S.C.C. FILE NO. 33981

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM 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)

FACTUM OF THE RESPONDENTS DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY and SHERYL KISELBACH

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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OVERVIEW

1. Should the law of standing be formulated and applied in a way that improves or erodes access to justice? To ask this question is to answer it. Yet this very question is at the heart of this appeal and arises in litigation in which Canada has challenged the right of an organization of street-level sex workers and a former sex worker to claim that the criminal laws that prohibit various aspects of prostitution violate their *Charter* rights.

2. The Respondents argue that the Court of Appeal was correct on the current law in finding both plaintiffs had public interest standing. The Respondents also urge this Court to reformulate the common law to ensure that public interest standing is presumptively granted in cases where public interest organizations commence public interest litigation and particularly where they advance the interests of their vulnerable members. The Respondents also identify other factors that should influence a court in the exercise of its discretion and that should ensure that public interest standing is granted in appropriate cases, such as this one.

3. The present law evinces an overwhelming preference for private interest standing, at the cost of appropriate public interest cases proceeding, by asking the question "whether there is another reasonable and effective way to bring the issue before the court." The law should be reformulated to ask instead whether *this* litigation *with this plaintiff* is a reasonable and effective way of bringing the issues before the court. In asking and answering this question, public interest litigation will occupy the place it deserves given the importance it plays in advancing the rights and freedoms of all members of Canadian society. The Respondents will also seek to uphold the order of the Court of Appeal, but not its reasons, by arguing that the Respondent Sheryl Kiselbach should have been granted private interest standing or standing pursuant to s. 24 of the *Charter*.

PART I: RESPONDENTS' STATEMENT OF FACTS

4. On August 3, 2007, the Downtown Eastside Sex Workers United Against Violence Society ("SWUAV") commenced an action seeking a declaration that ss. 210, 211, 212(1)(a),

(b), (c), (d), (e), (f), (h) and (j) and (3), and 213 of the *Criminal Code*[1] (the "Prostitution Laws") individually and/or in combination infringe ss. 7, 15, and 2(b) of the *Charter*.[2]

5. On September 29, 2008, SWUAV filed an Amended Statement of Claim adding Sheryl Kiselbach as a plaintiff and setting out an additional claim that the impugned provisions infringe s. 2(d) of the *Charter*.[3]

6. The Respondents challenge the following sections of the *Criminal Code*:

a. s. 213, which prohibits any person from stopping or communicating with any person in a public place for the purpose of engaging in prostitution (the "Communication Law");

b. s. 210, which prohibits being a keeper, inmate or occupant of a common bawdy house or knowingly permitting a place to be let or used for the purposes of a common bawdy-house, as an owner or someone in charge or control of the place and s. 211, which prohibits taking, transporting or directing any other person to a common bawdy-house (collectively, the "Bawdy House Law"); and

c. s. 212, which prohibits procuring and related conduct, including facilitating or managing another person's involvement in prostitution and living on the avails of prostitution (the "Procuring Law").

7. The Respondents allege that the Prostitution Laws, both as individual *Criminal Code* provisions and as a legislative scheme, infringe sex workers':

a. s. 7 liberty interests due to the possibility of arrest and imprisonment;

b. s. 7 rights to security of the person, given that the Prostitution Laws prevent sex workers from taking steps to improve the health and safety conditions of their work;

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[1] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (the "*Criminal Code*"), Appellant's Book of Authorities ("AGBoA"), Tab 75

[2] Writ of Summons and Statement of Claim filed August 8, 2007, Appellant's Record ("AR") Vol. I, Tab 7, pp. 96-108

c. s. 15 equality rights, given the Prostitution Laws' discriminatory effects on sex workers who are a disadvantaged group;

d. s. 2(b) expression rights in that s. 213 of the Criminal Code limits communication that could serve to increase their safety; and

e. s. 2(d) association rights because sex workers are prevented from joining together to increase their personal safety.

8. SWUAV is a registered non-profit society that is run by and for current and former sex workers who live and/or work in the Downtown Eastside neighbourhood of Vancouver, British Colombia (the "DTES").[4] SWUAV's mandate is based upon the vision and needs of street-based sex workers, and its objects include: working toward better health and safety for sex workers, working against all forms of violence against sex workers and lobbying for policy and legal changes that will improve the lives and working conditions of women working in the sex trade.[5]

9. SWUAV members are: all women, the majority of whom are of Aboriginal heritage, all living with addiction issues, health challenges and/or disabilities, all living in poverty and almost all victims of physical and/or sexual violence at some point in their lives.[6]

10. Ms. Kiselbach is a former sex worker who, for approximately 30 years, was engaged in various forms of sex work including working as an exotic dancer, performing live sex shows, working in massage parlours, conducting street level sex work and working independently in indoor sex work.[7]

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[3] Amended Writ of Summons and Statement of Claim filed September 29, 2008, paras. 27-31, AR Vol. I, Tab 12, pp. 134-135
[4] BCCA Reasons, para. 6, AR Vol. I, Tab 4, p. 61
[5] Affidavit #1 of Jill Chettiar, September 26, 2008 ("Chettiar Affidavit #1"), para. 8, Ex. B, AR Vol. IV, Tab 25, p. 180, AR Vol. V, p. 22
[6] Chettiar Affidavit #1, para. 10, AR Vol. IV, Tab 25, p. 180, AR Vol. V, p. 22
[7] BCCA Reasons, para. 5, AR Vol. I, Tab 4, p. 60

11. Ms. Kiselbach has been convicted of several prostitution-related offences, including Bawdy House offences and Communication offences.[8] She experienced significant violence while engaging in sex work, including being sexually assaulted, stabbed and forcibly confined.

12. Ms. Kiselbach stopped working in the sex industry in 2001, although she would engage in sex work again under different circumstances, including if conditions for sex workers were safer and it were possible to legally work in a situation that she controlled, without the risk of being criminally charged.[9] Ms. Kiselbach is currently employed as the Violence Prevention Coordinator at an organization situated in the DTES that provides support services to current and former sex workers.[10] In this workplace, Ms. Kiselbach can be open about her past involvement in sex work, which has been stigmatizing in other workplaces as well as in other aspects of her life.[11]

13. Ms. Kiselbach says she would not have been able to participate in this type of constitutional challenge when she was active in sex work because of the risk of public exposure, fears regarding her personal safety, and the potential loss of access to social services, income assistance, clientele and employment opportunities outside of the sex industry.[12]

14. SWUAV members are unable to come forward as individual plaintiffs in this litigation for a number of reasons. First, SWUAV members struggle with serious health challenges, addiction and disabilities and fear being unable to cope with the stress and demands of lengthy, complex and high profile legal proceedings. Second, SWUAV members are aware that the media may publicize their participation in this litigation which would result in a loss of privacy and safety, which could have the following repercussions:

a. their spouses, friends, family members and/or members of their community may become aware that they are or were involved in sex work;

b. increased violence by clients and retaliation by police officers;

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[8] BCCA Reasons, para. 5, AR Vol. I, Tab 4, p. 60; Affidavit #1 of Sheryl Kiselbach, September 25, 2008 ("Kiselbach Affidavit #1"), Ex. C, AR Vol. IV, Tab 24, p. 41
[9] BCCA Reasons, para. 5, AR Vol. I, Tab 4, p. 60; Kiselbach Affidavit #1 para. 21, AR Vol. IV, Tab 24, p. 18
[10] BCCA Reasons, para. 5, AR Vol. I, Tab 4, p. 60; Kiselbach Affidavit #1, para. 24, AR Vol. IV, Tab 24, p. 19
[11] Kiselbach Affidavit #1, para. 29, AR Vol. IV, Tab 24, p. 20
[12] Kiselbach Affidavit #1, para. 23, AR Vol. IV, Tab 24, p. 18

c. increased financial difficulties, such as loss of clientele or being cut off income assistance or disability benefits if the government is made aware that they are involved in sex work; and

d. eviction from their homes or apprehension of their children.[13]

Street-based sex work in the Downtown Eastside

15. Sex workers in the DTES are among the most marginalized and disadvantaged members of Canadian society.[14] The DTES has the lowest per capita income of any region in the country and sex workers in this community live in conditions of extreme poverty.[15] Street-level sex workers in the DTES are predominantly female, and disproportionately of First Nations ancestry.[16] They face a range of serious health issues, including drug and alcohol addiction, HIV/AIDS, Hepatitis and a range of other diseases and mental health issues.[17]

16. Sex workers face alarming rates of sexual and physical violence, and this is particularly so in the DTES.[18] Women in the sex trade are murdered at a rate of 60 to 120 times the rate of the general female population.[19] The DTES is the site of many missing and murdered street-level sex workers, some of whom were murdered by Robert Pickton who was charged with the murder of 27 drug addicted sex workers from the DTES, and was eventually convicted on six counts.[20]

Enforcement of the Prostitution Laws

17. Police in the DTES enforce the Prostitution Laws more rigorously than in other Canadian

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[13] Chettiar Affidavit #1, para. 18, AR Vol. IV, Tab 25, p. 184
[14] Affidavit #1 of N. Rielle Capler, September 25, 2008 ("Capler Affidavit #1"), Ex. D, AR Vol. IV, Tab 23, p. 3
[15] Kiselbach Affidavit #1 Ex. E, AR Vol. IV, Tab 24, p. 72
[16] Kiselbach Affidavit #1 Ex. E, AR Vol. IV, Tab 24, p. 55
[17] Kiselbach Affidavit #1 Ex. E, AR Vol. IV, Tab 24, pp. 54-55
[18] Capler Affidavit #1, Ex. C, AR Vol. II, Tab 23, p. 101, para. 6; p. 115, para. 2; pp. 140-141, paras. 9-13; p. 147, para. 5; pp. 148-149, paras. 3-7; p. 151, para. 3; pp. 153-154, paras. 4-7; pp. 157-158, paras. 5-7; pp. 160-161, paras. 3, 5; pp. 166-167, paras. 3-8; pp. 186-190, paras. 7, 11-12, 19-23, 29; Capler Affidavit #1, Ex. C, AR Vol. III, Tab 23, p. 3, para. 13; p. 18, para. 9; p. 72, para. 17
[19] Kiselbach Affidavit #1 Ex. E, AR Vol. IV, Tab 24, p. 58
[20] *R. v. Pickton*, [2010] 2 S.C.R. 198, 2010 SCC 32, at paras. 1-2, Respondents' Book of Authorities ("RBoA"), Tab 31

jurisdictions.[21] Sex workers in this area describe being targeted and arrested by police and also experience harassment, discrimination, verbal and physical abuse by police.[22] Many DTES sex workers are distrustful or fearful of police and face barriers to accessing police protection.[23]

18. Overall, rates of criminal charges pursuant to the Prostitution Laws decreased in the decade leading up to 2007, the year that SWUAV initiated this action. In those cases where charges were laid, more than 50% resulted in a stay of proceedings or withdrawal of charges.[24]

The Judgments Below

19. The SWUAV and Kiselbach action was set for a six-week trial in the British Columbia Supreme Court commencing February 2, 2009. However, in October 2008, Ehrcke J. of the British Columbia Supreme Court heard the Attorney General of Canada's application to dismiss the action on the basis that the plaintiffs lack private and public interest standing.

20. In response to the Attorney General's application, SWUAV and Ms. Kiselbach filed extensive evidence demonstrating the barriers that sex workers, and particularly street based sex workers, face in attempting to initiate this type of litigation. Their evidence included an affidavit from Ms. Rielle Capler[25] whose uncontroverted evidence included 94 affidavits from sex workers from the DTES who described their particular vulnerabilities, social exclusion and barriers to accessing government services and protections.

21. Ehrcke J. held that neither Ms. Kiselbach nor SWUAV had standing, private or public, to challenge the constitutional validity of the provisions in issue.

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[21] Affidavit of Peter Wrinch, January 30, 2011, Ex. B, AR Vol. VI, Tab 32, p. 2

[22] Capler Affidavit #1, Ex. C, AR Vol. II, Tab 23, p. 82, paras. 11-13; pp. 85-86, paras. 5-6, 10; p. 108, para. 6; p. 112, para. 5; p. 118, paras. 3-4; pp. 132-133, paras. 2-12; p. 136, paras. 4-6; pp. 148-149, paras. 3-7; pp. 162-163, paras. 4-5; pp. 169-170, paras. 5-11; pp. 176-177, paras. 6-10, 15-18; pp. 179-180, paras. 3-6; p. 183, para. 8; pp. 187-189, paras. 13-17, 24, 27; pp. 192-193, para. 2-8; pp. 198-200, paras. 5-10; Capler Affidavit #1, Ex. C, AR Vol. III, Tab 23, p. 14, para. 4; p. 30, para. 5; p. 43, para. 5; p. 145, paras. 4-5

[23] Kiselbach Affidavit #1, Ex. E, AR Vol. IV, Tab 24, p. 130; Capler Affidavit #1, Ex. C, AR Vol. II, Tab 23, p. 132, para. 2; pp. 139-140, para. 6; Tab 23, p. 160, para. 2; Tab 23, p. 164, para. 10; Tab 23, p. 177, para. 18; Capler Affidavit #1, Ex. C, AR Vol. III, Tab 23, p. 3, para. 11; Capler Affidavit #1, Ex. C, AR Vol. III, Tab 23, pp. 10-11, paras. 5-7; Tab 23, pp. 38-39, paras. 6–9, 15-16, 18; Tab 23, p. 82, para. 10; Tab 23, p. 85, para. 10; Tab 23, pp. 87-88, paras. 6-10; Tab 23, pp. 91-93, paras. 3-14; Tab 23, p. 102, para. 27; Tab 23, p. 159, para. 17; Tab 23, p. 165, paras. 14-17

[24] Affidavit #1 of Suzanne Wallace-Capretta, September 17, 2008, AR Vol. II, Tab 22

[25] Capler Affidavit #1, Ex. D, AR Vol. IV, Tab 23, p. 68

22. Ms. Kiselbach and SWUAV appealed the order dismissing the action. On October 12, 2010, the British Columbia Court of Appeal granted public interest standing to SWUAV and Ms. Kiselbach. Saunders J.A., writing for the majority, emphasized that the entire analysis for public interest standing is "to be performed in a liberal and generous manner" but that each criterion "is, so to speak, a necessary condition that must be met on an application for standing."[26] Saunders J.A. held that the case advanced by SWUAV and Ms. Kiselbach was uniquely "systemic and comprehensive."[27] She reasoned that the action was distinct from other challenges to the various Prostitution Laws. She thereby found that "the action was stripped of its central thesis" when the Chambers Judge simply referred to the number of prostitution related charges laid in order to conclude that there was a sufficient prospect that a reasonable and effective alternative exists.[28]

PART II: STATEMENT OF POSITION WITH RESPECT TO THE APPELLANT'S QUESTION

23. The Court of Appeal's order, which overturned the decision of Ehrcke J. dismissing the action:

a. should be upheld and the decision to grant public interest standing to the Respondents SWUAV and Sheryl Kiselbach sustained;

b. should also be upheld on the basis that Ms. Kiselbach is entitled to Private Interest Standing or standing pursuant to s. 24 of the *Charter*; and

c. the Respondents SWUAV and Sheryl Kiselbach should be entitled to special costs in this Court and in the Courts below.

PART III: STATEMENT OF ARGUMENT

A. STANDARD OF REVIEW

24. Saunders J.A. for the majority in the Court of Appeal was cognizant of the deference required respecting the exercise of a chambers judge's discretion. Her Ladyship said that the

[26] BCCA Reasons, AR Vol. I, Tab 4, p. 74, para. 43
[27] BCCA Reasons, AR Vol. I, Tab 4, p. 80, paras. 61-62

Court could only interfere "when this Court considers the judge acted on a wrong principle or failed to give sufficient weight to all relevant considerations"[29] This Court's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band* is to the same effect.[30]

25. In *Okanagan*, this Court found, in reviewing a discretionary decision, that the chambers judge erred by giving improper weight to two factors. The chambers judge had overemphasized the importance of one factor (avoiding an order that involved prejudging the issues), and the other was not supported by evidence and was not a reasonable one in circumstances (finding that a contingent fee arrangement might be a viable alternative for funding the litigation).[31] These errors are akin to those that the Court of Appeal identified in this case: not giving sufficient weight to the litigants' vulnerability and the comprehensive and systemic nature of their claim. This Court in *Okanagan* therefore intervened on the same basis as the Court of Appeal intervened below.

B. THE APPEAL DECISION CORRECTLY APPLIED THE *COUNCIL OF CHURCHES* TEST AND SHOULD BE UPHELD

26. The majority of the Court of Appeal correctly applied the existing legal test for public interest standing, as articulated by this Court in *Canadian Council of Churches*,[32] to the circumstances of the case.

27. In addition, this appeal provides this Court with the opportunity to reformulate the common law of standing to better ensure access to justice for all members of Canadian society, in particular those who are extremely marginalized and who require organizations such as SWUAV to advance their interests in Court. The Respondents argue that the third question in the three-part test should be reformulated so as to harmonize the law with established legal principles and to bring the law in better accord with *Charter* and other constitutional values.

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[28] BCCA Reasons, AR Vol. I, Tab 4, p. 80, paras. 61-62
[29] BCCA Reasons, AR Vol. I, Tab 4, p. 72, para. 38
[30] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*], at para. 43, AGBoA, Tab 4, citing *R. v. Regan*, 2002 SCC 12, at para. 118
[31] *Okanagan*, at para. 44, AGBoA, Tab 4
[32] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 [*Canadian Council of Churches*], RBoA, Tab 5

28. Before proposing how the common law test of public interest standing might be reformulated, we first defend the decision of the Court of Appeal on its own terms. Both the present formulation and any reformulation must be based on sound principles and values, which are explained below.

i. The Rationale for Public Interest Standing

29. The central animating principle of public interest standing is that standing should be granted to ensure the constitutionality of laws and state conduct. This approach began with *Thorson*, where the Court reasoned that a new standing rule was necessary to facilitate the testing of the constitutionality of bilingualism legislation.[33] Courts now recognize standing where lawsuits are brought by individuals or groups who are well positioned to raise a viable constitutional challenge but whose legal interests may not be directly or currently implicated by the impugned laws or conduct.[34] Providing the means for the public to challenge laws fulfills "the right of the citizenry to constitutional behaviour by Parliament."[35] The doctrine is connected to the interwoven principles of access to justice and the rule of law; and works to ensure that the judiciary fulfills its role in adjudicating the constitutionality of legislation, that courts are open to the citizenry, and that government action is bounded by law.[36]

30. The standing rules are to be afforded a liberal and generous approach, given the importance of the interests at stake.[37] The dissenting opinion in *Hy and Zel's* noted that lower courts ought to take a contextual and purposive approach in the standing analysis, referring to the "increasing recognition, most evident in *Thorson*, that courts should look beneath the rules governing standing and consider the rationale as it applies to the facts of a particular case."[38]

31. The law of standing is said to advance the following aims: (i) assuring the economical use of judicial resources; (ii) addressing the requirements of the adversarial process by ensuring an adequate factual context for the resolution of the legal issues raised; and (iii) accounting for

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[33] *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138 [*Thorson*], at pp. 162-163, RBoA, Tab 36
[34] *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, RBoA, Tab 22
[35] *Thorson*, at p. 163, RBoA, Tab 36; *Canadian Council of Churches*, at pp. 18-19, RBoA, Tab 5
[36] Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2008) 25 NJCL 191, RBoA, Tab 44; *Canadian Council of Churches*, at pp. 18-21, RBoA, Tab 5
[37] *Canadian Council of Churches*, at pp. 18-19, RBoA, Tab 5

the proper role of the court, by foreclosing judicial review of purely political, rather than legal, questions.[39] The Respondents do not contest the substance or importance of these aims, but assert that, on an application for public interest standing, they must be examined in context and not applied in a manner that defeats the overarching purpose of the standing law.

32. These aims are presently dealt with by way of a three-part test that is designed to guide the exercise of judicial discretion.[40] The first two questions ask about the claim alleged and the character of the plaintiff: (i) whether the case raises a serious issue as to the invalidity of legislation or public action; and (ii) whether a plaintiff evinces a genuine interest in the invalidity of legislation or public action. The first question is closely related to a rule of civil procedure that ensures that only claims known in law may proceed and take up judicial resources.[41] The second question is relevant to whether the plaintiff is likely to advance a proper and comprehensive factual record. This question is related to the question of the integrity of the adversarial process: parties with a genuine interest are more likely to enable the court to decide issues on a proper evidentiary foundation. These two requirements remain important as verification of the efficiency and integrity of public interest litigation. The second factor in particular enables a judge to protect courts from "busybodies" who may not fully appreciate the significance of the law and its effects. This type of judicial inquiry is similar to that undertaken in adjudicating intervention applications: the court may properly rely on this factor in order to examine whether the interests of the plaintiff will bring proper perspectives to the case. These factors amply support the standing of the Respondents, as set out further below.

33. The third question asks about the plaintiff and the character of the litigation in relation to the broader legal context, the assessment of which engages both the limitations and the goals of standing. The current language is: "whether there is another reasonable and effective way to bring the issue before the court." This was the question posed and correctly answered by the

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[38] *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v Ontario (Attorney General)*, [1993] 3 S.C.R. 675 [*Hy and Zel's*], p. 36, RBoA, Tab 15

[39] Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), RBoA, Tab 42; June M. Ross, "Standing in *Charter* Declaratory Actions," (1995) 33 *Osgoode Hall LJ* 151 at 156-58, RBoA, Tab 46; Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice," 44 *UBC L Rev* 2, 255–285 at 259 [*Reopening Law's Gate*], RBoA, Tab 41; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at para. 36 [*Finlay*], RBoA, Tab 10; *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575 [*Borowski*], para. 5, AGBoA, Tab 22

[40] *Canadian Council of Churches*, at pp. 22-24, RBoA, Tab 5; *Borowski*, p. 598, AGBoA, Tab 22

majority of the Court of Appeal in favour of allowing the Respondents public interest standing, as will be demonstrated below.

ii. The Respondents Satisfy the Three-Part Test

a. Serious Issue to be Tried

34. The Court of Appeal correctly concluded that the first stage of the *Canadian Council of Churches* test was easily met. The Respondents have commenced a claim that raises serious questions of public importance relating to the constitutionality of federal legislation.[42] The rights that are the foundation of the case are serious, as they relate to the lives, security, health and social citizenship of sex workers.

35. There is a high threshold for a finding that there is no cause of action in a *Charter* claim. This is because courts are rightly concerned about ensuring that early applications to strike do not preclude meritorious and significant claims from proceeding.[43]

36. The parties proceeded below on the basis that there was a serious issue raised in the pleadings on at least some of the issues, so as to satisfy the first stage of the test. The Appellant for the most part concedes that there are serious issues to be tried within the Respondents' claim.[44]

(1) Serious Issue in Relation to Section 2(b) and 2(d) Challenges to Section 213(1)(c)

37. Canada argues that the Respondents raise no serious issue in relation to the challenges under ss. 2(b) and 2(d) of the *Charter* to s. 213(1)(c) of the *Criminal Code*, arguing that this Court has already determined that the Communication Law does not infringe freedom of expression or freedom of association. That is incorrect. This Court in *Reference Re: s. 193 and*

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[41] British Columbia Supreme Court Civil Rules, Rule 9-5 and 9-6(3)(a)
[42] BCCA Reasons, AR Vol. I, Tab 4, pp. 73, 81, paras. 40, 67
[43] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 [*Fraser*], paras. 54, 56, RBoA, Tab 23; *British Columbia Nurses' Union v. British Columbia (Attorney General)*, 2008 BCSC 321, RBoA, Tab 3
[44] BCCA Reasons, AR Vol. I, Tab 4, pp. 73, para. 40

195.1(1)(c) of the Criminal Code and *R. v. Skinner* held that the Communication Law of the *Code* **did** infringe s. 2(b) of the *Charter*, but found that the breach was saved under s. 1.[45]

38. The Respondents' s. 2(d) claim is significantly different than that addressed by this Court in *Skinner*, where the Court examined only whether the Communication Law infringed the freedom of association. In *Skinner*, the respondent argued that the Communication Law violated s. 2(d) because it prohibited sex workers and clients from making contact with each other.[46] In the case at bar, the Respondents claim that the Communication Law violates freedom of association in that it prevents street-based sex workers from working collaboratively with each other and with third parties, which limits their ability to ensure safety and security.[47]

39. Further, the Respondents' claim is that the Communication Law, in *combination* with the Bawdy House and Procuring Provisions, infringes the freedom of association *and* other *Charter* rights. The Respondents allege that the interlocking effects of these laws have dire consequences for sex workers, with the s. 2(d) infringement overlapping with the s. 7 violations.[48]

40. The fact that a provision has been subject to review in the past does not cast the law in stone. "The rule of stare decisis brings certainty to the law. However, the common law is continually adapted to conform to contemporary conditions."[49]

41. Rothstein J., in reasons concurring in the result, in *Fraser* held, "the authorities are abundant that this Court may overrule its own decisions, and indeed it has done so on numerous occasions."[50] He then reviewed the "plethora of criteria for courts to consider in deciding between upholding precedent and correcting error,"[51] three of which are indicated in the case at bar:

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[45] Appellant's Factum, paras. 92, 93, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, RBoA, Tab 33; *R. v. Skinner*, [1990] 1 S.C.R. 1235 [*Skinner*], AGBoA, Tab 56
[46] *Skinner*, AGBoA, Tab 56
[47] Further Amended Writ of Summons and Statement of Claim, filed September 11, 2009, AR Vol. I, Tab 14, p. 177, para. 29
[48] Further Amended Writ of Summons and Statement of Claim, filed September 11, 2009, AR Vol. I, Tab 14, pp. 177-178, paras. 27-31
[49] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2003 BCSC 148 [*Little Sisters*], at para. 19, RBoA, Tab 18
[50] *Fraser*, at para. 129, RBoA, Tab 23
[51] *Fraser*, at para. 133, RBoA, Tab 23

a. Have facts so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification?[52]

b. Are there subsequent developments in the law that undermine the validity of the precedent?[53]

c. Are foundational principles of human and civil rights involved?[54]

42. It is submitted that these same factors would permit a trial court to conclude that it is not bound by a decision of the Supreme Court of Canada or at the very least would allow a trial court to conclude at the stage of standing that there is a serious issue to be tried.

43. That there is a serious issue to be tried on these issues has now been demonstratively proven to be the case by the decision of the Ontario Superior Court in *Bedford*. When considering the principle of *stare decisis* in relation to the ss. 7 and 2(b) claim, Justice Himel found:

> In my view, the s. 1 analysis conducted in the Prostitution Reference ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the Prostitution Reference are no longer valid today…. Here, the expression at issue is that which would allow prostitutes to screen potential clients for a propensity for violence. I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me. As will become evident following a review of the evidence filed by the parties, there is a substantial amount of research that was not before the Supreme Court in 1990.[55]

b. Genuine Interest

44. SWUAV is an organization comprised of many active street level sex workers living and working in the DTES. The Respondent, Ms. Kiselbach, is a former sex worker and is now employed with an organization that advocates for and counsels sex workers. There is no suggestion that they are mere busybodies or have no real and continuing interest in the issue.

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[52] *Fraser*, at para. 136, RBoA, Tab 23
[53] *Fraser*, at para. 134, RBoA, Tab 23
[54] *Fraser*, at para. 137, RBoA, Tab 23
[55] *Bedford v. Canada*, 2010 ONSC 4264 [*Bedford*], at para. 83, AGBoA, Tab 3

Below, the parties largely proceeded on the basis that the Respondents have a genuine interest in the question of the validity of the impugned provisions.[56]

c. No Other Reasonable and Effective Manner

45. The Court of Appeal correctly determined that there is no other reasonable and effective way for the issues raised by the Respondents to be determined.

(1) Systemic Claim

46. Canada asserts that the majority of the Court of Appeal "expanded" the law of public interest standing and took a "more relaxed view" on the basis that the case was "systemic" in nature.[57] The Respondents submit that the majority's decision does not expand the test, but is in fact entirely consistent with the direction of this Court in *Canadian Council of Churches* where it directed that the Court's discretion should be exercised in a "liberal and generous manner" and in line with the principles and purposes of the law of public interest standing.[58]

47. The Court of Appeal correctly held that the *nature of the claim* must be at the forefront of a judge's mind on a determination of standing. The Court had before it a claim of a comprehensive nature, against interlocking statutory provisions that together create a unique and dangerous impact on the rights and lives of sex workers. Understanding and grappling with the particular character of the litigation is essential to knowing whether it may be achieved in any other reasonable and effective manner.[59] The Court of Appeal rightly concluded that past challenges to the relevant provisions had not been as complex, had not been based upon the same provisions of the *Criminal Code* or the same sections of the *Charter*, and were "qualitatively different," with none addressing a "comprehensive challenge to a legislative scheme which relied heavily on systemic considerations."[60]

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[56] BCCA Reasons, AR Vol. I, Tab 4, p. 73, para. 40
[57] Appellant's Factum, paras. 50-51
[58] *Canadian Council of Churches*, at pp. 18-19, RBoA, Tab 5
[59] BCCA Reasons, AR Vol. I, Tab 4, pp. 79-80, paras. 60, 62
[60] BCCA Reasons, AR Vol. I, Tab 4, p. 78, para. 56

48. The majority of the Court of Appeal recognized that "the term 'systemic' is something of a chameleon"[61], so it is important not to be distracted by definitional issues. In its reasons the majority emphasized both the "systemic and comprehensive nature of the challenge advanced."[62]

49. For present purposes we submit that a case is "systemic" where it challenges, *inter alia* an entire legislative scheme or interlocking provisions and has a broad, varied and sometimes disproportionate impact on a class of persons subject to the scheme.[63]

50. Canada says that "systemic challenges do not justify granting public interest standing more readily than in a more confined case."[64] The Respondents disagree. By its nature, such a systemic challenge both justifies a grant of public standing and should cause a court to prefer it.

51. Binnie J. described the claim in *Chaoulli* as systemic because it was not limited to the circumstances of a particular plaintiff and the argument was not limited to case-by-case consideration. The claim was a general one about the way in which a legislative scheme caused harm to those on medical waiting lists.[65] Similarly, in the present case, the Respondents do not limit themselves to the experiences of a particular sex worker. They make a broader argument that the harmful effects on individual safety and dignity on all street-based sex workers caused by the Prostitution Laws destroy Parliament's authority to regulate sex work through existing criminal provisions.

52. *Canadian Council of Churches* may also be described as involving a systemic challenge insofar as the "claim makes a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the *Immigration Act, 1976*…".[66] But the Canadian Council of Churches' claim for standing was not rejected on that ground. It was rejected because the evidence in that case was clear: unlike the sick patients in *Chaoulli*, or the vulnerable sex workers in the present case, the refugees affected by the laws in *Canadian Council of Churches* had demonstrated a willingness and ability as individuals to challenge the very provisions under

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[61] BCCA Reasons, AR Vol. I, Tab 4, p. 78, para. 58
[62] BCCA Reasons, AR Vol. I, Tab 4, p. 78, paras. 62, 66
[63] BCCA Reasons, AR Vol. I, Tab 4, p. 79, para. 58
[64] Appellant Factum, para. 50
[65] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 [*Chaoulli*], at pp. 874-875, RBoA, Tab 6
[66] *Canadian Council of Churches*, at pp. 22-23, RBoA, Tab 5

attack by the Council.[67] For this reason, as the Court below rightly found, the present case is "systemic and comprehensive" and "closer on the spectrum to *Chaoulli* than *Canadian Council of Churches*…".[68]

53. In these circumstances, and contrary to what Canada claims, **it is proper** to consider whether "systemic evidence and analysis" will be needed to advance the challenge.[69] If so, there will be all the more reason to allow the challenge to be brought by persons or organizations that fully understand and can prove that systemic effect.

54. Where a motion to strike for want of standing is brought at the outset, the pleadings serve to identify the facts needed to establish the claim and to inform the chambers judge of the nature of the evidence that will be required. There is much to be said for not deciding the question of standing as a preliminary matter. In a case where the claim is said to be systemic, or in a case where there is doubt about whether there is a more reasonable and effective way of resolving the dispute, a court could simply ensure that there is at least an "arguable case" for standing.[70] Leaving a final determination until the end of the proceedings will allow the trial court to best appreciate whether the concerns raised by Professor Hogg and adopted by the Appellant for a restricted rule of standing materialize: namely "… (4) 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."[71]

55. The risk of leaving the final determination of standing until the end is borne by the plaintiff. This is not to diminish the government's concern about being drawn into needless and costly litigation. That concern is addressed by the threshold standing analysis of an "arguable case," which will weed out meritless claims and inappropriate litigants. In the context of

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[67] *Canadian Council of Churches*, at p. 25, RBoA, Tab 5
[68] BCCA Reasons, AR Vol. I, Tab 4, p. 80, para. 61
[69] Appellant's Factum, para. 63; BCCA Reasons, AR Vol. I, Tab 4, p. 88, para. 90 adopting the reasons of Brenner J. in *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38
[70] *Finlay*, at para. 16, RBoA, Tab 10
[71] Appellant's Factum, para. 38

Charter litigation, the court ought not apply a higher initial procedural bar, given the importance of the interests at stake.

(2) Nature of the Defence

56. In conducting the "reasonable and effective" analysis, consideration should not only be given to the role of the plaintiffs in advancing their claim, but also their role in responding to the issues raised in defence by the Attorney General. It cannot be realistically suggested that the defence would be any different were the claim advanced by a single sex worker making the same claims as the Respondents do in the present case.

57. In the case at bar, the Statement of Defence includes the following assertions:

a. that the Prostitution Laws "deter individuals from becoming involved in prostitution";[72]

b. that "risk is inherent to the activity of prostitution" and that prostitution is controlled by coercive individuals;[73]

c. that the Prostitution Laws "are an appropriately tailored response to the complex social issues that surround prostitution";[74]

d. that the Prostitution Laws have a purpose compatible with s. 15 of the *Charter*; and[75]

e. a denial that the Prostitution Laws subject sex workers to increased risks of violence, injury and other threats to security, health and safety, "and puts the Plaintiff to strict proof thereof."[76]

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[72] Statement of Defence, AR, Vol. 1, Tab 8, pp. 111-112, para. 10
[73] Statement of Defence, AR, Vol. 1, Tab 8, p. 112, para. 12
[74] Statement of Defence, AR, Vol. 1, Tab 8, pp. 112-113, para. 14
[75] Statement of Defence, AR, Vol. 1, Tab 8, p. 113, para. 15
[76] Statement of Defence, AR, Vol. 1, Tab 8, pp. 111-112, para. 10

58. In its Statement of Defence, Canada treats the Prostitution Laws as an interlocking entity and characterizes the laws as "an appropriately tailored response," not as a series of separate and specific responses. The systemic nature of the claim is reflected back by a systemic defence.

59. Canada also makes broad claims about deterrence, about the alleged equality-supporting purpose of the Prostitution Laws, and about the nature of prostitution. The evidence in support of these claims could not be confined to an individual set of facts or a specific offence. In applying the "reasonable and effective" analysis, it must be considered that a group of current sex workers in vulnerable circumstances and a former sex worker with experience in multiple aspects of sex work are best suited to inform counsel on an ongoing and knowledgeable basis in responding to such assertions. A single individual's experiences are unlikely to be accepted by a court in refuting these points, and expert evidence alone may not capture the full array of evidentiary responses.

(3) Justice Groberman's Dissent and the Judicial Function

60. At the root of Groberman J.A.'s dissent and the Appellant's arguments is the concern that public interest standing is incompatible with the judicial function. Groberman J.A. says "courts are not legislatures, nor are they commissions of inquiry."[77] He implies that the courts would be acting as legislators if they were to adjudicate the Respondents' claims, that the court lacks the "institutional capacity" to do so, that public interest litigants may not be able to advance the proper evidence, and that adjudication would disrupt a concern with efficiency and orderliness.[78]

61. The Respondents submit that the case brought by the plaintiffs in *Bedford*, as private interest plaintiffs, is also a broadly based challenge, and one in which the court heard extensive evidence on a multitude of issues, introduced by numerous non-parties. That litigation proceeded in a reasonable amount of time and in a manner consistent with an appropriate judicial role.[79]

62. What *Bedford* and other cases involving public law issues demonstrate is that private standing is akin to a "Trojan Horse"; an individual with private standing is but a technical

[77] BCCA Reasons, AR Vol. I, Tab 4, p. 85, para. 81 per Groberman J.A. dissenting
[78] BCCA Reasons, AR Vol. I, Tab 4, p. 86, para. 83, per Groberman J.A. dissenting
[79] *Bedford*, at paras. 85-134, AGBoA, Tab 3

entryway for a much more fulsome factual record. Those with private interest standing are permitted, and in fact required (as with s. 15 of the *Charter*) to adduce extensive evidence on a multitude of issues affecting a broad segment of the public. It ought to be the case that where a challenge to legislation is based on exactly those same issues, calling for the same evidence, it is right and proper to allow those that can legitimately claim to represent a broader class or group to commence the challenge.

63. Groberman J.A. also suggests that if the impugned provisions could be challenged by way of a defence to a criminal prosecution, this somehow precludes public interest standing.[80] There are many reasons why it is not reasonable to expect *this* challenge to arise in a provincial court as a defence to a prosecution. First, it is extremely unlikely that an accused would be concurrently charged with all of the Prostitution Laws, and there are no examples in the record of such a case. Therefore, the remedy that is sought here is not available in the context of a criminal proceeding. A second reason is the enormity of the task, which is not likely to be taken up by an accused who is unrepresented or has either no or insufficient legal aid coverage to address the cost of a constitutional challenge. Further, the Crown may stay the matter at any point, as was the case in *R v. Hamilton*[81], where, in 2000, the accused filed a constitutional challenge to the Bawdy House Law but there was no ruling because the Crown entered a stay of proceedings.

64. Finally, a determination in a provincial court is not an effective alternative. One factor is the institutional capacity of the provincial court to handle such challenges. This Court noted as much in *R. v. Marshall* and *R. v. Bernard*, holding that the determination of constitutional issues requiring careful consideration may most beneficially be litigated in the civil courts rather than through summary conviction proceedings in provincial courts.[82] The Court of Appeal also correctly held that the "constitutional limitations on provincial court judges" from making formal declarations of invalidity are relevant to whether this would constitute a "reasonable and effective" alternative.[83]

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[80] BCCA Reasons, AR Vol. I, Tab 4, p. 90, para. 93 per Groberman J.A.
[81] Affidavit #1 of Elizabeth Campbell, September 17, 2008, AR Vol. II, Tab 20, pp. 34-35, para. 6
[82] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, paras. 142-144, AGBoA, Tab 48. See also oral reasons for judgment in *R. v. Blais* (February 21, 2011), Port Coquitlam Registry, 76644-1 (BC Prov. Ct.) [*R. v. Blais*, BC Prov. Ct.], RBoA, Tab 26
[83] BCCA Reasons, AR Vol. I, Tab 4, p. 77, para. 54

65. Even assuming that complex constitutional issues could be properly litigated in the provincial court or in a superior court by way of a defence to a criminal charge, what this argument fails to address is the nature of the constitutional rights at stake in this case. People charged with offences have their **liberty** at stake and must, of course, be entitled to defend themselves on the basis that the law pursuant to which they are charged is unconstitutional. But the challenge that the Respondents have commenced is different. They say that the impugned laws, by their practical operation and effect, put their very **lives, safety and security** at risk, not solely their liberty. As such the Respondents submit that the superior courts should always be available to these persons in order to pre-emptively protect their life, liberty and security of the person.

66. The majority so found:

> Nor, in my view, must the only opportunity to mount a challenge to a section of the *Criminal Code* arise in the presentation of a defence to a criminal charge. Where, as here, the essence of the complaint is that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities, and exacerbates their vulnerability, the law on standing does not require the challenge to be by a person with private interest standing.[84]

(4) Vulnerable Persons

67. The Court of Appeal's decision should also be sustained given the necessity of examining *who* the claimants are and what a case of this nature will require of them. Here, the claim is based on the unconstitutional effects of the laws on street-based sex workers, and it is their specific evidence and experience that is brought forward in this case to make out the claims of harm. The claim is advanced by SWUAV and Ms. Kiselbach because the people whose present day experiences are directly at issue in the litigation face compound barriers to engaging in public and ongoing litigation.

68. Individual active sex workers are unlikely to have the ability to raise or sustain a comprehensive constitutional challenge such as the one in issue. On the record that was before Ehrcke J., there was no reasonable probability that a person currently engaged in the sex trade,

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

working in extremely marginalized and desperate circumstances, will initiate such litigation to challenge the legislative scheme of the Prostitution Laws.

69. The active sex workers represented by the Respondents live in the DTES, and work in notorious circumstances that lead them to have compound concerns about participating in public advocacy. They face serious repercussions from doing so, including increased violence and stigma, increased law enforcement attention, eviction, and the potential for child apprehension.[85] Furthermore, persons in the circumstances faced by the Respondents' members, which include those living with illnesses and disabilities, addictions and high rates of poverty, are likely to have difficulty pursuing and sustaining a comprehensive challenge, even if charged under the law, because of the instability of their circumstances and the necessity of focusing on meeting their subsistence needs. Both SWUAV and Ms. Kiselbach's evidence supported that conclusion.[86]

70. Organizations such as SWUAV have the benefit of the collective knowledge and experiences of individuals over time, are not subject to the personal constraints and vulnerability of individuals subject to criminal sanction. Further, SWUAV is able to provide stability and human resources in terms of instructing counsel over a lengthy time frame.[87] A person not currently engaged in sex work and who is working with sex workers will be similarly situated. These Respondents in combination have greater capacity to retain and instruct counsel, frame issues, assert facts, attract witnesses, retain experts, raise funds and lead evidence that goes to the heart of a constitutional issue.

71. Where a case involves the interests of individuals on the economic or social margins of society, the doctrine of public interest standing must be interpreted with a "common sense" appreciation as to the difficulty of mounting an individual legal challenge.[88] Disadvantaged or marginalized individuals face many barriers in the legislative process, and are then doubly disadvantaged in their limited capacity to bring an effective legal challenge. Such individuals are more capable of asserting legal claims while doing so in association with one another.

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[85] Capler Affidavit #1, paras. 2, 18
[86] Kiselbach Affidavit #1, para. 23; Chettiar Affidavit #1, para. 18, AR Vol. IV, Tab 25, p. 184
[87] *Reopening Law's Gate*, RBoA, Tab 41; BCCA Reasons, AR Vol. I, Tab 4, pp. 75-77, 80, paras. 50, 51, 63
[88] *Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580 (Ont. S.C.J.) (QL) [*Fraser v. Canada*], at paras. 114-119, RBoA, Tab 11, citing *Unishare Investments Ltd. v. R.*, (1994), 18 O.R. (3d) 603 (G.D.), aff'd [1997] O.J. No. 4009 (C.A.), leave to appeal refused [1997] S.C.C.A. No. 616 (S.C.C.)

Canadian courts have recognized, in the context of standing and beyond, that the rules of civil procedure should be interpreted so as to promote access to justice for the socially vulnerable and in recognition of the high costs of litigation.[89]

(5) No Reason to Refuse Standing

72. A systemic challenge to the Prostitution Laws like this one, which challenges four sections of the *Criminal Code,* alleging they individually and/or in combination infringe ss. 7, 15, 2(b) and 2(d) of the *Charter*[90] has never been brought before the Court in any previous criminal or civil actions. SWUAV and Ms. Kiselbach are the first plaintiffs to advance a claim that challenges the entirety of these provisions, and it is the first claim that asks the Court to examine the collective impact of the Prostitution Laws. Further, prior to the commencement of SWUAV's action, there had never been a s. 15 challenge to ss. 210, 211, 212(1)(a), (b), (c), (d), (e), (f), (h) and (j) and (3) of the *Criminal Code*.

73. Not only have there never been other systemic challenges of this kind, there was a significant period of time between January 2002 to April 2007 where there were no cases before the Courts involving challenges to any of the Prostitution Laws.

(6) No Similar Challenges Elsewhere

74. Canada points to the number of charges laid under the Prostitution Laws and the fact of constitutional challenges to one or more of those provisions as evidence that this case cannot satisfy the third prong of the test.[91] Similarly, Groberman J.A. in dissent reasoned that "many" of the "1000s" of criminal prosecutions involved constitutional challenges and that this supported the trial judge's decision that there were other reasonable and effective means to challenge the laws. With respect, these arguments do not reflect a serious examination of the kind, number, or substance of the prosecutions and challenges to the Prostitution Laws.

75. The claim brought by SWUAV was of a different scope than previous constitutional challenges, as found by the majority below. In particular, Saunders J.A. noted that only one of

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[89] *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), RBoA, Tab 19; *Okanagan*, AGBoA, Tab 4

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

the 16 challenges over the course of two decades raised a s. 15 claim in any substantial sense.[92] That a party could theoretically bring such a claim or raise such a defence does not mean that, on a balance of probabilities, someone will. In fact, the evidence showed that no one else had.

76. Nearly all of the criminal cases involving constitutional challenges listed by Canada and cited by the courts below were challenges to the Communication Law alone, brought over 20 years ago, prior to the *Prostitution Reference*. A central proposition in the Respondents' claim is that circumstances have changed and that reconsideration of the Communication Law is required.

77. In the years since the *Prostitution Reference*, leading up to the date that that SWUAV initiated their action, there were only four criminal prosecutions where provisions of the *Criminal Code* that relate to prostitution were subject to constitutional challenge. Specifically, there was one challenge to the Communication Law[93], one challenge to the presumption in s. 212(3) of the Procuring Law[94] and two challenges to the Bawdy House Law.[95]

78. In *Canadian Council of Churches*, judicial notice was taken of the fact that the provisions in issue were subject to constitutional challenge on a daily basis.[96] In the context of the present case, by contrast, over several decades and thousands of prosecutions, only a handful have raised a constitutional challenge. Even fewer have resulted in resolution of a constitutional issue. While the number of charges may satisfy the improper test used by Ehrcke J. (that a challenge *can* be brought by a private litigant),[97] it does not meet the standard set by this Court that, on proof of a balance of probabilities, the provisions will be subject to challenge.[98]

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[91] Appellant's Factum, paras. 17, 18, 84
[92] BCCA Reasons, AR Vol. I, Tab 4, p. 78, para. 56
[93] *R v Stagnitta*, [1990] 1 S.C.R. 1226, AGBoA, Tab 61
[94] *R v Downey*, [1992] 2 S.C.R. 10, AGBoA, Tab 38
[95] *R. v. Hamilton* (2002) BCPC, Campbell Affidavit #1, AR Vol. II, Tab 20, pp. 34-35, para. 6;. *R. v. DiGiuseppe; R. v. Cooper* (2002), 161 C.C.C. (3d) 424 (Ont. C.A.), ABoA, Tab 37
[96] *Canadian Council of Churches*, at pp. 23-23, RBoA, Tab 5
[97] BCSC Reasons, AR Vol. I, Tab 2, p. 34, para. 87
[98] *Canadian Council of Churches*, at p. 21, RBoA, Tab 5

79. Canada specifically points to two cases in support of its assertion that this case cannot meet the test: *Bedford* and *R. v. Blais*[99]. Neither case relied on by Canada indicates that there was another reasonable and effective means to bring the claim.

(A) *Bedford*

80. Four months prior to the commencement of the SWUAV action[100], Terri Jean Bedford (a former sex worker), Valerie Scott (a former sex worker) and Amy Leibovitch (an active sex worker) commenced an application in the Ontario Superior Court of Justice ("*Bedford*").[101]

81. The applicants in *Bedford* sought declarations that ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code of Canada* violate their rights under ss. 2(b) and 7 of the *Charter*.[102] They do not challenge several provisions of the *Criminal Code* relating to prostitution that are raised by SWUAV and Ms. Kiselbach, including: ss. 211, 212(1)(a), (b), (c), (d), (e), (f), (h) and (3) of the *Criminal Code*. Furthermore, they do not allege, and have not made out a case that the impugned provisions violate s. 15 or 2(d) of the *Charter*. The *Bedford* case originated in Ontario and would have no reach respecting the laws as applied in British Columbia for many years.

82. The Court of Appeal recognized the existence of a single case with distinct issues in another jurisdiction does not and should not determine the third factor of the standing test.[103]

83. Standing cannot be based on who wins a race to the courthouse, especially when that courthouse is in another jurisdiction. At best a court might exercise its discretion as a matter of "case management" to adjourn or stay a proceeding if it is satisfied that a decision from another court in the same or another jurisdiction is imminent. That discretion is altogether different in principle than the discretion to deny standing. At the time that Canada applied to strike the

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[99] *R. v. Blais* (2008), 301 D.L.R. (4th) 464, 2008 BCCA 389 [*R. v. Blais*, BCCA decision], AGBoA, Tab 31

[100] One should not confuse the date that the SWUAV action was filed with the date that preparation for its filing commenced. Prior to the date when SWUAV commenced its action, SWUAV's founding members had worked for several years on Pivot Legal Society's Sex Work and Human Rights campaign, which was gathering evidence regarding the impact of the Prostitution Laws, engaging in a constitutional analysis of the Prostitution Laws, producing reports on these issues and lobbying the Federal government for changes to the Prostitution Laws. See Affidavit of Peter Wrinch, January 30, 2011, Ex. B, AR Vol. VI, Tab 32, p. 138-142, para 8-17

[101] Affidavit #1 of Lisa Minarovich, September 17, 2008 (Minarovich Affidavit #1), para. 2, Ex. A, AR Vol. I, Tab 19, p. 189, AR Vol. II, pp. 1-9

[102] Minarovich Affidavit, para. 3, Ex. A, AR Vol. I, Tab 19, p. 190, AR Vol. II, Tab 19, pp. 1–9

[103] BCCA Reasons, AR Vol. I, Tab 4, pp. 81-82, para. 68

Respondents' claim on the basis of standing, there was no basis for the exercise of any discretion to adjourn and none sought by Canada, as the *Bedford* case was still in its relatively early stages.

84. Furthermore, as noted above, the claim in *Bedford* was not the same as the Respondents' claim. *Bedford* does not raise a s. 15 *Charter* challenge. Indeed, an intervenor applicant to the Ontario Court of Appeal was denied the opportunity to raise s. 15 on the basis that this would expand the issues in the case.[104] Section 15 is a separate right and constitutes a separate challenge to the Prostitution Laws. The impact of the Prostitution Laws on the equality guarantee is not addressed in *Bedford*.

85. As well, contrary to the finding of the Chambers Judge, the *Bedford* case does not provide assurance that the issues SWUAV seeks to advance will be brought before the courts.[105] The claimants in the *Bedford* case were not predominantly involved in street level sex work; they were involved in a range of indoor settings and worked on street at various times in their lives.[106] While these claimants were nonetheless able to argue and prove that the Prostitution Laws had a deleterious effect on street level sex workers,[107] surely the court should prefer to hear a case brought by those most directly at risk by the Prostitution Laws, even if it is brought forward by an organization rather than a single affected individual.

86. The Respondents advised this Court, by their application to adjourn this appeal until the *Bedford* litigation had run its course, that they were content to put their action in abeyance so as to determine whether it would still be necessary, and if so on what basis. While this Court dismissed the application[108] and at the same time permitted Canada to adduce new evidence about the *Bedford* case,[109] it is respectfully submitted that neither ruling should allow Canada to argue the merits of the appeal other than on the record that was before the Chambers Judge.

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[104] *Bedford*, AGBoA, Tab 3
[105] BCSC Reasons, AR Vol. I, Tab 2, p. 31, para. 75 per Ehrcke J.
[106] *Bedford*, at paras. 26-43, AGBoA, Tab 3
[107] *Bedford*, at paras. 421, 428, 432, AGBoA, Tab 3; *R. v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6 [*Ferguson*], at para. 59, RBoA, Tab 28
[108] Order of McLachlin C.J. dismissing the application that the appeal be held in abeyance or stayed or adjourned pending the final outcome of *Bedford v. Canada (AG)* (August 19, 2011) AR Vol. I, Tab 18, p. 188
[109] Order of Binnie J. granting the admission of fresh evidence (August 18, 2011) AR Vol. I, Tab 16, p. 186

87. It does not lie with Canada to suggest[110] that standing should be denied because of the advanced stage of the *Bedford* case when the Respondents are amenable to an adjournment of their action precisely because of the advanced stage of *Bedford*.

(B) *R. v. Blais*

88. Canada also points to *R. v. Blais* as a further alternative to public interest standing. The Respondents submit that this case demonstrates the extraordinary defects of a preference for private interest litigation to resolve a constitutional issue. The facts specific to the charge against Mr. Blais – a client, not a sex worker - had little to do with the constitutional defence that he raised. Mr. Blais attempted to raise the constitutional rights of sex workers, without the support or evidentiary basis of those workers themselves.

89. The accused's only witness, Dr. John Lowman, was unwilling to testify at Mr. Blais' trial because of his concern that counsel for the accused was not sufficiently knowledgeable of the evidence and did not appreciate the complexity of the issues.[111] Dr. Lowman brought an application for an order quashing the subpoena, which was unsuccessful.[112] The Provincial Court of British Columbia ultimately dismissed the claim on the basis that there was no evidentiary basis to find a s. 7 *Charter* violation.[113] In his oral reasons, Angelomatis J. stated:

> … I accept the arguments of the Crown. A lot of this is philosophical, a lot of this is, I believe, socially Marxist. If we are going to have a political diatribe and get involved on why some people are prostitutes and others are not, I think it would boil down to economic considerations and boil into philosophical, political differences. It can boil down to any number of things. And what the law does is try to release the irritants in society and release the change of conflict between persons. And law, as it is applied currently, does in some extent attach the penalties to a poor level of society, and it may seem unfair in the long run, but I do not see any alternative.
>
> That is not an answer to upholding the validity of the legislation, but it is simply an observation. So I am going to dismiss your application.

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[110] Appellant's Factum, paras. 66-67
[111] *R. v. Blais*, BCCA decision, at paras. 5 and 8, AGBoA, Tab 31
[112] *R. v. Blais*, BCCA decision, at para. 58, AGBoA, Tab 31
[113] *R. v. Blais*, BC Prov. Ct., paras. 9-10, RBoA, Tab 26

90. It cannot plausibly be suggested, given the result in *R. v. Blais*, that the seriousness and complexities the Respondents' claim is best served by an individual charged with a single provision of the *Criminal Code.*

C. REFORMULATION OF THE THIRD BRANCH OF THE TEST

91. The law of public interest standing is oft-stated to be driven by a concern that it is necessary to prevent the immunization of legislation.[114] The third branch of the *Canadian Council of Churches* test therefore asks: "whether there is another reasonable and effective way to bring the issue before the court."[115] This *language* suggests that *if* there is another option, namely an option based on private legal standing, that option will be preferred and the public interest plaintiff foreclosed. The doctrine, as currently formulated, is at risk of operating in a fashion contrary to the principles of public interest standing: it limits access to justice and does not guarantee effective use of judicial resources.

92. A standing rule that aims to prevent the immunization of legislation is, of course, appropriate. However, the purpose of the standing rule is not only to ensure that legislation not remain immune *from challenge*, but to ensure that unconstitutional legislation *is struck down*. The reasoning of Ehrcke J. suggests that the mere fact of a potential challenge is sufficient to defeat public interest standing, even where a public interest litigant is the *best* or *most* "reasonable and effective" way for the claim to be brought.[116] To the extent that the current language of the test induces such reasoning, it should be changed.

93. So long as the public interest litigant commences litigation that *is a reasonable and effective way* of bringing the issues to court, it should not matter that there is another reasonable and effective way (such as by a litigant with private interest standing). And it surely should matter, and matter a lot, contrary to Ehrcke J.'s conclusion, the public interest litigation is a better or even the best way to bring the claim.

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[114] *Canadian Council of Churches*, at p. 25, RBoA, Tab 5
[115] *Canadian Council of Churches*, at p. 22, RBoA, Tab 5; a slightly different way of saying the same thing and how Ehrcke J. applied the test was to ask "if there is *no other* reasonable and effective manner in which the issues may be brought before the Court": *Borowski* at p. 598, AGBoA, Tab 22
[116] BCSC Reasons, AR Vol. I, Tab 2, p. 34, para. 87

94. Individual litigation does not ensure high quality litigation nor the best use of judicial resources. *Charter* litigation involves the rights of everyone, whether a claim is brought by an individual or by an organization, and the court should and does expect a full evidentiary record. There is simply no basis to assume that an individual who is directly affected will be capable of bringing a sufficient record in these types of cases. Insisting that public interest organizations locate nominal litigants with private standing in order to assert constitutional claims is a counter-productive formalism that this Court should remedy.[117]

95. This reformulation of the third branch would provide better guidance to trial courts, which would continue to endeavour to ensure that only reasonable and effective litigation moves forward. It would remove the law's arbitrary preference for individual litigation in cases of broad impact, a preference which persists in a manner disconnected from the foundational principles of the doctrine, *including* the concern with resources and the adversarial process. As one scholar has noted: "these dichotomies [of public and private interests] and the formalism underlying them are at odds with the principles underlying public interest standing."[118]

96. The doctrinal concern with preserving judicial resources is aimed at ensuring the availability and efficiency of court processes. As such, the concern also relates to a more fundamental concern with access to justice. As a constitutional principle,[119] it must be a central and paramount value in determining the proper test for standing.

97. Nor should the Court be unduly concerned about the floodgates of litigation being opened by a reformulation of the third branch of the public interest standing test. Given the costs of litigation and the fiscal situation of most public interest groups, this is indeed a fanciful concern if not an *in terrorem* argument.

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[117] *Bedford*, AGBoA, Tab 3; *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661, RBoA, Tab 24; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, RBoA, Tab 12; *Withler* v. *Canada (Attorney General)*, [2011] 1 S.C.R. 396, 2011 SCC 12, AGBoA, Tab 72

[118] Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?", (2007) 40 U.B.C. L. Rev. 727-744, at 731, RBoA, Tab 47. Also see: BCCA Reasons, AR Vol. I, Tab 4, p. 73, paras. 41-42

[119] *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21, at paras. 16-17, RBoA, Tab 2, which recognizes access to courts as a constitutional principle even if it is not an absolute one. And the fact that the court did not find a broad general right to legal counsel as an aspect of, or precondition to, the rule of law does not diminish the importance of access to justice as being a foundational constitutional principle.

98. The Court in *Re Lavigne and O.P.S.E.U. (No. 2)* emphasized the need for the rules of civil procedure to protect the rights of ordinary Canadians to bring *Charter* litigation. The Court recognized that cooperating with a third party organization may be essential to that process:

> In my view, it is desirable that *Charter* litigation not be beyond the reach of citizens of ordinary means. The citizens of ordinary means is a term that covers, of course, the vast bulk of Canadians. There are few individuals, regardless of their walk of life, who could afford *Charter* litigation of the type experienced in this application. *I accept the validity of the applicant's proposition that, of necessity, the individual must seek assistance from third party organizations at times to assist in asserting his or her constitutional rights*. Otherwise, the individual unaided by a third party organization… would be a David pitted against a Goliath.[120] (emphasis added)

99. While *Lavigne* was decided in the context of an application for costs against a plaintiff in the context of public interest litigation, the reasoning applies forcefully here. The individuals represented by SWUAV and Ms. Kiselbach have far less economic and social power than "citizens of ordinary means." To require individual litigation against the state in these circumstances is not to pit David against Goliath, but to close the ring to the Davids that wait at the gate.

100. Reformulation of the third branch of the test is also supported by the *Charter* values of equality and freedom of association. The values embodied in the *Charter* must be given preference over an interpretation that would run contrary to them.[121]

101. Equality concerns are engaged when the effects of a law are visited upon disadvantaged or marginalized individuals, whose capacity to mount an effective challenge is hindered or denied due to social or economic circumstances.[122] As the Respondent expects the Intervener Prostitutes of Ottawa-Gatineau Work, Educate and Resist; Maggie's: Toronto Area Sex Workers Action Project; and Stella, L'Amie De Maimie to develop this line of argument, we will not be addressing this issue in our factum.

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[120] *Re Lavigne and Ontario Public Service Employees Union et al. (No. 2)* (1987), 60 O.R. (2d) 486 (Ont. H.C.J.) [*Lavigne*], at p. 35 of QL, RBoA, Tab 32

[121] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 85, RBoA, Tab 14, citing *R. v. Salituro*, [1991] 3 S.C.R. 654; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, RBoA, Tab 34; *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, RBoA, Tab 21

[122] *Law v. Canada*, [1999] 1 S.C.R. 497, at paras. 16, 29, 74, RBoA, Tab 17

102. The scope of freedom of association has been found to include the ability of persons to act together in pursuit of common goals, in particular for the purpose of exercising their lawful rights.

103. In *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, Justice Sopinka held:

> … If the freedom to establish, belong to and maintain an association is to have any meaning, it must include the freedom of individuals to join together in pursuit of objects they could lawfully pursue as individuals. A restriction on the collective exercise of an activity legally permitted to individuals is essentially an attack on the ability of individuals to establish an association for that purpose. As Dickson C.J. pointed out in the Alberta Reference, at p. 367, such an attack is aimed at the "collective or associational aspect" of the activity, and not the activity itself. [123]

104. As there can be no doubt that the individual members of SWUAV would have private interest standing denying those very same persons standing when they come together and form an association whose primary purpose is to commence litigation, is to effectively prevent these women from doing in association that which they would have a right to do individually.

105. This aspect of association is engaged where, as here, and in contrast to *Canadian Council of Churches*, the organization seeking public interest standing is comprised of persons who would have private standing.

106. The guarantee of freedom of association has only strengthened since the *PIPSC* case in light of decisions such as *Dunmore*[124], *Health Services*[125] and *Fraser*[126] where the Court gave a more contextual and purposive interpretation to this guaranteed freedom. The essential question now being whether the state has "precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals." [127]

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[123] *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 [*PIPSC*], at pp. 41–42
[124] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 [*Dunmore*], RBoA, Tab 7
[125] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27, at para. 95, RBoA, Tab 13
[126] *Fraser*, at para. 38, RBoA, Tab 23
[127] *Dunmore*, at para. 16, RBoA, Tab 7

107. This Court contemplated that the right to litigate collectively may be within the protection of s. 2(d) in *Dunmore* when the Court held:

> … [I]ndividuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a "majority view" cannot be expressed by a lone individual, but a group of individuals can form a constituency and distill their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union. To limit s. 2(*d*) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives. At best, it would encourage s. 2(*d*) claimants to contrive individual analogs for inherently associational activities, a process which this Court clearly resisted in the labour trilogy… [emphasis added][128]

108. If the common law of standing is to accord with the *Charter* value of freedom of association, then it is necessary that SWUAV in the present case be accorded public interest standing. Indeed it may even warrant a finding of private interest standing.

109. The law thus requires reformulation of the third branch of the test, in terms of the *language* of the test.

110. The Court should also endorse a more detailed list of *factors to guide the discretion* of lower courts in applying the new third branch of the test.[129] In asking "whether the action is a reasonable and effective way to bring the issue before the court," appropriate factors, already supported in the caselaw, can be summarized as follows:

a. whether the case is public interest litigation;[130]

b. whether the plaintiff is a "public interest litigant" or at least represents a significant sector of the public alleged to be affected by the impugned laws;[131]

c. whether the plaintiff represents a vulnerable group in economic, emotional or social terms;[132]

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[128] *Dunmore*, at para. 16
[129] *Canadian Council of Churches*, RBoA, Tab 5; *Reopening Law's Gate*, RBoA, Tab 41
[130] *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 [*Incredible Electronics*], RBoA, Tab 16; *Okanagan*, AGBoA, Tab 4
[131] *Thorson*, RBoA, Tab 36; *Fraser v. Canada*, RBoA, Tab 11
[132] *Unishare Investments Ltd. v. R.* (1994), 18 O.R. (3d) 603 (Ont. Gen.Div.), RBoA, Tab 37, overturned by the Ont CA but not on these grounds *Unishare Investments Ltd. v. and Her Majesty the Queen* [1997] O.J. No. 4009 Ontario Court of Appeal. Leave to appeal denied by SCC, *R. v. Unishare Investments Ltd. v. Her Majesty The Queen* [1997]

d. whether the impugned laws may detract from the ability of affected individuals to mount and sustain an individual legal challenge;[133]

e. whether the litigation raises issues that are likely to deter individuals from advancing them, such as issues of an intimate, private, or stigmatized nature;[134] and

f. whether the litigation is systemic and/or raises a comprehensive challenge to legislation or state action.[135]

111. Of all of the factors listed above it is submitted that the first two are the most important. While not all public interest litigation warrants the exceptional award of advance costs,[136] all such litigation should presumptively warrant public interest standing barring any compelling countervailing factors. The jurisprudence on the law of costs is now quite well developed insofar as identifying the factors that characterize a case as transcending the interests of the individual and engaging the wider public interest.[137] The law of intervention is rich with examples of how to identify an organization that can represent the public interest or the segment of the public most affected by the impugned laws.[138] A court is therefore equipped to make such determinations.

112. As noted above, litigation brought by an organization in the public interest may be best positioned to locate lay witnesses, attract superior expert witnesses, retain *pro bono* counsel, raise funds, explore evidence comprehensively, and achieve a relatively quick and final legal outcome. A public interest litigant will almost always be a more reasonable and effective means

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S.C.C.A. No. 616; *Fraser v. Canada*, RBoA, Tab 11; *Canadian Assn. of the Deaf v. Canada* (2006), 272 D.L.R. (4th) 55, 2006 FC 971, RBoA, Tab 4, *Vriend v. Alberta*, [1998] 1 S.C.R. 493, AGBoA, Tab 70; *Victoria (City) v. Adams*, 2008 BCSC 1209, RBoA, Tab 40

[133] *Fraser v. Canada*, RBoA, Tab 11, *Hy and Zel's*, at pp. 27-28, RBoA, Tab 15

[134] *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at paras. 148 and 172, RBoA, Tab 30

[135] *Chaouilli*, at para. 189, RBoA, Tab 6

[136] *Okanagan*, AGBoA, Tab 4; *Little Sisters*, RBoA, Tab 18; *R. v. Caron*, [2011] 1 S.C.R. 78, 2011 SCC 5, RBoA, Tab 27

[137] *Incredible Electronics*, at para. 92, RBoA, Tab 16

[138] *Faculty Assn. of the University of British Columbia v. University of British Columbia*, 2008 BCCA 376, at paras. 4, 9, RBoA, Tab 9; *Susan Heyes Inc. (c.o.b. Hazel & Co.) v. Vancouver (City)*, 2009 BCCA 611, at paras. 5, 8, RBoA, Tab 35; *Vancouver (City) Police Department v. British Columbia (Police Complaint Commissioner)*, 2001 BCCA 404, at paras. 8-9, RBoA, Tab 39; *R. v. Jenkinson* (2007), 280 D.L.R. (4th) 323, 2007 MBCA at paras. 20–23, RBoA, Tab 29; *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, at paras. 4-9., RBoA, Tab 1; Sheila M. Tucker and Elin R.S. Sigurdson, *Interventions in British Columbia: Direct Interest, Public Law & "Exceptional" Intervenors*, 23 C.J.A.L.P. 183-201 (Carswell), RBoA, Tab 48

of advancing public interest litigation than a private litigant. It will, at the very least and in the vast majority of cases, be no less reasonable and effective than litigation commenced by persons with private interest standing.

113. In our submission where such an organization is composed of or represents the interests of marginalized and vulnerable individuals who allege that the law violates their constitutional rights or freedoms, or the other factors listed above at paragraph 110 are present, the presumption in favour of public interest standing should be virtually irrebuttable.

114. If the purpose of public interest standing is to prevent the immunization of unconstitutional conduct by government – a purpose related to nothing short of the healthy maintenance of our political institutions - then it is submitted that the *reformulation* and *discretionary factors* outlined above will more fully deliver the aspirations of the law in this respect.

D. SHERYL KISELBACH HAS PRIVATE INTEREST STANDING

115. The Order of Ehrcke J. stated that the Plaintiffs' claim was dismissed.[139] The Order of the Court of Appeal stated that the appeal was allowed and the Order of Ehrcke J. dated December 15, 2008 was set aside.[140] Supreme Court of Canada Rule 29(3) provides:

> A respondent who seeks to uphold the judgment appealed from on a ground not relied on in the reasons for that judgment may do so in the respondent's factum without applying for leave to cross-appeal.[141]

The Respondents say that the Court of Appeal's order (judgment) overturning the decision of Ehrcke J. was correct. However, the Court should have also dismissed the appeal on the basis that Ms. Kiselbach had private interest standing.

116. The facts in relation to Ms. Kiselbach's standing were supplemented through her own affidavit evidence. Ms. Kiselbach was not cross-examined on her affidavit and her evidence was not contradicted or challenged on the application.

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[139] Order of Ehrcke J. (December 15, 2008), AR Vol. I, Tab 3, p. 36
[140] Order of BC Court of Appeal (October 12, 2010), AR Vol. I, Tab 5, p. 92
[141] Supreme Court of Canada Rule 29(3)

117. Although not actively selling sex at the time of the application, Ms. Kiselbach said that she would return to sex work under particular circumstances:

> I am not engaged in sex work at this time. I would engage in sex work again under different circumstances, including if conditions for sex workers were safer and it were possible to legally work in a situation that I controlled, without danger of prosecution. I have found that sex work is an effective and efficient way of earning money, and I would engage in sex work in particular if I required additional income for an important purpose. Sex work is not a moral issue to me. It is something I am not doing because it to be too dangerous [sic]. I exited sex work because I had a strong feeling that something horrible was going to happen to me soon if I continued to work in current conditions.[142]

118. Canada's factum begins with the premise that "constitutional law is best developed and decided in cases involving specific facts." Ms. Kiselbach's experience presented specific facts, both with respect to circumstances in which violence occurred, street level sex work, and with respect to the broader contexts in which sex work takes place. While her evidence would be accompanied by expert evidence and the evidence of other witnesses, the facts relating to Ms. Kiselbach's career provided the necessary backdrop to the circumstances in which the Prostitution Laws operate.

119. In discussing private interest standing, the Court of Appeal stated that Ms. Kiselbach was required to show "a direct, personal interest in the impugned provisions" and that she "must establish that she is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest" or to "suffer some disadvantage, other than a sense of grievance or debt for costs."[143] In two ways, Ms. Kiselbach's evidence did set out a direct personal interest in the Prostitution Laws quite apart from the average Canadian's interest in the laws. First, she said she would engage in sex work if "conditions for sex workers were safer and it were possible to legally work in a situation that I controlled, without danger of prosecution" (i.e. if the Prostitution Laws were repealed). Second, she said sex work "is an effective and efficient way of earning money, and I would engage in sex work in particular if I required additional income for an important purpose." Having the option to avail herself of an occupation in which she had 30 years of experience in the event of material need is a direct and personal interest on the part of Ms. Kiselbach.

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[142] Kiselbach Affidavit #1, para. 21, AR Vol. IV, Tab 24, p. 18
[143] BCCA Reasons, AR Vol. I, Tab 4, p. 78, para. 141

120. In addition to her former participation in sex work, Ms. Kiselbach claims that she has been and continues to be directly affected by the Prostitution Laws. Ms. Kiselbach suffered violence and injury because of the Prostitution Laws and the effects on her physical and psychological security due to that violence are significant and ongoing. She gives evidence that she has experienced discrimination because she was an active sex worker for many years. Her standing must be assessed in light of the full claim, including the equality rights claim. A repeal of the Prostitution Laws would have the direct impact of reducing the stigma faced on an ongoing basis by Ms. Kiselbach.[144]

121. There is no concern that Ms. Kiselbach's standing constitutes a collateral attack on her past convictions. In this Court's recent *TeleZone* decision, the Court found that the doctrine of collateral attack did not apply in a case for damages resulting from a ministerial decision to deny a personal communication service license application.

122. For essentially the same reasons, Ms. Kiselbach's claim is not a collateral attack on her previous convictions. She is not seeking to circumvent the effect of criminal conviction in relation to specific charges against her, or to invalidate or render inoperative charges or convictions that occurred in the past. She is not even seeking to attack the facts underlying particular charges or convictions. She is seeking constitutional relief from the impact of the Prostitution Laws, based in part on the evidence of the impact of those laws "consequent on" the charges and criminal conviction to which she was subject.

123. The relief sought, declarations that the Prostitution Laws are of no force and effect, will have a real impact on Ms. Kiselbach's future, in having the potential to re-open her occupation to her in new, safer circumstances and in reducing the stigma of her criminalized past that follows her to the present day.

124. Section 24(1) of the *Charter* provides that "anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

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[144] Kiselbach Affidavit #1, paras. 14, 18, 20 and 29, AR Vol. 4, Tab 24, pp. 15, 17-18, 20

125. Ms. Kiselbach is a person who is alleging that her right and freedoms have been infringed by the operation of the Prostitution Laws. Section 24 of the *Charter* provides that she "may apply to a court of competent jurisdiction" for a remedy. While this Court has suggested that s. 24 is limited to remedies for government conduct rather than unconstitutional laws,[145] it is submitted that it should also be available to establish that a person has standing to seek a declaration pursuant to s. 52 of the *Constitution Act, 1982* that the impugned laws are of no force and effect.

126. The Respondents commend the following passage from the text *Constitutional Litigation in Canada*[146] where the authors comment on the decision of the Court of Appeal in the present case where it denied Ms. Kiselbach private interest standing:

> We submit that the focus on the language of "exceptional prejudice" or "direct, personal interest" is unhelpful and unnecessary in light of the language of s. 24 of the *Charter*. That section, as noted, allows anyone "whose rights have been infringed or denied" to seek an "appropriate and just" remedy from a "court of competent jurisdiction". Section 24 has been applied to grant broad declarations as to the rights of persons whose minority language rights[147] or equality rights[148] under the *Charter* have been breached, without any question being raised as to the standing of the plaintiffs to obtain such relief. Likewise, a person seeking damages under s. 24 must assert a breach of her rights as part of the claim, which may involve consideration of the constitutionality of statutory provisions, or other broad *Charter* issues.[149] It seems inconsistent to require a special showing of "exceptional prejudice" in the conceptually similar context of a party seeking a declaration of invalidity.[150] As Professor Roach points out, standing based upon s. 24 is less restrictive than either the "exceptional prejudice" test for private standing (because no particular prejudice need be shown, other than an infringement or threatened infringement of the plaintiff's *Charter* rights) or the test for public interest standing (because the plaintiff need not show that there is no other reasonable and effective

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[145] *Ferguson*, at para. 35

[146] Andrew K. Lokan and Christopher M. Dassios: *Constitutional Litigation in Canada* (Carswell, in press), at p. 3-8.1, RBoA, Tab 43

[147] *Mahe v. Alberta*, [1990] 1 S.C.R. 342, RBoA, Tab 20

[148] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 95, RBoA, Tab 8

[149] *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, RBoA, Tab 38. Note that if the damages are based on the enforcement of a statute, the plaintiff must normally show not only that the statute is unconstitutional, but also that the conduct is "clearly wrong, in bad faith, or an abuse of power" in order to succeed: paras. 38-40

[150] The SCC has held that s. 52 provides authority for declarations of invalidity of statutes that violate the *Charter*, while s. 24 provides authority for a "personal remedy" for unconstitutional government actions that violate *Charter* rights: see e.g. *Ferguson*, at para. 61, RBoA, Tab 28. While this doctrine is entrenched in SCC jurisprudence, no case has traced the doctrine back to the purpose of the framers in including s. 24 in the *Charter*. On its terms, s. 24 could authorize a declaration of invalidity, and there seems to be no principled reason why s. 24 would not give a claimant standing to seek a declaration in the superior court relating to the validity of a statute if that is an "appropriate and just" remedy, just as it authorizes a declaration as to the claimant's rights

> manner of bringing the issue to court).[151] Alternatively, the "exceptional prejudice" or "direct, personal interest" requirement could be found to be satisfied in all cases where the claimant's *Charter* rights are infringed – with the understanding that in some circumstances, the claimant may be part of a very broad category of persons.

127. Canada's argument with respect to Ms. Kiselbach's standing has implications that are contrary to Canada's interest in upholding the rule of law and the public interest. Notwithstanding the pleadings in the Statement of Defence on the dangers of prostitution, Canada would essentially require Ms. Kiselbach to show that she had re-engaged in activity she knew to be dangerous in present circumstances and contrary to current law in order to qualify as a litigant. It is not clear whether Canada would require that be shown only at the outset of a case or on an ongoing basis. It would be unconscionable to say that the solution to the standing issue in this case was for Ms. Kiselbach to leave the courtroom during the application in October 2008, go to the Downtown Eastside, and stand outside to solicit potential clients for sex and put herself in harm's way.

PART IV: COSTS SUBMISSION

128. This case warrants special costs in this Court and in the Courts below. This is public interest litigation brought on behalf of a very poor and vulnerable population and with the aid of counsel acting *pro bono*. If this Court dismisses the appeal, it improves access to justice for Canadians. But it is respectfully submitted that it must also order special costs as it is the costs of litigation that remain the most significant impediment to access of justice in this country.

PART V: ORDER SOUGHT

129. That the appeal be dismissed with special costs to the Respondents in this Court and the Courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 27, 2011

Joseph J. Arvay, Q.C., Katrina Pacey
and Elin R.S. Sigurdson
Counsel for the Respondents

[151] Roach, *Constitutional Remedies in Canada*, (Canada Law Book, looseleaf), para. 5.380, RBoA, Tab 45

PART VI: TABLE OF AUTHORITIES

OTHER

PART VII: STATUTORY PROVISIONS

Rule 9-5 - Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[am. B.C. Reg. 119/2010, Sch. A, s. 22.]

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

(a) the registrar may, despite any other provision of these Supreme Court Civil Rules,

(i) retain the document and all filed copies of it, and

(ii) refer the document to the court, and

(b) the court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

(a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,

(b) the person who filed the document may, within 7 days after being notified, apply to the court, and

(c) the court may confirm, vary or rescind the order.

Rule 9-6 - Summary Judgment

…

Response to application

(3) An answering party may respond to an application for judgment under subrule (2) as follows:

(a) the answering party may allege that the claiming party's originating pleading does not raise a cause of action against the answering party;

…

http://www.canlii.org/en/ca/const/const1982.html

Primacy of Constitution of Canada **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada (2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

http://www.canlii.org/fr/ca/const/const1982.html

Primauté de la Constitution du Canada **52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution du Canada (2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/page-8.html#h-35

LEAVE TO CROSS-APPEAL

Application for Leave to Cross-Appeal

29. ...

(3) A respondent who seeks to uphold the judgment appealed from on a ground not relied on in the reasons for that judgment may do so in the respondent's factum without applying for leave to cross-appeal.

http://laws-lois.justice.gc.ca/fra/reglements/DORS-2002-156/index.html

AUTORISATION D'APPEL INCIDENT

Demande d'autorisation d'appel incident

29. …

(3) L'intimé qui cherche à faire confirmer le jugement de la juridiction inférieure pour des motifs différents de ceux invoqués dans ce jugement peut, sans déposer de demande d'appel incident, le faire dans son mémoire d'appel.