SCC File No. 39430

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Respondent)

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

RESPONDENT
(Appellant)

[*Style of cause continued on next page*]

FACTUM OF THE RESPONDENT, COUNCIL OF CANADIANS WITH DISABILITIES

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND FACTS

A. Overview

1. The Attorney General of British Columbia ("**AGBC**") falsely accuses the Court of Appeal of having articulated and applied a new approach to public interest standing. In fact, the AGBC wants a new approach: he urges this Court to rewrite the existing law of public interest standing, and to effectively abandon this Court's decision in *Downtown Eastside*. The AGBC's position has no principled basis, undermines public interest standing's purpose, and is unworkable in practice. This Court should reject the AGBC's urgings, dismiss the appeal, and confirm CCD's standing.

2. The chambers judge wrongly concluded that the Council of Canadians with Disabilities ("**CCD**") lacked public interest standing to challenge the constitutionality of British Columbia's mental health legislation. Applying *Downtown Eastside*, the Court of Appeal identified one of the chambers judge's many errors—he failed to appreciate that the legislation's constitutionality is a serious justiciable issue—and remitted the standing question for fresh consideration. The only problem with that highly restrained exercise in appellate review was one that operated to the AGBC's benefit: the Court of Appeal should have decided the standing question in CCD's favour instead of prolonging an already tedious and dilatory debate.

3. Dissatisfied with the existing approach and the Court of Appeal's provisional restoration of CCD's case, the AGBC now asks this Court to dramatically limit the availability of public interest standing. The AGBC proposes that novel threshold requirements be imposed on any public interest litigant who does not sue with a directly affected individual co-plaintiff: they must prove it is unrealistic for directly affected individuals to participate as plaintiffs, they must describe with specificity how they will provide a sufficient factual context at trial, and they must prove they are a "proxy" for directly affected individuals. According to the AGBC, they must be ready to meet all of these requirements even before discovery.

4. These requirements are not—and should not be—the law. No case or scholarship supports them. They are vague, unworkable in practice, and incompatible with the aim of ensuring that unconstitutional laws are not immunized for lack of any practical and effective means by which to challenge them. Properly applying *Downtown Eastside*, all three factors clearly favour granting CCD standing. This Court should therefore dismiss the appeal but substitute an order granting CCD judgment on the issue of standing so that the parties can get on with litigating the merits.

B. Facts

1. The Action

5. CCD's underlying action challenges the constitutionality of the "**Impugned Provisions**": five provisions of British Columbia's *Mental Health Act*,[1] *Health Care (Consent) and Care Facility (Admission) Act*,[2] and *Representation Agreement Act*.[3] CCD alleges the Impugned Provisions unjustifiably limit the rights of people with mental disabilities under ss. 7 and 15 of the *Charter* by depriving them of the health care consent rights everyone else enjoys.[4]

6. Subsection 31(1) of the *Mental Health Act* permits psychiatric treatment to be administered to involuntary patients without their consent, even if they are capable of giving, refusing, or revoking consent at the time of treatment. It does so by deeming—*i.e.*, creating a "statutory fiction"[5]—that all involuntary patients at all times consent to any treatment chosen by the director of a designated mental health facility, regardless of the patient's actual capacity when the treatment is administered.[6]

7. The Impugned Provisions also permit involuntary patients to be forcibly treated even if there is a supportive or substitute decision maker available to give, refuse, or revoke consent on the patient's behalf. The *Health Care (Consent) and Care Facility (Admission) Act* and the *Representation Agreement Act* protect *other* patients' rights to have decisions about their treatment made by a substitute decision maker and to enter into representation agreements, but the Impugned Provisions expressly preclude involuntary patients' enjoying those same rights.[7]

8. Forced psychiatric treatment denies an individual's autonomy and right to decide what is done with their own body. As this Court has recognized, the right to refuse treatment is "fundamental to a person's dignity and autonomy" and is "equally important in the context of

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[1] R.S.B.C. 1996, c. 288, s. 31(1).

[2] R.S.B.C. 1996, c. 181, ss. 2(b)-(c).

[3] R.S.B.C. 1996, c. 405, ss. 11(1)(b)-(c).

[4] Notice of Civil Claim [**NOCC**], Part 3, ¶1-16 (Appeal Record [**AR**], Tab 6); Amended Notice of Civil Claim [**Amended NOCC**], Part 3, ¶1-16 (AR, Tab 8).

[5] *R. v. Verrette*, [1978] 2 SCR 838, at 845.

[6] *Mental Health Act*, s. 31(1).

[7] *Health Care (Consent) and Care Facility (Admission) Act*, ss. 2(b)-(c), 4; *Representation Agreement Act*, ss. 4, 7, 11(1)(b)-(c).

treatment for mental illness".[8] Because the Impugned Provisions permit forced treatment when a patient is capable of understanding the treatment but does not consent to it, and when a patient has a supportive or substitute decision maker available to give, refuse, or revoke consent on their behalf, the Impugned Provisions violate involuntary patients' *Charter* s. 7 right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice. Because the Impugned Provisions single out people with mental disabilities to be stripped of the health care consent rights everyone else enjoys, they also violate involuntary patients' equality rights under *Charter* s. 15(1). These violations cannot be justified under *Charter* s. 1.

9. This appeal is about public interest standing, not the merits of the underlying constitutional challenge. Nevertheless, the AGBC's description of the Impugned Provisions and the nature of CCD's challenge to them is wrong and misleading:

(a) Subsection 31(1) of the *Mental Health Act* does not apply only to involuntary patients "whose conditions prevent them from recognizing their need for treatment".[9] There is no such limitation anywhere in the legislation; the AGBC has simply made it up.

(b) The Impugned Provisions do not apply only to patients who are physically located "in" a provincial mental health facility.[10] They also apply to involuntary patients released into the community on extended leave and those transferred to an approved home.[11]

(c) The *Mental Health Regulation*[12] and Form 5 under it do not guarantee any pre-treatment capacity assessment.[13] The *Regulation* does not require physicians to complete a Form 5,[14] and often they do not.[15] Even if they do, Form 5 does not allow for the possibility that an

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[8] *Starson v. Swayze*, 2003 SCC 32, ¶75.

[9] Appellant's Factum [**AF**], ¶25.

[10] AF, ¶22.

[11] *Mental Health Act*, s. 31(1).

[12] B.C. Reg. 233/99.

[13] AF, ¶25, 27, 51.

[14] Section 11(5) of the *Mental Health Regulation* merely specifies that "[a] consent for treatment for a patient admitted under section 22, 28, 29 or 42 of the Act must be in Form 5".

[15] See, *e.g.*, B.C. Ombudsperson, *Committed to Change: Protecting the Rights of Involuntary Patients under the Mental Health Act* (March 2019) [***Committed to Change***], at 48, 53 (reporting

involuntary patient may be capable of understanding a treatment but still refuse consent to it.[16] Further, the *Regulation* does not require any reassessment of a patient's capacity, even if the patient's condition or circumstances have changed.

10. The Impugned Provisions permit forced treatment on their face. Contrary to the AGBC's assertion that "CCD has never claimed that the Impugned Provisions are simply unconstitutional on their face",[17] this is and always has been precisely CCD's claim.

11. The Impugned Provisions' constitutionality is, at a minimum, suspect. No other province denies involuntary-but-still-capable patients the right to refuse psychiatric treatment.[18] Mental health legislation in other provinces that provides stronger rights protections to involuntary patients has been struck down as unconstitutional.[19] The multiple interveners familiar with mental health issues, including organizations whose membership includes directly affected individuals, have noted that the Impugned Provisions' constitutionality is at least suspect.[20] The Impugned Provisions have been widely criticized, including on *Charter* grounds.[21]

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that about 24% of patient files reviewed did not include a Form 5, and for those that did, "nearly all of the treatment descriptions in the Form 5s either were so vague as to be meaningless or consisted of an exhaustive list of all treatments available at the facility").

[16] Form 5 offers physicians only two options: (1) the patient is capable of understanding and consents to the psychiatric treatment; or (2) they are incapable and deemed to consent.

[17] AF, ¶86.

[18] *Committed to Change*, at 58; R. Dhand & K. Joffe, "Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*" (2020), 43 *Man. L.J.* 207, at 223; Representative for Children and Youth, *Detained: Rights of Children and Youth Under the Mental Health Act* (2021), at 3.

[19] See, *e.g.*, *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (C.A.) [***Fleming***].

[20] See, *e.g.*, Empowerment Council's Motion Record (Leave to Intervene), at 2, 19-20, 23, 33, 38; Mental Health Legal Committee's Motion Record (Leave to Intervene), at 25-26, 32-33; Canadian Mental Health Association *et al.*'s Motion Record (Leave to Intervene), at 78.

[21] See, *e.g.*, B.C. Ombudsman, *Listening: A Review of Riverview Hospital* (1994), at 4-7–4-13; M. Groves, "Suggested Changes to BC's Mental Health System Regarding Involuntary Admission and Treatment in Non-Criminal Cases" (Position Paper of the BC Civil Liberties Association, 2011); S.N. Verdun-Jones & M.S. Lawrence, "The *Charter* Right to Refuse Psychiatric Treatment" (2013), 46 *U.B.C. L. Rev.* 489, at 513-19 (CCD's Book of Authorities [**BOA**], Tab 12); S. Nunnelley, "Coercive Care in Civil Mental Health Law: An Autonomy Lens" (Munk School of Global Affairs, University of Toronto, 2015), at 6-10; I. Grant & R. Dhand, "*Charter*

12. CCD's action is not a policy argument dressed up as *Charter* litigation. CCD has never advocated, in this litigation or otherwise, for any particular legislative framework for psychiatric treatment;[22] it simply objects to this unconstitutional one. The fact that legislation may reflect a choice between competing policy alternatives does not immunize it from constitutional scrutiny.[23]

2. CCD

13. CCD is a national not-for-profit organization founded nearly half a century ago to represent and advance the interests of people with disabilities, including mental disabilities. CCD comprises 17 national and provincial member organizations whose members together number in the several hundred thousand.[24] CCD has an established history of advocating for the equal rights of people with disabilities, and for their equal decision-making rights specifically. For example:

(a) CCD advised the Canadian delegation involved in negotiating the U.N. *Convention on the Rights of Persons with Disabilities*,[25] which requires state parties to "recognize that persons with disabilities enjoy legal capacity on an equal basis as others in all aspects of life".[26]

Challenge to B.C. *Mental Health Act* Long Overdue", *Vancouver Sun* (23 September 2016); B. Froese, "British Columbia, Equality, Dignity and Inclusion: An Evaluation of British Columbia's Mental Health Laws, Policies and Service Standards" (Report to the B.C. Law Foundation, 2017) (BOA, Tab 4); Community Legal Assistance Society, *Operating in Darkness: BC's Mental Health Act Detention System* (November 2017), at 6-7, 75-85; U.N. Special Rapporteur on the Rights of Persons with Disabilities, "End of Mission Statement" (12 Apr. 2019); Canadian Centre for Elder Law, *Conversations About Care: The Law and Practice of Health Care Consent for People Living with Dementia in British Columbia* (2019), at 36-37; Dhand & Joffe, at 222-48; Standing Senate Committee on Social Affairs, Science and Technology, *Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada*, at 70, 84 (May 2006) [***Out of the Shadows***].

[22] Affidavit #1 of Melanie Benard dated August 14, 2018 [**Benard Affidavit**], ¶59 (AR, Tab 14).

[23] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 [***Chaoulli***], ¶89 (*per* Deschamps J.), ¶183-85 (*per* Binnie and LeBel JJ., dissenting, but not on this point); *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, ¶105.

[24] Benard Affidavit, ¶6 (AR, Tab 14).

[25] 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

[26] Benard Affidavit, ¶45-47 (AR, Tab 14).

(b) CCD made submissions before a Senate Committee advocating for the contractual competence of people with disabilities, either directly or through a substitute decision maker, to open a Registered Disability Savings Plan.[27]

(c) CCD intervened in *Carter v. Canada (Attorney General)* to make submissions about the potential for coerced medical treatment of people with disabilities without their consent.[28]

14. Representatives of CCD's member organizations sit on CCD's board of directors and oversee all of its activities. Those member organizations are similarly engaged in advocating for the equal decision-making rights of people with disabilities.

15. For example, the National Network for Mental Health is a member organization whose board, staff, and voting members are all individuals with lived experience of mental health issues. It worked on the report *Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada*,[29] which made recommendations about the ability of people with disabilities to give advance directives about mental health treatment.[30] Another member organization, Disability Alliance BC, helped develop the British Columbia *Representation Agreement Act*,[31] which enables supported and substitute decision making—a topic of particular importance for persons with disabilities.[32]

16. This litigation is directed by CCD's Mental Health Committee, which comprises individuals with expertise in, and lived experience with, mental disabilities.[33]

3. D.C. and Louise MacLaren's Claims

17. D.C. and Louise MacLaren are people with diagnosed mental disabilities who have directly experienced the Impugned Provisions' effects. Before CCD agreed to sue with them, it considered their abilities and willingness to meet the responsibilities of plaintiffs throughout complex, multi-year *Charter* litigation. CCD did so because people with mental disabilities who are subjected to

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[27] Benard Affidavit, ¶43 (AR, Tab 14).
[28] 2013 BCCA 435, rev'd 2015 SCC 5 [***Carter***]; Benard Affidavit, ¶35(c) (AR, Tab 14).
[29] *Out of the Shadows*.
[30] Benard Affidavit, ¶15, 41 (AR, Tab 14).
[31] R.S.B.C. 1996, c. 405.
[32] Benard Affidavit, ¶9-11, 17, 41 (AR, Tab 14).
[33] Benard Affidavit, ¶9, 29-30 (AR, Tab 14).

involuntary treatment face significant barriers to launching and sustaining litigation. They can experience mental conditions that improve and deteriorate over time, cycles of wellness and stability followed by deteriorating mental health, intermittent periods of treatment, side effects of treatment, lack of control over personal and financial affairs, and poverty, among other things.[34]

18. Despite CCD's efforts to identify suitable individuals with whom to sue, after the litigation entered its second year, D.C. and Ms. MacLaren became unable or unwilling to consistently meet the requirements and responsibilities of plaintiffs. They discontinued their claims, leaving CCD as the sole plaintiff.[35] However, the substance of the allegations remained unchanged.[36] CCD's amended notice of civil claim[37] challenged the same provisions, argued the same legal basis, and sought the same relief as the original pleading. It replaced material facts about how the Impugned Provisions affect D.C. and Ms. MacLaren specifically with material facts about how they affect people with mental disabilities generally.[38] A single sentence in the amended pleading described CCD's challenge as "systemic",[39] but adding this word had no effect on the claim. Nor would removing it now.

19. The parties then went about litigating. The AGBC filed an amended response to civil claim. Its defence went substantively unchanged, apart from a new cursory pleading about CCD's standing.[40] The AGBC delivered a list of documents and advised that its document review and production efforts remained ongoing. CCD, too, continued its document production efforts and

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[34] NOCC, Part 1, ¶17-48 (AR, Tab 6); Benard Affidavit, ¶52-54 (AR, Tab 14).

[35] Benard Affidavit, ¶55 (AR, Tab 14).

[36] Sch. "B".

[37] Amended NOCC (AR, Tab 8).

[38] Sch. "B". The amended pleading also raised new allegations about psychosurgeries (NOCC, Part 1, ¶32, 37-39 (AR, Tab 6)). The AGBC wrongly equates "psychosurgeries" with "lobotomies" (AF, ¶7, 88). But "psychosurgeries" has a broader definition and is explicitly designated as a valid form of "health care" in British Columbia (*Health Care Consent Regulation*, B.C. Reg. 20/2000, ss. 1(1), 5(1)(c)). Especially in view of that explicit definition and designation, there is no basis for the AGBC to insist that involuntary psychosurgeries are an "imagined" or "far-fetched" possibility (AF, ¶7, 88).

[39] Amended NOCC, Part 1, ¶29 (AR, Tab 8).

[40] Amended Response to Civil Claim (AR, Tab 9).

delivered a further list of documents.[41] The parties agreed that a four-week trial would be required for the action and had some discussion about the mode of trial.[42]

4. The AGBC's Summary Trial Application

20. Several months after D.C. and Ms. MacLaren discontinued their claims, the AGBC applied for a summary trial under Rule 9-7(2) of the *Supreme Court Civil Rules* on the sole issue of CCD's standing.[43]

21. The AGBC supported its application with only a single clerk's affidavit. That affidavit appended correspondence between counsel, some court documents, CCD's first list of documents, and print-outs from CCD's website.[44] The AGBC made abstract criticisms of CCD in a factual vacuum. The AGBC chose to lead no evidence from or about any other potential plaintiff. There was no evidence that any other organization or individual could or would challenge the Impugned Provisions—and certainly no evidence that they could or would do so better than CCD. Indeed, the AGBC led no evidence that another potential plaintiff even existed.

22. CCD's application response included an affidavit from Melanie Benard, the Chair of CCD's Mental Health Committee.[45] Before joining CCD, Ms. Benard worked as a lawyer specializing in mental health law and represented clients who were challenging their forced hospitalization or treatment.[46]

23. In addition to confirming CCD's connection to the issues raised in the litigation, CCD's extensive experience advocating for the equal rights of people with disabilities, and CCD's ability to prosecute the action,[47] Ms. Benard described how involuntary patients face significant barriers to launching and sustaining complex, multi-year constitutional litigation. She explained how, because of those barriers, individuals subjected to forced treatment under the Impugned Provisions

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[41] CCD's List of Documents (July 17, 2018) (Affidavit #1 of K. Doumakis, Ex. B (AR, Tab 15B)).
[42] *MacLaren v. British Columbia (Attorney General)*, 2018 BCSC 1753 [**BCSC Reasons**], ¶19 (AR, Tab 1).
[43] Notice of Application (AR, Tab 11).
[44] Affidavit #1 of Heather Lewis sworn July 13, 2018 (AR, Tab 13).
[45] Benard Affidavit (AR, Tab 14).
[46] Benard Affidavit, ¶5 (AR, Tab 14).
[47] Benard Affidavit, ¶28-49, 57 (AR, Tab 14).

cannot realistically be expected to bring and see through a *Charter* challenge to them. She explained how D.C. and Ms. MacLaren's discontinuances illustrated the real-life effects of these barriers.[48]

24. Ms. Benard confirmed that, although CCD was now the sole remaining plaintiff, at trial it would lead evidence from and about people directly affected by the Impugned Provisions. This would include testimony from individuals who had personally experienced the effects of the Impugned Provisions (*i.e.*, people who had experienced forced psychiatric treatment and been denied the right to a supportive or substitute decision maker), as well as expert evidence.[49]

25. The AGBC did not seek to cross-examine Ms. Benard. Nor did the AGBC ask any follow-up questions of CCD's counsel about CCD's intended witnesses. Nor did the AGBC lead any evidence, even in reply, to contradict Ms. Benard's evidence in any way.

C. The Chambers Judge's Decision

26. The chambers judge granted the AGBC's summary trial application, denied CCD standing, and dismissed CCD's action in its entirety.[50] The chambers judge's decision is replete with errors and reliance on considerations not supported by or even compatible with *Downtown Eastside*:

(a) On the first standing factor, the judge wrongly concluded that CCD's claim was incapable of raising a serious justiciable issue because it did not plead "a particular factual context of an individual's case" or facts that would permit identification of a comparator group to adjudicate the *Charter* s. 15(1) claim[51]—even though this Court had eliminated any comparator group requirement several years before CCD started the claim.[52]

(b) On the second factor, the chambers judge wrongly held that CCD had only a "weak" genuine interest in the decision-making rights of involuntary patients because, in his view, CCD was a general disability-rights organization and not focused on "mental illness" specifically. Stunningly, he doubted "the extent to which mental illness should be

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[48] Benard Affidavit, ¶10-19, 28-49, 51-55 (AR, Tab 14).
[49] Benard Affidavit, ¶56, 58 (AR, Tab 14).
[50] BCSC Reasons, ¶99 (AR, Tab 1).
[51] BCSC Reasons, ¶37-39 (AR, Tab 1).
[52] See *Withler v. Canada (Attorney General)*, 2011 SCC 12.

considered a disability"[53]—an argument even the AGBC did not consider tenable to advance.

(c) On the third factor, the chambers judge wrongly concluded that CCD had not proven the litigation was a reasonable and effective means of challenging the constitutionality of the Impugned Provisions. He reached that conclusion because CCD did not, in his view, satisfy a long parade of irrelevant, invented requirements:

(i) CCD had not been a plaintiff in more than one action before (although it had been an intervener in many);[54]

(ii) CCD had not disclosed in more "specific terms" why D.C. and Ms. MacLaren had become unable or unwilling to continue as plaintiffs[55] (even though this disclosure had never been requested by the AGBC, had no apparent relevance, and would put both privilege and privacy rights at risk);

(iii) CCD supposedly did not provide "any evidentiary foundation" for the proposition that people with mental disabilities face real barriers to seeing through constitutional litigation[56] (despite Ms. Benard's uncontradicted evidence that they do);

(iv) CCD had not proven a negative to his satisfaction—that "none of [the directly affected individuals] would be unwilling or unable [*sic*] to participate in the constitutional challenge" (despite D.C. and Ms. MacLaren's discontinuances and even though the Impugned Provisions had remained on the books for many years without any other challenge having reached a conclusion on the merits);[57]

(v) CCD had not proven "unanimity" or "general agreement" that those affected by the Impugned Provisions supported CCD's position (even though no such

[53] BCSC Reasons, ¶44, 53, 74 (AR, Tab 1).
[54] BCSC Reasons, ¶73 (AR, Tab 1).
[55] BCSC Reasons, ¶79 (AR, Tab 1).
[56] BCSC Reasons, ¶82 (AR, Tab 1).
[57] BCSC Reasons, ¶95 (AR, Tab 1).

requirement exists and the constitutionality of legislation never depends on a popularity contest);[58] and

(vi) CCD had not led adequate evidence of the "sufficiently concrete and well-developed factual setting" in which the action would be tried[59] (even though the case was still in the early stages of document discovery).

27. The chambers judge did not address—or even acknowledge—CCD's alternative position that, if the Court required more evidence about why directly affected individuals could not effectively sustain litigation challenging the Impugned Provisions, it was not appropriate to determine CCD's standing in isolation from the other issues raised in the action because the required evidence—evidence from and about directly affected individuals—would bear on those other issues.[60]

D. The Court of Appeal's Decision

28. The Court of Appeal unanimously allowed CCD's appeal. It focused on the chambers judge's analysis of the first standing factor. It held that the Impugned Provisions' constitutionality was "manifestly" a serious justiciable issue. The chambers judge erred by concluding that an individual plaintiff, or a specific individual's factual context, was needed to make it justiciable.[61]

29. Having found that the chambers judge erred in his approach to the first factor, the Court of Appeal considered it unnecessary to review his analysis of the other two standing factors. It also concluded that fresh evidence about a parallel constitutional challenge (which had already been discontinued) and a proposed class proceeding might be relevant to the standing analysis. It remitted the matter for fresh consideration.[62]

30. In *obiter*, the Court of Appeal observed that the chambers judge's treatment of the third standing factor did not align with the purposive approach required by *Downtown Eastside*.[63]

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[58] BCSC Reasons, ¶76 (AR, Tab 1).
[59] BCSC Reasons, ¶69 (AR, Tab 1).
[60] Application Response, ¶32-33 (AR, Tab 12).
[61] *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 [**BCCA Reasons**], ¶97, 112, 114 (AR, Tab 3).
[62] BCCA Reasons, ¶122-24 (AR, Tab 3).
[63] BCCA Reasons, ¶115 (AR, Tab 3).

PART II - ISSUES

31. Did the Court of Appeal adopt a "new approach" to public interest standing? No.

32. Does CCD deserve public interest standing? Yes.

33. Should this Court adopt the AGBC's proposed new requirements? No.

PART III - ARGUMENT

A. The Court of Appeal Did Not Depart from *Downtown Eastside*

34. The Court of Appeal broke no new ground. It summarized settled law and applied it to identify a clear legal error made by the chambers judge in his analysis of the first public interest standing factor. That pedestrian exercise in appellate review warrants no correction by this Court.

1. An Individual's Facts Are Not Required to Make an Issue Justiciable

35. There is nothing ground-breaking or even controversial about the Court of Appeal's conclusion that "[a]n issue is 'justiciable' if it is appropriate for judicial determination and 'serious' if it raises a substantial question that is 'far from frivolous'".[64] On that basis, the Court of Appeal correctly concluded that CCD's constitutional challenge to the Impugned Provisions raises a serious justiciable issue.

36. Forced psychiatric treatment is a severe intrusion on a person's liberty, security, and even life. It is manifestly a serious issue, as the Court of Appeal said. And, contrary to the AGBC's repeated characterizations, there is nothing sufficiently "abstract"[65] about CCD's challenge to render it non-justiciable.[66] Similar issues have been adjudicated by other courts in other provinces in relation to similar legislation.[67] Pleading facts about a particular individual is not needed to make the constitutionality of five specific legislative provisions pursuant to two specific *Charter* rights appropriate for judicial determination.

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[64] BCCA Reasons, ¶90 (AR, Tab 3); *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [***Downtown Eastside***], ¶40-42.

[65] AF, ¶3, 8, 28, 36-40, 52, 56, 76, 88, 110.

[66] Compare *Canadian Bar Association v. HMTQ*, 2006 BCSC 1342, aff'd 2008 BCCA 92.

[67] See, *e.g.*, *Fleming*.

2. The Court of Appeal Correctly Recognized Legality and Access to Justice as Core Purposes of Public Interest Standing

37. Relying on a single passage plucked from the Court of Appeal's 46-page decision, the AGBC argues that the Court of Appeal adopted a "new approach" to public interest standing generally and "recast" its purpose.[68] The AGBC specifically questions the appeal court's observation that "upholding the legality principle" and "facilitating access to justice" are the "key components" of the public interest standing analysis and thus merit particular weight under *Downtown Eastside*'s purposive approach.[69] But the Court of Appeal's observation is neither new nor impeachable: the legality principle and access to justice have always been public interest standing's *raison d'être*.

38. As this Court recognized nearly 30 years ago in *Canadian Council of Churches*, "the *whole purpose* of granting [public interest standing] is to prevent the immunization of legislation or public acts" from challenge.[70] The legality principle has been "central to the development of public interest standing in Canada" for decades, and it is the "underlying concern" of the Court's standing jurisprudence.[71] Saying that courts should give particular weight to the legality principle when purposively applying *Downtown Eastside* is uncontroversial and completely in line with decades of standing jurisprudence.

39. Nor did the Court of Appeal erroneously conflate the legality principle with access to justice or give undue weight to the latter.[72] Legality and access to justice are two sides of the same coin; the AGBC's effort to cleave them apart is misguided and artificial. *Downtown Eastside* rightly recognized that ensuring "practical and effective ways to challenge the legality of state action" is an indispensable aspect of the legality principle,[73] and that providing "access to justice for disadvantaged persons in society whose legal rights are affected" is "one of the ideas which

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[68] AF, ¶2, 46, 49.

[69] BCCA Reasons, ¶79 (AR, Tab 3).

[70] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 [***Canadian Council of Churches***], at 252 [emphasis added].

[71] *Downtown Eastside*, ¶21, 31.

[72] AF, ¶49.

[73] *Downtown Eastside*, ¶31.

animates public interest litigation".[74] In the years since *Downtown Eastside*, its flexible and purposive approach has been hailed as a "victory for access to justice in Canada"[75] and credited with "reduc[ing] the gap between the rights that people possess in theory and those they enjoy in reality".[76] The Court of Appeal was right to acknowledge that courts should keep the animating purpose of access to justice in view when purposively applying *Downtown Eastside*.

40. Even if the Court of Appeal had broken new ground by summarizing what this Court has already said (it did not), it would have been right to do so. It is widely acknowledged—by former justices of this Court,[77] leading academic commentators,[78] and the AGBC himself[79]—that access to justice has reached a crisis point in Canada. For vulnerable and marginalized people, the barriers to accessing justice are significant or even insurmountable.[80] This is especially true for people with

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[74] *Downtown Eastside*, ¶51.

[75] S.P. Morley, "The Many Lives of a 'Win': *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*", (2021) 52 *Columbia H.R.L. Rev.* 1240, at 1261. See also J. Bailey & A. Chaisson, "On Being 'Part of the Solution': Public Interest Standing after SWUAV SCC" (2012), 1 *Can. J. Pov. Law* 121, at 143; L. Kerr & E. Sigurdson, "'They Want In': Sex Workers and Legitimacy Debates in the Law of Public Interest Standing", (2017) 80 *S.C.L.R.* (2d) 145, at 174 (BOA, Tab 9).

[76] S. Burton, "Access to Justice in a Post-SWUAV Courtroom" (2015), 39:3 *LawNow* 30, at 30, 32. See also D. Phillips, "Public Interest Standing, Access to Justice, and Democracy under the *Charter*: *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*" (2013), 22 *Constitutional Forum* 21, at 21-22, 27; A. Grant, "Standing by Me: Public Interest Standing and Immigration and Refugee Advocacy in Canada" in C. Milne & K. Roach, eds., *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada, 2019) 147, at 147 (BOA, Tab 1); Hon. R.J. Sharpe, "Access to *Charter* Justice" (2013), 63 *S.C.L.R.* 3, at 5.

[77] See, *e.g.*, Hon. T.A. Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (2012), 63 *U.N.B.L.J.* 38, at 39; Hon. B. McLachlin, "The Legal Profession in the 21st Century" (14 Aug. 2015); Hon. B. McLachlin, "As Courts Reopen, Let's Focus on Creating Equitable Access to Justice for All", *Globe and Mail* (10 July 2020).

[78] See, *e.g.*, T.C.W. Farrow, "What Is Access to Justice?" (2014), 51 *Osgoode Hall L.J.* 957, at 962-63.

[79] Hon. D. Eby, "The Province and the Law Foundation", *BarTalk* (October 2019); B.C. Ministry of Attorney General, "New Legal Clinics Expand Access to Justice" (4 Nov. 2019); Hon. David Eby, "What Does Access to Justice Mean for David Eby?", *BarTalk* (February 2021).

[80] Rt. Hon. Richard Wagner, "Access to Justice: A Societal Imperative" (4 Oct. 2018); Hon. T. Cromwell & S. Anstis, "The Legal Services Gap: Access to Justice as a Regulatory Issue" (2016), 42 *Queen's L.J.* 1, at 4-9; T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) [**Cromwell, *Locus Standi***], at 168 (BOA, Tab 13); L.T. Doust, QC, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (March 2011) [***Foundation for Change***], at 7, 12, 36; Action Committee on Access to

mental disabilities subject to forced psychiatric treatment under laws like the Impugned Provisions. As the British Columbia Public Commission on Legal Aid's *Foundation for Change* report recognized over a decade ago, "[t]he severely mentally ill, which includes those living in the community and psychiatric patients in British Columbia[,] are almost entirely disempowered and often have very little access to justice anywhere".[81] No one could credibly suggest the situation has improved since.

41. Despite its animating purpose, public interest standing is not unbounded—nor does CCD say it should be. The Court of Appeal's recognizing access to justice and legality as purposes warranting central consideration did not "upset" the balancing exercise prescribed by *Downtown Eastside* or remove the limitations that have been properly placed on standing.[82] To the contrary, the Court of Appeal repeatedly affirmed that public interest standing is not a private reference power and remains subject to appropriate constraints. It recognized that "judges must balance access to justice with the preservation of judicial resources" and "maintain limitations to ensure that the courts are not overburdened with marginal or redundant claims, that so-called 'busybody litigants' are screened out, that the contending views of those most directly affected by an issue are presented and that the courts stay within their proper constitutional role".[83]

42. But the limitations appropriately placed on public interest standing do not displace its animating goals of legality and access to justice. The Court of Appeal was right to recognize those goals deserve weight in *Downtown Eastside*'s purposive analysis. Indeed, as this Court has acknowledged, the early fears that animated the limitations placed on public interest standing—that it would result in a proliferation of busybody litigants and ill-conceived lawsuits—"may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose … '[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom'".[84] As L'Heureux-Dubé J.

Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: 2013), at 8; Canadian Bar Association, Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (November 2013), at 17-18, 20.

[81] *Foundation for Change*, at 12, 36.

[82] AF, ¶46, 49.

[83] BCCA Reasons, ¶4, 70, 79, 86 (AR, Tab 3).

[84] *Downtown Eastside*, ¶28, quoting K.E. Scott, "Standing in the Supreme Court – A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645, at 674 (BOA, Tab 7). See also Burton, at 31-32; *Grant v.*

(dissenting) cautioned in *Hy & Zel's*, "care should be taken not to exaggerate the threat to the justice system by a more liberal approach to standing".[85]

43. Public interest standing is not a uniquely Canadian concept. Other common law jurisdictions allow it. Flexible and generous approaches are generally taken, and there is a reluctance to cut off potentially meritorious litigation at an early stage:

(a) In the U.K. (which lacks a written constitution), a court may grant standing in a judicial review application if "the applicant has a sufficient interest in the matter to which the application relates".[86] If challenged at a preliminary stage, standing will be denied in only the clearest cases.[87] Courts take an "increasingly liberal approach to standing".[88]

(b) In New Zealand, a court may grant standing in a judicial review application if there is "public interest in the administration of justice and the vindication of law".[89] A court will generally grant standing if the applicant challenges a decision that is or may be unlawful,[90] or the applicant has a *bona fide* interest in raising a matter of public interest, "unless the claim is frivolous, vexatious or untenable".[91] Courts prefer to address standing at trial, provided the applicant can establish a *prima facie* case for standing.[92]

Canada, [1995] 1 F.C. 158 (T.D.), at 196-97; *Daniels v. Canada (Minister of Indian Affairs & Northern Development)*, [2002] 4 F.C. 550 (T.D.), at 573-75; Ontario Law Reform Commission, *Report on the Law of Standing* (1989), at 46; J.M. Ross, "Standing in *Charter* Declaratory Actions" (1995), 33 *Osgoode Hall L.J.* 151, at 156; K. Roach, *Constitutional Remedies in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2020), §5.200 (BOA, Tab 8).

[85] *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at 712.

[86] *Senior Courts Act 1981* (U.K.), c. 54, s. 31.

[87] *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd.*, [1981] UKHL 2, at 1-2.

[88] *R. v. Secretary of State for Foreign Affairs*, [1994] EWHC Admin 1. See, *e.g.*, *R. v. Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2)*, [1993] EWCA Civ 9.

[89] *Smith v. Attorney General*, [2017] NZHC 1647 [***Smith***], ¶27.

[90] *Smith*, ¶28.

[91] *Moncrief-Spittle v. Regional Facilities Auckland Ltd*, [2021] NZCA 142, ¶130.

[92] *Finnigan v. New Zealand Rugby Football Union Inc.*, [1985] 2 NZLR 159 (C.A.), at 180.

(c) In South Africa, anyone may enforce the *Bill of Rights* if there was an "infringement or threatened infringement" of the *Bill of Rights*,[93] and the claimant is "acting in the public interest".[94] Standing may be available even without a "live case".[95]

(d) Various U.S. states have public interest standing tests akin to Canada's. For example, Utah courts may grant standing to an "appropriate party raising issues of significant importance".[96] Likewise, Alaska courts may grant standing on an issue of "public significance" (which need not "directly involve the litigant[]"[97]) to an "appropriate" plaintiff (who need not be the party "most directly affected"[98]).[99]

44. The AGBC speculates that public interest litigants will inflict an "enormous institutional burden" if the Court of Appeal's decision is left to stand.[100] The AGBC's anxious conjecture (and hyperbole) should not eclipse the facts: despite public interest standing having been available for decades, and despite initial fears that courts might be overwhelmed with improper suits, there has been no proliferation of unworthy litigation. To the contrary, there is an ongoing, widely recognized access to justice crisis in our country. This Court should not exacerbate it based on the AGBC's counterfactual arguments.

B. CCD Deserves Public Interest Standing

45. If the Court of Appeal is to be criticized for anything, it should be criticized for its decision to remit the question of CCD's standing for fresh consideration rather than to decide the question itself. Applying *Downtown Eastside*, CCD plainly deserves standing. As explained later, in Part V of this factum, this Court can and should dismiss the AGBC's appeal but substitute an order confirming CCD's standing; remitting the matter for reconsideration will result only in delay.

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[93] *Ferreira v. Levin NO; Vryenhoek v. Powell NO*, [1995] ZACC 13, ¶231, 235.

[94] *Constitution of the Republic of South Africa*, *1996*, No. 108 of 1996, c. 2, s. 38(d). See, *e.g.*, *Albutt v. Centre for the Study of Violence and Reconciliation*, [2010] ZACC 4.

[95] *Lawyers for Human Rights v. Minister of Home Affairs*, [2004] ZACC 12, ¶18.

[96] *Gregory v. Shurtleff*, 299 P (3d) 1098 (Utah Sup. Ct. 2013), ¶14. See, *e.g.*, *Utah Chapter of the Sierra Club v. Utah Air Quality Board*, 2006 U.T. 74 (Utah Sup. Ct. 2006).

[97] *Fannon v. Matanuska-Susitna Borough*, 192 P (3d) 982 (Ala. Sup. Ct. 2008) [***Fannon***], at 985.

[98] *Fannon*, at 986.

[99] See, *e.g.*, *Trustees for Alaska v. State*, 736 P (2d) 324 (Ala. Sup. Ct. 1987).

[100] AF, ¶3.

1. Serious Justiciable Issue

46. CCD's case challenges the constitutionality of the Impugned Provisions: five specific provisions of British Columbia's mental health legislation. Those provisions permit the state to administer psychiatric treatment forcibly even when a patient is capable of refusing consent, and even when there is a supportive or substitute decision maker available. As the Court of Appeal held, their constitutionality under *Charter* ss. 7 and 15(1) is "manifestly" a serious justiciable issue.[101]

2. Genuine Interest

47. CCD is a longstanding advocate for disability rights. Its member organizations represent people with mental disabilities who are subject to the Impugned Provisions. It is heavily involved in advocating for the equal decision-making rights of people with disabilities, including mental disabilities. Accordingly, CCD has "a real stake in the proceedings", "is engaged with the issues", and is no "mere busybody" under *Downtown Eastside*.[102]

48. The AGBC criticizes CCD because its work does not focus narrowly on people with "mental illness".[103] That is true, but beside 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. The criticism also ignores CCD's unchallenged evidence: mental illness *is* a disability, and people who have it are part of CCD and its member organizations.[104]

49. The AGBC's criticism also relies on—and thus accepts as sound—the very distinction between mental illness and other forms of disability that CCD alleges is unconstitutional.[105] A preliminary standing challenge cannot be premised on a tacit pre-judgment of the merits.

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[101] BCCA Reasons, ¶114 (AR, Tab 3).

[102] Benard Affidavit, ¶8-9, 14, 17, 28-30 (AR, Tab 14); *Downtown Eastside*, ¶43.

[103] AF, ¶4, 92, 98.

[104] Benard Affidavit, ¶29-30 (AR, Tab 14).

[105] Amended NOCC, Part 3, ¶13-14, 16 (AR, Tab 8); Benard Affidavit, ¶27 (AR, Tab 14); Amended Response to Civil Claim, ¶25-27, 61 (AR, Tab 9). See by analogy *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566.

3. Reasonable and Effective Means

50. CCD's action is a reasonable and effective means to litigate the Impugned Provisions' constitutionality. CCD has a dedicated Mental Health Committee and the resources to litigate the case. It is represented by experienced counsel—including counsel for the Community Legal Assistance Society, who have represented patients involuntarily treated under British Columbia's mental health legislation for nearly 45 years. Any suggestion that CCD nevertheless cannot or will not tender evidence at trial from individuals who were treated under and directly affected by the Impugned Provisions is not supportable.

51. CCD has repeatedly committed to leading evidence from and about directly affected individuals at trial. In particular, Ms. Benard's affidavit explicitly makes that commitment and describes CCD's intended evidence consistently with the descriptions given in other cases in which public interest standing was granted at a preliminary stage.[106] More detail—even if it were possible and sensible to give at such an early stage in the litigation—would add nothing to the standing assessment.

52. Despite the AGBC's recurrent—and at this point seemingly deliberate—mischaracterization of CCD's position, CCD has stated again and again that it has no ambition to litigate its claim based on reasonable hypotheticals or without a factual context.[107] The AGBC relies on CCD's single passing observation, in an application response filed years ago, that reasonable hypotheticals *can* be a legitimate aspect of constitutional litigation generally.[108] That observation was and is correct, but never had anything to do with how CCD plans to litigate *this* case.

53. The central premise of the AGBC's position on reasonable and effective means is that there is some other plaintiff better suited to challenge the Impugned Provisions' constitutionality than CCD. But the AGBC led not the slightest evidence about even a *single* individual or organization who is—or even *might* be—ready and willing to prosecute such a challenge, let alone to do so

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[106] Affidavit of J. Dixon sworn Aug. 30, 2011 (BCSC Van. Reg. No. S112688) (BOA, Tab 2); *Carter*; Notice of Civil Claim dated March 10, 2014 (BCSC New West. Reg. No. 159480) (BOA, Tab 10); *B.C./ Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817 [***Drug War Survivors***], aff'd 2015 BCCA 142.

[107] Benard Affidavit, ¶34-35, 57-58 (AR, Tab 14); Sch. "C".

[108] Application Response, ¶30 (AR, Tab 12).

better than CCD. Given the AGBC's vast experience and resources, not to mention its vigorous efforts to thwart this case at a preliminary stage, the only reasonable inference is that the AGBC searched assiduously for such evidence but came up empty-handed.

54. The AGBC makes a passing reference in his factum to the B.C. Schizophrenia Society.[109] That reference is unsupported by any evidence about the organization's purpose, membership, resources, expertise, experience in constitutional litigation, or familiarity with the Impugned Provisions. In fact, the organization represents the interests not of involuntary patients, but instead of their *friends and family members*. But friends and family members' interests can and sometimes do diverge from those of involuntary patients. This case is about the constitutional rights of people forcibly treated under the Impugned Provisions, not the rights—if any—of their friends and family members.

55. The AGBC also relies heavily on a single sentence from this Court's 43-page decision in *Downtown Eastside*: "[i]f 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".[110] Yet the AGBC led no evidence that even a single directly affected individual has deliberately refrained from doing anything. Instead, the AGBC merely speculates that there might be some "potential prejudice" to some unidentified individuals who might not "support[] CCD's litigation".[111] Similar speculation is possible in all constitutional litigation, and speculation is anyway no substitute for evidence.

56. The AGBC notes that, while he stalled CCD's case on the standing issue, three individuals filed a proposed class proceeding challenging the Impugned Provisions.[112] But evidence merely that another claim was *filed* while the AGBC hindered this one is not probative of the relevant question: will that other claim resolve the issues raised in CCD's case "in an equally or more reasonable and effective manner"?[113] The answer to that question is no:

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[109] AF, ¶95.
[110] AF, ¶111, quoting *Downtown Eastside*, ¶51 [emphasis added].
[111] AF, ¶111, 113.
[112] AF, ¶12, 108-10.
[113] *Downtown Eastside*, ¶51, 67.

(a) The existence of the proposed class proceeding proves only that some people with mental disabilities can *start* cases—just as D.C. and Ms. MacLaren did before eventually discontinuing their claims.

(b) The proposed class proceeding has not been, and may never be, certified. The AGBC does not even hint that it will consent to certification. If the AGBC litigates there as it has here, certification is certain to be aggressively opposed.

(c) Even if certification is granted, and then upheld on appeal (the AGBC will have an appeal as of right), the certified common issues may not address the Impugned Provisions' constitutionality. And even if they address the Impugned Provisions' constitutionality, a common issues trial is almost certainly many years away.

(d) Further, while the AGBC complains that CCD has not described with sufficient specificity what evidence it will lead at trial, there is *no* information about the intended evidence in the proposed class proceeding.

(e) Unlike CCD's case, the proposed class proceeding does not seek only to invalidate legislation; it also seeks damages. As in nearly all class proceedings, a financial settlement and payment of class counsel's fees may be the only eventual outcome.

57. There can be no assurance that the Impugned Provisions' constitutionality will ever be addressed through the proposed class proceeding, let alone that it will be addressed so much more reasonably or effectively than in CCD's action that the latter should be dismissed.

58. Although claims brought by plaintiffs with standing as of right *may* be preferred over those brought by public interest litigants,[114] this is so only where "[a]ll of the other relevant considerations [are] *equal*".[115] The AGBC has not even tried to prove the necessary equality in relation to the proposed class proceeding. The only thing proven by the proceeding's existence supports CCD's position, not the AGBC's: there are indeed people who were forcibly treated under the Impugned Provisions who question their constitutionality.

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[114] AF, ¶103.

[115] *Downtown Eastside*, ¶37 [emphasis added].

59. Before his appointment, the AGBC himself criticized the Crown's tactical use of standing challenges to stymie litigation that seeks to raise important constitutional questions:

> [Government lawyers] routinely make applications for a judge to dismiss a constitutional interest lawsuit, even before it begins. They'll argue … that the parties don't have standing … This is an established tactic that has been emphasized in their professional development programs. It's a bald attempt by a well-resourced opponent to exhaust resources. It's bullying, and it's directly opposed to any notion that the Crown is concerned about access to justice.[116]

60. The AGBC's attempt to stymie CCD's case at a preliminary stage is no exception. The AGBC launched a challenge to CCD's standing after it became the sole plaintiff, even though the case remained substantively unchanged, even through CCD committed to leading evidence from and about directly affected individuals at trial, and even though the AGBC could not point to a single other potential plaintiff who was (or even might be) willing and able to litigate the case at all (much less to do so better than CCD). As a result, a determination of Impugned Provisions' constitutionality has been delayed for over three years while the parties litigate standing.

C. This Court Should Reject the AGBC's Proposed New Requirements

61. In addition to arguing that the Court of Appeal misapplied *Downtown Eastside*, the AGBC asks this Court to change public interest standing law. The AGBC wants this Court to impose strict new threshold requirements on any plaintiff asserting public interest standing who does not sue with a co-plaintiff who has standing as of right: according to the AGBC, such a litigant must be able to (1) prove it is "unrealistic for individual plaintiffs to participate"; (2) "demonstrate, with some specificity", even before discovery, "how it will provide a concrete and well-developed factual context that compensates for the absence of an individual plaintiff"; and (3) prove the organization is a "suitable proxy" for directly affected individuals.[117]

62. The AGBC raised none of these proposed new requirements in his notice of application challenging CCD's standing.[118] Had he raised them, CCD may well have chosen to respond with additional evidence and argument. The AGBC cannot ambush CCD with new arguments on

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[116] David Eby, quoted in Michael Harris, "Civil Warrior", *The Walrus* (October 2012).
[117] AF, ¶40, 66, 69, 115.
[118] Notice of Application dated July 13, 2018 (AR, Tab 11).

appeal, then fault CCD for having failed to lead evidence that anticipated them. The ambush alone warrants rejecting the AGBC's proposed new requirements.[119]

63. In any event, the AGBC's proposed new requirements would not serve public interest standing's core purpose of providing a practical and effective means of challenging laws or state action. Instead, they would thwart it, by imposing extraneous and unworkable burdens on public interest litigants bringing appropriate claims.

1. Incompatible with *Downtown Eastside*

64. The AGBC's proposed requirements are novel. No modern case law or scholarship supports them, and each is incompatible with *Downtown Eastside*.

65. *Downtown Eastside* strongly disfavours imposing rigid threshold requirements for public interest standing as the AGBC proposes. This Court expressly refused to adopt any "hard and fast requirements", and instead favoured a "flexible and purposive" approach that could account for the facts of the specific case and fulfill public interest standing's basic purpose.[120] This Court should reject the AGBC's invitation to jettison that approach in favour of a rigid and arbitrary one. Automatically disqualifying any plaintiff who does not satisfy even one of the AGBC's proposed new requirements would not serve legality or access to justice.

66. The AGBC's first proposed requirement is a thinly veiled attack on *Downtown Eastside*. By seeking to limit public interest standing to cases in which the plaintiff is either tagging along with individual co-plaintiffs who already have the right to sue or else the *only* litigant who can realistically bring the case to court, the AGBC tries to resurrect some earlier authorities that suggested public interest standing was available only if there was *no other means* of bringing the case to court. Since *Downtown Eastside*, however, that is not the law: a litigant need show only that its claim is *a* reasonable and effective means of bringing the case to court, even if other reasonable and effective means exist.[121] In other words, even if an affected individual could participate as a plaintiff or co-plaintiff, this does not automatically bar public interest standing.

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[119] *R. v. Mian*, 2014 SCC 54; *Meier v. Saskatchewan Institute of Agrologists*, 2016 SKCA 116, ¶29; D. J.M. Brown & D. Fairlie, *Civil Appeals* (Thomson Reuters) (electronic loose-leaf, updated 2021), §10:50-10:51 (BOA, Tab 5).

[120] *Downtown Eastside*, ¶20, 52.

[121] *Downtown Eastside*, ¶44.

67. The AGBC's second proposed requirement is also off-side *Downtown Eastside*. When a defendant challenges a plaintiff's public interest standing before trial, *Downtown Eastside* does not direct the court to hold an advance mini-trial about the sufficiency of the plaintiff's intended trial evidence. In fact, *Finlay* expressly prohibits this. *Finlay* holds that, on a preliminary determination, standing "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 at a preliminary stage of the nature of the interest asserted".[122]

68. Although the AGBC relies on *Downtown Eastside* as authority for his third proposed requirement,[123] the term "proxy" appears nowhere in that decision. Instead, *Downtown Eastside* confirms that, in assessing the "genuine interest" factor, courts may consider a plaintiff's "link with *the claim*" and "interest in *the issues*".[124]

2. Undue Emphasis on Individualized Facts

69. The AGBC's proposed novel requirements all flow from his argument that an "individual fact matrix", and preferably an individual *plaintiff's* fact matrix, is "essential" in *Charter* litigation.[125] But a plaintiff can establish a suitable factual matrix through evidence from and about directly affected individuals even if they do not sue as co-plaintiffs.[126] If the AGBC wants "evidence from those directly impacted" to "ensur[e] that a factual context suitable for judicial determination is present",[127] there is no difference between the facts of a plaintiff and those of a witness. A defendant's preference about how the plaintiff should go about trying to prove its case is not a reason to dismiss the plaintiff's claim.

70. Nor is there any reason to restrict public interest standing to free up resources for a wholly theoretical private interest litigant who might seek to raise similar issues. Litigation brought by an experienced and well-resourced public interest organization will often be *more* efficient and

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[122] *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at 617 [emphasis added].
[123] AF, ¶90.
[124] *Downtown Eastside*, ¶43 [emphasis added].
[125] AF, ¶3, 37.
[126] See, *e.g.*, *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 [***Shantz***]; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 [***CCLA***]; *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 [***BCCLA***].
[127] AF, ¶60.

effective than litigation brought by an individual, and may bring forward a greater number and richer set of individuals' facts.[128] The organization may have superior skill, expertise, and resources, and may be better positioned to learn about, organize, and present the experiences of a range of affected individuals.

71. Indeed, years of experience show that public interest lawsuits brought by organizations acting alone can be an efficient and effective means of enforcing the legality principle.[129] Here, CCD is represented by two sets of counsel—one of whom has represented patients involuntarily treated under British Columbia's mental health legislation for nearly half a century. There is no basis to suggest CCD's presentation of the issues will somehow be defective.

72. Although CCD *will* lead evidence from and about directly affected individuals, the AGBC's position overstates the importance of an individual's facts in constitutional litigation. Courts can and regularly do decide complex constitutional questions where facts about any particular individual, let alone the plaintiff, are not material or even pertinent.

73. For example, many *Charter* cases do not turn on the facts of the plaintiff's, or even *any* individual's, particular circumstances.[130] In *Big M*, the accused corporation had no religion. Nevertheless, it was given standing to challenge the *Lord's Day Act* for violating *individuals' Charter* s. 2(*a*) right to freedom of religion by prohibiting the sale of goods on Sundays. The

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[128] P. Bowal, "Speaking Up for Others: *Locus Standi* and Representative Bodies" (1994), 35 *Les Cahiers de droit* 905, at 938. See also S. McIntyre, "Above and Beyond Equality Rights: *Canadian Council of Churches v. Canada*" (1992), 12 *Windsor Y.B. Access Just.* 293, at 315 (BOA, Tab 11); J. Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011), 44 *U.B.C. L. Rev.* 255, at 266 (BOA, Tab 6).

[129] See, *e.g.*, *Shantz*; *CCLA*; *BCCLA*.

[130] See, *e.g.*, *R. v. DeSousa*, [1991] 2 S.C.R. 944 (ss. 7 and 11(d) *Charter* compliance of *Criminal Code* offence of unlawfully causing bodily harm); *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4 (ss. 12 and 15 *Charter* compliance of *Criminal Code* provision permitting use of force to correct children's behaviour); *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (ss. 7-8 *Charter* compliance of federal anti-money laundering legislation).

plaintiff's facts were irrelevant to the assessment of the impugned law's constitutionality. The case was decided based on theoretical consideration of how the law violated others' rights.[131]

74. In *Nur*, the offenders challenged a law that imposed a mandatory minimum sentence for possessing loaded prohibited firearms. They alleged that the law would inflict cruel and unusual punishment on *other* offenders. In striking it down, this Court confirmed that "a challenge to a law … does not require that the impugned provision contravene the rights" of a claimant with standing as of right, and that a claimant may rely entirely on "reasonable hypothetical cases"—*i.e.*, fictional scenarios that may reasonably be expected to arise.[132] This methodology, which is well established in *Charter* cases,[133] focuses exclusively on the law's reasonably foreseeable effects—irrespective of the claimant's or *any* identifiable individual's particular circumstances.

75. In *Chaoulli*, a patient and a physician relied on public interest standing to challenge the constitutionality of Quebec's prohibition on private health insurance. They argued that it deprived Quebec residents of access to health care services that did not come with the wait times in the public system. The case had very little to do with the plaintiffs' particular circumstances, and this Court did not address them in any detail. It focused instead on the impugned laws' effect on the people of Quebec generally, and held that they were inconsistent with the *Quebec Charter*.[134]

76. Even where facts about an individual's particular circumstances *are* material to assessing a *Charter* claim, they are never sufficient. The analysis under s. 1 invariably requires consideration of the impugned law's broader context and effects.[135]

77. Federalism cases supply another example of constitutional issues being decided in the absence of facts about any particular individual's circumstances.[136] For example, in *Morgentaler*,

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[131] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 314.

[132] *R. v. Nur*, 2015 SCC 15, ¶51.

[133] See, *e.g.*, *R. v. Smith*, [1987] 1 S.C.R. 1045; *R v. Mills*, [1999] 3 S.C.R. 668.

[134] *Chaoulli*.

[135] See, *e.g.*, *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Frank v. Canada (Attorney General)*, 2019 SCC 1.

[136] *Canadian Generic Pharmaceutical Association v. Canada (Health)*, 2009 FC 725, ¶142. See, *e.g.*, *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.R. 199 (validity of federal law prohibiting the sale of tobacco products without health warnings); *Rothmans, Benson &*

there were no facts about how the impugned law impacted any particular individual, but this Court held that a provincial law prohibiting abortion outside of hospitals was *ultra vires* the province.[137]

78. References are yet another example. They are "often divorced from any existing dispute or firm factual foundation",[138] even in the *Charter* context. For instance, in *Reference re Same-Sex Marriage*, this Court held that a section of a proposed federal marriage law was *ultra vires* Parliament, that another section was consistent with s. 2(*a*) of the *Charter*, and that s. 2(*a*) protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs. This Court did all that despite the absence of any evidence about how the proposed law impacted any particular individual.[139] The existence and use of the reference power signals that the legislative and executive branches of government consider the courts competent to address constitutional issues, including *Charter* issues, otherwise than at the instigation of, and without even participation by, a directly affected individual.

79. To repeat yet again, CCD does not propose to litigate this case in a factual vacuum; it will lead evidence from and about individuals directly affected by the Impugned Provisions. But the AGBC's myopic focus on requiring evidence about a particular individual's circumstances at the stage of a standing challenge is misplaced. Despite the AGBC's ritualized incantations about the ills of litigating in the abstract, he has not identified a single case brought by a plaintiff with public interest standing in which a court found itself unable to decide the issues for want of sufficient facts. CCD has not been able to identify such a case either.

Hedges Inc. v. Saskatchewan, 2005 SCC 13 (operability of provincial legislation regulating tobacco advertising).

[137] *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

[138] Cromwell, *Locus Standi*, at 175 (BOA, Tab 13). See, *e.g.*, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (s. 7 *Charter* compliance of provincial motor vehicle legislation); *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (s. 2(*d*) *Charter* compliance of provincial labour relations legislation); *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3 (s. 11(*d*) *Charter* compliance of reductions to provincial court judges' salaries).

[139] *Reference Re Same-Sex Marriage*, 2004 SCC 79.

3. Irrelevant to the Standing Analysis

80. *Downtown Eastside*'s purposive approach requires courts to assess public interest standing with a view to enforcing the legality principle and facilitating access to justice. The AGBC's novel proposed requirements would only detract from that exercise.

81. Requiring a plaintiff to prove that it is "unrealistic for individual plaintiffs to participate" is pointless given public interest standing's animating purpose: to ensure that there are practical and meaningful ways to challenge laws and state action. Provided the court is satisfied that the claim raises a serious justiciable issue, the plaintiff has a genuine interest in that issue, and the action is a reasonable and effective means for it to be adjudicated, nothing is added by a requirement for proof that individual plaintiffs cannot realistically participate.

82. Here, CCD's uncontradicted evidence is that people with mental disabilities who experience forced treatment under the Impugned Provisions face significant barriers to commencing *and seeing through* complex constitutional litigation. The submissions of multiple interveners engaged with mental health issues,[140] and the experience of this case, corroborate that evidence. Additional detail about the nature and extent of the difficulties—which the AGBC never requested in any fashion, to satisfy a proposed requirement of which CCD had no notice—is irrelevant.

83. On the second proposed requirement, the AGBC says that whenever an organization's standing is challenged—even if the challenge precedes discovery—the organization must lead "particularized evidence" about its trial plan, including "identi[ties of] directly affected individuals who [are] prepared to testify", "how many individuals [the litigant] hope[s] to call", and "how recent or representative their experiences might be".[141] But the AGBC does not identify *why* he needs the information he seeks, or what he or the court would possibly do with it. What could a court or opposing litigant infer from a preliminary list of witness names and dates—and nothing more—delivered years before trial? It would add nothing to CCD's sworn evidence that it plans to lead evidence from and about directly affected individuals.

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[140] See, *e.g.*, Mental Health Legal Committee's Motion Record (Leave to Intervene), at 21-23, 27-28; Empowerment Council's Motion Record (Leave to Intervene), at 21; Canadian Mental Health Association *et al.*'s Motion Record (Leave to Intervene), at 22-26.

[141] AF, ¶70, n. 123.

84. On the third proposed requirement, the AGBC seeks to require public interest litigants to prove they are a "proxy" for directly affected individuals. He does not define what litigants must show to be considered a proxy, or even what the word could possibly mean in the context of public interest standing. The term has been defined as "[a]n agent representing and acting for principal" or "a person appointed to represent another";[142] it implies a lawful delegation of authority. These concepts make faint sense in the public interest standing context: if one or more directly affected individuals were capable of lawfully delegating the enforcement of their constitutional rights (the AGBC cites no authority to suggest they are), their proxy would have standing as of right.

85. The AGBC also never explains *why* a plaintiff with a genuine interest in a law's constitutionality must also be a proxy—whatever it means—for the individuals whom the law affects. There is no reason to think that imposing this additional requirement would do anything but stifle meritorious and important cases.

86. To illustrate, the British Columbia Civil Liberties Association has a broad mission—"the promotion, defence, sustainment and extension of civil liberties and human rights"[143]—and does not purport to be a proxy for any particular group. Yet it has been granted public interest standing in cases touching on a wide range of issues—indeed, some of the most important and controversial issues in Canadian society—and has litigated them highly effectively. To use a recent example, the Association is not a proxy for individuals who are grievously and irremediably ill, but it was granted public interest standing to challenge Canada's assisted dying laws in *Carter*—and succeeded, at every level of court, despite this Court's having dismissed a previous challenge.[144] Yet the AGBC's new proxy requirement would appear automatically to exclude the Association and other organizations with broad interests and memberships from being granted standing, at least as sole plaintiffs. That would benefit only the AGBC and others interested in better insulating unconstitutional laws from challenge.

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[142] *German Triathlon Union v. International Triathlon Union*, 2002 BCSC 125, ¶61, citing the *Shorter Oxford English Dictionary*.

[143] *Elmasry and Habib v. Roger's Publishing and MacQueen*, 2008 BCHRT 199, ¶4.

[144] *Carter*. See also *CCLA*; *BCCLA*.

87. The AGBC faults CCD for not having proven "general agreement amongst involuntary patients in support of CCD's position".[145] But public interest standing has never depended on whether the plaintiff represents the views of all or even a majority of directly affected individuals. Many constitutional challenges raise issues that severely divide affected individuals. For example, there was no unanimity or even general agreement among affected individuals in *Downtown Eastside*; a later case (*Bedford*) revealed differing perspectives.[146] Likewise, the plaintiffs in *Carter* did not purport to represent the views of all or even most people with grievous and irremediable illnesses. The conflicting views advanced by the interveners demonstrated fractured and diverse perspectives.[147]

88. Indeed, many public interest litigants have brought the perspective of only a tiny fraction of affected individuals. For example, in *Drug War Survivors*, an association of "drug users or former drug users" was granted standing to challenge certain bylaws on behalf of "Abbotsford's Homeless", even though not all homeless people affected by the bylaws were current or former drug users.[148] In *Downtown Eastside*, an organization and an individual formerly affected by Canada's sex work laws were granted standing to challenge those laws, even though both plaintiffs' experiences with the laws related to their application in only one area of downtown Vancouver, and the organization's experience was limited to street-level solicitation.[149]

89. Requiring proof of unanimity or general agreement is also incompatible with facilitating access to justice for disadvantaged or marginalized groups—one of the animating concepts behind public interest standing.[150] The idiosyncrasy of an individual or organization's views, and whether there are contending points of view that are more mainstream, is irrelevant. What matters is whether there is a serious justiciable issue sought to be litigated in a reasonable way by someone with a genuine interest.

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[145] AF, ¶111.

[146] *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

[147] Compare, *e.g.*, the Euthanasia Prevention Coalition factum and the Alliance of People with Disabilities factum.

[148] *Drug War Survivors*, ¶1, 29-30, aff'd 2015 BCCA 142.

[149] *Downtown Eastside*, ¶6, 64.

[150] *Downtown Eastside*, ¶51.

4. Unworkable and Unfair

90. The AGBC's proposed requirements are not only unsound in theory, but also unworkable in practice.

91. As to the first proposed requirement, what evidence is needed to prove the negative proposition that it is "unrealistic for individual plaintiffs to participate"? Is evidence from the plaintiff itself sufficient, or must it lead evidence from affected individuals explaining their circumstances and why they will not sue? What will satisfy the standard of "unrealistic"? Does participation have to be impossible, very difficult, or merely hard? For how many individuals? Five? Fifty? A hundred? All of them? What if some individuals *could* sue but will not, for example because they have concerns or other priorities? What if they simply prefer that someone else do the suing? The AGBC's factum answers none of these questions. While the AGBC points out that more than 90 affidavits were filed by the plaintiff in *Downtown Eastside*,[151] the AGBC neglects to mention that virtually all of them had already been prepared for an earlier research report—not to establish standing in the litigation.[152]

92. Similarly, how would a plaintiff "demonstrate, with some specificity, how it will provide a concrete and well-developed factual context" (beyond what CCD did here, which was in keeping with prior cases in which public interest standing was granted)? Must it provide a witness list? Must it also specify what each witness will say? Must those witnesses also swear affidavits outlining their anticipated evidence? If so, should they be subjected to cross-examination at a preliminary stage before standing is decided? Would proposed experts need to be retained and identified? Would they, too, need to swear affidavits previewing their anticipated evidence? Would the plaintiff be allowed to update or amend its list of witnesses, or would it be locked in to what it presented at the preliminary standing challenge, even if it occurred before discovery? If so, does the defendant have to preview and commit to its defences before discovery too? Again, the AGBC just argues for the requirement without regard for its workability or fairness.

93. On the third proposed requirement, how would a plaintiff ever prove it is a proxy for directly affected individuals? Must it show previous involvement by or affiliation with directly

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[151] AF, ¶64.

[152] Affidavit of Nicole Rielle Capler sworn September 29, 2008, ¶1-4 (BCSC Van. Reg. No. S075285) (BOA, Tab 3).

affected individuals? If so, how much, and by or with how many? And what type of involvement? Must the involvement of directly affected individuals be to the exclusion of others? Must the organization prove majority support to be considered a proxy? Is unanimity needed? How is support proven? Must the organization conduct a survey? How many individuals would need to be surveyed? What if directly affected individuals turn out to have a diversity of perspectives on the laws sought to be challenged? Would that diversity render everyone incapable of being a proxy, and immunize the laws from attack? Again, the AGBC simply specifies a requirement without any concern for its practical ramifications—including unpredictability of outcomes.

94. These practical problems are compounded by the obvious unfairness that the AGBC's proposed requirements would inflict on public interest litigants. Faced with a standing challenge, a plaintiff would be required to disclose extensive information about its experts and other witnesses, and overall litigation strategy, with all the risks to privilege that entrains. By contrast, the AGBC and other defendants would need to disclose nothing. And, by bringing the challenge at the inception of the case, they could avoid the normal litigation process, including obligations such as document production—exactly what the AGBC did here.

5. Incompatible with the Basic Mechanics of a Civil Action

95. The AGBC's proposed requirements are also incompatible with the basic mechanics of a civil action. No litigant in Canada is required to show, before discovery, how they intend to prove their case.[153] Public interest litigants should not be the first. Nor do the AGBC's speculative—and, here, totally unwarranted—concerns about a trial by ambush or an otherwise unfair procedure justify the AGBC's proposed rigid requirements for standing.

96. Requiring public interest litigants to come armed with their evidence even before completion of discovery would filter out potentially meritorious cases in which the necessary evidence is not readily available to the plaintiff. As the Court of Appeal for British Columbia has noted, at the start of a case, "[l]itigants do not always have access to all of the relevant evidence bearing on the issues raised. Often, relevant documents are in the sole possession or control of

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[153] The only notable exception is plaintiffs suing under secondary market disclosure schemes in provincial securities legislation, which reflect a context-specific policy choice designed to deter unmeritorious strike suits. See, *e.g.*, *Securities Act*, R.S.O. 1990, c. S.5, s. 138.8.

their opponents".[154] For example, in conspiracy cases, a plaintiff may have no choice but to plead conspiracy with as much specificity as possible and hope that the evidence needed to substantiate that pleading exists and will come out through discovery.[155] Similarly, public interest litigants may bring cases in which only the Crown has much or all of the most relevant evidence.

97. The ordinary rules of court supply all the tools needed to ensure a fair, orderly, and efficient litigation process. In British Columbia, these rules permit the AGBC to demand particulars; request document production; seek admission of certain facts; apply to strike any improper pleadings; apply for summary judgment where there is no genuine issue for trial; and request a case management conference to settle a case plan, which may address document production, expert evidence, witness lists, and other aspects of a proceeding.[156] Of course, as in all cases, counsel should be encouraged to work together to try to resolve any concerns—whether about sufficiency of pleadings, ensuring a fair procedure, or anything else—before rushing off to court.

98. There is no reason to think that these basic tools would not operate as designed to ensure a fair, orderly, and efficient process. They answer each of the AGBC's concerns, which are common to all civil litigation. The AGBC's fear of having to respond to "abstract" or "purely hypothetical" questions that raise no triable issue is answered by the AGBC's ability to move to strike pleadings or seek summary judgment.[157] The AGBC's fear of "trial by ambush" is answered by the requirement that litigants plead all materials facts, causes of action, and remedies sought, and by a defendant's ability to seek particulars where necessary.[158] The AGBC's fear of being left "at the mercy" of a case management judge rests on baseless speculation that the judge may craft an unfair procedure.[159]

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[154] *Mayer v. Mayer*, 2012 BCCA 77, ¶79.

[155] *North York Branson Hospital v. Praxair Canada Inc.*, 1998 CanLII 14799 (Ont. S.C.), ¶22; *Crosslink v. BASF Canada*, 2014 ONSC 4529, ¶27; *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646, ¶173.

[156] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 3-7(23), 7-1(11), 7-7(1), 9-5, 9-6(2), 12-2.

[157] AF, ¶62, 76.

[158] AF, ¶71.

[159] AF, ¶71.

99. This Court has already said that, given these tools, courts should not reach immediately for the blunt instrument of denying public interest standing.[160] By the same token, this Court should not impose new restrictions on standing to meet concerns that these tools already address.

100. The new threshold prerequisites the AGBC seeks to impose exceed even those faced by a plaintiff seeking to certify its claim as a class proceeding. Like public interest standing, class proceedings aim to provide a practical and effective means of accessing justice.[161] Unlike public interest litigation, however, class proceedings are often motivated mainly or entirely by the potential for financial recovery. Further, judgment on common issues or a settlement binds all class members (minus opt-outs) and is dispositive of their rights.[162] Yet a plaintiff can obtain certification at a pre-discovery stage based on a boilerplate litigation plan containing little to no detail about its intended evidence,[163] and the representative plaintiff need not prove itself to be a proxy for, or even "typical" of, the entire class.[164] There is no imaginable reason to impose higher burdens on public interest litigants who seek to vindicate Canadians' constitutional rights without any monetary motive.

PART IV - COSTS

101. CCD seeks an award of special costs on a full-indemnity basis throughout.

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[160] *Downtown Eastside*, ¶75; BCCA Reasons, ¶113 (AR, Tab 3).

[161] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [***Dutton***], ¶28; *Hollick v. Toronto (City)*, 2001 SCC 68, ¶15, 27; *AIC Limited v. Fischer*, 2013 SCC 69, ¶26, 31, 34.

[162] *Class Proceedings Act*, R.S.B.C. 1996, c. 50, ss. 26(1), 35(4).

[163] See, *e.g.*, *Cooper v. Merrill Lynch*, 2006 BCSC 1905, Sch. "A" (12 paragraphs, no information on intended evidence); *MacKinnon v. National Money Mart Company*, 2007 BCSC 348, Sch. "B" (13 paragraphs, no information on intended evidence); *Lundy v. VIA Rail Canada Inc.*, 2016 ONSC 425, Sch. "A" (four brief sections, no information on intended evidence); *Allen v. Aspen Group Resources Corporation*, 2009 CanLII 67668 (Ont. S.C.), ¶162; *Robinson v. Rochester*, 2010 ONSC 463, ¶73.

[164] *Dutton*, ¶41; *MacLean v. Telus Corporation*, 2006 BCSC 766, ¶53; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.*, 2002 CanLII 6199 (Ont. S.C.), ¶44; *Campbell v. Flexwatt Corp.*, 1997 CanLII 4111 (B.C.C.A.), ¶45; *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 472, ¶49-51.

102. This Court may grant such an award where (1) the case involves matters of public interest that have a significant and widespread societal impact; and (2) the litigant shows it has no personal, proprietary, or pecuniary interest in the litigation that would justify it on economic grounds, and that it would not have been possible to pursue the litigation effectively with private funding.[165]

103. Both criteria are met. First, the scope of public interest standing, and in particular the circumstances in which organizations may pursue public interest litigation absent an individual co-plaintiff, is a matter of public interest with significant and widespread societal impact. The participation of over 20 interveners from across the country representing a wide range of interests and perspectives in this appeal is a testament to this fact. Second, CCD has no personal, proprietary, or pecuniary interest in the litigation, and it would not have been possible for CCD to pursue the litigation—led by *pro bono* counsel—effectively with private funding.

104. This Court should exercise its discretion to award special costs because the AGBC's continued efforts to stymie this litigation have derailed it for over three years. In that time, directly affected individuals have paid the price in terms of their constitutional rights.

105. If the appeal is allowed, CCD asks that no costs be awarded against it.

PART V - ORDERS SOUGHT

106. This Court can make any order the Court of Appeal could have made.[166] It may do so even if it dismisses the appeal.[167] It may also determine an issue that requires assessment of the record, provided doing so is "in the interests of justice and feasible on a practical level".[168]

107. This Court should decide the issue of CCD's standing. Doing so is both practically feasible and in the interests of justice. This Court is in as good a position as the chambers judge was to determine this issue. The record is sufficient, credibility is not in issue, and both parties have fully argued CCD's standing before this Court. If this Court dismisses the appeal and restores the Court

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[165] *Carter*, ¶140.

[166] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 45; *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(1).

[167] See, *e.g.*, *Lefolii v. Gouzenko*, [1969] S.C.R. 3, at 6-7; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, ¶208; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, ¶55; *R. v. Smith*, 2015 SCC 34, ¶33.

[168] *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, ¶33.

of Appeal's judgment, the result will be months or years of further delay and judicial resources devoted to a preliminary standing determination. The standing issue would be remitted to the trial court. There is every reason to believe the AGBC would exhaust all appeals available to him. Meanwhile, capable involuntary patients would continue to be subjected to forced treatment under the Impugned Provisions, without any final determination of their constitutionality. If the AGBC litigates the merits of CCD's claim with the same enthusiasm, doggedness, and imagination as he has litigated standing, that final determination may not come for many, many years.

108. In the administrative law context, a court may exercise its remedial discretion to decide an issue itself, rather than remit the matter to the administrative decision maker that the legislature has directed must decide the issue, if there is "concern for delay, fairness to the parties, [and] urgency of providing a resolution to the dispute".[169] So too here. The interests of justice are badly served by sending the matter back for yet more litigation on the preliminary issue of standing. This Court should decide CCD's standing so that the constitutional challenge can be heard on its merits.

109. Accordingly, CCD asks the Court to dismiss the appeal, grant CCD public interest standing, and order the AGBC to pay CCD's costs on a full-indemnity basis throughout.

PART VI - SUBMISSIONS ON PUBLICATION

Nil.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MICHAEL A. FEDER, Q.C.
KATHERINE BOOTH
CONNOR BILDFELL
Counsel for the Respondent,
Council of Canadians with Disabilities

[169] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, ¶142.

PART VII - TABLE OF AUTHORITIES

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SCHEDULE "A" – IMPUGNED PROVISIONS

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

Application of this Act

2 This Act does not apply to

…

(b) the provision of psychiatric care or treatment to a person detained in or through a designated facility under section 22, 28, 29, 30 or 42 of the Mental Health Act,

(c) the provision of psychiatric care or treatment under the Mental Health Act to a person released on leave or transferred to an approved home under section 37 or 38 of the Mental Health Act…

Mental Health Act, R.S.B.C. 1996, c. 288

Deemed consent to treatment and request for a second opinion

31 (1) If a patient is detained in a designated facility under section 22, 28, 29, 30 or 42 or is released on leave or is transferred to an approved home under section 37 or 38, treatment authorized by the director is deemed to be given with the consent of the patient.

(2) A patient to whom subsection (1) applies, or a person on the patient's behalf, may request a second medical opinion on the appropriateness of the treatment authorized by the director once in each of the following periods:

(a) a one month period referred to in section 23 or 24 (1) (a);

(b) a 3 month period referred to in section 24 (1) (b);

(c) a 6 month period referred to in section 24 (1) (c).

(3) On receipt of a second medical opinion prepared as described in subsection (2), the director must consider whether changes should be made in the authorized treatment for the patient and authorize changes the director considers should be made.

Representation Agreement Act, R.S.B.C. 1996, c. 405

Mental health decisions

11 Despite sections 7 (1) (c) and 9 (1) (c), an adult may not authorize a representative to refuse consent to

…

(b) the provision of professional services, care or treatment under the Mental Health Act if the adult is detained in a designated facility under section 22, 28, 29, 30 or 42 of that Act, or

(c) the provision of professional services, care or treatment under the Mental Health Act if the adult is released on leave or transferred to an approved home under section 37 or 38 of that Act.

SCHEDULE "B" – TABLE COMPARING CCD'S ORIGINAL CLAIM AND AMENDED CLAIM

Deleted Paragraph in Original Notice of Civil Claim	**New Paragraph in Amended Notice of Civil Claim**
Paras. 2-3 [Description of Louise MacLaren and D.C.]	*Deleted*
Paras. 17-20 [Louise MacLaren's background]	*Deleted*
21. As an Involuntary Patient, Ms. MacLaren has been administered Forced Psychiatric Treatment, including electroconvulsive therapy ("ECT") and psychotropic medications.	32. Psychotropic medications, electroconvulsive therapy ("ECT"), and psychosurgery can be administered as Forced Psychiatric Treatment under the *Mental Health Act*.
22. Ms. MacLaren has undergone approximately 300 rounds of ECT in her life. ECT, formerly known as electroshock therapy, is a psychiatric treatment in which seizures are induced by administering electric currents through electrodes placed on the patient's head. ECT is currently administered to patients under general anesthetic. The most common adverse effects immediately following ECT are confusion and memory loss, as well as any side effects that result from the administration of general anesthetic.	35. ECT, formerly known as electroshock therapy, is a psychiatric treatment in which seizures are induced by administering electric currents through electrodes placed on the patient's head. ECT is currently administered to patients under general anesthetic. 36. ECT carries a number of risks and side-effects, including confusion, memory loss, nausea, headache, jaw pain, and muscle ache, as well as any side effects that result from the administration of general anesthetic.
23. Psychotropic medications are psychiatric medications that alter chemical levels in the brain that affect mood, thinking, and behavior. They include antipsychotic medications, mood stabilizing medications, antidepressants, and sedatives. Psychotropic medications can be ingested orally, injected intramuscularly, or, rarely, administered intravenously.	33. Psychotropic medications are psychiatric medications that alter chemical levels in the brain that affect mood, thinking, and behavior. They include antipsychotic medications, mood stabilizing medications, antidepressants, and sedatives. Psychotropic medications can be ingested orally, injected intramuscularly, or, rarely, administered intravenously.
24. Psychotropic medications carry a number of risks and side effects, the most serious of which are: (a) a potentially fatal condition known as neuroleptic malignant syndrome; (b) a potentially irreversible condition known as tardive dyskinesia (involuntary movements); (c) metabolic changes, including hyperglycemia, diabetes, and dyslipidemia; and (d) other side effects, including dizziness, lightheadedness, drowsiness, tiredness, lethargy,	34. Psychotropic medications carry a number of risks and side effects, the most serious of which are: (a) a potentially fatal condition known as neuroleptic malignant syndrome; (b) a potentially irreversible condition known as tardive dyskinesia (involuntary movements); (c) metabolic changes, including hyperglycemia, diabetes, and dyslipidemia; and (d) other side effects, including dizziness, lightheadedness, drowsiness, tiredness, lethargy,

anxiety, akathisia, agitation, extrapyramidal symptoms, excess saliva/drooling, blurred vision, weight gain, gastro-intestinal symptoms, musculoskeletal stiffness, extremity pain, myalgia, muscle spasms, headache, cardiovascular symptoms, and trouble sleeping.	anxiety, akathisia, agitation, extrapyramidal symptoms, excess saliva/drooling, blurred vision, weight gain, gastro-intestinal symptoms, musculoskeletal stiffness, extremity pain, myalgia, muscle spasms, headache, cardiovascular symptoms, and trouble sleeping.
25. Health care providers have administered Forced Psychiatric Treatment to Ms. MacLaren by: (a) demanding that Ms. MacLaren take medications even though she expressed refusal to do so; (b) threatening to inject Ms. MacLaren with medications if she refused to take medications orally; (c) forcibly injecting Ms. MacLaren with medication; (d) requiring Ms. MacLaren to take medications and receive ECT as a condition of her release from hospital on leave; (e) threatening to recall Ms. MacLaren to hospital from leave if she refused to take medications or receive ECT; and (f) issuing a warrant for Ms. MacLaren's apprehension under section 39(2) of the *Mental Health Act* following her refusal to take medications or receive ECT while on leave.	41. Health care providers administer Forced Psychiatric Treatment by: (a) demanding that Involuntary Patients cooperate with Forced Psychiatric Treatment even when they expressly refuse consent; (b) threatening to inject Involuntary Patients with psychotropic medications if they refuse to take psychotropic medications orally; (c) injecting Involuntary Patients with psychotropic medications through physical force; (d) placing or threatening to place, Involuntary Patients in mechanical restraints if they refuse to cooperate with Forced Psychiatric Treatment; (e) placing, or threatening to place, Involuntary Patients in seclusion (i.e., solitary confinement) if they refuse to cooperate with Forced Psychiatric Treatment; (f) requiring that Involuntary Patients cooperate with Forced Psychiatric Treatment as a condition of their release on leave from designated facilities; (g) threatening to recall Involuntary Patients from leave to designated facilities if they refuse to cooperate with forced Psychiatric Treatment; and (h) issuing warrants to apprehend Involuntary patients under section 39(2) of the *Mental Health Act* if they refuse to cooperate with Forced Psychiatric Treatment while on leave.
26. When Ms. MacLaren was not certified as an Involuntary Patient, health care providers threatened to recertify Ms. MacLaren as an Involuntary Patient if she refused to voluntarily take medications or receive ECT.	42. As a result of the Impugned Provisions, health care providers use the threat of detention as an Involuntary Patient and the threat of Forced Psychiatric Treatment to secure cooperation and compliance from voluntary patients.
27. There are many treatment approaches available to treat Ms. MacLaren's symptoms, including approaches that do not entail ECT or the psychotropic medications administered to her as Forced Psychiatric Treatment.	39. There are a variety of treatment approaches available to treat mental illness, including variations in approaches involving psychotropic medications, ECT, or psychosurgery and approaches that do not involve psychotropic medications, ECT, or psychosurgery.

28. At all times during which Ms. MacLaren was undergoing Forced Psychiatric Treatment, she was either capable of making a decision regarding psychiatric treatment or had family members or friends who were available and able to make a decision as a Substitute Decision Maker.	44. As a result of the Impugned Provisions, Forced Psychiatric Treatment is administered to Involuntary Patients who are capable of making decisions regarding psychiatric treatment. 45. As a result of the Impugned Provisions, Forced Psychiatric Treatment is administered to Involuntary Patients who are incapable of making decisions regarding psychiatric treatment but who have family members or friends who can make decisions for them as Substitute Decision Makers.
Paras 29-33 [Effects of forced psychiatric treatment on Louise MacLaren]	46. The use, and threatened use, of Forced Psychiatric Treatment can cause physical harm and severe psychological pain and stress to Involuntary Patients.
34. Ms. MacLaren's experiences as an Involuntary Patient have made her fearful of voluntarily seeking medical help in the future should she cease to be an Involuntary Patient because any contact with health care providers could lead to certification as Involuntary Patient and a complete loss of control over decision-making for her treatment.	47. The prospect of Forced Psychiatric Treatment makes people apprehensive about seeking medical and social services and otherwise engaging voluntarily with health care providers for fear that any contact with health care providers could lead to detention as an Involuntary Patient and a complete loss of control over psychiatric treatment decisions.
Paras. 35-39 [D.C.'s background]	*Deleted*
40. As an Involuntary Patient, D.C. was administered Forced Psychiatric Treatment, including antipsychotic medications.	32. Psychotropic medications, electroconvulsive therapy ("ECT"), and psychosurgery can be administered as Forced Psychiatric Treatment under the *Mental Health Act*.
41. Health care providers have administered Forced Psychiatric Treatment to D.C. by: (a) demanding that D.C. take medications even though he expressed refusal to do so; (b) threatening to inject D.C. with medications if he refused to take medication orally; (c) injecting D.C. with medications, sometimes using four-point restraints; (d) placing D.C. in seclusion (solitary confinement) and demanding that he take medications while in seclusion; (e) requiring D.C. to take medications as a condition of his release from hospital on leave; and (f) threatening to recall D.C. to hospital from leave if he refused to take medications.	41. Health care providers administer Forced Psychiatric Treatment by: (a) demanding that Involuntary Patients cooperate with Forced Psychiatric Treatment even when they expressly refuse consent; (b) threatening to inject Involuntary Patients with psychotropic medications if they refuse to take psychotropic medications orally; (c) injecting Involuntary Patients with psychotropic medications through physical force; (d) placing or threatening to place, Involuntary Patients in mechanical restraints if they refuse to cooperate with Forced Psychiatric Treatment; (e) placing, or threatening to place, Involuntary Patients in seclusion (i.e., solitary confinement) if they refuse to cooperate with Forced Psychiatric Treatment;

	(f) requiring that Involuntary Patients cooperate with Forced Psychiatric Treatment as a condition of their release on leave from designated facilities; (g) threatening to recall Involuntary Patients from leave to designated facilities if they refuse to cooperate with forced Psychiatric Treatment; and (h) issuing warrants to apprehend Involuntary patients under section 39(2) of the *Mental Health Act* if they refuse to cooperate with Forced Psychiatric Treatment while on leave.
42. When D.C. was not certified as an Involuntary Patient, health care providers threatened to certify D.C. as an Involuntary Patient if he did not voluntarily take medications.	42. As a result of the Impugned Provisions, health care providers use the threat of detention as an Involuntary Patient and the threat of Forced Psychiatric Treatment to secure cooperation and compliance from voluntary patients.
43. There are many treatment approaches available to treat D.C.'s symptoms, including approaches that do not entail the antipsychotic medications administered to him as Forced Psychiatric Treatment.	39. There are a variety of treatment approaches available to treat mental illness, including variations in approaches involving psychotropic medications, ECT, or psychosurgery and approaches that do not involve psychotropic medications, ECT, or psychosurgery.
44. At all times D.C. was undergoing Forced Psychiatric Treatment, he was either capable of making a decision regarding psychiatric treatment or had family members or friends who were available and able to make a decision as a Substitute Decision Maker.	44. As a result of the Impugned Provisions, Forced Psychiatric Treatment is administered to Involuntary Patients who are capable of making decisions regarding psychiatric treatment. 45. As a result of the Impugned Provisions, Forced Psychiatric Treatment is administered to Involuntary Patients who are incapable of making decisions regarding psychiatric treatment but who have family members or friends who can make decisions for them as Substitute Decision Makers.
Paras. 45-46, 48 [Impacts of forced psychiatric treatment on D.C.]	46. The use, and threatened use, of Forced Psychiatric Treatment can cause physical harm and severe psychological pain and stress to Involuntary Patients.
47. D.C.'s experiences as an Involuntary Patient have made him fearful of voluntarily seeking medical help in the future should he cease to be an Involuntary Patient because any contact with health care providers could lead to certification as an Involuntary Patient and a complete loss of control over decision-making for his treatment.	47. The prospect of Forced Psychiatric Treatment makes people apprehensive about seeking medical and social services and otherwise engaging voluntarily with health care providers for fear that any contact with health care providers could lead to detention as an Involuntary Patient and a complete loss of control over psychiatric treatment decisions.

SCHEDULE "C" – EXCERPTS FROM CCD'S SUBMISSIONS REGARDING REASONABLE HYPOTHETICALS

CCD's Application Response (August 15, 2018)[170]

7. At trial, [CCD] intends to lead expert evidence from both fact and expert witnesses, including from people who have directly experienced the impacts of the Impugned Provisions.

31. No matter who might challenge the Impugned Provisions, there is every reason to expect that the most relevant evidence will come from witnesses other than the plaintiff. The litigation turns on complex questions about mental health, capacity, psychiatric treatments, and the effects of those treatments. Expert evidence on those questions is required.

CCD's Factum in the Court of Appeal (February 27, 2019)

10. At the trial, CCD intended to lead expert evidence from both lay and expert witnesses, including from witnesses who had directly experienced the impacts of the Impugned Provisions.

15. [A]t trial, CCD planned to lead both lay and expert evidence addressing the nature of mental disabilities; the stereotypes and barriers faced by people with mental disabilities; the lived experiences of people who receive forced psychiatric treatment; and the impact of the Impugned Provisions on the people whom they affect.

33. Third, the chambers judge's reasoning ignores the unchallenged evidence that CCD planned to call evidence from and about individuals affected by the Impugned Provisions at trial.

73. [The chambers judge's] holding improperly ignores that both parties estimated 20 days would be required to try the action, as well as the uncontradicted evidence that, at trial, CCD would call individuals who have directly experienced the impacts of the Impugned Provisions as well as multiple expert witnesses.

87. The uncontested evidence on the summary trial application was that CCD would call, at trial, evidence from individuals directly affected by the Impugned Provisions, as well as expert evidence.

CCD's Memorandum of Argument re Leave to Appeal to this Court (January 18, 2021)

12. Despite this, the AGBC asserts that CCD intended "to prove constitutional infirmity by way of 'reasonable hypotheticals'", and plucks a few tangential sentences from CCD's application response to support its assertion. The AGBC's assertion is false, and its selective quote is deceptive. CCD never once stated that it intended to rely on reasonable hypotheticals. Rather, it stated—repeatedly—that it intended to prove its case with evidence from individuals directly affected by the impugned provisions, as well as expert evidence. CCD's only mention of reasonable hypotheticals was a passing observation that they can be a legitimate aspect of constitutional litigation.

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[170] AR, Tab 12.

23. The Court of Appeal also never held that reasonable hypotheticals provide a sufficient evidentiary basis for constitutional litigation in cases without an individual plaintiff. Nor did CCD ever argue it. Nor does CCD wish to. The AGBC has fabricated this issue to try to make its proposed appeal interesting. But the issue simply does not arise—neither of the judgments below mentions it. This issue will not be presented in an adversarial setting if this Court grants leave; CCD will not argue that reasonable hypotheticals are sufficient.

33. The AGBC also argues that leave should be granted because the Court of Appeal supposedly accepted that reasonable hypotheticals could and would provide a "sufficient evidentiary basis for public interest litigation in cases without an individual plaintiff". This is completely concocted.

34. CCD never argued that reasonable hypotheticals would constitute a sufficient evidentiary basis for its constitutional challenge. And the Court of Appeal never held that this or indeed any constitutional challenge could succeed without evidence or based on reasonable hypotheticals alone. The phrase "reasonable hypothetical" appears nowhere in the decision. The Court of Appeal did not even discuss the issue.