COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General),* 2010 BCCA 439

Date: 20101012
Docket: CA036762

Between:

Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach

Appellants (Plaintiffs)

And

The Attorney General of Canada

Respondent (Defendant)

And

British Columbia Civil Liberties Association, Trial Lawyers Association of British Columbia, and West Coast Women's Legal Education and Action Fund

Intervenors

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, December 15, 2008 (*Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726, Vancouver Docket No. S075285)

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Place and Date of Hearing:	Vancouver, British Columbia January 21 and 22, 2010
Place and Date of Judgment:	Vancouver, British Columbia October 12, 2010

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Neilson

Dissenting Reasons by:
The Honourable Mr. Justice Groberman (page 26, para. 72)

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] This appeal concerns the standing of Ms. Kiselbach and Downtown Eastside Sex Workers United Against Violence Society ("SWUAV") to challenge the constitutional validity of various sections of the *Criminal Code,* R.S.C. 1985, c. C-46 related to prostitution. They seek to do this through the device of a broadly framed action, invoking s. 2(b), s. 2(d), s. 7 and s. 15 of the *Canadian Charter of Rights and Freedoms.*

[2] On the application of the Attorney General of Canada, Mr. Justice Ehrcke dismissed the action on the basis neither Ms. Kiselbach nor SWUAV had standing, private or public, to challenge the constitutional validity of the provisions in issue.

[3] Ms. Kiselbach and SWUAV appeal the order dismissing the action. They contend the learned judge erred in finding Ms. Kiselbach does not have private interest standing and in finding neither she nor SWUAV have public interest standing.

The Nature of the Action

[4] The action challenges s. 210 (keeping and being within a common bawdy house), s. 211 (transporting a person to a common bawdy house), s. 212 except 212(1)(g) and (i) (procuring and living on the avails of prostitution), and s. 213 (soliciting in a public place). All impugned offences concern adult prostitution.

[5] Ms. Kiselbach is described in the statement of claim as a former sex worker born in 1950, who was engaged for approximately 30 years in a number of forms of sex work including: working as an exotic dancer; performing live sex shows; working in massage parlours; and conducting street level sex work and freelance indoor sex work. The statement of claim alleges that although she does not intend to re-enter the sex trade at this time, a change in life circumstances could result in her doing so. The statement of claim asserts Ms. Kiselbach has been convicted of several

prostitution related offences in the past, particularly under the former prohibition on solicitation and under the bawdy house provisions. Ms. Kiselbach is currently employed providing support services for current and former sex workers.

[6] SWUAV is described as a society whose objects include the improvement of working conditions for women in the sex trade. Its members are women, including transgendered women, who recently were or currently are engaged in sex work, primarily in the Downtown Eastside neighbourhood in Vancouver, British Columbia. The statement of claim alleges the members "do not have the ability to commence this action in their own names", and that they face risks if they are identified as part of these legal proceedings or as persons with involvement in sex work. The risks alleged include violence, discrimination, decreased access to social and medical services, eviction from housing, attraction of attention from child protection services and creation of difficult relations with the police.

[7] The central thesis of the action is that the impugned provisions of the *Criminal Code* deprive sex workers, whose work itself is lawful, of the ability to conduct their work safely. It is fair to conclude that some of the impetus for this action is the deeply troubling revelations attendant on the notorious missing women investigation in Vancouver. In their statement of claim the appellants allege, and I paraphrase, that the communication provisions push sex workers into isolated areas, working alone where assistance is not near at hand, that the bawdy house provisions deprive sex workers of the opportunity to work indoors in a safer setting, and that the procurement provisions limit the ability of sex workers to establish safer working environments. They contend the laws are therefore contrary to s. 7 of the *Charter*.

[8] As to s. 2 of the *Charter*, the appellants complain the impugned provisions limit the ability of sex workers to work collectively and to communicate, leading to a deficiency of safety and security. Last they say the provisions offend s. 15 of the *Charter* because sex workers are disproportionately members of disadvantaged classes. They complain that the impugned provisions have created barriers, including to accessing protection and services available to others in the community,

such as the protection and advantages generally available to workers through application of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492 and the *Employment Insurance Act*, S.C. 1996, c. 23.

[9] I have described the statement of claim, and although I have for brevity's sake been selective, what I have set out demonstrates the scope of the challenge. The appellants, in short, seek to render invalid the *Criminal Code* provisions they say prevent them from receiving the benefits that generally accrue to members of the community who are employed, and they seek to do so by considering the provisions not only under s. 2 of the *Charter*, which is traditional ground for challenging these and similar provisions, but also under s. 7 and, significantly, the equality provisions of s. 15 of the *Charter*. In a sense, the appellants seek to strike down sections of the *Criminal Code* so as to permit themselves to organize in ways akin to others in the community whose work does not attract the sanctions of the *Criminal Code;* in the interests of safety, security and their own well-being, they want in.

The Reasons for Judgment

[10] The application before the judge included, in addition to the issue of standing, an application to strike portions of the pleadings under R. 19(24) of the *Rules of Court* and an application for an order staying that part of the action on the basis the pleadings disclose no reasonable claim, and in the alternative, an application for particulars. In response to the R. 19(24) application, the plaintiffs sought to further amend their statement of claim.

[11] The judge allowed the application to further amend the statement of claim. He did not decide the R. 19(24) application, finding instead that the plaintiffs lack standing to bring the claim. However, the judge observed that many of the alleged defects, if defects they are, could be remedied by further amendments to the statement of claim or through delivery of particulars. Further, he found, quoting

Justice Cory in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 254, 88 D.L.R. (4th) 193, that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation," and he recognized that the portions of the statement of claim relating to s. 7 of the *Charter* were not challenged by the Attorney General of Canada under R. 19(24).

[12] On the issue of standing, the judge first addressed the preliminary nature of the respondent's application to dismiss the claim. He referred to *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, in holding that whether standing should be determined in advance of a full hearing on the merits depends on the nature of the issues and the sufficiency of the materials. The judge found that the issues were appropriately clear and the material before him was sufficient to permit determination of the standing question as a preliminary issue. In so saying, the judge assumed the plaintiffs would be able to prove the allegations of fact pleaded, thereby putting them, for the purposes of the standing issue, in as strong a position as if the issue were left to trial.

[13] The judge then addressed private interest standing. He grounded his decision on this matter upon s. 52(1) of the *Constitution Act, 1982*:

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

[14] The judge observed that the usual circumstance in which a person has private interest standing to challenge the constitutional validity of a provision of the *Criminal Code* occurs when the person is charged with an offence and seeks to persuade the court there can be no conviction because the law is unconstitutional. He recognized that a person also may have private interest standing to challenge the constitutional validity of a legislative scheme where the person is a defendant in an action brought by a government agency under the impugned legislation. He distinguished the involuntary nature of the involvement in the court process in each

of those examples with the situation before the court, in which the plaintiffs come to the court of their own initiative seeking declarations of constitutional invalidity. In his discussion of the law the judge drew upon *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 313-14, 18 D.L.R. (4th) 321, and *Canadian Egg Marketing Agency v. Richardson,* [1998] 3 S.C.R. 157 at para. 44, 166 D.L.R. (4th) 1.

[15] The judge first held SWUAV lacks private interest standing. It is neither charged with an offence nor a defendant in an action commenced by the government relying upon legislation. Further, it asserts its members' rights, not its own rights. The judge held, citing *District of Kitimat v. Alcan Inc.* (2006), 51 B.C.L.R. (4th) 314 at para. 47, 265 D.L.R. (4th) 462 (C.A.) and *Re Energy Probe et al. and Attorney General of Canada* (1987), 61 O.R. (2d) 65 at 70, 42 D.L.R. (4th) 349 (H.C.J.), rev'd on other grounds (1989), 68 O.R. (2d) 449, 58 D.L.R. (4th) 513 (C.A.), that, as a separate legal entity distinct from its members, SWUAV cannot attract private interest standing by purporting to act in a representative capacity on behalf of its members.

[16] The judge also concluded Ms. Kiselbach lacks private interest standing. He recognized Ms. Kiselbach has past convictions for soliciting and keeping a common bawdy house. He replicated portions of her affidavit deposing to certain ways in which she has been affected by the impugned provisions, and he observed that these effects are said to arise from her past activities. He noted the statement of claim says Ms. Kiselbach is not currently engaged in sex work and at present does not intend to be so engaged in the future, although she does not rule out that possibility. He held:

> [47] ... The fact that she cannot rule out the possibility that she may change her mind and may want to engage in sex work in the future does not distinguish her from any other member of the general public. Private interest standing cannot be founded on hypothetical possibilities: *Canadian Council for Refugees v. Canada* (2008), 74 Admin. L.R. (4th) 79, 2008 FCA 229 at paras. 99-102.
>
> [48] The impugned laws do not presently cause Ms. Kiselbach to work in unsafe conditions because she is not currently engaged in sex work. For the

> same reason, she is not currently in jeopardy of being charged or convicted, because she is not doing any of the activities that the impugned laws prohibit.
>
> [49] Ms. Kiselbach says that her past convictions under the impugned laws continue to stigmatize her, but that cannot be a basis for now claiming personal interest standing to bring this declaratory action, because that would be akin to a collateral attack on her previous convictions. The rule against collateral attack holds that a court order made by a court having jurisdiction to make it may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment": *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at p. 599; *R. v. Litchfield*, [1993] 4 S.C.R. 333 at p. 349.
>
> [50] All of the constitutional arguments Ms. Kiselbach now seeks to raise could have been advanced by her, as of right, in the context of the criminal trials that resulted in her convictions. If she did raise those arguments then and they failed, her remedy was to take an appeal. If she did not raise them then, she cannot argue now that she is unfairly stigmatized: *Grenon v. Canada (Attorney General)* (2007), 76 Alta. L.R. (4th) 346 (Q.B.) at para. 40; *Zeyha v. Canada (Attorney General)* (2004), 246 D.L.R. (4th) 631 (Sask. C.A.).

[17] The judge observed that framing the action as one for a declaration does not relieve the plaintiffs from establishing they have standing, and concluded that neither SWUAV nor Ms. Kiselbach established private interest standing.

[18] The judge next addressed public interest standing. He discussed the development of jurisprudence on this issue, starting from the proposition said to derive from *Smith v. Attorney General of Ontario,* [1924] S.C.R. 331, [1924] 3 D.L.R. 189, that a person has no standing to challenge the constitutional validity of a statutory provision absent special effect or exceptional prejudice from the provision. He related the modern development of the law, from *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, to *Nova Scotia (Board of Censors) v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, to *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, to *Finlay v. Canada,* and finally to *Canadian Council of Churches v. Canada.* In particular, he referred to these passages:

from *Borowski* at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its 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.

from *Finlay v. Canada* at p. 631:

> The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson*, *McNeil* and *Borowski*.

from *Canadian Council of Churches v. Canada* at p. 252:

> the principles for granting public interest standing set forth by this Court need not and should not be expanded.

and at p. 253:

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

[19] The judge found that the first aspect for public interest standing is established in this case: the plaintiffs raise a serious issue as to the invalidity of the impugned provisions. So, too, there being no contest on the second aspect, he found that the plaintiffs have a genuine interest in the validity of the legislation.

[20] The third aspect of the test, as the judge observed, was strongly contested: is there another reasonable and effective way to bring the issue before the court? The judge noted the observation of Justice Major in *Hy and Zel's Inc. v. Ontario (Attorney General)*; *Paul Magder Furs Ltd. v. Ontario (Attorney General),* [1993] 3 S.C.R. 675 at 692, 107 D.L.R. (4th) 634 that this test lies at the heart of the discretion to grant public interest standing and balances the value of judicial economy with preventing immunization of legislation from review.

[21] The judge then considered the defendant's submission that there are other reasonable and effective means to adjudicate the constitutional validity of the impugned provisions. He referred to a case, reasons for judgment recently released, in Ontario set for trial in 2009, *Bedford, Lebovitch and Scott v. Attorney General of Canada,* No. 07-CV-329807 PD1, challenging ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code* on the basis they violate s. 7 of the *Charter,* and s. 213(1)(c) on the basis it violates s. 2(b) of the *Charter*. He concluded that the fact *Bedford* was outstanding is not necessarily a sufficient reason for concluding the instant case should not proceed. He observed, however, that *Bedford* demonstrates there may be potential plaintiffs with personal interest standing who could bring the issues in this case to court. He then said:

> [76] In answer to this, the plaintiffs argue that the members of SWUAV currently engaged in prostitution are a particularly vulnerable group, who are unable to come forward as personal plaintiffs for fear of reprisal from clients, partners, family, community members, and the police. I do not find that to be a persuasive argument for granting public interest standing to SWUAV and Ms. Kiselbach. If this matter were to proceed to trial, there is every likelihood that members of SWUAV would be called to testify in court in support of the plaintiffs' case. It may be that applications would be made to protect their identity. I cannot see how their vulnerability makes it impossible for them to come forward as plaintiffs, given that they are prepared to testify as witnesses.
>
> [77] In addition to the *Bedford* case, the defendant points to the fact that there are hundreds of criminal prosecutions every year in British Columbia under the impugned legislation, and 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. According to the affidavit evidence, the total number of charges under ss. 210-213 in British Columbia were 347 in 2002, 324 in 2003, 315 in 2004, 448 in 2005, 336 in 2006, and 281 in

> 2007. Over these years, approximately 60% of the accused were women, and 40% were men.
>
> [78] The plaintiffs argue that it is unreasonable to expect persons charged with prostitution-related offences to undertake the expense and responsibility of mounting a challenge to the legislation in the context of their criminal prosecution. The force of that argument is undermined by the fact that *Charter* challenges have been mounted by accused persons in numerous prostitution-related criminal trials. One case currently underway is *R. v. Blais*, Port Coquitlam Provincial Court Registry No. 76644. An issue in respect of that case was recently heard in the British Columbia Court of Appeal: *R. v. Blais*, 2008 BCCA 389.

[22] In addition to *Blais*, the judge referred to 16 other cases, including four in British Columbia, in which various of the impugned provisions have been challenged under ss. 2(b) , 2(d), 7 and 15 of the *Charter.* He concluded:

> [83] The plaintiffs are therefore incorrect in asserting that the case at bar represents the only effective venue in which to advance their arguments about the combined effect of the various impugned sections of the *Criminal Code*. In particular, they are incorrect in their assertion that their arguments could not be advanced in a criminal trial unless the accused was charged under all of the impugned sections at once.
>
> ...
>
> [85] ... As articulated in the Supreme Court of Canada cases that have been discussed above, the test is not whether granting public interest standing to a proposed litigant would be "the most reasonable and effective way to bring litigation challenging the constitutionality of the criminal provisions"; rather, the test, in its third component, is whether there is no other reasonable and effective way to bring the issue before the court.
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> [86] The rationale of the Supreme Court of Canada in expanding the rules of standing to permit the granting of public interest standing on a discretionary basis was to ensure that no constitutionally suspect legislation would be immune from judicial scrutiny.
>
> [87] I am not persuaded that it is necessary or desirable to grant public interest standing to either SWUAV or Ms. Kiselbach. The constitutional challenges that they seek to raise can be brought in the context of a case where the applicant has private interest standing. Refusing to grant public interest standing to SWUAV and Ms. Kiselbach will not result in the legislation being effectively immune from judicial scrutiny.

Discussion

1. Private Interest Standing

[23] The difference between private interest standing and public interest standing may be explained generally as the difference between standing as a matter of right arising from a direct relationship between the person and the state, and standing granted by a court in the exercise of discretion in a situation where, by definition, that direct relationship is lacking. The difference is reflected in the role of this Court in reviewing the judge's order on these two related, but separate, issues, and the conclusion on private interest standing may attract, by virtue of the different relationships at issue, a lesser level of deference than does the order on public interest standing. Broadly speaking, it seems to me that the basis for private sector standing admits of little scope for the exercise of discretion, and little deference need be given to a judge of first instance by a reviewing judge. Where the state engages a person in a court process, under legislation, that person may challenge the constitutional validity of the legislation as part of making full answer and defence, or of defending an action. The principle is inextricably entwined with s. 52(1) of the *Constitution Act*. The question for this Court is whether the judge was correct in denying private interest standing.

[24] On appeal, the appellants advance only Ms. Kiselbach's interest as supporting private interest standing. They contend the judge erred in requiring present jeopardy of being charged or convicted under the impugned laws to find such standing. They further argue that the judge erred in failing to recognize Ms. Kiselbach's alleged past experience of the unconstitutional effect of the impugned laws provides a sound basis to assert private interest standing to obtain a declaration of their constitutional invalidity. The appellants rely, in this submission, upon *Canada v. Solosky*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745; *Fraser v. Houston,* [1996] B.C.J. No. 2096 (Q.L.) (S.C.); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 and *Lavoie v. Canada,* 2002 SCC 23, [2002] 1 S.C.R. 769.

[25] Further, the appellants contend the judge erred in failing to accord to the possibility of Ms. Kiselbach returning to sex work in the future, sufficient weight to establish private interest standing.

[26] In response to the judge's view that granting Ms. Kiselbach private interest standing on the basis of past convictions would seem to countenance a collateral attack, the appellants submit this view misunderstands the case because the challenge is not to past convictions. They allege the judge failed to flexibly apply the rule against collateral attack in the manner envisaged in *R. v. Litchfield*, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97.

[27] The appellants say, further, that the judge considered Ms. Kiselbach's claim only with reference to her s. 7 *Charter* challenge, and not with reference to her ss. 2(b), 2(d) or 15 *Charter* challenges, thereby erring by considering her claim and request for a remedy in too narrow a fashion.

[28] Last, the appellants raise s. 24(1) of the *Charter*. While the statement of claim did not seek a s. 24(1) remedy, the appellants now seek leave to amend the pleadings to make a claim for such a remedy, be it either damages or a pardon, and say such a claim is a sound basis to accord Ms. Kiselbach standing.

[29] I would not accede to these several submissions. The law on private interest standing is, in my view, well stated by the judge. Ms. Kiselbach must be able to establish a direct, personal interest in the impugned provisions: *Finlay v. Canada,* at 622. In words approved in *Finlay* from the High Court of Australia decision in *Australian Conservation Foundation Incorporated v. Commonwealth* (1980), 146 C.L.R. 493, 28 A.L.R. 257, Ms. Kiselbach must establish that she "is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest" or to "suffer some disadvantage, other than a sense of grievance or debt for costs".

[30] In my view the judge's conclusion that Ms. Kiselbach does not have a direct personal interest in the litigation sufficient to engender private interest standing is entirely correct.

[31] Nor do I consider the judge's reasoning, in focusing upon her s. 7 *Charter* claim, demonstrates error. Absent a direct contest between Ms. Kiselbach and the state, the claims under ss. 2(b), 2(d) and 15 are, in my view, best seen as issues that may engage public interest standing. *Vriend,* relied upon by the appellants, was resolved as a matter of public interest standing. *Lavoie*, while an instance where private interest standing was given on a s. 15 *Charter* challenge, was a case in which success for the plaintiff would immediately benefit the plaintiffs by removing a discriminatory bar that limited the plaintiff's employment opportunity with the federal government.

[32] In this case, in contrast, success on the s. 2(b), s. 2(d) and s. 15 claims would not have an immediate effect upon Ms. Kiselbach. For example, although the appellants contend the impugned laws are part of a scheme that limits their access to benefits provided by statutes (such as certain employment benefits), the challenge brought would not directly make any of those statutes applicable. Nor would striking the laws that they say limit freedom of association or freedom of expression have a direct and immediate effect upon Ms. Kiselbach because such a result would only affect activity which Ms. Kiselbach has deposed she has no present plans on pursuing.

[33] Further, in my view the nature of the impugned laws is also significant to the analysis of this issue. The provisions are found in the *Criminal Code*. The effect of success would be to discredit the convictions of Ms. Kiselbach. She had private interest standing to challenge the provisions when she was charged, but now the challenge, as the judge indicated, has overtones of collateral attack. I do not consider this a proper circumstance to accord private interest standing as sought.

[34] Ms. Kiselbach also raises the prospect of a claim for a remedy under s. 24(1). This claim is raised in this Court for the first time, and was neither pleaded nor addressed by the judge.

[35] In my view, a s. 24(1) remedy is not available to Ms. Kiselbach in a claim of this sort, as she seeks only to challenge legislation and not state action. The Supreme Court of Canada has confirmed that s. 52(1) relates to unconstitutional laws, and s. 24(1) is a remedy for government action that violates the *Charter*: *Schacter v. Canada,* [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96.

[36] I conclude that Ms. Kiselbach does not have a personal stake in the action sufficient to accord her private interest standing. I would not accede to this ground of appeal.

2. Public Interest Standing

[37] The order denying the appellants public interest standing was made in the exercise of discretion by the judge. In *Canadian Council of Churches v. Canada*, Justice Cory observed at pp. 252-3:

> ... The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nevertheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

[38] Being an order made in the exercise of discretion, the order appealed attracts considerable deference from this Court. As a general proposition, we may interfere with discretionary decisions of the trial court only when this Court considers the judge acted on a wrong principle, or failed to give sufficient weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1*; Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

[39] In this case the judge concluded the three criteria set out in *Canadian Council of Churches* are not met by the appellants and for that reason declined to accord them public interest standing. The appellants contest this conclusion, and say in any event that the judge had a residual discretion to grant standing which he failed to recognize and to exercise. Canada disputes both propositions. It says that the judge was correct in holding the three criteria are not all met, and that the discretion of the court lies in the ultimate decision whether to grant standing in situations where the three criteria are met. The Crown contends there is no discretion to accord public interest standing where the three criteria are not all met.

[40] The first two criteria discussed in *Canadian Council of Churches*, while engaging the judgment of the judge, are unlikely to be the matter of serious comment in this Court. Nor are they in this case. All parties proceed on the basis there is a serious issue raised in the pleadings on at least some issues so as to satisfy the "serious question to be tried" criterion, and that the appellants have a genuine interest in the validity of the impugned provisions. (The respondent does contest satisfaction of this criterion in respect to the challenge to s. 213(1)(c) under ss. 2(b) and 2(d) of the *Charter.* I shall return to this aspect.) The main divergence is on the third criterion, whether there is no other reasonable or effective manner to bring the issue to court, and on the issue of residual discretion.

[41] The Supreme Court of Canada has made it clear the discretion to grant standing must not be exercised mechanistically. Rather, it must be exercised in a broad and liberal manner to achieve the objective of ensuring the impugned law is not immunized from review: *Canadian Council of Churches*, pp. 255-6. Further, in *Canadian Egg Marketing Agency v. Richardson* Justices Iacobucci and Bastarche observed at para. 33 that:

> ... the Court is always free to hear *Charter* arguments from parties who would not normally have standing to invoke the *Charter* on the basis of the residuary discretion ...

[42] On the other hand, in *Canadian Council of Churches* Justice Cory said at p. 252:

> ... The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.

[43] Although it is not entirely clear, I read this last statement from *Canadian Council of Churches* as confirming that while the entire analysis is intended to be performed in a liberal and generous manner, each of the three criterion is, so to speak, a necessary condition that must be met on an application for standing. In other words, the scope of the permissible discretion is to refuse standing even though the criteria are met, but does not extend to granting standing where all the criteria are not met.

[44] In this it is not unlike the three-part test for injunctions described in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.,* [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321, and applied in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. This conclusion demonstrates the central power of the third criterion: is there no other reasonable and effective manner to bring the issue before the court? As was said in *Hy and Zel's* by Justice Major (at p. 692), this criterion "lies at the heart of the discretion to grant public interest standing".

[45] The appellants observe that the criteria are to be determined on a balance of probabilities, but say the mere possibility a private litigant may challenge the provisions is not sufficient to negative the third criterion, relying upon *Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580 (S.C.) and *Grant v. Canada (Attorney General)*, [1995] 1 F.C. 158, 81 F.T.R. 195 (T.D.), aff'd (1995), 125 D.L.R. (4th) 556, 31 C.R.R. (2d) 370 (F.C.A.), leave to appeal refused [1995] S.C.C.A. No. 394.

[46] The appellants contend that the judge erred in finding there was another reasonable and effective manner to bring the issue before the court. They submit that in order for there to be such an alternative, it must be established on a balance

of probabilities that there is a person who is more directly affected than the applicants, who might reasonably be expected to initiate litigation to challenge the laws they seek to have declared unconstitutional.

[47] There are, they agree, people more directly affected by the legislation than the appellants – persons presently engaged in sex work who may be charged or are now charged with offences under the impugned sections. The appellants contend, however, that it is not likely that such people, vulnerable and with limited means, will initiate litigation to challenge the legislation.

[48] The respondent's proposition is not that there is another person or group that could assert public interest standing and be better situated to do so, but that there are prospective private litigants who may do so. That is, the respondent advances the existence of persons with private interest standing as of right, who could challenge these laws, as a reason the third criterion must be decided against the appellants.

[49] I accept the proposition that a person who may assert private interest standing to challenge a law, if in fact available in the full sense of the word, will always present a reasonable way to bring the issue to court which, provided the person has either personal ability or the opportunity to have counsel, will likely be effective, so as to negate the criterion the applicant for public interest standing must establish. In the hierarchy of standing, the availability of a person with private interest standing will generally defeat an applicant for public interest standing.

[50] The appellants say, however, that the judge erred in concluding such persons (with private interest standing) are available to present the constitutional challenge they seek to advance. They say the judge erred in concluding persons charged under the impugned sections will initiate litigation to challenge these provisions collectively because such persons are vulnerable and without resources. They rely upon *Fraser v. Canada*, a case concerning foreign migrant agricultural workers, and *Morgentaler v. New Brunswick,* 2008 NBQB 258, 295 D.L.R. (4th) 694, a case

concerning legislation in respect to abortion services. In both those cases the vulnerable nature of proposed private interest litigants contributed to a determination that they did not represent a reasonable and effective alternative to the proposed public interest litigant. The appellants say the judge was wrong to discount the evidence and the pleadings that members of SWUAV are so vulnerable as to make it impossible to emerge as plaintiffs. Citing *Vriend*, *Canadian Association of Deaf v. Canada*, 2006 FC 971, 272 D.L.R. (4th) 55, and *Victoria (City) v. Adams*, 2008 BCSC 1363, 299 D.L.R. (4th) 193, varied on other grounds 2009 BCCA 563, 313 D.L.R. (4th) 29, they say it is not reasonable to require vulnerable people to face specific charges as a condition of standing to challenge the constitutional validity of laws they say treat them unequally and violate their *Charter* rights. They say that even if such individuals were faced with specific charges, any challenge could result, at most, in a declaration of invalidity of the section under which the charge was laid. Such a forum, they allege, would not be suited to the multi-provisional *Charter* challenge that is the thesis of this action, and would not provide such access to the courts as is required to prevent immunization of the legislation from the comprehensive challenge they advance.

[51] The appellants contend the judge failed to appreciate the multi-faceted, and interrelated, challenges they seek to bring to the case. The appellants contend an effective challenge cannot be brought to these statutory provisions in the context of a criminal proceeding because it is unlikely a single person will be charged with an offence under all sections. Even though some cases, such as *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223, 28 C.R.R. 226 (Man. P.C.), concern a challenge to more than one provision, they submit no case in the jurisprudence advances a comprehensive and multi-faceted challenge based on the systemic impact of the impugned provisions that amounts to a breach of *Charter* rights of a significant number of socially disadvantaged persons. The appellants contend the breadth of their challenge is required to establish their essential position that the laws so corral their lawful activities that they are put at risk, made vulnerable, and placed outside of the protection others in the community enjoy. They allege the instrument of their

travails is the collective effect of the impugned provisions, and so those provisions are challenged not just to escape criminal conviction, but also to improve their living circumstances.

[52] These are bold propositions, and they remain, of course, to be established. The issue before this Court is whether the action as framed should be allowed to proceed so that these propositions may be tested in open court.

[53] It is true that a broad *Charter* challenge may be brought in defence to charges under legislation. For example, in *R. v. Lewis* (1996), 139 D.L.R. (4th) 480, 24 B.C.L.R. (3d) 247 (S.C.), extensive evidence, on both sides of the disputed issue, was laid before the court in defence of charges arising from an alleged breach of the *Access to Abortion Services Act,* S.B.C. 1995, c. 35 (Now R.S.B.C. 1996, c. 1.) However, even in that case the *Charter* challenge to the legislation was narrowly directed at the offence before the court and not at systemic considerations.

[54] The constitutional limitations upon a provincial court judge, who would be likely to try such charges, from making a formal declaration of invalidity in respect of a law found to be unconstitutional are, however, relevant to the discussion of "another reasonable and effective alternative"; see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5, para. 17; *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54, para. 318. The observations in *R.V.H. (R.J.)* (2000), 186 D.L.R. (4th) 468 at 474 (Alta. C.A.) are apt:

> The Provincial Court is a creature of statute and possesses no inherent power. It has long been accepted in Canadian law that the powers and functions of Provincial Court judges are "circumscribed by the provisions of the statute and must be found to have been thereby conferred either expressly or by necessary implication". [Citations omitted.]

[55] In considering whether there is another reasonable and effective alternative to test the constitutionality of the impugned laws, the judge focussed, as in most cases, upon the availability of another challenge to the constitutional validity of these provisions. That, of course, is one measure. There is, however, another aspect to be

considered in determining the availability of a reasonable and effective alternative, which is the multi-faceted nature of the proposed challenge.

[56] The judge here referred to a long list of cases as demonstrating the effectiveness of a challenge under all of s. 2(b), s. 2(d), s. 7 and s. 15 of the *Charter*, to certain of the prostitution laws. Of the cases to which he referred, only *R. v. Smith* (1988), 44 C.C.C. (3d) 385 (Ont. S.C.) dealt at length with a challenge under s. 15 of the *Charter. Smith* concerned a challenge to the prohibition on communication for the purposes of prostitution on the basis the law discriminated against the accused on the ground of occupation, the distinction being between those who charge for sexual services and those who do not. The case advanced before this Court is significantly more complex, and challenges the laws with reference to the cumulative effect of the impugned provisions on the lives of those involved in sex work. *Cunningham*, also referred to by the judge, while a s. 15 challenge, in my respectful view is much narrower than this action and consequently is of little assistance as an example of a case demonstrating a reasonable and effective alternative to this challenge. The judge referred as well to *R. v. D. (S.B.)*, more widely reported as *R. v. White*, *R. v. S.B.*(1994), 136 N.S.R. (2d) 77, 35 C.R. (4th) 88 (N.B.C.A.). However, *D. (S.B.)* is not a case of a s. 15 challenge to legislation, but rather a challenge to the enforcement of legislation, and so is qualitatively different. Last of the cases referred to that included a challenge under s. 15 of the *Charter* is *R. v. Gudbranson* (1985), 14 W.C.B. 298 (B.C. Prov. Ct.). There the challenge was to the offence of keeping a common bawdy house, and involved a simple comparison that was directed specifically to a single impugned provision. Two other cases, *R. v. Bear* (1986), 54 C.R. (3d) 68 (Alta. Prov. Ct.) and *R. v. Kazelman,* [1987] O.J. No. 1931 (Prov. Ct.) summarily dismissed s. 15 claims. In sum, none of the cases referred to addressed a comprehensive challenge to a legislative scheme which relied heavily on systemic considerations.

[57] In *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, Justices Binnie and LeBel, (dissenting but as I read the judgment not on this aspect)

considered the standing of the appellants to mount their constitutional challenge to the prohibition on private health insurance. In according standing they gave considerable weight to the generic nature of the challenge, characterizing it as a systemic challenge.

[58] The term "systemic" is something of a chameleon: it is used where an entire legislative scheme is challenged and, particularly in human rights cases, is used to describe situations in which disproportionately adverse consequences accrue to persons from legislative provisions that do not, on their face, target those persons adversely.

[59] The characterization of the challenge in *Chaoulli* as systemic was doubted by Chief Justice Brenner in *Canadian Bar Association v. British Columbia,* 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, in his conclusion that the Canadian Bar Association lacked standing to bring a challenge to the legal aid program in British Columbia. While that conclusion was one of the issues on appeal, it was not addressed by this Court which dismissed the appeal on other grounds: 2008 BCCA 92, 290 D.L.R. (4th) 617, leave to appeal dismissed [2008] S.C.C.A. No. 185. In any case, *Chaoulli* recognizes that a systemic challenge often differs in scope from a challenge that may be brought by an individual addressing a discrete issue, and the problems arising from that difference in scope may be resolved by taking a more relaxed view of standing in the right case.

[60] The differences between a systemic challenge and an individual direct challenge, particularly in cases alleging discrimination, was the subject of comment by this Court in *British Columbia v. Crockford*, 2006 BCCA 360, 271 D.L.R. (4th) 445 at para. 49.

> [49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see *Radek* at para. 513. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the *Code*. The

> types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.

[61] While none of the cases before us present the identical issue as the one before us, this case is, by reason of the importance of the s. 7 and s. 15 *Charter* challenges to the appellants' overall theory, closer on the spectrum to *Chaoulli* than to *Canadian Council of Churches,* in my view.

[62] The examples of *Vriend* and *Fraser* demonstrate the appropriateness of giving public interest standing to suitable s. 15 challenges, and support a generous approach in this case. I conclude, with respect, that the reasons for judgment do not fully reflect the systemic and comprehensive nature of the challenge advanced. In likening this action to the cases listed and by referring to the number of prostitution-related charges laid, and therefrom concluding there was a sufficient prospect that a reasonable and effective alternative exists, the action was stripped of its central thesis.

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

[64] During the hearing of the appeal, concern was expressed that the case would amount to the work of a Commission of Inquiry. I do not agree. It seems to me inconsistent to say "do not worry – this challenge may be brought by an individual", and also to say that hearing the case advanced, which all agree raises justiciable issues, is beyond the role of the courts. Justice Laskin's cautious statement in *Thorson* that "The question of the constitutionality of legislation has in this country

always been a justiciable question" articulates an important principle, one which requires provision of a venue to permit that question to be heard.

[65] While the pleadings may be untidy, the judge readily agreed the defects could be cured by amendments and particulars. Those pleadings will frame the evidence required. This process is properly within the role of the Courts and there is no other way the constitutional validity of the impugned sections may be tested, apart from a court process.

[66] In this case I respectfully conclude the judge failed to give sufficient weight to the breadth of the constitutional challenge and the comprehensive and systemic nature of the plaintiffs' theory. The balance struck by the jurisprudence is between judicial economy and openness to court review of seriously challenged legislation. In my respectful view, the third criterion, considering the claim in total, is met and the balance tips toward access to court review of the impugned legislation.

[67] I have earlier referred to the respondent's reservation as to the first criterion, the existence of a serious case in relation to s. 213(1)(c), on the basis that that section has been previously declared constitutional and so must be taken as being constitutionally valid: *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 and *R. v. Skinner*, [1990] 1 S.C.R. 1235, 56 C.C.C. (3d) 1. However, the nature of the proposed challenge in this case is considerably different from the one mounted in that case, and has not been considered by the Supreme Court of Canada. I conclude it is open to renew the challenge to s. 213(1)(c), on the terms pleaded. This is not a basis, in my view, to deny standing.

[68] The respondent also has referred to the challenge to these sections made in the *Bedford* case. The result in *Bedford*, of course, is not binding in British Columbia unless it becomes the subject of a decision from the Supreme Court of Canada. That there is a similar challenge ongoing in Ontario, led by two persons who plan to return to prostitution-related activities and one who is currently so engaged, is of interest to

this case, but is not a matter that bears directly on the application here of the criteria for public interest standing.

[69] I conclude, respectfully, that the three criteria have been met by the appellants. The issue remains – should the court exercise its discretion to grant public interest standing?

[70] There is little discussion in the jurisprudence in this area of the circumstances in which standing will be refused, notwithstanding the criterion are established. I see no reason, in this case, that standing should not be granted. As in *Vriend*¸ it is appropriate, in my view, to accord both plaintiffs public interest standing.

[71] I would accordingly allow the appeal, set aside the order dismissing the action, and remit the matter to the Supreme Court of British Columbia for disposition of the Rule 19(24) application and the application for particulars.

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Madam Justice Neilson"

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[72] I have had the opportunity of reading, in draft, the reasons of my colleague, Madam Justice Saunders, and regret that I am unable to agree with the disposition of the case that she proposes. While I agree with much of her reasoning, I do not consider that the broad nature of the attack on legislation in this case assists the plaintiffs in meeting the third criterion for the granting of public interest standing.

[73] The chambers judge carefully considered whether, in the event that standing was denied, there would be other reasonable and effective ways to bring the issues before the court. He noted that a civil case brought by parties with private interest standing was possible, and noted the existence of the *Bedford* case in Ontario. He also noted that there was an extensive history of challenges to prostitution laws in the context of criminal prosecutions, and considered the fact that such prosecutions are not rare in British Columbia. He concluded:

> [87] I am not persuaded that it is necessary or desirable to grant public interest standing to either SWUAV or Ms. Kiselbach. The constitutional challenges that they seek to raise can be brought in the context of a case where the applicant has private interest standing. Refusing to grant public interest standing to SWUAV and [Ms.] Kiselbach will not result in the legislation being effectively immune from judicial scrutiny.

[74] The appellants argue that the judge was wrong to conclude that persons with private interest standing will bring challenges to the impugned legislation and will have the opportunity to raise the issues that the appellants seek to raise in this litigation. With respect, it appears to me that the trial judge had evidence before him upon which he was entitled to reach the conclusion he did. I would not accede to the appellants' argument in that regard.

[75] The appellants raise another argument, however, to the effect that standing should be given in this case because the challenges that they wish to bring are "comprehensive, complex and systemic" in nature. They argue that no individual is likely to be charged under all of the impugned provisions, and that there will

therefore not be another opportunity to bring a challenge of the sort mounted in this case.

[76] I accept that it is unlikely that a case will arise in which a multi-pronged attack on all of the impugned provisions can take place. There will also be no single case in which a court has jurisdiction to strike all of the impugned laws at once. The question is whether the lack of an opportunity for such "one stop shopping" is a valid basis for granting the appellants standing. The appellants argue that the efficiencies to be gained by a comprehensive challenge mean that it is.

[77] The fact that an accused is charged under only one provision of the *Criminal Code* does not, of course, make other provisions of the *Code* irrelevant to a constitutional challenge. As the chambers judge noted:

> [80] The plaintiffs submit that if their action is allowed to proceed to trial, they will argue not only that each individual impugned section of the *Criminal Code* violates the *Charter*, but also that the combined effect of the sections is unconstitutional.
>
> [81] There is no reason, however, why such arguments could not also be raised in the context of a prosecution, as was done in *R. v. Banks* (2007), 84 O.R. (3d) 1 (Ont. C.A.), where the court observed at para. 27:
>
> > Of course, the appellants may rely on all the provisions of the Act in the course of reading the Act as whole with a view to discerning the purpose and effects of the particular sections at issue in the appeal.
>
> [82] Similarly, in *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.), in the context of a criminal trial on charges of soliciting under what was then s. 195.1(1)(c) of the *Criminal Code* [now s. 213(1)(c)], the various accused were permitted to challenge the constitutionality of that section by arguing that the combined effect of that section along with the other provisions of s. 195.1 and the bawdy-house provisions in s. 193 [now s. 210] resulted in an infringement of their rights under s. 7 of the *Charter*.

[78] It is sometimes the case that the constitutionality of legislation depends on both social conditions and on the existence of other legislative provisions. For example, in the recent decision of this Court in *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28, the constitutionality of the City's *Parks Regulation Bylaw* No. 07-059 was affected by the existence of other legislation, which prohibited certain activities outside of parks, as well as by the state of social housing in the

municipality. In such a case, evidence touching on all of the relevant provisions is admissible, and argument may be addressed not only to the impugned provisions, but also to other provisions that may affect the constitutionality of the impugned provisions.

[79] The appellants contend, however, that this does not fully deal with their concerns, as the only statutory provisions that could be struck down in a particular prosecution are those that are directly engaged in it. Further, even if other relevant provisions of the *Code* could be considered, those that do not impinge on the constitutionality of the offence charged could not.

[80] The appellants are correct, then, in stating that a constitutional challenge brought in any individual case would almost certainly have to be narrower than the challenge that they seek to bring in this case. In my view, however, that does not mean that they should be granted standing.

[81] Courts are not legislatures, nor are they commissions of inquiry. Courts lack the institutional capacity to explore issues that are not directly relevant to the questions that they must decide. Ideally, they develop the law (including interpretation of the *Charter*) incrementally. In doing so, they rely on the parties before them to fully present the relevant evidence and the legal arguments that relate to the case. They are unable to conduct investigations on their own, and, with limited exceptions, are completely reliant on the parties to provide evidence.

[82] When courts hear cases that are based on particular factual scenarios, there are some assurances that the parties will be in a position to present the relevant evidence – in civil cases, parties have rights of discovery, and in criminal cases, investigative systems are in place for the purpose of gathering evidence. I do not suggest that this means that an ideal evidentiary basis for constitutional adjudication will always be present in a case based on private interest standing, but at least there are mechanisms in place to assist with the process.

[83] When a case is not based on a particular fact scenario, it is much more difficult for the parties to achieve the goal of making sure that the court has all of the evidence that it needs to reach an appropriate determination. A very broad-ranging challenge, such as is put forward in this case, presents special difficulties, as it will require extensive evidence on a multitude of issues. It is not at all clear that the litigation process will be capable of dealing fairly and effectively with such a broad-based challenge in a reasonable amount of time. In my view, the courts are far more adept at dealing with a series (if necessary) of more limited challenges that are presented in an orderly fashion within the confines of concrete cases.

[84] In saying this, I am not suggesting that there be a reluctance to take a liberal and generous approach to the tests for standing. Rather, I am simply saying that I am not persuaded that the courts ought to be more eager to grant standing where a broad challenge is presented than where a more confined one is contemplated.

[85] The appellants rely principally on the minority judgment of Binnie and LeBel JJ. (Fish J. concurring) in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791. After referring to the tests for public interest standing articulated in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193, Binnie and LeBel JJ.refer to the "systemic" nature of the challenge:

> 189 All three of these conditions are met in the present case. First, there is a serious challenge to the invalidity of the impugned provisions. Access to medical care is a concern of all Quebec residents. Second, Dr. Chaoulli and Mr. Zeliotis are both Quebec residents and are therefore directly affected by the provisions barring access to private health insurance. Third, the appellants advance the broad claim that the Quebec health plan is unconstitutional for *systemic* reasons. They do not limit themselves to the circumstances of any particular patient. Their argument is not limited to a case-by-case consideration. They make the generic argument that Quebec's chronic waiting lists destroy Quebec's legislative authority to draw the line against private health insurance. From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances. In

> this sense, there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine. Consequently, we agree that the appellants in this case were rightly granted public interest standing. However, the corollary to this ruling is that failure by the appellants in their systemic challenge would not foreclose constitutional relief to an individual based on, and limited to, his or her particular circumstances. [Emphasis in original.]

[86] Several facts must be kept in mind when interpreting this passage. First, it must be remembered that it is not from the majority judgments; only the two authors and Fish J. subscribed to it. Deschamps J., who gave the majority judgment as it relates to the Quebec *Charter*, took a somewhat different approach to standing:

> 35 Clearly, a challenge based on a charter, whether it be the *Canadian Charter* or the *Quebec Charter*, must have an actual basis in fact: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441. However, the question is not whether the appellants are able to show that they are personally affected by an infringement. The issues in the instant case are of public interest and the test from *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, applies. The issue must be serious, the claimants must be directly affected or have a genuine interest as citizens and there must be no other effective means available to them. These conditions have been met. The issue of the validity of the prohibition is serious. Chaoulli is a physician and Zeliotis is a patient who has suffered as a result of waiting lists. They have a genuine interest in the legal proceedings. Finally, there is no effective way to challenge the validity of the provisions other than by recourse to the courts.

[87] McLachin C.J. and Major J.'s reasons (Bastarache J. concurring) do not address the issue of standing at all, but concur generally with the judgment of Deschamps J. Their reasons do not suggest an intention to broaden the basis for standing.

[88] A second caution that must be applied to the reasons of Binnie and LeBel JJ. is that they are using the word "systemic" in a particular sense. *Chaoulli* was not a challenge to a large number of provisions purporting to create a "system" of health care. Only two provisions were attacked: s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28. The sections were closely related; both prohibited the provision of private health care insurance to residents of Quebec.

[89] The challenges were “systemic” in the sense that the plaintiffs alleged that all residents of Quebec suffered from a system of wait lists that were used by the public insurance plan to limit expenditures. It was argued that all residents of Quebec were affected by this system, and that the denial of the ability to purchase private health insurance was a denial of the constitutional rights of all residents of Quebec. The deprivation, therefore, was systemic, and not dependent on an individual showing that he or she had personally been placed in jeopardy by wait lists.

[90] The challenge in *Chaoulli* was only “systemic” in this very narrow sense. It is not surprising, then, that in *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38 (appeal dismissed without dealing with this issue 2008 BCCA 92, 76 B.C.L.R. (4th) 48), Brenner C.J.S.C. was unconvinced that *Chaoulli* was properly categorized as a “systemic” challenge in the sense that the plaintiffs alleged:

> [66] The CBA places great reliance on *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 for the proposition that the “no other reasonable and effective manner” requirement is met in circumstances where individual resources are lacking and/or where individual circumstances are otherwise dire. I agree that the decision is instructive, but not for the reasons relied on by the CBA.
>
> [67] The CBA points to the practical concerns expressed by Binnie and LeBel, JJ in their dissent in *Chaoulli* at para. 189:
>
> > [W]hile individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan as was done here. The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances. In this sense, there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine.
>
> [68] However, *Chaoulli* was an individual challenge. The co-plaintiff George Zeliotis was an individual patient. He had experienced a number of serious health problems over the years and had been faced with waiting lists for heart and hip surgeries. There is no question that as an individual citizen faced with a prohibition against taking out private health insurance, he would have had direct standing to challenge the legislation; indeed, that is what the majority concluded.

> [69] In addition, the individual plaintiffs in *Chaoulli* challenged the constitutional validity of Quebec legislation that barred Quebec residents from purchasing private health insurance. It was clearly a challenge to specific legislation which the two individual plaintiffs said contravened the Quebec *Charter of Human Rights and Freedoms* as well as the *Charter*.
>
> [70] It also seems to me that it may not be correct to characterize *Chaouilli* as a "systemic challenge". This characterization arguably conflates a challenge to the validity of a specific statute with the systemic evidence and analysis advanced to support the challenge. Systemic evidence and analysis is not unusual in *Charter* challenges; in the area of equality rights, systemic evidence is almost universally required.
>
> [71] In my view *Chaoulli* can be viewed as a typical constitutional challenge to legislation brought by two directly affected citizens. In the event the challenge were successful it would have had (and in the result did have) a systemic effect, as do all successful challenges that result in a declaration of statutory invalidity.

[91] The third caution that should be applied in interpreting the statement of Binnie and LeBel JJ. is that they purported to apply the tests enunciated in *Canadian Council of Churches* and did not express any doubts as to the correctness of that decision. *Canadian Council of Churches* was a claim that was a systemic attack on legislation in the sense contended for by the plaintiffs in the case before us. The Supreme Court described the statement of claim in *Canadian Council of Churches* as making "a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the *Immigration Act, 1976*" (at S.C.R. 253). As in the case before us, it would have been impossible for all of the provisions that were impugned to be attacked in the case of an individual claimant. Nonetheless, the Court in *Canadian Council of Churches* considered that individual cases presented a preferable manner for matters to be litigated (at S.C.R. 254-255):

> … It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear concrete factual background upon which the decision of the court could be based.

[92] In my view, *Chaoulli* does not stand for the proposition that public interest standing should be given preferentially to wide-sweeping attacks on legislation. The remarks of Binnie and LeBel JJ. should be read as reflecting the fact that the

particular challenge in that case did not depend on proof that an individual had been placed in physical jeopardy by the lack of ability to purchase private health insurance. The mere possibility of jeopardy was enough to found a claim for standing.

[93] The plaintiffs have cited certain other cases in their arguments for the proposition that a plaintiff who brings a "systemic challenge" ought to be granted public interest standing. It is noteworthy that all of the cases cited (*Fraser v. Canada*; *Grant v. Canada*; *Chaoulli*; and *Vriend v. Alberta*) were cases that could only have been brought by a challenge commenced by a plaintiff. None was a case in which there was any real possibility of the constitutional issue being raised in defence of a prosecution, nor did any of the cases involve situations in which a government protagonist was likely to bring administrative proceedings against any person whose constitutional rights were allegedly violated. In other words, in all of those cases, a direct challenge to the legislation by way of a civil action was the only reasonable method by which the constitutionality of the impugned legislation could be tested. The only real issue in those cases was whether the plaintiff who brought the action was an appropriate person to have done so.

[94] The case we are considering is not of that type. The chambers judge found that there would be adequate opportunities for the various impugned provisions to be challenged on the grounds set out in the statement of claim.

[95] Before leaving the discussion of "systemic" challenges, it should be noted that the plaintiffs use the word "systemic" in more than one sense. They use it to describe not only a comprehensive challenge to a large number of provisions of the *Criminal Code*, but also to describe what is often termed "adverse effect discrimination" or "systemic discrimination". In my view, this second sense of the word "systemic" does not assist the standing argument. The courts have extensive experience with claims involving systemic discrimination. Such claims are routinely raised in cases in which those claiming discrimination have private interest standing.

There is no need to accord public interest standing in order for such claims to be advanced.

[96] In summary, the case before us does not include any challenges that cannot be properly advanced in an appropriate case where there is private interest standing. If all of the challenges are to be advanced, they will have to be advanced in separate cases. I do not, in the context of this case, see this as either weakening arguments or making them unlikely to be advanced.

[97] I am of the view that the chambers judge made no error in his analysis of the law or in his use of evidence. His finding that the plaintiffs had not made out a case for public interest standing was, in my view, a finding within his jurisdiction.

[98] I would prefer not to express any view as to whether there might be extraordinary cases in which, despite the plaintiff's failure to meet the three-part test in *Canadian Council of Churches*, a court could exercise a residual discretion to grant standing. If there is a residual discretion, however, it must be a narrow one, confined to cases in which conservation of judicial resources overwhelmingly favours the granting of public interest standing. Nothing in the case before us would bring it within that narrow class of cases, assuming it exists.

[99] In any event, I would observe the judge's statement that he was not persuaded that it was "necessary *or desirable* to grant public interest standing" [emphasis added]. This suggests that even if the judge had residual discretion in this case, he would have declined to exercise it. There would be no basis for overturning that decision.

[100] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"