Court of Appeal File No. CA036762

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Mr. Justice Ehrcke of the Supreme Court of British Columbia pronounced the 15th day of December 2008.

BETWEEN:

DOWNTOWN EASTSIDE SEX WORKERS UNITED
AGAINST VIOLENCE SOCIETY and SHERYL KISELBACH

APPELLANTS
(PLAINTIFFS)

AND:

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(DEFENDANT)

AND:

WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
TRIAL LAWYER ASSOCIATION OF BRITISH COLUMBIA

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OPENING STATEMENT

West Coast LEAF has a demonstrable interest in ensuring that the principles of substantive equality are reflected in the application of the common law, and is committed to ensuring that the test for public interest standing is interpreted and applied in a manner that allows women, particularly vulnerable women, equal and expansive access to courts to enforce their equality rights.

A generous and purposive application of the public interest standing test that is consistent with the *Charter* value of equality, international human rights treaties and the fundamental constitutional guarantee of access to justice requires courts to turn their minds to apply the constitutionally-mandated equality lens as an integral part of each of the three steps in the test. To do otherwise is to make the public interest standing test into an additional barrier to equal access to justice for vulnerable and disadvantaged groups. In particular, courts should: make a full inquiry into the direct or genuine interest of the public interest plaintiff and consider that the ability to act collectively and seek standing as a group is particularly important for women and other vulnerable groups who face obstacles in accessing justice; and assess the reasonable likelihood that effective claims will be brought by directly affected persons with regard to the *Charter* value of substantive equality.

By finding that there were reasonable and effective alternatives to these plaintiffs' bringing this claim, the Chambers judge ignored the lived reality of women impacted by the Prostitution Laws. The evidence shows that women involved in the survival sex trade often start selling sex as minors, having previously experienced sexual assault and/or drug addiction, having dropped out of school at a young age, often ending up on Vancouver's Downtown Eastside, struggling with addiction, poverty, racism and the daily fear of sexual and physical violence. The Chambers judge erred in finding that individual women belonging to this marginalized group could reasonably be expected to bring an effective constitutional challenge to the Prostitution Laws. Public interest standing is a necessary tool for ensuring that such challenges gain access to the courts.

Part 1: Statement of Facts:

1. West Coast LEAF (WCL) is an incorporated non-profit society in British Columbia and a federally registered charity. The mission of West Coast LEAF is to achieve equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education.

2. WCL adopts the Appellants' statement of facts.

3. The record shows that the Appellants' experience, individually and collectively, is marked by the following indicia of vulnerability and marginalization: gender; poverty and reliance on social assistance; lack of basic necessities including food and shelter; experiences of sexual assault; serious health problems; drug use; lack of education; and, membership in socially excluded groups as members of visible minorities or due to Aboriginal status.

> Affidavits of Sex Workers, Exhibit C to Affidavit #1 of Nicole Capler, Appellant's Appeal Book, Volumes 1-3 at 92-412. See Condensed Book for detailed references.

Part 2: WCL Position on the Issues:

4. WCL submits that the Chambers judge erred in the application of the governing principles and made a palpable and overriding error in assessing the evidence and dismissing the Plaintiffs' claim on the basis that the Plaintiffs did not have public interest standing. Both SWUAV and Ms. Kiselbach should be granted public interest standing on the basis that there is a serious issue to be tried, they have a direct and genuine interest in the matter and there is no other reasonable and effective means for this constitutional challenge to come before the Courts.

5. WCL takes no position on the other issues in this appeal.

Part 3: Argument:

A. Introduction

6. West Coast LEAF has a demonstrable interest in ensuring that the principles of substantive equality are reflected in the application of the common law, and is committed to ensuring that the test for public interest standing is interpreted and applied in a manner that allows women, particularly vulnerable women, equal and expansive access to courts to enforce their equality rights.

7. The test for public interest standing should be applied in a generous and purposive manner that promotes substantive equality, pursuant to the equality values contained in s. 15(1) of the *Charter*, international human rights treaties and the unwritten constitutional principle of the rule of law which guarantee equal access to justice. The Court below erred by applying the test for public interest standing in a narrow, overly restrictive and unconstitutional manner.

8. Public interest standing is granted where a serious issue has been raised by a party with a direct or genuine interest and where there is no reasonable and effective alternative for the issues to come before the court. The Chambers judge found that the case at bar passed the first branch of the test since a serious issue had been raised and this finding is not contentious. The second and third branches of the test must be construed in a manner that is consistent with substantive equality principles and contextualized by an understanding of the situation of inequality experienced by women, particularly the vulnerable and marginalized group of women engaged in the sex trade, in accessing the courts.

> *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C. R. 236 at para. 37.

B. Public Interest Standing and Equal Access to Justice

9. Public interest standing is one important means through which courts can ensure equal access to justice. Canadian courts have consistently held that the test for public interest standing should be construed and applied in a purposive

and generous manner. One of the central purposes of the granting of public interest standing is providing a means by which constitutional claimants who experience barriers to justice can gain access to the courts. While this concern is generally couched in terms of ensuring that unconstitutional laws and actions are not immune from judicial scrutiny, one of the underlying concerns is that meritorious claims not be denied access to the courts.

Thorson v. Canada (Attorney General), [1975] 1 S.C.R. 138 at 146

Canadian Council of Churches, *supra* at para. 31, 36 and 42.

Russell Binch, "The Mere Busybody: Autonomy, Equality and Standing" (2002) 40 Alta. L. Rev. 367 at 390.

10. The Supreme Court of Canada has recognized that there is a general public interest in ensuring constitutional compliance by governments. At the same time, it is important to take into account that the "general public" is not a homogenous group and to recognize that some laws will have a unique impact on particular groups of individuals. Equality concerns are engaged when the primary effects of a law are visited on disadvantaged or marginalized individuals whose capacity to mount an effective challenge is hindered or denied due to social or economic circumstances, or other substantial barriers to the courts.

Canadian Council of Churches, *supra* at paras. 31, 36 and 42.

11. Equal access to justice must be regarded as an integral aspect of equal protection and benefit of the law encompassed by s.15 (1) of the *Charter*. In *Andrews*, Justice McIntyre stated that "[t]he section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*." The *Charter* value of equality is a guiding principle in the application of the common law and should be integrated into the application of the governing principles on public interest standing.

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at para. 52.

Hill v. Church of Scientology of Toronto, [1995] 1 S.C.R. 1130 at para. 91.

Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 593-594.

R. v. Salituro, [1991] 3 S.C.R. 654 at para.49.

12. The inherent jurisdiction of the courts to ensure equal access to justice in the application of the public interest standing test is further bolstered by the unwritten constitutional principle of the rule of law, which protects (although not without limitation) both equality and the ability of citizens to access legal protections. Without access to court to defend – or, just as importantly, to assert – rights, citizens cannot be said to be truly equal. A right cannot be considered 'inviolable' if it cannot be vindicated in court; a freedom is not 'fundamental' if it may not be protected at the instigation of its holder.

> *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at paras.24-26.
>
> *British Columbia (Attorney General) v. Christie,* [2007] 1 S.C.R. 873 ("*Christie* (S.C.C.)") at paras.16-17.
>
> *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.) at para.12, leave to appeal refused, [1997] S.C.C.A. No. 78.
>
> *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 153 D.L.R. (4th) 460 (B.C.C.A.) at paras. 10-11; leave to appeal refused, [1998] S.C.C.A. No. 205

13. International human rights guarantees further underscore the direct connection between rights and equal access to the courts and effective remedies for rights violations. Conditions that have the effect of preventing individuals from effectively exercising their rights are considered to violate the *International Convention on Civil and Political Rights*. In addition, the Committee on Economic Social and Cultural Rights has explained that state parties have a duty to fulfil the economic, social and cultural rights of men and women equally, which includes establishing "appropriate venues for redress such as courts and tribunals or administrative mechanisms that are *accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women.*" [emphasis added]

> *Universal Declaration of Human Rights*, G.A. Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 at Arts. 8, 10.
>
> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976), at Arts. 2(2), (3).
>
> *Äärelä and Näkkäläjärvi v. Finland,* Communication No. 779/1997 24 October 2001 CCPR/C/73/D/779/1997 at para 7.2

UN CESCR. *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 16*, 34th Sess., Annex, Agenda Item 5, UN Doc. E/C.12/ 2005/4 (2005) at para. 7.

14. The law defines the rights and obligations of individuals and governments. The justice system provides the procedures and decision making authority by which disputes, including disputes with governments, can be resolved. It is axiomatic that the substantive content of the law, the rights and obligations, are hollow unless a means is available to ensure that these rights can be exercised equally by all those who they are intended to protect.

15. Equal access to justice is a fundamental tenet of the Canadian justice system. The principle of equal access to justice flows from the overarching constitutional commitment to both the rule of law and the norm or *Charter* value of substantive equality. These principles are inextricably linked in a constitutional democracy and in the inherent values of the dignity of the human person, the commitment to social justice and equality and the respect for cultural and group identity.

R. v. Oakes, [1986] 1 S.C.R. 103 at para. 64

16. Within the rubric of the rule of law today, equal access to justice does not mean Diceyan formal equality, that is, mere recognition of everyone's similar position in the justice system and its equal application to everyone. Section 15 and human rights jurisprudence must be considered as part of the interpretive backdrop to the rule of law. The Court has been unequivocal in eschewing a "thin and impoverished" narrow formalistic interpretation of the equality rights both in constitutional and quasi-constitutional law. Rather it has unhesitatingly embraced a rich, purposive, substantive guarantee of equality, which encompasses the duty to promote a more equal society and an obligation to take into account the possible impact of measures on "already disadvantaged classes of persons".

Ontario Human Rights Commission v. Simpsons-Sears, [1985] 2 S.C.R. 536 at paras. 14 and 18

Andrews, supra at paras. 26 and 34.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at paras. 73, 78, 79.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at paras. 61, 83.

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] 3 S.C.R. 3 at paras. 41 and 81.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at para. 51.

R. v. Kapp, [2008] 2 S.C.R. 483 at paras. 14-16, 25.

17. The *Charter* value of substantive equality means that courts must take into account the situation of disadvantage experienced by a public interest plaintiff or an organization representative thereof in considering the issue of standing. The abstract right of equal access to justice must be grounded in the real experiences of individuals seeking to challenge the constitutionality of laws or governmental actions that have a differential impact on them.

18. The rule of law is particularly important for disadvantaged and marginalized persons because as a group their underprivileged status makes them particularly vulnerable and most in need of protection from arbitrary power, for the preservation of the normative order, and for protection from the state.

Christie (S.C.C.)*, supra* at para.20.

Patricia Hughes, "Recognizing Equality as a Fundamental Constitutional Principle", (1999) 22 Dalhousie L.J. 5 at 33

Janet Mosher, "Poverty – A Case Study", Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, vol. 3 (Toronto: Ontario Legal Aid Review, 1997), at 915

19. With respect, the Chambers judge erred in failing to turn his mind to the value of equality in considering the law and evidence in this matter. As a result of the restrictive interpretation of public interest standing employed by the Chambers judge, the very persons intended to benefit from the *Charter* lack the means to bring a constitutional challenge, a lack which compounds and exacerbates the effects of their exclusion from the legislative process. To deny access to justice to persons who are some of the most fragile, most marginalized, most isolated and exposed to violence is a profound denial of the

equality before the law which underlies all of the *Charter's* guarantees, and which is an essential foundation of the rule of law in a democratic society.

20. WCL submits that a liberal and generous application of the public interest standing test that is consistent with the *Charter* value of equality and the fundamental constitutional guarantee of access to justice requires courts to turn their minds to apply the constitutionally-mandated equality lens as an integral part of each of the three steps in the test. To do otherwise is to make the public interest standing test into an additional barrier to equal access to justice for vulnerable and disadvantaged groups. The Chambers judge failed to integrate equality concerns into the application of the relevant principles resulting in fatal errors in applying the principles and in assessing the evidence related to the second and third steps.

C. The Appellants Have a Direct and Genuine Interest

21. The second branch of the public interest standing test concerns the individual or organization seeking standing. The Appellants have both a direct and genuine interest in challenging the Prostitution Laws.

22. In the Court below, the Respondent did not seriously challenge the bona fide nature of the Appellants' interest in this matter and hence the issue was addressed only briefly. Indeed, there is a tendency to undertake a cursory pro forma analysis at this stage in order to move on quickly to the more contentious third step. However, it is important to make a full inquiry at each branch in order to avoid collapsing the two steps together, as exemplified by the errors in the judgment below. The second step inquires into "who" is bringing the claim and the nature of their interest in the matter, and the third pertains to the issues related to the nature of the process, that is to the questions of "what" and "how" the public interest plaintiff proposes to proceed and whether there are reasonable and effective alternatives to it.

Reasons for Judgment at paras. 68-69 and 75.

Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General), [1993] 3 S.C.R. 675 at paras.15-16

Canadian Council of Churches, supra at paras.39-40.

Canadian Bar Assn. v. British Columbia (2006), 59 B.C.L.R. (4th) 38 (S.C.) at paras.58-59; aff'd on other grounds 76 B.C.L.R. (4th) 48 (C.A.)

23. The evidence below clearly demonstrates that prostitutes, the members of SWUAV and Ms. Kiselbach are a particularly vulnerable group.

Affidavits of Sex Workers, Exhibit C to Affidavit #1 of Nicole Capler, Appellant's Appeal Book, Volumes 1-3 at 92-412. See Condensed Book for details.

24. The direct nature of the Appellants' interest in pursuing this public interest claim is demonstrated through the personal histories of Ms. Kiselbach and SWUAV members and the reasons for associating for the purposes of collective action. The Chambers judge erred by discounting the past and ongoing unconstitutional impact of the impugned provisions claimed by Ms. Kiselbach and individual members of SWUAV.

Affidavit #1 of Sheryl Kiselbach at para 23, Appellant's Appeal Book, Volume 3

Affidavit # 1 of Jill Chettiar, at paras. 14(b), 18(d), Appellant's Appeal Book, Volume 3 at 594-99.

25. The finding that SWUAV and Ms Kiselbach's interest in this claim is not distinguishable from members of the general public flies in the face of this evidence and can only be explained by the Chamber judge's failure to appreciate the equality concerns at issue here. The Appellants are clearly affected by the Prostitution Laws in a manner different from the ordinary citizen given their lived experiences and the claimed impact of the impugned laws on their constitutional rights.

26. SWUAV is a society comprised of women who are currently or were recently engaged in prostitution. The fact that SWUAV is an organizational plaintiff does not rob it of its genuine interest in pursuing this claim. Canadian courts have held that a direct effect can give rise to a genuine interest, even though no personal constitutional rights are engaged. Organizations have been granted public interest standing in appropriate circumstances.

Canadian Bar Association, British Columbia Branch v. British Columbia (Attorney General) (1993), 101 D.L.R. (4th) 410 at 419 (BCSC).

Conseil du Patronat du Quebec v. Quebec (Attorney General), [1991] 3 S.C.R. 685 at para. 1; aff'ing 55 D.L.R. (4th) 523 at 528 (C.A.).

Hospital Employees' Union v. Northern Health Authority, 2003 BCSC 778 at paras. 21-23.

27. The ability to act collectively and seek standing as a group is particularly important for women and in particular this group of women who are among the most vulnerable in our community.

Affidavits of Sex Workers, Exhibit C to Affidavit #1 of Nicole Capler, Appellant's Appeal Book, Volumes 1-3 at 92-412. See Condensed Book for details.

Sierra Club of Canada v. Canada (Minister of Finance), [1999] 2 F.C. 211 (T.D.) at para.53

28. There is nothing contingent, speculative, hypothetical or abstract about the Appellants' claim. Their claim is not that the impugned laws might lead to a violation of their rights, as was the case in *Chaoulli*, but that it has done so. The Appellants' interest in this claim is much more direct than that of many other public interest plaintiffs who have been awarded standing to proceed in other cases.

Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791 at paras. 35, 186-9.

Vriend, supra at para.46.

Canada (Minister of Justice) v. Borowski, [1981] 2 S.C.R. 575 at 596-598.

Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265 at 271.

29. The Chambers judge erred by, in effect, conflating the requirement for a direct or genuine interest with the more onerous test for standing as of right. It is ironic that the fact that the Appellants are affected by the impugned laws in a manner different than the ordinary citizen would have been sufficient to ground standing under the more restricted traditional rule in *Smith v. Attorney General of Ontario*. The reformulation of the test which began in the mid-1970s with *Thorson* and maintained after the advent of the *Charter* in *Canadian Council of Churches* was aimed at expanding public interest standing, but its application in this case has had the opposite effect.

Reasons for judgment, at para. 75.

Smith v. Attorney General of Ontario, [1924] S.C.R. 331.

D. There is No Reasonable or Effective Alternative to the Granting of Public Interest Standing

30. WCL submits that the Chambers judge's restrictive interpretation of public interest standing in the case at bar has effectively resulted in the omission of any analysis of reasonableness or effectiveness in the third step of the test. In other words, it is as if the Court is requiring the plaintiffs to show that there is *no other means* for this matter to come before the Court, rather than what the test actually requires, which is for the plaintiffs to show that there are no other *reasonable and effective means*. The test must be applied in a purposive and fulsome manner that ensures that the words "reasonable" and "effective" are given substantial meaning in light of equality considerations.

i. Reasonable likelihood that claims will be brought by directly affected persons must be assessed with regard to the *Charter* value of equality

31. The "mere possibility" that a directly affected private litigant might bring the type of systemic claim brought by the Appellants does not result in the denial of public interest standing. The test is not simply that other directly affected persons could sue, but that such suits would be a reasonable and effective manner to bring the issues before the court and there is a "reasonable likelihood" that they will be brought.

Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 at para.28 and 35

Vriend, supra at para.47

Canadian Bar Association v. British Columbia, 1993*, supra* at 417

Fraser v. Canada (*Attorney General*), [2005] O.J. No. 5580 at para.109 (Sup. Ct. J.)

32. In determining whether there is a reasonable likelihood that claims will be brought by persons directly affected, the court will consider the socio-economic conditions of persons directly affected. This issue must be assessed with common sense. As McPherson J. held in *Unishare Investment Ltd v. R.,* where individuals on the economic margins are affected by a law, it is not reasonable and not realistic to expect that they will be able to mount a challenge to its

constitutionality. The position of those on the "outer margins" of Canadian society constitutes a significant barrier to their participation in this litigation.

> *Fraser*, *supra* at para. 117.
>
> *Unishare Investments Ltd. v. R.*, (1994), 18 O.R. (3d) 603 at 607 (Gen. Div.), aff'd [1997] O.J. No. 4009 (C.A.), leave to appeal refused [1997] S.C.C.A. No. 616.

33. In his dissenting opinion in *Chaoulli,* Binnie J., concurring with the majority on the issue of standing, held that it was unreasonable to expect that individuals in desperate need of medical care would have the material and emotional resources to mount a systemic challenge to the medical scheme. As a result, he found that there was no other class of persons that was more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge. The same holds true here.

> *Chaoulli*, *supra* at para. 189

34. The constitutionally-mandated equality lens requires the Court to take into account the vulnerability of women who engage in prostitution and the barriers to accessing justice experienced by women and in particular marginalized women in its discretion to award public interest standing.

35. Due to their relative disadvantage in Canadian society, women experience unequal access to justice as a result of the many barriers to the courts that operate to hinder and deny their access to the courts, including poverty. One critical example of these barriers is the wholly inadequate legal aid system in this province. Prostitutes face additional barriers to the civil courts due to their precarious and vulnerable situation which militates against the reasonable likelihood of their individual engagement in constitutional litigation, as illustrated by the obstacles to participation in the Parliamentary Subcommittee on Solicitation Laws hearings documented in the record.

> *Christie v. British Columbia (Attorney General)*, 2005 BCSC 122 at para. 74; aff'd in 2005 BCCA 631 at paras. 38-40; rev'd on other grounds 2007 SCC 21.
>
> *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 55.

UN CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada*, 42nd session, 854-55th Mtgs., UN Doc. CEDAW/C/CAN/CO/7 (2008) at para. 21.

UN CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, 36th Sess., 9th-12th Mtgs., UN Doc. E/C.12/CAN/CO4 (2006) at paras. 11(b), 14.

Breaking down barriers: Taking Steps to Improve Sex Trade Workers' Access to the Parliamentary Hearings on Sex Work, Exhibit D to Affidavit #1 of Nicole Capler, Appellant's Appeal Book, Volume 3 at 415-23.

36. WCL submits that consideration of whether an alternative claimant will reasonably be able to bring the claim before the Court must include a substantive equality analysis. That is, given an alternative claimant's vulnerabilities and actual position in society, is it reasonable to presume that claimant will be able to bring the case before the court? In this case, it is unreasonable to expect an individual woman involved in the survival sex trade to bring a constitutional challenge at the time that she is made most vulnerable by the alleged discrimination and other unconstitutional harms claimed to be caused by the impugned laws.

37. There is no requirement that equality claimants challenge discrimination at a particular moment in time when its effects are the most severe. To rule otherwise is to require claimants to further endanger their physical security and expose themselves to risks of violence and incarceration in order to raise issues of discrimination and unconstitutionality of that law. Analogous to the Supreme Courts' finding in *Vriend*, to proceed as the Chambers judge suggests would be an unfair and unsatisfactory result for the vulnerable individuals involved, as well as being wasteful of judicial resources.

Vriend, supra at para.47

ii. The effectiveness of alternatives must be assessed in light of the nature of the public interest claim at issue framed by a substantive equality analysis

38. Where, as in the case at bar, it is unreasonable to expect that a directly affected individual will bring a comparable claim, the Court must consider whether the public interest claim is an effective one. This involves a

consideration of whether the Plaintiffs are capable of making a full, genuine and competent argument and adducing the necessary evidence to enable the court to make a judicial determination of the serious issues raised. This aspect of the test must also be framed by a substantive equality analysis.

39. The preference for parties who have a direct interest is based on the principle that the court should decide the legal issues based on a full factual foundation. However, the correlation between being directly affected and the ability to establish a factual basis for the *Charter* violation is, at best, indirect and imprecise. It should not be presumed that a public interest litigant will be unable to present the requisite factual foundation to decide a case or that a directly affected litigant will always present sufficient facts.

> Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book Inc., looseleaf edition) at para. 5.95.
>
> *Human Rights Institute of Canada v. Canada (Minister of Public Works and Government Services),* [2000] 1 F.C. 475 (T.D.) at para. 26
>
> *Benoit v. Canada*, [1994] F.C.J. No. 595 (T.D.) at para. 11

40. While in some cases a directly affected individual is in a better position to raise legal arguments and present a precise factual scenario, it does not hold that this is always or automatically true. A complex *Charter* claim like the one in the case at bar requires the preparation and presentation of an evidentiary record that is well beyond the means and knowledge of a single, directly affected plaintiff. The preference for individual fact scenarios coupled with the requirement to adduce broad adjudicative facts is highly problematic and creates serious barriers to the courts, particularly for equality rights seekers.

> *Chaoulli, supra* at para. 189.
>
> *Christie* (S.C.C.), *supra* at para. 28.
>
> *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429 at paras. 46-47, 50-51.

41. The New Brunswick Court of Appeal recently underscored the importance of considering the public interest plaintiff's ability to conduct litigation in the third step of the standing test:

> It is, as well, worth bearing in mind that Dr. Morgentaler brings to the judicial arena financial resources and legal expertise which will undoubtedly help level the playing field and greatly improve the chances that any judicial decision on the merits is fully informed both factually and legally.
>
> *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26 at para. 59

42. In the present case, a reasonable inference ought to be drawn that the public interest plaintiff is better placed to ensure that the contending points are before the court.

43. The issue of effectiveness must also be assessed in light of the scope of the claim and the nature of the proceeding. The Chambers judge failed to take into account the very real limitations of raising constitutional issues in a criminal proceeding. These limitations include: prosecutions for these offences are by their nature of brief duration; the vast majority of charges are pled out; legal aid or paid counsel is rarely available to the women charged; and, the Crown has the power to stay prosecution thereby rendering the constitutional issues moot. All of these points are borne out by the evidence before the Chambers judge. Under these conditions, there is no level playing field between the *Charter* claimant and the Crown which largely controls the process.

> Affidavit #1 of Suzanne Wallace-Capretta at paras. 11-14, Appellant's Appeal Book, Volume 1 at 67-73.
>
> Affidavit #1 of Elizabeth Campbell at para. 6, Appellant's Appeal Book, Volume 1 at 6-7.

44. Standing is concerned with consideration of the appropriateness of the court dealing with the particular issue presented at the instance of the particular plaintiff. In *Chaoulli*, Binnie J. clearly distinguished between the systemic claim which in light of practical considerations could only be brought by public interest plaintiffs and claims of individual violations of rights which should be brought by a directly affected person pleading individual circumstances. An individual rights claim cannot be an effective alternative to one that is founded on the systemic violation of rights of a particular group. There is no rational basis for comparing the two.

Chaoulli, supra at para. 189

45. The Chambers judge erred in finding that individual claims (as unlikely as they are) are an effective alternative to this case. The Appellants' claim is not comparable to a rights claim asserted by an individual. The case at bar is based on a wholly different theory of the case: that the collective impact of the impugned laws has an unconstitutional and discriminatory impact on a specific group, that is the group of women working in the survival sex trade. This theory and approach distinguishes this claim from other ongoing cases as well as past precedents, includes those involving alleged johns. It does not duplicate other proceedings that have been or are reasonably likely to be brought by individuals.

46. The protection of scarce judicial resources and the promotion of equal access to justice are both advanced through the granting of public interest standing to the Appellants. It would be an ineffective and imprudent use of court resources to litigate these complex constitutional issues in individual cases. Not only is this alternative scenario unlikely, it is also fundamentally unfair to the vulnerable women claimants who face many barriers to the courts. Given the context of unequal access to justice, it is imperative that this group of women be provided with alternative means of accessing courts to assert their equality rights collectively through the granting of public interest standing.

Part 4: Nature of Order Sought:

47. The appeal should be allowed and public interest standing be granted to SWUAV and Ms. Kiselbach. WCL does not seek costs and requests that costs not be awarded against it.

All of which is respectfully submitted,

Dated:

Melina Buckley	Kasari Govender
Counsel for the Intervener	Counsel for the Intervener

List of Authorities

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Universal Declaration of Human Rights, G.A. Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71	13

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COURT OF APPEAL

BETWEEN:

DOWNTOWN EASTSIDE SEX WORKERS UNITED
AGAINST VIOLENCE SOCIETY and SHERYL KISELBACH

APPELLANTS
(PLAINTIFFS)

AND:

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(DEFENDANT)

AND:

WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
TRIAL LAWYER ASSOCIATION OF BRITISH COLUMBIA

INTERVENERS

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