On Being “Part of the Solution”: Public Interest Standing after SWUAV SCC

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The modern rules are, the spirit of them is, this: let’s be part of the solution, not part of the problem....

Drapeau CJNB during the Morgentaler hearing on public interest standing

INTRODUCTION

In September 2012, the Supreme Court of Canada (“SCC”) granted the Downtown Eastside Sex Workers United Against Violence (“SWUAV”) and former sex trade worker and anti-violence advocate Sheryl Kiselbach public interest standing to challenge the constitutionality of numerous prostitution-related provisions of the Criminal Code. SWUAV is an organization of current and former street level sex workers that, together with Ms. Kiselbach, argues that the impugned Code provisions systematically operate to prevent sex workers from taking steps to improve the health and safety conditions of their work due to the threat of criminalization. They argue that, as a result, the provisions violate

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2 Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 [SWUAV SCC].

3 Criminal Code, RSC 1985, c C-46.

4 Ibid. at ss 210 (keeping a common bawdy house), 211 (transporting to a common bawdy house), 212 (procuring and living from the avails of prostitution, but not ss 212(1)(g) and (i)) and 213 (solicitation in a public place)

5 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.
sex workers’ constitutional rights to freedom of expression and association, to life, liberty and security of the person and to equality. The SCC’s judgment affirmed the 2:1 decision of the British Columbia Court of Appeal (“BCCA”) granting SWUAV and Ms. Kiselbach public interest standing. The BCCA majority had reversed the decision of Ehrcke J, who initially denied standing on the basis of the public interest standing test articulated in prior SCC decisions such as Canadian Council of Churches\(^6\) and Hy and Zel’s.\(^7\)

SWUAV SCC not only represents a victory for SWUAV and Ms. Kiselbach, but also for access to justice for equality-seeking groups more generally. In granting public interest standing in this case, the SCC rewrote the third element in the public interest standing test, which had previously been a stumbling block to public interest group representation of the interests of members of socio-economically marginalized communities.\(^8\) The SCC also introduced an element of flexibility into the application of the standing test, which should enhance the capacity of courts in the future to render more fully contextualized decisions that better recognize and account for the challenging conditions in which some of the most vulnerable members of our communities live. In so doing, the SCC modeled the way in which judicial decision-making inside the courtroom can become “part of the solution” in addressing the access to justice crisis.

I. HISTORY LEADING UP TO SWUAV SCC

A. Law of Public Interesting Standing

The law of public interest standing in Canada had something of a checkered history in terms of making justice accessible to members of marginalized groups prior to SWUAV SCC.\(^9\) The SCC clearly signaled a move away from a strict approach to standing that permitted only those with a direct interest in a legal matter from pursuing litigation by developing the test for public interest standing

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\(^6\) Canadian Council of Churches v Canada (Minister of Employment and Immigration), [1992] 1 SCR 236 [Canadian Council of Churches].

\(^7\) Hy and Zel’s Inc v Ontario (Attorney General), [1993] 3 SCR 675 [Hy and Zel’s].


in a series of four decisions rendered over the course of the decade from the mid-1970s to the mid-1980s.

In *Thorson* the SCC granted an individual taxpayer standing to challenge the constitutionality of statutes that he argued were *ultra vires* the jurisdiction of Parliament. In concluding that Mr. Thorson should be granted standing, the SCC expressed concern that unless standing were granted, there was no way in which the justiciable question of the “alleged excess of legislative power … could be made the subject of adjudication” because the Attorney General had declined to seek judicial review of the issues raised by Mr. Thorson. One year later in *McNeil*, the SCC expanded upon *Thorson* by allowing an individual standing to challenge provincial legislation that purported to grant an administrative tribunal censorial powers, even though the Court recognized that other more directly affected individuals could conceivably advance such a claim (although for practical reasons they were unlikely to do so). In so doing, the SCC demonstrated that public interest standing was not reserved only for situations in which the constitutionality of legislation would be isolated from judicial review due to the absence of any other plaintiffs to bring the matter forward.

Five years later, in *Borowski*, the SCC stated that standing to challenge the validity of legislation would be made out if:

(i) “there is a serious issue as to [the legislation’s] invalidity”;
(ii) “[the plaintiff] is affected by it directly or … has a genuine interest as a citizen in the validity of the legislation”; and
(iii) “there is no other reasonable and effective manner in which the issue may be brought before the Court.”

At the same time, however, the SCC seemed to apply the third criterion as it had in *McNeil* by granting a “right to life” advocate standing to challenge the abortion

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10 *Thorson v Attorney General of Canada*, [1975] 1 SCR 138, 43 DLR (3d) 1 [*Thorson*].
14 *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575, 130 DLR (3d) 688 [*Borowski*].
provisions of the *Criminal Code*, even though it explicitly recognized that the provisions *could* be challenged by those charged with violating the provisions or by would-be fathers (although, again, practical reasons would likely prevent such challenges).

Finally, in its 1986 decision in *Finlay*, the SCC further expanded the ambit of public interest standing by expressly allowing an individual standing to challenge the constitutionality of administrative action, albeit while maintaining the strict “no other reasonable and effective means” language to describe the third criterion.

The SCC’s decisions over the decade from 1975 to 1986 clearly indicated that public interest standing was available to challenge the constitutionality of legislative and administrative action by government, and was by no means absolutely barred simply because another more directly affected person *could* initiate a constitutional challenge, notwithstanding language in the third criterion that suggested the contrary. This approach, however, seemed to have been transformed in *Canadian Council of Churches*. On the surface, it appeared that *Canadian Council of Churches* softened the test by transforming the third criterion “no other reasonable and effective way to bring the issue before the court?” Despite this, and the SCC’s own language suggesting a “liberal and generous” approach should be taken to public interest standing, the Court in that case mechanistically denied an experienced public interest group standing to mount a comprehensive challenge to the *Immigration Act* simply because some of the provisions could be (and had been) challenged by directly affected refugee applicants at their hearings.

The SCC warned that its conclusion “should not be interpreted as a mechanistic application of a technical requirement”. Yet the Court’s rejection of the contextualized argument that comprehensively testing the constitutional limits of a legislative scheme ought not to be left up to already vulnerable individual

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16 *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, 33 DLR (4th) 321 [*Finlay*].

17 *Canadian Council of Churches*, supra note 6.


community members was highly abstract and inequitable,\(^{21}\) if not explicitly mechanistic. Moreover, although the express articulation of the public interest standing test in *Canadian Council of Churches* may have seemed to be moving closer to the way in which the public interest standing test had been applied in practice in cases like *McNeil* and *Borowski*, the application of the test in *Canadian Council of Churches* signaled a shift toward conservatism.

Rigid application of the third criterion was evident in the SCC’s decision one year later in *Hy and Zel’s*.\(^{22}\) In that case, the majority concluded that a party seeking public interest standing must demonstrate “there is no other reasonable and effective means of bringing the matter before the court,” and reiterated its conclusion in *Canadian Council of Churches* that “the granting of 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.”\(^{23}\) In emphasizing this aspect of the reasons in *Canadian Council of Churches* the Court in *Hy and Zel’s* demonstrated a strong preference for private interest litigation, at the expense of appropriate public interest cases proceeding on the merits.

More than a decade later, in *Chaoulli*,\(^{24}\) the SCC seemed to signal a change in approach with respect to public interest standing, albeit with very little explicit reflection on the issue. The majority reasons liberalized the third criterion to impose on applicants an obligation to demonstrate “there is no other effective means available to them” to “challenge the validity of the provisions other than by recourse to the courts.”\(^{25}\) Binnie J (in dissenting reasons, which concurred on the issue of standing) specifically adopted a contextualized analysis of the third criterion, directing attention to both the nature of the challenge at issue and a realistic assessment of the situation of directly affected individuals who might be argued to present another “reasonable and effective means of bringing the matter before the court”.\(^{26}\) Binnie J highlighted the unreasonableness of refusing to allow public interest standing in the context of complex systemic challenges on

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\(^{21}\) For further discussion of the equality implications of *Canadian Council of Churches*, see: Bailey, *supra* note 9 at 264-268.

\(^{22}\) *Hy and Zel’s*, *supra* note 7.


\(^{25}\) *Ibid.* at para. 35.

the basis that they could be undertaken by directly affected individuals, where the “material, physical and emotional resources” of those individuals made it highly unrealistic for them to do so.27

Unfortunately, the movement toward a contextualized, less rigid approach suggested in Chaoulli was not consistently taken up in subsequent decisions by lower courts. For example, a decontextualized and mechanistic application of the “no other reasonable and effective means” criterion prevented the Canadian Bar Association from gaining public interest standing to challenge the constitutionality of drastic cuts to legal aid funding in British Columbia, which directly affected the fundamental interests of highly vulnerable community members.28 In contrast, contextualized analysis of the emotional and financial burdens that realistically limited the likelihood that women seeking abortions would challenge the constitutionality of abortion-related provisions in provincial legislation led the New Brunswick Court of Appeal to conclude that Dr. Henry Morgentaler should be granted public interest standing to mount such a challenge.29

Thus, by 2007 when SWUAV initiated its challenge to prostitution related provisions of the Criminal Code, the law of public interest standing was, at best, in a state of flux and, at worst, mired in a decontextualized mechanistic approach that added one more barrier to the voices of marginalized community members being represented before the law. The impugned provisions themselves had also been steeped in controversy for decades.


Sex between consenting adults in exchange for money is legal in Canada. Indeed, the bawdy house and communication provisions were enacted to address public nuisance concerns, not prostitution concerns.30 However, there are competing positions among the public at large and within feminist and equality seeking communities as to whether the criminalization of acts relating to

27 Ibid.
29 Morgentaler v New Brunswick, 2009 NBCA, 344NBR (2d) 39.
prostitution are better viewed as an affirmation of women’s worth\textsuperscript{31} or as a key barrier to the safety of women involved in the sex trade.\textsuperscript{32}

These competing viewpoints with respect to the social and equality implications of sex work and the legal issues surrounding it were explored in Parliament’s 2006 \textit{Subcommittee on Solicitation Laws}. The Subcommittee was mandated by Parliament to review and recommend changes to the prostitution-related sections of the \textit{Criminal Code} in order to improve the safety of sex workers, and reduce the exploitation and violence they experience.

The Subcommittee focused on the violence experienced by sex workers, stating:

> With the disappearances and sadistic murder of a number of prostitutes, particularly in Vancouver and Edmonton, the public has become aware of the violence to which many prostitutes fall prey in Canada. This violence is not new, and is by no means confined to Vancouver or Edmonton. People who engage in prostitution, particularly street prostitution, are faced with many different types of abuse and violence, ranging from whistles and insults to assault, rape and murder. The violence comes from clients, pimps, drug pushers, members of the public, co-workers, and even police officers.\textsuperscript{33}

Yet the \textit{Subcommittee} failed to recommend legislative changes needed to protect the health, safety and human rights of adult sex workers in Canada.

Despite the plethora of opinions on the issue, it is indisputable that sex work in its current form is extremely dangerous. Women sex trade workers are murdered at a rate that is 60-120 times the rate faced by the general female population, and the Downtown Eastside of Vancouver (“DTES”) itself is the site of “many missing


\textsuperscript{32} For an exploration of this position see: Pivot Legal Society Sex Work Subcommittee, \textit{Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws} (Vancouver: Law Foundation of British Columbia, 2004).

and murdered street-level sex workers”, the murder of 27 of whom Robert William Pickton was charged (although he was convicted on only 6 counts). \(^{34}\) Pickton’s case is a distressing and all too real illustration of the dangers faced by street-level sex workers. The evidence at Pickton’s trial revealed the tragedy of his victims, all of whom were sex workers with addiction challenges who had worked on the streets of the DTES. \(^{35}\) 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. Street-level sex workers in the DTES are predominantly female, and disproportionately of First Nations ancestry. They face a range of serious health issues, including drug and alcohol addiction, HIV/AIDS, hepatitis and a range of other illnesses and mental health issues.

In 2010, the British Columbia government established the Missing Women Commission of Inquiry to inquire into, among other things, police investigations between January 23, 1997 and February 5, 2002 relating to women reported missing from the DTES. Shortly after its establishment, the Commission was plagued with concerns that sex workers had been systematically shut out of the process. \(^{36}\) The Commission released its report on December 17, 2012, following an 11-month extension of its mandate. \(^{37}\) The report provides disturbing details with respect to how Pickton was able to prey on the women from the DTES, as well as how the discriminatory attitudes and systemic bias in law enforcement contributed to the ongoing disappearances of street-level sex workers. \(^{38}\)

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\(^{34}\) Ibid. at paras.15-16.


\(^{36}\) The British Columbia government denied funding to 13 groups representing aboriginal women, sex trade workers and residents of the DTES. The province did assist with the legal costs of the families of missing and murdered women who appeared at the inquiry: The Canadian Press, “Advocacy groups denied funding for missing women inquiry” 25 May 2011, online: <http://www.cbc.ca/news/canada/british-columbia/story/2011/05/25/bc-missing-women-advocacy-funding.html>.


\(^{38}\) Obviously Pickton was not alone in terrorizing women in the DTES. As the report notes, “Putting Robert Pickton behind bars is not the end of the story; he was one serial predator who wreaked extensive devastation, but is not alone – there are many unsolved cases of missing and murdered women”: Ibid. at 7, 217-238.
SWUAV’s legal challenge was controversial for all of these reasons, and additionally because four months prior to the commencement of the SWUAV action, 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 challenging the prostitution provisions ("Bedford"). Bedford sought declarations that ss. 210, 212(1)(j) and 213(1)(c) of the Criminal Code violate ss. 2(b) and 7 of the Charter. The Bedford claim was successful at first instance, although the Ontario Court of Appeal subsequently narrowed the decision. That decision has been appealed to the Supreme Court of Canada.

Unlike the SWUAV claim (which originated in British Columbia), Bedford originated in Ontario and does not challenge ss. 211, 212(1)(a), (b), (c), (d), (e), (f), (h) and (3) of the Criminal Code, nor does it allege or seek to demonstrate the impugned provisions violate s. 15 or 2(d) of the Charter. Perhaps most significantly, the applicants in Bedford were not predominantly involved in street level sex work; they were involved in a range of indoor settings and worked on the street at various times in their lives and so did not speak directly from the perspectives of more vulnerable street level sex workers.

C. SWUAV and Ms. Kiselbach’s Action

SWUAV commenced its action in 2007, and subsequently amended its claim to add Ms. Kiselbach as a plaintiff in 2008. By the time the matter was heard, the plaintiffs claimed that the Criminal Code provisions prohibiting communication for the purposes of prostitution, keeping and transporting persons to a common bawdy house, and the procuring laws related to facilitating or managing another’s involvement in prostitution as well as living off the avails of prostitution separately and together violated sex workers’ Charter rights to life, liberty and security of the person (s. 7), equality (s. 15), freedom of expression (s. 2(b)) and freedom of association (s. 2(d)). They argued that sex workers’ liberty interests were violated due to the risk of arrest and imprisonment, that their security of the person was violated because the laws prevent sex workers from “taking steps to improve the health and safety conditions of their work” (e.g. by moving onto well-

39 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.

40 Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 (Factum of the Respondent at paras. 4-6)
lit, high traffic streets where the risk of “bad dates” could be mitigated), that their equality rights were violated due to the laws’ discriminatory effects on sex workers, that their expression rights were violated by limiting communication “that could serve to increase their safety”, and that their association rights were violated because the laws prevented sex workers “from joining together to increase their personal safety”.  

According to court documents, “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 … DTES neighbourhood of Vancouver British Columbia.” SWUAV’s members, unlike the plaintiffs in Bedford, were street-based sex workers, all of whom are “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.” As noted above, DTES sex workers are among Canada’s most marginalized and at-risk community members.

Ms. Kiselbach engaged in sex work for approximately 30 years until 2001, was convicted of numerous prostitution-related offences and experienced “significant violence” while she was a sex worker (including sexual assault, stabbing and forcible confinement). She now works in violence prevention in the DTES and swore that “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” would have prevented her from participating in a constitutional challenge while she was a sex worker.

Other SWUAV members were unable to act as plaintiffs in the constitutional challenge due to health challenges and addictions that undermined their ability to deal with the stress of prolonged, high-profile litigation, but also out of fear of a loss of privacy due to media publicity that could “out” them as sex workers to family, friends and community members, put them at increased risk of violence by clients and police officers, increased financial problems (including loss of

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41 Ibid. at para 6.
42 Ibid. at para 8.
43 Ibid. para 9.
44 Ibid. paras. 10-13.
clients and being cut off of social assistance) and being evicted or having their children apprehended.\(^{45}\)

Rather than responding substantively to the allegations made by SWUAV and Ms. Kiselbach, the Attorney General of Canada brought a motion to strike, relying (in part)\(^{46}\) on the *Canadian Council of Churches* in order to argue that the plaintiffs did not have standing to initiate the action.

**D. Decisions Below**

In a chambers decision, Ehrcke J allowed the Attorney General’s motion to strike on the basis that the plaintiffs had neither private nor public interest standing.\(^{47}\) Given that neither SWUAV nor Ms. Kiselbach were facing criminal charges nor responding to a civil action related to the prostitution provisions, Ehrcke J concluded that neither had private interest standing.\(^{48}\) While accepting that the first two *Canadian Council of Churches* criteria for public interest standing had been satisfied, the chambers judge concluded that the third had not. His analysis demonstrates the mechanistic approach to standing encouraged by that decision, particularly as interpreted by the SCC in its decision in *Hy and Zel’s*. Ehrcke J asked himself whether “if standing is denied, there exists another reasonable and effective way to bring the issue before the court.”\(^{49}\) He concluded that the plaintiffs had failed to satisfy the third criterion for three reasons.

First, he concluded that the *Bedford* litigation demonstrated that another more directly affected person (i.e. one currently engaged in sex work) could bring the issue of the provisions’ constitutionality before the court.\(^{50}\) Second, he rejected the argument that the members of SWUAV were particularly vulnerable

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\(^{45}\) Ibid. para. 14.

\(^{46}\) The Attorney General also sought to strike the claim on the basis that it disclosed no reasonable cause of action.


\(^{48}\) With respect to Ms. Kiselbach, Ehrcke J also expressed concern that if she were accorded standing on the basis of her past prosecutions under the prostitution provisions, the civil action could be seen as a collateral attack on those prior convictions: *SWUAV SC, supra* note 2 at paras. 49-50.

\(^{49}\) Ibid. at para. 70.

\(^{50}\) Ibid. at para. 75.
individuals who were unlikely to initiate a constitutional challenge out of fear of reprisal. Since it was likely that SWUAV members would be called as witnesses if the matter were to proceed to trial, Ehrcke J could “not see how their vulnerability makes it impossible for them to come forward as plaintiffs, given that they are prepared to testify as witnesses.” 51 Third, he reasoned that hundreds of prosecutions under the prostitution provisions every year provided ample opportunity for those charged to challenge the constitutionality of the provisions as of right, and noted numerous cases in which challenges had been brought. 52

SWUAV’s appeal of Ehrcke J’s decision to the British Columbia Court of Appeal (BCCA) was allowed, with the Court holding 2:1 that SWUAV and Ms. Kiselbach had public interest standing. Saunders JA, writing for herself and Neilson J, concluded from Canadian Council of Churches that the public interest standing test should “interpreted in a broad and liberal manner to achieve the objective of ensuring the impugned law is not immunized from review”, but that each of the three criterion was “a necessary condition that must be met” in order for standing to be granted. 53 With respect to the third criterion, the majority concluded that the availability of another constitutional challenge of the provisions (as focused upon by the chambers judge) represented only one measure of whether another reasonable and effective alternative to the instant litigation existed. In addition, the majority reasoned, it was necessary to consider the “multi-faceted nature of the proposed challenge”, which sought to attack the “cumulative effect of the impugned provisions on the lives of those involved in sex work”. 54 Saunders JA concluded that the systemic nature of the challenge posed by SWUAV and Ms. Kiselbach materially differed from many of the individual challenges to the provisions that Ehrcke J had referred to in his reasons for decision. The systemic nature of the challenge, the majority concluded, rendered SWUAV’s challenge comparable to the broad-based challenge to the health care system mounted in Chaoulli. That, along with the equality issues raised, tipped the balance in favour of “a more relaxed view of standing”. 55 Finally, the majority dismissed the Bedford case as determinative in any way since the result in that case “is not binding in

51 Ibid. at para. 76.
52 Ibid. at paras. 77-79.
54 Ibid. at paras. 55-56.
55 Ibid. at paras. 59-62.
British Columbia unless it becomes the subject of a decision from the Supreme Court of Canada”.

Goberman JA, dissenting, would have dismissed SWUAV and Ms. Kiselbach’s appeal. His reasons for decision dismiss their proceeding as a “multi-pronged attack” aimed at “one stop shopping” and raise the specter of the case as pleaded becoming an unmanageable “commission of inquiry” rather than a lawsuit.

The SCC granted the Attorney General leave to appeal the BCCA’s decision in March 2011, offering Canada’s highest court the opportunity to guide public interest standing law in a direction that enhanced the prospect of meaningful access to justice for marginalized groups. The SCC made good on that opportunity by dismissing the Attorney General’s appeal and holding that both SWUAV and Ms. Kiselbach had public interest standing. The unanimous reasons emphasized a flexible, non-mechanistic approach to public interest standing, clarified the ambit of the justiciability question and rewrote the “reasonable and effective alternative” criterion. In so doing, the Court opened the path for equitable, contextualized analysis of reasonable and effective alternatives to public interest litigation, which is likely to go a long way toward alleviating the equality-undermining effects of cases such as Canadian Council of Churches and CBA.

II. ANALYSIS OF SWUAV SCC

The reasons in SWUAV SCC, written by Cromwell J, for a unanimous court, provide an informative framework for assessing questions of standing in the future. The reasons also revise the test for public interest standing in ways that should promote principled, contextualized assessments of standing that allow for the exercise of judicial discretion on a superficially “procedural” matter in a manner that contributes meaningfully to access to justice for equality-seeking, socioeconomically marginalized groups. The SCC has chosen to become “part of

56 Ibid. at para. 68.
57 Ibid. at para. 76.
58 Ibid. at para. 81.
59 SWUAV CA, leave to appeal to SCC granted, 33981 (March 31, 2011).
60 Bailey, supra note 9 at 276-283.
the solution”, rather than “part of the problem” by: (i) both clearly articulating the reasons underlying the imposition of limits on standing and directly demonstrating how those reasons and the principle of legality might animate future exercises of standing discretion; (ii) reframing the test for public interest standing as a flexible and cumulative weighing of the three criteria, rather than a mechanistic checklist in which each criterion is individually assessed and must be individually “passed” in order for standing to be granted; (iii) revising the third criterion in the public interest standing test and clarifying the standards applicable to assessing the first two criteria; and (iv) clearly identifying the types of issues to be taken into account in assessing the third criterion.

A. Reasons for Imposing Limits on Standing & the Principle of Legality

Cromwell J confirmed the SCC’s earlier exposition of the four fundamental reasons why courts have imposed the limits on standing previously articulated in *Finlay*:

(i) to ensure courts don’t become “hopelessly overburdened” by “marginal or redundant cases” (because cluttering the court system with these kinds of claims could undermine the “operation of the court system as a whole”); (ii) to screen out “busybody” litigants who might burden the system with a multiplicity of law suits and also take positions that could compromise the rights of those most directly affected by an impugned law or government action (while recognizing that the scope of this “problem” may have been overstated); (iii) to ensure courts have the benefit of contending viewpoints from those most directly affected (recognizing that the adversarial model in Canada depends upon the parties for skillful presentation of contending viewpoints); and (iv) “to ensure courts play their proper role within our democratic system of government” (recognizing that constitutionally, judges are vested with the responsibility for reviewing questions that are justiciable, rather than, for example, purely political).  

However, Cromwell J noted that these concerns must also be balanced with the equally important “role of courts in assessing the legality of government action,”  

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61 *SWUAV*, *supra* note 2 at paras. 1, 26-30.

which reflects the right of citizens both to constitutional behaviour by the state and to challenge the constitutionality of state behaviour through judicial review.\textsuperscript{53} Given that courts are vested with this important democratic role, Cromwell J emphasized the importance of determining whether the constitutionality of an impugned state action would effectively be immunized from judicial scrutiny if public interest standing were refused in a particular case.\textsuperscript{64}

**B. A Flexible and Cumulative Approach**

Emphasizing the SCC’s statements in \textit{Canadian Council of Churches} that judicial discretion to grant public interest standing should not be exercised mechanistically and should be interpreted in a “liberal and generous manner”\textsuperscript{65} (seemingly not withstanding the mechanistic way in which the discretion was arguably \textit{actually} exercised in that case), Cromwell J concluded that the three criteria “should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.”\textsuperscript{66} The burden will lie with the party seeking standing to satisfy the court that the three factors, assessed cumulatively in the manner directed by the SCC, weigh in favour of granting standing. However, “[a]ll of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.”\textsuperscript{67} With this interpretive approach in mind, the SCC then turned to the three criteria themselves.

**C. Revision and Reframing of the Three Criteria**

Cromwell J, for the Court, held that the exercise of public interest standing discretion involves the weighing of three criteria (which were attributed to \textit{Canadian Council of Churches} notwithstanding the clear revision of the third criterion):

\begin{quote}
(a) “whether the case raises a serious justiciable issue”;
\end{quote}

\textsuperscript{63} \textit{Ibid.} at para. 31.
\textsuperscript{64} \textit{Ibid.} at paras. 33-34.
\textsuperscript{65} \textit{Ibid.} at para. 35.
\textsuperscript{66} \textit{Ibid.} at para. 36.
\textsuperscript{67} \textit{Ibid.} at para. 37.
(b) “whether the party bringing the action has a real stake or a genuine interest in its outcome”; and
(c) “whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court”.  

While the most marked revision relates to the third criterion, the Court also resolved outstanding disagreements with respect to the first and second criteria.

(a) Serious justiciable issue

The Court contextualized the first criterion, “serious justiciable issue”, by reference to the legality principle (ensuring courts play their proper democratic role by reviewing state action in connection with justiciable issues) and the concern to properly allocate judicial resources (ensuring that courts do not become embroiled in purely political questions more appropriately left to legislative and executive branches of government). 69 However, the Court clarified that in assessing “seriousness”, courts should look for substantial or important constitutional issues, but should not examine the merits of the case “in anything other than a preliminary manner”. 70 If the claim discloses one serious issue that raises a claim that is “far from frivolous”, a court need not examine each of the issues raised in detail to determine whether they too demonstrate a serious issue. 71 Importantly then, the SCC has signaled that determinations of questions relating to public interest standing are not to be converted into clause by clause analyses of the merits of each of the individual claims being advanced, nor are they to be used as a substitute for other kinds of preliminary processes meant to assess the formal or substantive adequacy of pleadings. At its highest, the first criterion would only militate against granting public interest standing if all of the issues raised by the claim are “so unlikely to succeed that its result would be seen as a ‘foregone conclusion’.” 72

In applying the first criterion to the facts of the case before it, the Court noted that questions surrounding the constitutionality of the prostitution provisions in the

68 Ibid. at para. 2.
69 Ibid. at paras. 39-40.
70 Ibid. at para. 42.
71 Ibid. at para. 43, 54.
72 Ibid. at para. 42.
Criminal Code were both “far from frivolous” and clearly justiciable in that they sought to directly engage the court in a review of the legality of legislation.\textsuperscript{73} Moreover, the Court rejected the government’s contention that one of the issues in the claim (challenging the constitutionality of the communication provisions) could not be considered “serious” in that it had already been determined in prior SCC jurisprudence.\textsuperscript{74} In keeping with its directions to other courts for future public interest standing decisions, the Court concluded that the multi-faceted claim raised a number of serious justiciable issues, so that it was not necessary at the stage of determining standing to “get into a detailed screening of the merits of discrete and particular aspects of the claim”.\textsuperscript{75}

(b) Nature of the plaintiff’s interest

The Court recognized that the second criterion, relating to the nature of the plaintiff’s interest, could be satisfied in a number of ways. Cromwell J found that the key to the determination is whether the plaintiff is “engaged” with the claim. In the context of an individual applicant, being “engaged” might mean being directly affected personally (as in Finlay). Engagement of a representative group seeking standing could be measured by consideration of that group’s reputation, their continuing interest in the issues raised by the claim and the ways in which the group is linked to the claim.\textsuperscript{76}

Cromwell J had no difficulty in finding that this criterion was satisfied by SWUAV, given its long-standing engagement with the issues raised in the claim and the fact that the organization itself is run “by and for” current and former sex workers in the DTES whose interests are directly affected by the provisions challenged. Similarly, the Court concluded that Ms. Kiselbach’s previous 30 year involvement in the sex trade and her current role as a violence prevention coordinator “deeply engaged” her in the issues raised by the claim.\textsuperscript{77}

\textsuperscript{73} Ibid. at para. 54.
\textsuperscript{74} Ibid. at para. 55.
\textsuperscript{75} Ibid. at para. 56. In addition, the Court rightly noted that other procedural mechanisms were available for the detailed screening of all aspects of the claim. Presumably, this would include the motion to strike initiated by the government in tandem with its standing challenge.
\textsuperscript{76} Ibid. at para. 43.
\textsuperscript{77} Ibid. at paras. 58-59.
(c) Reasonable and effective means

The most momentous changes effected by SWUAV SCC relate to the third criterion, reasonable and effective means. The Court’s most significant change was to reject an articulation of the third criterion that would require applicants to show there are no other reasonable and effective means to get the matter before the courts (as the test had been explicitly stated in Borowski, Finlay and Hy and Zel’s). Although the Court spends several paragraphs arguing that it had not consistently articulated the third criterion in this rigid way and had not consistently applied it restrictively, it concluded in SWUAV SCC that the third criterion “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”.

Thankfully, this restatement of the third criterion is a far cry both from a burden to demonstrate there is “no reasonable and effective alternative” (Hy and Zel’s, Borowski, Finlay) or from an inquiry into whether there is “another reasonable and effective way to bring the issue before the court”, where the factual existence of challenges by individuals with standing as of right is a sufficient basis for denying standing to advance a public interest claim (Canadian Council of Churches). The change effected signals the potential for better-contextualized analyses of the claims being advanced in public interest litigation because the Court clearly indicates that neither the mere fact that an individual may have standing as of right to constitutionally challenge legislation in private litigation, nor the fact that such individuals have raised challenges fully addresses what the “reasonable and effective means” criterion is meant to capture. While this formulation does not eliminate the need to compare the proposed public interest litigation with alternative means of bringing a matter before the courts, importantly from a social justice viewpoint, it also emphasizes a contextualized analysis of the proposed litigation on its own merits.

In this regard, Cromwell J instructs that a purposive and flexible approach must be taken, with no “binary, yes or no, analysis possible”. The factors that the Court indicates are illustrative of the sorts of considerations to be assessed

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78 Ibid. at para. 44.
79 Ibid. at paras. 45-48.
80 Ibid. at para. 44.
81 Ibid. at para. 50.
under the third criteria are also indicative of the contextualized approach that the SCC is now endorsing. These factors are:

(i) the plaintiff’s capacity to advance the claim;
(ii) whether the claim raises a matter of public interest;
(iii) alternatives to the public interest litigation that not only exist theoretically, but in light of practical realities actually present equally or more effective means of bringing the matter before the court; and
(iv) what impact the public interest litigation would have on the rights of others who might be equally or more directly affected.\(^{82}\)

Under each factor, the Court explicitly invites nuanced context-based decision-making.

(i) \textit{Plaintiff’s capacity}

In assessing the plaintiff’s capacity, courts are to consider the plaintiff’s resources and expertise, as well as whether the claim can be presented with a sufficient factual foundation to allow for effective adjudication. The Court noted that SWUAV is “a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside”, that Ms. Kiselbach was a former sex worker supported by SWUAV and that SWUAV is represented by a well-known human rights lawyer, as well as by the non-profit Pivot Legal Society that operates in the DTES and focuses on issues affecting that community. Further, the Court found that the extensive involvement of SWUAV with the community whose interests it sought to address in the claim (as evidenced by affidavits from over 90 current and former sex workers from the DTES) ensured a suitable factual context for determination of the issues in an adversarial setting.\(^{83}\)

(ii) \textit{Matter of public interest}

The Court held that seeking to raise a claim that “transcends the interests of those most directly affected”\(^ {84}\) weighs in favour of granting public interest standing. Perhaps most importantly from an access to justice perspective, Cromwell J instructs future courts that they \textit{should} directly take access to justice

\(^{82}\) \textit{Ibid.} at para. 51.

\(^{83}\) \textit{Ibid.} at para. 74.

\(^{84}\) \textit{Ibid.}
considerations into account in assessing the second factor, without necessarily presuming that self-identified guardians of the interests of marginalized groups ought automatically to be granted standing:

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.\footnote{Ibid.}

With respect to the facts before it, the Court found that the comprehensive nature of the challenge provided an opportunity for examining not only the individual interests of those directly affected, but also the constitutionality of the operations of the broader legislative scheme related to prostitution as a whole.\footnote{Ibid. at para. 73.}

(iii) \textit{Reasonable and effective alternatives}

The Court's direction to contextually assess "reasonable and effective alternatives" for the purposes of evaluating the third criterion also holds promise from an access to justice perspective. Cromwell J identifies guidelines that, if followed, should go a long way toward avoiding de-contextualized analyses such as that in \textit{Canadian Council of Churches} and \textit{CBA} in future. The Court instructs other courts considering public interest standing applications to take a "practical and pragmatic approach" to assessing alternative means, with the goal of seeing whether these alternatives are more likely to effectively and efficiently use judicial resources and provide a more suitable factual context for "adversarial determination".\footnote{Ibid.} However, the Court instructed that this exercise in comparing the proposed public interest litigation with alternative means must be conducted in light of "practical realities, not theoretical possibilities". In so holding, Cromwell J explicitly signals that the mere existence of another potential or actual claim or claimant is not in and of itself determinative.\footnote{Ibid. at paras. 51, 67.} Rather, courts must in the future assess whether, given the practical realities of the alternative claimants’
situations, they could reasonably be expected to amass the resources necessary to mount the kind of challenge posed in the public interest litigation.\textsuperscript{89}

Cromwell J specifically recognizes that broad-based challenges to systems of laws, rather than to individual provisions or to the application of individual provisions in a given circumstance, are \textit{realistically} less likely to be mounted by individual claimants than by public interest groups, even where those individuals \textit{technically} have standing to raise such challenges.\textsuperscript{90} Moreover, the Court notes that systemic challenges in the context of individual criminal proceedings should not be presumed to be more reasonable and effective alternatives to public interest litigation for various reasons, including that in individual criminal cases it may be difficult for the person accused to muster an evidentiary record that provides an adequate factual basis upon which to determine the constitutional issue, the process is unpredictable (e.g. charges may be withdrawn or proceedings stayed), and cases proceeding by way of summary conviction “may not necessarily be a more appropriate setting for a complex constitutional challenge.”\textsuperscript{91} Further, the Court clearly acknowledges that a multitude of individually mounted challenges does not necessarily negate public interest litigation as a reasonable and effective means for bringing a matter before the courts. In fact, the proliferation of individual suits may well signal that a single, comprehensive proceeding could more reasonably and effectively resolve the constitutional issues, thereby serving the goal of preserving judicial resources.\textsuperscript{92}

Importantly, the Court not only directed future courts to consider the nature of the claim being raised in public interest litigation, but also the way in which the lived reality of other potential claimants is likely to affect their capacity to mount the challenge proposed. In this way, evidence as to vulnerabilities suffered by the others identified as potential individual claimants becomes highly relevant to assessing \textit{realistically} the likelihood (and perhaps the fairness?) of determining that individual challenges by them reflect a reasonable and effective alternative to public interest litigation. In this case, the Court acknowledges that the undisputed evidence of the vulnerable life circumstances of the street level sex workers represented by SWUAV supports their claim that they would neither be

\textsuperscript{89} \textit{Ibid.} at para. 67.

\textsuperscript{90} \textit{Ibid.} at para. 73.

\textsuperscript{91} \textit{Ibid.} at paras. 69-70.

\textsuperscript{92} \textit{Ibid.} at para. 70.
willing nor able to mount the challenge in their own names.\textsuperscript{93} Further, the Court recognizes that even if individual claims could be mounted it would be very difficult for counsel to obtain the “timely and appropriate instructions” that would be necessary to prosecute the litigation.\textsuperscript{94}

Finally, Cromwell J recognizes that extant proceedings brought by directly affected individuals may not necessarily resolve the issues raised by proposed parallel public interest litigation in an equally or reasonably effective manner because the latter may address distinct issues and offer distinct perspectives not addressed by the former.\textsuperscript{95} In the instant case, the Court found that the parallel Ontario proceedings in \textit{Bedford} did not act as a bar to granting public interest standing to SWUAV and Ms. Kiselbach since they seek to raise both different issues (e.g. equality through a section 15 analysis in SWUAV) and to offer different perspectives on the issues (i.e. those of street level sex workers from the DTES).\textsuperscript{96} The Court noted that any concerns about the scarcity of judicial resources raised by parallel proceedings might be managed by staying SWUAV and Ms. Kiselbach’s proceeding pending the outcome of the \textit{Bedford} litigation in Ontario, rather than denying them standing at the outset.

\textbf{(iv) Impact on directly affected individuals}

Finally, courts are to consider in future cases how the proposed public interest litigation might impact the rights of those equally or more directly affected. In particular, Cromwell J instructs, courts should be cautious about granting public interest standing in cases where the failure of a comprehensive public challenge might prejudice future rights of directly affected individuals to bring forward their own claims. Further, evidence that directly affected individuals had chosen not to mount claims related to the issues raised in proposed public interest litigation might be taken as an indication that public interest standing to raise such claims ought to be denied.\textsuperscript{97}

\textsuperscript{93} \textit{Ibid.} at para. 71.

\textsuperscript{94} \textit{Ibid.}

\textsuperscript{95} \textit{Ibid.} at para. 51.

\textsuperscript{96} \textit{Ibid.} at para. 64. In addition, Cromwell J reiterates the BCCA majority’s conclusion that the determination of issues through litigation before one provincial court does not in any way preclude another provincial court from granting standing to bring forward the same or similar issues.

\textsuperscript{97} \textit{Ibid.} at para. 51.
On the record before it, the Court noted there was no evidence that those directly affected had chosen not to challenge the provisions (in fact the provisions had already been challenged by individuals in Bedford and in a number of other less comprehensively-framed claims). Moreover, the strength and experience of the legal team supporting and advancing the claim was taken as evidence by the Court that the rights of individuals most directly affected by the impugned scheme were not at risk of being undermined by “a diffuse or badly advanced claim”. 98

In light of all of these considerations, the Court concluded:

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 [citation omitted]. 99

CONCLUSION

By 2008, SWUAV and Sharon Kiselbach found themselves in a doubly-vexed legal arena. First, they sought to raise arguments about a highly contested area of substantive law that disproportionately affects some of the most vulnerable of Canadian women. Second, they were forced by a government motion to prove they should be permitted standing to act on behalf of highly vulnerable street level sex trade workers from the DTES in bringing their unique perspectives before the law. Here, they became mired in a troubled area of procedural law too-frequently interpreted in a manner that seemed designed to individuate legal problems and remedies in a way that undermined their contestation through comprehensive challenges orchestrated by experienced public interest groups and advocates, effectively foisting their resolution on the individual shoulders of the most disenfranchised members of the Canadian community. How or why they continued is anybody’s guess, but thanks to their perseverance, they have established their standing to bring the perspectives of their members to bear on the constitutionality of the prostitution provisions. In addition, they have succeeded in establishing a binding SCC precedent that measurably improves

98 Ibid. at para. 73.

99 Ibid. at para. 76.
opportunities for public interest groups to shoulder the burden of challenging unconstitutional laws that too often disproportionately affect members of the Canadian community whose vulnerabilities realistically preclude them from bringing forward individual claims.

Further, it seems clear that the SCC has stepped up to the plate to continue to illuminate the ways in which the access to justice concerns of equality-seeking groups can and should be taken into account in the everyday exercise of authority and discretion by judges across the country. In SWUAV SCC, the SCC has moved beyond platitudes that on one hand stress the importance of taking a "liberal and generous" approach to the exercise of public interest standing discretion, but on the other, apply it restrictively and without due regard for the vulnerabilities of many directly affected individuals that realistically preclude them from initiating legal challenges. Not only did the SCC rewrite and reframe critical aspects of the three public interest standing factors in a way that requires contextualized purposive analysis, it also applied that analysis to produce a promising result for bringing the voices of socially vulnerable members of equality-seeking groups before the law.

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