Citation: Court of Appeal (Chambers) of British Columbia (Minister) v. British Columbia Teachers' Federation, 2016 BCCA 172

Date: 20160426
Docket: CA43663
Registry: Vancouver

Court of Appeal (Chambers)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Bennett
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated October 17, 2015 (*Minister v. British Columbia (Attorney General)*, 2015 BCSC 1772).

Between:

Minister of Education, Minister of Finance and Minister responsible for Public Sector Employers

Respondents (Applicants)

And

British Columbia Teachers' Federation

Appellant (Respondent)

Attorney General of British Columbia

Intervener

Counsel for the Appellant: G. Mitchell
S. Rudi

Counsel for the Respondents: K. Wilson
D. Gruenke
J. Gaul

Counsel for the Intervener British Columbia Civil Liberties Association: J. Rose
J. Gaul

Counsel for the Intervener Attorney General of British Columbia: J. Gaucher
A. Gunn
S. Kamp

Place and Date of Hearing: Vancouver, British Columbia
April 18, 2016

Written Submissions received: April 20, 25, 26, 27, 28, 2016

Place and Date of Judgment: Vancouver, British Columbia
April 26, 2016

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Fenlon

Table of Contents

	Paragraph Ranges
INTRODUCTION	[1] - [4]
THE PROCEEDINGS BELOW	[5] - [13]
FACTUAL BACKGROUND	[14] - [25]
ISSUES	[26] - [27]
THE LAW	[28] - [29]
Summary Test Application	[30] - [31]
ARGUMENT ON THE PRELIMINARY JUDICIAL REVIEW TEST	[32] - [33]
ARGUMENT ON THE MERITS	[34] - [35]
Unconstitutionality	[36] - [37]
Government's Resolve Means Its Bets Are Credentials to Court	[38] - [39]
ON APPEAL	[40] - [41]
Standard of Review	[42] - [43]
Summary Conclusions	[44] - [45]
Section 2(b) Freedom of Expression	[46] - [48]
Section 2(d) Freedom of Association	[49] - [50]
Section 2(d) Freedom of Association: Other Challenged Contexts	[51] - [52]
Section 2(d) Freedom of Association: Other Collective Contexts	[53] - [54]
Section 2(d) Freedom of Association: Collective Bargaining	[55] - [56]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements	[57] - [58]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights	[59] - [60]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts	[61] - [62]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law	[63] - [64]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[65] - [66]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law	[67] - [68]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[69] - [70]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law	[71] - [72]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law	[73] - [74]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[75] - [76]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law	[77] - [78]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[79] - [80]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[81] - [82]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[83] - [84]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[85] - [86]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[87] - [88]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[89] - [90]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[91] - [92]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[93] - [94]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[95] - [96]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[97] - [98]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[99] - [100]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[101] - [102]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[103] - [104]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[105] - [106]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[107] - [108]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[109] - [110]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[111] - [112]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[113] - [114]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[115] - [116]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[117] - [118]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[119] - [120]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[121] - [122]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[123] - [124]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[125] - [126]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[127] - [128]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[129] - [130]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[131] - [132]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[133] - [134]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[135] - [136]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[137] - [138]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[139] - [140]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[141] - [142]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[143] - [144]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[145] - [146]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[147] - [148]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[149] - [150]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[151] - [152]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[153] - [154]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[155] - [156]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[157] - [158]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[159] - [160]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[161] - [162]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[163] - [164]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[165] - [166]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[167] - [168]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[169] - [170]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[171] - [172]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[173] - [174]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[175] - [176]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[177] - [178]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[179] - [180]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[181] - [182]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[183] - [184]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[185] - [186]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[187] - [188]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[189] - [190]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[191] - [192]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[193] - [194]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[195] - [196]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[197] - [198]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[199] - [200]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[201] - [202]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[203] - [204]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[205] - [206]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[207] - [208]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Agreements: Effective Rights: Collective Agreements Are Not Contracts: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law: Contract Law Is Not Labour Law: Contract Law Is Not Collective Bargaining Law	[209] - [210]
Section 2(d) Freedom of Association: Collective Bargaining: Collective Ag

[82] As to the benefits of contending viewpoints, Justice Cromwell explained that, in our adversarial system, "concrete adverseness" sharpens the debate and that a personal stake in the outcome of a claim helps ensure arguments are presented thoroughly and diligently; at para. 29. He went on to find that granting standing to a well-represented advocacy organization in that case "will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized parts of society, but it will also promote the economical use of scarce judicial resources"; at para. 76.

[83] The prospect that granting standing to a public interest litigant may promote, not impede, the economical use of judicial resources overall has also been recognized in other recent cases. For example, in *British Columbia/Yukon Association of Drug War Survivors*, Chief Justice Hinkson granted standing to an advocacy organization for homeless people to pursue a comprehensive constitutional challenge of bylaw provisions in part because he found the challenge "may prevent a multiplicity of individual challenges": at para. 59. Nevertheless, all other relevant considerations being equal, a plaintiff with private interest standing will usually be preferred over a public interest litigant seeking to advance a duplicative claim in a separate action: *Downtown Eastside* at para. 37.

[84] In my view, this was the point Justice L. Smith was making in *Carter* in the passage the Chief Justice quoted in his reasons (para. 49). In that passage, Justice L. Smith stated:

> [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*.
>
> [Emphasis added.]

[85] In other words, Justice Smith recognized that permitting a public interest organization to advance a separate duplicative action simultaneously with a private interest litigant may result in an inappropriate allocation of scarce judicial resources, all other relevant considerations being equal. However, this is not the relevant context for consideration when individual co-plaintiffs withdraw from a claim, as occurred in *Thompson*, *Trial Lawyers Association* and the action below.

Determining Public Interest Standing

[86] As I have explained, since *Downtown Eastside* was decided judges have been obliged to apply the *Borowski* test in a flexible and purposive manner. The three *Borowski* factors, which are interrelated, are not to be treated as hard and fast requirements, nor are they to be applied mechanically. Rather, they are to be weighed cumulatively, in light of the underlying purposes of standing and the circumstances of the case, and applied flexibly with a view to serving those purposes. In exercising their discretion to grant or refuse public interest standing, judges must balance access to justice with the preservation of judicial resources, with a particular view to upholding the legality principle. In doing so, they must interpret and apply the governing principles in a liberal and generous way: *Downtown Eastside* at paras. 20–23, 31–33; *Canadian Council of Churches* at 249–250, 252–253.

[87] The question of standing is sometimes addressed in advance of a full hearing on the merits. Whether a preliminary determination should be made will depend on the nature of the issues raised and the sufficiency of the material presented to the court. The salient question on an application for a preliminary determination on standing (including by way of summary trial) is whether the material "by way of allegations of fact, considerations of law and argument" is sufficient for "a proper understanding at a preliminary stage of the nature of the matters in issue and the assertion" by a prospective public interest litigant: *Finlay* at 617. The focus of a standing inquiry is on whether the public interest litigant is an appropriate party to advance a justiciable claim, not on the detail of intended trial evidence or the claim's ultimate prospect of success.

[88] As Justice Cromwell stated in *Downtown Eastside*, a complete denial of standing is a blunt procedural instrument. Depending on the circumstances of a case, it may not be the best means of guarding against the concerns that justify strictly limiting standing. This is particularly so given the availability of other litigation management tools for early screening of claims, including, for example, demands for particulars and summary determinations on the merits. That said, regardless of when standing is determined, the plaintiff bears the onus of persuading the court that the *Borowski* factors, applied purposively and flexibly, favour granting it public interest standing: *Downtown Eastside* at paras. 28, 37, 75.

[89] Against this backdrop, I turn to a brief review of the *Borowski* factors and then to the CCD's grounds of appeal.

Serious Justiciable Issue

[90] An issue is "justiciable" if is appropriate for judicial determination and "serious" if it raises a substantial question that is "far from frivolous": *Finlay* at 632–633. In *Canadian Bar Association*, *BCSC*, citing *Thorson*, Chief Justice Brenner stated that a challenge to the constitutionality of legislation is always justiciable: at paras. 23, 36.

[91] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, Justice Rowe described the concept of justiciability like this:

> [32] … The general question is this: Is the issue one that is appropriate for a court to decide?
>
> [33] Lorne M. Sossin defines justiciability as
>
> > a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
> >
> > (*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)
>
> Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.

[34] There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court may look at whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).

[92] In *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49, Chief Justice Dickson explained that "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity": at 89–91. Accordingly, the serious justiciable issue factor is primarily concerned with maintaining the proper role of the courts and their constitutional relationship to the other branches of government, as well as with the wise allocation of scarce judicial resources. In *Downtown Eastside*, Justice Cromwell stated that the latter concern should be assessed practically and possible means of addressing its goals other than refusing standing should be considered. He also stated that courts should not refuse to determine an issue on the basis that it would be better addressed by the legislative or executive branches of government simply because it arises in a policy context or has policy implications: at paras. 40–42.

[93] Although the fact that an issue arises in a policy context or has policy implications does not render it non-justiciable, political questions of broad social and economic policy are nevertheless often non-justiciable. This is because many such questions engage the accountability of parliament or the legislatures and cannot be resolved by the application of law. Courts are neither powerful nor well suited "to embark on a course… resembling a public inquiry": *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 at para. 33. However, as the Supreme Court of Canada has repeatedly affirmed, when a government policy is translated into law or state action those laws and state actions are subject to judicial scrutiny. In such circumstances, the justiciable issue is whether the law or state action in question complies with the requirements of the *Charter*: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 105; *Chaoulli* at para. 89.

[94] The question of whether a claim raises a serious justiciable issue is closely related to the question of whether the pleadings disclose a reasonable cause of action, but the two are not identical. Where a reasonable cause of action is disclosed on the pleadings the foundation is laid for a conclusion that there is a serious question to be tried: *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142 at para. 25. For standing purposes, it is generally only necessary for one serious issue to be disclosed on the pleadings. A detailed screening of the merits of every aspect of a multifaceted claim is not required to satisfy the first factor of the *Borowski* test: *Downtown Eastside* at para. 56.

[95] Whether a reasonable cause of action is disclosed on the pleadings depends on the nature of the cause of action alleged and the material facts pleaded in support, assuming the truth of those factual allegations. For example, in *Canadian Bar Association*, *BCSC*, Chief Justice Brenner noted that a claim for a declaration that there is a constitutional right to civil legal aid would almost certainly be struck because there is ample authority that there is no general constitutional right to legal aid, but only a right to counsel in certain circumstances: at para. 52. In the case of *British Columbia/Yukon Association of Drug War Survivors*, *BCCA*, at para. 37, However, constitutional rights are more general in their application and pleadings regarding the particular factual context of a specific individual's case need not always be pleaded for a constitutional claim to disclose a reasonable cause of action. Rather, depending on the cause of action pleaded, the facts underlying a broad and systemic constitutional challenge may relate to an identifiable group of similar individuals in materially similar circumstances, rather than to a specific individual in specific circumstances.

[96] In *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439, Justice Saunders commented that individual and systemic constitutional challenges differ significantly in scope and that "the problems arising from that difference may be resolved by taking a more relaxed view of standing in the right case": at para. 59. She also noted that this difference is particularly acute in cases involving alleged systemic discrimination. In *British Columbia v. Crockford*, 2006 BCCA 360, Justice Levine explained:

> [49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see *Radek* at para. 523. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory to proven to have occurred and to have constituted discrimination contrary to the *Code*. The types of evidence required to establish such a claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.

[97] As is apparent from the foregoing, broad systemic constitutional challenges are a unique form of civil litigation, as are the form of pleadings and evidence required to advance and prove them. While material facts sufficient to ground such a challenge must be pleaded to enable the claim to serve as a foundation for public interest standing, cases such as *Downtown Eastside*, *British Columbia/Yukon Association of Drug War Survivors* and *British Columbia Civil Liberties Association v. Canada (Attorney General)* affirm that an individual plaintiff and plaintiff-specific material facts are not always necessary for a serious justiciable issue to be raised.

Genuine Interest

[98] The genuine interest factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues in question. As noted, its purpose is to achieve "concrete adverseness" to ensure sharp debate, thorough argument and thus economical use of judicial resources: *Downtown Eastside* at paras. 29, 43.

Reasonable and Effective Means

[99] In *Ry and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, Justice Major described the third *Borowski* factor as lying "at the heart of the discretion to grant public interest standing": at 692. It was traditionally expressed and sometimes applied as a strict requirement that an applicant must show "there is no other reasonable and effective manner in which the issue may be brought forward": *Borowski* at 249 quoting with approval *Hendrickson v. Canada*. In *Downtown Eastside*, where Justice Cromwell held that the third factor should be assessed flexibly and purposively by considering "whether the proposed suit is, in all of the circumstances, and in light of a number of considerations … a reasonable and effective means to bring the challenge to court" (emphasis added): at para. 44.

[100] Justice Cromwell provided a non-exhaustive list of interrelated matters that the court should consider when assessing the third *Borowski* factor, including the plaintiff's capacity to bring the claim and "whether the issue will be presented in a sufficiently concrete and well-developed factual setting". Whether the case transcends the interests of those most directly affected and facilitating access to justice for affected disadvantaged persons are also highly relevant, as are the practical prospects of private interest plaintiffs "bringing the matter to court at all or by equally or more reasonable and effective means" and the potential impact on the rights of directly affected others, especially where private and public interests may come into conflict: at para. 51.

[101] When Justice Cromwell went on to apply the third *Borowski* factor to the circumstances of the case, he discussed each concern that led the chambers judge to deny standing under the traditional approach, namely, similar ongoing parallel litigation, criminal prosecutions in which the constitutional issues could be raised as of right and the possibility that individual sex workers could bring the challenge forward as private litigants. However, he found that, under a flexible, purposive approach, none weighed heavily in an assessment of whether the action was a reasonable and effective means of bringing the claims forward: at paras. 61–72. He also identified other relevant matters, such as the comprehensive nature of the proposed Charter challenge, the public importance of the issues raised and the skill with which they would be presented, and concluded that the third *Borowski* factor favoured granting public interest standing. The systemic nature of the constitutional challenge was a significant factor that weighed heavily in that determination, as was the capacity of the society to bring the necessary evidence before the court.

Did the Chief Justice err in assessing whether the claim raised a serious justiciable issue?

[102] The CCD contends that the Chief Justice erred in concluding its claim did not raise a serious justiciable issue. In particular, it says, he erred in finding that: "the lack of a particular factual context of an individual's case" was fatal to its standing claim; in ignoring Ms. Benard's unchallenged evidence that the CCD would call directly-affected witnesses at trial; in failing to allow it to amend its pleadings; in "improperly disputing disputed issues; and in failing to consider whether there was a substantial constitutional question for determination that was "far from frivolous".

[103] I do not agree that the Chief Justice ignored Ms. Benard's unchallenged evidence. On the contrary, he expressly considered her evidence that the CCD intended to call presently unidentified individuals directly affected by the impugned provisions and to present a robust factual record at trial (at paras. 58–59). Nor did he prejudge any disputed issues. Rather, he summarized the background facts without purporting to make findings on contested matters such as the use of Form 5s, their legal implications or the appropriate distinction, if any, to be drawn between physical and mental disabilities. And, while he did not expressly ask whether there was a substantial constitutional question for determination, that question was the focus of his analysis of the first *Borowski* factor.

[104] However, in my view, the Chief Justice erred in his interpretation and reliance upon *Canadian Bar Association*, *BCSC* and *Canadian Bar Association*, *BCCA*, which led him to err in his assessment of the factual foundation required to ground the constitutional challenge advanced and satisfy the serious justiciable issue criterion.

[105] As noted, in *Canadian Bar Association*, *BCSC*, Chief Justice Brenner stated that a challenge to the constitutional validity of legislation is always justiciable. This was a correct statement which has been repeatedly affirmed in the subsequent jurisprudence, as outlined above. However, he declined to grant public interest standing to the CBA because it did not plead or advance any such challenge. Rather, its challenge was to the alleged inadequacy of the civil legal aid scheme overall and the claim was brought "on behalf of an amorphous group of individuals whose *Charter* rights may have been, or in the future may be breached", namely, "poor people".

[106] As Justice Saunders explained in *Canadian Bar Association*, *BCCA*, the descriptor "amorphous" applied to the group of "poor people" in question in that case because, as determined in *Christie*, "there is no general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal". Accordingly, membership in the group could not be determined "in relation to any aspect of specific facts of an individual's case" based on a range of variable factors such as the seriousness and complexity of the proceedings and the particular capacities of each individual in that context (at paras. 48–49). As she also explained, based on the law in force at the time, s. 15 *Charter* challenge could only be analysed "in the context of a comparator group that is chosen bearing in mind the characteristics of the individual" (at para. 51). Notably for present purposes, in *Witner v. Canada (Attorney General)*, 2011 SCC 12 the Supreme Court of Canada later held that s. 15 equality analysis does not require the identification of a mirror comparator group.

[107] Contrary to the Chief Justice's statement, this Court did not uphold Chief Justice Brenner's finding that the CBA lacked public interest standing. Justice Saunders concurred in *Canadian Bar Association*, *BCCA*, that he quoted and relied upon in the context of deciding that the CBA's pleadings did not disclose a reasonable cause of action. She expressly declined to consider the standing issue on appeal. Nevertheless, as I have explained, the two questions are closely related and pleadings that do not disclose a reasonable cause of action cannot serve as a foundation for a serious justiciable issue. It is, therefore, illuminating to consider Justice Saunders' statements and their implications for whether a serious justiciable issue is raised on the pleadings in this case.

[108] The Chief Justice repeatedly drew analogies between the CCD's claim and that of the CBA and relied upon those analogies in his analysis of the serious justiciable issue criterion. In finding that the "fundamental difficulty" with the CCD's role was "the lack of a particular factual context of an individual's case" he stated "[t]his issue was fatal to the claim for standing in *Canadian Bar Association*" and he referred specifically to paras. 49 and 51 of Justice Saunders' reasons where she discussed the need for an individual factual context to ground the CBA's claims (at paras. 37–38). In addition, in expressing his final conclusion, the Chief Justice returned to the analogy and stated 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 …" (at para. 98, emphasis added).

[109] However, in my view, the two claims were not analogous. The CCD challenged the constitutional validity of specific legislation. The CBA did not. As discussed, a challenge to the constitutional validity of legislation is always justiciable, regardless of whether it has policy implications, because the challenge concerns government policy translated into law and thus subject to judicial review. This is a critical distinguishing feature of the CCD's claim.

[110] Another critical distinguishing feature between the two claims is the permissibly broad and general nature of the CCD's constitutional challenge from a legal perspective. As Justice Saunders explained in *Canadian Bar Association*, *BCCA*, the ss. 7 and 15 *Charter* challenges brought by the CBA were necessarily grounded in an individualized factual matrix in accordance with the then-prevailing law and thus the claim, as pleaded, was impermissibly broad. In contrast, in this case the constitutional challenges concern the alleged generally shared right of all involuntary patients to be free from exposure to Forced Psychiatric Treatment and discrimination based on mental disability. To the extent these constitutional *rights* exist, they are shared by all members of the group regardless of the individual factual contexts within which they arise.

[111] The amended notice of civil claim pleads concrete and detailed material facts regarding the nature and potential impacts of Forced Psychiatric Treatment to which all members of persons in British Columbia who are subjected to or at risk of being subjected to the impugned provisions. It also pleads that the impugned provisions create a discriminatory distinction based on mental disability that impacts all directly affected members of the group. Unlike "poor people", membership in the group is not amorphous, although the group is very large. The alleged breaches are manifestly serious and the claim is "far from frivolous".

[112] In other words, unlike the CBA's claim, the CCD's claim is a comprehensive and systemic constitutional challenge to specific legislation that directly affects all members of a defined and identifiable group in a serious, specific and broadly-based manner regardless of the individual attributes or experiences of any particular member of the group.

[113] In my view, based on these pleadings, as in *Thompson*, it would be open to the CCD to seek to establish its claim by adducing evidence from directly-affected non-plaintiff and expert witnesses rather than through a personal co-plaintiff. To the extent the Attorney General might require access to relevant documents and other forms of discovery to defend itself adequately, there are litigation management tools short of the blunt instrument of a complete denial of standing available to meet those needs.

[114] For the foregoing reasons, I conclude that the Chief Justice erred in his assessment of the first *Borowski* factor. In my view, the CCD's claim does not require "a particular factual context of an individual's case" or an individual plaintiff and it manifestly raises a serious justiciable issue.

[115] Given my conclusion on this ground of appeal, it is unnecessary to analyse the other grounds of appeal advanced by the CCD regarding the denial of public interest standing. However, I wish to comment that, in my view, the Chief Justice's analysis of the third *Borowski* factor did not comport in all respects with the flexible, purposive approach mandated in *Downtown Eastside*. Although I do not accept that he imposed a precondition that all directly-affected individuals share the CCD's viewpoint, which is plainly unnecessary, to the extent the Chief Justice may have suggested that, if possible, it is always preferable for a public interest organization to assist an individual party in the background rather than seek public interest standing (at para. 95), I cannot agree. As Justice Cromwell explained in *Downtown Eastside*, the existence of other potential plaintiffs who have standing is relevant to the question of the reasonable and effective means of 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" on a standing application: at para. 51. And as Justice Diner stated in *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131, it is not always desirable "for "ghost" parties to lurk in the background, providing extensive funding, evidence, advice, or information": at paras. 66–68. Rather, in my view, every standing application must turn on its own unique constellation of facts.

[116] I also wish to address the CCD's alternative position regarding the suitability of a summary trial on the issue of public interest standing.

Did the Chief Justice err by failing to consider the CCD's alternative position regarding the suitability of a summary trial on the issue of public interest standing?

[117] The CCD submits that the Chief Justice overlooked its alternative position, namely that, if more evidence was required to establish its public interest standing, the standing issue was not suitable for preliminary determination. I do not accept this submission.

[118] In my view, the Chief Justice considered and rejected the CCD's alternative position. As outlined above, he found that it "misconstrues the onus that [it] faces on the application before me" (at para. 60) and that, in responding to the application, "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" (at para. 62). He also found that, unlike the *Thompson* case where "adjudicative facts necessary for consideration of the issues had been agreed to", the CCD's application was "an evidence dispute" (at paras. 63–64) and there would not be "a sufficiently concrete and well-developed factual setting upon which the constitutional question it has raised can be decided" (at para. 69).

[119] I agree with the CCD that it was not obliged to plead or present its trial evidence in response to the application for a preliminary determination on public interest standing. I also agree that it would not have been just for the Chief Justice to decide the standing issue if the application evidence and the trial evidence were inextricably interwoven. As noted, in such circumstances a summary trial would not improve the overall efficiency of the trial process and, in any event, the key issue on a standing determination is much narrower than on a merits determination. However, as also noted, to the extent reasonably possible, the parties must come to a summary trial prepared for their onus, whatever it may be.

[120] The onus on the CCD was to establish that it was an appropriate party to advance a justiciable claim pleaded in the amended notice of civil claim. I do not interpret the Chief Justice's reasons as amounting to a finding that the CCD needed to plead or present its intended trial evidence in order to meet this onus. Although he did refer to pleading evidence, read in context, that reference was directed at the need for the CCD to plead material facts and its capacity eventually to prove them should standing be granted. It did not amount to a finding that much or all of the trial evidence was required on the summary trial to enable a proper determination on the standing issue.

[121] Nor do I interpret the Chief Justice's reasons as overlooking the question of whether the standing question was suitable for summary determination. Rather, in my view, they reflect a clear, if implicit, finding that, as is in many cases, the question of standing was suitable for preliminary determination in this case. I agree.

In light of the error identified, what order should this court make?

[122] While this appeal was on reserve, the court was informed that an action was commenced in October 2019 under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, by three private litigants on their own behalves and on behalf of a proposed class seeking, among other relief, a declaration that the same statutory provisions at issue in this case unjustifiably infringe s. 7, 12 *ber* 15(1) of the *Charter*. In addition, the court was informed that one of the two former individual co-plaintiffs in this action commenced a new action challenging the constitutional validity of the impugned provisions approximately four months after the decision below was handed down but later discontinued that action as well. Although such information would ordinarily be placed before the court on an application to adduce new evidence, I would accept and consider it in the form provided. In my view, its admission is in the interests of justice as it is relevant to the appropriate remedy to be granted on this appeal: *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, leave to appeal refused, [2017] S.C.C.A. No. 94 at para. 63.

[123] The existence of the potentially duplicative constitutional challenge commenced in October 2019 is relevant to, though not determinative of, the CCD's application for public interest standing in this action. The fact that one of the two former individual co-plaintiffs subsequently commenced but discontinued another constitutional challenge to the impugned provisions is also relevant to a fully informed consideration of the third *Borowski* factor. However, in my view, the Supreme Court of British Columbia is best placed to assess the CCD's standing application and draw whatever inferences may be appropriate based on a revised record that incorporates and addresses all of the relevant circumstances, including the new information with respect to those claims.

Conclusion

[124] I would allow the appeal, set aside the order dismissing the action and remit the CCD's application for public interest standing to the Supreme Court of British Columbia for fresh consideration.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"