NOVA SCOTIA COURT OF APPEAL

Citation: *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80

Date: 20161109
Docket: CA 447911
Registry: Halifax

Between:

Ward Dicks, Ben McIntyre, Dan Vinette, Dave Garroick, Andy Reistetter, and Peter Beerli as trustees for the Canadian Elevator Industry Education Program

Appellants

v.

The Chief Inspector appointed pursuant to the *Elevators and Lifts Act*, SNS 2002, c. 4

-and-

The Director of Technical Safety Division, Department of Labour and Advanced Education

-and-

Randy Kelly, Nathan McMichael, Craig Longard, Corey Cole, Jonathan McGregor, and James Noade

-and-

CKG Elevator Ltd.

Respondents

Judges:	Farrar, Hamilton and Bryson, JJ.A.
Appeal Heard:	September 6, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bryson, J.A.; Farrar and Hamilton, JJ.A. concurring
Counsel:	Raymond Larkin, Q.C., for the appellants Alison Campbell and Jennifer Crewe (articled clerk), for the respondents Chief Inspector of Elevators and Lifts and the Director of Technical Safety Division, Department of Labour and Advanced Education Nancy Barteaux, Q.C. and Krista Smith for the respondents CKG Elevator Ltd., Randy Kelly, Nathan McMichael, Craig Longard, Corey Cole, Jonathan McGregor and James Noade

Reasons for judgment:

Introduction

[1] Mechanics working on elevators in Nova Scotia must have a certificate of competency which requires completion of a training program provided by the Canadian Elevator Industry Education Program (CEIEP) or "another equivalent education program acceptable to the Chief Inspector", (Regulation 14(a) authorized under the *Elevators and Lifts Act*, S.N.S. 2002, c. 4). CEIEP is operated as a trust. The Trustees are nominated by the International Union for Elevator Constructors and the companies that employ unionized mechanics.

[2] Elevator mechanics are trained as apprentices whose work is overseen by a certified mechanic. Accordingly, apprentices must be employed by a company in order to receive education and training. CEIEP does not offer training to apprentices unless they are employed by companies with collective agreements. CEIEP training is unavailable to those who work for non-unionized companies.

[3] The Chief Inspector accepted, and the respondent Director later approved, a program offered by the Elevating Devices Training Academy as an appropriate equivalent to CEIEP training. The individual respondents were employees of non-unionized businesses who took the Academy program. The lone corporate respondent employs five of them, (collectively "the private respondents").

[4] Upon learning that the individual respondents had been granted certificates of competency, the Trustees of CEIEP applied for judicial review. The Chief Inspector and Director (collectively the "Province") objected to the Trustees' standing to complain about authorization of a program which they did not offer, for which they were not responsible, and for mechanics whom they would not train, because they were not members of a union.

[5] The Honourable Justice Denise Boudreau granted the Province's motion and held that CEIEP had no standing to object to the certificates of competency issued by the Chief Inspector, (2015 NSSC 362).

[6] The Trustees now appeal, arguing that the motions judge erred in finding that:

1. they had no private interest standing;

2. they had no public interest standing;

3. standing should be decided as a preliminary motion rather than at a hearing on the merits.

[7] Before addressing these grounds of appeal, it will be convenient to briefly review the principles of standing in cases involving claims against public authorities.

Standing: Overview

[8] The traditional approach to standing involving public rights is described by the Supreme Court of Canada in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at ¶ 17:

> . . . The nature of the interest required by a private individual for standing to sue for declaratory or injunctive relief where, as in the present case, a question of public right or interest is raised, has been defined with reference to the role of the Attorney General as the guardian of public rights. Only the Attorney General has traditionally been regarded as having standing to assert a purely public right or interest by the institution of proceedings . . . His exercise of discretion as to whether or not to give his consent to relator proceedings is not reviewable by the courts. . . .

[9] However, the general rule has always been subject to an exception where the right of or impact on a private individual was affected by public actors. That exception appears in *Finlay*, quoting from Buckley, J. in *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109 at page 114:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with . . . and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

The first criterion describes an applicant's right, the second, the impact on the applicant, irrespective of interference with a right.

[10] The Supreme Court characterized Justice Buckley's statement of the law as authoritative but not always easy of application, quoting from the High Court of Australia in *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257:

> Although the general rule is clear, the formulation of the exceptions to it which Buckley J. made in *Boyce v Paddington Borough Council* is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His reference to "special damage" cannot be limited to actual pecuniary loss, and the words "peculiar to himself" do not mean that the plaintiff, and no one else, must have suffered damage. However, the expression "special damage peculiar to himself", in my opinion should be regarded as equivalent in meaning to "have a special interest in the subject matter of the action".

[11] *Finlay* also refers to jurisprudence that describes standing to sue as requiring that the applicant be "exceptionally prejudiced by the wrongful act", having "a special interest in the subject matter of the action", or being "more particularly affected than other people" (pages 620-621). In *Finlay*, the Supreme Court concluded by citing Chief Justice Laskin in an earlier case:

> Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society.
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> [*Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575, p. 578]

[12] In the recent decision of *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, Justice Cromwell speaking for the court mentioned private interest standing in passing:

> [1] . . . The traditional approach was ***to limit standing to persons whose private rights were at stake or who were specially affected by the issue.*** In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [Emphasis added]

[13] The rules and application of standing differ depending on whether one is seeking private or public interest standing, because the interests engaged differ. Vindicating private rights is the interest of the former. The latter is a matter of maintaining the rule of law as a general principle, regardless of whether a private right or interest is involved. As Chief Justice Laskin, speaking for the majority, said in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 145:

> [. . .] it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

[14] In *AXA General Insurance Limited and others v. The Lord Advocate and others*, [2011] UKSC 46, ¶ 170, the Supreme Court of the United Kingdom makes the rule of law point explicit:

> [. . .] where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law.

[15] Nevertheless, not every breach of the law attracts judicial scrutiny because not every transgression warrants legal attention that is constrained by available resources. Those seeking to advance such cases without apparent public benefit have been described as "busy bodies" whom the courts will not indulge with standing, (e.g.: *Downtown Eastside*, ¶ 41)

Private interest standing: did the motions judge identify the correct test?

[16] The Trustees allege that the motions judge erred by not applying a "contextual approach" when determining whether they enjoyed private interest standing. The Province counters that although the motions judge did not use precisely this language, in effect she applied a "contextual approach" when deciding whether the Trustees met the requirements for private interest standing.

[17] The Trustees argue that the motions judge confined her analysis to *legal* interests and obligations of the Trustees rather than the broader category of "interests". Relying upon the Supreme Court of the United Kingdom in *AXA*, they say the rule of the law cannot depend on a private rights foundation for standing:

> [169] [. . .] There is . . . a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law . . .

[18] This reasoning is sound, although "incompatibility" is too strong a distinction to make where private and public interests intersect. It would be more accurate to say that the rule of law includes, but is not exhausted by, the protection or preservation of private rights. Interference with a private right confers standing,

but standing may yet be available where legal rights and obligations are not engaged.

[19] Reliance on *AXA* and other U.K. cases must be treated with caution, because they do not recognize the Canadian distinction between private and public law standing. Since 1978, the single test for standing in the U.K. has been "sufficient interest", (*Senior Courts Act* 1981 (UK) 1981, c. 54, s. 31).

[20] The Trustees suggest that the motions judge adopted the wrong test for determining private interest standing – or at least too narrow a test. The "contextual analysis" they argue for requires consideration of the relationship between the Trustees and the challenged decision, the nature of the statutory scheme, and the merits of the Trustees' complaints.

[21] The Trustees go on to say that by failing to adopt a contextual approach the motions judge then erred in her analysis of the Trustees' standing by confining it to legal rights and obligations rather than an "interest" based analysis involving the contextual approach described in *AXA* and, arguably, by the Supreme Court in *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447.

[22] With respect, the motions judge is accused by the Trustees of identifying a narrower test than she actually describes, although she certainly points out that the Trustees' interests in this case do not engage legal rights or obligations. What the motions judge actually said was:

> [71] To have standing to bring an application for judicial review, a person has a certain test to meet: commonly phrased as a "person aggrieved". It has also been described as "an interest peculiar to him or herself", a "more special interest", and interest "beyond that of the general public". I refer to the case *Lord Nelson Hotel v. City of Halifax* (1972), 4 NSR (2d) 753 as an example. Many cases and authors both inside and outside Nova Scotia have discussed this test. Furthermore, there must be a correlation between the decision and its effect on the applicant.
>
> 2015 NSSC 362

[23] Plainly the motions judge uses the language of "interest", not rights or obligations, in her statement of this principle. She speaks again of "interest" later in her decision:

> [85] I start with this: CEIEP clearly has no direct interest in the decision made by the chief inspector. [. . .]

> [86] So if they have no direct interest, what is their (indirect) interest? There was some question as to whether the applicant's interest in this decision was commercial, or a concern about competition. This is specifically denied by the applicant. [. . .]

[24] The motions judge is faulted for quoting from *Robichaud v. College of Registered Nurses*, 2011 NSSC 379:

> [12] It is not sufficient to be interested in the decision. The party applying for judicial review must have a special, private or sufficient interest in the decision or proceeding. That will be satisfied when that party's rights or obligations have been, are or will be affected more than the general public. [emphasis in original]

[25] The Trustees rely upon the last sentence of this quotation to suggest that the judge erred because she confined herself to a legal rights and obligations analysis. But that is not what *Robichaud* says, nor is it what the motions judge did. Consideration of the parties' legal rights or obligations is appropriate when assessing their potential interest in a proceeding. It is the most common ground sustaining private interest standing. But the analysis is not confined to legal rights and obligations as the first sentence of the quotation shows and as the judge's analysis, apparent in earlier quotations, makes plain.

[26] The Trustees' argument confuses the analytical disposition of the case with the general principle which animates that analysis. There is nothing in the motion judge's decision that suggests she narrowed the test in principle which she had already correctly described. The Trustees draw a distinction which the judge does not make and then criticize her for an analysis that she did not undertake.

[27] The Trustees say that the motions judge should have, but failed to, consider:

1. The relationship between the Trustees and the challenged decision;
2. The nature of the statutory scheme out of which the impugned decision issued;
3. The merits of the Trustees' complaint.

[28] Applying these criteria, the Trustees submit that the *Act's* purpose is public safety in connection with the operation of elevators in the province. The *Act* regulates the qualifications of those who work on those elevators. The regulations require the Chief Inspector to compare the Trustees' program with that of any other approved by the Chief Inspector, such as that offered by the Academy.

[29] The Trustees' say that the regulations require the Chief Inspector to accept the equivalency of the impugned alternative training to that offered by the Trustees. The Trustees further urge that they have a vital interest in the qualifications required to be granted a certificate of competency under the *Act*. They claim a "significant interest in comparison of their program to that of the alternative". But that is not what happened. It was the Academy's programme that was being compared to CEIEP – it was not a question of CEIEP meeting the standard – CEIEP is the standard.

[30] The motions judge recognized all this:

> It is true that CEIEP is named in the legislation, but it is merely named as a comparator: meaning a comparison is made between it, and a third-party. I point out that only the third-party is being evaluated. CEIEP is the standard. CEIEP claims that this fact gives it an interest in the decision, but frankly, have not articulated why. When I asked counsel for the applicant during oral argument to identify the interest of CEIEP, he described the concern about mobility, in that these Nova Scotian certificate holders might now move to other areas of Canada. [emphasis in original]

[31] Then the Trustees add that there must be a "level [regulatory] playing field". They argue that unionized employees and unionized companies represented by them "may be disadvantaged by acceptance of a lower standard".

[32] Here the Trustees' argument shifts from the interest of themselves as "the person aggrieved" to employees and unionized companies. It illustrates the glaring omission of those parties from these proceedings. It may be that unionized companies and unionized employees could successfully make such an argument. But they are not making it. This distinction is implicit in one of the authorities cited by the Trustees. In *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 the court recognized standing where the applicants were regulated by the authority under review:

> [9] The courts have always weighed a number of factors in determining whether a party is "aggrieved". An important factor is "the relationship between the applicant and the challenged decision", or how directly the challenged administrative act will affect the legally-recognized interests of the applicant. Thus, if the applicant's property rights, economic rights, or legally recognized personal interests (such as the applicant's liberty) will be affected by the administrative decision, the applicant will likely have standing. So, for example, if the applicant's license has been revoked, resulting in a direct impact on the interests of the applicant, the applicant is bound to be granted standing. There is

> no finite list of interests that the law will recognize in determining issues of standing, but business, professional, employment and property interests have traditionally been recognized. ***Thus, if the applicants are operators of businesses subject to the same regulatory regime as the one being challenged, that will usually reveal a sufficient legal interest. Those regulated are entitled to insist that all others in the industry play by the rules.*** It is thus common to grant to participants in a regulated industry standing to challenge decisions made by the regulator. [authorities omitted]
>
> [Emphasis added]

[33] The Trustees protest that they "represent" the union and unionized employers. But Trustees are not agents for settlors or beneficiaries. They administer the trust for the benefit of the beneficiaries. They are not the "alter ego" of the beneficiaries, (see for example *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012, pp. 56-59)).

[34] The Trustees have excluded non-unionized mechanics from CEIEP training. The Trustees and the Academy do not occupy a common playing field because the Trustees have kept Academy trainees off the field. The Trustees are not competing with the Academy for the training of elevator mechanics.

[35] Next, the Trustees submit that the motions judge erred by failing to consider the merits of their argument that the Chief Inspector made an unreasonable decision. The Trustees cite no authorities on point. They rely upon general language from the 1986 text of then-Professor Cromwell, *Locus standi: a commentary on the law of standing in Canada*, (Toronto: Carswell, 1986). Resort to this text does not make the Trustees' argument. Here is an example:

> . . . the discretion with respect to standing and the discretion with respect to the remedy itself is, at best, blurred. As a result, it is difficult and perhaps unwise to divorce the question of standing from the merits of the challenge itself . . .

[36] The Province argues that this quotation merely captures the confusion in many of the older cases between discretion relating to standing and discretion relating to the remedy of *certiorari*.

[37] As a matter of principle, the merits should not matter when considering private interest standing for the simple reason that a party who has an interest in the proceeding should not need to demonstrate the strength of his case to obtain the standing to make it. This is quite different from public interest standing where the strength or importance of the case may increase in analytical significance while the

interest of the applicant may recede. The success of a strong argument challenging the legality of judicially reviewed government behaviour should not simply depend on the personal effect of that illegality on she who advances the argument. This is addressed further under "Public Interest Standing" below.

[38] The motions judge could not see that a favourable decision on the merits would have any effect on the Trustees. In other words, a decision on the merits would not engage their interests:

> [80] [. . .] Even if one were to assume for the sake of argument, that the Chief Inspector failed to do his work properly, and issued certificates of competency when he should not have, does this provide CEIEP with more of an interest in the matter? Does it provide them with a more special interest?

[39] Although the Trustees do not claim a commercial interest arising from any perceived competition with the Academy, the private respondents suggest that the Trustees are unhappy about an alternative to a training program over which they enjoy a monopoly favouring unionized employees and companies. Whether or not they are right, the judge did not agree that the decision of the Chief Inspector had any impact on the Trustees. The cases that the Trustees rely upon make this point. For example, when arguing for a "contextual" approach they cite *Friedmann*. It is significant that in *Friedmann* the Supreme Court described a party who is "aggrieved or may be aggrieved" as someone who is " . . . threatened with, any form of harm *prejudicial to his interests*, whether or not a legal right is called into question . . ." There is no evidence, nor has any credible argument been made, of any potential prejudice to the Trustees as a result of the Chief Inspector's decision.

[40] Likewise, the Trustees rely upon this Court's decision in *Ogden Martin Systems of Nova Scotia Ltd. v. Nova Scotia* (1995), 146 N.S.R. (2d) 372 (N.S.C.A.) describing private interest standing:

> [11] A review of these authorities indicates that the trend of the courts has been to be more generous in according private interest standing to persons to challenge the decisions of the public authorities in the courts. The approach favours granting standing wherever the relationship between the plaintiff and the challenged action is direct, substantial, immediate, real, more intense or having a nexus with such action as opposed to being a contingent or indirect connection. [. . .]

[41] In *Ogden*, the applicant was given standing because the impugned administrative action of the Minister of the Environment could have prejudicially

affected Ogden's existing contractual relationship with a third party. The potential for harm to Ogden was clear. No such harm is apparent to the Trustees.

[42] In contrast to the Trustees, the Province refers to the following factors described by Sarah Blake in her text *Administrative Law in Canada*, 5th ed (Markham: LexisNexis, Canada 2011), that should be considered when determining private interest standing:

(a) Statutory purposes;

(b) The subject matter of the proceeding;

(c) A person's interest in the subject;

(d) The effect that decision might have on that interest.

[43] The considerations proposed by the Province are more comprehensive and better capture the discussions in the jurisprudence. Importantly, the "merits" of the case are not a consideration. As we shall see, courts have even been ambivalent about the importance of the merits in cases of public interest standing.

[44] The Province submits that the motions judge effectively adopted and applied the Blake factors. Certainly, the judge noted the regulatory adoption of CEIEP and its status as a comparator for approval of any alternative program. The judge also commented on the public safety goals of the *Act*. She considered the statute.

[45] The Province adds that the *Act* authorizes appeals from decisions of the Chief Inspector regarding certificates of competency, but not for parties such as the Trustees. The Trustees acknowledge that they have no standing under the *Act* to make any such appeal because they are not "directly aggrieved" by the Chief Inspector's decision. This is one reason why they have proceeded by judicial review. While a statutory right of appeal does not preclude judicial review, it certainly is a factor the Court can take into account when deciding whether standing should be accorded to someone who wishes to judicially review a decision that could otherwise be appealed by another with a stronger connection to the impugned decision.

[46] The respondents also submit that the judge considered the subject matter of the proceeding and the Trustees' alleged interest in it, but was simply not persuaded for reasons already described. The Trustees' concern about allegedly unqualified elevator mechanics is not peculiar to them, but would be shared by all

members of the public. The Trustees' interests are not especially affected by that concern.

[47] The judge also considered the relationship between the Chief Inspector's decision and its effect on the Trustees. There must be some impact or potential impact on the applicant to ground an aggrieved status. The judge was not persuaded that the Trustees had shown any impact and none is apparent. The judge concluded, "CEIEP has argued that its interest is unique and different from the general public. But having read their brief and having heard the oral argument, with respect, I still am at a loss to articulate what that interest is. CEIEP has not done so to my satisfaction (¶ 87)." I agree.

[48] The Trustees have failed to establish private interest standing, and the judge did not err in refusing it.

Public interest standing

[49] In contrast with private interest standing, public interest standing is granted by courts on a discretionary basis considering three factors, described by Justice Cromwell in *Downtown Eastside*:

> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises ***a serious justiciable issue***, whether the party bringing the action has ***a real stake or a genuine interest in its outcome*** and whether, having regard to a number of factors, ***the proposed suit is a reasonable and effective means to bring the case to court***: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).
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> [Emphasis added]

[50] The motions judge was satisfied that there was a justiciable question in this case, but entertained doubts about whether it was "serious".

Serious Justiciable Issue

[51] In *Downtown Eastside*, Justice Cromwell elaborated on "serious justiciable issue":

> [42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p.

> 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy* and *Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690).

[52] Justice Cromwell explained that "serious justiciable issue" addressed two related concerns: the appropriateness of judicial resolution of the matter (as opposed to legislative or executive action), and proper use of judicial resources (overburdening the courts with marginal or redundant suits) (¶¶ 39-41).

[53] The Supreme Court did not endorse assessment of the merits of the claim when deciding whether a serious justiciable issue was raised, (¶ 41). Nevertheless, it may be difficult in practice to ignore the merits altogether if maintaining the "rule of law" underwrites public interest standing, as *AXA* says and *Downtown Eastside* implies (¶ 31). Certainly, consideration of the merits is how the Ontario and Manitoba Courts of Appeal resolved this factor in *Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General)* (1998), 40 O.R. (3d) 489, ¶ 87 and *Rowell v. Manitoba*, 2006 MBCA 14, ¶ 50, respectively.

[54] The Trustees fault the motions judge for confining her analysis of "serious" to constitutional or *Charter* issues or to the challenge of legislation. The motions judge described the Chief Inspector's decision in this way:

> [98] The case at bar is a challenge to a government representative's decision. The decision was a discretionary one, made within the terms of his own home statute. The challenge to that decision would address whether it was made within a range of reasonable outcomes, and the decision-maker would be granted deference.

[55] Contrary to the Trustees' suggestions, the motions judge did not deny the appellants' standing because they were challenging an administrative decision.

[56] The motions judge then addressed the foundation of the Trustees' argument for public interesting standing:

> [99] CEIEP submits that the seriousness of this matter arises, due to the very real concern for public safety. The maintenance and safety of elevators is of crucial importance for the public. That should, CEIEP argues, raise this matter in seriousness, beyond that of another routine governmental decision.

[57] The motions judge went on to show how safety concerns alone would be inadequate grounds for public interest standing:

> [100] Let me be clear: There is no doubt whatsoever that safe elevators are an important matter of public safety, and that unsafe elevators could have devastating effects to both life and limb. However, and without in any way minimizing the importance of having appropriately trained elevator mechanics, I disagree that the public safety aspect of this issue, elevates it to a public interest standing level.
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> [101] Many, many, aspects of our lives are matters of public safety. Properly trained mechanics of vehicles are needed to ensure public safety. Properly trained electricians, carpenters, mechanics for city buses and passenger ferries, all of these are concerns for public safety. Proper manufacturing of prescription drugs, proper manufacturing of appliances, all these also raise issues of public safety. There are countless examples.
>
> [102] All these areas of human activity are also subject to legislation, regulation, and at times, government decision makers. While an unsafe elevator is clearly of enormous public concern, so is an unsafe city bus, or an unsafe drug. That cannot, as of right, be the basis for a claim of public interest standing. If matters of public safety raise the seriousness of the matter to that level required by public interest standing, frankly, the requirement of seriousness will lose its meaning.

[58] As it turns out, the Academy no longer offers an alternative elevator mechanics training program, so the only people who would be affected by this case are the respondents. They argue, and the Trustees appropriately acknowledge, that this diminishes the seriousness of any justiciable issue. The effect of any decision would be marginal. This weighs heavily against exercising any discretion to grant public interest standing.

[59] Having determined that the issue before her was not "serious" the motions judge did not consider the other two factors of the public interest standing test.

[60] *Downtown Eastside* suggests that all three factors should be assessed together:

> [36] It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.
>
> [37] In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring

> the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

To some extent, these factors may overlap. For example, in this case the Trustees argue that "safety concerns" are relevant both to "serious issue" and "genuine interest".

Genuine Interest

[61] The Trustees argue that they have a "genuine interest" because CEIEP is a national programme involved in setting national standards for the education of elevator mechanics. They buttress this submission by reference to the personal qualifications of the Trustees. They conclude that CEIEP is recognized by its inclusion in the Act's Regulations.

[62] None of this shows how the Trustees have a genuine interest in anything other than the programme they administer. It does not engage the discretionary decision of the Chief Inspector to recognize an alternative programme that accommodates a gap in the industry created by the Trustees' exclusion of non-unionized workers.

[63] Although the motions judge did not explicitly address this factor, it is implicitly addressed in her findings on a related issue. As earlier described, the Trustees repeat that safety is a "genuine issue" for them. But they have no greater interest in safety than anyone else, as the judge found when addressing "serious issue", (¶ 57 above).

Reasonable and Effective Means

[64] The Supreme Court elaborated on this third factor in *Downtown Eastside*:

> [50] The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, ***by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of***

> ***legality***. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.
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> [Emphasis added]

[65] In the broadest sense, this is an access to justice issue. Entertaining marginal cases plainly compromises access to justice for more meritorious claims.

[66] It is not an economical use of judicial resources to persist in an application directly affecting only five people regarding a programme no longer offered, challenging a discretionary decision whose questioned legality is confined to the reasonableness of the Chief Inspector's decision. That is especially so in a case like this in which an unexercised right of appeal can be made by those "directly aggrieved".

[67] Again, this factor is defeated by the failure to establish a "serious justiciable issue". How could it be economical and effective to try and litigate something not seriously justiciable?

[68] The decision to deny public interest standing is a discretionary one to which this Court owes deference. Although *Downtown Eastside* says that the motions judge should have gone on to consider the Trustees' "genuine interest" and "reasonable and effective means" of bringing the matter to court, assessment of those criteria does not overcome the Trustees' failure to establish a "serious justiciable issue".

[69] The motions judge reasonably exercised her discretion to refuse standing to the Trustees. That she did not address the second and third factors in *Downton Eastside* did not affect the outcome or result in a patent injustice.

Should standing be determined as preliminary motion?

[70] The Trustees object that the motions judge wrongly relied on *Civil Procedure Rule* 12 to entertain the motion against their standing. Related to this, the Trustees argue that the absence of a record is unfair to them, and, finally, that the motions judge was wrong to rely on inherent jurisdiction prior to a full hearing on the merits because this would be inconsistent with the requirements of the *Rules*

governing judicial review and judicial review generally. They add that, in the absence of a record, the Province's motion was premature.

[71] Consideration of a motion on standing prior to a hearing on the merits is a question of discretion. The private respondents aptly cite *Finlay* quoting from page 617 as follows:

> . . . This question was also considered by the High Court of Australia in *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, where the opinion was expressed that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether to determine the question of standing with final effect as a preliminary matter or to reserve it for consideration on the merits. The Court held that for reasons of cost and convenience the judge had properly exercised that discretion in dealing with the question of standing as a preliminary matter and striking out the statement of claim. Assuming that the question whether an issue of standing to sue may be properly determined as a preliminary matter in a particular case is one which a court should consider, whether or not it has been raised by the parties, I agree with the view expressed in the *Australian Conservation Foundation* case. It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. . . .

[72] The exercise of discretion in such matters is guided, but not unduly constrained, by the *Rules*. Of course, the *Rules* themselves must complement and be interpreted in light of the cultural shift described by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, requiring a balance of process, expense and timeliness. While it is always important that the merits be appropriately adjudicated, it is equally important that valuable judicial resources not be squandered on unmeritorious claims. Disposing of cases on a preliminary basis in appropriate circumstances is part of promoting efficiency in the conduct of litigation and the administration of justice (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Canada (Attorney General) v. Walsh Estate*, 2016 NSCA 60 at ¶ 18).

[73] The decision to hear the parties on standing prior to a hearing on the merits was one of discretion, to which this Court owes deference. There will be cases where a full record is necessary in order to determine the question of standing. In other cases, such as this, the essential facts are known and are not in dispute. Preliminary consideration of standing accords with the policy reasons endorsed by

the Supreme Court in *Hryniak*. In such cases it is neither unfair nor premature to decide standing as soon as the essential facts are known.

[74] Because I am satisfied the motions judge had the inherent jurisdiction to make the decision that she did, it is unnecessary to consider whether the motion was properly brought under *Rule* 12.

[75] There is no inconsistency in this case between the Court's inherit jurisdiction to control its own process and *Rule* 7 respecting judicial review. *Rule* 7 is not a complete code of procedure in such matters and does not preclude a preliminary motion to avoid unnecessary expense, delay or poor use of judicial resources.

[76] I would dismiss the appeal, with costs of $5,000.00, inclusive of disbursements, $2,500 of which is payable to the Province and $2,500 to the private respondents by the appellants.

Bryson, J.A.

Concurred in:

Farrar, J.A.

Hamilton, J.A.