

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Downtown Eastside Sex Workers
United Against Violence Society v.
Attorney General (Canada),***
2008 BCSC 1726

Date: 20081215
Docket: S075285
Registry: Vancouver

Between:

**Downtown Eastside Sex Workers United
Against Violence Society and Sheryl Kiselbach**

Plaintiffs

And

Attorney General of Canada

Defendant

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

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Date and Place of Trial/Hearing:

October 21, 22, 23, 27, 28, 31, 2008
Vancouver, B.C.

Introduction

[1] The plaintiffs in this action apply for a declaration that various sections of the ***Criminal Code of Canada*** dealing with prostitution violate ss. 2(b), 2(d), 7 and 15 of the ***Canadian Charter of Rights and Freedoms*** (the “***Charter***”) and are therefore of no force and effect.

[2] The matter is set for a six-week trial commencing February 2, 2009. Before me now is an application by the defendant Attorney General of Canada to dismiss the action on the basis that the plaintiffs lack either private or public interest standing. In the alternative, the defendant applies under Rule 19(24) of the ***Rules of Court*** to have portions of the statement of claim struck out and that part of the action stayed on the basis that the pleadings disclose no reasonable claim. In the further alternative, the defendant applies for particulars which it says are necessary for it to know the case it has to meet.

[3] The defendant’s application was heard over a six-day period from October 21, 2008 to October 31, 2008. During the course of that hearing, the plaintiffs also brought a motion to further amend the statement of claim.

Issues

[4] There are thus five issues before me:

- (1) Should the plaintiffs be permitted to further amend their statement of claim?
- (2) Do either or both of the plaintiffs have private standing to bring this action for declaratory relief?

- (3) Do either or both of the plaintiffs have public interest standing to bring this action for declaratory relief?
- (4) Should portions of the statement of claim be struck out under Rule 19(24)?
- (5) Should the plaintiffs be ordered to provide particulars?

Application to Amend the Statement of Claim

[5] In the original writ of summons and statement of claim filed August 3, 2007, there was only a single plaintiff, the Downtown Eastside Sex Workers United Against Violence Society (“SWUAV”). A statement of defence was filed on September 14, 2007. An amended writ of summons and statement of claim were filed on September 29, 2008 which, among other things, added Sheryl Kiselbach as a second plaintiff.

[6] At the hearing of the defendant’s application to dismiss the plaintiffs’ claim, the plaintiffs applied for leave to further amend their statement of claim pursuant to Rule 24(1) which provides:

24(1) A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court, and, subject to Rules 15 (5) and 31 (5)

- (a) once without leave of the court, at any time before delivery of the notice of trial or hearing, and
- (b) at any time with the written consent of all the parties.

[7] The proposed amendments come in response to difficulties in the pleadings that the plaintiffs recognized during the course of the defendant’s arguments. The

purpose of the proposed amendments is, for the most part, to reduce ambiguity and to clarify certain expressions used in the pleadings, including the term “sex worker”.

[8] For example, in paragraph 2 of the amended statement of claim, “sex workers” is defined as “women, including transgendered women, who are currently or recently engaged in sex work primarily in the Downtown Eastside neighbourhood in the City of Vancouver.” This would be replaced in paragraph 2A of the proposed further amended statement of claim, by the following:

2A. For the purposes of this case, the term “sex worker” means a person who is or has been primarily engaged in street based prostitution. The term “street based prostitution” means that the seller of sexual services attempts to engage clients or engages clients in a public place or in a place open to public view. “Prostitution” has the same meaning as it is interpreted and applied in the *Criminal Code of Canada*.

[9] Most of the other proposed amendments are consequential on that change in terminology. For example, in paragraphs 8, 9, 10, 12, 13, 18, 22, 24 and 41 the word “prostitution” would be substituted for the phrase “sex work”. As well, proposed amendments to paragraphs 33, 35, 38, 39, 41, 42 and 43 would clarify the nature of the plaintiffs’ claim in relation to s. 15 of the ***Charter***.

[10] In ***Langret Investments S.A. v. McDonnell*** (1996), 21 B.C.L.R. (3d) 145 (C.A.) at para. 34, our Court of Appeal held that an application for leave to amend under Rule 24(1) ought to be granted unless the opposing party can demonstrate prejudice or unless the amendment will be useless:

Rule 24(1) of the *Rules of Court* in British Columbia allows a party to amend an originating process or pleading. Amendments are allowed

unless prejudice can be demonstrated by the opposite party or the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the civil rules which is to ensure the just, speedy and inexpensive determination of every proceeding on the merits. See McLachlin and Taylor, *British Columbia Practice* (2nd Ed.) pp. 24-1 to 24-2-10, and the decision of this Court in *Chavez v. Sundance Cruises Corp.* (1993), 15 C.P.C. (3d) 305, 309-10.

[11] In my view, no real basis has been shown for refusing to permit the proposed amendments. The application for an order that the statement of claim be amended in the manner set out in Appendix “A” of the plaintiffs’ notice of motion filed October 30, 2008 is granted. In the remainder of this judgment, when I refer to the statement of claim, I am referring to the statement of claim as thus amended.

The Nature of the Plaintiffs’ Claim

[12] The only relief sought in the statement of claim is for a declaration. The court’s jurisdiction to make declaratory judgments is found in Rule 5(22), which provides:

5 (22) No proceeding shall be open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[13] The plaintiffs’ prayer for relief is set out at the end of the statement of claim in these terms:

The Plaintiffs claim as follows:

- (a) A declaration that ss. 210, 211, 212(a), (b), (c), (d), (e), (f), (h), and (j) and (3), and 213 of the *Criminal Code* individually and/or

in combination infringe ss. 7, 15, 2(b) and/or 2(d) of the *Charter*, and that the impugned sections of the *Criminal Code* are not justified under s. 1 of the *Charter* and as such are of no force and effect.

- (b) In the alternative, a declaration that ss. 210, 211, 212(a), (b), (c), (d), (e), (f), (h), and (j) and (3), and 213 of the *Criminal Code* individually and/or in combination infringe ss. 7, 15, 2(b) and/or 2(d) of the *Charter*, and that the impugned sections of the *Criminal Code* are not justified under s. 1 of the *Charter* and as such are of no force and effect, save and except for s. 212(1), which shall be read down and replaced by the following:

Every person who lives wholly or in part on the avails of prostitution of another person, and who,

(a) for the purposes of profit, aids, abets, counsels or compels the person to engage in or carry on prostitution with any person or generally, and

(b) uses, threatens to use or attempts to use violence, intimidation or coercion in relation to the person or to another person; and/or

(c) procures a person to enter or leave Canada for the purposes of prostitution; and/or

(d) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[14] The impugned sections of the ***Criminal Code*** deal with different aspects of prostitution.

[15] The plaintiffs seek to strike down s. 210, which makes it an offence to keep or to be found in a common bawdy-house:

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

- (a) is an inmate of a common bawdy-house,
- (b) is found, without lawful excuse, in a common bawdy-house, or
- (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

[16] The plaintiffs also seek to strike down s. 211, which deals with transporting a person to a common bawdy-house:

211. Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.

[17] Section 212 deals with procuring and living on the avails of prostitution. The plaintiffs do not attack all aspects of that section. In particular, they do not seek to strike down those parts of the section that deal with persons under the age of eighteen years, or with administering a stupefying substance, or with procuring a person to enter or leave Canada for the purposes of prostitution. The impugned parts of the section are limited to ss. 212(a), (b), (c), (d), (e), (f), (h), and (j) and (3), which provide:

212. (1) Every one who

- (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
- (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
- (c) knowingly conceals a person in a common bawdy-house,
- (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
- (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
- (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,

...

- (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,

...

- (j) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

...

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).

[18] Finally, the plaintiffs seek to strike down s. 213, which deals with soliciting in a public place:

213. (1) Every person who in a public place or in any place open to public view

- (a) stops or attempts to stop any motor vehicle,
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
- (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

[19] To put these sections in context, it is useful to cite certain definitions contained in s. 197 of the ***Criminal Code***, although the plaintiffs do not attack those definitions. Section 197(1) defines "common bawdy-house", and "prostitute" as follows:

197. (1) In this Part,

...

"common bawdy-house" means a place that is

- (a) kept or occupied, or
- (b) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

...

"prostitute" means a person of either sex who engages in prostitution;

[20] The allegation of the plaintiffs is that the impugned sections of the ***Criminal Code***, which they refer to as the "Prostitution Laws", individually and collectively have effects that infringe the rights of sex workers (that is, persons who are or have been primarily engaged in street based prostitution) guaranteed by ss. 2(b), 2(d), 7, and 15 of the ***Charter***. Those sections provide:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

...

(d) freedom of association.

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[21] With respect to s. 2(b) of the ***Charter***, the plaintiffs' claim at paragraph 45 of the statement of claim is as follows:

45. The Communication Law infringes sex workers' rights, including those of the members of SWUAV and Ms. Kiselbach, to freedom of expression. The Communication Law is aimed specifically at restricting the content of expression by prohibiting a particular message sought to be conveyed, namely communication for the purpose of engaging in prostitution.

[22] In relation to s. 2(d) of the ***Charter***, the plaintiffs say at paragraph 27 of the statement of claim:

27. The Prostitution Laws individually and/or collectively infringe and have infringed sex workers' rights, including those of the members of SWUAV and Ms. Kiselbach, to freedom of association. The Laws prevent and/or limit sex workers from joining together in furtherance of a common goal, namely the goal of improving and controlling working conditions, including safety and security. The Laws prevent and/or limit sex workers from engaging in associational activities and from doing collectively what they may otherwise legitimately do individually.

[23] The alleged effect on sex workers' freedom of association is further particularized in paragraphs 28-31.

[24] The plaintiffs claim in relation to s. 7 of the **Charter** as set out at paragraph 20 of the statement of claim is that:

20. The Prostitution Laws individually and/or collectively subject or have subjected sex workers, including members of SWUAV and Ms. Kiselbach, to increased risk of physical and sexual violence, psychological injury, kidnapping and death, and other threats to security, health and safety. The Prostitution Laws deprive sex workers of the ability to lawfully conduct their work safely because they are prevented from taking steps to improve health and safety conditions in their work (described below). Under the Prostitution Laws, taking such steps involves committing criminal offences and increases the potential for police detection and criminal sanction.

[25] The alleged effects are further particularized in paragraphs 21-26.

[26] With respect to s. 15 of the **Charter**, the plaintiffs' claim at paragraphs 35 and 38:

35. The Prostitution Laws discriminate against sex workers, as represented by SWUAV, and against Ms. Kiselbach personally. In particular, the Prostitution Laws, have a severe and disproportionate impact on those who sell sex, either on the basis of their status as sex workers, or because they are women, as compared to people who buy sex. The Prostitution Laws together create a situation where risk to sex workers is increased and frequently realized, in a manner harmful

to their persons and their dignity, because they are working in remote places and working alone in order to avoid police detection and contravention of the Prostitution Laws.

...

38. In addition or in the alternative, the Prostitution Laws draw a formal distinction or, in the alternative, have a severe and disproportionate impact on sex workers, as compared to those persons in other occupations, by making prostitution more dangerous than it would be if the Prostitution Laws did not exist and placing sex workers at greater risk. Persons in other occupations are permitted to communicate in public, are permitted to operate indoors and are permitted to form business relationships with others for the purpose of advancing their economic well-being. These activities are prohibited under the Prostitution Laws.

[27] The alleged infringement of s. 15 is further particularized in paragraphs 32 to 44 of the statement of claim.

The Plaintiffs

[28] The Downtown Eastside Sex Workers United Against Violence Society is described in paragraphs 1 and 2B of the statement of claim as a registered British Columbia society whose objects include improving working conditions for women working in the sex trade, and whose members are women, including transgendered women, sex workers primarily in the Downtown Eastside neighbourhood of Vancouver.

[29] Sheryl Kiselbach is described in paragraph 7 of the statement of claim as a 58-year-old former sex worker, who is currently a coordinator at a centre that offers support services for sex workers.

The Issue of Standing

[30] The defendant takes the position that the action commenced by these two plaintiffs should be dismissed on the basis that neither plaintiff has standing to seek the relief set out in the statement of claim.

[31] The question of standing is distinct from the question under Rule 19(24)(a) of whether the pleadings disclose a reasonable claim. The latter question focuses on the nature of the claim pleaded, whereas the issue of standing has to do with whether the plaintiff is a person in a position to be making that particular claim. As explained in T. A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), at p. 3:

Standing is concerned with the appropriateness of the court's dealing with the particular issue presented at the instance of the particular plaintiff.

[32] In ***Saanich Inlet Preservation Society v. Cowichan Valley (Regional District)***, [1983] 4 W.W.R. 673 (B.C.C.A.) Hutcheon J.A. explained at p. 674 that standing is "the legal entitlement of [the plaintiff] to invoke the jurisdiction of the Court."

[33] Traditionally, standing for private individuals to litigate constitutional issues was limited to those cases in which they had a direct interest. Where such a direct interest in the question to be litigated can be shown, the party is said to have personal or private interest standing. Such standing arises as of right from the party's direct interest in the issue and does not depend on the discretion of the court.

More recently, however, courts have recognized the need in certain exceptional cases to permit constitutional issues to be litigated by a party who does not have such a direct personal interest. In these cases, the court has a discretion to grant public interest standing provided certain requirements are met, most notably, the requirement that there is no other reasonable and effective means of bringing the matter before the court.

[34] In the present case, the plaintiffs assert both that they have private interest standing, and also that they should be granted public interest standing.

[35] The plaintiffs also submit that if there is any doubt as to their standing, this question should not be determined as a preliminary issue on this motion, but should rather be deferred to trial.

[36] In ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607, Le Dain J. discussed the circumstances under which it may be appropriate to decide an issue of standing in advance of a full hearing on the merits and concluded at p. 617 that it depends on the nature of the issues and the sufficiency of the material before the court on the preliminary motion:

It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. In my opinion the present case is one in which the question of standing can be properly determined on a motion to strike. The nature of the respondent's interest in the substantive issues raised by his action is sufficiently clearly established by the allegations and contentions in the statement of claim and the statutory and contractual provisions relied on without the need of evidence or full argument on the merits.

[37] I am satisfied that the issues raised here are clear and that the material before me is sufficient to determine the question of standing on this preliminary motion. For the purposes of deciding this question, I shall assume that the plaintiffs would be able to prove the allegations of fact set out in the statement of claim. The plaintiffs are therefore, on this motion, in as strong a position as they would be if the issue were left to be decided at trial: ***District of Kitimat v. Alcan Inc.*** (2006), 51 B.C.L.R. (4th) 314 (C.A.) at paras. 14-16.

Private Interest Standing

[38] The issues that the plaintiffs seek to have determined on this action all relate to the constitutional validity of various sections of the ***Criminal Code***. They ask for a declaration that ss. 210, 211, 212(a), (b), (c), (d), (e), (f), (h), and (j) and (3), and 213 dealing with prostitution are of no force and effect because they are inconsistent with ss. 2(b), 2(d), 7 and 15 of the ***Charter***.

[39] Although the statement of claim makes no mention of it, the plaintiffs presumably rely upon s. 52(1) of the ***Constitution Act, 1982***, which provides:

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.

[40] The usual circumstance in which a person would have private interest standing to challenge the constitutional validity of a criminal law statute is where that person is charged with an offence under the legislation. In that case, the person would have private interest standing to raise the constitutional question without

having to seek leave of the court, since no one should be convicted under an unconstitutional statute. That situation, where the person is before the court involuntarily as an accused, is to be contrasted with a case like the present one, where the plaintiffs on their own initiative come to court seeking a declaration that the statute is unconstitutional.

[41] Thus, in ***R. v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, the Court held at pp. 313-314:

Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575) but that was not the reason for its appearance in Court.

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the *Charter* and by reason of s. 52 of the *Constitution Act, 1982*, it is of no force or effect.

[42] Similarly, a person or corporation may have private interest standing to challenge the constitutional validity of a compulsory legislative scheme if it is a defendant in a civil law suit brought against them by a government agency under that legislation. Again, the rationale for recognizing standing as of right in such a case is that the litigant did not come before the court voluntarily seeking a declaration, but rather is seeking to defend itself against coercive government action

under what it claims is an unconstitutional statute. As the Supreme Court of Canada explained in ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R.

157, at para. 44:

Our expanding the *Big M Drug Mart* exception to civil proceedings in these limited circumstances is not intended to provide corporations with a new weapon for litigation. The purpose of the expansion is to permit a corporation to attack what it regards as an unconstitutional law when it is involuntarily brought before the courts pursuant to a regulatory regime set up under an impugned law. Surely, just as no one should be convicted of an offence under an unconstitutional law, no one should be the subject of coercive proceedings and sanctions authorized by an unconstitutional law.

[43] In the present case, SWUAV clearly lacks private interest standing. It is not charged under any of the impugned provisions, nor is it a defendant in a suit instituted against it by the government. Moreover, the rights which it says are infringed by the impugned provisions are not its own rights, but rather the rights of some of its members. As a society registered under the ***Society Act***, R.S.B.C. 1996, c. 433, SWUAV is a separate person, distinct in law from its members. It cannot achieve private interest standing by purporting to act in a representative capacity for its members: ***District of Kitimat v. Alcan Inc.*** at para. 47; ***Re Energy Probe et al. and Attorney-General of Canada*** (1987), 61 O.R. (2d) 65 (H.C.J.) at p. 70, reversed on other grounds (1989), 68 O.R. (2d) 449 (C.A.).

[44] Evaluating Sheryl Kiselbach's claim to private interest standing is more complex. Although she is not a defendant in a civil law suit and is not now charged with an offence, she has in the past been charged and convicted of soliciting under s. 213, and of keeping a common bawdy-house under what is now s. 210.

According to paragraph 9 of the statement of claim, Ms. Kiselbach worked for 30 years as an exotic dancer, performing live sex shows, working in massage parlours, and engaging in street-based prostitution as well as freelance indoor prostitution.

[45] Referring to the statement of claim and to Sheryl Kiselbach's affidavit affirmed September 25, 2008, counsel for the plaintiffs submit that Ms. Kiselbach's **Charter** rights have been affected by the impugned legislation in the following ways:

- (a) Her rights under ss. 2(b) and 7 of the **Charter** have been affected by s. 213 of the **Criminal Code** because it has restricted her ability to communicate in public, and has caused her to engage in dangerous work in order to avoid it (statement of claim paragraphs 22(a), 29, 45);
- (b) Her rights under s. 2(b) of the **Charter** have been affected because communicating in public has led to her being charged and convicted under s. 213 of the **Criminal Code** (statement of claim paragraphs 11, 45);
- (c) Her rights under ss. 2(d) and 7 of the **Charter** have been affected by ss. 210, 211, and 212 of the **Criminal Code** because they have restricted her ability to work indoors with other sex workers to create safer working conditions (statement of claim paragraphs 22(b), (d));
- (d) Her rights under s. 7 of the **Charter** have been affected because she has been charged and convicted under what is now s. 210 of the **Criminal Code** (statement of claim paragraph 11);
- (e) Her charges and convictions have affected her ability to obtain other employment, thereby infringing her rights under s. 15 of the **Charter** (statement of claim paragraph 11);
- (f) She has been affected by ss. 210, 211, 212 and 213 of the **Criminal Code** together in their restriction of her ability to work safely outside, work inside without fear of prosecution, and work together with others to work more safely. All of these features of the effects of the laws contributed to increased danger for her, leading to her being the victim of violence on numerous occasions, which has had lasting effects on her (statement of claim paragraphs 12, 22, 36, 38);

(g) She has been affected by ss. 210, 211, 212 and 213 of the ***Criminal Code*** together in their deprivation of her ability to safely do an otherwise legal activity (statement of claim paragraphs 38, 39, 43);

(h) She has been affected by ss. 210, 211, 212 and 213 of the ***Criminal Code*** together, due to their isolating effect on a class of people (sex workers) who are treated with less worth and dignity by the laws as a result. This isolation of sex workers as being deserving of criminal sanction has caused or contributed to their general exclusion from society and the negative or insufficient treatment they receive, and Ms. Kiselbach has experienced those effects directly (statement of claim paragraphs 13, 14, 15, 38, 39, 41, 43).

[46] The critical impediment to Ms. Kiselbach now claiming to have personal or private interest standing to challenge the impugned provisions in the current action is that the effects which she says she has experienced are a result of her past activities as a sex worker and the way the legislation impacted on those activities.

[47] Paragraph 10 of the statement of claim states that Ms. Kiselbach is not currently engaged in prostitution and does not at present intend to re-enter the sex trade. 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.).

[51] The fact that the plaintiffs have framed their action as a request for a declaratory judgment does not relieve them from the requirement of demonstrating that they have standing: ***Fraser v. Houston***, [1996] B.C.J. No. 2096 (S.C.). As Finch C.J. observed in delivering the judgment of the Court of Appeal in ***District of Kitimat v. Alcan Inc.***, at para. 92:

A simple claim to declaratory relief, in the absence of some adversely affected legal interest does not give the Court an overriding discretion

to grant that relief, and to ignore the legal principles governing private interest standing.

[52] Neither of the plaintiffs has shown any proper basis for claiming private interest standing to bring the present action. Accordingly, the action must be dismissed unless at least one of them is able to persuade the court that they should be granted public interest standing, the topic to which I next turn.

Public Interest Standing

[53] Until the mid-1970s it was generally held that an individual has no standing to challenge the constitutional validity of a statute unless he or she is specially affected or exceptionally prejudiced by it. This was known as the rule in ***Smith v. Attorney General of Ontario***, [1924] S.C.R. 331. A typical formulation of the rule is found in ***Mercer v. Attorney General of Canada*** (1972) 24 D.L.R. (3d) 758 (Alta. S.C. App. Div):

The rule that one who seeks to question the validity of federal or provincial statutes must either be placed in jeopardy by its provisions or be affected by them in a manner different from the ordinary citizen, has its origin in *Smith v. A.-G. Ont.*

[54] What we now speak of as public interest standing was introduced into Canadian law in a series of Supreme Court of Canada cases starting with ***Thorson v. Canada (Attorney General)***, [1975] 1 S.C.R. 138. In that case, the Court exercised a discretion to grant Mr. Thorson standing as a taxpayer to seek a declaration that Canada's ***Official Languages Act***, R.S.C. 1970, c. O-2 was

unconstitutional, even though he could not show private interest standing under the rule in ***Smith***.

[55] Next, in ***Nova Scotia Board of Censors v. McNeil***, [1976] 2 S.C.R. 265, a member of the public was granted standing to challenge Nova Scotia's ***Theatres and Amusements Act***, R.S.N.S. 1967, c. 304 on the basis that it was *ultra vires* the provincial legislature and therefore improperly affected what he, and all other members of the public, could and could not see in the theatre. The Court exercised its discretion to grant Mr. McNeil standing, even though he was not a theatre owner and was therefore not directly subject to the regulatory effect of the Act.

[56] Then, in ***Canada (Minister of Justice) v. Borowski***, [1981] 2 S.C.R. 575, the Court granted standing to an anti-abortion activist seeking a declaration under the ***Canadian Bill of Rights*** that sections of the ***Criminal Code*** permitting therapeutic abortion were invalid and inoperative. At p. 598, the Court set out three principles governing the discretion to grant public interest standing to a litigant seeking declaratory relief: the litigant must demonstrate that he is directly affected or has a genuine interest in the validity of the legislation, that there is a serious constitutional issue involved, and that there is no other reasonable and effective way to bring the issue before the court.

[57] A few years later, in ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607, the Supreme Court extended the discretion to grant public interest standing to include cases involving a challenge to the exercise of administrative authority. Speaking for the Court, Le Dain J., at p. 631, reaffirmed the three criteria for granting

public interest standing articulated in *Borowski*, and explained the judicial concerns underlying them:

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*.

[58] The principles for granting public interest standing were again reviewed in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. Speaking for the Court, Cory J. remarked at p. 252 that “the principles for granting public standing set forth by this Court need not and should not be expanded” and then rearticulated the test 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?

Serious Issue to be Tried

[59] The plaintiffs take the position that the defendant’s application under Rule 19(24)(a) ought to be determined first, before the issue of standing is decided. The defendant takes the opposite view.

[60] The plaintiffs' position seems to be based on the proposition that the first requirement for public interest standing, namely, that there is a serious issue to be tried, is equivalent to the question under Rule 19(24)(a) of whether the pleadings disclose a reasonable cause of action.

[61] While those two questions are obviously related, I do not agree that the question of whether there is a serious issue can only be determined by first ruling on the Rule 19(24) application. In ***Canadian Council of Churches***, the Supreme Court of Canada was able to conclude that there was a serious issue as to the validity of the legislation without engaging in the detailed analysis that would have been necessary to reach a conclusion on all the points that had been raised about the adequacy of the pleadings. At pp. 253-254, after noting that some of the allegations in the statement of claim were "so hypothetical in nature that it would be impossible for any court to make a determination with regard to them", Cory J., speaking for the Court, went on to find that for the purpose of standing "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation." Then at p. 256, after deciding the plaintiff lacked standing, he concluded it was not necessary to review the statement of claim in detail to determine if it disclosed a cause of action:

In light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail.

[62] In the present case, as part of its argument under Rule 19(24), the defendant made detailed submissions about numerous alleged inadequacies in the statement

of claim. Many of the alleged defects, if found to exist, could no doubt be remedied by further amendments to the statement of claim, or through the delivery of particulars.

[63] For the purposes of the inquiry into whether public interest standing ought to be granted, I am prepared to find (in the words of Cory J.) that “some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation.”

[64] For one thing, although the defendant has applied to strike out portions of the statement of claim dealing with ss. 2(b), 2(d), and 15 of the **Charter**, it does not argue that the portions dealing with s. 7 should be struck. Thus, even if the defendant were entirely successful on its application under Rule 19(24)(a), there would still remain some aspects of the claim that raise a serious issue as to the validity of the legislation.

[65] Moreover, many of the defendant’s arguments in respect of ss. 2(b), 2(d), and 15 of the **Charter** have more to do with the improbability of success of the plaintiffs’ position than with actual defects in the pleadings. For example, the defendant submits that the predecessor of s. 213(1)(c) of the **Criminal Code** has already been upheld in **Reference re ss. 193 and 195.1(1)(c) of the Criminal Code**, [1990] 1 S.C.R. 1123, and therefore it is plain and obvious that the plaintiffs’ attack on that section under s. 2(b) of the **Charter** is bound to fail. The plaintiffs, on the other hand, submit that it is open to the Supreme Court of Canada to reverse its position, particularly if new and different evidence is led on the issue of whether a violation of

s. 2(b) can be saved under s. 1 of the **Charter**. They refer to ***Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia***, [2007] 2 S.C.R. 391 as a recent example where the Supreme Court of Canada reversed the position it had earlier adopted in ***Reference re Public Service Employee Relations Act (Alta.)***, [1987] 1 S.C.R. 313 and ***Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)***, [1990] 2 S.C.R. 367 on the scope of the protection offered by s. 2(d) of the **Charter**.

[66] I agree with the plaintiffs that their claim should not be struck out under Rule 19(24)(a) simply on the basis that it is unlikely to succeed. As Wilson J. noted in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959 at pp. 990-991, the fact that a pleading reveals a difficult but arguable point of law should not justify striking it out, as otherwise the law would be unable to develop and evolve.

[67] I conclude, therefore, that the first requirement for public interest standing is met; the plaintiffs have raised a serious issue as to the validity of the legislation.

Genuine Interest

[68] The second requirement a plaintiff must establish for public interest standing is that he or she is directly affected by the legislation or has a genuine interest in its validity.

[69] As I understand it, the defendant does not argue that the plaintiffs lack a genuine interest in the validity of the legislation. The thrust of their argument is rather on the third component of the public interest test.

Other Reasonable Means

[70] The third question that must be answered before granting public interest standing is whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court.

[71] As Major J. noted 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 p. 692, it is this component that lies at the heart of the discretion to grant public interest standing:

The third criteria, that there be no other reasonable and effective way to bring the issue before the court, lies at the heart of the discretion to grant public interest standing. If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations.

[72] In ***Canadian Council of Churches*** at pp. 252-53, Cory J. said this about the rationale for the third component:

The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982*. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a [*sic*] well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be

detrimental, if not devastating, to our system of justice and unfair to private litigants.

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. 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. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

[Underlining Added]

Those comments were referred to with approval by Major J. in ***Hy and Zel's Inc.*** at p. 689.

[73] The defendant submits that there are other reasonable and effective means for the constitutional validity of the impugned sections of the ***Criminal Code*** to come before the court and has filed a number of affidavits to establish that there is currently other litigation underway in Canada in which the same issues are being raised.

[74] ***Bedford, Lebovitch and Scott v. Attorney General of Canada***, No. 07-CV-329807PD1 is an application filed in the Ontario Superior Court of Justice seeking a declaration that ss. 210, 212(j) and 213(1)(c) of the ***Criminal Code*** violate s. 7 of the ***Charter*** and that s. 213(1)(c) violates s. 2(b) of the ***Charter*** and that the sections are therefore of no force and effect. According to the affidavit material before me, a hearing date has not yet been set, but it is expected to be some time in the summer of 2009.

[75] The fact that there is another civil case in another province which raises many of the same issues would not necessarily be sufficient reason for concluding that the present case in this province should not proceed. What is noteworthy, however, is that one of the plaintiffs in the Ontario case has deposed that she is *currently* engaged in prostitution. It thus appears that she may have a more direct interest in the constitutional challenge than do the plaintiffs in the case at bar. If nothing else, the ***Bedford*** case illustrates that if public interest standing is not granted to SWUAV and Ms. Kiselbach, there may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court.

[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.

[79] Other criminal cases in which the impugned legislation has been challenged on the basis of alleged infringements of ss. 2(b), 2(d), 7, and 15 of the **Charter** include: **R. v. DiGiuseppe**; **R. v. Cooper** (2002), 161 C.C.C. (3d) 424 (Ont. C.A.); **R. v. Hamilton**, Vancouver Provincial Court Registry No. 114267; **R. v. W.(S.D.)**, [1995] C.R.D. 350.70-01 (N.S.C.A.); **R. v. Skinner**, [1990] 1 S.C.R. 1235; **R. v. Stagnitta**, [1990] 1 S.C.R. 1226; **R. v. Smith** (1988), 44 C.C.C. (3d) 385 (Ont. H.C.J.); **R. v. Jahelka** (1987), 43 D.L.R. (4th) 111 (Alta. C.A.); **R. v. Kazelman** (1987), 10 C.R.D. 525.100-08 (Ont. P.C.); **R. v. McLean**; **R. v. Tremayne** (1986), 28

C.C.C. (3d) 176 (B.C.S.C.); ***R. v. Bailey*** (1986), 9 C.R.D. 525.20-02 (Ont. P.C.); ***R. v. Renner*** (1986), 29 C.C.C. (3d) 138 (N.S.S.C.); ***R. v. Bear*** (1986), 54 C.R. (3d) 68 (Alta. P.C.); and ***R. v. Gudbrandson*** (1985), 14 W.C.B. 298 (B.C.P.C.).

[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 (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. P.C.), 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***.

[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.

[84] In their written submissions at paragraph 180, the plaintiffs argue that:

The most reasonable and effective way to bring litigation challenging the constitutionality of the criminal law provisions regulating sex work is for that society [SWUAV], working together with and in support of an individual plaintiff [Ms. Kiselbach], who is able to present to the Court evidence about the factual scenarios in which their members' rights have been breached by the effect of the Prostitution Laws.

[85] That submission, however, misstates the test that I am bound to apply. 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.

[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 I Kiselbach will not result in the legislation being effectively immune from judicial scrutiny.

Conclusion

[88] I find that neither of the plaintiffs has standing to seek the relief set out in the statement of claim. For that reason, the claim is dismissed. In light of this conclusion, it is not necessary to consider in further detail the defendant's application under Rule 19(24) or its application for the plaintiffs to deliver further and better particulars.

The Honourable Mr. Justice W. F. Ehrcke