SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45

DATE: 20120921
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BETWEEN:

Attorney General of Canada
Appellant
and
Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach
Respondents
- and -
Attorney General of Ontario, Community Legal Assistance Society, British Columbia Civil Liberties Association, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth,
ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and
Positive Living Society of British Columbia
Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 78): Cromwell J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring)

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2012 SCC 45

File No.: 33981.

2012: January 19; 2012: September 21.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Parties — Standing — Public interest standing — Public interest group and individual working on behalf of sex workers initiating constitutional challenge to prostitution provisions of Criminal Code — Whether constitutional challenge constituting a reasonable and effective means to bring case to court — Whether public interest group and individual should be granted public interest standing.

A Society whose objects include improving conditions for female sex workers in the Downtown Eastside of Vancouver and K, who worked as such for 30 years, launched a *Charter* challenge to the prostitution provisions of the *Criminal Code*. The chambers judge found that they should not be granted either public or private interest standing to pursue their challenge; the British Columbia Court of Appeal, however, granted them both public interest standing.

Held: The appeal should be dismissed.

In determining whether to grant standing in a public law case, courts must consider three factors: whether the case raises a serious justiciable issue; whether the

party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

In this case, the issue that separates the parties relates to the formulation and application of the third factor. This factor has often been expressed as a strict requirement that a party seeking standing persuade the court that there is *no* other reasonable and effective manner in which the issue may be brought before the court. While this factor has often been expressed as a strict requirement, this Court has not done so consistently and in fact has rarely applied the factor restrictively. Thus, it would be better expressed as requiring that the proposed suit be, in all of the circumstances and in light of a number of considerations, *a* reasonable and effective means to bring the case to court.

By taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is

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

In this case, all three factors, applied purposively and flexibly, favour granting public interest standing to the respondents. In fact, there is no dispute that the first and second factors are met: the respondents' action raises serious justiciable issues and the respondents have an interest in the outcome of the action and are fully engaged with the issues that they seek to raise. Indeed, the constitutionality of the prostitution provisions of the *Criminal Code* constitutes a serious justiciable issue and the respondents, given their work, have a strong engagement with the issue.

In this case, the third factor is also met. The existence of a civil case in another province is certainly a highly relevant consideration that will often support denying standing. However, the existence of parallel litigation — even litigation that raises many of the same issues — is not necessarily a sufficient basis for denying standing. Given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. Further, the issues raised are not the same as those in the other case. The court must also examine not only the precise legal issue, but the

perspective from which it is made. In the other case, the perspective is very different. The claimants in that case were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. A stay of proceedings pending resolution of other litigation is one possibility that should be taken into account in exercising the discretion as to standing.

Taking these points into account here, the existence of other litigation, in the circumstances of this case, does not seem to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward.

Moreover, the existence of other potential plaintiffs, while relevant, should be considered in light of practical realities, which are such that it is very unlikely that persons charged under the prostitution provisions would bring a claim similar to the respondents'. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance.

In this case, also, the record shows that there were no sex workers in the Downtown Eastside willing to bring a challenge forward. The willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge in their own names.

Other considerations should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of K, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

Having found that the respondents have public interest standing to pursue their action, it is not necessary to address the issue of whether K has private interest standing.

Cases Cited

Applied: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; **discussed:** *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and*

Immigration), [1992] 1 S.C.R. 236; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; **referred to:** *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331; *Baker v. Carr*, 369 U.S. 186 (1962); *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *R. v. Smith* (1988), 44 C.C.C. (3d) 385; *R. v. Gagne*, [1988] O.J. No. 2518 (QL); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111; *R. v. Kazelman*, [1987] O.J. No. 1931 (QL); *R. v. Bavington*, 1987 CarswellOnt 3371; *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. v. Bailey*, [1986] O.J. No. 2795 (QL); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL); *R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(*b*), (*d*), 7, 15.

Constitution Act, 1982.

Criminal Code, R.S.C. 1985, c. C-46, ss. 210 to 213.

Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], r. 19(24).

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Neilson and Groberman JJ.A.), 2010 BCCA 439, 10 B.C.L.R. (5th) 33, 294 B.C.A.C. 70, 324 D.L.R. (4th) 1, 260 C.C.C. (3d) 95, 219 C.R.R. (2d) 171, [2011] 1 W.W.R. 628, 498 W.A.C. 70, [2010] B.C.J. No. 1983 (QL), 2010

CarswellBC 2729, setting aside in part a decision of Ehrcke J., 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, 305 D.L.R. (4th) 713, 182 C.R.R. (2d) 262, [2009] 5 W.W.R. 696, [2008] B.C.J. No. 2447 (QL), 2008 CarswellBC 2709. Appeal dismissed.

Cheryl J. Tobias, Q.C., and *Donnaree Nygard*, for the appellant.

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

Janet E. Minor and *Courtney J. Harris*, for the intervener the Attorney General of Ontario.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

Jason B. Gratl and *Megan Vis-Dunbar*, for the intervener the British Columbia Civil Liberties Association.

Justin Duncan and *Kaitlyn Mitchell*, for the intervener Ecojustice Canada.

C. Tess Sheldon and *Niamh Harraher*, for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and ARCH Disability Law Centre.

Written submissions only by Mark C. Power and *Jean-Pierre Hachey*, for the intervener Conseil scolaire francophone de la Colombie-Britannique.

Kent Roach and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Written submissions only by Cara Faith Zwibel, for the intervener the Canadian Civil Liberties Association.

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Written submissions only by Michael A. Feder, *Alexandra E. Cocks* and *Jordanna Cytrynbaum*, for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

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

courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[3] In this case, the respondents the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers, and Ms. Kiselbach, have launched a broad constitutional challenge to the prostitution provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. The British Columbia Court of Appeal found that they should be granted public interest standing to pursue this challenge; the Attorney General of Canada appeals. The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. Applying it here, my view is that the Society and Ms. Kiselbach should be granted public interest standing. I would therefore dismiss the appeal.

II. Issues

[4] The issues as framed by the parties are whether the respondents should be granted public interest standing and whether Ms. Kiselbach should be granted private interest standing. In my view, this case is best resolved by considering the discretion to grant public interest standing and standing should be granted to the respondents on that basis.

III. Overview of Facts and Proceedings

A. *Facts*

[5] The respondent Society is a registered British Columbia society whose objects include improving working conditions for female sex workers. It is run "by and for" current and former sex workers living in the Vancouver Downtown Eastside. The Society's members are women, the majority of whom are Aboriginal, living with addiction issues, health challenges, disabilities, and poverty; almost all have been victims of physical and/or sexual violence.

[6] Sheryl Kiselbach is a former sex worker currently working as a violence prevention coordinator in the Downtown Eastside. For approximately 30 years, Ms. Kiselbach engaged in a number of forms of sex work, including exotic dancing, live sex shows, work in massage parlours and street-level free-lance prostitution. During the course of this time, she was convicted of several prostitution-related offences. Ms. Kiselbach left the sex industry in 2001. She claims to have been unable to participate in a court challenge to prostitution laws when working as a sex worker because of risk of public exposure, fear for her personal safety, and the potential loss of social services, income assistance, clientele and employment opportunities (chambers judge's reasons, 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, at paras. 29 and 44).

[7] The respondents commenced an action challenging the constitutional validity of sections of the *Criminal Code* that deal with different aspects of prostitution. They seek a declaration that these provisions violate the rights of free expression and association, to equality before the law and to life, liberty and security of the person guaranteed by ss. 2(*b*), 2(*d*), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The challenged provisions are what I will refer to as the "prostitution provisions", the "bawdy house provisions", the "procurement provision" and the "communication provision". Prostitution provisions is the generic term to refer to the provisions in the *Criminal Code* relating to the criminalization of activities related to prostitution (ss. 210 to 213). Within these provisions can be found the bawdy house provisions, which include those relating to keeping and being within a common bawdy house (s. 210), and transporting a person to a common bawdy house (s. 211). The procurement provision refers to the act of procuring and living on the avails of prostitution (s. 212, except for s. 212(1)(*g*) and (*i*)), while the communication provision refers to the act of soliciting in a public place (s. 213(1)(*c*)). Neither respondent is currently charged with any of the offences challenged.

[8] The respondents' position is that the prostitution provisions (ss. 210 to 213) infringe s. 2(*d*) freedom of association rights because these provisions prevent prostitutes from joining together to increase their personal safety; s. 7 security of the person rights due to the possibility of arrest and imprisonment and because the provisions prevent prostitutes from taking steps to improve the health and safety conditions of their work; s. 15 equality rights because the provisions discriminate

against members of a disadvantaged group; and s. 2(*b*) freedom of expression rights by making illegal communication which could serve to increase safety and security.

B. *Proceedings*

(1) British Columbia Supreme Court (Ehrcke J.)

[9] The Attorney General of Canada applied in British Columbia Supreme Court Chambers to dismiss the respondents' action on the ground that they lacked standing to bring it. In the alternative, he applied under Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by *Supreme Court Civil Rules*, B.C. Reg. 168/2009, effective July 1, 2010), to have portions of the statement of claim struck out and part of the action stayed on the basis that the pleadings disclosed no reasonable claim. In the further alternative, he applied for particulars which he said were necessary in order to know the case to be met (chambers judge's reasons, at para. 2). The chambers judge dismissed the action, holding that neither respondent had private interest standing and that discretionary public interest standing should not be granted to them. In light of this conclusion, the chambers judge found it unnecessary to consider the Attorney General's applications under Rule 19(24) and for particulars (para. 88).

[10] The chambers judge reasoned that neither the Society nor Ms. Kiselbach was charged with any of the impugned provisions or was a defendant in an action brought by a government agency relying upon the legislation. Further, the Society is

a separate entity with rights distinct from those of its members. Ms. Kiselbach, he determined, was not entitled to private interest standing because she was not currently engaged in sex work and the continued stigma associated with her past convictions could not give rise to private interest standing because that would amount to a collateral attack on her previous convictions.

[11] The chambers judge turned to public interest standing and found that he should not exercise his discretion to grant standing to either respondent. He reviewed what he described as the three "requirements" for public interest standing as set out in *Canadian Council of Churches* and concluded that the respondents' action raised serious constitutional issues and they had a genuine interest in the validity of the provisions. Thus, the judge held that the first and second "requirements" for public interest standing were established. He then turned to the third part of the test, "whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court" (para. 70). This, in the judge's view, was where the respondents' claim for standing faltered.

[12] He agreed with the Attorney General's argument that the provisions could be challenged by litigants charged under them. The fact that members of the Society were "particularly vulnerable" and allegedly unable to come forward could not give rise to public interest standing (para. 76). Members of the Society would likely have to come forward as witnesses should the matter proceed to trial and if they were willing to testify as witnesses, they were able to come forward as plaintiffs. The

chambers judge noted that there was litigation underway in Ontario raising many of the same issues: *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part, 2012 ONCA 186, 109 O.R. (3d) 1. He reasoned that, while the existence of this litigation was not necessarily a sufficient reason for denying standing, it tended to show that there "may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75). He also referred to the fact that there had been a number of cases in British Columbia and elsewhere where the impugned legislation had been challenged and that there are hundreds of criminal prosecutions every year in British Columbia in each of which the accused "would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77).

[13] The judge concluded that he was bound to apply the test of whether there is no other reasonable and effective way to bring the issue before the court and that the respondents did not meet that test (para. 85).

(2) British Columbia Court of Appeal (2010 BCCA 439, 10 B.C.L.R. (5th) 33, Saunders J.A., Neilson J.A. Concurring, Groberman J.A. Dissenting)

[14] The respondents appealed, submitting that the chambers judge had erred by rejecting private interest standing for Ms. Kiselbach and public interest standing for both respondents. The chambers judge's finding that the Society did not have private interest standing was not appealed (para. 3). The majority of the Court of Appeal upheld the chambers judge's decision to deny Ms. Kiselbach's private interest

standing, but concluded that both respondents ought to have been granted public interest standing. The only issue on which the Court of Appeal divided was with respect to the third factor, that is, whether standing should be denied because there were other ways the issues raised in the respondents' proceedings could be brought before the courts.

[15] Saunders J.A. (Neilson J.A. concurring), writing for the majority, found no reason for denying public interest standing. She held that this Court has made it clear that the discretion to grant standing must not be exercised mechanistically but rather in a broad and liberal manner to achieve the objective of ensuring that impugned laws are not immunized from review. The majority read the dissenting reasons for judgment of Binnie and LeBel JJ. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, as characterizing the *Charter* challenge in that case as a "systemic" challenge, which differs in scope from an individual's challenge addressing a discrete issue. To the majority, *Chaoulli* recognized that any problems arising from the difference in scope of the challenge may be resolved by taking "a more relaxed view of standing in the right case" (para. 59).

[16] Applying this approach, the majority considered this case to fall closer on the spectrum to *Chaoulli* than to *Canadian Council of Churches*. Saunders J.A. took the view that the chambers judge had stripped the action of its central thesis by likening it to cases in which prostitution-related charges were laid. Saunders J.A. focused on the multi-faceted nature of the proposed challenge and felt that the

respondents were seeking to challenge the *Criminal Code* provisions with reference to their cumulative effect on sex trade workers. In the majority judges' view, public interest standing ought to be granted in this case because the essence of the complaint was that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities and exacerbates their vulnerability.

[17] In dissent, Groberman J.A. agreed with the chambers judge's reasoning. In his view, this case did not raise any challenges that could not be advanced by persons with private interest standing. He accepted the respondents' position that it was unlikely that a case would arise in which a multi-pronged attack on all of the impugned provisions could take place. However, he did not consider that the lack of such an opportunity established a valid basis for public interest standing. He took the view that a very broad-ranging challenge such as the one in this case required extensive evidence on a multitude of issues and he did not find it clear that the litigation process would deal fairly and effectively with such a challenge in a reasonable amount of time. Interpreting the judgment in *Chaoulli*, Groberman J.A. held that the Court had not broadened the basis for public interest standing. In his view, *Chaoulli* did not establish that public interest standing should be granted preferentially for wide and sweeping attacks on legislation.

IV. Analysis

A. Public Interest Standing

(1) The Central Issue

[18] In *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, the majority of the Court summed up the law of standing to seek a declaration that legislation is invalid as follows: if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598). At the root of this appeal is how this approach to standing should be applied.

[19] The chambers judge, supported by quotations from the leading cases, was of the view that the law sets out three requirements — something in the nature of a checklist — which a person seeking discretionary public interest standing must establish in order to succeed. The respondents, on the other hand, contend for a more flexible approach, emphasizing the discretionary nature of the standing decision. The debate focuses on the third factor as it was expressed in *Borowski* — that there is no other reasonable and effective manner in which the issue may be brought to the court — and concerns how strictly this factor should be defined and how it should be applied.

[20] My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard

and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.

[21] I do not propose to lead a forced march through all of the Court's case law on public interest standing. However, I will highlight some key aspects of the Court's standing jurisprudence: its purposive approach, its underlying concern with the principle of legality and its emphasis on the wise application of judicial discretion. I will then explain that, in my view, the proper consideration of these factors supports the Court of Appeal's conclusion that the respondents ought to be granted public interest standing.

(2) The Purposes of Standing Law

[22] The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches*, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav*. 121. The Court has recognized that, in a

constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

[23] This Court has taken a purposive approach to the development of the law of standing in public law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches*, at p. 252.

[24] It will be helpful to trace, briefly, the underlying purposes of standing law which the Court has identified and how they are considered.

[25] The most comprehensive discussion of the reasons underlying limitations on standing may be found in *Finlay*, at pp. 631-34. The following traditional concerns, which are seen as justifying limitations on standing, were identified: properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government. A brief word about each of these traditional concerns is in order.

(a) *Scarce Judicial Resources and "Busybodies"*

[26] The concern about the need to carefully allocate scarce judicial resources is in part based on the well-known "floodgates" argument. Relaxing standing rules may result in many persons having the right to bring similar claims and "grave inconvenience" could be the result: see e.g. *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331, at p. 337. Cory J. put the point cogently on behalf of the Court in *Canadian Council of Churches*, at p. 252: "It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important." This factor is not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole.

[27] The concern about screening out "mere busybodies" relates not only to the issue of a possible multiplicity of actions but, in addition, to the consideration that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other challenges by parties with "specific and factually established complaints": *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 694.

[28] These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court — A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see e.g. *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 145.

(b) *Ensuring Contending Points of View*

[29] The second underlying purpose of limiting standing relates to the need for courts to have the benefit of contending points of view of the persons most directly affected by the issue. Courts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skillfully. "[C]oncrete adverseness" sharpens the debate of the issues and the parties' personal stake in the outcome helps ensure that the arguments

are presented thoroughly and diligently: see e.g. *Baker v. Carr*, 369 U.S. 186 (1962), at p. 284.

(c) *The Proper Judicial Role*

[30] The third concern relates to the proper role of the courts and their constitutional relationship to the other branches of government. The premise of our discretionary approach to public interest standing is that the proceedings raise a justiciable question, that is, a question that is appropriate for judicial determination: *Finlay*, at p. 632; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91; see also L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at pp. 6-10. This concern engages consideration of the nature of the issue and the institutional capacity of the courts to address it.

(3) The Principle of Legality

[31] The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should be not be "immunized from judicial review by denying

standing to anyone to challenge the impugned statute" (p. 145). He concluded that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication" (p. 145 (emphasis added)).

[32] The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).

[33] The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the

Charter and the courts' new concomitant constitutional role called for a "general and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

[34] In *Hy and Zel's*, Major J. commented on the underlying rationale for restricting standing and the balance that needs to be struck between limiting standing and giving due effect to the principle of legality:

> If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations. [p. 692]

(4) Discretion

[35] From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147, 161 and 163; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of

the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

[36] It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

(5) A Purposive and Flexible Approach to Applying the Three Factors

[37] In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[38] The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) *Serious Justiciable Issue*

[39] This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

[40] By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. 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, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.

[41] This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody: *Canadian Council of Churches*, at p. 252; *Finlay*, at pp. 631-33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

[42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the

proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) *The Nature of the Plaintiff's Interest*

[43] In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation,

continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. T. Roach, *Constitutional Remedies in Canada* (loose-leaf), at ¶ 5.120).

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

[44] This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show . . . that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598 (emphasis added)); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

[45] A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

[46] The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] another reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

[47] A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff

(pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

[48] Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) <u>This Factor Must Be Applied Purposively</u>

[49] This third factor should be applied in light of the need to ensure full and complete adversarial presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at ¶ 5.120. In *Hy and Zel's*, Major J. linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring

the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

[50] The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

[51] It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.

- The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

- The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would

have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

- The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and

factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

[52] I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.

(6) Weighing the Three Factors

[53] I return to the circumstances of this case in light of the three factors which must be considered: whether the case raises a serious justiciable issue, whether the respondents have a real stake or a genuine interest in the issue(s) and the suit is a reasonable and effective means of bringing the issues before the courts in all of the circumstances. Although there is little dispute that the first two factors favour granting standing, I will review all three as in my view they must be weighed cumulatively rather than individually. I conclude that when all three factors are considered in a purposive, flexible and generous manner, the Court of Appeal was right to grant public interest standing to the Society and Ms. Kiselbach.

(a) *Serious Justiciable Issue*

[54] As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. The constitutionality of the prostitution laws certainly constitutes a "substantial constitutional issue" and an "important one" that is "far from frivolous": see *McNeil*, at p. 268; *Borowski*, at p. 589, *Finlay*, at p. 633. Indeed, the respondents argue that the impugned *Criminal Code* provisions, by criminalizing many of the activities surrounding prostitution, adversely affect a great number of women. These issues are also clearly justiciable ones, as they concern the constitutionality of the challenged provisions. Consideration of this factor unequivocally supports exercising discretion in favour of standing.

[55] The appellant submits, however, that the respondents' action does not disclose a serious issue with respect to the constitutionality of s. 213(1)(*c*) (formerly s. 195.1 (1)(*c*)) because this Court has upheld that provision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *R. v. Skinner*, [1990] 1 S.C.R. 1235.

[56] On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects

of the statement of claim raise serious issues as to the invalidity of the legislation. Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.

(b) *The Proposed Plaintiff's Interest*

[57] Applying the purposive approach outlined earlier, there is no doubt, as the appellant accepts that this factor favours granting public interest standing. The Society has a genuine interest in the current claim. It is fully engaged with the issues it seeks to raise.

[58] As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run "by and for" current and former sex workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the 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 the sex workers (R.F., at para. 8).

[59] From Sheryl Kiselbach's affidavit, it is clear that she is deeply engaged with the issues raised. Not only does she claim that the prostitution laws have directly and significantly affected her for 30 years (A.R., vol. IV, at pp. 15-17), but also she notes that she is now employed as a violence prevention coordinator.

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

[60] Understandably, the chambers judge treated the traditional formulation of this factor as a requirement of a strict test. He rejected respondents' submission that they ought to have standing because their action was "the most reasonable and effective way" to bring this challenge to court. The judge noted that this submission misstated the test set down by this Court and that he was "bound to apply" the test requiring the respondents to show that there "is no other reasonable and effective way to bring the issue before the court" (paras. 84-85). However, for the reasons I set out earlier, approaching the third factor in this way should be considered an error in principle. We must therefore reassess the weight to be given to this consideration when it is applied in a purposive and flexible manner.

[61] The learned chambers judge had three related concerns which he thought militated strongly against granting public interest standing. First, he thought that the existence of the *Bedford* litigation in Ontario showed that there could be other potential plaintiffs to raise many of the same issues. Second, he noted that there were many criminal prosecutions under the challenged provisions and that the accused in each one of them could raise constitutional issues as of right. Finally, he was not

persuaded that individual sex workers could not bring the challenge forward as private litigants. I will discuss each of these concerns in turn.

[62] The judge was first concerned by the related *Bedford* litigation underway in Ontario. The judge noted that the fact that there is another civil case in another province which raises many of the same issues "would not necessarily be sufficient reason for concluding that the present case . . . should not proceed", it nonetheless "illustrates that if public interest standing is not granted . . . there may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75).

[63] The existence of parallel litigation is certainly a highly relevant consideration that will often support denying standing. However, I agree with the chambers judge that the existence of a civil case in another province — even one that raises many of the same issues — is not necessarily a sufficient basis for denying standing. There are several reasons for this.

[64] One is that, given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. What is needed is a practical and pragmatic assessment of whether having parallel proceedings in different provinces is a reasonable and effective approach in the particular circumstances of the case. Another point is that the issues raised in the *Bedford* case are not identical to those

raised in this one. Unlike in the present case, the *Bedford* litigation does not challenge ss. 211, 212(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*h*) or (3) of the *Code* and does not challenge any provisions on the basis of ss. 2(*d*) or 15 of the *Charter*. A further point is that, as discussed earlier, the court must examine not only the precise legal issue, but the perspective from which it is raised. The perspectives from which the challenges in *Bedford* and in this case come are very different. The claimants in *Bedford* were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. As the claim of unconstitutionality of the prostitution laws revolves mainly around the effects it has on street-level sex workers, the respondents in this action ground their challenges in a distinctive context. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. We were told, for example, that the respondents proposed that their appeal to this Court should be stayed awaiting the results of the *Bedford* litigation. A stay of proceedings pending resolution of other litigation is one possibility that should be taken into account in exercising the discretion as to standing.

[65] Taking these points into account, the existence of the *Bedford* litigation in Ontario, in the circumstances of this case, does not seem to me to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward. The *Bedford* litigation, in my view, has not been shown to be a more reasonable and effective means of doing so.

[66] The second concern identified by the chambers judge was that there are hundreds of prosecutions under the impugned provisions every year in British Columbia. In light of this, he reasoned that "the accused in each one of those cases would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77). He noted, in addition, that such challenges have been mounted by accused persons in numerous prostitution-related criminal trials (paras. 78-79). In my view, however, there are a number of points in the circumstances of this case that considerably reduce the weight that should properly be given this concern here.

[67] To begin, the importance of a purposive approach to standing makes clear that the existence of a parallel claim, either potential or actual, is not conclusive. Moreover, the existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.

[68] The cases to which we have been referred did not challenge nearly the entire legislative scheme as the respondents do. As the respondents point out, almost all the cases referred to were challenges to the communication law alone: *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *Skinner*; *R. v. Smith* (1988), 44 C.C.C. (3d) 385

(Ont. H.C.J.); *R. v. Gagne*, [1988] O.J. No. 2518 (Prov. Ct.) (QL); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111 (Alta. C.A.); *R. v. Kazelman*, [1987] O.J. No. 1931 (Prov. Ct.) (QL); *R. v. Bavington*, 1987 CarswellOnt 3371 (Prov. Ct.); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.); *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255 (Prov. Ct.); *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232 (S.C.); *R. v. Bailey*, [1986] O.J. No. 2795 (Prov. Ct.) (QL); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464. Most of the other cases challenged one provision only, either the procurement provision (*R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (C.A.) (QL), or the bawdy house provision (*R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (Ont. C.A.)). From the record, the only criminal cases that challenge more than one section of the prostitution provisions were commenced *after* this case (Affidavit of Karen Howden, June 24, 2011, at para. 10 (*R. v. Mangat*) (A.R., vol. V, at pp. 102-3; A.R., vol. IX, at pp. 31-36); paras. 4-5 (*R. v. Cho)* (A.R., vol. V, at p. 102; A.R., vol. VIII, at p. 163); paras. 2 and 11 (*R. v. To*) (A.R., vol. V, at pp. 101 and 104-12)). At the times of writing these reasons, one case had been dismissed, the other held in abeyance pending the outcome of this case and the last one was set for a preliminary inquiry.

[69] Of course, an accused in a criminal case will always be able to raise a constitutional challenge to the provisions under which he or she is charged. But that does not mean that this will necessarily constitute a more reasonable and effective alternative way to bring the issue to court. The case of *Blais* illustrates this point. In that case, the accused, a client, raised a constitutional challenge to the communication

provision without any evidentiary support. The result was that the Provincial Court of British Columbia dismissed the constitutional claim, without examining it in detail. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance. For instance, in *R. v. Hamilton* (Affidavit of Elizabeth Campbell, September 17, 2008, at para. 6 (A.R., vol. II, at pp. 34-35), the Crown, for unrelated reasons, entered a stayed of proceedings after the accused filed a constitutional challenge to a bawdy house provision. Thus, the challenge could not proceed.

[70] Moreover, the fact that many challenges could be or have been brought in the context of criminal prosecutions may in fact support the view that a comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised. There could be a multitude of similar challenges in the context of a host of criminal prosecutions. Encouraging that approach does not serve the goal of preserving scarce judicial resources. Moreover, a summary conviction proceeding may not necessarily be a more appropriate setting for a complex constitutional challenge.

[71] The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown

Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

[72] I conclude, therefore, that these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them.

[73] I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that

transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

[74] The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (R.F., at para. 20). Further, the Society is represented by experienced human rights lawyers, as well as by the Pivot Legal Society, a non-profit legal advocacy group working in Vancouver's Downtown Eastside and focusing predominantly on the legal issues that affect this community

(Affidavit of Peter Wrinch, January 30, 2011, at para. 3 (A.R., vol. VI, at p. 137)). It has conducted research on the subject, generated various reports and presented the evidence it has gathered before government officials and committees (see Wrinch Affidavit, at paras. 6-21). This in turn, suggests that the present litigation constitutes an effective means of bringing the issue to court in that it will be presented in a context suitable for adversarial determination.

[75] Finally, other litigation management tools and strategies may be alternatives to a complete denial of standing, and may be used to ensure that the proposed litigation is a reasonable and effective way of getting the issues before the court.

(7) Conclusion With Respect to Public Interest Standing

[76] All three factors, applied purposively, favour exercising discretion to grant public interest standing to the respondents to bring their claim. Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society, but it will also promote the economical use of scarce judicial resources: *Canadian Council of Churches*, at p. 252.

B. *Private Interest Standing*

[77] Having found that the respondents have public interest standing to pursue their claims, it is not necessary to address the issue of whether Ms. Kiselbach has private interest standing.

V. Disposition

[78] I would dismiss the appeal with costs. However, I would not grant special costs to the respondents. The Court of Appeal declined to do so (2011 BCCA 515, 314 B.C.A.C. 137) and we ought not to interfere with that exercise of discretion unless there are clear and compelling reasons to do so which in my view do not exist here: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 77.

Appeal dismissed with costs.

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Solicitors for the respondents: Arvay Finlay, Vancouver; Pivot Legal, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Community Legal Assistance Society: Community Legal Assistance Society, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Gratl & Company, Vancouver; Megan Vis-Dunbar, Vancouver.

Solicitor for the intervener Ecojustice Canada: Ecojustice Canada, Toronto.

Solicitors for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and ARCH Disability Law Centre: West Coast Women's Legal Education and Action Fund (West Coast LEAF), Vancouver; Justice for Children and Youth, Toronto; ARCH Disability Law Centre, Toronto.

Solicitors for the intervener Conseil scolaire francophone de la Colombie-Britannique: Heenan Blaikie, Ottawa.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitor for the intervener the Canadian Civil Liberties Association: Canadian Civil Liberties Association, Toronto.

Solicitors for the interveners the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees: Waldman & Associates, Toronto.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia: McCarthy Tétrault, Vancouver.