IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MacLaren v. British Columbia (Attorney General),* 2018 BCSC 1753

Date: 20181012
Docket: S168364
Registry: Vancouver

Between:

Mary Louise MacLaren, D.C., and Council of Canadians with Disabilities

Plaintiffs

And

Attorney General of British Columbia

Defendant

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:	M. Feder K. Booth L. Johnston
Counsel for the Defendant:	K. Horsman Q.C. M. Witten K. Chewka
Place and Date of Hearing:	Vancouver, B.C. August 23, 2018
Place and Date of Judgment:	Vancouver, B.C. October 12, 2018

[1] The notice of civil claim in this action was filed on September 12, 2016. In it, the plaintiffs seek a declaration that subsection 31(1) of the *Mental Health Act*, R.S.B.C. 1996, c. 288, subsections 2(b) and (c) of the *Health Care (Consent) and Care Facility (Administration Act)*, R.S.B.C. 1996, c. 181, and subsections 11(1)(b) and (c) of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, (collectively, the "*Three Acts*") violate ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], and are therefore unconstitutional and of no force and effect.

[2] On October 25, 2017, Ms. MacLaren and D.C. filed notices of discontinuance of their claims, leaving the Council of Canadians with Disabilities ("CCD") as the only remaining plaintiff.

[3] The Attorney General of British Columbia ("Attorney") challenges the ability of the CCD to pursue this action on its own, and applies for an order pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, and the inherent jurisdiction of the Court dismissing CCD's claim on the basis that it lacks standing to continue the action.

I. The Impugned Legislation

[4] Subsection 31(1) of the *Mental Health Act* provides:

> 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.

[5] Subsections 2(b) and (c) of the *Health Care (Consent) and Care Facility (Administration Act)* provide:

> **Application of this Act**
>
> 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* …

[6] Subsections 11(1)(b) and (c) of the *Representation Agreement Act* provide:

> **Decisions not permitted**
>
> Despite sections 7 (1) (c) and 9, 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…

[7] The Attorney asserts that the *Mental Health Act* and the *Mental Health Act Regulation*, B.C. Reg. 233/99, create a legislative scheme that permits the involuntary admission and treatment of persons in provincial mental health facilities if the statutory conditions for admission in s. 22 of the *Mental Health Act* are met.

[8] The CCD summarizes the impugned provisions of the *Three Acts* as permitting physicians to forcibly administer psychiatric treatment to involuntary patients with mental disabilities without their consent or the consent of a substitute or supportive decision-maker:

> a) regardless of whether those patients are actually capable of giving, refusing, or revoking consent at that time, and;
>
> b) regardless of whether consent can be given, refused, or revoked by and appropriate substitute or supportive decision-maker.

[9] In order for a facility to involuntarily admit an individual for examination and treatment for up to 48 hours, s. 22(1) of the *Mental Health Act* requires that the

director of a designated facility receive a medical certificate completed by a physician. In order to detain and treat a person for more than 48 hours, s. 22(2) of the *Act* requires that the director of a designated facility must also receive a medical certificate from a second physician.

[10] Each certificate must state that a physician has examined the person in issue; is of the opinion that the person has a mental disorder and the reasons for that opinion; that the person requires treatment in or through a designated facility to prevent the person's substantial mental or physical deterioration or for the protection of the person or others; and that the person cannot suitably be admitted as a voluntary patient.

[11] Once an involuntary patient is admitted, the powers and duties of a director of the facility are found in s. 8 of the *Mental Health Act,* which provides, in part:

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

[12] Before treatment is provided to an involuntary patient, Form 5 of the *Mental Health Regulation* must be completed by a physician. Form 5 may either be signed or not signed by the patient. If signed, the physician must attest that the patient is "capable of understanding the nature of the authorization" contained in the Form. If not signed by the patient, the physician's signature alone is sufficient if the physician attests that the patient is "incapable of appreciating the nature of treatment and/or his or her need for it, and is therefore incapable of giving consent."

II. The Council of Canadians with Disabilities

[13] The CCD describes itself as a "national human rights organization of people with disabilities working for an inclusive and accessible Canada" and identifies its organizational priorities as:

1) Disability-related supports;

2) Poverty alleviation;

3) Increased employment for persons with disabilities;

4) Promotion of human rights;

5) Ratification and implementation of the UN Convention on the Rights of Persons with Disabilities ("UN CRPD");

6) Technology developed according to the principles of universal design; and

7) Air, rail, bus and marine transport that is accessible to persons with all types of disabilities.

[14] Melanie Benard is the Chair of the CCD's Mental Health Committee. In her affidavit sworn August 14, 2018, Ms. Benard deposed that:

> 6. CCD is a national, not-for-profit organization founded in 1976 by individuals with disabilities to represent and advance the interests of people with disabilities, including people with mental health-related disabilities. Today, CCD has 17 member organizations whose members, together, number in the several hundred thousand.
>
> 7. CCD's mandate is to promote the equality, autonomy, and rights of people living with all types of disabilities in Canada. It does this by undertaking law reform, policy development, and rights advancement work on behalf of people with disabilities, including litigation.
>
> 8. CCD's work is directed by and for people with disabilities. Through CCD, people with disabilities, via various member organizations, identify and raise issues that affect their equality, autonomy, and rights. CCD then provides the institutional structure and resources needed to undertake work to address those issues on behalf of people with disabilities. This structure is important because people with disabilities are a historically marginalized population. We face barriers that can make it difficult to advocate for ourselves and ensure our interests are represented. CCD's structure is also important because it provides an effective means to pursue disability rights issues that, due to various factors (*e.g.*, their broad significance or the resources required), are better pursued by CCD than by individual member organizations.
>
> 9. CCD carries out its work through a board of directors called the National Council of Representatives, which is made up of one representative from each of CCD's 17 member organizations. The National Council of Representatives meets regularly to consider issues raised by the member organizations and to make decisions about the issues and work that CCD will pursue. CCD conducts the majority of its work through committees that have

specific mandates. For instance, CCD's Mental Health Committee, whose members are all individuals with specific expertise in mental health-related disabilities, is mandated to direct this litigation.

C. CCD's Member Organizations

10. CCD's member organizations are all national or provincial organizations that have a specific focus on promoting and improving the lives and rights of persons living with disabilities, including mental disabilities. CCD's member organizations are:

(a) Alberta Committee of Citizens with Disabilities;

(b) Disability Alliance BC;

(c) Citizens with Disabilities - Ontario;

(d) Confédération des Organismes de Personnes Handicapées du Québec;

(e) Coalition of Persons with Disabilities – Newfoundland and Labrador;

(f) Manitoba League of Persons with Disabilities;

(g) Nova Scotia League for Equal Opportunities;

(h) P.E.I. Council of People with Disabilities;

(i) Saskatchewan Voice of People with Disabilities;

(j) Northwest Territories Disabilities Council;

(k) Alliance for Equality of Blind Canadians;

(l) Canadian Association of the Deaf;

(m) DisAbled Women's Network-Canada/Réseau d'action des femmes handicapées;

(n) National Educational Association of Disabled Students;

(o) National Network for Mental Health;

(p) People First of Canada; and,

(q) Thalidomide Victims Association of Canada.

…

34. CCD also conducts other litigation similar to this litigation. CCD has brought or intervened in over 35 court cases dealing with the rights of people with disabilities, including 24 cases at the Supreme Court of Canada, 27 cases dealing specifically with the equality rights of people with disabilities under both the *Charter* and other human rights legislation, and interventions in 15 cases dealing specifically with ss. 7 and 15(1) of the *Charter*. Attached as Exhibit "A" to this affidavit is a list of all the *Charter* and human rights-related cases in which CCD has been involved. The CCD's recent litigation is conducted by specific committees, whose members are all people with lived experience of disabilities, disability rights advocates, legal academics, or practitioners who are recognized for their experience in the fields of disability, equality, and human rights.

35. Some of the cases in which CCD has been involved demonstrate the organization's ability to bring this litigation and its engagement with the specific issues raised in this case:

(a) CCD was the plaintiff in *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15. In that decision, the Supreme Court of Canada recognized that CCD had been granted permission to intervene before that court on "a number of occasions" relating to human rights and equality issues under the *Charter* (para. 25). Since then, Supreme Court of Canada has granted CCD leave to intervene on 9 further occasions.

(b) CCD has intervened in landmark cases that advanced the *Charter s.* 15 rights of people with disabilities, including *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78; *Newfoundland (Treasury Board) v. N.A.P.E*., 2004 SCC 66; *Lovelace v. Ontario*, 2000 SCC 37; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R, 624; *Brant County Board of Education v. Eaton* [1997] 1 S.C.R. 241; and *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, among others.

(c) CCD has intervened on the specific issue of the potential for coerced medical treatment of people with disabilities in *Carter v. Canada (Attorney General)*, 2012 SCC 5, aff'g 2013 BCCA 435, both at the Supreme Court of Canada and the B.C. Court of Appeal. This built on CCD's previous work on this issue by way of its intervention in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

(d) CCD intervened in *Battlefords and District Co-operative Ltd v. Gibbs*, [1996] 3 S.C.R. 566 and *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, two cases about discrimination against employees with mental disabilities (specifically mental health-related and addiction disabilities). CCD addressed the lived experiences of people with mental disabilities, including the discrimination and stigma they face.

(e) CCD intervened in *R. v. D.A.I.*, 2012 SCC 5, a case which considered the capacity of adults with mental disabilities to testify and, more specifically, a requirement that they explain the nature of the obligation to tell the truth before being considered competent to testify. CCD argued against limiting the ability of people with intellectual disabilities to testify in court, addressing the effects such limitations would have on the reporting and prosecution of offences against people with mental disabilities. CCD spoke to the reality of discrimination against people with disabilities and the courts' duty to facilitate the participation with mental disabilities in the judicial process in order to ensure equality before the law.

[15] In fact, of the 35 cases referred to at paras. 34–35 of Ms. Benard's affidavit, the CCD conducted only one of those cases as a party. Its involvement in the other 34 cases was as an intervenor only.

III. The CCD's Position

[16] In its amended notice of civil claim, the CCD pleaded that:

> 1. This claim challenges the constitutionality of British Columbia's mental health legislation, which deprives all involuntary patients — including patients living in the community and those actually detained — of the right to give, refuse, or revoke consent to psychiatric treatment, regardless of those patients' actual capability to do so. British Columbia's legislation allows capable adults to be forcibly administered psychiatric treatment, including psychotropic medication or electroconvulsive therapy, against their will. The legislation further deprives those adults of the right to have psychiatric treatment decisions made by a substitute decision maker, such as a representative, friend, or family member. Involuntary patients are deprived of the health care consent rights and protections enjoyed by others in society. Most fundamentally, they are deprived of the right to control what is done to their own bodies.
>
> …
>
> 5. In British Columbia, every adult is presumed to be capable of giving, refusing, or revoking consent to health care: *Health Care (Consent) and Care Facility (Admission) Act*, section 3; *Representation Agreement Act*, section 3.
>
> 6. Health care providers must not provide health care without obtaining the adult's consent, subject to certain exceptions: *Health Care (Consent) and Care Facility (Admission) Act*, section 5.
>
> 7. When a patient is found incapable of giving, refusing, or revoking consent to health care, health care providers must seek consent to provide health care from a Substitute Decision Maker: *Health Care (Consent) and Care Facility (Admission) Act*, sections 11 and 16.
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> 8. By way of a representation agreement made pursuant to the *Representation Agreement Act*, an adult may appoint an authorized representative to support the adult with health care decisions or make health care decisions on her or his behalf in the event that she or he is found incapable. The Supreme Court of British Columbia may appoint a personal guardian to make health care decisions on an adult's behalf pursuant to the *Patients Property Act*.
>
> 9. Health care providers must choose a temporary substitute decision maker to make a health care decision for an adult found incapable who does not have an authorized representative or personal guardian. If no family member or friend is available and qualified to act as a temporary substitute decision maker, an employee of the Public

Guardian and Trustee must make the health care decision: *Health Care (Consent) and Care Facility (Admission) Act*, section 16.

[17] In Ms. Benard's affidavit, she deposed that:

> 23. Attempts to create artificial distinctions between the discrimination experienced by people with mental health-related disabilities as compared to people with other types of disabilities or "disability issues" more generally denies the shared discrimination and marginalization that all people with disabilities face. People with all types of disabilities, including mental disabilities, share experiences of discrimination and marginalization. While individuals' experiences may vary depending on the specific context, type of disability, personal characteristics (such as gender or race), and numerous other factors, it is inaccurate to suggest that people with different types of disabilities have nothing in common, or that they can or should be artificially distinguished.
>
> …
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> 27. … CCD's position is that the Impugned Provisions are a constructed barrier that precludes people with a specific type of disability—mental disability—from participating in meaningful treatment and recovery decisions. Involuntary patients are deprived of this right without regard to their actual capacity to make decisions or to the availability of substitute or supported decision-making mechanisms. This is done in a way that is not necessarily experienced by people with other types of disabilities or by people without disabilities. Artificial distinctions between "disability issues" and "mental disability issues" further perpetuate the stereotypes and discrimination faced by people with mental disabilities. As a cross-disability organization, CCD has a unique perspective relevant to the litigation about how the Impugned Provisions result in discrimination between people with and without disabilities, but also discrimination between people with different types of disabilities, specifically physical versus mental disabilities.

[18] In its amended notice of civil claim, the CCD goes on to explain that:

> 22. There are approximately 20,000 involuntary admissions under the *Mental Health Act* each year in British Columbia and in all cases the Involuntary Patient is vulnerable to Forced Psychiatric Treatment.
>
> 23. The constitutional validity of Forced Psychiatric Treatment administered through the deemed consent model of the Impugned Provisions is an issue that is relevant to all residents of British Columbia.
>
> …
>
> 25. Involuntary Patients face numerous barriers to accessing the court system, including barriers inherent to ongoing detention, lack of access to counsel, lack of control over their personal and financial

affairs, side-effects of Forced Psychiatric Treatment, and mental health conditions that can improve and deteriorate over time.

26. Involuntary Patients fear that asserting their health care rights through litigation could impair ongoing relationships with their health care providers, including treating physicians or mental health treatment teams, which could negatively impact their ability to access health care.

27. Involuntary Patients fear that sensitive and confidential medical information disclosed in litigation could become publically available through the course of a high profile constitutional challenge. The prejudice and stigma associated with mental health diagnoses, *Mental Health Act* detention, and Forced Psychiatric Treatment could be detrimental to Involuntary Patients, for example, by impairing future employment opportunities.

…

29. The claim raises a comprehensive and systemic challenge to the Impugned Provisions of three inter-related statues, not all of which would necessarily be engaged by a challenge raised by an individual Involuntary Patient.

IV. Legal Principles and Authorities

[19] The Attorney contends, and I accept, that if the CCD lacks standing to advance the claim it asserts, the preservation of judicial resources will benefit from the early resolution of the issue of standing in order to avoid what the parties have estimated will be a four week trial.

[20] The two bases upon which standing can be established are first, a direct or private interest, and second, a public interest. With the departure of the two personal plaintiffs from this action, the CCD advances only a public interest basis for its asserted standing.

[21] In *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575 [*Borowski*], the Supreme Court of Canada granted public interest standing to an individual anti-abortion activist who sought a declaration under the *Canadian Bill of Rights*, S.C. 1960, c. 44, that sections of the *Criminal Code*, R.S.C. 1985, c. C-46, permitting therapeutic abortion, were invalid and inoperative.

[22] Later, in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 [*Finlay*], the Supreme Court of Canada extended the discretion to grant public interest

standing to include cases involving a challenge to the exercise of administrative authority. In this case at p. 616, Mr. Justice Le Dain outlined the judicial concerns underlying the expansion of public interest standing as:

> [C]oncern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government.

[23] The principles to be considered in the exercise of discretion to grant public interest standing were revisited by the Supreme Court of Canada in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 [*Canadian Council of Churches*]. In that case, Mr. Justice Cory remarked at p. 252 that the principles that had been set out by the Court need not and should not be expanded. Cory J. then rearticulated the test from *Borowski* for public interest standing at p. 253 as follows:

> [C]onsideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

[24] At p. 252 Cory J. commented:

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act*, *1982*. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a [*sic*] well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
>
> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest

> standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

[25] The matter of public interest standing was again considered by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*]. In that case, at para. 20, Mr. Justice Cromwell said that the test to be applied when a court considers whether to grant public interest standing requires that the three elements identified in *Borowski* must be weighed cumulatively in the exercise of judicial discretion, but that none of the factors, and especially the third one should be treated as a hard and fast requirement or a free-standing independent test.

[26] At paras. 39–44, Cromwell J. refined how the three *Borowski* factors are applied. With respect to the first factor, Cromwell J. commented at paras. 39, 40, and 42 that:

> 39 The Serious Justiciable Issue] factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.
>
> 40 By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 *U.B.C. L. Rev.* 727, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.
>
> …

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

[27] At para. 41, Cromwell J. emphasized that concerns over scarce judicial resources and overburdening the courts must be “assessed practically in light of the particular circumstances rather than abstractly and hypothetically” and that other means of guarding against such concerns ought to be considered.

[28] At para. 43, Cromwell J. commented that the second *Borowski* factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. He pointed out that in *Borowski,* the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion, and that in *Finlay*, for example, although in the Court's view the plaintiff did not have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. As a citizen and taxpayer, he was a concerned he had sought unsuccessfully to have the issue determined by other means.

[29] In *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 692, Mr. Justice Major noted that the third *Borowski* factor lies at the “heart of the discretion” to grant public interest standing. While legislation cannot be immunized from review, if there are

other means to bring the matter before the court, scarce judicial resources may be put to better use.

[30] At para. 44 in *Downtown Eastside*, Cromwell J. provided the following clarification on how to approach the third *Borowski* factor:

> 44 [The Reasonable and Effective Means of Bringing the Issue before the Court] factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show ... that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598 (emphasis added)); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

[31] When approaching the third factor from *Borowski*, Cromwell J. gave several examples of the “types of interrelated matters that courts may find useful to take into account” at para. 51:

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting
- The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.
- The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by

> equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.
>
> - The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.
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> [Emphasis added.]

V. Discussion

1. Serious Justiciable Issue

[32] The Attorney contends that the amended notice of civil claim offers no particulars of any alleged individual breach of any *Charter* rights, and thus raises no justiciable issue. The Attorney contends that the CCD seeks to advance a systemic challenge to the impugned legislation, inviting the court into a legislative policy debate about the appropriate model of decision-making for involuntary patients.

[33] In support of this position, the Attorney relies on *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342 [*Canadian Bar Association*], aff'd 2008 BCCA 92 [*BCCA Canadian Bar Association*], leave to appeal dismissed [2008] S.C.C.A. No. 185, where Chief Justice Brenner found that the Canadian Bar Association ("CBA") lacked public interest standing to bring an action seeking declarations that the government of British Columbia, the Attorney General of Canada, and the Legal

Services Society were providing inadequate civil legal aid services in breach of the *Charter* and international human rights provisions guaranteeing meaningful, equal access to justice for all.

[34] Brenner C.J.S.C. held that the CBA failed to meet the serious justiciable issue requirement described in *Borowski* at paras. 54–56 and, at para. 86, wrote:

> 54 Sopinka, J.'s concerns are apposite here. The court is being asked to "answer a purely abstract question which would in effect sanction a private reference" (*Borowski* (No. 2) at 367). In order for the intended beneficiaries of this action to obtain a meaningful remedy, the CBA asks the court to identify the parameters of a constitutionally valid scheme of civil legal aid. Just as Mr. Borowski was unable to advance a s. 24(1) claim on behalf of a third party, the CBA here has no standing to assert a claim on behalf of an amorphous group of individuals whose *Charter* rights may have been, or in the future may be, breached by the operation (or more accurately the non-operation) of a public program.
>
> 55 In saying this I am mindful of the plaintiff's submission that the court should be "flexible, responsive and purposive" and further, that "if there is a right there is a remedy". The plaintiff says that the court should be guided by the Supreme Court's decision in *Operation Dismantle*. However, in that case no issue was raised as to standing. There were also twenty other activist groups along with the nominate plaintiff. The statement of claim alleged potential violation of the plaintiffs' s. 7 rights. In that case, no issue appears to have been taken with the fact that there were no individual plaintiffs.
>
> 56 Also of note is that the individual members of all of the groups in *Operation Dismantle* alleged that their s. 7 rights were at issue; in the case at bar the CBA does not contend that any of its *Charter* rights or its members' *Charter* rights are at issue. As attempted in *Borowski* (No. 2), it is advancing a claim, including a *Charter* claim, on behalf of third parties with whom it stands at arm's length.
>
> …
>
> 86 I conclude that the CBA has failed to establish that there is a serious issue as to the invalidity of legislation or as to the invalidity of particular public acts. Further, the CBA has failed to establish that there is no other reasonable or effective manner by which the issue may be brought before the court. I therefore decline to exercise my discretion to grant standing to the CBA in this matter.

[35] The Court of Appeal upheld the finding of a lack of standing determined by Brenner C.J.S.C. Madam Justice Saunders, for the Court, determined at paras. 47–51:

47 In my view, the broadly-directed pleadings of a systemic problem violating unwritten constitutional principles do not raise a reasonable claim, and I see no basis upon which to interfere with the Chief Justice's conclusion on this question.

48 Likewise, in my view, the *Charter* challenges fail to raise a reasonable claim. As to s. 7, the matter is answered in *Christie (SCC)*:

> [25] Section 10(*b*) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the *Charter*, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in *New Brunswick*, the Court was at pains to state that the right to counsel outside of the s. 10(*b*) context is a case-specific multi-factored enquiry (see para. 86).

49 In other words, a s. 7 *Charter* challenge in respect to legal services must be brought in the context of specific facts of an individual's case because not every legal proceeding affecting a person's rights requires counsel. For example, in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, Lamer C.J., writing for the majority, said:

> [86] I would like to make it clear that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's right to life, liberty, or security of the person. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.

50 This statement of claim, devoid of particulars of individuals, their cases, and their jeopardy, does not raise a justiciable issue on s. 7. The pleading is simply too general to permit the enquiry sought or the relief contended for.

51 I have come to the same conclusion on the other allegations of breach of the *Charter*. In particular, a s. 15 enquiry requires the court to not only review the particular deficiency alleged, but to do so in the context of a comparator group that is chosen bearing in mind the characteristics of the individual. Although the Association contends that it is for the trial judge to determine whether there is a *Charter* breach justifying the relief sought, the plaintiff is still required to plead material facts that warrant the court's enquiry into the matter. This means there must be a pleading that, if all facts are taken as true, can lead to the relief sought. Such is not the case here.

[36] The CCD contends that, unlike the CBA in *Canadian Bar Association* who purported to sue on behalf of those it defined as “poor people” but did not attack the constitutionality of any statute or regulation, the CCD is more measured and specific in its claim. The CCD further asserts that while the impugned provisions of the *Three Acts* may reflect a choice between competing policy alternatives that does not render the constitutionality of that choice non-justiciable.

[37] While I do not disagree with the latter assertion, it does not address the fundamental difficulty with the CCD’s role in this litigation: the lack of a particular factual context of an individual’s case. This issue was fatal to the claim for standing in *Canadian Bar Association*, as discussed therein at paras. 49 and 51 by Saunders J.A., set out above.

[38] In this case, the CCD’s amended notice of civil claim lacks the indispensable factual foundation that particularizes the claim and permits the enquiry and relief sought.

[39] Difficulties would also arise in addressing the plaintiff’s asserted s. 15 claim. An inquiry under s. 15 “requires the court to not only review the particular deficiency alleged, but do so in the context of a comparator group that is chosen bearing in mind the characteristics of the individual”: *BCCA Canadian Bar Association* at para. 51. To be granted public interest standing, the plaintiff is required to plead the material facts that, if true, can lead to the relief sought: *BCCA Canadian Bar Association* at para. 51. The CCD has failed to do so in this case.

[40] Although I am not persuaded that CCD has demonstrated that it meets the first *Borowski* factor, as my task is to weigh all three of the *Borowski* factors cumulatively, my conclusion with respect to the first *Borowski* factor is not the end of the matter.

2. Genuine Interest

[41] As stated above, the “genuine interest” factor is intended to address whether the plaintiff has a real stake in the proceedings or is engaged with the issues it seeks to raise.

[42] The Supreme Court of Canada has recognized that there can be a collective aspect to a *Charter* right, and that individuals may sometimes require a legal entity in order to give effect to their constitutionally protected rights: see e.g. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, where the Supreme Court of Canada considered the application of the guarantee of freedom of religion under s. 2(a) of the *Charter.*

[43] I have mentioned some of the plaintiff's purposes in paragraph 13 above. Its interest in the promotion of human rights, equality and autonomy are interests that could be affected by the impugned legislative scheme and could permit the CCD to assert a genuine interest in the impugned legislative scheme.

[44] The CCD’s history of involvement in cases shows it is more focussed on disability (particularly physical disability) and far less focussed on mental health. Of the cases in which it has been involved, only one concerned mental illness. It is perhaps ironic that Ms. Benard asserts on the one hand that those with mental health-related disability have been uniquely stigmatized, and on the other hand that people with mental health-related disabilities—as compared to people with other types of disabilities or “disability issues”—face the shared discrimination and marginalization that all people with disabilities face.

[45] The CCD points to a number of cases where the British Columbia Civil Liberties Association (“BCCLA”) has been granted public interest standing despite advocacy involving broad principles such as human rights, equality, and civil liberties: see e.g. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2007 FC 901; *British Columbia Civil Liberties Association v. Royal Canadian Mounted Police*, 2008 FC 49; *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FCA 401 [*Amnesty International*]; *Carter v. Canada*

(Attorney General), 2012 BCSC 886 [*Carter* BCSC]; and *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62.

[46] I do not find these cases to be of assistance with respect to the CCD's claim for public interest standing. In the first of these cases, the BCCLA filed a complaint with the Commission for Public Complaints against Royal Canadian Mounted Police ("RCMP") as a result of the death of a man in the custody of the RCMP. Mr. Justice O'Keefe did not address standing in his reasons for judgment.

[47] In the second case, the BCCLA's application for Judicial Review was dismissed as premature, and the issue of standing was not discussed.

[48] In *Amnesty International*, there was no discussion of the standing of either of the two appellants, Amnesty International and the BCCLA, and the case was dismissed on the basis that the *Charter* did not apply.

[49] In the fourth case, *Carter* BCSC, both defendants conceded that the BCCLA had a genuine interest in the litigation. In her decision on standing, Madam Justice Smith emphasized the importance of BCCLA's role as a co-plaintiff, in support of plaintiffs with private standing at para. 98:

> 98 Finally, and most importantly, the BCCLA is involved as a co-plaintiff, in support of plaintiffs who have private standing. The issue is very different than it would be if the BCCLA were attempting to bring a separate action; in that case, the existence of an action by Ms. Carter, Mr. Johnson and Ms. Taylor might provide a strong argument that the BCCLA lacked standing to advance its own separate claim.

[50] Now that the personal plaintiffs have discontinued their participation in this case, that factor discussed by Smith J. does not pertain.

[51] In the last of these cases, the defendants accepted that the BCCLA and its co-plaintiff were entitled to public interest standing, but argued that the lack of an individual plaintiff had implications for the available remedies: at para. 6.

[52] In *British Columbia Civil Liberties Association v. University of Victoria*, 2015 BCSC 39, a case not relied upon by counsel, the BCCLA were granted public

interest standing to participate in litigation challenging the University's policy related to students booking outdoor space, and the regulation of use of common areas as contrary to ss. 2(b), 2(c) and 2(d) of the *Charter*. The BCCLA was not granted standing on its own, but was granted on the basis that it had a genuine contribution to make in the proceedings and that they would be able to assist Mr. Côté, who was found to have private interest standing, to ensure that the perspectives presented to the court were complete.

[53] While I am satisfied that the CCD is no mere busybody and that it has some genuine interest in the issues that it wishes to raise in these proceedings, I find that interest only weakly meets the second criterion for public interest standing.

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

[54] The CCD bears the burden of establishing standing to advance the *Charter* issues it seeks to pursue in these proceedings: *Christian Labour Association of Canada and General Workers Union v. B.C. Transportation Financing Authority*, 2000 BCSC 727.

[55] If public interest standing for the CCD is denied, does there exist another reasonable and effective way to bring the issue before the court? To paraphrase the direction of Cromwell J. at para. 44 in *Downtown Eastside*: it is too narrow a view to require that there be no other reasonable and effective manner in which an issue may be brought before the Court. But again, that is but one of the three factors which must be assessed and weighed in the exercise of judicial discretion. This factor should be seen as requiring consideration of whether the proposed suit is, in all of the circumstances and in light of other considerations, a reasonable and effective means to bring the challenge to court.

[56] In *Downtown Eastside*, Cromwell J. cautioned at para. 73 that:

> I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It

> provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.
>
> [Emphasis added.]

[57] The Attorney argues that there is an insufficient factual and adversarial context for the resolution of the *Charter* claim in this case, that there is no evidence that it would be unduly difficult for an individual with direct experience to bring a claim, and that the potential prejudice to others militates against awarding the CCD public interest standing as there is no assurance that it acts in a representative capacity.

[58] The CCD responds to the contention that it cannot establish a sufficient factual matrix upon which to advance the claim it wishes to advance by reliance on paras. 56 and 58 of Ms. Benard's affidavit, which asserts that at the trial of this action, it will call individual, but presently unidentified individuals who have directly experienced the impacts of the impugned legislative provisions as well as expert witnesses.

[59] The CCD argues that the case will involve a "robust factual record" and that, given the significant barriers to individual patients litigating this issue, granting it public interest standing would be a reasonable and effective means of bringing this challenge to court.

[60] Ms. Benard averred that much of the evidence that the CCD intends to lead at trial includes evidence regarding the nature of mental health-related disabilities; the stereotypes and barriers faced by people with mental disabilities; the lived experiences of people who are receiving or have received forced psychiatric treatment; and the impacts of the impugned provisions on people with mental health-

related disabilities. The CCD asserts that any deficiency in its pleadings because of lack of specificity can be cured by the Attorney's use of the *Supreme Court Civil Rules*. In my view this position misconstrues the onus that the CCD faces on the application before me.

[61] In my view this does not address the underlying purposes of limiting standing, applied in a flexible and generous manner, that I must address in cumulatively weighing the three *Borowski* factors in the manner directed by Cromwell J.

[62] As the Attorney seeks the summary dismissal of the CCD's claim, the CCD is obliged to meet the criticisms raised by the Attorney. It is not open to the CCD to attempt to shift the onus onto the Attorney where he has clearly raised the adequacy of CCD's pleadings as a basis for the relief he seeks.

[63] While I appreciate that in *Thompson v. Attorney General of Ontario,* 2011 ONSC 2023 [*Thompson*], Mr. Justice Brown permitted the Empowerment Council to continue a constitutional challenge to required psychiatric treatment legislation after Ms. Thompson was no longer able to participate in the case, Brown J. observed that the adjudicative facts necessary for consideration by the Court were available. In that case Ms. Thompson's evidence had been taken. In allowing the challenge to continue, Brown J. appears to have concluded that there was no other reasonable and effective manner by which the issues may be brought before a court.

[64] While I question whether evidence previously given but potentially inadmissible could be a basis upon which to approve a non-individual's public interest standing, there is no such evidence pleaded in this case.

[65] The approach adopted by Brown J. in *Thompson* is similar to that approved of in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 [*Trial Lawyers*]. In that case, a chambers judge in this Court struck down the provincial hearing fees charged to litigants who appeared in the court: *Vilardell v. Dunham*, 2012 BCSC 748. While the litigants were self-represented in this Court, the B.C. Branch of the CBA and the Trial Lawyers

Association of British Columbia (“Trial Lawyers”) intervened at the Court of Appeal and challenged the hearing fee scheme as unconstitutional: *Vilardell v. Dunham*, 2013 BCCA 65. The Court of Appeal agreed that the scheme could not stand as is, but held that if the exemption provision were expanded by reading in the words "or in need", it would pass constitutional muster but, nonetheless, exempted the claimant from paying a hearing fee.

[66] Understandably, as she had been relieved of the payment of the hearing fees, Ms. Vilardell did not seek leave to appeal to the Supreme Court of Canada. Both the CBA and Trial Lawyers were granted leave to be added as parties in the Supreme Court of Canada and to appeal the decision: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* [2013] S.C.C.A. No. 137. Ultimately, however, the appeal in the Supreme Court of Canada was carried by the Trial Lawyers.

[67] I am not prepared to follow the result in either *Thompson* or *Trial Lawyers*. In both of those cases, the necessary factual matrix for the consideration of the constitutional challenges had been established by personal litigants who were unavailable for the hearing of the challenges. That is not the case here.

[68] In *Lamb v. Canada (Attorney General)*, 2018 BCCA 266 at para. 89, Mr. Justice Willcock referred with approval to the comments of Mr. Justice Slatter in *Allen v. Alberta*, 2015 ABCA 277 at paras. 22–23:

> [22] The courts have always been reluctant to decide constitutional questions in a factual vacuum: *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 51, [2004] 3 S.C.R. 698; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para. 46, [2002] 2 SCR 146. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, for example, was only decided after a full trial, at which numerous expert witnesses testified. That is as it must be.
>
> [23] The presumption is that constitutional cases will be decided on a full evidentiary record, including, where appropriate, the evidence of expert witnesses: *Canada (A.G.) v Bedford*, 2013 SCC 72 at paras. 53-4, [2013] 3 SCR 1101. The expectation is that the parties will prove the facts on which the constitutional challenge lies, and that resort to judicial notice will be kept on a "short leash", the more so the closer one comes to the ultimate issue: *R. v Spence*, 2005 SCC 71 at paras. 58, 64, [2005 3 SCR 458. As a general

> rule, evidence from unrelated cases cannot be transported into the record: *R. v Daley*, 2007 SCC 53 at para. 86, [2007] 3 SCR 523.

[69] In this case, the CCD has not satisfied me that there will be a sufficiently concrete and well-developed factual setting upon which the constitutional question it has raised can be decided. There is an insufficient factual matrix to consider the CCD's claim in this case.

[70] The CCD emphasizes that it has the expertise and resources to bring the litigation and that it need only to be one reasonable means not the only reasonable means of litigating the issue.

[71] I accept that as the CCD has instructed counsel from a national law firm who are prepared to represent it on a pro bono basis, and as it has a sizeable membership, there is sufficient evidence to demonstrate that it has the resources necessary to advance the claim it asserts.

[72] While the CCD's case might be seen as providing access to justice for disadvantaged persons in our society whose legal rights are affected, I am not persuaded that it can fairly represent the interests of all of those who may be affected by the impugned provisions.

[73] However, I question whether, on the basis of CCD's sole experience in conducting one constitutional case, I can conclude that it has an obvious ability to do so, when its involvement in the other 34 cases in which it participated was as an intervenor.

[74] I am not persuaded that the CCD's advocacy efforts over the past 40 years necessarily commend it as an advocate for those with mental health-related disabilities. In part, the strength of its argument seems to rest on the extent to which mental illness should be considered a disability. Given its argument that mental illness is just one subset of disability but one which is particularly disadvantaged, it seems noteworthy that it has engaged in so little advocacy for mental illness.

[75] In *Downtown Eastside,* Cromwell J. stated at para. 67 that:

> [T]he existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.

[76] I accept the Attorney's submission that if the CCD is granted public interest standing, it will act as the effective proxy for those more directly impacted by its challenge. I am not satisfied on the evidence before me, however, that there is unanimity or even general agreement amongst those so affected as to whether they support the CCD's position, let alone "all residents of British Columbia" to whom it referred in para. 23 of its amended notice of civil claim.

[77] The CCD contends that it is unrealistic to expect a party directly affected by the impugned provisions to maintain a challenge of the nature they propose due to the barriers those with mental challenges face in accessing the legal system.

[78] Ms. Benard stated in her affidavit that:

> 55. Despite CCD's careful consideration, it became apparent by the second year of litigation that D.C. and Ms. MacLaren were no longer willing or in a position to consistently fulfil the roles and responsibilities of plaintiffs in this litigation. As a result, they discontinued their claims and the litigation continued with CCD as the sole plaintiff. In my view, the course of this litigation illustrates that it is not reasonable or practical to expect a constitutional challenge to the Impugned Provisions to be prosecuted by affected individuals.

[79] Ms. Benard did not explain in any specific terms why D.C. and Ms. MacLaren were no longer willing or in a position to consistently fulfil the roles and responsibilities of plaintiffs in this litigation.

[80] Ms. Benard also deposed that:

> 51. While it might theoretically be possible for individual plaintiffs who have mental disabilities and who have experienced the impacts of the Impugned Provisions to bring and see through a complex constitutional challenge such as this litigation, I believe it is not realistic to expect them to do so. In the unlikely event that they managed to do so, I believe it would entail a much less efficient and effective use of judicial resources than this litigation. CCD's experience in this case supports this.

[81] Ms. Benard did not explain why she thought that it is not realistic to expect individual plaintiffs who have mental disabilities and who have experienced the impacts of the impugned provisions to bring and see through a complex constitutional challenge such as this litigation. She did state that:

> 52. *Charter* litigation is complex, often protracted, and stressful and can attract significant public attention and controversy. It can be challenging for any individual to manage the pressures and strain that accompany this type of litigation while remaining available and able to provide instructions to counsel as required. These demands are even more challenging for individuals with mental disabilities, since they may experience mental conditions that can improve and deteriorate over time; cycles of periods of wellness and stability followed by periods of deteriorating mental health; intermittent periods of in-patient treatment; side-effects of psychiatric treatment; lack of control over their personal and financial affairs; poverty; concerns about potential negative reactions of health care providers or personal support networks; and fear of public exposure and the stigma associated with mental disabilities and specifically with mental health-related disabilities.
>
> 53. Despite the anticipated challenges, CCD originally attempted to bring this claim in conjunction with individual co-plaintiffs with mental disabilities who had directly experienced the effects of the Impugned Provisions, namely, D.C. and Louise MacLaren.
>
> 54. Part of CCD's consideration in commencing the litigation with these individual co-plaintiffs was their perceived ability to meet the requirements and responsibilities of a plaintiff throughout complex, multi-year *Charter* litigation. This included consideration of each potential co-plaintiff's ability and willingness to manage the pressures and stress of this type of litigation without significant negative impacts on his or her health, social supports, privacy, ability to access services, and life. This also included consideration of each potential co-plaintiff's likelihood of remaining available and able to provide instructions to counsel as required.

[82] I do not accept that such general statements can apply to the numbers of patients otherwise referred to in Ms. Benard's affidavit. This assertion is unsupported by any evidentiary foundation and the Attorney offers examples that suggest that the CCD's contention is, in fact, unfounded.

[83] For example, in *McCorkell v. Riverview Hospital (Director*), [1993] B.C.J. No. 1518 (S.C.), the plaintiff was involuntarily detained and admitted to Riverview Hospital on the certification of two doctors who said he displayed dangerously aggressive behaviour in the manic phase of his bipolar mood disorder. He

challenged the constitutional validity of the provisions of the *Mental Health Act*, dealing with the involuntary committal and detention of mentally ill persons. His experiences as a patient were put forward as a test case where he was a named plaintiff by the Community Legal Assistance Society (CLAS) in an effort to narrow the criteria for involuntary committal.

[84] In *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (C.A.), two involuntary patients were diagnosed as schizophrenic. They each had a long history of mental challenges and were confined at the Oak Ridge Division of the Penetanguishene Medical Health Centre under the authority of Lieutenant Governor's Warrants, having been found not guilty by reason of insanity of criminal offences. They raised the issue of whether the state could administer neuroleptic drugs in non-emergency situations to involuntary incompetent psychiatric patients who have, while mentally competent, expressed the wish not to be treated with such drugs.

[85] In *Thwaites v. Health Sciences Centre Psychiatric Facility*, [1988] M.J. No. 107 (C.A.), the plaintiff had a lengthy history of admissions to psychiatric facilities. She was examined by a medical practitioner under the compulsory admission provisions of the Manitoba *Mental Health Act*, R.S.M. 1970, c. M110, and admitted to a psychiatric facility as a compulsory patient. She sought a writ of habeas corpus. She argued that the compulsory admission provisions of the *Mental Health Act*, and particularly s. 9 thereof, offended her rights guaranteed under ss. 7, 9, and 15 of the *Charter*. The Manitoba Court of Appeal held that the compulsory committal provisions of the legislation violated s. 9 of the *Charter* and were not salvaged under s. 1.

[86] In *T. (S.M.) v. Abouelnasr*, [2008] O.J. No. 1298 (Sup. Ct. J.), T. (S.M.) suffered brain damage in a motor vehicle accident which led to cognitive impairment and a psychotic disorder. In 2001, T. (S.M.) was charged with several criminal offences but was found unfit to stand trial and was detained at a mental health centre. In 2005, the Consent and Capacity Board found that T. (S.M.) was not capable with respect to treatment for anti-psychotic medication. At that time, T.

(S.M.)'s sister was appointed his substitute decision-maker. Although he was eventually acquitted of all charges, T. (S.M.) remained a patient at the mental health centre. In 2007, T. (S.M.) applied to the Consent and Capacity Board for a review of the findings of incapacity. Madam Justice Lack heard T. (S.M.)'s appeal from the decision of the Consent and Capacity Board.

[87] T. (S.M.)'s counsel took the position that the legislative schemes allowing for forcible injection of anti-psychotic drugs infringed T. (S.M.)'s *Charter* rights. Lack J. concluded that the legislation authorizing forcible injection of anti-psychotic medications contained substantial safeguards which exceeded the minimal constitutional protections required by the principles of fundamental justice and did not infringe T. (S.M.)'s *Charter* rights.

[88] In *Franks v. Ruddiman*, 2004 BCSC 632, the plaintiff was injured in a motor vehicle accident and treated by Dr. Ruddiman for the injuries that he sustained in the accident. Mr. Franks sought damages arising from his apprehension and detention under the *Mental Health Act* after Dr. Ruddiman completed a medical certificate requiring Franks' detention for examination and treatment.

[89] Mr. Justice Brooks found that Dr. Ruddiman believed that Mr. Franks suffered from a mental disorder which required treatment, and that it was unlikely that Franks would submit to treatment voluntarily. Brooke J. held that Mr. Franks' detention was justified under the *Mental Health Act*, as it was reasonable for Dr. Ruddiman to believe that Mr. Franks posed a threat to himself and others.

[90] In *N.T. v. British Columbia*, 2017 BCSC 1742, the plaintiff claimed that two doctors were negligent in their diagnosis and treatment of him. He was first certified as an involuntary patient in 2000 and last renewed as such in 2012. He was discharged from involuntary patient status in 2013. His action was dismissed by Mr. Justice Meiklem on the basis that it was barred by the provisions of the *Limitation Act*, S.B.C. 2012, c. 13.

[91] In *Mullins v. Levy*, 2005 BCSC 1217 [*Mullins*], the plaintiff—who had been involuntarily detained under the *Mental Health Act*—sought to challenge the constitutionality of the committal and treatment provisions of that statute despite contending that he was not mentally ill nor did he suffer from a mental disorder. The court held at para. 227 that Mr. Mullins did not have standing to bring a constitutional challenge on behalf of those who did in fact suffer from such conditions.

[92] Mr. Justice Holmes noted in *Mullins* that the British Columbia Schizophrenia Society—a support group for friends and family of people with schizophrenia—intervened to support the constitutional validity of the *Mental Health Act* and the *Mental Health Regulation* as "providing vital community assistance to persons suffering from serous [*sic*] mental illness": at para. 20.

[93] As I have set out above, according to Ms. Benard, the CCD has 17 member organizations whose members, together, number in the several hundred thousands. How many of these suffer from mental health challenges is unclear, but she did aver that "mental health-related disability … is one of the most common types of disability".

[94] Moreover, the CCD has pleaded that in British Columbia there are approximately 20,000 involuntary admissions each year under the *Mental Health Act* and that in all of those admissions the involuntary patient is vulnerable to forced psychiatric treatment.

[95] I do not accept that if funded and supported by the CCD, none of those patients would be unwilling or unable to participate in the constitutional challenge proposed by the CCD. A challenge by one or more of these patients would provide the individual evidential record necessary to decide the constitutional issues alleged.

[96] Therefore, while not alone dispositive of the Attorney's application, the CCD has not persuaded me in all the circumstances that exercising my discretion to grant public interest standing in this case would be a reasonable and effective means of bringing this issues that the CCD wishes to litigate before the court.

[97] I am satisfied that there are other reasonable and effective ways to bring the issues the CCD wishes to litigate before the court, and that they have been pursued in the past, and will likely find their path back to the courts without the CCD advancing them as a public standing litigant.

VI. Conclusion

[98] Having cumulatively weighed the three *Borowski* factors I find that, as with the CBA, the CCD should be denied standing to assert the claim it has pleaded on behalf of the amorphous group of individuals whose *Charter* rights may have been, or in the future may be, breached by the operation of the impugned provisions in the *Three Acts*.

[99] I will therefore decline to exercise my discretion to afford the CCD public interest standing to bring this action, and dismiss its claim.

"The Honourable Chief Justice Hinkson"