Court File No.: 16-A-17

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.

Respondents

REPLY OF THE MOVING PARTY

(Motion for Leave to Appeal)

Dated: May 25, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Allan Matte
Tel: (819) 994 2226
Fax: (819) 953 9269
Email: *Allan.Matte@otc-cta.gc.ca*

Solicitor for the Respondent,
Canadian Transportation Agency

AND TO: **D'ARCY & DEACON LLP**
1 Lombard Place, Suite 2200
Winnipeg, MB   R3B 0X7

Brian J. Meronek, Q.C.
Tel: (204) 942-2271
Fax: (204) 943-4242
Email: *bmeronek@DarcyDeacon.com*

Ian S. McIvor
Tel: (403) 541-5290
Email: *imcivor@DarcyDeacon.com*

Solicitors for the Respondent,
Newleaf Travel Company Inc.

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REPLY OF THE MOVING PARTY

1. The bulk of the present reply is dedicated to the question of standing that was raised by NewLeaf; however, before turning to that, NewLeaf's brief submissions on the proposed grounds of appeal are addressed.

A. THE PROPOSED GROUNDS OF APPEAL

2. NewLeaf mischaracterizes the proposed grounds of appeal at paragraph 27 of its memorandum. The proposed appeal challenges the legality of government action, namely, Decision No. 100-A-2016 of the Agency (the "Impugned Decision") on the basis that: (a) no reasonable interpretation of the *CTA* is capable of supporting its conclusion; and (b) the Agency exceeded its jurisdiction by purporting to exercise powers that Parliament explicitly withheld from it. Group (a) of the proposed grounds of appeal is similar in flavour to what the Supreme Court of Canada articulated as follows:

> [...] a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

***Canada (CHRC) v. Canada*, 2011 SCC 53, para. 62** — **Moving Party's Record, Vol. II, Tab 1, p. 23**

3. Lukács does not argue that the Agency is bound by its considered and consistent view; rather, he submits that the considered and consistent view of the Agency is entitled to some weight in determining the reasonableness of a diametrically opposite interpretation of the *CTA* in the Impugned Decision. Furthermore, departure "in an unexplained way from administrative or judicial precedent may also be suspect" (in the words of Stratas, J.A.). The *Domtar* case cited by NewLeaf does not contradict these submissions of Lukács.

4. The main argument of Lukács is that the text, context, and purpose of the *CTA* show that there is no other reasonable interpretation of the relevant provisions except what had been the considered and consistent view of the Agency, namely, that IASPs are required to hold a licence. NewLeaf failed to address any of these submissions of Lukács in its memorandum.

Memorandum of Lukács, paras. 51-65 **Moving Party's Record, Vol. I, pp. 120-124**

5. NewLeaf misquotes *Dunsmuir* at paragraph 31 of its memorandum.

(a) The phrase "commence its hearing or inquiry" is not found in *Dunsmuir*.

(b) *Dunsmuir* describes a true question of jurisdiction as whether the statutory grant of power gives the decision-maker the authority to make a particular decision. This is precisely the question raised by Lukács at paragraphs 69-70 of his memorandum.

(c) Regardless of how one classifies this question and what the appropriate standard of review is, NewLeaf cited no legislation nor other authority with respect to the substance of the question raised by Lukács.

B. STANDING

(i) The Impugned Decision is not immune to review by this Court

6. NewLeaf's position at paragraphs 18-19 of its memorandum that the Impugned Decision is immune to the review of this Honourable Court, because NewLeaf is the only entity that could appeal it under s. 41 of the *CTA* and NewLeaf is happy with the decision, is inconsistent with the strong presumption against such immunization, which stems from the principle of legality:

> Our judge-made law in the area of administrative law develops in a way that furthers the accountability of public decision-makers in their decision-making and avoids immunization, absent the most compelling reasons [...]

***Lukács v. CTA*, 2016 FCA 103, para. 7** — **Moving Party's Record, Vol. II, Tab 9, p. 86**

***Canada v. Downtown Eastside Sex Workers*, 2012 SCC 45, paras. 31-32** — **p. 26**

7. *CNR v. Canada* does not address the points of law in support of which NewLeaf purports to cite it at paragraph 16 of its memorandum. The question before the court in *CNR v. Canada* was the powers of the Governor in Council under s. 40 of the *CTA* to review decisions of the Agency, and not who can exercise the statutory right of appeal under s. 41 of the *CTA*. Furthermore, paragraph 33 (cited by NewLeaf) dealt only with s. 120.1 of the *CTA*.

8. Subsection 41(1) of the *CTA* does not restrict potential appellants to the "parties" (but only requires "notice to the parties"), and for a reason: the statutory right of appeal exists not only with respect to decisions and orders, but also with respect to rules and regulations, where there are no "parties" at all.

***Canada Transportation Act*, s. 41(1)** — **Moving Party's Record, Vol. I, p. 155**

(ii) Lukács has a right of appeal as he participated before the Agency

9. In *Bell Canada v. Amtelecom Limited Partnership*, this Honourable Court recognized that the traditional notion of a "party" may have to be adapted to the realities of administrative proceedings involving consultations with a large number of participants, and substituted with the notion of a participant. As a result, service on "1055 others who participated before the CRTC" was ordered.

Order of the Federal Court of Appeal (Stratas, J.A.), dated July 5, 2013 **p. 41**

10. It is common ground that the Impugned Decision was preceded by a consultation, and that Lukács participated in it by making submissions. Thus, based on *Bell Canada*, it is submitted that Lukács may exercise the statutory right of appeal under s. 41 of the *CTA* (subject, of course, to leave of this Honourable Court), because he "participated before" the Agency.

Materials in the Possession of Agency, Tab 9

(iii) Public interest standing

11. NewLeaf's argument that public interest standing is not available under s. 41(1) of the *CTA* is not supported by any authority, and is erroneous. In *Lukács v. Canada (CTA)*, 2014 FCA 76, this Honourable Court granted Lukács leave to appeal a rule made by the Agency (to which Lukács could not possibly have been a "party"), and explicitly recognized that "the appeal was in the nature of public interest litigation."

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62** **Moving Party's Record, Vol. II, Tab 7, p. 66**

12. Thus, as an alternative to paragraph 10, Lukács asks that this Honourable Court exercise its discretion and grant him public interest standing to appeal the Impugned Decision.

13. The legal test for public interest standing calls for considering three inter-related factors weighed cumulatively, and in light of their purpose: (1) whether there is a serious justiciable issue raised; (2) whether the person seeking public interest standing has a genuine interest in it; and (3) whether the proposed proceeding is a reasonable and effective way to bring the issue before the courts.

***Canada v. Downtown Eastside Sex Workers*, 2012 SCC 45, paras. 36-37**	**pp. 27-28**

14. Ensuring that those who exercise statutory powers do not overstep their legal authority is a constitutional function of the courts. The proposed appeal raises a ***serious justiciable issue***, because it challenges the legality of the action of the Agency, which is part of the government, based on arguable grounds.

***Canada v. Downtown Eastside Sex Workers*, 2012 SCC 45, para. 32**	**p. 26**
***Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 27-30**	**NewLeaf's Authorities, Tab 3, pp. 111-112**

15. Lukács, who is a Canadian air passenger rights advocate whose work and public interest advocacy have been widely recognized in Canada, including in a number of judgments of this Honourable Court, has a ***genuine interest*** in the proposed appeal, because of the profound impact of the Impugned Decision on the availability of consumer protection measures for passengers.

Lukács Affidavit, paras. 2-4	**Moving Party's Record, Vol. 1, Tab 5, p. 28**

16. Since Lukács is the only person seeking leave to appeal the Impugned Decision and the deadline for doing so has passed, denying Lukács public interest standing will immunize the Impugned Decision from review by this Honourable Court. Thus, the proposed appeal is ***a reasonable and effective way*** to bring the issue before the courts.

17. Although the test articulated in *Downtown Eastside* does not require demonstrating that there are no other reasonable and effective ways for bringing the issue before the courts, it is worth noting that the "alternative remedy" proposed by NewLeaf at paragraphs 21-24 of its memorandum is ineffective:

(a) The GIC is not a court, and it is not a substitute to the courts' constitutional function to supervise various branches of the government.

(b) It would significantly delay determination of the legality of the Impugned Decision, and the travelling public would suffer from the delay.

(c) There is no statutory right of appeal from orders of the GIC; they can be challenged only by way of judicial review in the Federal Court.

(d) Judicial review of an order of the GIC would concern the legality of actions of the GIC, and not the legality of the Agency's Impugned Decision.

(iv) Further alternative: s. 28(1)(k) of the *Federal Courts Act*

18. In the further alternative, if this Honourable Court finds that Lukács cannot challenge the Impugned Decision by way of a statutory appeal under s. 41(1) of the *CTA*, then this Court has jurisdiction to hear and determine the issue raised by Lukács pursuant to s. 28(1)(k) of the *Federal Courts Act*.

***Federal Courts Act*, s. 28** **p. 10**

19. Should this be the case, Lukács asks that the Honourable Court exercise its discretion and direct that the matter proceed as an application for judicial review instead of a statutory appeal, pursuant to Rule 57 of the *Federal Courts Rules*:

> An originating document shall not be set aside only on the ground that a different originating document should have been used.

C. TRANSMISSION OF THE AGENCY'S RECORD

20. NewLeaf's argument at paragraphs 35-36 of its memorandum, that this Honourable Court should decide questions of law or jurisdiction without a record and in a factual vacuum, is not only inconsistent with the well-established principles of judicial review, but is also contrary to the explicit direction of Parliament:

> **41(3)** An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.
>
> [Emphasis added.]

***Canada Transportation Act*, s. 41(3)** **Moving Party's Record, Vol. I, p. 155**

21. With respect to the confidentiality-based objections at paragraphs 33-34 and 39-40 of NewLeaf's memorandum, Lukács submits that:

(a) These are bare allegations that are not supported by any evidence, and NewLeaf knew that evidence was required to substantiate them.

***Lukács v. CTA*, 2016 FCA 103, para. 19** **Moving Party's Record, Vol. II, Tab 9, p. 91**

(b) Rule 354 of the *Federal Courts Rules* required NewLeaf to submit any supporting affidavits together with its memorandum of fact and law, but it submitted none.

(c) Even if all facts alleged by NewLeaf are assumed to be true, they are not capable of supporting the conclusion that some or all of the Agency's record should be withheld from this Honourable Court.

(d) It is this Honourable Court, and not NewLeaf, that has to be satisfied with the safeguards that are incorporated into a confidentiality order.

22. On May 18, 2016, Lukács sought directions from this Honourable Court, pursuant to Rule 318(2), with respect to the procedure for making submissions about the objections, and asked that the same procedure be following with respect to submissions as in File No. A-39-16.

***Lukács v. CTA*, 2016 FCA 103, paras. 20-23** **Moving Party's Record, Vol. II, Tab 9, pp. 91-92**

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 25, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to February 15, 2016

Last amended on June 23, 2015

À jour au 15 février 2016

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(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

c) elle a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) elle a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont elle dispose;

e) elle a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) elle a agi de toute autre façon contraire à la loi.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made

Contrôle judiciaire

28 (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

in respect of any of the following federal boards, commissions or other tribunals:

(a) the Board of Arbitration established by the *Canada Agricultural Products Act*;

(b) the Review Tribunal established by the *Canada Agricultural Products Act*;

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(d) [Repealed, 2012, c. 19, s. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(f) the National Energy Board established by the *National Energy Board Act*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board Act*;

(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(h) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(i) the Public Service Labour Relations and Employment Board that is established by subsection 4(1) of the *Public Service Labour Relations and Employment Board Act*;

(i.1) adjudicators as defined in subsection 2(1) of the *Public Service Labour Relations Act*;

(j) the Copyright Board established by the *Copyright Act*;

a) le conseil d'arbitrage constitué par la *Loi sur les produits agricoles au Canada*;

b) la commission de révision constituée par cette loi;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail et de l'emploi dans la fonction publique, créée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l'emploi dans la fonction publique*;

i.1) les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans la fonction publique*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

(k) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(l) [Repealed, 2002, c. 8, s. 35]

(m) [Repealed, 2012, c. 19, s. 272]

(n) the Competition Tribunal established by the *Competition Tribunal Act*;

(o) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(p) [Repealed, 2012, c. 19, s. 572]

(q) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(r) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572; 2013, c. 40, ss. 236, 439.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572; 2013, ch. 40, art. 236 et 439.

29. to 35 [Repealed, 1990, c. 8, s. 8]

29. à 35 [Abrogés, 1990, ch. 8, art. 8]

Substantive Provisions

Dispositions de fond

Prejudgment interest — cause of action within province

36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Intérêt avant jugement — Fait survenu dans une province

36 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Indexed as:

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society

Attorney General of Canada, Appellant;
v.
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.

[2012] 2 S.C.R. 524

[2012] 2 R.C.S. 524

[2012] S.C.J. No. 45

[2012] A.C.S. no 45

2012 SCC 45

File No.: 33981.

Supreme Court of Canada

Heard: January 19, 2012;
Judgment: September 21, 2012.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella,

Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

(78 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Civil procedure -- Parties -- Standing -- Public interest standing -- Public interest group and individual working on behalf of sex workers initiating constitutional [page525] 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.

Summary:

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.

[page526]

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 [page527] 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. [page528] 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. (4) 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. (4) 111; *R. v. Kazelman*, [1987] O.J. No. 1931 (QL); *R. v. Bavington*, [1987] O.J. No. 2728 (QL); *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.

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History and Disposition:

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. (5) 33, 294 B.C.A.C. 70, 498 W.A.C. 70, 324 D.L.R. (4) 1, 260 C.C.C. (3d) 95, 219 C.R.R. (2d) 171, [2011] 1 W.W.R. 628, [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. (4) 177, 305 D.L.R. (4) 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.

Counsel:

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.

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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, *Niamh Harraher* and *Kasari Govender*, for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and the 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.

Lorne Waldman, *Clare Crummey* and *Tamara Morgenthau*, for the interveners the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees.

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 [page531] 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, [page532] 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 [page533] 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, [page534] 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.),
2008 BCSC 1726, 90 B.C.L.R. (4th) 177

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 [page535] 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. [page536] 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).

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(2) British Columbia Court of Appeal, 2010 BCCA 439, 10 B.C.L.R. (5th) 33

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).

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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.

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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 [page540] 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) <u>The Purposes of Standing Law</u>

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 [page541] 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 [page542] 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 [page543] 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. 204.

(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 [page544] 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 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).

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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 "generous 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 [page546] 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.

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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: [page548] *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 [page549] 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. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para5.120).

(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 [page550] 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: see *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 [page551] 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 [page552] 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 para5.120. 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) <u>A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor</u>

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

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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 [page554] 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 [page555] 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 [page556] 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 [page557] 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 the respondents' submission that they ought to have standing because their action was "[t]he 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 [page558] 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 [page559] 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 [page560] 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 (QL) (Prov. Ct.); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111 (Alta. C.A.); [page561] *R. v. Kazelman*, [1987] O.J. No. 1931 (QL) (Prov. Ct.); *R. v. Bavington*, [1987] O.J. No. 2728 (QL) (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 (QL) (Prov. Ct.); *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 (QL) (C.A.)), 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 p. 102; vol. IX, at pp. 31-36); paras. 4-5 (*R. v. Cho*) (A.R., vol. V, at p. 102; vol. VIII, at p. 163); paras. 2 and 11 (*R. v. To*) (A.R., vol. V, at pp. 101-3 and 104-12)). At the time 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 [page562] unrelated

reasons, entered a stay 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)). [page563] 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 [page564] 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. V, 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 (A.R., vol. V, at pp. 137-44)). 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.

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(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.

Solicitors:

Solicitor for the appellant: Attorney General of Canada, Vancouver.

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.

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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 the 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.

Federal Court of Appeal Cour d'appel fédérale

Date: 20130705

Docket: N/A

Ottawa, Ontario, July 5, 2013

Present: STRATAS J.A.

BETWEEN:

BELL CANADA, BELL MOBILITY INC., MTS INC., NORTHERNTEL, LIMITED PARTNERSHIP, ROGERS COMMUNICATIONS PARTNERSHIP, SASKATCHEWAN TELECOMMUNICATIONS, TÉLÉBEC, SOCIÉTÉ EN COMMANDITE and TELUS COMMUNICATION COMPANY

Applicants

and

AMTELECOM LIMITED PARTNERSHIP, BRAGG COMMUNICATIONS INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., GLOBALIVE WIRELESS MANAGEMENT CORP., HAY COMMUNICATIONS CO-OPERATIVE LIMITED, HURON TELECOMMUNICATIONS CO-OPERATIVE LIMITED, MORNINGTON COMMUNICATIONS CO-OPERATIVE LIMITED, NEXICOM MOBILITY INC., NORTHWESTEL INC., PEOPLE'S TEL LIMITED PARTNERSHIP, PUBLIC MOBILE INC., QUADRO COMMUNICATIONS CO-OPERATIVE INC., QUEBECOR MEDIA INC., SOGETEL MOBILITÉ INC., THUNDER BAY TELEPHONE, VAXINATION INFORMATIQUE, CONSUMERS' COUNCIL OF CANADA, DIVERSITYCANADA FOUNDATION, MEDIA ACCESS CANADA, MOUVEMENT PERSONNE D'ABORD DU QUÉBEC, PUBLIC INTEREST ADVOCACY CENTRE, CONSUMERS' ASSOCIATION OF CANADA, COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA, OPENMEDIA.CA, SERVICE DE PROTECTION ET D'INFORMATION DU CONSOMMATEUR, UNION DES CONSOMMATEURS, CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION, COMMISSIONER FOR COMPLAINTS FOR TELECOMMUNICATIONS SERVICES INC., COMPETITION BUREAU OF CANADA, GLENN THIBEAULT, HER MAJESTY THE QUEEN

IN RIGHT OF ALBERTA, GOVERNMENT OF MANITOBA, GOVERNMENT OF THE NORTHWEST TERRITORIES, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, GOVERNMENT OF YUKON, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, CATHERINE MIDDLETON, TAMARA SHEPHERD, LESLIE REGAN SHADE, KIM SAWCHUK, BARBARA CROW, SHAW TELECOM INC., TERRY DUNCAN, GLENN FULLERTON, TANA GUINDEBA, NASIR KHAN, MICHAEL LANCIONE, ALLAN MUNRO, FREDERICK A. NAKOS, RAINER SCHOENEN and DANIEL SOKOLOV

Respondents

ORDER

WHEREAS the applicants move *ex parte* for an order validating service of the motion record and authorities under Rules 136(1) and 147;

AND WHEREAS this motion was supported by submissions made in a letter dated July 3, 2013 sent to the Court by counsel for the applicants;

AND WHEREAS such an order may be made *ex parte* under Rule 136(2);

AND WHEREAS the applicant delivered the motion record and authorities by email to the respondents (other than the CTRC and the Attorney General of Canada) and to 1055 others who participated before the CRTC;

AND WHEREAS the CRTC and the Attorney General of Canada were served personally;

AND WHEREAS the Court has been advised that service in the CRTC proceedings was effected by email without controversy;

AND WHEREAS the Court agrees that the usual manner of service upon so many parties would be unduly cumbersome;

AND WHEREAS the Court wishes to ensure that service by email was effective in bringing notice of the applicants' motion to all these persons;

AND WHEREAS, on occasion, emails are not delivered or "bounced back" because the attachments are too voluminous; in this case, the two volume motion record may be too voluminous and some emails may have been bounced back;

AND WHEREAS under Rule 53 this Court may attach just and reasonable terms to any order it makes;

THIS COURT ORDERS the following:

1. The service by email upon the respondents (other than the CTRC and the Attorney General of Canada) and 1055 others who participated before the CRTC is validated;

2. The motion record and authorities shall be accepted for filing as of July 3, 2013;

3. This Order and the July 3, 2013 letter shall be emailed immediately to all respondents and the 1055 others;

4. To the extent that any of the emails effecting service, the emails under paragraph 3 of this Order, or both were bounced back to the applicants or were otherwise not delivered to the recipients, the applicants shall exercise best efforts to notify these intended recipients of these materials; among other things, this should include sending another email containing a link to the materials posted on a website and investigating with the CRTC whether a notice containing a link to the materials can be posted on its website;

5. By July 19, 2013, the applicants shall file with the Court a report concerning the number of emails effecting service that were bounced back to the applicants or for which the applicants have reason to believe were not received, the best efforts made under paragraph 4 of this Order to notify the recipients of the materials, and any other relevant information bearing upon the provision of notice; and

6. Prior to filing the report in paragraph 5 of this Order, the report shall be served by email upon all named respondents and proof of service by email filed with the Court.

"David Stratas"
J.A.