. (2d) 344 (Ont. S.C.J.); *Franks v. Ruddiman*, 2004 BCSC 632; *N.T. v. British Columbia*, 2017 BCSC 1742; *Nelson v. Livermore*, 2017 ONCA 712; *Stewart v. Postnikoff*, 2014 BCSC 707; *J.H. v. Alberta Health Services,* 2017 ABQB 477; *P.S. v. Ontario*, 2014 ONCA 900; *McCorkell*, *supra*; *M.B. v. Alberta (Minister of Health)*, [1997] A.J. No. 649 (Q.B.); *C.W. v. Manitoba Mental Health Review Board*, [1994] M.J. No. 401 (C.A.); *C.B. v. Sawadsky*, (2006) 82 O.R. (3d) 661 (C.A.).

[108] *Canadian Council of Churches,* para. 40.

[109] Appellant's factum, para. 64.

violence from clients, or loss of children from child protection authorities.[110] This case is more analogous to *Canadian Council of Churches* where the Council was denied standing because individual refugees "who would present a clear concrete factual background" had the right to challenge the legislation and had done so in the past.[111]

83. In British Columbia, the *MHA* has faced two prior constitutional challenges, both involving individual plaintiffs.[112] In *McCorkell*, the Supreme Court dismissed a s. 7 *Charter* challenge to the involuntary admission provisions of the *MHA*. In *Mullins*, the Supreme Court dismissed a malpractice action brought by a former involuntary patient, that eventually expanded to include a constitutional challenge to the deemed consent treatment model under the *MHA*. This Court affirmed the judgment on appeal.

84. A feature of both *McCorkell* and *Mullins* was the involvement of former patients and family members in supporting the government's defence against the constitutional challenge. As noted, the BC Schizophrenia Society intervened in *Mullins* to support the constitutional validity of the challenged legislation. In *McCorkell*, the government witnesses included former patients who had been involuntarily detained. Donald J., as he then was, observed how these former patients supported the *MHA*:

> **66** As to the standards for committal, I find that they strike a reasonable balance between the rights of the individual to be free from restraint by the state and society's obligation to help and protect the mentally ill. In fact, as the testimony from the former patient plaintiffs shows, the interests of the individual and the state are not always opposed in this area. The patients' only regret was that they were not involuntarily committed earlier. Unlike incarceration in the criminal justice system, involuntary committal is primarily directed to the benefit of the individual so that they will regain their health.

85. Significantly, the Court in *Mullins* dismissed the constitutional challenge on the basis that the plaintiff lacked standing to pursue it. The plaintiff denied he had a mental disorder, and indeed this was the premise of his malpractice suit. In the trial judgment, R.R. Holmes J. held that this position meant the plaintiff lacked private interest standing. The plaintiff also did not meet the test for public interest standing because an individual

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[110] *Downtown Eastside*, paras. 5-6
[111] *Canadian Council of Churches,* paras. 40, 42.
[112] *McCorkell*; *Mullins BCSC; Mullins BCCA*.

suffering from a mental disorder "is clearly in a position to bring the challenge".[113] If a former involuntary patient lacks standing to challenge the *MHA* if they do not allege a direct breach of their own *Charter* rights, the same must be true of an institutional plaintiff that is even further removed from the direct impacts of the legislation.

Insufficient factual and adversarial context for resolution of Charter claim

86. In considering the third *Downtown Eastside* factor, the Court must also assess whether the issues to be decided will be "presented in a sufficiently concrete and well-developed factual setting".[114] This factor is applied "in light of the need to ensure full and complete adversarial presentation",[115] and the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue".[116]

87. The chambers judge held that "the CCD ha[d] not satisfied [him] that there will be a sufficiently concrete and well-developed factual setting upon which the constitutional question it has raised can be decided. There is an insufficient factual matrix …."[117] The CCD argues that the litigation was at an early stage and that it was premature to conclude that it had failed to present a sufficiently concrete factual setting. The CCD points to the twenty-day trial estimate (a late capitulation to the AGBC's estimate) and Ms. Benard's assertion that the CCD "intend[ed]" to call unidentified lay witnesses.

88. The chambers judge's conclusion is unassailable. The time to assess the CCD's interest was on the summary trial application, which took place two years after the action commenced. The CCD, which bore the onus to establish the conditions for a grant of standing, had every opportunity to provide a legal and evidentiary response to the AGBC's application but was unable to identify even one potential *Charter* claimant. A party's failure to take steps to prepare its response to a summary trial application in a timely way does not render resolution of an issue premature.[118]

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[113] *Mullins BCSC,* para. 208. This Court expressly upheld this finding in *Mullins BCCA*, para. 64.
[114] *Downtown Eastside,* para. 51.
[115] *Downtown Eastside,* para. 49
[116] *Downtown Eastside,* para. 49; *Finlay,* p. 633.
[117] Reasons, para. 69; AR, p. 81.
[118] CCD Application Response, Part 5, para. 33; AR, p. 53; *Anglo Canadian Shipping Co. v. P.P.W., Local 8* (1988), 27 B.C.L.R. (2d) 378, paras. 19, 20; *Creyke v. Creyke*, 2014 BCSC 1632, para. 7.

89. The CCD could not compensate for the lack of a proper factual record to ground its standing by referring to "reasonable hypotheticals" and making vague assurances that it would provide such a record when the action gets to trial. This was particularly so given the absence of any evidence that the CCD had been deeply engaged in issues surrounding the impugned provisions.

90. With respect to the pleadings, although the factual allegations in the amended claim were expansive, they were not grounded in the alleged breach of *Charter* rights of any individual. For example, the CCD alleged that:

a. the impugned provisions impose forced psychiatric treatment on involuntary patients in the form of psychotropic medications, electroconvulsive therapy, and psychosurgery;
b. health care providers administer forced treatment by demanding cooperation even where patients expressly refuse to consent;
c. health care providers threaten to inject involuntary patients with psychotropic medications if they refuse to ingest them orally, and place patients in restraints; and
d. compulsory treatment is administered to involuntary patients without an assessment of whether they are capable of consenting to psychiatric treatment.[119]

91. Without an individual plaintiff, the allegations in the amended claim were grounded in hypotheticals that the AGBC could not effectively test. The references to the use, or threatened use, of forced psychiatric treatment did not pertain to any individual plaintiff's experience under the *MHA*. A complete absence of adjudicative facts is not a context "suitable for adversarial determination".[120] Indeed, the Court in *Thompson v. Attorney General of Ontario* recognized the need for some adjudicative facts to ground a public interest litigant's challenge to mental health legislation.[121]

92. The absence of an individual factual matrix is a distinguishing feature of the CCD's claim. The present case is not comparable to a scenario where an organization seeks standing to serve as an "institutional litigant" *in addition* to individual plaintiffs or litigants who provide the underlying factual context for the alleged *Charter* breach.[122]

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[119] Amended Notice of Civil Claim, Part 1, paras. 1, 32, 40, 41 and 43; AR, pp. 2-13.
[120] *Downtown Eastside,* para. 51.
[121] *Thompson v. Attorney General of Ontario*, 2011 ONSC 2023.
[122] See, for example: *Carter*, paras. 80-99.

Nor is it comparable to the more unusual scenario where an organization serves as a proxy for marginalized members who *are* directly impacted by legislation.[123]

93. The factual context that grounded public interest standing in *Downtown Eastside* provides a useful contrast to the abstract claim proposed by the CCD. In that case, the plaintiff Downtown Eastside Sex Workers United Against Violence Society was run by current and former sex workers. The plaintiff Sheryl Kiselbach was a former sex worker who was working as a violence prevention coordinator in Vancouver's Downtown Eastside neighbourhood. During her time as a sex worker, Ms. Kiselbach was convicted of several prostitution-related offences. She gave evidence that she was unable to participate in a court challenge to the prostitution provisions while working as a sex worker because of the risk of public exposure, fear for personal safety, and potential loss of income assistance and employment opportunities.[124] In upholding the grant of public interest standing to the plaintiffs, the Court in *Downtown Eastside* stated:

> [73] …The presence of the individual respondent [Ms. Kiselbach], as well as the Society, will 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… [Emphasis added]

94. The present case is fundamentally different. The amended claim had no individual dimension or concrete factual background. The CCD did not claim to have expertise working with involuntary patients in British Columbia or say that the impugned provisions directly impacted its members. The CCD does not represent those most directly affected by the legislation.

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[123] See*, for example, Downtown Eastside* and *DWS.*
[124] *Downtown Eastside*, paras. 5-6.

The chambers judge did not impose a unanimity requirement

95. The CCD's factum places considerable emphasis on the chambers judge's reference to a lack of general agreement or unanimity in support of the CCD. In relation to the CCD's pleading that "all residents of British Columbia" would benefit from the litigation, the chambers judge noted that there was no evidence before him of general agreement or unanimity amongst involuntary patients in support of the CCD.[125] Indeed, apart from two *discontinued* individual plaintiffs, there was no evidence that *any* involuntary patients or family members in British Columbia supported the CCD's action.

96. This passage should not be interpreted as the imposition of a requirement of unanimous support for a public interest litigant's position. The chambers judge was taking into account the rights of others more directly affected and the potential for private and public interests to come into conflict, as is appropriate at this stage of the analysis. In assessing the third factor, the Court in *Downtown Eastside* said:

> [51] …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. … 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.

97. A unique feature of this case is the CCD's distance from involuntary patients and the impugned provisions. A unique feature of past challenges to the *MHA* was the testimony of involuntary patients and intervention of the BCSS to support the *MHA*. The BCSS also sought leave to intervene in this appeal to explain that it supported the deemed consent provision, disapproved of the substitute decision maker model, and had purposely refrained from challenging the *MHA*, but was denied intervenor status.[126] In weighing this factor, the judge could not lose sight of the potential prejudice to those most directly impacted by the relief sought – involuntary patients and their family members – in permitting the action to proceed in the manner CCD envisioned.

98. In *Downtown Eastside*, the Court considered it important that the Society "represented those most directly affected by the legislation". The chambers judge had

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[125] Reasons, para. 76; AR, p. 82.
[126] *CCD v. AGBC*, (09/April/2019) Vancouver CA45711 (BCCA) (Savage J.A. in Chambers)

no similar assurance in the present circumstances that the CCD acted in a representative capacity for individuals who were not before the court. Indeed, it may be that the vast majority of directly affected individuals view the *MHA* as striking the appropriate balance between respect for individual autonomy and meaningful treatment. In this circumstance, where the CCD was essentially seeking to litigate the rights of others, this factor was particularly apposite. The chambers judge rightly found this factor to weigh against a discretionary grant of public interest standing.

VII. The Chambers Judge did not err in Determining the Standing Issue under Rule 9-7

99. The CCD says that the chambers judge failed to address its alternative argument that, if its evidence was insufficient to establish standing, then the issue of standing was unsuitable for summary trial.[127] This argument is premised on a narrow reading of the decision and a misunderstanding of the burden of proof on a Rule 9-7 application.

100. Whether standing ought to be resolved at a preliminary stage is a question of judicial discretion, having regard to the particular circumstances of a case.[128] Standing is often determined on a preliminary basis in advance of trial in the interest of efficiency.[129]

101. In this case, the chambers judge noted that early resolution of the standing issue would conserve judicial resources and went on to consider the AGBC's application.[130] Notably, the chambers judge determined the CCD had misconstrued the onus it faced by planning to establish a concrete factual setting at some later point.[131] The chambers judge ultimately declined to grant the CCD public interest standing, and proceeded to dismiss its claim. In doing so, he clearly considered it suitable to dispose of the case under Rule 9-7 and implicitly addressed the CCD's argument. He did not err in doing so.

102. In *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.*[132] this Court set out the factors to consider in assessing whether an issue is suitable for summary disposition:

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[127] Appellant's factum, para. 81.
[128] *Finlay*, at p. 616. The Court held that the nature of the discretionary test depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding of the interest asserted.
[129] *Hy and Zel's Inc.* p. 692; *Finlay*; *Thorson v. Canada,* [1975] 1 S.C.R. 138; *Canadian Council of Churches.*
[130] Reasons, para. 19; AR, p. 66.
[131] Reasons, paras. 60-61; AR, pp. 78-79.
[132] *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202.

> [49] In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia,* the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

103. This Court has subsequently identified other factors, including: the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create unnecessary complexity, and whether the application would result in litigating in slices.[133]

104. Applying these factors to the present case, the Court had a sufficient evidentiary record to decide the standing issue on a preliminary basis. Credibility was not at issue. Early resolution of standing promoted efficiency and preserved judicial resources.

105. At base, the CCD's alternative argument distils into the following claim: if the evidence of Ms. Benard—which consisted in large part of legal argument, hearsay, and opinion evidence—is insufficient to support a grant of public interest standing, then the issue of standing is inherently unsuitable for determination under Rule 9-7. This erroneously equates two distinct questions: whether a party seeking standing has discharged its burden and whether a matter is suitable for summary disposition.

106. The law is well-settled that a party facing a summary trial application must "bring forward all of its case or risk having judgment go against it."[134] A suggestion that the discovery process may produce evidence cannot defeat a summary trial application.[135] As this Court emphasized in *Everest Canadian Properties v. Mallman*:

> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. … a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up' … The same is true of a plaintiff where the defence has brought the R.18A motion. …[136]

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[133] *Dahl v. Royal Bank of Canada,* 2005 BCSC 1263, para. 12, aff'd 2006 BCCA 369.
[134] *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66, para. 20.
[135] *Tassone v. Cardinal,* 2014 BCCA 149, paras. 37-39.
[136] *Everest Canadian Properties Ltd. v. Mallman,* 2008 BCCA 275, para. 34 (emphasis added).

107. In this matter, when faced with the AGBC's application for summary judgment, the CCD filed only the affidavit of Ms. Benard. The chambers judge considered Ms. Benard's opinions to be insufficient and, at times, unsupported. The fact the CCD did not come to the summary trial hearing "prepared to prove its claim" does not mean that public interest standing was unsuitable for determination under Rule 9-7.[137]

108. The CCD argues the chambers judge demanded additional evidence that "overlapped completely or substantially" with the evidence it intended to present at trial.[138] This argument is meritless. The CCD could have tendered, by way of example only, affidavits from affected individuals expressing willingness to testify and provide a documentary record; individual explanations for being unwilling to act as a plaintiff; evidence of *some* support for the CCD's preferred policy; or even evidence of failed efforts to find a plaintiff. This is not the "same sort of evidence" that would be tendered to support a *Charter* claim. The failure of the CCD to marshal such evidence does not mean the chambers judge erred in declining to grant the CCD standing.

109. The CCD's alternative ground of appeal should be dismissed.

PART 4 – NATURE OF ORDER SOUGHT

110. The AGBC seeks an order dismissing the appeal with costs.

111. The CCD seeks special costs. The standard for an award of special costs in "reprehensible conduct" by a party.[139] CCD has not alleged any variety of misconduct by the AGBC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April 2019, at Vancouver, British Columbia.

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Counsel for the Attorney General of British Columbia

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[137] *Gichuru,* para. 32.
[138] Appellant's factum, paras. 87, 88.
[139] *Gichuru v. Smith,* 2014 BCCA 414, paras. 77-81.

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