ORIGINAL RESEARCH ARTICLE

Navigating the Interplay Amongst Public Interest Standing, Prematurity, Abuse of Process, and Facts and Evidence

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Abstract: This article considers how the public interest standing test should be applied when a litigant challenges legislation that has not yet been invoked, on the basis that the mere existence of the legislation chills *Charter* rights and freedoms. The Supreme Court of Canada has directed that the public interest standing test should be applied generously and liberally, to ensure robust protection for *Charter* rights and freedoms. The recent Alberta Court of Appeal decision of *Alberta Union of Public Employees v Alberta* illustrates that in cases involving legislative chill, the breadth of the public interest standing test can be restricted by interweaving concepts of prematurity, abuse of process, and facts and evidence. *Alberta Union of Public Employees* is a problematic precedent, but it also provides a rich opportunity for considering how litigants and courts should approach public interest standing in cases involving *Charter* claims based on legislative chill. This article teases out how the Alberta Court of Appeal narrowed the test for public interest standing by combining the concepts of prematurity, abuse of process, and facts and evidence, and provides guidance on how these concepts can be navigated to ensure litigants can turn to courts for relief when legislatures enact statutes that threaten democratic practices and institutions.

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Introduction

Standing is a legal determination as to whether "*this* plaintiff, in *these* circumstances [can] have *this* issue adjudicated."[1] In some areas of law, such as public nuisance law, special rules regarding standing have been developed by the courts.[2] In others, such as corporate oppression and derivative remedies, legislators have implemented standing rules through statute.[3] Many administrative

1. Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell Co Ltd, 1986) at 210 [emphasis added].
2. *See Ryan v Victoria (City)*, 1999 CanLII 706 (SCC) at para 52; *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 66; Shaun Fluker, "The Right to Public Participation in Resources and Environmental Decision-Making in Alberta" (2015) 52:3 Alta L Rev 567 at 573-74.
3. See e.g. *Canada Business Corporations Act*, RSC 1985, c C-44, ss 238-39, 241, 247, discussed in Cromwell, *supra* note 1 at 27-42.

tribunals and decision-makers have their standing rules set out in their enabling legislation.[4] In civil cases, standing often goes uncontested because it is evident that the plaintiff is directly affected by a dispute, for example, when an injured party sues for compensation following a car accident or when a spouse seeks relief following the breakdown of a relationship. In public interest litigation, including constitutional litigation, a party may have standing on the basis that they are directly impacted by the impugned legislation, such as when someone accused of a criminal offence challenges the constitutionality of the provision under which they have been charged. Alternatively, a party may be granted public interest standing to challenge the constitutionality of legislation despite not being directly impacted by it.[5]

Arguments over standing in public interest litigation engage with fundamental questions about the role of the judiciary, access to justice, and the scope of the *Charter*. Writing in 1987, WA Bogart observed that one question animating the doctrine of standing is: "[W]hat interests should be recognized and protected and how is it that we make such decisions?"[6] He worried that if courts adopted a narrow approach to standing, it would reinforce a narrow interpretation of the *Charter*, focused on conventional notions of harm to individual persons and property.[7] Similarly, in 2011, Jane Bailey warned that an overly narrow approach to public interest standing would result in individualized litigation and individualized remedies, undermining the ability of *Charter* litigation to achieve systemic reform.[8] The Supreme Court of Canada (SCC) has directed that, to avoid "shackl[ing]" the *Charter*, "a generous and liberal approach should be taken to the issue of standing."[9] This generous and liberal approach promotes robust *Charter* rights and freedoms for all Canadians.

Cases in which legislative chill is an aspect of an alleged rights violation sharpen the importance of generous and liberal approaches to public interest standing. Legislative chill occurs when there is "uncertainty surrounding the scope or application of a law", and thus people avoid engaging in

4. See e.g. *Water Act*, RSA 2000 c W-3, s 109, discussed in Fluker, "The Right to Public Participation in Resources and Environmental Decision-Making in Alberta", *supra* note 2 at 579; *Municipal Government Act*, RSA 2000, c M-26, s 685.
5. Although the test for public interest standing was developed in constitutional litigation, it has been used to grant parties standing in other areas of law: see *Finlay v Canada* (*Minister of Finance*), 1986 CanLII 6 (SCC) [*Finlay*].
6. WA Bogart, "Standing and the Charter of Rights and Identity" in Robert J Sharp, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 1-26 at 2.
7. *Ibid* at 7, 23.
8. Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44:2 UBC L Rev 255 at 265.
9. *Canadian Council of Churches v Canada* (*Minister of Employment and Immigration*), 1992 CanLII 116 (SCC) at 250.

Charter-protected activities "for fear of violating the relevant law."[10] Cases involving legislative chill call on courts to assess threats to democratic practices and institutions; where judicial reasoning on standing is stingy, critically important legal issues may be shielded from review.[11]

In December 2021, the Alberta Court of Appeal released a decision on public interest standing in a case involving legislative chill, *Alberta Union of Public Employees v Alberta*.[12] A union and three individual union members challenged the constitutionality of a new provincial statute on the basis that it impermissibly restricted their *Charter* freedoms of expression, association, and assembly, as well as on other grounds. Their challenge was commenced before anyone had been charged under the legislation, and the plaintiffs argued that the mere existence of the legislation created a "chill" that impermissibly prevented people from exercising their *Charter* freedoms.

The Alberta Court of Appeal struck the plaintiffs' claim as an abuse of process, holding that the plaintiffs lacked standing to challenge the statute because their application was premature and not supported by a sufficient factual setting and evidentiary record. The plaintiffs sought leave to appeal the matter to the SCC, but their application was denied.

A month after the *Alberta Union of Public Employees* decision was released, the SCC heard arguments in another public interest standing case, *British Columbia* (*Attorney General*) *v Council of Canadians with Disabilities*.[13] In *Alberta Union of Public Employees*, one of the Alberta government's arguments for why leave should *not* be granted was that the issues raised by the plaintiffs would be resolved in *Council of Canadians with Disabilities*.[14] The *Council of Canadians with Disabilities* case does provide direction on how courts should assess the sufficiency of an applicant's factual setting and evidentiary record when deciding whether to grant them public interest standing. However, the SCC decision in *Council of Canadians with Disabilities* does not answer the questions raised by *Alberta Union of Public Employees* about when standing is appropriate for litigants to pursue *Charter* claims based on legislative chill.

The *Alberta Union of Public Employees* case stands as a problematic precedent and has already been relied on by at least one government party arguing against granting public interest standing to a litigant.[15] But, the case also provides a rich opportunity for considering how litigants and courts *should* approach public interest standing in cases involving *Charter* claims based on legislative chill.

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10. *Hansman v Neufeld*, 2023 SCC 14 at para 75 (describing "chill" in freedom of expression cases).
11. With special thanks to Jessica Eisen for helping me to clarify my thinking on this point.
12. 2021 ABCA 416 [*Alberta Union of Public Employees* (ABCA)], rev'g 2021 ABQB 371 [*Alberta Union of Public Employees* (ABQB)], leave to appeal to SCC refused, 2022 CanLII 69784 (SCC) [*Alberta Union of Public Employees* (SCC leave)].
13. 2022 SCC 27 [*Council of Canadians with Disabilities* (SCC)], aff'g 2020 BCCA 241 [*Council of Canadians with Disabilities* (BCCA)], rev'g *MacLaren v British Columbia* (*Attorney General*), 2018 BCSC 1753 [*MacLaren*].
14. *Alberta Union of Public Employees* (SCC leave), *supra* note 12 (Response to Application for Leave to Appeal at paras 40-44).
15. *Single Mothers' Alliance of BC Society v British Columbia*, 2022 BCSC 2193 at paras 48, 76.

This article teases out how the Alberta Court of Appeal narrowed the test for public interest standing in *Alberta Union of Public Employees* by combining the concepts of prematurity, abuse of process, and facts and evidence, and provides guidance on how these concepts can be navigated to ensure litigants can turn to courts for relief when legislatures enact statutes that threaten democratic practices and institutions.

The article starts, in Part I, with an overview of *Alberta Union of Public Employees* and *Council of Canadians with Disabilities*. It then turns to the three threads that the Alberta Court of Appeal wove together in *Alberta Union of Public Employees* to create a restrictive approach to standing: prematurity, abuse of process, and facts and evidence. Part II examines prematurity, which is the concept that a court can decline to decide issues before they are ripe. A premature claim is non-justiciable, and a party cannot be granted public interest standing to litigate a non-justiciable claim. Part III takes up the concept of abuse of process, arguing that the Alberta Court of Appeal in *Alberta Union of Public Employees* was wrong to hold that pursuing litigation where one does not have standing is, *without more*, an abuse of process. Part IV considers what types of facts and evidence are necessary for sustaining a claim to public interest standing in constitutional litigation. The article concludes with suggestions for how future courts and litigants can approach the overlapping concepts of standing, prematurity, abuse of process, and facts and evidence.

I. A Brief Introduction to *Alberta Union of Public Employees* and *Council of Canadians with Disabilities*

Alberta Union of Public Employees and *Council of Canadians with Disabilities* centre on the test for when a party will be granted public interest standing. The SCC developed the test through a trilogy of cases, starting with *Thorson v Canada* in 1974, followed the next year by *Nova Scotia Board of Censors v McNeil*.[16] In the 1981 case of *Canada v Borowski* ("*Borowski #1*"), the third case in the trilogy, the Court articulated a three-part test, indicating that a grant of public interest standing was appropriate: (i) "if there is a serious issue" as to the constitutional validity of legislation; (ii) if the litigant is directly affected or "has a genuine interest as a citizen"; and (iii) if "there is no

16. *Thorson v Attorney General of Canada* (1974), 1974 CanLII 6 [*Thorson*]; *Nova Scotia Board of Censors v McNeil*, 1975 CanLII 14 (SCC) [*McNeil*]. For a history of the development of the public interest standing test, see generally Cromwell, *supra* note 1 at 74-95; Peter Hogg & Wade K Wright, *Constitutional Law of Canada, Vol 2*, 5th ed (Toronto: Carswell, 2021) (loose-leaf updated 2022, release 1, supp) at 59-7-12; and Bailey, *supra* note 8 at 260-64.

other reasonable and effective manner in which the issue may be brought before the Court."[17] The SCC subsequently confirmed that the test could be used to grant public interest standing in non-constitutional cases as well.[18]

In the 2012 case of *Downtown Eastside Sex Workers United Against Violence Society v Canada*, a unanimous SCC refined the test in two important ways.[19] First, the court recharacterized the three-part test, directing that the three parts should not be treated as a "rigid checklist", but rather as a set of "considerations to be taken into account and weighed in exercising judicial discretion."[20] Second, the Court restated the third part of the test. Instead of asking if there was "no other reasonable and effective manner" to bring the issue before the court, it asked if the proposed litigation was a reasonable and effective manner of bringing the issue before the court.[21] Although not identified as a change to the test, the Court also reworded the first part to ask whether the litigant had articulated a "serious justiciable issue."[22] The courts in *Alberta Union of Public Employees* and *Council of Canadians with Disabilities* applied this revised version of the test.

1. *Alberta Union of Public Employees v Alberta*

In *Alberta Union of Public Employees v Alberta*, the Alberta Court of Appeal overturned a lower court decision to grant a union, and three of its members, public interest standing. The plaintiffs had challenged a new statute, the *Critical Infrastructure Defence Act* (*CIDA*).[23] *CIDA* imposed penalties and imprisonment on people and organizations for a range of activities, including "entering" onto

17. *Minister of Justice (Can.) v Borowski*, 1981 CanLII 34 (SCC) at 598 [*Borowski #1*], rev'g on other grounds *Borowski v Minister of Justice of Canada and Minister of Finance of Canada*, 1980 CanLII 2279 (SKCA), rev'g in part 1980 CanLII 2238 (SKKB).
18. *Finlay*, *supra* note 5.
19. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside Sex Workers*].
20. *Ibid* at paras 3, 36.
21. *Ibid* at para 44 [emphasis added]; see discussion of this change in Lisa Kerr & Elin Sigurdson, "'They Want In': Sex Workers and Legitimacy Debates In the Law of Public Interest Standing" (2017) 80 SCLR (2d) 145 (QL) at para 61.
22. *Ibid* at para 2. On justiciability, see Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed (Toronto: Thomson Reuters Canada, 2012) at 32. See also the text accompanying note 42.
23. *Alberta Union of Public Employees* (ABCA), *supra* note 12, challenging *Critical Infrastructure Defence Act*, SA 2020, c C-32.7 [*CIDA*].

essential infrastructure "without lawful right, justification or excuse."[24] According to one member of the Alberta Legislative Assembly, *CIDA* was "introduced primarily in response to blockades by 'green zealots and eco radical thugs'", and scholars have noted that it formed part of a larger legislative agenda seemingly targeting progressive activism.[25]

The plaintiffs were concerned with how *CIDA* interfered with the union and its members' ability to picket and leaflet during collective bargaining. They challenged the constitutionality of the law on a number of grounds, including that it infringed their *Charter*-protected freedoms of expression, assembly, and association; that section 7 of the *Charter* was infringed by the statute's "vague and overbroad language" as well as its "disproportionate and arbitrary penalties"; and that the statute was *ultra vires* the province as it infringed on the federal government's powers over criminal law and interprovincial pipelines.[26] The plaintiffs sought a declaration that *CIDA* was unconstitutional and of no force and effect.[27] They launched their challenge six days after the statute was passed and before anyone had been charged under it.[28]

After the plaintiffs filed their Statement of Claim, and before any further steps were taken in the litigation, the Government of Alberta applied to strike or dismiss the claim on the following grounds:

> The Statement of Claim discloses no reasonable claim, is irrelevant or improper, and has no merit. The remedies sought in the Claim are premature; and are purely speculative and hypothetical. Further or in the alternative, the Plaintiffs have no standing to bring this Claim.[29]

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24. *Ibid*, ss 2-3.

25. Jodi Lazare, "Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?" (2020) 58:1 Alta L Rev 83 at 89, citing Alberta, Legislative Assembly, *Alberta Hansard*, 30-2 (26 February 2020) at 12 (Michaela Glasgo) online: <docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_30/session_2/20200226_0900_01_han.pdf>. Lazare likens *CIDA* to another statute passed by the same government in 2019, the *Trespass Statutes* (*Protecting Law-Abiding Property Owners*) *Amendment Act*, 2019, SA 2019, c 23, which Lazare indicates was targeted at farm-based animal rights protestors. See also Jennifer Koshan, Lisa Silver & Jonnette Watson Hamilton, "Protests Matter: A *Charter* Critique of Alberta's Bill 1" (9 June 2020), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2020/06/Blog_JK_LAS_JWH_Bill1.pdf>. Legislation like *CIDA* is not unique to Alberta. Writing in 2022, Nick Crockett noted that 18 American states had enacted similar legislation: Nick Crockett, "The Rise of Critical Infrastructure Protest Legislation and Its Implications for Radical Climate Activism" (2022) 33:2 Colo Envtl LJ 407 at 420.

26. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim at para 8).

27. *Ibid* (Statement of Claim at para 42).

28. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 2. They argued that the statute also ran afoul of provisions in Alberta's Bill of Rights and international labour law instruments (*ibid* at paras 37-39).

29. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Application to Strike, Respondent at paras 4-5).

A Justice of the Court of Queen's Bench of Alberta (as it was then known) dismissed the Government's application, finding that the Court should exercise its discretion to grant the plaintiffs public interest standing. The Government appealed and the Alberta Court of Appeal reversed the lower court's decision, finding that the lower court erred in granting public interest standing to the applicants. The Alberta Court of Appeal held that claim lacked a "factual platform established by evidence" and thus the litigation was not a reasonable and effective way to challenge the legislation.[30] It also held that bringing a claim without standing amounted to an abuse of process.[31]

2. *British Columbia (Attorney General) v Council of Canadians with Disabilities*

In the case of *British Columbia (Attorney General) v Council of Canadians with Disabilities*, the SCC granted public interest standing to a not-for-profit.[32] The not-for-profit sought to challenge the constitutionality of British Columbia legislation that allowed patients with mental disabilities to be subjected to involuntary treatment on the basis of sections 7 and 15 of the *Charter*.

Initially, the not-for-profit and two individual plaintiffs, both of whom had been subject to involuntary treatment, brought the litigation. The two individual plaintiffs discontinued their litigation, and the not-for-profit amended its notice of civil claim to plead that it was entitled to public interest standing.[33] The Attorney General of British Columbia applied to dismiss the claim on the basis that the not-for-profit lacked standing.

The British Columbia Supreme Court granted the Attorney General's application and dismissed the not-for-profit's claim, finding that it had failed the first and third parts of the test for public interest standing and only "weakly" met the requirement of a genuine interest.[34] It held that the plaintiff's factual basis was insufficient and that the constitutional issues could be raised by directly impacted individuals.[35] The British Columbia Court of Appeal found that the lower court had erred on the question of whether there was a serious justiciable issue, and remitted the matter to the lower court for reconsideration.[36] The SCC held that both lower courts erred: the British Columbia

30. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at paras 1, 82.
31. *Ibid* at para 18.
32. *Council of Canadians with Disabilities* (SCC), *supra* note 13.
33. *Ibid* at para 10.
34. *MacLaren*, *supra* note 13 at paras 40 (no serious justiciable issue), 53 ("weakly" meets the genuine interest criteria), 96 (not a reasonable and effective means), 98-99 (claim dismissed).
35. *Ibid* at paras 37, 95.
36. *Council of Canadians with Disabilities* (BCCA), *supra* note 13 at paras 114 (error), 124 (remit for reconsideration).

Supreme Court in denying standing and the British Columbia Court of Appeal in remitting the matter back to the lower court. It granted public interest standing to the not-for-profit, noting that there were serious limitations to individuals with mental disabilities pursuing *Charter* litigation, and that the organization could call individuals to provide evidence about their experiences without joining them as litigants.

II. Prematurity and Public Interest Standing

An important difference between *Alberta Union of Public Employees* and *Council of Canadians with Disabilities* is that in the latter case, there was substantial evidence available on how the challenged law was operating. People were being subjected to involuntary treatment under the impugned legislation. In contrast, in the former case, the plaintiffs launched their challenge of *CIDA* six days after the legislation had come into force.[37] Nobody had been charged under it by the time the challenge was launched, and 18 months later, when the Alberta Court of Appeal released its reasons, it noted that the statute still had not been "invoked against anyone."[38] Thus, the applicants could not provide evidence of how individuals were affected when subjected to the statute's punitive provisions. However, the union's argument was not merely that the law *might* be invoked against a person in a manner that was unconstitutional but that the very existence of vaguely worded and punitive legislation inhibited people from exercising their constitutionally protected freedoms of expression, assembly, and association.

In *Alberta Union of Public Employees*, the Alberta Court of Appeal characterized the plaintiffs' claim as premature because they were attempting to litigate a constitutional question on the basis of "hypothetical scenarios".[39] Lorne Sossin has characterized hypothetical questions as one element of the doctrine of ripeness. Ripeness refers to the principle "that a person's interests must be affected by an action or law prior to their challenging it."[40] A claim that is not sufficiently ripe is called premature.[41] The ripeness principle is part of the larger doctrine of justiciability, and gives courts discretion to decline to hear a case if it determines that the matter is premature.[42]

37. *Alberta Union of Provincial Employees* (ABCA), *supra* note 12 at para 2. *CIDA* came into force on June 17, 2020.

38. *Ibid* at para 5. The statute was eventually used to charge Arthur Pawlowski, a controversial pastor involved in an anti-lockdown blockade in Coutts, Alberta: see Meghan Grant, "Calgary preacher guilty of mischief for urging truckers to continue Coutts border protest", *CBC News* (2 May 2023), online: <cbc.ca/news/canada/calgary/calgary-preacher-artur-pawlowski-coutts-charges-1.6828385>.

39. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 1.

40. Sossin, *supra* note 22 at 40.

41. Hogg & Wright, *supra* note 16 at 59-24.

42. Sossin, *supra* note 22 at 32.

Justiciability is a separate concept from standing, concerned with the question of what issues a court should hear as opposed to *who* is able to bring the claim;[43] however, the concepts are intimately connected. The first part of the test for public interest standing requires an applicant to satisfy the court that the issue they wish to argue is both *serious* and *justiciable*.[44] In *Canadian Bar Association v British Columbia*, a case about the (in)sufficiency of civil legal aid, the British Columbia Court of Appeal analyzed the question of whether the issue was justiciable before considering the question of standing. It reasoned that a litigant pursuing a non-justiciable claim could not satisfy the first part of the public interest standing test.[45]

Not all claims based on hypothetical examples are non-justiciable; the analysis is complicated.[46] The SCC has repeatedly endorsed the use of hypothetical examples to assess the constitutionality of legislation that is alleged to violate section 12 of the *Charter*'s prohibition on cruel and unusual punishment.[47] The SCC recently reaffirmed this practice in *R v Hills*, a case decided after both *Alberta Union of Public Employees* and *Council of Canadians with Disabilities*.[48] Both the SCC and Sossin note that the use of hypothetical examples is not limited to section 12 cases, and cite *Big M Drug Mart* to illustrate how a case can rely on hypothetical examples to determine that legislation infringed the *Charter*.[49] In *Big M Drug Mart*, the majority reasoned that a Sunday closing law was unconstitutional as against a corporation based on the following hypothetical involving the *Charter* rights of an individual:

43. Hogg & Wright, *supra* note 16 at 59-3.

44. *Downtown Eastside Sex Workers*, *supra* note 19 at para 2; and see Sossin, *supra* note 22 at 258.

45. 2008 BCCA 92 [*Canadian Bar Association* (BCCA)] at para 11, aff'g on different grounds 2006 BCSC 1342, leave to appeal to SCC refused, 2008 CanLII 39172 (SCC), as discussed in Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid" (2007) 40:2 UBC L Rev 727; and Bailey, *supra* note 8 at 271. The interlocking questions of justiciability and public interest standing have more recently arisen in youth-led climate change litigation: see e.g. *Mathur v Ontario*, 2020 ONSC 6918 at paras 103-140, 238-253 and discussed in Nathalie J Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The *Charter*'s Section 15(1) Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 JL & Equality 1 at 37-40, 61-62.

46. Sossin, *supra* note 22 at 48-83.

47. *Ibid* at 49.

48. 2023 SCC 2 at paras 67-93 [*Hills*].

49. *Ibid* at paras 70, 72; Sossin, *supra* note 22 at 52; see also Sossin, "The Justice of Access", *supra* note 45 at 736, citing additional examples, including *R v Oakes*, 1986 CanLII 46 (SCC) and *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*]; see also *R v Heywood*, 1994 CanLII 34 (SCC) at 799.

> If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.[50]

Consider also the SCC's 1989 decision in *Edmonton Journal v Alberta*.[51] A newspaper challenged legislation that restricted it from publishing information about family and civil claims on the basis that the legislation infringed the newspaper's freedom of expression. The case turned on section 1 of the *Charter*, and the majority and dissent both relied on hypotheticals to analyze whether the legislation was a reasonable limit of freedom of expression protections under section 2(b). The main disagreement between the majority and the dissent had to do with what types of information the legislation prohibited the newspaper from publishing. For example, Cory J expressed concern that the newspaper could be subject to enforcement proceedings "if... [it] discussed in general terms the kinds of evidence introduced" in a lawsuit without identifying the litigants or "if... [it] chose to comment on the conduct or remarks of a judge or counsel."[52] In dissent, La Forest J rejected the contention that either of these hypotheticals entitled the Attorney General to take enforcement proceedings under the legislation.[53]

Sossin distinguishes between the permissible use of *hypothetical examples* and *hypothetical claims*, which are problematically premature because they lack a "live dispute" involving "real people in real situations."[54] A litigant's invocation of hypothetical examples may indicate that their claim is problematically hypothetical, but not in every case. Problematically hypothetical claims fall into two categories: speculative or contingent questions, and abstract or academic questions.[55] In the former category, Sossin includes situations where people have challenged legislation under which they could be prosecuted, but have not yet been.[56] In the latter category, he includes cases where litigants lack a live interest and cases where there is an insufficient factual foundation.[57] The following three subsections examine each of these three subcategories of hypothetical cases, consider if the *Alberta Union of Public Employees* case falls into any of them, and conclude that it does not.

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50. *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) at para 100 [*Big M Drug Mart*]. There is complexity around when a corporation can challenge the constitutionality of legislation based on a breach of a hypothetical individual's *Charter* rights: see Hogg & Wright, *supra* note 16 at 59-12-19; Howard Kislowicz, "Business Corporations as Religious Freedom Claimants in Canada" (2017) 51 RJTUM 337 at 346-47; however, this issue was not raised in *Alberta Union of Public Employees* (ABCA), *supra* note 12, and likely would not need to be, given that three of the plaintiffs were individuals.
51. June Ross, "Standing in *Charter* Declaratory Actions" (1995) 33:1 Osgoode Hall LJ 151 at 168, citing *Edmonton Journal v Alberta* (*Attorney General*), 1989 CanLII 20 (SCC) [*Edmonton Journal* (SCC)], rev'g 1987 ABCA 147 (CanLII) [*Edmonton Journal* (SCC)], aff'g 1985 CanLII 1233 (ABKB) [*Edmonton Journal* (ABKB)].
52. *Edmonton Journal* (SCC), *supra* note 51 at 1346. Wilson J concurred on this point (*ibid* at 1357).
53. *Ibid* at 1375.
54. Sossin, *supra* note 22 at 48-49.
55. *Ibid* at 53.
56. *Ibid* at 53-54.
57. *Ibid* at 71-76.

1. Speculative or Contingent Questions

A speculative case is "contingent on future events."[58] Sossin cites the 1964 SCC decision in *Saumur v Canada* as an example of a speculative case, and it is a useful case to spend some time with because it bears many similarities to *Alberta Union of Public Employees*.[59] In *Saumur*, a member of the Jehovah's Witness religious community challenged a Québec statute the day after it came into force on the basis that it was *ultra vires* the province. The legislation prohibited people from making "outrageous or injurious" attacks on other religions and provided that people who breached the act could be fined or made subject to a court injunction.[60] The plaintiff had not been charged or enjoined under the legislation. The speculative aspect of the case was that someone might be charged under the legislation at some future point, and such a charge would be unconstitutional because it would amount to a provincial exercise of the federal criminal power. The SCC described the plaintiff's claim as: "asking us to prevent the troubles that this legislation might cause him and protect him from inconvenience that he has not suffered yet."[61] The SCC declined to decide the constitutional question, finding that the plaintiff lacked a sufficient interest in the matter.

Some of the claims advanced by the plaintiffs in *Alberta Union for Public Employees* were speculative, and some of them were not. The plaintiffs argued that *CIDA* might deprive individuals of their liberty under section 7 of the *Charter*. This was a speculative claim because it was based on the possibility that a person might be arrested under the law. But the plaintiffs also argued that the existence of broadly worded, punitive legislation had cast a chill that prevented the union and its members from exercising their freedoms of expression, association, and assembly. The chill was not speculative, but a fact capable of proof from the moment the legislation was enacted.

This division between the speculative and non-speculative claims in *Alberta Union for Public Employees* is evident in the Court of Queen's Bench of Alberta's analysis. The Justice accepted, for the purposes of the motion to strike, that there was a chill.[62] She then went on to develop a number of hypothetical examples of situations that may give rise to charges upon which the constitutionality of the legislation could also be tested.[63] These hypothetical examples were relevant to analyzing the claims based on potential invocations of the law, but not those based on chill.

58. *Ibid* at 53.

59. *Saumur et al c Procureur général du Québec*, 1964 CanLII 67 (SCC) [*Saumur*]. Additionally, Sossin, *supra* note 22 at 53 cites *Smith v The Attorney General of Ontario*, 1924 CanLII 3 (SCC) [*Smith*], discussed in Part II(3).

60. *An Act Respecting Freedom of Worship and the Maintenance of Good Order*, 2-3 Eliz II, c 15 (SQ, 1953-4), ss 2, 10.

61. *Saumur*, *supra* note 59 at 256 [translated by author].

62. *Alberta Union of Public Employees* (ABQB), *supra* note 12 at para 17.

63. *Ibid* at paras 38-39.

The Court of Queen's Bench of Alberta was not prohibited from using hypothetical examples to evaluate the plaintiffs' speculative claims. As set out above, the SCC has employed hypothetical examples in its analysis of *Charter* claims and has recently endorsed this practice in strong terms. But, even if this case was not an appropriate one for the use of hypothetical examples, they were unnecessary to analyze whether the legislative chill constituted an infringement on *Charter* rights. The claim about chill was not speculative.

2. Abstract or Academic Questions – No Live Interest

An abstract case can be one where litigants lack a "live interest."[64] Sossin cites the 1989 SCC decision in *Borowski #2* as an example of a case that is hypothetical because the plaintiff lacked a live interest.[65] Mr. Borowski, an anti-abortion activist, appeared twice before the SCC on the issue of standing.

In its first decision, *Borowski #1*, the SCC granted public interest standing to Mr. Borowski to challenge the provisions of the *Criminal Code* that allowed doctors to perform therapeutic abortions.[66] At the time, performing an abortion was a criminal offence unless it was covered by the exculpatory provision.[67] The applicant alleged that the exculpatory provisions violated the *Charter* rights of feotuses.

After being granted public interest standing in *Borowski #1*, Mr. Borowski's claim returned to the trial level for an argument on the merits. He received unfavourable decisions at the Court of Queen's Bench for Saskatchewan (as it was then known) and the Saskatchewan Court of Appeal; both levels of court held that *Charter* protections did not apply to foetuses.[68] Mr. Borowski appealed to the SCC, but before his matter was heard, the *Criminal Code* provisions that he was challenging were struck down as unconstitutional in *R v Morgentaler*.[69] The SCC then declined to decide the substantive merits of Mr. Borowski's claim, holding instead that the claim was moot and Mr. Borowski did not have standing to pursue it. Mr. Borowski was no longer challenging the constitutional validity of legislation, but rather was asking the Court to rule on an abstract question, namely the scope of the protections contained in sections 7 and 15 of the *Charter*.[70]

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64. Sossin, *supra* note 22 at 71.
65. *Ibid*.
66. *Borowski #1*, *supra* note 17.
67. *Criminal Code*, RSC 1970, c C-34, s 251.
68. *Borowski v Attorney General of Canada and Minister of Finance of Canada*, 1983 CanLII 2157 (SKKB), aff'd 1987 CanLII 4890 (SKCA) [*Borowski #2* (SKCA)], aff'd on other grounds 1989 CanLII 123 (SCC) [*Borowski #2* (SCC)]. Both levels of court found section 7 did not apply to foetuses. The Saskatchewan Court of Appeal held that section 15 also did not apply; this argument had not been "seriously pursued" before the Court of Queen's Bench for Saskatchewan because that section of the *Charter* was not in force at the time: *Borowski #2* (SKCA) (*ibid* at para 11).
69. *R v Morgentaler*, 1988 CanLII 90 (SCC).
70. *Borowski #2* (SCC), *supra* note 68 at 352, 366-67.

The claim in *Alberta Union of Public Employees* was not abstract in the sense contemplated in *Borowski #2*. The plaintiffs were not asking the court to opine, in the abstract, on the scope of the freedoms of expression, assembly, or association, but rather, to consider if an existing, in-force statute infringed on those freedoms.

3. Abstract or Academic Questions – Cases Lacking a Factual Foundation

Sossin cites two cases as exemplars of claims that are hypothetical because they lack a factual foundation: *Danson v Ontario*[71] and *MacKay v Manitoba*.[72] These cases involved litigants who were unsuccessful because they failed to plead sufficient facts about the legislation's real-world impact and tried instead to rely on facts about the legislation's background or social context.

It will be helpful, in thinking about these cases, to distinguish between facts and evidence. Facts are assertions that are capable of proof. Adequate pleadings must set out the facts that, if proven, will entitle litigants to the relief they seek. Often, litigants will have competing accounts of the facts. Evidence is the material that parties put before the court to support their account of the facts, and can include documents, oral or written testimony, and expert opinions.

In *Danson v Ontario*, a lawyer brought a constitutional challenge without facts or evidence.[73] A new procedural rule allowed courts to make lawyers personally liable for costs awards, and the lawyer alleged that the rule infringed the independence of the legal profession, was *ultra vires* the province's powers over the administration of justice, and violated sections 7 and 15 of the *Charter*.[74] His challenge was brought under a provision of Ontario's *Rules of Civil Procedure* that allowed for a litigant to bring a proceeding by way of application where "it is unlikely that there will be any material facts in dispute."[75]

The SCC quashed Danson's application, holding that the claim could not be decided in the abstract because the challenge was based on the effect of the law on the legal profession in Ontario.[76] To decide the constitutional issue, the court would require two types of facts: adjudicative *and* legislative facts.[77] It described the distinction between these two facts as follows:

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71. *Danson v Ontario* (*Attorney General*), 1990 CanLII 93 (SCC) [*Danson*].
72. 1989 CanLII 26 (SCC) [*Mackay*].
73. *Danson*, *supra* note 71 at 1091. Eventually, on appeal to the SCC, he did make an application to adduce fresh evidence, but the SCC decided his appeal on the basis of whether he could challenge the rule without a factual underpinning (*ibid* at 1098). However, it is unclear how additional evidence would assist his position if his pleadings did not contain the necessary facts, and perhaps he should have instead applied to amend his pleadings.
74. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 57.07 [*Rules of Civil Procedure* (ON)].
75. *Ibid*, r 14.05(3)(h).
76. *Danson, supra* note 71 at 1101.
77. *Ibid*.

> Adjudicative facts are those that concern the immediate parties: in Davis' [sic] words, "who did what, where, when, how, and with what motive or intent ..." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements.[78]

The applicant had indicated he would put legislative facts before the court in his argument, but the Court held that, in this case, the applicant's factual foundation was insufficient. The Court struck the claim, likening it to the case it decided a year earlier: *Mackay*.

In *Mackay*, a taxpayer challenged Manitoba legislation that allowed provincial election candidates to have up to 50 per cent of their expenses reimbursed by the provincial government if they received more than 10 per cent of the vote.[79] The taxpayer alleged that the legislation violated their freedom of expression, but their application was dismissed by the SCC.[80] At different points in the Court's analysis, it describes the defect in the plaintiff's case as a "factual vacuum" or an insufficient evidentiary record, but these are, as set out above, distinct defects.[81] Counsel for the applicant did appear to have provided some evidence of *legislative* facts to the court: they cited statistics about the popularity of neo-Nazi political parties in Canada and made representations about how more money in campaigns negatively impacted the quality of discourse.[82] The SCC noted: "It may well be that one could take judicial notice of some of the broad social facts referred to by the appellants, but here there is a total absence of a factual foundation to support their case."[83] From this, one can surmise that it was the combined absence of *adjudicative* facts, and evidence to establish them, which was fatal to the applicant's case.

Below, Part IV(1) will outline that there are exceptional cases in which courts are prepared to decide matters solely on the basis of legislative facts, and thus *Danson* and *Mackay* should not be read as a complete bar on this practice.

The question in *Alberta Union of Public Employees* was not put before the court based solely on legislative facts. Rather, the plaintiffs' pleadings set out adjudicative facts that help particularize the impact of the chill. These facts included a description of the employees represented by the union, some of the collective agreements for which the union was the exclusive bargaining agent, and that

78. *Ibid* at 1099, citing Kenneth Culp Davis, *Administrative Law Treatise*, Vol 2 (St Paul, Minn: West Publishing, 1958) at para 15.03.

79. *The Elections Finances Act*, SM 1982-83-84, c 45.

80. *Mackay*, *supra* note 72 at 360.

81. Compare *ibid* at 361 ("*Charter* decisions should not and must not be made in a factual vacuum.") and at 363 ("In this case there has been not one particle of evidence put before the Court.").

82. *Ibid* at 363-66.

83. *Ibid* at 366.

the collective agreements for at least two of the bargaining units had expired in March 2020 (three months before the Statement of Claim was filed) and were being renegotiated.[84] According to the Statement of Claim, "an inability, or perceived inability to engage in leafletting, or lawful picketing will substantially hinder AUPE's ability to meaningfully engage in the collective bargaining process."[85]

The claim that *CIDA* was so vague and punitive that it prevented Albertans from exercising their *Charter*-protected rights is not hypothetical in any of the senses considered by Sossin. The chilling effect of *CIDA* became a fact, capable of proof, the moment that the legislation came into force, or at the very latest when people in Alberta circumscribed their activities because they feared repercussions under *CIDA*. The key question before the Court was whether the magnitude of the threat posed by the legislation, even without being invoked against anyone, was sufficiently oppressive to constitute an unconstitutional infringement of *Charter*-protected rights, including those of expression, assembly, and association.

The 1924 SCC case of *Smith v Ontario* is often cited as illustrating the restrictive approach to public interest standing taken by Canadian courts prior to *Thorson, McNeil*, and *Borowski #1*.[86] And yet, even in this case, the Court indicated that a statute might be so oppressive that it will be appropriate to grant a party standing to bring a pre-emptory challenge. *Smith v Ontario* involved an individual challenging the validity of temperance legislation, despite not been charged under it.[87] In three sets of concurring reasons, the SCC held that the plaintiff did not have standing. Duff J (on behalf of himself and Maclean J) acknowledged that this put the litigant in a difficult position:

84. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim, paras 7-20).

85. *Ibid* (Statement of Claim, para 20); suggesting additional factual details that the plaintiffs could have included in their pleadings see: Jennifer Koshan, Lisa Silver & Jonnette Watson Hamilton, "Frost on the Constitutional Windshield: Challenge to *Critical Infrastructure Defence Act* Struck by Alberta Court of Appeal" (8 February 2022), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2022/02/Blog_JK_LS_JWH_CIDA_ABCA.pdf>.

86. *Smith, supra* note 59, and see discussion of *Thorson, supra* note 16, *McNeil, supra* note 16 and *Borowski #1*, *supra* note 17. Citing *Smith* (*ibid*) as an exemplar of a historically restrictive approach to standing, see e.g. *Cabana v Newfoundland and Labrador*, 2015 NLTD(G) 158 at paras 7-12, and the initial decision in *Downtown Eastside Sex Workers United Against Violence Society v Attorney General* (*Canada*), 2008 BCSC 1726 at paras 53-57.

87. *Smith, supra* note 59.

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal.[88]

However, Duff J went on to worry that if the court granted standing to this litigant, it "would involve the consequence that virtually every resident of Ontario could maintain a similar action".[89] In his concurring reasons, Mignault J expressed a similar concern that granting standing to the litigant would open the doors for every Ontarian to challenge the temperance legislation in court. He added important nuance, noting that on a different set of facts, it may be important for a court to allow a party to challenge a law pre-emptively, "[t]here might conceivably be such a situation of oppression, by reason of drastic and arbitrary legislation, that would entitle this argument to very serious consideration."[90] The Court in *Smith* did not consider a prohibition on purchasing alcohol to be sufficiently drastic and arbitrary to warrant a grant of standing, but allowed that the outcome might be different in other circumstances.

If one accepts the possibility that *CIDA* infringed the *Charter* freedoms of the plaintiffs and other Albertans from the moment it came into force, then the question becomes how long people should be required to suffer such infringements before turning to the courts for relief. The plaintiffs launched their challenge within days of the legislation being passed, but 18 months later, when the Alberta Court of Appeal released its decision, still no one had been charged under *CIDA*. If the existence of the legislation is alleged to chill *Charter* rights, but a direct challenge is not possible because no one has been charged under it, at some point the courts *must* be willing to grant a litigant public interest standing, or else the legislation will be immunized from judicial oversight.

The magnitude of the alleged infringement should shape how quickly parties can turn to the courts for relief. Sossin notes that when deciding whether to hear a claim where ripeness has been raised as an issue, courts must "strik[e] a balance between the requirements of an adversarial system (e.g., the necessity of a sufficient factual record) and the potential hardship to litigants if their day

88. *Ibid* at 337. Compare this reasoning with Binnie and LeBel's reasons on standing in *Chaoulli*, *supra* note 49 at para 189, where they held that public interest standing should be granted to the litigants because *as residents of Québec* they were directly affected by the prohibition on private insurance, though not to a greater or lesser extent than any other resident of Québec. Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2009) 25 NJCL 191 at 195-96, and Bailey, *supra* note 8 at 278-79, point to *Chaoulli* (*ibid*) as an example of the SCC taking a liberal and generous approach to standing.

89. *Smith, supra* note 59 at 337. Idington J's reasons were brief and did not engage with this point (*ibid* at 332-34).

90. *Ibid* at 347; see also Bogart, *supra* note 6 at 13 (arguing that standing may be appropriate in cases where all people are equally affected if the governmental act or legislation is of sufficient import).

in court is denied or deferred."[91] The plaintiffs in *Alberta Union of Public Employees* alleged that *CIDA* impaired key associational activities of workers involved in collective bargaining. These key democratic activities warrant greater protection than one's ability to purchase alcohol, which was the practice constrained by the legislation in *Smith*. But that leaves open the question of whether *CIDA*'s chill was of a *sufficient* magnitude to warrant a grant of public interest standing.

The Alberta Court of Appeal in *Alberta Union of Public Employees* engaged with the question of whether *CIDA* was so oppressive that a litigant should be allowed to challenge it before being charged under it. It asked: "how much 'chilling' does it take to breach the *Charter*? ...how much additional chill is demonstrably justified in a free and democratic society?"[92] It determined that it could not answer these questions "without an evidentiary record."[93] But, the Court should have accepted the facts, as pled by the plaintiffs, as true. This was the approach taken by the court below and how the matter was argued by the parties on appeal. Instead, the Alberta Court of Appeal created an unfair expectation of evidence because it analyzed the question of standing *as* an abuse of process. Part III examines why the Court was wrong to conflate standing with abuse of process. Part IV explains the repercussion of this conflation on how the Court evaluated the absence of evidence.

III. Abuse of Process

In *Alberta Union of Public Employees*, the Alberta Court of Appeal analyzed the question of standing through the lens of abuse of process.[94] The Alberta Court of Appeal's decision could be read as saying that *any* challenge to standing should be framed as an abuse of process, but if that is what the Court intended to say, it got the law wrong. Where a party decides to litigate without having a strong claim to public interest standing, that might amount to an abuse of process; but not in all cases. Absent evidence of serious unfairness in a party's decision to litigate, standing and abuse of process should be treated as analytically separate grounds for dismissing a claim.

Serious unfairness is a vital component of abuse of process. The SCC describes abuse of process as "engag[ing] the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute."[95] Superior courts have inherent jurisdiction to stay or dismiss a claim for abuse of process, and this power has been bolstered by provincial procedural

91. Sossin, *supra* note 22 at 103.

92. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 40.

93. *Ibid* at para 42.

94. *Ibid* at para 18: "When standing is challenged, that is most appropriately seen as an application for a stay under R. 3.68(1), because the action is an abuse of process under R. 3.68(2)(d)."

95. *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 40 [*Behn*], citing *Canam Enterprises Inc v Coles*, 2000 CanLII 8514 (ONCA) at para 55, as discussed in Gerard J Kennedy, "The Alberta Court of Appeal's Vexatious Litigant Order Trilogy: Respecting Legislative Supremacy, Preserving Access to the Courts, and Hopefully Not to a Fault" (2021) 58:3 Alta L Rev 739 at 740.

rules.[96] The "primary focus [of the doctrine] is the integrity of courts' adjudicative functions, and less on the interests of parties."[97] It is a "compendious principle" that can be applied in a range of different situations, including both criminal and civil proceedings.[98] It is also a standalone tort.[99] In the civil context, abuse of process is commonly used to prevent parties from relitigating a matter when the strict requirements of issue estoppel are not established.[100] It has also been used to address unfairness caused by a delay in proceedings and where litigants try to use the civil court process to hold litigants liable under penal and regulatory statutes.[101]

The SCC has indicated that standing and abuse of process are separate concepts. In *Downtown Eastside Sex Workers*, the SCC identified abuse of process as an alternative to public interest standing that could be used to address similar policy concerns.[102] In its 2013 decision of *Behn v Moulton Contracting Ltd*, the Court was prepared to strike the defendants' defences on the basis they constituted an abuse of process and thus the Court did not need to decide whether the defendants had standing to raise them.[103]

96. Paul M Perell, "A Survey of Abuse of Process" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2007* (Toronto: Thomson Carswell, 2007) 243-69 at 244; and see e.g. *Alberta Rules of Court*, Alta Reg 124/2010, rr 1.4(2)(b)(ii), 3.68(2)(d) [*Alberta Rules of Court*]; *Rules of Civil Procedure* (ON), *supra* note 74, rr 2.1.01, 21.01(3)(d), 25.11; *Supreme Court Civil Rules*, BC Reg 168/2009, r 9-5(1)(d) [*Supreme Court Civil Rules* (BC)].

97. *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 36 [*Abrametz*].

98. *Reece v Edmonton (City)*, 2011 ABCA 238 at para 16 [*Reece* (ABCA)], aff'g 2010 ABQB 538 [*Reece* (ABQB)], leave to appeal to SCC refused, 2012 CanLII 22074 (SCC); on abuse of process in criminal proceedings, see e.g. *R v Jewitt*, 1985 CanLII 47 (SCC).

99. Perell, *supra* note 96 at 263; John Irvine, "The Resurrection of Tortious Abuse of Process" (1989) 47 Can Cases L Torts 217; see also *Grenon v Canada Revenue Agency*, 2016 ABQB 260 at paras 99-125, varied in part but not on this point, 2017 ABCA 96 at paras 31-33, leave to appeal to SCC refused, 2017 CanLII 61800 (SCC).

100. Garry D Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990) 69:4 Can Bar Rev 623; Perell, *supra* note 96 at 254.

101. *Reece* (ABCA), *supra* note 98 at paras 16, 20.

102. *Downtown Eastside Sex Workers*, *supra* note 19 at para 28. Other alternative means the court identified were striking a claim for lack of merit and costs awards.

103. *Behn, supra* note 95. For critical analysis of the *Behn* decision, see Shiri Pasternak & Irina Ceric, "'The Legal Billy Club': First Nations, Injunctions, and the Public Interest" (2023) 1:1 TMU L Rev 7; Sarah Dalton, "Our Land, Our Way: The Rule of Law, Injunctions, and Indigenous Self-Governance" (2022) 73 UNBLJ 312 at 328; Bruce McIvor, "The Duty to Consult—A Roadblock to Direct Action" (21 May 2013), online (blog): *First Peoples Law* <firstpeopleslaw.com/public-education/blog/the-duty-to-consulta-roadblock-to-direct-action>.

Despite standing and abuse of process being separate concepts, government litigants in Alberta have frequently challenged litigation on both grounds. Writing in 2019, Shaun Fluker described this trend as "a troublesome conflation of abuse of process and public interest standing developing in the Alberta law."[104] He referenced three cases as evidence of the trend: a pair of lawsuits involving Lucy the Elephant, a longtime resident of the Edmonton Valley Zoo, and *Alberta's Free Roaming Horses Society v Alberta*.[105]

Yet, even in the cases identified by Fluker, where the government litigants seemed to be conflating two doctrines, the Alberta courts analyzed them separately. Both Lucy lawsuits turned on a party raising a claim through a channel that the respondents alleged was inappropriate. In the first Lucy case, as in *Behn*, the Court held it was unnecessary to decide the question of standing *because* there was an abuse of process, and thus dismissed the case on that basis.[106] Then Chief Justice Catherine Fraser wrote a lengthy dissent, finding that the litigation was not an abuse of process and that the applicants should have been granted public interest standing. In the second Lucy lawsuit, the Alberta Court of Appeal again dismissed the case. This time it found no abuse of process, but held it was reasonable for the lower court to deny the plaintiff standing.[107] In *Alberta's Free Roaming Horses Society*, the Court dealt with the abuse of process allegation after finding that the three parts of the public interest standing test were satisfied.[108] The Alberta government argued that the litigation was an abuse of process because the applicants had an improper or collateral purpose.[109] The Court found no evidence before it of a collateral or improper purpose and no abuse of process. It granted the applicant public interest standing, but granted summary dismissal in favour of the government on the basis of a limitations defence.[110]

104. Shaun Fluker, "Public Interesting Standing and Wild Horses in Alberta" (22 November 2019), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2019/11/Blog_SF_FreeRoamingHorses.pdf>; see also Environmental Law Centre, *Standing in Environmental Matters* (Edmonton: Environmental Law Centre, 2014), online: <elc.ab.ca/media/98894/Report-on-standing-Final.pdf> at 21, noting that courts have evidenced a "new concern with 'abuse of process'" in matters involving public interest standing.

105. *Reece* (ABCA), *supra* note 98; *Zoocheck Canada Inc v Alberta* (*Agriculture and Forestry*), 2017 ABQB 764 at [*Zoocheck* (ABQB)], aff'd in part 2019 ABCA 208, leave to appeal to SCC refused, 2019 CanLII 120705 (SCC); 2019 ABQB 714 [*Alberta's Free Roaming Horses Society*].

106. *Reece* (ABCA), *supra* note 98 at paras 36-37. See discussions of this case in Tyler Totten, "Should Elephants Have Standing?" (2015) 6:1 West J Leg Stud 623; Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm" (2013) 50:4 Alta L Rev 783; Peter Sankoff, "Opportunity Lost: The Supreme Court Misses a Historic Chance to Consider Question of Public Interest Standing for Animal Interests" (2012) 30:2 Windsor YB Access Just 129; Katie Sykes & Vaughan Black, "Don't Think About Elephants: Reece v City of Edmonton" (2012) 63 UNBLJ 145.

107. *Zoocheck* (ABQB), *supra* note 105 at paras 48-49.

108. *Alberta's Free Roaming Horses Society*, *supra* note 105 at paras 16-21.

109. *Ibid*.

110. *Ibid* at paras 21, 57.

Although courts analyze abuse of process and public interest standing separately, they are connected concepts.[111] Abuse of process is broad and can be used to challenge many different aspects of a litigant's claim (or defence, as seen in *Behn*). The facts that make the litigation abusive may also be relevant to each of the three parts of the public interest standing test. Where a party seeks to relitigate an issue that has already been decided, that might be relevant to the first part of the standing test, i.e., whether they have a serious, justiciable issue. If a respondent shows that a party has an improper motive in bringing the litigation, that might be relevant to the second part of the standing test, i.e., whether they have a genuine interest in the issue being litigated.[112] The availability of a different procedure for enforcing a right can be important to the abuse of process analysis, but also to the third part of the public interest standing test, i.e., whether the litigation is a reasonable and effective way to bring the issue before the court.[113]

It is difficult to conceive of a scenario where the facts relevant to the abuse of process analysis are not also relevant to a court's discretionary decision to grant public interest standing. If a court found that litigation was an abuse of process, that would seem to preclude a finding that a litigant should be granted public interest standing, but the converse is not true.

There will be cases, likely many of them, where a court decides that it should not exercise its discretion to grant public interest standing to a litigant, and yet nothing about the litigation is so unfair as to rise to the level of an abuse of process. Abuse of process is governed by a different—and more demanding—legal standard than public interest standing. The central question under the abuse of process doctrine is whether the litigation violates "the community's sense of fair play and decency" seriously enough that it would reflect badly on the legal system to allow the litigation to continue.[114] There must be something *especially unfair* about the litigation to ground a finding of abuse of process.[115] Under the public interest standing doctrine, the central question is whether the court should exercise its discretion to allow the party to pursue the litigation, having regard for the

111. The connection between abuse of process and public interest standing was raised in a novel way in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348 at para 56, rev'd on other grounds 2022 BCCA 163, where the court held that it was *not* an abuse of process for the government to challenge the organization's claim to public interest standing, even though the organization had previously been granted public interest standing to litigate a similar topic.

112. *Alberta's Free Roaming Horses Society, supra* note 105 at para 17.

113. *Reece* (ABQB), *supra* note 98 at para 9(c).

114. *Abrametz, supra* note 97 at para 33, citing *Regina v Young*, 1984 CanLII 2145 (ONCA) at 329.

115. See e.g. *Yashcheshen v Government of Saskatchewan and EHealth Saskatchewan*, 2022 SKQB 1 at paras 33, 36 [*Yashcheshen*], where the plaintiff, a vexatious litigant, was found not to have public interest standing and to have abused the court's process by submitting "seriously deficient" pleadings that were "rambling and sweeping"; see also *Humphries v Ontario (Attorney General)*, 2020 ONSC 4460.

competing purposes that weigh against and in favour of allowing parties to litigate a matter when they are not directly affected by it.[116] Courts should analyze these questions separately; conflating them muddies the doctrinal analysis and risks unfairly stigmatizing litigants who lack standing but have not abused the courts' processes.

The standard for finding an abuse of process has not always been so high, and this has led to some confusion when the doctrine is applied in contemporary settings.[117] Earlier in the history of English and Canadian common law, abuse of process was used to stay or dismiss cases where there was no reasonable claim.[118] However, provincial rules of courts now recognize that lack of a reasonable claim and abuse of process are two separate grounds for striking or staying a lawsuit. Striking for lack of a reasonable claim is now better understood as a "separate independent part" of the rules of civil procedure, rather than a "sub-set of the doctrine of abuse of process."[119] Moreover, as discussed below in Part V(2), the evidentiary rules for striking for lack of a reasonable claim differ from the rules applicable to striking for abuse of process. Thus, it is vital that litigants and courts carefully restrict their use of abuse of process to its modern meaning, as a tool to address serious unfairness.

Abuse of process and the public interest standing test require separate analyses, but are related, and the question arises of whether there is a preferable order for carrying out these analyses. In her dissent in the first Lucy lawsuit, Fraser CJ argued that the Court should have analyzed the question of standing first, rationalizing that if the applicants had standing, then their claim could not be an abuse of process.[120] Her rationale is correct: as discussed above, it is unlikely that a grant of public interest standing would ever be appropriate if there were grounds for finding an abuse of process. However, the conclusion she draws about the correct order in which to analyze abuse of process and standing is open to debate. Courts have varied in their approaches, with some analyzing abuse of process first and others starting with public interest standing.[121]

116. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at paras 29-31.

117. With thanks to Gerard Kennedy for drawing this aspect of the doctrine to my attention.

118. *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC) at 972 [*Hunt*], citing *Dyson v Attorney-General (No.1)*, [1911] 1 KB 410, [1910] 12 WLUK 60 at 418-19; and see discussion of the history of this use of the doctrine of abuse of process in English law in *Hunt, ibid* at 968-75.

119. Stephen GA Pitel & Matthew B Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014) 43:3 Adv Q 344 at 349.

120. *Reece* (ABCA), *supra* note 98 at paras 140-41.

121. Examples of cases where abuse of process is dealt with first: *MK v British Columbia* (*Attorney General*), 2020 BCCA 261; *New Directions for Children, Youth, Adults and Families Inc et al v Rural Municipality of Springfield*, 2013 MBQB 243; *Grenon v Canada* (*Attorney General*), 2007 ABQB 403. Examples of cases where public interest standing is dealt with first: *Yashcheshen, supra* note 115; *Forum des Maires de la Péninsule Acadienne Inc c Minister of Justice and Public Safety et al*, 2022 NBKB 174; *Watts v Canada* (*Attorney General*), 2021 ONSC 4611; *Broda v Alberta*, 2020 ABQB 221; *Schnurr et al v Canadian Tire Corporation Limited et al*, 2019 ONSC 5781; *Democracy Watch v Canada* (*Attorney General*), 2021 FC 613 [*Democracy Watch*]; *Strickland v Canada* (*Attorney General*), 2013 FC 475.

It may be expedient for courts to consider the question of abuse of process first. For example, if there was evidence of a litigant having an improper motive that rose to the level of "abuse of process", a court could dismiss the case on that basis. Such a litigant might also lack a "genuine interest" in the issue, thus making it inappropriate for a court to grant them public interest standing. By disposing of the case on the basis of abuse of process, the court would not be required to analyze and weigh the other two parts of the public interest standing test. This approach would accord with the British Columbia Court of Appeal's approach in *Canadian Bar Association*, described above, of assessing justiciability first and moving on to the balance of the standing analysis *only if* a justiciable claim exists.[122]

If a court considers standing first, it will start by weighing all three parts in the public interest standing test. If it decides to deny the litigant standing, the court then needs to consider if there is sufficient unfairness to engage the abuse of process doctrine. There may be situations where there is some benefit to this approach. For example, in the 2021 decision of *Democracy Watch v Canada*, the Court determined that the litigant had public interest standing to pursue some, but not all its claims.[123] The litigant was not allowed to relitigate claims that had previously been decided. The Court then determined that, with the repetitious claims struck, the litigant could proceed *without* abusing process.[124] A court may prefer such an approach because it allows it to address the problematic aspects of the litigation without making a finding of abuse of process, which can be stigmatizing for litigants.

Regardless of the order in which the court analyzes the issues, it is vital that the party alleging abuse of process, and the court applying it, both identify precisely what aspect of the litigation is abusive. Or, in other words, where is the unfairness that threatens the repute of the legal system? Is this relitigation of an issue decided elsewhere? Is this a party motivated by an improper desire to vex the adverse party? Given the breadth of issues that have been considered abuses of process, if a party merely alleges that litigation is abusive, without providing further particulars, the party against whom the allegations are made will have insufficient notice of the case to be met.

The *Alberta Union of Public Employees* case illustrates the unfairness that flows when a party is not given sufficient notice of the particulars of an allegation of abuse of process. Alberta's application did not mention abuse of process as a ground for striking the claim. It generally cited the procedural rules empowering courts to strike or stay a claim on a variety of grounds, but without specifying which of the grounds it would be relying upon.[125] In its memorandum, Alberta alleged that the claim

122. *Canadian Bar Association* (BCCA), *supra* note 45 at para 11. In *Democracy Watch*, *supra* note 121, the court analyzed the issues in this order: (i) justiciability, (ii) public interest standing, and (iii) abuse of process.

123. *Democracy Watch*, *supra* note 121.

124. *Ibid* at para 75.

125. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Application, Her Majesty the Queen in Right of Alberta at para 7).

was an abuse of process "because the Plaintiffs have no standing and the pleadings disclose no cause of action".[126] This framing conflates separate legal tests, but fails to identify what about the litigation was so unfair, oppressive, or vexatious as to bring the administration of justice into disrepute. Alberta's notice of appeal from the Queen's Bench decision did not mention "abuse of process", and its factum argued that the claim should be struck because the parties lacked standing and the claim was premature: it advanced no arguments about any aspect of the litigation amounting to an abuse of process.[127]

Given how the case had proceeded up to the hearing of the matter before the Alberta Court of Appeal, that Court's decision to analyze the claim as an abuse of process seems to have taken the plaintiffs by surprise. In their application for leave to appeal to the SCC, the plaintiffs argued that they should be granted leave, in part, because the Court of Appeal had improperly decided the case on the basis of abuse of process, despite this not having been raised on appeal or by the Court during argument. The plaintiffs describe the resulting unfairness as follows:

> If AUPE was provided notice that the Court of Appeal wished to consider the issue of abuse of process, AUPE would have addressed whether this was the appropriate framework through which to strike the Claim and whether the Claim amounted to an abuse of process at all. AUPE could have provided evidence to establish it had public interest standing as well as to demonstrate the chilling effect Bill 1 has on public demonstrations.[128]

The Court of Appeal's decision to frame the standing issue as a matter of abuse of process impacted how it evaluated the lack of evidence, and this is the point on which the *Council of Canadians with Disabilities* case provides the clearest direction. The following Part examines how to evaluate facts and evidence when applying the public interest standing test.

IV. Facts, Evidence, and the Possibility of Future Evidence

It will be helpful in this section to recall the distinction set out in Part II(3) between facts and evidence. Facts are assertions, made in the litigants' pleadings, that are capable of proof. Evidence is the material that litigants put before the court to support their account of the facts.

In the *Alberta Union of Public Employees* case, the plaintiffs asserted in their statement of claim that *CIDA* would have a "chilling effect on legitimate and peaceful protests, demonstrations, strikes and leafleting."[129] This was a fact capable of proof. To support this account of the effect of *CIDA*, the plaintiffs could have provided testimonials from people who intended to engage in these activities, but then opted not to for fear that they could be arrested for violating *CIDA*. Alternatively, the plaintiffs

126. *Ibid* (Memorandum of Argument, Her Majesty the Queen in Right of Alberta at para 7).

127. "Abuse of process" is mentioned only once in the factum, when Alberta recites the grounds upon which it initially applied to strike the claim: *Alberta Union of Public Employees* (ABCA), *supra* note 12 (Factum, Appellant at para 7).

128. *Alberta Union of Public Employees* (SCC leave), *supra* note 12 (Memorandum of Argument, Appellant at paras 41-42).

129. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim at para 7).

might have provided evidence of a more systemic nature. For example, they could have hired an expert social scientist to survey members of their union about whether they were less willing to engage in protests, demonstrations, strikes, and leafleting because of the risk of punishment posed by *CIDA*. The government could have provided its own evidence to demonstrate a lack of chill. They gestured towards the type of evidence they might present in their written arguments before the Court of Queen's Bench. The government argued that the allegation of a chill was "belied by the fact that AUPE members engaged in an illegal strike and illegal picketing in front of the Royal Alexandra Hospital on October 26, 2020."[130]

None of the applicant's evidence of chill was before the court at the time the Alberta Court of Appeal decided the *Alberta Union of Public Employees* case. The Court decided against the plaintiffs because they had not (yet) produced evidence to support their claims, but this was an unfair expectation. The government applied to strike the claim early in the process: three months after the plaintiffs filed their Statement of Claim and before the government had filed a Statement of Defence.[131] No discovery had taken place yet. The SCC in *Council of Canadians with Disabilities* notes that: "When standing is challenged at a preliminary stage, the plaintiff should not be required to provide trial evidence. That would be procedurally unfair, as it would permit the defendant to obtain evidence before discovery."[132]

Litigants are not required to provide *trial* evidence when their standing is challenged on a preliminary basis, but sometimes they will need to provide some evidence to avoid an adverse decision. Whether evidence is before the court will depend on the substance of the underlying claim, the manner in which the litigation is commenced, and the manner in which standing is challenged. For example, in *Alberta's Free Roaming Horses Society*, the applicant applied for judicial review of the government decision, supported by affidavit evidence. The government applied for summary dismissal of the applicant's claim, and the court relied on the applicant's affidavit evidence when analyzing the question of standing.[133] In *Council of Canadians with Disabilities*, the not-for-profit started its claim with a Notice of Civil Claim, which is not issued with accompanying evidence. However, the government challenged the not-for-profit's standing under a rule that allowed the Court to assess evidence, the not-for-profit filed affidavit evidence, and the Court relied on this evidence in its reasons.[134]

130. *Ibid* (Memorandum of Argument, Her Majesty the Queen in Right of Alberta at paras 6, 24). The government cited newspaper articles about the strike in support of this claim.

131. The Statement of Claim was filed on June 23, 2020, and the Application to Strike was filed September 16, 2020.

132. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 72.

133. *Alberta's Free Roaming Horses Society*, *supra* note 105 at paras 3, 15.

134. *Supreme Court Civil Rules* (BC), *supra* note 96, r 9-7; *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 4; see also *Williams v London Police Services Board*, 2019 ONSC 227 at paras 24, 63-64.

In other scenarios, a court will not have any evidence before it on which to assess a litigant's claim to public interest standing. The following section will consider two of these scenarios: where the legislation is so obviously unconstitutional that evidence—and even adjudicative facts—are unnecessary, and where the court proceeds on the basis that the facts alleged in the pleadings are true. Although evidence may not be tendered in either of these scenarios, in the latter one courts will need to assess the plaintiff's capacity to produce a sufficient evidentiary record. The last section in this Part turns to this topic.

1. Evidence is Unnecessary Because the Legislation is Obviously Unconstitutional

In *Council of Canadians with Disabilities*, the SCC indicated that there will be "exceptional" constitutional cases where evidence and adjudicative facts ("who did what, where, when, how, and with what motive or intent")[135] are not required because "a claim may be proven on the face of the legislation at issue as a question of law alone."[136] It then went on to hold that the case before it was such a case:

> Much of the case can be argued on the basis that the legislation is unconstitutional on its face because it authorizes, under certain circumstances, forced psychiatric treatment without the consent of the patient or of a substitute decision-maker. Expert evidence regarding how health care providers treat involuntary patients and evidence with respect to particular patients may provide helpful insight into how the legislation is applied. At this early stage of the litigation, however, information about individual plaintiffs would not add much value.[137]

The SCC cited two cases in support of the principle that adjudicative facts would not always be necessary for a *Charter* challenge: *Danson*, the case discussed above about a rule change imposing the potential of personal liability for costs on lawyers, and *Manitoba (AG) v Metropolitan Stores Ltd*.[138] The latter case dealt with when a court should stay legislation pending a decision on its constitutionality and provides little insight into when adjudicative facts are unnecessary.[139] *Danson*, on the other hand, provides some guidance in this respect.

The Court in *Danson* suggested that the legislative facts may be sufficient if the purpose of the statute renders it unconstitutional.[140] This invocation of purpose can be taken as a refence to the SCC's 1985 decision in *R v Big M Drug Mart*, discussed in Part II, where the Court held a Sunday closing law

135. *Danson*, *supra* note 71.

136. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 70.

137. *Ibid* at para 106.

138. *Danson*, *supra* note 71; 1987 CanLII 79 (SCC) [*Metropolitan Stores*].

139. The case *is* important for the SCC's clear statement of law on this topic: see *Metropolitan Stores*, *supra* note 138 at 133, as cited in *Danson*, *supra* note 71 at 1100-01.

140. *Danson*, *supra* note 71.

to be unconstitutional because its purpose infringed the *Charter*.[141] In that case, the Court reviewed the long legislative history of Sunday closing laws, all the way back to the 1448 English statute, The *Sunday Fairs Act*, along with how Canadian and American courts characterized Sunday closing laws in previous decisions.[142] Based on this review of case law and legislative facts, the majority determined that the purpose of the law was to compel everyone to observe the Christian Sabbath, that this purpose infringed the religious freedom of individuals, and thus the law was unconstitutional.[143]

A challenge to legislation may also be possible without adjudicative facts on grounds *other than* an allegation of an unconstitutional purpose. In an article written in 1995, June Ross pointed to the case of *Edmonton Journal*, also discussed in Part II, as an example of a *Charter* challenge against legislation that was unconstitutional on its face, and thus required little evidence.[144] Unlike in *Big M Drug Mart*, the case turned not on the purpose of the legislation or even its effect, but whether it was a "reasonable limit" under section 1.[145] The SCC split 4:3 on the issue, with the majority of justices finding that the legislation could not be justified as a reasonable limit. Neither facts nor evidence played a significant role in the decision. Justice Cory cited some statistics but the balance of the majority, concurring, and dissenting reasons relied on hypothetical examples about the types of conduct that would be penalized under the statute.

Big M Drug Mart and Edmonton Journal reveal the overlap between cases that can be decided on their face, without adjudicative facts, and those that can be decided using hypothetical examples. Recall that in *Alberta Union of Public Employees*, the Court of Queen's Bench of Alberta was prepared to analyze some of the plaintiffs' claims using hypothetical examples. The Alberta Court of Appeal took issue with this approach but then, in one particularly puzzling passage, appears to have employed it. The Court identified a series of hypothetical situations where it determined that the government would be justified in protecting essential infrastructure.[146] Based on this analysis, it concluded that *CIDA* was not unconstitutional on its face.[147] This conclusion about the constitutionality of *CIDA* should

141. *Big M Drug Mart*, *supra* note 50.

142. *The Sunday Fairs Act*, 1448, 27 Hen 6, c 5; *Big M Drug Mart*, *supra* note 50 at paras 51-77.

143. *Big M Drug Mart*, *ibid* at paras 93, 100, 143.

144. Ross, "Standing in *Charter* Declaratory Actions", *supra* note 51 at 168, citing *Edmonton Journal* (SCC), *supra* note 51. Ross was an academic at the time this article was written and is now a Justice of the Alberta Court of King's Bench.

145. Compare *Edmonton Journal* (ABKB), *supra* note 51 at para 5, with *Edmonton Journal* (SCC), *ibid* at 1342.

146. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at paras 65-66. For example, the Court indicated that the legislature would be justified in "preventing access to a public utility, like an electrical substation, which is securely fenced and clearly marked as being accessible by authorized personnel only" (*ibid*).

147. *Alberta Union of Public Employees* (ABCA), *ibid* at para 66.

be approached with caution because it was reached without the benefit of either party's arguments on the merits of the constitutional challenge. But, at the same time, it further demonstrates that, in some cases, substantive *Charter* analysis can be performed without adjudicative facts.

2. Evidence is Unnecessary Because the Court Assumes the Facts Pled are True

Even in cases where a court requires adjudicative facts, it may not require evidence proving those facts. When standing is challenged on a preliminary basis, courts may proceed on the assumption that all the facts pled in the commencement document are true.[148] This presumption is required by some, but not all, of the civil procedure rules an adverse party can use to challenge a litigant's standing. For example, Rule 3.68 of the *Alberta Rules of Court* (*Alberta Rules*) provides that a matter may be struck or stayed if a statement of claim discloses "no reasonable claim", is "frivolous, irrelevant, or improper", or is "an abuse of process."[149] The *Alberta Rules* stipulate that where a matter is challenged on the first ground (i.e., that it discloses no reasonable claim), "no evidence may be submitted."[150] The court is to assume the facts pled are true unless they are incapable of being proven.[151]

In *Alberta Union of Public Employees*, the government's application cited five rules, including Rule 3.68.[152] It did not specify on which subpart of Rule 3.68 it was relying. It submitted no evidence in support of its claim. The plaintiffs proceeded on the basis that the facts in their pleadings would be presumed true, as did the Court of Queen's Bench of Alberta.[153] The Alberta Court of Appeal did not.

The Alberta Court of Appeal analyzed the motion as an abuse of process. It reasoned that: "a challenge to standing is not an assertion that the claim does not disclose a reasonable claim or that the claim is without merit."[154] But the absence of a *reasonable claim* is precisely the ground upon which the government challenged the plaintiffs' lawsuit. The government argued that the plaintiffs' claims were premature, which is another way of saying they were insufficiently ripe. Recall that ripeness is a subset of justiciability.[155] Thus, when the government challenged the plaintiff's claim

148. *Thorson*, *supra* note 16 at 145; *Finlay*, *supra* note 5 at 625.

149. *Alberta Rules of Court*, *supra* note 96, r 3.28(2)(b)-(d). Similar rules are found in other jurisdictions, see e.g. *Rules of Civil Procedure* (ON), *supra* note 74, r 21.01(2); *Supreme Court Civil Rules* (BC), *supra* note 96, r 9-5(2).

150. *Alberta Rules of Court*, *ibid*, r 3.28(3).

151. *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 64, citing *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22; *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC) at 455.

152. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim).

153. *Alberta Union of Public Employees* (ABQB), *supra* note 12 at para 17; Brief of the Plaintiffs at para 20. The plaintiffs also noted that the Government had appeared to abandon its claim for summary dismissal, noting: "The Government's submissions do not reference R 7.3, nor has the Government provided the requisite affidavit evidence to bring an application for summary dismissal" (*ibid* at para 15).

154. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 18.

155. See *supra* notes 41-42 and accompanying in-text discussion.

on the basis of prematurity, it was arguing that there was "no reasonable claim", because the claim advanced was non-justiciable. Whether a party has a justiciable claim is relevant to standing because the first part of the test articulated in *Downtown Eastside Sex Workers* requires the party seeking standing to show that there is a serious, *justiciable* issue.

Historically, a challenge based on a lack of a reasonable claim *could* have been addressed using the abuse of process doctrine, but these are now two discrete grounds under Rule 3.68 for challenging a lawsuit.[156] Distinguishing between these two grounds is vitally important because they have different evidentiary rules.

If the Alberta Court of Appeal in *Alberta Union of Public Employees* analyzed the government's application as alleging the plaintiffs had "no reasonable claim", it would have proceeded on the basis that the facts as pled were true. On the basis of the facts as pled, the Court would need to have determined if there was enough of a "live dispute" involving "real people in real situations" for the Court to hear the matter.[157] It would have been open to the Court to make one of three findings: (i) *assuming the facts to be true*, the claim was sufficiently ripe to be justiciable; or (ii) *assuming the facts to be true*, the claim was not sufficiently ripe to be justiciable and should be struck or stayed; or (iii) *there were insufficient facts in the pleadings to assess the ripeness of the claim*, in which case the matter should either have been struck or the plaintiffs should have been given an opportunity to amend their pleadings. If the Court had found that the claim was sufficiently ripe to survive a preliminary challenge on the basis of justiciability, it could then have proceeded to determine whether the other components of the test for public interest standing were satisfied: was the justiciable claim serious, did the plaintiffs have a genuine interest, and was this a reasonable and effective way to advance the claim?[158]

But the Alberta Court of Appeal did not evaluate the sufficiency of the facts as pled. Instead, it asked if there was a sufficient "factual platform *established by evidence*".[159] It assessed the sufficiency of the evidence because it analyzed the question of standing under the rubric of abuse of process, and thus was not bound by the requirement to assume that the facts pled were true. The decision to analyze the claim as an abuse of process lead the Court down an erroneous line of reasoning: because there was no evidence, there were no facts *established by evidence*. Because there were no facts *established by evidence*, the claim was hypothetical and too premature to be heard.

The Court compounded this error with a further, questionable holding. It determined that the applicant's invocation of hypothetical examples "implicitly meant that there would be no further actual or evidentiary record."[160] This logic is faulty: there was no evidence yet, so there would never be any evidence.

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156. See *supra* notes 118-119; *Alberta Rules of Court*, *supra* note 96, r 3.68.

157. See *supra* note 54 and accompanying in-text discussion.

158. *Canadian Bar Association* (BCCA), *supra* note 45.

159. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 1.

160. *Ibid* at para 21.

The Alberta Court of Appeal's unexpected approach to analyzing the standing question—as an abuse of process—led it to look for evidence where none had been submitted and draw negative conclusions from its absence. As outlined above, this twist created unfairness for the plaintiffs because of how the litigants and the courts had approached *this* case. *Council of Canadians with Disabilities* suggests that on *any* preliminary challenge to standing, the focus of the court should be less on the evidence produced and more on a litigant's capacity to produce evidence.

3. Capacity to Produce Evidence

In *Council of Canadians with Disabilitie*s, the SCC indicated how future courts could assess a litigant's capacity to produce evidence when public interest standing is raised as an issue early in a lawsuit. The Court set out a non-exhaustive list of criteria that courts should consider: the stage of the proceedings, the pleadings, the nature of the public interest litigant, undertakings, and evidence already produced.[161] As the lawsuit progresses, a court should focus less on the party's capacity to produce evidence and instead shift to considering whether sufficient evidence has actually been produced. After discovery, failure to produce a sufficient evidentiary record would be a basis for denying standing, unless the nature of the claim does not require evidence.[162] A decision to grant standing on a preliminary basis may be revisited later in the lawsuit. This power to revisit standing should be used sparingly, but is appropriately used when there has been a material change, such as an applicant breaching an undertaking they had provided to produce evidence, or the legal issue in question becoming moot, like in *Borowski #2*.[163]

Had the Alberta Court of Appeal in *Alberta Union of Public Employees* applied the framework articulated in *Council of Canadians with Disabilities*, there would have been a strong basis for finding that the plaintiffs had the capacity to produce a sufficient evidentiary record. The lack of evidence could have been explained in part by the early challenge to standing. The Court would have looked at the facts, as pled, in the plaintiffs' statement of claim. One of the plaintiffs was a union, which represents many people who might personally experience the chilling effect of *CIDA*. The Court could have inferred that the plaintiffs would be able to elicit affidavit evidence from directly affected individuals. The lawyers for the plaintiffs could have bolstered their case by providing undertakings to the Court about the record they would be producing or submitting affidavit evidence from affected parties. Of course, the SCC did not set out this framework until after the Alberta Court of Appeal released its decision in *Alberta Union of Public Employees*. It could not be employed in that case, but it provides useful guidance to future courts assessing facts and evidence in the context of the public interest standing test.

161. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 72.

162. *Ibid* at paras 70-72.

163. *Ibid* at paras 74-77, and citing *Borowski #2* (SCC), *supra* note 68, as an example of a case where standing was denied because a claim became moot.

Conclusion

Constitutional litigation, where questions of public interest standing arise, involves debates over "fundamental legal and political values."[164] The legislation being challenged in *Alberta Union of Public Employees* allegedly impaired key associational activities of unionized workers in Alberta (as well as other democratic activities, like political protests), yet the litigants were denied the opportunity to challenge these impairments to their rights because they were denied standing. The Alberta Court of Appeal decision in *Alberta Union of Public Employees* is out of step with the SCC's generous and liberal approach to public interest standing and weakens the ability of courts to safeguard fundamental democratic practices. It is not merely an instance of a court exercising its discretion restrictively. It creates a troubling precedent because of how the Alberta Court of Appeal connected the ideas of public interest standing, prematurity, abuse of process, and facts and evidence. This article has disentangled these ideas with the aim of assisting future litigants and courts to navigate these intersecting concepts.

A challenge to legislation that has yet to be invoked will not always be premature. Courts must consider the magnitude of the chill before deciding whether to entertain the challenge when a statute is alleged to chill *Charter* rights and freedoms. The court may also wish to consider the target of the chill. It may be especially important for courts to grant public interest standing when legislation chills the *Charter* rights of marginalized communities, who lack the political clout to seek redress through legislative channels. In *Alberta Union of Public Employees*, the legislation in question constrained the ability of all Albertans to protest, and could be expected to have a disproportionate impact on marginalized communities. Koshan, Silver, and Watson Hamilton note that while *CIDA* was facially neutral, "it is often marginalized 'others' without access to legislative or corporate halls of power who demonstrate against government or corporate interests."[165] Members of these communities have been silenced twice over: by having their right to protest statutorily restricted, and by being denied standing to challenge those restrictions in court.

The *Alberta Union of Public Employees* decision could be cited for propositions about the weakness of a *Charter* claim based on legislative chill, but the Alberta Court of Appeal's conclusions should be approached with caution. Gerard Kennedy and Lorne Sossin have warned courts that, when they decide constitutional litigation summarily, they should take care so as to not thwart the opportunity to develop *Charter* rights, especially as there is a risk that a summary decision may be cited for broad propositions that foreclose future litigation.[166] Legislative chill is a topic that warrants a more careful analysis, carried out on the basis of full argument and a robust evidentiary record.

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164. Mathen, *supra* note 88.

165. Koshan, Silver & Watson Hamilton, *supra* note 25.

166. Gerard J Kennedy & Lorne Sossin, "Justiciability, Access to Justice, Summary Procedures in Public Interest Litigation" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada, 2019) 119-45 at 134-34. Kennedy and Sossin made this observation in respect of the Ontario Court of Appeal's decision to strike the claims in *Tanudjaja v Canada* (*Attorney General*), 2014 ONCA 852, on the basis of justiciability. They observe that *Tanudjaja* set the precedent that "such general issues as a right to housing are not within the realm of the courts".

Where abuse of process is alleged, the party raising the issue and the court deciding it should specify what aspect of the litigation is unfair. The meaning of abuse of process has evolved over the history of English and Canadian law, but recent pronouncements from the SCC clarify that the contemporary abuse of process doctrine is used to address serious unfairness. Courts should ensure to employ this contemporary version of the doctrine. Commencing a claim where one is eventually held to lack public interest standing is not, without more, an abuse of process.

Litigants who are bringing a claim on the basis of public interest standing should ensure that their pleadings set out legislative and adjudicative facts to show their legal entitlement to relief. In *Charter* litigation, this will necessitate showing that government conduct or legislation infringes a *Charter*-protected right or freedom. Additionally, they should plead facts that relate to the test for standing. For example, an organization might plead that it has many individual members who can provide evidence as to the impact of impugned legislation on them. However, in drafting these pleadings, lawyers should be careful to avoid running afoul of the rule that pleadings should be limited to facts and not evidence.[167] If their standing is challenged, litigants should confirm the procedural rules by which it is being challenged. If there is a possibility that the court will be expecting evidence proving the facts, plaintiffs would be wise to submit some such evidence, especially to bolster the assertion that they will be able to produce more evidence later in the proceedings.

Courts also need to be careful about how they analyze the sufficiency of the facts and evidence relevant to standing. Most, but not all, cases will require the parties to set out adjudicative facts in their pleadings. Some cases can be decided on the basis of legislative facts or hypothetical examples. A court's analysis of evidence changes as the litigants move through their case from preliminary stages to a hearing on the merits. The court should focus on pleadings and other indications of a litigant's capacity to produce evidence early in a case, whereas following discovery, this focus shifts to the evidence actually produced.

This article has focused on *public* interest standing. In *Alberta Union of Public Employees*, the plaintiffs also argued that they were entitled to private interest standing because of the direct impact that the legislation had on them.[168] Both levels of court in Alberta rejected this argument, finding that private interest standing was limited to instances where a plaintiff has been engaged in a court process, for example, by being charged under the legislation.[169] There is reason to suspect that private interest standing is not so narrowly restricted. Ross examined this question in detail in her 1995 article on the topic, but much has changed in the law of standing since, and a scholarly reconsideration of this concept would be welcome.[170]

167. *Alberta Rules of Court*, *supra* note 96, r 13.6(2)(a); *Rules of Civil Procedure* (ON), *supra* note 74, r 25.06(1); *Supreme Court Civil Rules* (BC), *supra* note 96, r 3-7(1).

168. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Brief of the Plaintiffs at para 29).

169. *Ibid* at para 18; *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 26.

170. Ross, *supra* note 51 at 175-200.

Restrictive approaches to standing prematurely shut down important debates and weaken protection for *Charter* rights and freedoms. In cases where legislation is challenged because of its chilling effect on *Charter* rights, a restrictive approach can immunize that legislation from review. The Alberta Court of Appeal's approach to public interest standing in *Alberta Union of Public Employees* was unduly restrictive, but not straightforwardly so. Rather, the restrictions emerged from the Court's interweaving of prematurity, abuse of process, and facts and evidence into the public interest standing test. This case reveals that to maintain a generous and liberal approach to standing, and thus robust protection for *Charter* rights and freedoms, litigants and courts must pay careful attention when navigating these overlapping concepts.