Cause No. FC-9-21

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Plaintiff

- and –

PROVINCE OF NEW BRUNSWICK

Defendant

PRE-HEARING BRIEF
On behalf of the Plaintiff, Canadian Civil Liberties Association
May 17, 2021 at 9:30 a.m.

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TABLE OF CONTENTS

Page

PART I – OVERVIEW 1

PART II – FACTS 3

A. CCLA's Substantial Experience Promoting and Defending Civil Liberties 3
B. CCLA's Long History Protecting and Promoting the Rights of Women in Need of Reproductive Healthcare and the Right of Access to Abortion 4
C. CCLA's Action Challenging the Province's Barriers to Access to Abortion 5
D. The Province's Recent Statement to "Take it to Court" Over its Abortion Policy 7
E. The Social Stigma Against Abortion 8

PART III - ISSUES 10

PART IV – LAW & ARGUMENT 10

A. There is a Serious Justiciable Issue 11
B. CCLA's Genuine Interest in the Issue 12
C. This Proceeding is a Reasonable and Effective Way to Bring the Issues Before the Court 14

PART V – RELIEF SOUGHT 20

PART VI – LIST OF AUTHORITIES 21

PART I – OVERVIEW

1. The Plaintiff, the Canadian Civil Liberties Association ("CCLA"), commenced an action against the Province of New Brunswick challenging the constitutionality and validity of Schedule 2(a.1) of *Regulation 84-20* of the *Medical Services Payment Act*. This regulation excludes out-of-hospital abortions from coverage under the provincial Medicare plan. It is CCLA's position that the impugned provision is unconstitutional and violates sections 7 and 15 of the Canadian Charter of Rights and Freedoms by excluding clinical abortions from Medicare coverage. The provision unjustifiably, arbitrarily and discriminatorily limits access to abortion by imposing barriers to abortion on women, girls and trans people. The CCLA also seeks a declaration that the impugned provision is in violation of the *Canada Health Act*.

2. As a direct result of this Regulation, in order to obtain a surgical abortion covered by Medicare, a patient must travel across the province to one of two cities (Bathurst or Moncton) that have a hospital approved to offer such services. Women, girls and trans persons requiring an abortion face significant financial, privacy and logistical barriers, particularly those who cannot take time off work, arrange for childcare or transportation, or afford to travel. For those who cannot travel such great distances or obtain an appointment within the hospital's early gestational limit, their only remaining option is to pay out of pocket for a surgical abortion at a medical clinic. There is only one clinic, Clinic 554 located in Fredericton, that offers such services and it is about to close due to the lack of provincial funding.

3. This inaccessibility is no accident. It is because the Province of New Brunswick remains politically and principally opposed to providing barrier-free abortion services. The CCLA has commenced this important action seeking to have this unconstitutional and invalid provision of *Regulation 84-20* struck down.

4. The issue on this motion is whether CCLA should be granted public interest standing to pursue this action. In CCLA's respectful submission, the answer is yes.

5. *First*, CCLA has raised a serious justiciable issue. There should be no question that the constitutionality and validity of a regulation that purports to limit access to abortion is an important issue. Indeed, Premier Higgs has recently stated that if critics of the Province's abortion policy do not believe that there is adequate access to abortion, they should "take [the Province] to court." CCLA has taken the Province up on its invitation and has raised these serious issues.

6. *Second*, CCLA has a genuine interest in the issues raised. Canadian courts have recognized that CCLA, a national human rights organization that is committed to defending the rights of people in Canada, is an "experienced and qualified public interest litigant" with "substantial experience in promoting and defending the civil liberties of Canadians." For over forty-five years, CCLA has engaged in numerous activities to protect the rights of women seeking reproductive health, and to protect and defend access to abortion. CCLA thus has a proven track record of strong engagement with the issues raised and does not fall within the Supreme Court of Canada's definition of a "busybody" that is wasting judicial resources.

7. *Third*, this action is a reasonable and effective way to bring these issues before the court. The decision to terminate a pregnancy is a private healthcare decision, and one that carries heavy stigma. A pregnant woman's opportunity to access abortion is also time limited. Canadian courts, including the New Brunswick Court of Appeal, have recognized that it is unreasonable to expect individuals to assume the role of a plaintiff and put on trial this intimate healthcare decision. No individual challenges have ever been commenced in the Province of New Brunswick.

8. CCLA's action is a suitable way to have these important issues determined by the New Brunswick courts. Having these important issues raised and determined in a single action, for the benefit of all New Brunswick women, girls and trans people who are or may become pregnant and require an abortion, achieves the goals of preserving scarce judicial resources and promoting access to justice. This single comprehensive action will be led by an experienced organization with the means to thoroughly and credibly advance this litigation.

PART II – FACTS

A. CCLA's Substantial Experience Promoting and Defending Civil Liberties

9. Founded in 1964, CCLA is a national, independent, non-profit, and non-governmental organization dedicated to the furtherance of human dignity and rights in Canada. The underlying purpose of its work is to promote and maintain the civil liberties, human rights and democratic freedoms of all people across Canada.[1]

10. CCLA seeks to protect fundamental rights and freedoms through advocacy both inside and outside of courts. Since its founding, CCLA has challenged legislation, intervened and appeared in courts across Canada, presented briefs to legislative committees and delivered programs to promote fundamental rights and freedoms for persons in Canada.[2] CCLA has been involved in the litigation of many important civil liberties issues arising both prior to and under the *Charter*, as both a party and an intervener. A list and description of over 270 cases in which CCLA has acted in these capacities is included in the Motion Record.[3]

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[1] Affidavit of Noa Mendelsohn Aviv affirmed February 8, 2021 ("Mendelsohn Aviv Affidavit"), paras. 4-5, CCLA's Motion Record, Tab 2, p. 7.

[2] Mendelsohn Aviv Affidavit, paras. 6-7, CCLA's Motion Record, Tab 2, pp. 7-8.

[3] Mendelsohn Aviv Affidavit, paras. 8-10 and Appendix "A," CCLA's Motion Record, Tab 2, pp. 8-10.

B. CCLA's Long History Protecting and Promoting the Rights of Women in Need of Reproductive Healthcare and the Right of Access to Abortion

11. As explained by Ms. Mendelsohn Aviv, CCLA's Director of the Equality Program, "CCLA has had a long history of being involved both politically and in litigation in order to advance and protect the right and autonomy of pregnant girls and women, and in particular defending and promoting the right of access to abortion."[4] Ms. Mendelsohn Aviv's affidavit provides a detailed list of examples, with activities dating back to 1974. For example:[5]

(a) In 1974, CCLA intervened in the landmark Supreme Court of Canada case in *R. v. Morgentaler* (decided in 1976), where CCLA argued that the criminal prohibition on abortion was unconstitutional and contrary to Canada's 1960 *Bill of Rights*. Its brief included extensive documentary evidence on the impact of the abortion law.

(b) In 1976 and 1983, CCLA sent letters to political leaders and provincial ministries seeking their actions to defend the right to access to abortion.

(c) In 1989, CCLA intervened in the Supreme Court of Canada case in *Tremblay v. Daigle* on the issue of whether coercing a woman to keep a fetus in her body against her will was in accordance with legal principles.

(d) In 1997, CCLA intervened in the Supreme Court of Canada case of *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* where CCLA argued that to restrain the rights of a pregnant woman would represent a "dramatic rewriting of the law, a rewriting with vast ramifications for the civil liberties of pregnant women."

(e) In 2011, CCLA sent a letter to the Prince Edward Island Minister of Health and Wellness expressing concern about the lack of access to abortion services in the province due to the lack of provincial Medicare coverage.

(f) In 2016, CCLA sent a letter to the federal Minister of Health regarding the rules restricting access to the drug product for medical abortion care.

(g) In August 2020, CCLA published a statement of support for Rally on Right to Abortion, which was a protest for abortion access rights in New Brunswick.

(h) In September 2020, CCLA published a statement of support for the Vigil for Clinic 554, which was in support of activists and protestors gathered to celebrate the achievements of Clinic 554 (the only medical clinic in New Brunswick to provide abortion services) and its predecessor, the Morgentaler Clinic.

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[4] Mendelsohn Aviv Affidavit, para. 11, CCLA's Motion Record, Tab 2, pp. 10-11.

[5] Mendelsohn Aviv Affidavit, para. 11, CCLA's Motion Record, Tab 2, pp. 10-11.

(i) In October 2020, CCLA sent a letter to the Premier and Minister of Health of New Brunswick demanding a repeal of *Regulation 84-20*, as it creates barriers to abortion, and that they take urgent measures to ensure abortion access in the province.

C. CCLA's Action Challenging the Province's Barriers to Access to Abortion

12. The issue in the underlying action is the constitutionality and validity of Schedule 2(a.1) of *Regulation 84-20*, enacted pursuant to the *Medical Services Payment Act*. [6]

13. In New Brunswick, Medicare, *i.e.*, the publicly funded and administered health care system, is governed by the *Medical Services Payment Act*. The Act and Regulations define which medical services are covered by the medical insurance plan and which are excluded.

14. Schedule 2 of *Regulation 84-20* lists the services that are *excluded* from the range of "entitled" medical services under the Act. Schedule 2(a.1) states that abortion is deemed not to be an entitled service "unless the abortion is performed in a hospital approved by the jurisdiction in which the hospital facility is located."[7]

15. In this action, CCLA challenges the constitutionality and validity of that provision. CCLA claims that it is unjustifiable and arbitrary to exclude out-of-hospital abortions, such as those performed in a medical clinic, from medical insurance coverage. The effect of the *Regulation* makes access to abortions for New Brunswickers difficult and uncertain. CCLA's position is that the provision is discriminatory as it imposes barriers on women, girls and trans people seeking access to abortion and violates the *Charter* and the *Canada Health Act*.[8]

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[6] *Medical Services Payment Act*, R.S.N.B. 1973, c. M-7.

[7] Schedule 2 of *Regulation 84-20*, CCLA's Book of Authorities, Tab 1.

[8] CCLA's Statement of Claim, CCLA's Motion Record, Tab 2A.

16. The relief that CCLA seeks in the action are declarations that Schedule 2(a.1) of *Regulation 84-20*: (a) violates sections 7 and 15 of the *Charter*, (b) is *ultra vires* the powers of the Province of New Brunswick, as it is in pith and substance criminal law, and (c) is inconsistent with and in violation of the *Canada Health Act*.

17. In summary, the CCLA alleges:

(a) The purpose of Schedule 2(a.1) of *Regulation 84-20* is to suppress access to abortion services and prevent or undermine the establishment of and access to medical clinics providing abortion services. The Province's political and moralistic position is that abortion is a socially undesirable or immoral practice, making this provision, in pith and substance, a matter of criminal law. This underlying purpose of the provision is evidenced by the history of this provision's enactment. Shortly after the Supreme Court of Canada decision in *R. v. Morgentaler* in 1988, Premier McKenna told reporters he would give Dr. Morgentaler the "fight of his life" if he tried to establish an abortion clinic in New Brunswick. There is no medical reason to require abortions be performed in hospitals rather than clinics. Other procedures, like vasectomies, are covered in New Brunswick whether they are performed in a hospital or a clinic.[9]

(b) As a result of the *Regulation*, abortion is not accessible in New Brunswick, violating ss. 7 and 15 of the *Charter* and the *Canada Health Act*. In order to obtain a surgical abortion covered by the Province's medical insurance plan, a patient's only option is to travel across the province to one of two cities (Bathurst or

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[9] CCLA's Statement of Claim, paras. 20-27, 46-47, 56, CCLA's Motion Record, Tab 2A, p. 52-53, 58-59, 61.

Moncton) that have a hospital approved to offer such services. This imposes many barriers. Even assuming a patient can obtain an appointment within the hospital's early gestational limits, the requirement to travel across the Province imposes insurmountable financial, logistical and privacy barriers to patients, particularly those who are already underprivileged, marginalized and vulnerable.[10]

(c) For the many patients who cannot access hospitals in the two cities due to financial, geographic, timing and/or other personal restrictions, their other option is to pay out of pocket for a surgical abortion at a clinic. The only clinic in the province that provides this type of service, Clinic 554 located in Fredericton, is about to close its doors due to a lack of provincial funding for the abortion healthcare services the clinic provides.[11]

18. The Province has not yet defended the action. Therefore, for the purposes of this motion, the scope of the alleged facts and legal issues in the claim are determined solely by reference to the Statement of Claim.

D. The Province's Recent Statement to "Take it to Court" Over its Abortion Policy

19. Recently and on multiple occasions, Premier Higgs has been cited as making statements that the government should be "taken to court" if the public believes the Province is not meeting its obligation to provide adequate access to abortion.

20. In an article dated December 17, 2020, it was reported that the Provincial Government neutralized a motion calling for the funding of surgical abortions at Clinic 554 and the repeal of

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[10] CCLA's Statement of Claim, paras. 8, 28-34, CCLA's Motion Record, Tab 2A, pp. 49, 53-55.
[11] CCLA's Statement of Claim, paras. 9, 35-39, CCLA's Motion Record, Tab 2A, pp. 49, 55-56.

Schedule 2(a.1) of *Regulation 84-20*.[12] Premier Higgs was reported to have "said during the election campaign that the province was complying [with the *Canada Health Act*] by providing access [to abortion] in three locations and that <u>if supporters of Clinic 554 disagreed, they should go to court</u>."[13] [Emphasis added].

21. In another article dated April 20, 2021, it was reported that the Federal Government's new budget criticizes the lack of access to abortion in New Brunswick. According to the article, Premier Higgs responded to the budget and reportedly again stated that the way to resolve the dispute over access to abortion in the Province is to "<u>take [the Province] to Court.</u>"[14] [Emphasis added].

22. The CCLA has done exactly what the Premier has suggested: it is taking the Province to Court to seek the protection of New Brunswickers' constitutional rights and to address the impact of the *Regulation* on access to abortion. Despite the Premier's invitation, the Province opposes this motion for public interest standing.

E. The Social Stigma Against Abortion

23. Individuals who are directly affected by Schedule 2(a.1) of *Regulation 84-20* have not and are unlikely to bring this type of court challenge. This is not only because of the time-sensitive nature of abortions, but also because the decision to get an abortion is an intimate, private healthcare concern that faces social stigma.[15]

24. Since commencing this action, CCLA has received several negative comments on social media. This commentary provides a window into the type of social stigma that exists against

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[12] CBC Article dated December 17, 2020, CCLA's Motion Record, Tab 3A, pp. 157-163.

[13] CBC Article dated December 17, 2020, CCLA's Motion Record, Tab 3A, p. 162.

[14] CBC Article dated April 20, 2021, CCLA's Motion Record, Tab 3B, pp. 165-170.

[15] See paragraphs 52-56 below.

abortion and that any individual plaintiff could face in their community if they were to move forward with this type of action.[16]

25. In January 2021, CCLA posted on Twitter about its action challenging *Regulation 84-20* and promoting access to abortion in New Brunswick. While CCLA received many supportive posts, it also received many negative ones that would be difficult for an individual to receive from members of their community. For example:[17]

(a) "Yes because murdering the unborn so people have the freedom to be whores is a good thing. If abortion is legal then why isn't murder?"

(b) "You people are all crazy as f***. You don't even know what is going on. Wow."

(c) "Gay and trans people are seriously f***** in the head. This is the main reason for the demise of mankind."

(d) "What great human rights! The right to butcher and dismember innocent preborn human beings. The right to keep women in the dark about their options, support, and what abortion really does to them [stet] their babies."

(e) "Unborn humans have no civil liberties eh? Y'all suck."

(f) "Canadians are experiencing the largest crackdown of their rights and freedoms EVER. But sure, we need to make sure people can kill their unborn children. This organization is a disgrace."

(g) "#AbortionisMurder."

(h) "I remember when someone having an abortion wasn't a celebrated thing, by the person having it done or the public. It was a hard decision that was hard to get over. Now you guys are partying in the street about murdering life, and want to be able to do it no matter what trimester. Sick."

26. This type of negative public attention is not uncommon to those who are in the public domain, promoting and defending access to abortion services. For example, Clinic 554 faces similar types of comments on social media. In May and September 2020, Clinic 554 published two

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[16] Mendelsohn Aviv Affidavit, paras. 16-18, CCLA's Motion Record, Tab 2, pp. 13-15.

[17] Mendelsohn Aviv Affidavit, para. 16, CCLA's Motion Record, Tab 2, pp. 13-14.

posts on Facebook about its impending closure and the problems of obtaining access to abortion services in New Brunswick. It received the following responses to those tweets:[18]

(a) "Abortion is murder, baby's [stet] can feel up to 10-12 weeks. And spread their fingers repent from your wickedness and turn to Jesus."

(b) "Heartwarming to know that no more vulnerable will be brutally murdered at this facility."

(c) "STOP KILLING INNOCENT BABIES!"

(d) "Who wouldnt wanna fund a place that commits cold blooded murder."

(e) "How horrendous and unacceptable that women have to drive so far to murder an innocent, unborn baby!"

PART III - ISSUES

27. The issue to be determined by this Honourable Court on this motion is whether the CCLA should be granted public interest standing. CCLA respectfully submits that the issues raised in this action are best resolved by granting it such standing.

PART IV – LAW & ARGUMENT

28. The law of standing governs who will be entitled to bring a case before the Courts. It is intended to limit the over-burdening of the court system and prevent frivolous or duplicative cases. The law of standing is about striking a balance between ensuring access to the courts and preserving judicial resources.[19]

29. The test for public interest standing was set out by the Supreme Court of Canada in *Downtown Eastside*. The court weighs three factors, applied in a "liberal and generous manner":

(a) Is there a serious justiciable issue raised?

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[18] Mendelsohn Aviv Affidavit, para. 17, CCLA's Motion Record, Tab 2, pp. 14-15.

[19] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, paras. 2, 23, CCLA's BOA, Tab 2; *Deegan v. Canada*, 2019 FC 960, paras. 188-190, CCLA's BOA, Tab 3.

(b) Does the applicant have a real stake or genuine interest in the issue? and

(c) In all the circumstances, is the proposed proceeding a reasonable and effective way to bring the issue before the courts?[20]

30. As the Supreme Court made clear, these three factors are not "hard and fast requirements or free-standing independently operating tests." Rather, they are to be "weighed and assessed cumulatively" and applied in a "flexible and generous manner."[21]

31. The Supreme Court also recognized that the complete denial of standing is a "blunt instrument."[22] In this case, following the Supreme Court's guidance and applying these factors, CCLA submits public interest standing should be granted.

A. There is a Serious Justiciable Issue

32. The threshold to establish the existence of a serious constitutional issue is low. CCLA does not have to demonstrate a likelihood of success on the merits. The question is whether the issues raised are "important" or "far from frivolous." The Court is not to examine the merits of the case.[23] Rather, once it becomes clear that the statement of claim raises at least one serious issue, the Court need not minutely examine every pleaded claim for the purpose of determining standing.[24]

33. There can be little doubt this first prong of the test is satisfied in this case. The constitutionality and validity of a regulation that allegedly restricts access to abortion services, and violates the equality rights of women and others, is a serious justiciable issue and there can be no

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[20] *Downtown Eastside*, *supra*, paras. 2, 31-34, 37, CCLA's BOA, Tab 2.

[21] *Downtown Eastside*, *supra*, para. 20, CCLA's BOA, Tab 2.

[22] *Downtown Eastside*, *supra*, paras. 28, 64, CCLA's BOA, Tab 2.

[23] *Downtown Eastside*, *supra*, para. 42, CCLA's BOA, Tab 2; *Verge v. New Brunswick*, 2020 NBQB 224, paras. 14, 18, CCLA's BOA, Tab 4.

[24] *Downtown Eastside*, *supra*, paras. 42, 56, CCLA's BOA, Tab 2.

credible suggestion otherwise. Furthermore, as set out at paras. 19-22 above, Premier Higgs has stated on multiple occasions that those who disagree that the Province is providing adequate access to surgical abortions should "take it to Court." It therefore does not lie in the Province's mouth to now claim there is no justiciable issue.

34. In *Morgentaler v. New Brunswick*, the New Brunswick Court of Appeal granted public interest standing to Dr. Morgentaler when he sought to bring a similar challenge to Schedule 2(a.1) of *Regulation 84-20* (the case ultimately never proceeded to the merits after Dr. Morgentaler's death). In finding the first factor of the test was met, the Court of Appeal held that the underlying action "poses a serious challenge to the constitutionality of the regulatory provision at issue."[25] That finding applies equally to this case where the same issues are raised.

35. This is also consistent with the approach of the Supreme Court of Canada in *Downtown Eastside*. In that case, a public interest organization launched a constitutional challenge to the prostitution provisions in the *Criminal Code*, seeking declarations that they violated the *Charter*. The Supreme Court held that the constitutionality of the prostitution laws "certainly constitutes a 'substantial constitutional issue' and an 'important one' that is 'far from frivolous'."[26]

B. CCLA's Genuine Interest in the Issue

36. This factor reflects the concern for conserving scarce judicial resources and the need to screen out what the courts have termed as the "mere busybody."[27]

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[25] *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26, para. 56, CCLA's BOA, Tab 5.
[26] *Downtown Eastside*, *supra*, para. 54, CCLA's BOA, Tab 2.
[27] *Downtown Eastside*, *supra*, para. 43, CCLA's BOA, Tab 2.

37. In *Downtown Eastside*, the Supreme Court of Canada held that it had "no doubt" that the public interest organization in that case, whose objects included improving working conditions for female sex workers, had a genuine interest in challenging the constitutionality of the prostitution laws.[28]

38. In *Verge*, this Court recently granted a non-profit organization, whose mandate focused on protecting the constitutional rights of the New Brunswick Francophone minority, public interest standing to bring an action involving that community's *Charter* rights. Chief Justice DeWare held that the organization had shown "long-standing dedication to the protection of the constitutional and statutory rights" of that community and as such there was "no doubt" that it had a genuine interest in the proceeding and was not a "mere busybod[y]."[29]

39. Canadian courts have recognized that CCLA is an "experienced and qualified public interest litigant."[30] The Ontario Court of Appeal recognized that CCLA "has substantial experience in promoting and defending the civil liberties of Canadians."[31]

40. Recently, in *CCLA v. Attorney General of Ontario*, the Ontario Superior Court of Justice granted CCLA public interest standing to bring a constitutional challenge to legislation that forced gas retailers to post anti-carbon tax stickers, in violation of s. 2(b) of the *Charter*. The Court held that in bringing this application, "CCLA conformed with its history as a prominent civil liberties organization in the province."[32] In finding that CCLA's interest in the case was genuine, the Court

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[28] *Downtown Eastside*, *supra*, paras. 57-58, CCLA's BOA, Tab 2.

[29] *Verge*, *supra*, para. 25, CCLA's BOA, Tab 4.

[30] *Landau v, Ontario (Attorney General)*, 2013 ONSC 6152, para. 22(c), CCLA's BOA, Tab 6; *CCLA v. Attorney General of Ontario*, 2020 ONSC 4838, para. 36, CCLA's BOA, Tab 7.

[31] *Tadros v. Peel Regional Police Service*, 2008 ONCA 775, para. 3, CCLA's BOA, Tab 8.

[32] *CCLA v. Ontario*, *supra*, para. 26, CCLA's BOA, Tab 7.

recognized CCLA's "track record of engagement with the constitutional issue at hand" and its "lengthy record of involving itself in public interest litigation."[33]The Court further held that CCLA's "interest in the case reflects the core of the civil liberties and constitutional law mandate which it exists to defend, and as an organization it has the capacity to take on this litigation."[34]

41. CCLA submits that, like the public interest organizations in *Downtown Eastside* and *Verge*, CCLA has a strong engagement with the issues raised. CCLA has proven itself to be a credible and qualified public interest litigant, with a long-standing dedication to the protection of civil rights generally and, as set out at para. 11 above, the protection of the rights of women in need of access to reproductive healthcare choices specifically.

C. This Action is a Reasonable and Effective Way to Bring the Issues Before the Court

42. In *Downtown Eastside*, the Supreme Court of Canada emphasized that this third factor is not to be applied rigidly but purposively. The situation is to be examined from a "practical and pragmatic" point of view.[35] Among other things, courts should consider "whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality."[36]

43. Justice Cromwell provided a non-exhaustive list of issues for the court to consider when assessing the third discretionary factor, including: [37]

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[33] *CCLA v. Ontario*, *supra*, para. 36, CCLA's BOA, Tab 7.
[34] *CCLA v. Ontario*, *supra*, para. 37, CCLA's BOA, Tab 7.
[35] *Downtown Eastside*, *supra*, para. 47, CCLA's BOA, Tab 2.
[36] *Downtown Eastside*, *supra*, para. 50, CCLA's BOA, Tab 2.
[37] *Downtown Eastside*, *supra*, para. 51, CCLA's BOA, Tab 2.

(a) the plaintiff's capacity to bring forward a claim, such as the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting;

(b) 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; and

(c) 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.

44. Applying the principles laid out by the Supreme Court of Canada, CCLA submits that its action is a reasonable and effective way to bring these important issues before the Court.

45. ***CCLA's capacity to bring forward the claim***. CCLA unquestionably has the legal resources and experience necessary to organize and advance this constitutional challenge.

46. As set out above, CCLA has extensive experience acting as both a public interest litigant and an intervenor in over 270 cases, including many of the leading *Charter* cases at the Supreme Court of Canada. CCLA also has the legal resources and determination to produce a complete evidentiary record that will assist this Court in making the findings necessary to resolve the constitutional questions at issue, including a record containing the relevant legislative facts and evidence on the impact and effect of the impugned regulation.[38]

47. ***This case is in the public interest***. The issues raised in this case affect all women, girls and trans people in New Brunswick who are or may become pregnant and who may wish or need to

[38] Mendelsohn Aviv Affidavit, para. 14, CCLA's Motion Record, Tab 2, p. 12.

have an abortion. Thus, the principal issues before the court raise issues of public importance that impact a large community of New Brunswickers.

48. Importantly, Schedule 2(a.1) of *Regulation 84-20* disproportionately impacts disadvantaged and marginalized women, girls and trans people who do not have the means or ability to travel across the Province to one of two cities to obtain an abortion, or for whom it is too great a risk, (such as those who cannot take time off work, arrange childcare or transportation, and/or afford to travel). These individuals may also face significant privacy and safety issues (*e.g.* minors or those suffering from ongoing domestic violence), as they may require an abortion without informing their family members. CCLA's action will provide access to justice for this disadvantaged and marginalized group whose legal rights are affected, but who do not have the means to bring this type of challenge and should not be forced to publicly disclose their intimate circumstances.[39]

49. In *Downtown Eastside*, the Supreme Court found that the public organization's challenge to the prostitution provisions of the *Criminal Code* constituted public interest litigation. Justice Cromwell held that the action provided "an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it." He also recognized that determining the issue in one comprehensive action could prevent a multiplicity of individual challenges. There was no risk of the rights of those individuals with a more direct stake in the issue being adversely affected by a badly advanced claim, as it was "obvious that the claim is being pursued with thoroughness and skill."[40]

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[39] See *Downtown Eastside*, *supra*, para. 51, CCLA's BOA, Tab 2.
[40] See *Downtown Eastside*, *supra*, para. 73, CCLA's BOA, Tab 2.

50. Similarly, CCLA has the means and ability to effectively advance this claim in a thorough and skillful manner. In doing so, it will allow the Court to comprehensively determine the important issues raised in one action, for the benefit of all New Brunswickers who are pregnant or may become pregnant, particularly those who are disadvantaged and marginalized.

51. ***There are no realistic alternative means***. Litigation is a necessary step to address the unconstitutionality and invalidity of Schedule 2(a.1) of *Regulation 84-20*. CCLA has sent letters to the Province demanding the repeal of the impugned provision and there have been protests demanding better access to abortion.[41] Those political steps have not achieved a non-litigious resolution. Rather, the Province has responded by stating that critics should take it to court.

52. CCLA does not dispute that there are other individuals more directly affected by Schedule 2(a.1) of *Regulation 84-20*: women, girls and trans people who have had or may require an abortion. However, individual challenges by directly affected individuals are not a realistic alternative means.

53. A decision to obtain an abortion can be stressful and is certainly an extremely private form of healthcare. An individual who would commence this type of action would not only need to fund the significant cost of litigation, but to also put their personal and intimate private healthcare decisions on public display and trial. As set out at paras. 23-26 above, such individuals would also likely face enormous stigma in their community. It is therefore unsurprising that no individual challenge has been commenced.

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[41] Mendelsohn Aviv Affidavit, para. 11(j) and (k), CCLA's Motion Record, Tab 2, p. 11.

54. Canadian courts, including the New Brunswick Court of Appeal, have recognized that women, girls and trans persons affected by this Regulation are unlikely to bring their own challenge because of the intimate and private nature of a decision to obtain an abortion.

55. In *Morgentaler v. P.E.I.*, Dr. Morgentaler was granted standing to challenge the validity of a government policy regarding the funding of abortions. Justice Jenkins recognized that those most directly affected could not be expected to bring such a challenge:

> I share the applicant's view that in all of the circumstances of pregnancy and a decision regarding abortion, it is unreasonable to expect a woman to pursue government's policy and then carry out a court challenge within the very short time within which this all could be done. […] Furthermore, the mere fact of pregnancy, let alone an unwanted pregnancy, inherently and unavoidably gives rise to stress and anguish, and that pregnancy termination is a decision of an intimate and private nature. [42] [Emphasis added].

56. In *Morgentaler v. New Brunswick*, the New Brunswick Court of Appeal cited this quote from Jenkins J. affirmatively, and recognized that there are "many valid reasons why women who have had abortions at the Fredericton Clinic [predecessor to Clinic 554] would not or could not bring this challenge."[43] The Court of Appeal also recognized that "none of the many women who availed themselves of the Clinic's services in the past 15 years or so has initiated proceedings for the declaratory relief [sought]." The Court held this is likely because of the substantial cost of litigation and the "intimate and private" nature of the decision to terminate a pregnancy.[44]

57. Furthermore, even if there were potential individual plaintiffs, CCLA's action would still be a reasonable and effective way to bring this challenge. The Supreme Court of Canada has

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[42] *Morgentaler v. Prince Edward Island (Minister of Health & Social Services)*, 1994 CarswellPEI 77, para. 18 (Supreme Court, Trial Division), CCLA's BOA, Tab 9.

[43] *Morgentaler* (NBCA), *supra*, para. 58, CCLA's BOA, Tab 5.

[44] *Morgentaler* (NBCA), *supra*, para. 59, CCLA's BOA, Tab 5.

recognized that the presence of potential individual plaintiffs does not preclude a claim for public interest standing.[45] In *Manitoba Métis Federation v. Canada*, the Supreme Court granted the Federation public interest standing to challenge an Act on behalf of the Métis people even though there were individual plaintiffs in that case.[46]

58. In *Downtown Eastside*, the Supreme Court noted that an accused facing a criminal charge under the impugned provisions could also raise a constitutional challenge, but "that does not mean that this will necessarily constitute a more reasonable and effective alternative way to bring the issue to court." Having a potential multitude of similar challenges does not serve the goal of preserving scarce judicial resources. Rather, the Court found it was better for one comprehensive action addressing the entire scheme to be led by the Federation.[47]

59. In this case, no alternative plaintiffs have come forward to bring this important constitutional challenge. But even if there were, like *Downtown Eastside*, having these important constitutional issues determined in a single comprehensive action, brought by a public interest organization with the means and experience to thoroughly and credibly advance the litigation, is a reasonable and effective alternative to bring the issue before the Court. It achieves the goal of preserving scarce judicial resources while promoting access to justice.

60. Lastly and importantly, granting public interest standing to CCLA in this case is necessary to preserve the legality principle, which is at the heart of standing law. The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority,

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[45] *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14 at para. 43, CCLA's BOA, Tab 10.

[46] *Manitoba Metis Federation*, *supra*, para. 44, CCLA's BOA, Tab 10.

[47] *Downtown Eastside*, *supra*, paras. 69-70, CCLA's BOA, Tab 2.

i.e., the rule of law, and that there must be practical and effective ways to challenge the legality of state action.[48]

61. The Supreme Court has emphasized the important role public interest standing plays in protecting the legality principle and ensuring that "no law [is] immune from challenge."[49] In this case, public interest standing should be granted to ensure that Schedule 2(a.1) of *Regulation 84-20* is not immune from challenge.

PART V – RELIEF SOUGHT

62. CCLA respectfully requests the following relief:

(a) CCLA be granted public interest standing in relation to this action; and

(b) Such further and other relief as this Honourable Court deems just and reasonable.

May 3, 2021 ALL OF WHICH IS RESPECTFULLY SUBMITTED

Torys LLP

Lawyers for the Plaintiff, CCLA

[48] *Downtown Eastside*, *supra*, para. 31, CCLA's BOA, Tab 2.
[49] *Downtown Eastside*, *supra*, para. 33, CCLA's BOA, Tab 2.

PART VI – LIST OF AUTHORITIES

Statutes & Regulations

1. *Regulation 84-20* under the *Medical Services Payment Act*, R.S.N.B., 1973, c. M-7

Jurisprudence

2. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45
3. *CCLA v. Attorney General of Ontario*, 2020 ONSC 4838
4. *Deegan v. Canada*, 2019 FC 960
5. *Landau v. Ontario (Attorney General),* 2013 ONSC 6152
6. *Manitoba Metis Federation v. Canada (Attorney General),* 2013 SCC 14
7. *Morgentaler v. Prince Edward Island (Minister of Health & Social Services*), 1994 CarswellPEI 77 (Supreme Court, Trial Division)
8. *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26
9. *Tadros v. Peel Regional Police Service*, 2008 ONCA 775
10. *Verge v. New Brunswick*, 2020 NBQB 224