Court File No. 33981

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

**THE ATTORNEY GENERAL OF CANADA**

**APPELLANT**
(RESPONDENT)

AND:

**DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY AND SHERYL KISELBACH**

**RESPONDENTS**
(APPELLANTS)

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# APPELLANT'S FACTUM

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## PART I - STATEMENT OF FACTS

### A. Overview

1. This Court has repeatedly held that constitutional law is best developed and decided in cases involving specific facts. The important foundational nature of this principle is reflected not only in the law of standing, but also in this Court's approach to mootness, declaratory relief, and deciding only those issue which need to be decided in order to dispose of a case. Exceptions are made only for compelling reasons.

2. The current test for public interest standing, as set out by this Court in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 88 DLR 4th 193 ("*Council of Churches*") appropriately balances this principle, and the reasons behind it, with the need to ensure that legislation is not immunized from constitutional challenge. That balance was undermined by the approach of the majority of the Court of Appeal in this case. The majority of the Court of Appeal decided to take a "more relaxed"[1] approach to the requirement that there be no other reasonable and effective manner by which the issue could be brought before the court because of its "systemic" nature and the fact that it involved a vulnerable group. There was no reason to do so.

3. The majority of the Court of Appeal failed to appreciate that the current test for public interest standing already accommodates "systemic" claims and takes into account the circumstances of those affected by the impugned legislation. In doing so, the current test provides for public interest standing where it is necessary to prevent legislation from being immunized from challenge.

4. Public interest standing was not necessary in this case. The motions judge found that the multitude of prosecutions involving the impugned provisions, some of which raised *Charter* challenges, and a challenge in an ongoing civil action, demonstrated that

[1] Reasons of the British Columbia Court of Appeal (BCCA Reasons), para. 59, Appellant's Record (AR) Vol. I, Tab 4, p 79

the impugned provisions were not immunized from review, and that the vulnerability of those affected by the legislation was not a barrier to such challenges.

5. The majority of the Court of Appeal adapted the third prong of the public interest standing test, such that a reasonable alternative must be a case bringing precisely the same challenges and arguments as the applicant seeking public interest standing. In doing so, they have subordinated cases involving private interest parties raising specific factual situations, which allow for careful incremental development of the law, to broad ranging hypothetical challenges brought by public interest litigants, which do not. As for the challenge to s.213(1)(c) (the "communicating" offence) pursuant to ss. 2(b) and 2(d) of the *Charter*, the courts below erred in finding that the respondents' pleadings established a serious issue, in the face of this Court's decisions in *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man)* and in *R. v Skinner*.[2]

## B. The Proceedings

6. On August 3, 2007, the Downtown Eastside Sex Workers United Against Violence Society (the "Society") commenced this action.[3] On September 14, 2007, the appellants filed a Statement of Defence denying that the Society had pleaded the facts necessary to establish standing to challenge the various provisions of the *Criminal Code* impugned in the Statement of Claim.[4] Prior to filing the defence and for several months afterwards, the appellant attempted to resolve the standing issue by correspondence with opposing counsel.[5]

7. Attempts to resolve the standing issue continued with the respondents providing a draft Amended Statement of Claim on July 31, 2008. This did not resolve the matter and on September 29, 2008, the respondents filed their Amended Statement of Claim which added Sheryl Kiselbach as a plaintiff and included various details about her and her

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[2] *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 SCR 1123, S.C.J. No. 52; *R v Skinner*, [1990] 1 SCR 1235, SCJ No. 51 (QL)

[3] Writ of Summons and Statement of Claim filed August 8, 2007 (Statement of Claim), AR Vol I Tab 7 pp 96-108

[4] Statement of Defence filed September 14, 2007 (Statement of Defence), paras. 4-6, AR Vol I Tab 8 p 110

[5] Affidavit of Sally Yee, September 26, 2008, (Yee Affidavit) paras 3, 5-7, 9, 13, Exhibits B, D, E, F, H and L, AR Vol V, Tab 26, pp. 38, 40-45, 47-48, 72

experiences before exiting prostitution in 2001. A claim that the impugned provisions infringe s. 2(d) of the *Charter* was also added.[6]

### 1. The Impugned Provisions

8. The respondents seek to challenge most of the offences in the *Criminal Code* pertaining to adult prostitution. Specifically, the respondents challenge ss. 210 and 211 (the bawdy-house provisions), s.212(1) (prohibitions against procuring for the purpose of prostitution and living off the avails of prostitution) and s.213(1)(c) (communicating in a public place for the purposes of prostitution).

9. "Prostitute" is defined in s. 197(1) of the *Criminal Code.* However, the respondents used the term "sex worker" in their Statement of Claim and the subsequent amendments to it. The meaning of the term as the respondents use it has evolved through several versions in the course of these proceedings,[7] and it is not co-extensive with the meaning of the term "prostitute" defined in the *Criminal Code*. Therefore, the appellant uses the term "prostitute" for the sake of clarity.

### 2. Nature of the Claim

10. This action seeks a declaration that the impugned provisions "individually and/or in combination infringe ss.7, 15, 2(b) and/or 2(d) of the *Charter*" without reference to the individual(s) or class of individuals whose rights are in issue.[8]

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[6] Amended Writ of Summons and Statement of Claim filed September 29, 2008 (Amended Statement of Claim), paras. 27-31, AR Vol I, Tab 12, pp 134-135

[7] Statement of Claim para. 2, AR Vol I, Tab 7 pp 100-101; Amended Statement of Claim para.2, AR Vol I, Tab 12, pp 126-127; Transcript, Oct. 27, 2008, pp. 45-46, AR Vol V, Tab 29, pp 85-86; Affidavit of Tami Mukai,, September 17, 2008 (Mukai Affidavit), para. 5-6, Exhibits D, E, AR Vol II, Tab 21, pp 38, 42-50; Transcript, Oct. 21, 2008, pp. 2-3, AR Vol V, Tab 28, pp 82-83; Transcript, Oct. 27, 2008, pp. 51-54, ll.23-40 AR Vol V, Tab 29, pp 87-90; Transcript, Oct. 31, 2008, pp. 1-3, AR Vol V, Tab 31, pp 98-100; Notice of Motion of the Plaintiffs, October 29, 2008 (Plaintiffs' Motion), Vol I, Tab 13, pp 142-164; Further Amended Writ of Summons and Statement of Claim filed September 11, 2009 (Further Amended Statement of Claim), para. 2A, Vol I, Tab 14, pp 165-184; Reasons, of Erchke, J., (BCSC Reasons) paras. 11, 20, AR Vol I, Tab 2, pp 6, 11-12

[8] Further Amended Statement of Claim, para. 46, AR Vol I, Tab 14, p 181

11. In the Further Amended Statement of Claim the respondents assert that the challenged provisions infringe the *Charter* rights of "sex workers, including Ms. Kiselbach and the members of the Society".[9] In this pleading the respondents define a "sex worker" as a person "who is or has been primarily engaged in street level prostitution".[10] The respondents allege that the impugned provisions:

a) infringe s.7 of the *Charter* by subjecting them to increased risk of violence and other threats to security, health and safety because these laws prevent them from taking steps to improve health and safety conditions in their work;[11]

b) infringe s.15 of the *Charter* by discriminating against them "either on the basis of their status as 'sex workers', or because they are women, as compared to people who buy sex"[12] or "as compared to those persons whose trade or occupation is not sex work"[13] or "as compared to other persons engaging in consensual, sexual relations that do not involve the exchange of money";[14]

c) infringe s.2(d) of the *Charter* in that they "prevent and/or limit sex workers from joining together…[to] improve and control working conditions, including safety and security" because the laws prevent or limit them from "engaging in such practices as referring other sex workers to safe clients and providing protection to other sex workers by collecting information" or "communicating with one another in a public place for the purpose of carrying out their work";[15]

d) infringe s.2(b) of the *Charter* in that s.213(1)(c) restricts their freedom of expression.[16]

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[9] Further Amended Statement of Claim, paras. 20, 27, 35, 45, AR Vol I, Tab 14, pp 174, 177, 178, 181
[10] Further Amended Statement of Claim, para. 2A, AR Vol I, Tab 14, p. 169
[11] Further Amended Statement of Claim, paras. 20-25, AR Vol I, Tab 14, pp 174-176
[12] Further Amended Statement of Claim, para. 35, AR Vol I, Tab 14, p 178
[13] Further Amended Statement of Claim, paras. 39-41, AR Vol I, Tab 14, p 179
[14] Further Amended Statement of Claim, para. 43, AR Vol I, Tab 14, p 180
[15] Further Amended Statement of Claim, paras. 27-29, AR Vol I, Tab 14, p 177
[16] Further Amended Statement of Claim, para. 45, AR Vol I, Tab 14, p 181

12. In support of the allegations regarding s.7 of the *Charter*, the respondents also claim that the impugned laws prevent and/or limit "sex workers" from obtaining the protections and benefits of labour, workplace and employment laws. Further, they claim that the impugned laws also have an adverse discriminatory effect against "sex workers" as compared to persons in other occupations in creating "barriers to accessing the protections, rights, and entitlements pursuant to workplace, labour, and health and safety legislation, *including but not limited to*…" (emphasis added) six provincial and federal statutes and regulations made pursuant to them, including the *Workers Compensation Act* and the *Employment Insurance Act*.[17] The respondents have not acceded to the appellant's request to specify details of the benefits in issue, or even the specific provisions relied upon in those enactments.[18]

13. In addition, the respondents claim that having been convicted under the impugned laws is one of the ways in which those laws discriminate against Ms. Kiselbach and members of the Society as women and as "sex workers".[19]

### 3. The Respondents

14. The Society's objects include the improvement of working conditions for those engaging in prostitution. Its members are women, including transgendered women, who recently were, or currently are, engaged in prostitution, primarily in the Downtown Eastside neighbourhood in Vancouver, British Colombia.[20] The membership of the Society is not fixed nor are formal membership lists maintained.[21]

15. Ms. Kiselbach is a former prostitute who last engaged in prostitution in 2001.[22] Most of the specific instances of violence, stigmatisation and discrimination alleged in the Amended Statement of Claim to be the unconstitutional effects on Ms. Kiselbach of

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[17] Further Amended Statement of Claim paras. 31, 41, AR Vol I, Tab 14, pp 178, 179
[18] Mukai Affidavit, para 5, Exhibit D para. 24, Exh. E para. 24, AR Vol II, Tab 21, pp 38, 45, 46, 49
[19] Further Amended Statement of Claim, paras. 6, 11, 36-37, AR Vol I, Tab 14, pp 171-172, 179
[20] BCCA Reasons, para 6, AR Vol I, Tab 4, p 61
[21] Mukai Affidavit, paras. 3-4, Exhibit E, AR Vol II, Tab 21, pp 38, 47-49
[22] Mukai Affidavit, para 5, Exhibit D, para. 10, Exhibit E, para. 10, AR Vol II, Tab 21 , pp 38, 43, 48

the impugned laws[23] occurred before the *Charter* came into effect in 1982. The Amended Statement of Claim alleges that she had been charged and convicted of several solicitation and bawdy-house offences[24] and that these convictions are one of the discriminatory effects of the challenged laws.[25] Her one conviction for keeping a common bawdy house occurred in 1978.[26] Although there are no further convictions for prostitution offences on her criminal record, other evidence indicates that she was put on probation and required to do community work service with respect to three instances of communicating for the purpose of prostitution in 1992 and 1993.[27]

16. Although she engaged in street level prostitution along with several other forms of prostitution, the pleadings do not reveal whether Ms. Kiselbach fits the definition of "sex worker" in the Further Amended Statement of Claim by having been at any point "*primarily* engaged in street level prostitution".[28]

**C. Prosecutions of Prostitution Offences**

17. There have been thousands of prosecutions under ss.210-213 in British Columbia alone, with many more across Canada.[29] Many of those cases, some of which are ongoing, involve challenges to various prostitution offences under various sections of the *Charter*, as set out in the table below:

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[23] Amended Statement of Claim paras. 12, 22, 36, AR Vol I, Tab 12, pp 129, 132, 136; Affidavit of Sheryl Kiselbach September 25, 2008 (Kiselbach Affidavit), para. 15-16, AR Vol IV, Tab 24, p 16; Amended Statement of Claim, paras. 13, 36, AR Vol I, Tab 13, pp 129, 136 Kiselbach Affidavit, para. 2, 18, AR Vol IV Tab 24 p. 12, 17; Mukai Affdiavit, para 6, Exhibit E, para. 13, AR Vol II, Tab 21, pp 38, 48; Amended Statement of Claim, paras. 15, 36, AR Vol I, Tab 12, pp 130, 136; Kiselbach Affidavit, para. 2 AR Vol IV, Tab 24, p 12; Mukai Affidavit, para 6, Exhibit E, para 14, AR Vol II, Tab 21, pp 38, 48

[24] Amended Statement of Claim para. 11, AR Vol I, Tab 12, p 129

[25] Amended Statement of Claim para.36, AR Vol I, Tab 12, p 136

[26] Kiselbach Affidavit, Exhibit B, AR Vol IV, Tab 24, p 40

[27] Kiselbach Affidavit, Exhibit C, AR Vol IV, Tab 24, p 41

[28] Amended Statement of Claim para.9, A AR Vol I, Tab 12, p 128; Kiselbach Affidavit, para. 9, AR Vol IV, Tab 24, p 14

[29] Affidavit of Elizabeth Campbell, September 17, 2008 (Campbell Affidavit), para. 4 AR Vol II, Tab 20, p 33; Affidavit of Suzanne Wallace-Capretta, September 17, 2008 (Capretta Affidavit), paras. 11-14, AR Vol II, Tab 22, pp 55-60

| Case | *Code*[30] | *Charter* |
|---|---|---|
| *R v Mangat(ongoing)*(BCSC)[31] | 210(1)(a), 212(1)(a),(j) | 2(b), 7, 15 |
| *R v Cho (ongoing)*(BCPC)[32] | 213(1)(c) | 2(b), 7 |
| *R v To (ongoing)*(Alta QB)[33] | 210(1), 212(1)(j) | 7 |
| *R. v Blais* (ongoing) (BCSC)[34] | 213(1)(c) | 2(b), 7 |
| *R. v DiGiuseppe* (2002) (ONCA)[35] | 210 | 7 |
| *R. v Hamilton* (2002) (BCPC)[36] | 210 | 7 |
| *R. v Downey* (1992) (SCC)[37] | 212(3) | 11(d) |
| *R. v Stagnitta* (1990) (SCC)[38] | 213(1)(c) | 2(b), 7 |
| *R. v Skinner* (1990) (SCC)[39] | 213(1)(c) | 2(b), (d) |
| *R. v Smith* (1988) (Ont. HC)[40] | 213(1)(c) | 2(b), (d), 7, 15 |
| *R. v Gagne* (1988) (Ont. PC)[41] | 213(1)(c) | 2(b) |
| *R. v Boston* (1988) (BCCA) [42] | 212(1)(j) | 2(d), 7, 11(g) |
| *R. v Jahelka* (1987) (Alta CA)[43] | 213(1) | 2(b) |
| *R. v Kazelman* (1987) (Ont. PC)[44] | 213(1) | 2(b) |
| *R. v Bavington et al* (No. 2) (1987) (Ont. PC)[45] | 213(1)(c) | 2(b) |
| *R. v Cunningham* (1986) (Man. PC)[46] | 213(1)(c) | 2(b), 7 |
| *R. v Bear* (1986) (Alta PC)[47] | 213(1)(c) | 2(b), (d), 6, 7, 15 |
| *R. v McLean* (1986) (BCSC)[48] | 213(1) | 2(b) |
| *R. v Bailey* (1986) (Ont. PC)[49] | 213(1) | 2(b), 2(d), 7 |
| *R. v Cheeseman* (1986) (Sask PC)[50] | 213(1)(c) | 2(b), 2(d), 7 |

[30] The current Criminal Code sections have been used for reference, *Criminal Code*, RSC 1985, c C-46
[31] Affidavit of Karen Howden, June 24, 2011 (Howden Affidavit), paras 10, 11, Exhibits G, H AR Vol V, Tab 32, pp 102-103, AR Vol IX, pp 31-36
[32] Howden Affidavit, paras 4, 5, Exhibit C, AR Vol V, Tab 32, p 102, AR Vol VIII, pp 163-164
[33] Howden Affidavit, para 2, Exhibit A, AR Vol V, Tab 32, pp 101, 104-112
[34] Howden Affidavit, para 7, Exhibit E, AR Vol V, Tab 32, p 102, AR Vol VIII, pp 170-172; Campbell Affidavit, para. 5, AR Vol II, Tab 20, p 34
[35] *R v DeGiuseppe; R v Cooper*, [2002] 161 CCC (3d) 424 (ONCA), OJ No. 86
[36] Campbell Affidavit, para. 6, AR Vol II, Tab 20, pp 34, 35
[37] *R v Downey*, [1992] 2 SCR 10, 90 DLR (4th) 449
[38] *R v Stagnitta*, [1990] 1 SCR 1226, SCJ No. 50 (QL)
[39] *R v Skinner*
[40] *R v Smith, (*1988) 44 CCC (3d) 385 (ONSC), OJ No. 1750 (QL)
[41] *R v Gagne*, [1988] OJ No. 2518 (Prov Crt) (Q.L.)
[42] *R v Boston*, [1988] BCJ No. 1185 (CA) (QL)
[43] *R v Jehelka; R v Stagnitta* (1987), 43 DLR (4th) 111 (Alta CA), A.J. No. 654
[44] *R v Kazelman*, [1987] OJ No. 1931 (Tor Pro Crt) (QL)
[45] *R v Bavington et al (No. 2),* [1987] 2 WCB (2d) 346 (Ont Prov Crt.), 36 CCC (3d) 267
[46] *R v Cunningham*, [1986] 31 CCC (3d) 223 (Man Pro Crt), M.J. No. 690
[47] *R v Bear*, [1986] 47 Alta LR (2d) 255 (Alta Prov Crt), [1986] AJ No 848
[48] *R v McLean; R v Tremayne (*1986), 2 BCLR (2d) 232 (SC)
[49] *R v Bailey*, [1986] OJ No. 2795 (Ont Prov Crt) (QL)
[50] *R v Cheeseman* (June 19, 1986) (Sask Prov Crt) unreported

| Case | *Code*[30] | *Charter* |
|---|---|---|
| *R. v Renner* (1986)(NSSC)[51] | 212(3) | 11(d) |
| *R. v Gudbranson* (1985) (BCPC)[52] | 210 | 2(d) |

18. In two of the ongoing cases, *R v Cho* and *R. v To*, the accused base their applications on *Bedford Lebovitch, Scott v Attorney General of Canada ("Bedford")*, described below.[53]

**D. Other Challenges to the Prostitution Laws**

19. At the time that the Society brought this action, the Ontario Superior Court was grappling with similar issues, involving many of the same provisions, in *Bedford*.

20. On September 28, 2010, as the decision appealed from was under reserve, Himel J. of the Ontario Superior Court of Justice declared that the impugned provisions all violate s.7 of the *Charter*, and cannot be saved by s.1.[54] The *Bedford* matter is now under reserve in the Ontario Court of Appeal.

21. In *Bedford*, the three applicants were each found to have private interest standing but the Court would have denied public interest standing to the two applicants not currently engaged in prostitution because the claim could be (and had been) brought on the basis of private interest standing alone. The Court noted that the Attorney General of Canada had not challenged the private interest standing of the one applicant still engaged in prostitution.[56]

22. The *Bedford* applicants filed extensive evidence, including evidence dealing with prostitution on the downtown eastside of Vancouver and used four of the same experts as the respondents are intending to use.[57]

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[51] *R v Renner* (1986), 29 CCC (3d) 138 (NSSC), NSJ No. 217
[52] *R v Gudbranson* (1985), 14 WCB 298 (BCPC)
[53] Howden Affidavit, para 2, 4, 10, Exhibits A, C, G AR Vol V, Tab 32, pp 101, 102, 104-112, AR Vol VII, pp 163-164, AR Vol IX, pp 31-34
[54] *Bedford v Canada*, 2010 ONSC 4264, 327 DLR (4th) 52
[56] *Bedford v Canada*, para. 62
[57] Affidavit of Lisa Minarovich, September 17, 2008 (Minarovich Affidavit), para. 8-11, 13, Exhibit D, AR Vol I, Tab 19, pp 190-199, AR Vol II pp 19-31; Transcript,, Oct. 7, 2008, p. 4, AR Vol V, Tab 27, pp 77, 78

23. The respondent Society sought and was granted leave to intervene in the *Bedford* appeal.[58]

## E. The Judgments Below

### 1. British Columbia Supreme Court

24. In October, 2008, Erhcke J. heard the appellant's application for an order to dismiss or stay the proceeding for lack of standing and other alternative relief. During the hearing, Erhcke J. invited the respondents (plaintiffs) to apply to amend the definition of "sex worker" found in the Amended Statement of Claim to conform to their argument.[59]

25. On December 15, 2008, Ehrcke J. granted the Crown's application to dismiss the action in its entirety, finding that the respondents were entitled to neither private interest standing, nor public interest standing.[60]

26. Ehrcke J. found that there were other reasonable and effective means by which such constitutional challenges could be effectively advanced.[61] He noted the hundreds of prosecutions under the impugned provisions each year in British Columbia, including *Charter* challenges in numerous prostitution-related criminal trials[62] and the fact that accused charged under single provisions have been permitted to challenge those provisions on the basis of the combined effect of the prostitution-related provisions.[63] He also concluded that *Bedford* illustrates that if public interest standing was not granted to the Society and Ms. Kiselbach, there may nevertheless be potential plaintiffs with private interest standing who could bring all of these issues before the court.

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[58] Howden Affidavit, para. 6, Exhibit D, AR Vol V, Tab 30, p 102, AR Vol VIII, pp 165-169
[59] Transcript, October 28, 2008, pp.92-93, AR Vol V, Tab 30, pp 95, 96
[60] BCSC Reasons, paras. 52, 87, AR Vol I, Tab 2, pp 23, 34, 35
[61] BCSC Reasons, para. 83, AR Vol I, Tab 2, pp 33, 34
[62] *R v Blais*, 2008 BCCA 389, 301 DLR. (4th) 464
[63] *R v Cunningham*, [1986] 31 CCC (3d) 223 (Man Pro Crt), M.J. No. 690

### 2. British Columbia Court of Appeal

27. On October 12, 2010, the British Columbia Court of Appeal upheld the determination that Ms. Kiselbach is not entitled to private interest standing but otherwise allowed the appeal of Ehrcke J.'s judgment. The Court granted public interest standing to both of the respondents on the basis that the broad nature of the attack on the legislation assisted the respondents in meeting the criteria for public interest standing.[64]

28. Saunders J.A., writing for herself and Neilson J.A., described the respondents' challenge as "systemic" in nature, in that it was "multifaceted", involved the cumulative effect of several related provisions, and addressed a comprehensive challenge to a legislative scheme which relied heavily on systemic considerations.[65] She found that in such cases, a more lenient view of standing was justified.[66] She also found that evidence of constitutional challenges brought by litigants in the context of prosecutions did not demonstrate that there were reasonable and effective alternatives to bring the matter before the court since none of the challenges in those cases were as broad as the respondents' challenges. The majority stated that the *Bedford* case was "of interest" but did not bear directly on the application of the public interest standing test.

29. In dissent, Groberman J.A. found there was no justification for relaxing the test. In his view there was no reason that "the courts ought to be more eager to grant standing where a broad challenge is presented than where a more confined one is contemplated."[67]

30. Finally, Groberman J.A. found that that there were reasonable and effective alternatives to granting standing, as the case did not include any challenges that could not be properly advanced in an appropriate case by a private litigant.[68]

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[64] BCCA Reasons, para. 61, AR Vol I, Tab 4, p 80
[65] BCCA Reasons,, Tab 3C, paras. 55-56, AR Vol I, Tab 4, pp 77, 78
[66] BCCA Reasons,, Tab 3C para. 62, AR Vol I, Tab 4, p 80
[67] BCCA Reasons, Tab 3C, para. 84, AR Vol I, Tab 4, p 86
[68] BCCA Reasons,, Tab 3C, para 96, AR Vol I, Tab 4, p 91

## PART II – QUESTIONS IN ISSUE

31. In concluding that the respondents should be granted public interest standing, did the Court of Appeal err by:

a) misinterpreting and unjustifiably relaxing the requirement that public interest standing should only be granted if there is no other reasonable or effective manner to bring the issue to court, and

b) finding that the respondents had raised a serious question to be tried with respect to the constitutionality of s.213(1)(c) of the *Criminal Code*?

## PART III - ARGUMENT

32. In *Council of Churches* this Court held that public interest standing is available at the court's discretion if the applicant establishes that:

a) the issue raised is a serious one;

b) the applicant is directly affected or has a genuine interest in its validity; and

c) there is no other reasonable and effective way to bring the issue before the court.[69]

33. The central issue in the decisions of the Courts below was the application of the third branch of the *Council of Churches* test. The appellant does not take issue with the findings that the first two branches of the test for public interest standing have been satisfied, with one exception. The Court of Appeal erred in finding that the respondents' pleadings disclosed a serious issue to be tried respecting the constitutionality of s.213(1)(c) in light of this Court's rulings in *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man)* and in *R. v Skinner.*[70]

34. Since the grant of public interest standing is discretionary,[71] an appellate court should only intervene if "the motion judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts."[72] The majority of the Court of Appeal found that Ehrcke J. had made two errors in determining whether there were other reasonable and effective means to bring the issue before the court:

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[69] *Council of Churches* at 253
[70] *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.); R. v Skinner*
[71] *Manitoba Métis Federation Inc. v Canada (Attorney General)*, [2010] M.J. No. 219 (MBCA), at para 249, 261, application for leave to appeal to the SCC, SCCA No 344, CSCR No 344. See also *League for Human Rights of B'Nai Brith Canada v Canada*, [2010] F.C.J. No. 1424 (CA); *604598 Saskatchewan Ltd v Saskatchewan (Liquor and Gaming Licensing Commission)* (1998), 157 DLR (4th) 82, SCC leave refused, SCCA No 146; *Council of Churches*, at para 33
[72] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, at para. 43

a) "the reasons for judgment do not fully reflect the systemic and comprehensive nature of the challenge advanced";[73] and

b) "the judge failed to give sufficient weight to the breadth of the constitutional challenge and the comprehensive and systemic nature of the plaintiffs' theory".[74]

35. On the contrary, Ehrcke J. properly applied the law set out in *Council of Churches*. The test is whether "on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant".[75] The test does not require that public interest standing be granted unless a private interest party will bring a challenge that is identical in all its aspects to the one proposed by the applicant for public interest standing.

36. Applying the correct test, Ehrcke J. found as a fact that there may be potential plaintiffs with private interest standing "who could, if they chose to do so, bring all of these issues before the court"[76] and that therefore refusing to grant the respondents public interest standing would not "result in the legislation being effectively immune from judicial scrutiny".[77] The Court of Appeal did not overturn this finding.

### A. Expanding The Availability Of Public Interest Standing Undermines The Rationale Behind The *Council Of Churches* Test

37. The majority of the Court of Appeal decided that the larger scope of a systemic challenge justifies a "more relaxed view of standing" than that to be applied to a challenge brought by an individual addressing a discrete issue.[78] The majority also found that, "where it is argued the law impermissibly renders individuals vulnerable…and exacerbates their vulnerability, the law on standing does not require the challenge to be

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[73] BCCA Reasons, para 62, Vol I, Tab 4, p 80
[74] BCCA Reasons, para 66, Vol I, Tab 4, p 81
[75] *Council of Churches* at para 36
[76] BCSC Reasons, paras 75 and 83, AR Vol I, Tab 2, pp 31, 33, 34
[77] BCSC Reasons, para 87, AR Vol I, Tab 2, p 34, 35
[78] BCCA Reasons, para 59, AR Vol I, Tab 4, p79

by a person with private interest standing."[79] These conclusions are erroneous. Those factors do not justify expanding the availability of public interest standing.

38. Courts have imposed restrictions on standing in order to control the proper use of the court and their resources. The reasons for these restrictions include:

> …(1) to avoid opening the floodgates to unnecessary litigation; (2) to ration scarce judicial resources by applying them to real rather the hypothetical disputes; (3) to place limits on the exercise of judicial power by precluding rulings that are not needed to resolve disputes; (4) to avoid the risk of prejudice to persons who would be affected by a decision but are not before the court; (5) to avoid the risk that cases will be inadequately presented by parties who have no real interest in the outcome; and (6) to avoid the risk that a court will reach an unwise decision of a question that comes before it in a hypothetical or abstract form, lacking the factual context of a real dispute.[80]

39. These considerations are only fully met where legislation is tested by those who are placed in jeopardy by the legislation or are affected by it in a manner different from the ordinary citizen. Accordingly, only such individuals have a right to standing.[81]

40. The principle that the law is best developed in cases involving live disputes set within a concrete fact situation arises repeatedly throughout the jurisprudence in a number of areas, including mootness, references, declaratory proceedings and unripe cases. It is a foundation for the court's reluctance to decide hypothetical and abstract questions and the courts' general practice of declining to address constitutional issues unless necessary to dispose of a case.[82]

41. In each of these situations the importance of this foundational principle can be explained from both an institutional and a practical perspective. From an institutional perspective, the preference of the courts to decide live matters brought by private interest

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[79] BCCA Reasons, para. 63, AR Vol I, Tab 4, p 80

[80] P. Hogg, Constitutional Law of Canada (3rd ed. 1992), at p. 1263, referred to in *Hy and Zel's Inc. v Ontario (Attorney General); Paul Magder Furs Ltd. v Ontario (Attorney General)*, [1993] 3 SCR 675, SCJ No 113 at para. 44

[81] *Smith v Attorney General of Ontario*, [1924] Sup C. 331, 3 DLR 189

[82] See generally Robert J. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in Robert J. Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 327-356

parties reflects the separation between the judicial and legislative branches. As Sharpe describes in his text *Charter Litigation*:

> The role of the courts is to decide actual disputes. Judicial pronouncements upon the constitutional validity of laws or practices may be seen as merely incidental to the task of deciding concrete cases. Courts are not entitled to pronounce upon constitutional issues at large or at will. From this perspective, judge-made law (particularly when overruling the legislature) is only legitimate when it is the product of adjudication of an actual dispute…. While our constitution does not explicitly limit the courts to actual cases or controversies, an important element of our judicial tradition and legal culture does.[83]

42. From a practical perspective, if there is no obstacle to judicial scrutiny of a law at the suit of someone who is directly affected by a particular government measure, then it is not a wise use of scarce judicial resources to permit proceedings by others who are not directly affected. Further, as explained by Jamal and Taylor in *The Charter of Rights in Litigation*:

> Unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Even though an appeal may be fully argued, that reason alone is not sufficient to warrant deciding difficult *Charter* issues and laying down guidelines simply because to do so might be "helpful".[84]

43. The need for the exceptional granting of public interest standing in the context of constitutional challenges developed from the recognition that traditional rules for standing could effectively immunize certain types of legislation from review. Only individuals who are placed in jeopardy by legislation or are affected by it in a manner different from the ordinary citizen have a right to standing to bring a constitutional challenge in respect of that legislation.[85] Although the public interest is generally represented by the Attorney General, the Attorney General is responsible for defending

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[83] Robert J. Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 329, 332, cited in *Manitoba Métis Federation Inc. v Canada (Attorney General)*, [2010] M.J. No. 219 (MBCA) at para 355

[84] *The Charter of Rights in Litigation*, looseleaf (Aurora: The Cartwright Group Ltd., 2009) at para. 4:09[2], cited in *Manitoba Métis Federation Inc. v Canada (Attorney General)*, at para 367

[85] *Smith v Attorney-General of Ontario*

the constitutionality of legislation and therefore standing to challenge legislation must be available to private individuals on a sufficiently broad basis to ensure that governments adhere to the Constitution.[86]

44. The test for public interest standing addresses the need to prevent legislation from being immunized while at the same time, and to the greatest extent possible, addressing traditional concerns which dictate the need to restrict standing.[87] It does so by establishing a preference for deciding concrete cases brought by litigants with private interest standing, but giving the court discretion to grant standing to some public interest litigants where the application of the traditional standing rules would immunize legislation from judicial review.

### 1. Many International Jurisdictions Find a Similar Balance

45. Whether in the context of common law standing or statutory grants of standing, other jurisdictions are equally concerned with striking the appropriate balance between ensuring that legislation and government actions are not immune from judicial review, and the concerns raised by unfettered access to the courts by public interest litigants. In Canada, it is the third criterion of the *Council of Churches* test that serves the important gatekeeping function, since many cases meet the first and second criteria. Different jurisdictions use different mechanisms to strike this balance but, as in Canada, most place significant emphasis on the availability of a private interest party to bring the matter before the courts when considering standing.[88]

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[86] See generally Thomas A. Cromwell. *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 68-92; see also *Council of Churches* at 252

[87] *Council of Churches* at 251; *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, SCJ No 73 at 631

[88] *R. v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd*, [1995] 1 WLR 386, 1 All E.R. 611 at 620, para E (QBD); *R. v Inspectorate of Pollution and another ex parte Greenpeace Ltd. (No 2)*, [1994] All E.R. 329 at 350, para E (QBD); *Save Bell Park Group v Kennedy*, [2002] QSC 174 at para 14; *Nth Qld Conservation Council Inc v Executive Director, Qld Parks & Wildlife Service* [2000] QSC 172 at para 35; *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, [2004] CCT 18/03 at paras 16 and 18 (S Afr Const Ct)

46. Public interest standing is more readily available in Canada than in most other jurisdictions. The availability of public interest standing in jurisdictions such as the United States,[89] Europe,[90] and Australia[91] is more restrictive. Even where Law Reform Commissions have made recommendations to expand public interest standing in other jurisdictions, these recommendations have generally not been acted upon by the courts or the government. [92]

47. While some jurisdictions are argued to be more generous in granting standing than Canada, those situations generally involve specific statutory or constitutional grants of standing. For example, in the United Kingdom there are various statutes that permit the court to grant leave to bring an action. As a result, this Court has noted that the case law from the United Kingdom may be of limited assistance in Canada.[93] In addition, since ratifying the *European Convention on Human Rights* in 1998, the United Kingdom is in much the same restrictive situation as Europe when it comes to human rights issues.[94]

48. Similarly, courts in South Africa have pointed out that the generous standing provisions of South Africa's constitution "introduce a radical departure from the common law" and that "the terms of the section limit considerably the degree to which an analysis of the standing jurisprudence in other countries can be of real assistance".[95]

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[89] US, Library of Congress, Congressional Research Service, *Congressional Standing to Sue: An Overview* by Jay R Shampansky (Washington, DC: Distributed by Penny Hill Press, 2001) at 1-2
[90] *Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4 1950, Europ. TS No 5, UNTS 221, art 34; Tanase v Moldova*, ECHR Application no.7/08, 27 April 2010 [GC] at para. 104
[91] Michael Head, *Administrative Law Content and Critique*, 2d ed. (Sydney: The Federation Press, 2008) at 123-124
[92] Austl, Commonwealth, Law Reform Commision, *Beyond the Door-Keeper: Standing to Sue for Public* Remedies (Report No 78) (Canberra: Australian Government Publishing Service, 1996) (AustLII) at 3.18-3.24; Austl, Commonwealth Law Reform Commission, *Annual Report 2008-2009* (Ultimo, NSW: AustLII, 2009) at 34, 140 and 146 ; *The Recognition of Class Actions and Public Interest Actions in South African Law*, South African Law Reform Commission, Project No 88 (August 1998) at 22-23
[93] *Canadian Council of Churches* at 244
[94] *Human Rights Act 1998* (UK), c 42, s 7(7); *Director General of Fair Trading v Proprietary Association of Great Britain*, [2001] EA Civ 1217 (BAILII) at paras 4-19*; JRI's Application*, [2011] NIQB 5 at para 38
[95] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, at para 14

49. Even in South Africa, where s.38 of the constitution provides for very generous standing rules, such litigants must prove they are genuinely acting in the public interest. South African courts will examine a variety of factors in this regard, including the nature of the right said to be infringed, whether there is another reasonable and effective manner in which the challenge can be brought, and the range of persons who may be directly or indirectly affected by any order made and the opportunity that those persons have to present evidence and argument to the courts.[96]

### 2. "Systemic" Challenges Do Not Require an Expansion of the *Council of Churches* Test

50. This Court has said that, although the principles applicable to public interest standing should be interpreted generously and liberally, they need not and should not be expanded.[97] Nevertheless, Saunders J.A. applied an expanded approach to public interest standing on the basis that this case is "systemic" in nature, and held that Ehrcke J. had erred in failing to do so.[98] She used the term "systemic" in various senses: to describe situations in which an entire legislative scheme is challenged; to describe schemes that disproportionately affect some persons; and to describe cumulative effects of legislation.[99] This approach was misconceived. As Groberman J.A. correctly concluded, "systemic" challenges do not justify granting public interest standing more readily than in a more confined case.[100]

51. Saunders J.A.'s "more relaxed view" of standing makes it easier to satisfy the requirement that there be no other reasonable and effective way to bring the issue before the court. Although this Court has held that a challenge brought by a private interest litigant constituted a reasonable and effective alternative,[101] Saunders J.A. said that the availability of a person with private interest standing would only "generally" defeat an

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[96] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, paras. 16 and 18
[97] *Council of Churches* at 252
[98] BCCA Reasons, paras 62, 66, AR Vol I, Tab 4, pp 80, 81
[99] BCCA Reasons, paras 51-66, AR Vol I, Tab 4, pp 76-81
[100] BCCA Reasons, para 84, AR Vol I, Tab 4, p 86
[101] *Council of Churches* at 252

application for public interest standing.[102] Thus, although Ehrcke J. found that there were people with private interest standing who if they chose to do so could challenge the legislation, not only in prosecutions but in civil actions, this was not enough.

52. In comparing the existing individual challenges to the proposed challenge in this case, the majority of the Court of Appeal looked for all of the following similarities with the proposed challenge:

a) a multi-faceted challenge against the same provisions impugned by the respondents;[103]

b) the provisions are challenged under the same sections of the *Charter*;[104]

c) the same argument or central thesis is put forward;[105]

d) the challenge is before a superior court,[106] and,

e) the challenge is brought in the same province.[107]

53. Such a level of similarity far exceeds what is required to expose legislation to judicial review by being "a reasonable and effective way to bring the issue before the court".[108] The "issue" does not have to be a single challenge to all the same provisions, relying on the very argument, structured in the same way that the respondents have, in the same jurisdiction and subject to the same remedy that the respondents seek. In other words, as Ehrcke J. correctly observed, the standard is not whether "granting public interest standing to the proposed litigant would be 'the *most* reasonable and effective

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[102] BCCA Reasons, para 49, AR Vol I, Tab 4, p 75
[103] BCCA Reasons, para 55, AR Vol I, Tab 4, pp 77, 78
[104] BCCA Reasons, paras. 61 and 66, AR Vol I, Tab 4, pp 80, 81
[105] BCCA Reasons, para 62, AR Vol I, Tab 4, p 80
[106] BCCA Reasons, para 54, AR Vol I, Tab 4, p 77
[107] BCCA Reasons, para 68, AR Vol I, Tab 4, p 81
[108] *Council of Churches* at 253

way…' but whether there is *no other* reasonable and effective way to bring the issue before the court" [109] (emphasis added).

### *a. The Existing Test Was Developed in Broad and Multifaceted Cases*

54. Contrary to the reasoning of Saunders J.A., no adaptation of the *Council of Churches* test is needed for challenges that are systemic in the sense that they impugn the cumulative effect of multiple provisions. Many of the decisions on public interest standing deal specifically with such challenges. The claim in *Council of Churches* was as much a systemic attack on legislation as that advanced by the respondents in this case – it was "a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the Immigration Act, 1976".[110] It would have been impossible for all of the provisions that were impugned in *Council of Churches* to be simultaneously attacked by an individual refugee claimant. Nonetheless, this Court considered that individual cases presented a preferable manner for testing the legislation.[111]

55. The Council's request for public interest standing failed because, amongst other reasons, (a) each refugee claimant had standing to initiate a constitutional challenge to secure his or her own rights under the *Charter*; and (b) each refugee's case (unlike the sweeping attack brought by the Council of Churches) presented a clear concrete factual background upon which the decision of the court could be based.

56. Similarly, in *Corporation of the Canadian Civil Liberties Association v Canada (Attorney General)*, the Ontario Court of Appeal refused the CCLA public interest standing, partly due to the fact that a private litigant had once raised a narrower challenge to the impugned provisions.[112]

57. In contrast to these cases, the claim in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 ("*Chaoulli*"), on which Saunders J.A. relied, was not systemic in the sense of

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[109] BCSC Reasons, para 87, AR Vol I, Tab 2, pp 34, 35
[110] *Council of Churches* at 253
[111] *Council of Churches* at 254-255
[112] *Corporation of Canadian Civil Liberties Association v Canada (Attorney General)* (1998), 40 OR (3d) 489 (ONCA) at 519-520, leave to appeal to SCC refused, [1998] SCCA No 487 (QL)

challenging a series of interrelated provisions in a legislative scheme. Rather, *Chaoulli* was systemic in the sense that the provisions being challenged affected all residents of Quebec - the denial of the ability to purchase private health insurance was a denial of the constitutional rights of all residents of Quebec.[113] The majority in *Chaoulli* did not describe the claim as a systemic challenge to the public health system; rather it was a challenge by a doctor and a patient to two statutory provisions which prohibited private health care insurance.[114] *Chaoulli* has been viewed as a typical constitutional challenge to legislation brought by two directly affected individuals.[115]

58. As noted by Groberman J.A. in dissent, the dissenting judgment of Binnie and LeBel JJ. (Fish J. concurring) referred to the test enunciated in *Council of Churches* and did not express any doubts as to the correctness of that decision. Deschamps J. took a somewhat different approach to standing by simply finding there was no effective way to challenge the validity of the provisions other than by recourse to the courts.[116] The reasons of McLachlin C.J. and Major J. (Bastarache J. concurring) do not address the issue of standing at all, but concur generally with the judgment of Deschamps J.[117] Their reasons do not suggest an intention to broaden the basis for public interest standing.

59. Given the factual context in *Council of Churches*, the test set out there already takes into account considerations relevant to challenges to legislative schemes as opposed to individual provisions, and nothing in *Chaoulli* changed this. There is no need to create a special category for these types of challenges.

60. Furthermore, the goal of public interest standing is not to ensure that the greatest number of public interest individuals or groups can bring *Charter* challenges, but to ensure that *someone* can bring a challenge so that the legislation is not immunized from judicial review. When dealing with an attempt to challenge a legislative scheme, the

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[113] *Chaoulli* at paras 100, 102-103, 119, and 159
[114] *Chaoulli* at paras 100, 102-103, 119, and 159
[115] *Canadian Bar Association v British Columbia*, 2006 BCSC 1342, [2007] 59 BCLR (4th) 38; aff'd on other grounds, 2008 BCCA 92, 290 DLR (4th) 617 at para 71
[116] BCCA Reasons, para 86, AR Vol I, Tab 4, p 87
[117] BCCA Reasons, para 87, AR Vol I, Tab 4, p 87

reasoning in *Council of Churches* did not require that the individual refugees, who were bringing challenges within their specific cases, must bring precisely the same challenges and arguments as the Council of Churches.[118] Likewise, in *Canadian Council of Refugees v Canada*, the Federal Court of Appeal found that the Council did not have public interest standing to bring a generalised attack on the legislation because it was preferable to have individual challenges brought by litigants with private interest standing.[119]

### *b. Cumulative Effects Can Be Considered in a Challenge to One or More Provisions*

61. Saunders J.A. found that a challenge to a single provision or limited number of provisions, which generally is the case in prosecutions, does not permit adequate consideration of the cumulative effects of the various provisions in a legislative scheme.[120] However, the entire legislative scheme does not have to be challenged in order for the Court to take into account its cumulative effects,[121] as demonstrated by this Court's decisions in *Charkaoui* and *Withler*.[122] One of the provisions in question in the instant case, s.195(1)(c) of the *Criminal Code* [now s.213(1)(c)], was challenged before the Manitoba Provincial Court in *R. v Cunningham.*[123] That court considered the cumulative effect of s.195(1)(c) together with the other provisions of s.195.1 and s.193 [now s.210] in concluding that s.195.1(1)(c) violated the accused's rights under s.7 of the *Charter*.

62. With few exceptions,[124] the constitutionality of criminal legislation is challenged in the context of prosecutions. The criminal law can most appropriately be tested by the

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[118] *Council of Churches* at 254-256
[119] *Canadian Council for Refugees v Canada*, 2008 FCA 229, at paras 99-104, 73 Imm LR (3d) 159, leave to appeal dismissed, [2008] S.C.C.A. No. 422
[120] BCCA Reasons, para 56, AR Vol I, Tab 4, p 78
[121] BCCA Reasons, paras 77-78, AR Vol I, Tab 4, p 84
[122] *Charkaoui* v *Canada*, 2007 SCC, 91 SCR 350; *Withler v Canada*, 2011 SCC 12, 1 SCR 396
[123] *R v Cunningham*, [1986] 31 CCC (3d) 223 (Man Pro Crt), at 233-236, MJ No 690
[124] E.g., *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, at para 7, 1 S.C.R. 76; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at 543-544, 107 DLR (4th) 342; *Minister of Justice (Can) v Borowski*, [1981] 2 S.C.R. 575 at 587-589, 130 DLR (3d) 588; *Ogden v British Columbia Registrar of Companies*,

many individuals with standing as of right who come before the courts to determine their criminal liability on the basis of a firm factual foundation rather than on an abstract basis. As Groberman J.A. stated, courts are more adept at dealing with a series of more limited challenges within the confines of concrete cases,[125] and advancing challenges to all of the provisions in separate cases will not weaken the arguments or make them unlikely to be advanced.[126]

63. The majority of the Court of Appeal also used the term "systemic" for cases involving legislative schemes which are alleged to create "systemic" problems for groups of people. However, this type of "systemic" case still involves those effects manifesting themselves against individuals who are able to challenge the legislative scheme. The "systemic" aspect of those cases is related to the type of evidence and analysis required to support the claim and does not affect to the ability of a litigant with private interest standing to bring the claim.[127]

### *c. A Criminal Court Is An Appropriate Forum*

64. Saunders J.A. considered the constitutional limitations that prevent a provincial court judge in a criminal case from making a formal declaration to be relevant to the assessment of whether prosecutions are a reasonable and effective alternative.[128] This was an error. Provincial Courts, as statutory courts, have no inherent jurisdiction to make a formal declaration of invalidity, but do have jurisdiction to decide that the law upon which a charge is based is of no force and effect by reason of the *Charter.* Such declarations may be limited to the particular case in which they are made, but become more broadly applicable on appeal to a superior court.[129] There are many examples of the

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2011 BCSC 1151 at para 3, *PHS Community Services Society v Canada (Attorney General)*, 2010 BCCA 15, 314 D.L.R. (4th) 209 at para 22-24

[125] BCCA Reasons, (Dissent) para 83, AR Vol I, Tab 4, p 86

[126] BCCA Reasons, (Dissent) para 96, AR Vol I, Tab 4, p 91

[127] BCCA Reasons, para 90; *Council of Churches* at 253

[128] BCCA Reasons, para 54, AR Vol I, Tab 4, 77

[129] *Shewchuk v Ricard* (1986), 28 D.L.R. (4th) (BCCA) at 439-440 BCJ No 335, cited with approval in *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 S.C.R. 570 at 591, 77 DLR (4th) 94; *Okwuobi v Lester B Pearson School Board*, 2005 SCC 16, 1 SCR 257

constitutionality of *Criminal Code* provisions being determined in proceedings commenced as prosecutions before provincial courts.[130]

65. Nor can it be said that the criminal courts are not an appropriate forum for *Charter* challenges to the *Criminal Code*. In a select few prosecution decisions involving aboriginal treaty, rights and title issues[131] and language rights[132] this Court has commented that a civil case is a more appropriate forum and procedure for "major constitutional litigation",[133] where the criminal or regulatory context is simply a background to the constitutional fight. However, these exceptions are readily distinguished from prosecutions like those listed in paragraph 17 because they do not involve direct *Charter* scrutiny of the offence provisions before the court. Rather they involve broad aboriginal or language rights which may incidentally come into conflict with criminal or regulatory prohibitions.

***d. Jurisdiction Is Not Relevant***

66. Despite its great similarity to the instant case, Saunders J.A. said that the existence of the *Bedford* case was only of "interest to this case, but is not a matter that bears directly on the application here of the criteria for public interest standing" since the result in *Bedford*, would not be binding in British Columbia.[134]

67. The fact that the *Bedford* case was being dealt with by the superior court in Ontario, and was therefore not binding in British Columbia, is immaterial. The *Criminal Code* is of national application and the question raised by the test for public interest standing is whether the provisions in issue are immunized from attack, not whether there is a binding precedent about to be created in the same jurisdiction.

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[130] *R. v Oakes*, [1982] OJ No 3460 (Prov Ct (Crim Div)), aff'd, [1983] OJ No 2501 (ONCA), aff'd [1986] 1 SCR 103 at para 80; *R. v Caine*, [1998] BCJ No 885 (Prov Ct) at para 130, aff'd, *R v Malmo-Levine*, 2000 BCCA 335, 145 CCC (3d) 225 (CA) paras 1-2, aff'd [2003] 3 SCR 571; *R. v Smith (Edward Dewey)*, [1983] BCJ No. 1232 (Co Ct), aff'd, [1984] BCJ No 1506 (CA), rev'd, [1987] 1 SCR 1045, SCJ No 36

[131] *R. v Marshall; R. v Bernard,* 2005 SCC 43. 2 SCR 220; *R v Caron,* 2011 SCC 5, 1 SCR 78

[132] *R v Caron*

[133] *R v Caron* at para. 19

[134] BCCA Reasons, para 68, AR Vol I, Tab 4, pp 81, 82

### 3. The Court of Appeal's Interpretation Is Counterproductive and Unnecessary

68. Saunders J.A.'s adaptation of the "no reasonable and effective alternative" requirement seriously undermines the principles underlying the test for public interest standing. Public interest standing is to be exceptional. Interpreting "no reasonable and effective alternative" by demanding that alternative ways of bringing the issue to court be identical to the challenge proposed by the applicant means that public interest standing will no longer be the exception contemplated by this Court. |The balance between ensuring that legislation is exposed to judicial scrutiny and effectively using judicial resources will not effectively be achieved. A recent example is afforded by *Pratten v British Columbia (Attorney General)*, 2010 BCSC 1444 where the court granted public interest standing simply on the basis that the challenge was systemic with no further inquiry into whether the applicant had demonstrated that there was no other reasonable and effective alternative to the challenge.[135]

69. Public interest litigants will be encouraged to bring unnecessarily broad reaching, multi-faceted challenges in an attempt to meet this branch of the test. Such sweeping challenges present their own special difficulties as they "require extensive evidence on a multitude of issues"[136] and do not permit the courts to develop the law incrementally, informed by concrete factual scenarios. Such concrete factual backgrounds are important to properly assess constitutional claims and ensure that the law develops in a way that takes into account real situations, and not just abstract ones.

70. The problems of a general claim are illustrated by the vague, general and frequently shifting pleadings in this case. For example, the respondents have been inconsistent in defining the very class of persons whose rights they seek to defend.

71. Furthermore, a preference for multi-faceted, broad reaching challenges brought by public interest litigants also raises the very concern identified by this Court in *Council of Churches*, namely, the concern that scarce judicial resources will be diverted from the

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[135] 2010 BCSC 1444, at paras 31-37
[136] BCCA Reasons, para 83, AR Vol I, Tab 4, p 86

courts essential role of resolving matters involving private interest parties. [138] As this Court stated:

> It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organisations pursing their own particular cases certain it the knowledge that their cause is all important.[139]

72. The approach of the majority effectively creates a presumption in favour of public interest litigants bringing broad challenges and relegates to secondary importance private interest parties raising specific factual situations. This is precisely the situation this Court warned against in *Hy and Zel's,* which denied standing to businesses challenging the constitutionality of the *Retail Business Holidays Act.* In that case, this Court said:

> In *Danson v Ontario (Attorney General),* [1990] 2 S.C.R. 1086, at p.1093, this Court cautioned that "the failure of a diffuse challenge could prejudice subsequent challenges or the impugned rules by parties with specific and factually established complaints"….In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that Charter issues are decided in a proper factual context are compromised.[140]

73. There will always be new arguments which could be put forward to challenge legislation. However, allowing every such new argument to found a claim for public interest standing undermines the goal of striking an appropriate balance amongst preserving judicial resources, obtaining just results by making decisions on the basis of concrete facts rather than theory, and ensuring that legislation is not immunized from judicial review.

74. That is not to say that the perspective of such groups is unimportant. However, the perspectives of public interest groups can be taken into consideration through the

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[138] *Council of Churches* at Paras 28 and 43
[139] *Council of Churches* at Para 35
[140] *Hy and Zel's Inc. v. Ontario (Attorney General) ; Paul Madger Furts Ltd. v Ontario (Attorney General),* [1993] 3 SCR at 694 , SCJ No 113

granting of intervener status, without having those groups supplant the position of private interest parties who are able to put concrete factual situations before the court.[141]

### B. Challenging Legislation Which Impacts Vulnerable Groups Does Not Automatically Justify Public Interest Standing

75. Although Saunders J.A. did not specifically find that Ehrcke J. failed to take the vulnerability of prostitutes into account, she stated that vulnerable groups allegedly made more vulnerable by the impugned laws should not have to wait for a challenge by a person with private interest standing.[142] She erred in so doing. Given that challenges to the impugned provisions had already taken place, the vulnerable individuals were not in fact waiting. More importantly, there is no need to expand the *Council of Churches* test in order to take into account the vulnerability of groups subject to legislation. Such vulnerability is already a relevant consideration in the third branch of the *Council of Churches* test.

76. However, vulnerability of an affected group does not automatically justify public interest standing. The question still remains whether the impugned provisions are likely to be subject to attack by a private interest party. In assessing the third branch of the test, whether the vulnerability of affected groups will, on the basis of the evidence, create a barrier to attacking the provisions is what must be determined. The third criterion is satisfied only where it is shown that the vulnerability of a group creates such a serious obstacle to their access to the courts that the impugned legislation will effectively be insulated from challenge.[143] Vulnerability does not necessarily create a barrier to attacking legislation. Individuals may be able to bring challenges despite their vulnerability, or not all those subject to the legislation may be vulnerable, and those who are not will be in a position to challenge the legislation.

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[141] BCCA Reasons, para 82. , AR Vol I, Tab 4, p 85
[142] BCCA Reasons, para 63, AR Vol I, Tab 4, p 80
[143] See *Constitutional Law of Canada*, Fifth Edition Supplemented Volume 2 Peter W. Hogg Professor Emeritus, Osgoode Hall Law School York University, Toronto Scholar in Residence, Blake, Cassels & Graydon, LLP, Toronto, Ch 59 (59-10) although not as specific as this; see also *Manitoba Métis Federation Inc. v Canada (Attorney General)*

77. This Court's analysis in *Council of Churches* takes into account issues of access to justice viewed from both an individual and systemic perspective. On the one hand, this Court sought to ensure that government action is not immune from challenge due to the lack of any realistic possibility that private interest claimants will bring such challenges. On the other hand, this Court was concerned with the implications for access to justice that would result from a judicial system overloaded with claims seeking to advance broad policy goals rather than the rights and interest of private parties where such private parties were able to get before the courts.

78. Saunders, J.A. pointed to this Court's decision in *Vriend*[144]as demonstrating the appropriateness of granting public interest standing to vulnerable groups. However, the situation in *Vriend* was that Mr. Vriend had private interest standing to challenge one provision of the *Individual's Rights Protection Act* and was simply including in his challenge other very similar provisions which did "not depend on any particular factual context in order to resolve their constitutional status."[145]

79. A more appropriate analogy is *Council of Churches,* where public interest standing was denied in part on the basis that the disadvantages faced by refugees as a group did not preclude their effective access to the court, as was evidenced by the fact that many refugee claimants had indeed appealed administrative decisions under the statute.

80. In contrast, Saunders, J.A. in this case simply found that where the essence of the complaint is that the law renders individuals vulnerable, and exacerbates their vulnerability, "the law on standing does not require the challenge to be by a person with private interest standing."[146] This blanket statement goes far beyond what this Court did in *Vriend* and is counter to this Court's approach in *Council of Churches.* It ignores the principles behind the test for public interest standing as it fails to take into account the particulars of the case. Vulnerability can not automatically negate the need to show that

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[144] *Vriend v Alberta*, [1998] 1 S.C.R. 493, 156 DLR (4th) 385
[145] *Vriend v Alberta* at para 48
[146] BCCA Reasons, para 63

there is no other reasonable way to bring the matter before the courts. That is a factual question which must be decided in the particular context of the case and not on the basis of contentious assumptions.

81. As found by Ehrcke, J., despite any vulnerability of those engaging in street level prostitution, they and other accused have been able to regularly advance *Charter* challenges to the provisions at issue here, and to other prostitution-related provisions. Such challenges were regularly brought prior to this Court's decisions regarding the constitutionality of ss. 210, 212(3) and 213.[147] Challenges have been less common since those decisions, but that is to be expected after this Court has decided the constitutionality of a law.

82. Without the need for public interest standing, in 22 cases, at least 29 women engaged in prostitution advanced *Charter* challenges to most of the impugned provisions - ss.210, 212(1)(a) and (j), 212(3) and 213 - on the basis of alleged infringements of ss. 2(b), 2(d), 7, 11(d) and 15 of the *Charter*.[148]

83. In addition to these challenges, there have been several cases in which those engaging in street level prostitution have litigated the constitutionality or interpretation of prostitution related laws or violations of *Charter* rights due to the manner in which the prostitution provisions of the *Criminal Code* were enforced.[149] This once again demonstrates that vulnerability of this group is not a barrier to challenges to legislation affecting the group.

**C. This Case Surpasses The Standard**

84. In the present case, the number of previous and ongoing prosecutions and ongoing civil proceedings more than suffices to establish that there are other reasonable and

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[147] See para 17 in the Facts

[148] See para 17 in the Facts

[149] *Westendorp v The Queen*, [1983] 1 SCR 43, 144 DLR (3d) 259; *Hutt v The Queen* [1978] 2 SCR 476, 82 DLR (3d) 95; *R. v Whitter*, [1981] 2 SCR 606, 129 DLR (3d) 577; *R. v Head*, (1987) 36 C.C.C. (3d) 562, BCJ No 1611 (BCCA); *R. v Edwards*, (1974) 16 CCC (2d) 545, BCJ No. 854 (BCCA); *R. v Phillips*, (1974) 19 CCC (2d) 27 (BCCA)*; R. v White; R. v SB*, [1994] 136 NSR (2d) 77 (CA)

effective ways to challenge the impugned provisions. The purposes served by the test for granting public interest standing are met where there are directly affected individuals who could, if they chose to do so, bring a constitutional challenge to the impugned legislation, on the basis they deem most appropriate. In this case Ehrcke J. found that many such individuals existed and concluded that:

> The constitutional challenges [the respondents] seek to raise can be brought in the context of a case where the applicant has private interest standing. Refusing to grant public interest standing to SWUAV and Kiselbach will not result in the legislation being effectively immune from judicial scrutiny.[150]

85. This case goes even further. Since the Court of Appeal's decision, at least two accused have brought Charter challenges to multiple prostitution offence provisions,[152] and another accused has challenged one of the impugned sections.[153]

86. Moreover, in *R. v Blais* and *Bedford,* some of the ongoing cases, very similar arguments are being made as in this case. In *R. v Blais*, currently on appeal to the B.C. Supreme Court, [154] Mr. Blais has challenged s.213(1)(c) of the *Criminal Code* under ss. 2(b) and 7 of the *Charter* as breaching the rights of those engaging in prostitution. Even though he only challenges one section, Mr. Blais is advancing arguments similar to those the respondents advance and as were advanced in *Bedford*.[155] He alleges that:

a) The law forbids communication of any kind between persons who have the right to communicate for legal purposes;

b) The law does not abate a nuisance but perpetuates a class of persons who are vulnerable to physical harm, abuse and murder; and

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[150] BCSC Reasons, para 87, AR Vol I, Tab 2, pp 34, 35
[152] Howden Affidavit, paras 2, 10, AR Vol V, Tab 32, p 101, 102
[153] Howden Affidavit paras 4, 5, AR Vol V, Tab 32, 102
[154] Howden Affidavit, para 7, Exhibit E, AR Vol V, Tab 32, pp 102, 170-172
[155] *R v Blais*

c) The law contributes to the physical harm, abuse and murder of the persons by suggesting that their lives and safety are less important than the nuisance of engaging in street level prostitution.[156]

**1. Challenge in Bedford**

87. The *Bedford* case illustrates that if public interest standing is not granted in this case, the matter will still be before the courts and as a result *Bedford* should have played a much more definitive role than it did in the analysis the majority of the Court of Appeal. In *Bedford*, three women formerly or currently engaged in prostitution challenged ss.210, 212(1)(j), and 213(1)(c) of the *Criminal Code* as violating s.7 of the *Charter*[157] and s.213(1)(c) as violating s.2(b). They claimed that these provisions unjustifiably violate their rights to liberty and security of the person, both alone and in combination, by denying them safe and legal options for conducting prostitution in a secure setting, and that s.213(1)(c) also unjustifiably violates their s.2(b) right to freedom of expression.[158]

88. The *Bedford* case clearly showed that the legislative scheme is not immunized from attack. While *Bedford* does not involve all the same *Criminal Code* or *Charter* provisions as this case, the same essential allegations were made, namely, whether the laws expose those engaged in prostitution to an increased risk of harm. The few additional provisions challenged by the respondents are all related to the same subject that has been challenged in *Bedford* - criminal prohibitions related to the practice of prostitution - and some of the evidence in Bedford relates to the circumstances of prostitution in British Columbia and the downtown eastside of Vancouver.[159]

89. In its ruling in *Bedford*, the Ontario Superior Court of Justice found the impugned provisions, both alone and in concert with the other impugned provisions,[160] contributed

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[156] Campbell Affidavit, para. 5, AR Vol II, Tab 20, p 34; *R.v Blais*
[157] Minarovich Affidavit, paras 2, 3, Exhibit A, AR Vol I, Tab 19,pp 189, 190, AR Vol II, pp 1-9; *Bedford et al v Attorney General of Canada*, at paras 9-10, 26, 32, 37
[158] Bedford at paras 285, 373
[159] See paras 19-23 of the facts
[160] Bedford at paras 385, 387, 388

to a deprivation of the applicants' security of the person, because the offences made many potentially safety-enhancing measures for prostitutes illegal.[161]

90. Despite arguing in the courts below that *Bedford* does not constitute another reasonable and effective means to get the issue before the courts, the Society has intervened in the *Bedford* appeal, pointing out the overlap between the two cases in their intervention application.[162] As with this case, the Society argues in *Bedford* that the cumulative effect of the laws impugned in *Bedford* make prostitution more dangerous by prohibiting the necessary conditions to allow individuals engaged in prostitution to do so in a safe and secure setting.[163] In its motion on the intervention application, the Society stated that it would argue that the motions judge appropriately considered the "complex social context" when considering whether the impugned laws were unconstitutional"[164] and that it intended to focus on the experience of and conditions faced by street-based sex workers.[165] The Society filed affidavit evidence stating that if the appeal is successful, the decision will "provide persuasive precedent in the British Columbia Litigation [this case], which raises many of the same issues."[166]

91. As the respondent Society has demonstrated by this intervention, the voices of organisations such as the Society are capable of being heard in direct interest litigation, such as *Bedford*, through intervener status. In *Bedford,* their assistance is given against a background of concrete facts in a context which allows for a proper balance between

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[161] Bedford at para. 361
[162] Howden Affidavit, para 8, Exhibit F, AR Vol V, Tab 32, p 102, AR Vol IX, pp 1-30
[163] Howden Affidavit, para 8, Exhibit F, AR Vol V, Tab 32, p 102, AR Vol IX, pp 1-30
[164] Howden Affidavit para 3, Exhibit B para 24, AR Vol V, Tab 32, pp 101, 102, 125, 126, *Bedford et al v Attorney General of Canada and Attorney General of Ontario*, Toronto C52799 and C52814 (ONCA) (Notice of Motion), paras. 24 and 28
[165] Howden Affidavit, *Bedford et al v Attorney General of Canada and Attorney General of Ontario*, Toronto C52799 and C52814 (ONCA) (Notice of Motion), paras. 1-2
[166] Howden Affidavit para 3, Exhibit B, Affidavit of Peter Wrinch, para 46, AR Vol V, Tab 32, pp 101, 102, 152, *Bedford et al v Attorney General of Canada and Attorney General of Ontario*, Toronto C52799 and C52814 (ONCA) Howden Affidavit, para 3, Exhibit B, Affidavit of Jill Chettiar, para 22, AR Vol V, Tab 32, pp 101, 102, AR Vol VI, p 163; *Bedford et al v Attorney General of Canada and Attorney General of Ontario*, Toronto C52799 and C52814 (ONCA), Howden Affidavit, para3, Exhibit B, Affidavit of Peter Wrinch, para 47, AR Vol V, Tab 32, pp 101, 102, 153

providing for the perspective of public interest litigants and preserving judicial resources to adjudicate on constitutional issues with the benefit of specific factual scenarios.[167]

### D. No Serious Issue In Relation To The Ss. 2(B) And 2(D) Challenges To S. 213(1)(C)

92. In addition to failing to meet the test for public interest standing as a result of the existence of other reasonable means for the matter to get before the courts, there is also no serious issue in relation to the ss.2(b) and 2(d) challenges to s.213(1)(c).

93. In *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man)* and in *R. v Skinner,* this Court has previously held that what is now s.213(1)(c) of the *Criminal Code* does not violate either ss. 2(b) or 2(d) of the *Charter.* Although the current case brought by the respondents is broader in scope than those cases, there is nothing in the current challenge as pled which would affect this Court's conclusion that s.213(1)(c) does not violate ss. 2(b) or 2(d). Given this, even if all other aspects of the test were met, the respondents should not be granted public interest standing on this issue.

### E. Public Interest Standing Cannot Be Used To Avoid The Rule Against Collateral Attacks

94. The fact that Ms. Kiselbach has prior convictions under the provisions which she now seeks standing to challenge should have been considered in relation to her claim for public interest standing as it was in her claim for private interest standing.

95. In analysing Ms. Kiselbach's claim to private interest standing, the Court of Appeal noted that Ms. Kiselbach had previously been charged under the impugned provisions and had private interest standing to challenge them at that time. The Court pointed out that success in this current challenge would discredit the prior convictions of Ms. Kiselbach and have overtones of collateral attack.[168] However, the fact that Ms. Kiselbach's challenge can be characterised as a collateral attack on her previous

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[167] *Council of Churches* at 256; *Canadian Bar Association v British Columbia* at para 77
[168] BCCA Reasons, para 33, AR Vol I, Tab 4, p 71

convictions was not taken into account by the majority when considering Ms. Kiselbach's claim to public interest standing.

96. Given that the effect of Ms. Kiselbach's challenge would be the same whether on the basis of private interest standing or public interest standing, it was a relevant factor which should also have also defeated her claim for public interest standing. Not taking this factor into consideration when considering public interest standing can result in public interest standing being used to circumvent the rule against collateral attacks.[169]

**F. Conclusion**

97. The test for public interest standing, as set out in the *Council of Churches*, has resulted in an appropriate balance being struck. It achieves the goal of ensuring that legislation is not immunized from challenge. Now, as then, there is no need to expand the test. To do so would undermine the important balance which the current test for public interest standing strikes between the need to ensure that the constitutionality of legislation is not immune from judicial scrutiny and the need to ensure the just development of the law through the consideration of its consequences on those most directly affected. The number of cases involving one or more of the impugned sections that regularly come before the courts and specifically the cases already before the courts involving arguments very similar to those advanced by the respondents go far beyond what is necessary to accomplish the balance achieved by the public interest standing test. Private interest litigants must not be displaced by public interest litigants. In the words of Cory J., "it would be detrimental, if not devastating, to our system of justice and unfair to private litigants"[170] if that were to happen.

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[169] *Grenon v Canada (Attorney General)*, 2007 ABQB 403, at para 47, 76 Alta LR (4th) 346; *Zeyha v Canada (Attorney General)*, 2004 SKCA 157, 26 DLR (4th) 631 (QL) at para 5; *Action des Nouvelles Conjointes du Quebec v Canada*, 2004 FC 797, F.C.J. No. 971 (QL) at paras 43-44

[170] *Council of Churches* at 252

## PART IV – SUBMISSIONS CONCERNING COSTS

98. Should the appeal be allowed, the appellant does not seek costs. However, in accordance with the usual rule, the costs order made in the British Columbia Court of Appeal should be set aside.

99. Should the appellant be unsuccessful in whole or part, costs should follow the event in the normal fashion. There is no justification in this case for anything other than a regular cost award.

## PART V – NATURE OF ORDER SOUGHT

100. The appellant requests that this appeal be allowed and the decision of the British Columbia Court of Appeal set aside.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, in the Province of British Columbia, this 1st day of September, 2011.

_____
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## PART VI – TABLE OF AUTHORITIES

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## PART VII – RELEVANT STATUTORY PROVISIONS

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