IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

CIVIL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

Citation: CCLA v. PNB 2021 NBQB 119
Date: 2021/May/17

FC-9-2021

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Plaintiff,

– and –

THE PROVINCE OF NEW BRUNSWICK,

Defendent.

DECISION

BEFORE:	Madam Chief Justice, Tracey K. DeWare
AT:	Fredericton, New Brunswick
DATE OF HEARING:	May 17, 2021
DATE OF DECISION:	June 1, 2021
APPEARANCES:	Andrew Bernstein and Emily Sherkey, on behalf of the Plaintiff
	Richard Williams, Q.C. and Isabel Lavoie Daigle, on behalf of the Defendant

INTRODUCTION

[1] The present action was commenced by the plaintiff, Canadian Civil Liberties Association, "CCLA", on January 8, 2021. The action challenges the constitutionality and validity of schedule 2(a.1) of Regulation 84-20 of the ***Medical Services Payment Act,*** R.S.N.B. 1973, CM-7. On February 12, 2021, the CCLA filed the present notice of motion seeking a declaration granting it public interest standing in order to proceed with the action. The defendant, The Province of New Brunswick, "The Province", has yet to file a statement of defense and opposes the CCLA's request for public interest standing.

[2] Prior to reviewing the relevant facts, it is in my view appropriate to restate the law as confirmed by our Court of Appeal in the ***Province of New Brunswick and Dr. Henry Mortgentaler*** *2009 NBCA 26* (Canlii). In that case, the New Brunswick Court of Appeal upheld a trial judge's decision granting public interest standing to Dr. Morgentaler to bring an action which called into question the constitutionality of certain regulatory provisions pertaining to abortion services in the Province of New Brunswick. Chief Justice Drapeau, as he then was, succinctly confirmed the trial judge's finding and reviewed pertinent case law on the topic at paragraphs 58 and 59 as follows:

> [58] "The motion judge then made the following critical observations before concluding "[t]here are many valid reasons why women who have had abortions at the Fredericton Clinic would not or could not bring this challenge" and holding "Dr. Morgentaler is therefore a suitable alternative person to do so" (para. 26):

In the case of *Morgentaler v. P.E.I.* [1994] P.E.I.J. No. 16, Justice Jenkins said the following at paragraph 17:

> 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. The Supreme Court of Canada expressed this viewpoint in R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30. Further, 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: R. v. Morgentaler, [1988] 1 S.C.R. 30, at 148 and 172.

Justice Jenkins held that because of the "intimate and private nature" of the decision to terminate a pregnancy, it was not reasonable to expect a woman to assume the role of plaintiff in a court challenge to legislation.

In *Vriend v. Alberta* 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, the Plaintiff Vriend and three special interest groups challenged Alberta's human rights legislation which excluded sexual orientation as a prohibited ground of discrimination. Vriend had been fired from his employment because he was a homosexual. The Province sought to limit his challenge to those sections dealing with employment practices. In rejecting the Province's submission Justice Cory said the following:

> With respect to the third criterion, the only other way the issue could be brought before the Court with respect to the other sections would be to wait until someone is discriminated against on the ground of sexual orientation in housing, goods and services, etc. and challenge the validity of the provision in each appropriate case. This would not only be wasteful of judicial resources, but also

> unfair in that it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases. This cannot be a satisfactory result.

In another case involving persons referred to as "vulnerable individuals," Justice MacPherson of the Ontario Court said:

> In my view the applicant also meets the third branch of the *Canadian Council of Churches* test. It is true that individual street vendors could challenge section 3(1) of the Act. However I do not regard that as a more reasonable or effective way of bringing the issue before the courts. Most street vendors are people of very limited means. Although they might have a legal interest in challenging the law, it is in my opinion unrealistic to expect them to do so in light of their financial situation.
>
> [...]

In the case of *N.S. v. McNeil* 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265, the Plaintiff was granted standing, notwithstanding that there were other classes of persons more specifically affected because there was "no other way, practically speaking, to subject the challenged Act to judicial review ..."

[59] In my respectful judgment, the record offers ample support for the motion judge's negative answer to the final question posed by the governing test for public interest standing. In addition to the events described in Ms. Liebowitch's uncontradicted affidavit, the record reveals another pertinent fact: 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 Dr. Morgentaler solicits. **That state of affairs is likely the product of two factors operating in tandem: the prohibitive cost of litigation and the "intimate and private nature" of the decision to terminate a pregnancy:** *Morgentaler v. Prince Edward Island (Minister of Health and Social Services)* (1994), 1994 CanLII 3412 (PE SCTD), 117 Nfld. & P.E.I.R. 181 (P.E.I.S.C. (T.D.), [1994] P.E.I.J. No. 16

> (QL)), Jenkins J. (now Chief Justice of Prince Edward Island). It is, as well, worth bearing in mind that Dr. Morgentaler brings to the judicial arena financial resources and legal expertise which will undoubtedly help level the playing field and greatly improve the chances that any judicial decision on the merits is fully informed both factually and legally. **At the end of the day, I can find no fault whatsoever with the motion judge's conclusion that Dr. Morgentaler's action is the only reasonable and effective way to litigate the constitutionality of the regulatory provision at issue."**
>
> (Emphasis mine)

[3] The current request before this Court for a declaration of public interest standing is exactly the same as the one granted by our Court and confirmed by the Court of Appeal in ***Morgentaler*** in 2009. With all due respect to the position of the Province, it is without merit and given the jurisprudence directly on point, surprising. CCLA's motion for a declaration of public interest standing is granted for the reasons that follow.

FACTS

[4] The CCLA was founded in 1964 and is a non-profit, non-governmental organization independently funded with the goals of advancing causes in support of human rights. In their pre-hearing brief CCLA explains their goal at paragraph 10 as follows:

> "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. 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."

[5] In the underlying action, the CCLA seeks to challenge the constitutionality and validity of Schedule 2(a.1) of *Regulation 84-20* under the ***Medical Services Payment Act***. The CCLA suggests that this provision is unjustifiable, arbitrary and is designed to exclude from coverage out of hospital abortions such as those that could be performed in a medical clinic. CCLA's position is that this regulation is in fact discriminatory as it imposes barriers on women, girls and trans people seeking access to abortion services. The CCLA challenges the regulation pursuant to sections 7 and 15 of the ***Canadian Charter of Rights and Freedoms.*** The CCLA further argues that the provision is inconsistent and in violation of the ***Canada Health Act,*** R.S.C. 1985, cc-6.

[6] Schedule 2 (a.1) of Regulation 84-20 of the ***Medical Services Payment Act*** states as follows:

> "The following are deemed not to be entitled services:
>
> (a.1) abortion, unless the abortion is performed in a hospital facility approved by the jurisdiction in which the hospital facility is located;"

[7] In New Brunswick, an individual seeking access to a surgical abortion covered by Medicare must travel to a hospital in either Bathurst or Moncton to access this service. In the event an individual seeking an abortion was unable to travel the necessary distance or obtain an appointment within the hospital's early

gestational limit, their only recourse was to pay for a surgical abortion at a medical clinic.

POSITION OF THE PARTIES

[8] The CCLA submits that this action is the only and the proper mechanism by which to challenge the validity and constitutionality of the regulation in question. The CCLA points out that the Premier has in fact endorsed a court application as a means to resolve the dispute, inviting individuals to take the Province to court should they be unhappy with the current level of abortion services. The CCLA included in their materials news reports quoting the Premier suggesting that if people disagreed with the government's position on access to abortion services, they should take the Province to court. The CCLA points out that the issue of public interest standing in such circumstances has already been resolved in this Province and in Canada. The CCLA points out that they have met all the criteria necessary to obtain a declaration of public interest standing.

[9] The Province suggests that this is not an appropriate case for the Court to exercise its discretion and grant the CCLA public interest standing. The Province maintains that the CCLA has not met all of the requirements to obtain public interest standing as set out recently by the Supreme Court of Canada in ***Downtown Eastside Sex Workers United against Violent Society v. Canada*** *2012 SCC 45*. The Province argues that there is not a serious justiciable issue for

the Court to consider in this matter as the Court would not be in a position to intervene in an interpretation of the ***Canada Health Act***. The Province suggests that the ***Canada Health Act*** is a financial statute and not legislation which grants rights and obligations that could be resolved in a court of law. The Province points out that pursuant to the ***Constitution Act***, 1867, the Province has exclusive jurisdiction over health care. The Province maintains that the manner in which it decides to administer and offer health care services is a policy decision and not a justiciable question. Finally, the Province is of the view that the CCLA's action is not a reasonable nor an effective means to bring these questions before the court.

ISSUES

[10] The sole issue to be determined by this Court is whether or not the CCLA should be granted public interest standing in order to proceed with the underlying action.

LAW & ARGUMENT

[11] The Supreme Court of Canada set out the test to be met when seeking public interest standing in ***Downtown Eastside***. Justice Cromwell in ***Downtown Eastside*** directed courts considering these questions to apply the necessary factors in a liberal and generous manner. The three questions to be considered are:

a. Is there a serious justiciable issue raised?

b. Does the applicant have a real stake or genuine interest in the issue?

c. In all the circumstances, is the proposed proceeding a reasonable and effective way to bring the issue before the courts?

IS THERE A SERIOUS JUSTICIABLE ISSUE?

[12] The Province maintains the action brought by the CCLA does not constitute a serious issue. The Province relies upon the division of powers set out in the ***Constitution Act***, 1867 in support of this position. The Province suggests that Canada's Medicare system is administered by provincial ministries. The ***Canada Health Act*** is in place to assist and monitor funding. However, the Province points out that the sole interpreter of the ***Canada Health Act*** is the federal government. Further, there is a consultation process imbedded within the ***Canada Health Act*** when there is a dispute between a province and the federal government. The Province suggests that the CCLA's action pursuant to the ***Canada Health Act*** is inappropriate and cannot be entertained by the courts.

[13] The Province cites as authority for their position ***BC Civil Liberties Association v. British Columbia (Attorney General)****(1988)(24 BCLR 2nd 189)* at paragraph 12:

> "Before I examine the legislation, I wish to dispose of another matter that was mentioned in argument. The Canada Health Act, 1984 (32-33 Eliz.2), c. 6 provides financial assistance to provincial health care plans that satisfy certain criteria which are described in the federal Act, particularly universality and accessibility. **In my view, the possibility that the**

> **impugned regulation may disqualify the British Columbia plan from federal funding, if such is the case, is of no consequence in deciding this administrative law question. It is for the Cabinet to assess the risk of losing federal funding and take such other political steps and political responsibility as it may be advised."**
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> (Emphasis mine)

[14] The Province also relies upon the reasoning of the Court in ***Lexogest Inc. v. Manitoba (Attorney General)***[1993] *WDFL 453* in support of their position. In ***Lexogest***, the respondent sought a declaration that the regulation limiting funding for therapeutic abortions to hospital settings was in conflict with the requirements of the ***Canada Health Act.*** However, the court found that the ***Canada Health Act*** was designed to allow provinces the flexibility to operate and administer their own health care insurance plans in order to exercise primary responsibility for the provision of health care within the provinces. The Province points out that access to and delivery of health care services are political and governmental decisions and as such are not justiciable questions.

[15] The Province argued the applicability of ***Lexogest*** before the Court of Appeal in ***Morgentaler*** in 2009. Chief Justice Drapeau agreed with the motion's judge who had granted public interest standing that ***Lexogest*** was distinguishable. Chief Justice Drapeau stated at paragraphs 54 and 56 of ***Morgentaler*** as follows:

> [54] After noting the parties' consensus on the applicability of the *Borowski* test, the motion judge turned her attention to the first of its three parts, namely whether there is a serious issue to be tried. She began her succinct analysis by recalling Chief Justice Laskin's observation in *Thorson* **that "[t]he question of the constitutionality of legislation has in this country always been a justiciable question."** The motion judge then summarized the Province's submission on topic, which was then, and remains now that the constitutionality of the impugned

> legislation is a foregone conclusion in light of *Lexogest Inc. et al. v. Manitoba et al.* She then expressed the view that the standard under the first part of the *Borowski* test was similar to the one governing applications for interlocutory injunctions: "[i]t is not necessary for the Court to determine whether the plaintiff will succeed but only whether the issue is a serious one, as opposed to a frivolous or vexatious one" (para. 17). The motion judge concluded her analysis by finding that the "issues raised in this case are serious and justiciable and the first test is satisfied".
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> [56] I agree with the motion judge that Dr. Morgentaler has satisfied the first part of the *Borowski* test: the underlying action poses a serious challenge to the constitutionality of the regulatory provision at issue. **My reasons for so concluding are as follows: (1) while *Lexogest Inc. et al. v. Manitoba et al.* features, as one would expect, a thorough analysis of the issues raised in that case, it does not authoritatively settle the controversy in the courts of this Province; (2) the legislation at issue in that case and the one under study here are not identical; and (3) Dr. Morgentaler's challenge does not duplicate the one mounted in *Lexogest Inc. et al. v. Manitoba et al.***
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> (Emphasis mine)

[16] The CCLA points out that the threshold to establish a serious justiciable issue is not merits-based. If the statement of claim filed on behalf of the CCLA raises at least one serious issue, the Court need not go further in determining standing. The CCLA suggests that while the Province takes great umbrage with their arguments under the ***Canada Health Act,*** the Province says little concerning the constitutional challenges to the regulation pursuant to Sections 7 and 15 of the ***Charter***. It is telling that neither of the ***Charter*** challenges are discussed by the Province in their brief or in oral submissions as it relates to the serious justiciable issue.

[17] Chief Justice Drapeau's comments concerning the framework of the constitutional questions posed by Dr. Morgentaler as well as the issues raised pursuant to the ***Canada Health Act*** are very relevant to the question of a "serious justiciable issue" now before this Court. Chief Justice Drapeau noted at paragraphs 31 and 40 in ***Morgentaler*** the following:

> [31] I begin by underscoring that Dr. Morgentaler does not rely upon s. 24(1) of the *Charter* to seek the declaration of unconstitutionality particularized in his Statement of Claim. Section 24(1) allows anyone whose *Charter* rights or freedoms have been infringed or denied to apply for an appropriate and just remedy. Dr. Morgentaler does not allege his rights or freedoms, as guaranteed by the *Charter*, have been breached. **Rather, he contends Regulation 84-20, by way of its arguably narrow abortion-related definition of "entitled" services, infringes or denies the rights of pregnant New Brunswick women under ss. 7 and 15 of the *Charter***. In fact, Dr. Morgentaler's constitutional challenge is grounded in the proposition that Regulation 84-20 is, to the extent detailed above, "inconsistent with the provisions of the *Constitution*" and "to the extent of the inconsistency, of no force or effect": s. 52(1) of the *Constitution Act, 1982*. From a purely textual standpoint, s. 52(1)'s scope of application is not restricted to those whose *Charter* rights or freedoms are detrimentally affected by an unconstitutional law.
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> [40] At first blush, Dr. Morgentaler would appear to have a strong case for standing as of right with respect to his application for a declaration that Regulation 84-20 is inconsistent with, and in violation of the *Canada Health Act*. After all, it is admitted that he is licensed to practice medicine in New Brunswick and that he owns and operates the only private abortion clinic in this Province. It is also an accepted fact that the Clinic is not an approved hospital facility within the meaning of paragraph (a.1) of Schedule 2 to Regulation 84-20. As mentioned, that provision excludes from the category of "entitled services" any abortion performed outside an approved hospital facility. **That said, I am alive to the following passages in the Province's Statement of Defence: (1) non-compliance with the Canada Health Act "does not found a cause of action by an individual against a province and is not a justiciable issue"; and (2) "[i]t is within the sole discretion of the federal government as to what steps, if any, it shall take where it determines a default has occurred." Whether there is merit to either of those pleas remains to be determined in another forum, following a contextual interpretation of the pertinent**

legislation. Had the Province conceded standing and justiciability in respect of the non-constitutional challenge, the case for distinguishing *Irwin Toy* might have more oomph and Dr. Morgentaler might well have elected to pursue public interest standing only as an alternative solution.

(Emphasis mine)

[18] The issues raised by Dr. Morgentaler in 2009 are nearly identical to the issues raised by the CCLA in 2021. In the statement of claim the CCLA sets out the relief sought at paragraph 1 as follows:

1. "The Plaintiff claims:

(a) A declaration that Schedule 2(a.1) of *Regulation 84-20*, enacted pursuant to the *Medical Services Payment Act*, R.S.N.B. 1973, c. M-7, is inconsistent with and n violation of the *Canada Health Act*, R.S.C., 1985, c. C-6;

(b) A declaration that Schedule 2(a.1) of *Regulation 84-20* is *ultra vires* the powers of the province of New Brunswick, as it is in the pith and substance criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*, and is therefore of no force and effect;

(c) A declaration that Schedule 2(a.1) of *Regulation 84-20* violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 (the "*Charter*"), and is therefore of no force and effect;

(d) A declaration that Section 2.01(b) of the *Medical Services Payment Act* does not apply to medical offices and clinics;

(e) Costs of this action; and

(f) Such other orders and declarations and other relief including consequential and ancillary orders that may be necessary and advisable to the Court. "

[19] The Province will have the opportunity to vigorously defend this action. Whether or not CCLA will be successful in their constitutional challenge of this regulation as well as the complaint concerning the Province's compliance with the ***Canada Health Act*** are debates for another day. However, for the purpose of the present exercise, the CCLA has raised a serious justiciable issue in this action.

CCLA'S GENUINE INTEREST IN THE ISSUE

[20] The CCLA points out that Canadian courts have for decades now recognized its experience and qualifications as a public interest litigant. The Ontario Court of Appeal in ***Tedros v. Peel Regional Police Service****, 2008 ONCA 77*, para 3, noted that the CCLA has "*substantial experience in promoting and defending the civil liberties of Canadians.*" The CCLA points out that it has demonstrated strong engagement with the issues raised in the present action and have established a proven track record as a credible and qualified public interest litigant. The CCLA presents with a long-standing dedication to the protection of civil rights and the financial ability to prosecute such actions.

[21] The Province maintains that the CCLA is not directly impacted by the subject matter of this litigation, is not a citizen of the province, nor a registered lobbyist. The Province suggests that the CCLA has not demonstrated a strong engagement in the issues set out in the underlying action.

[22] In ***Verge v. PNB*** 2020 NBQB 224 (Canlii), I had the opportunity to consider the request of a non-profit corporation seeking a declaration for public interest standing. Jacques Verge and Egalité Santé sought public interest standing in order to bring an action challenging the French linguistic community's right to distinct health care pursuant to the ***Canadian Charter of Rights and Freedoms*** and the ***Official Languages Act*** in New Brunswick. In concluding that Jacques Verge and Egalité Santé did have the necessary interest to be granted public interest standing, I commented at paragraph 25 as follows:

> [25.] **In this case, the applicants have shown long-standing dedication to the protection of the constitutional and statutory rights of the Francophone community in matters of health.** There is no doubt that the applicants have a genuine interest in these proceedings and that they are committed with regard to the issues raised. The applicants are not the "mere busybodies" mentioned by **Cromwell J.** in *Downtown Eastside*. I accept that the applicants meet the second criterion regarding their standing to sue, namely to have a genuine interest in the resolution of the issues that are before the Court.
>
> (Emphasis mine)

[23] The CCLA has demonstrated a genuine interest in the issue before the Court as well as the capacity to adequately prosecute the action. The CCLA is not "mere busybodies" as identified by Justice Cromwell in ***Downtown Eastside*** as presenting challenges for the justice system. The CCLA has filed the present action as a genuine means to address the concerns raised – the constitutionality of the regulation in question and the Province's compliance within the ***Canada Health Act***.

IN ALL THE CIRCUMSTANCES IS THE PROPOSED PROCEEDING A REASONABLE AND EFFECTIVE WAY TO BRING THE ISSUES BEFORE THE COURTS?

[24] In ***Downtown Eastside***, Justice Cromwell was clear that in considering this third factor, Courts must examine the question from a practical and pragmatic point of view. In this particular case, that is of particular note. Justice Cromwell set out the following non-exhaustive list of issues a court should consider when assessing this third discretionary factor:

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 the public interest in the sense that it transcends the interest of those most directly affected by the challenge, 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.

[25] The CCLA suggests that all three of the criteria proposed by Justice Cromwell, are determined in their favour in the context of this case. Firstly, the

CCLA has the necessary resources in which to bring this type of proceeding and a proven track record in litigating issues concerning civil liberties in Canada. The CCLA also suggests that the issues raised in the action are of public importance to a large community of New Brunswickers who otherwise would not have a voice.

[26] The CCLA suggests that schedule 2(a.1) of *Regulation 84-20* disproportionately impacts disadvantaged and marginalized women, girls and trans people who do not have the means by which to access the abortion services currently available in the province. The CCLA's action will provide a voice to these individuals who otherwise have no means by which to have their legal rights considered.

[27] The CCLA argues there are no realistic alternative means for these questions to be considered. The CCLA has sent letters to the Province demanding the repeal of the concerning regulation and have participated in peaceful protests. However, political steps and protests have not achieved the sought-after critical examination of the regulation in question. Rather, the CCLA points out the Province has responded by suggesting that it be taken to court. This is exactly what the CCLA has done. The CCLA strongly refutes the notion that it is appropriate in circumstances such as this for an individual seeking an abortion to be the face of an action of this nature.

[28] The Province, in paragraphs 36 and 40 of their pre-hearing brief, suggests that the appropriate manner for the present action to come before the court is by way of a directly aggrieved citizen. The Province states at paragraphs 36 and 40 of their brief the following:

> [36] "It is the Province's position that the way health care is managed and delivered is the prerogative of the Province. If a citizen claims that their rights pursuant to the Charter have been violated by the Province's decision as to management and delivery of health care services, it is up to the citizen to make a case for such violation. Specifically, the funding scheme could be challenged by a person who is directly affected, *i.e.* a woman seeking an abortion outside a hospital.
>
> [40] The fact that an abortion would surely be performed before a final appellate determination also should not prevent adjudication of the issue by a concerned citizen. The issue would not really be moot because the plaintiff, in that eventuality, would still be seeking compensation from the Province for the cost of the abortion or could still seek an Order from the Court to invalidate the *Regulation*."

[29] I need not restate the law which is set out in ***Morgantaler v. PEI*** and ***Morgentaler v. New Brunswick***. It is not reasonable, nor appropriate, to suggest that the only way an issue of this nature can be brought before the courts is by a woman seeking an abortion. In my view, for the same reasons set out by Chief Justice Drapeau in ***Morgentaler v. New Brunswick***, 2009 and Justice Jenkins in ***Morgentaler v. PEI*** (1994), it is "*not reasonable to expect a woman to assume the role of plaintiff*" in this matter.

[30] The Province refers the Court to Chief Justice Drapeau's, as he then was, comment in ***New Brunswick (Minister of Education) v. Kennedy*** *2015 NBCA 58* at paragraph 106:

"The rule of law was never designed to bring about government by judges. As we noted in remarks incidental to the judgment rendered from the bench "[a]bsent a sufficiently weighty juridical basis for intervention, **in a parliamentary democracy, judges, none of whom are elected, must leave standing policy decisions taken by the elected representatives of the people"**

(Emphasis mine)

[31] Canadian Democracy is founded upon three pillars - the legislative, executive and judicial branches of government. The Province is quite correct, as so eloquently stated by Chief Justice Drapeau, "*judges must leave standing policy decisions taken by the elected representatives*". This argument will undoubtably be advanced by the Province in their statement of defense and appropriately so. However, today the issue is the ability to challenge the constitutionality of a law enacted by the legislative branch of government. Such a challenge falls squarely within the mandate of the judicial branch of government. Whether or not the regulation in question will be found to be constitutional or not is not relevant to the current issue before the Court. However, the suggestion that the question of the constitutionality of the regulation cannot be raised by the CCLA as a public interest litigant is an assertion this court cannot accept. A healthy democracy survives thanks to the checks and balances which exist between the three branches of government. The ability of a recognized litigant with private interest or public interest standing to bring a constitutional challenge before the courts is a necessary component of a healthy democracy.

CONCLUSION

[32] The law on this issue is clear. The CCLA is granted public interest standing to proceed as the plaintiff in this action. The position taken by the Province in the face of clear jurisprudence to the contrary was unreasonable. I grant the CCLA's motion and order costs payable by the Province in the amount of $5000.

DATED at Moncton, N.B., this 1st day of June 2021.

Tracey K. DeWare
Chief Justice of the Court of Queen's Bench
of New Brunswick