# "They Want In": Sex Workers and Legitimacy Debates In the Law of Public Interest Standing

**Lisa Kerr and Elin Sigurdson***

> *... the appellants seek to strike down sections of the* Criminal Code *so as to permit themselves to organize ... in the interests of safety, security and their own well-being, they want in*.
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> Justices Saunders and Neilson, British Columbia Court of Appeal, *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*[1]

## I. INTRODUCTION

Echoes of David and Goliath permeated a five-year long legal fight by a Vancouver-based sex workers organization for the opportunity to access the courts and prosecute their constitutional rights. Overcoming profound marginalization, this group advanced a legal challenge to a criminal law regime that stood between them and the ability to do sex work more safely. The unlikely litigants in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* ("*SWUAV*") then gave life to an unplanned change in the law.[2]

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* Lisa Kerr is an Assistant Professor at Queen's Law where she teaches criminal, sentencing and prison law. Elin Sigurdson is an Associate at Mandell Pinder LLP in Vancouver where her practice focuses on Aboriginal and constitutional litigation. Lisa and Elin both worked with Pivot Legal Society and the Downtown Eastside Sex Workers United Against Violence Society on the litigation discussed in this article.

1 *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2010] B.C.J. No. 1983, 2010 BCCA 439, at para. 9 (B.C.C.A.) [hereinafter "*SWUAV* BCCA"].

2 *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, 2012 SCC 45 (S.C.C.) [hereinafter "*SWUAV*"]. The plaintiff SWUAV is a non-profit organization founded in 2004 by sex workers in the Downtown Eastside of Vancouver, providing outreach and peer support services as well as harm reduction supplies to women engaged in street-level sex work. All of SWUAV's directors and members are current and former street-based sex workers who have experienced poverty, homelessness, addiction and physical and/or sexual violence.

A unanimous Supreme Court of Canada held that the doctrine of public interest standing should be broadened to better enable claimants like them to challenge unconstitutional laws through a group plaintiff.

The Court's decision, authored by Justice Cromwell, represents the important proposition that, where individuals face barriers to bringing litigation in their own names, and the claim is advanced in a manner that would not detract from the justice of the proceeding, a trial judge should typically exercise her discretion to let a claim by a representative organization proceed. *SWUAV* announced a test more consistent with the animating norms of Canadian standing law, including the principles of legality, judicial economy and access to justice.[3]

The *SWUAV* opinion is a uniquely fitting jurisprudential contribution given that Cromwell J. once authored Canada's leading text on the law of standing.[4] Justice Cromwell remarked, in that 1986 text, that standing rules in Canada lacked a rational scheme; "it may be doing the topic an unwarranted kindness to even speak of a law of standing."[5] Decades later, Cromwell J. as Supreme Court jurist was able to articulate the underlying purposes of the law of standing and bring to the doctrine a coherent rationality. The *SWUAV* decision also underscores Cromwell J.'s lengthy public engagement with issues of access to justice. His reasons reveal deep respect and understanding of the barriers sex workers and other marginalized litigants face in advancing constitutional claims as individuals. Justice Cromwell concludes that a formal application of standing rules would amount to a denial of access to judicial review, particularly for the street-based sex workers who constituted the membership of the group plaintiff.

The story of the *SWUAV* litigation, which this chapter endeavours to tell, brings important nuance to a debate about the legitimate functions of courts and legislatures. Constitutional cases invariably raise issues that apply to a broad community of stakeholders. In many cases, not only will an

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[3] For discussion of the *SWUAV* case, see Jane Bailey, "On Being 'Part of the Solution': Public Interest Standing after SWUAV SCC" (2012) 1 Canadian Journal of Poverty Law 121; Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*" (2013) 22:2 Const. Forum Const. For the history of public interest standing generally in Canadian law, see, *e.g.*, Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44 U.B.C. L. Rev. 255, at 259; Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2008) 25 N.J.C.L. 19; Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40 U.B.C. L. Rev. 727.

[4] Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986).

[5] *Id*., at 11.

individual plaintiff be poorly positioned to represent those broad interests, it may be that individual claims are antithetical to the proper resolution of systemic issues.[6] A liberal public interest standing doctrine may thereby not only provide a superior measure of access to the court; a liberal approach to standing may also allow public law claims to be adjudicated on the basis of a proper evidentiary record, and in the context of proceedings that are grounded in those communities most affected by a legal regime.

The upside of a group plaintiff is particularly clear when litigating a controversial and complex issue such as prostitution. In Canada, opponents to decriminalization of sex work have suggested that it is not sex workers themselves who seek decriminalization, but the lawyers who represent them.[7] While there is no evidence for that in this particular case — quite the opposite — it is important as a general matter to ground legal claims in the collective goals of the affected group.[8] Further, in scholarship on the ethical dimensions of community lawyering, there is a call for lawyers to be sensitive to the full range of challenges and dynamics that bear upon their clients' lives.[9] Legal claims should be grounded in collective goals and the litigation experience should be

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[6] Consider, for example, the decision in *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 (S.C.C.) [hereinafter "*Chaoulli*"], where a single doctor and his patient convinced the Supreme Court of Canada to strike down laws that made it illegal to obtain private health insurance for publicly available health services. At the heart of the case was the *Canada Health Act*, R.S.C. 1985, c. C-6, which ensures the delivery of a public healthcare system that affects all Canadians. The *Chaoulli* litigant clearly had private interest standing, but the case shows how an individual claim can implicate the interests of the collective. Certain procedural rules, such as permitting interveners to file briefs and make submissions, can be read as a partial response to this problem.

[7] See, *e.g.*, Janine Benedet, "Paradigms of Prostitution: Revisiting the Prostitution Reference" in Kim Brooks, ed., *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009), at 131. Benedet says this about the two Canadian challenges to the prostitution laws: "The applicants in these challenges have not been charged with any criminal offences. Instead, civil libertarian or 'social justice' lawyers are leading the challenges, with groups of women who identify as 'sex workers' added as applicants to their motions for declaratory relief.": *id.*, at 132. The author offers no source or citation for the suggestion that sex workers were merely "added" to claims that were designed and driven by lawyers.

[8] Justice Cromwell's opinion in *SWUAV* seems aware of that risk, as he directs trial judges to consider factors related to the origins, character and likely effects of a case when exercising their discretion on standing: *SWUAV*, *supra*, note 2, at para. 51.

[9] See, *e.g.*, Shauna Marshall, "Mission Impossible?: Ethical Community Lawyering" (2000) 7 Clinical L. Rev. 147; Stephen Wexler, "Practicing Law for Poor People" (1970) 79:5 Yale L.J. 1049; Anthony Alfieri, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative" (1991) 100:7 Yale L.J. 2107. See also Sameer Ashar, "Law Clinics and Collective Mobilization" (2008) 14 Clinical L. Rev. 355-414. Ashar calls for lawyering agendas that aim to generate conditions for collective mobilization. Rather than being driven by a desire to liberate an individual client, community lawyering should aim for clients to self-actualize "not through their relationship with us, but through their solidarity with peers and visionary political organizers": *id.*, at 406-407.

designed so as to strengthen the collective within which the individual will live beyond the close of any case.[10]

In this light, litigation brought in the name of a group like SWUAV may help to productively resolve some of the ethical quandaries associated with the lawyer-client hierarchy. Justice Cromwell's liberal, flexible approach to public interest standing may help to ensure that legal claims can be tethered to the interests and well-being of the group. Acting on behalf of a group rather than an individual requires true constituency in an affected community. It requires counsel to address conflicting voices within the group and build consensus before being able to obtain instructions and take action. The litigation experience itself, regardless of outcome, may strengthen the group in the sense that working on the case brings opportunities to come together, offer mutual support and consolidate a shared political identity. In contrast, litigation in the name of a single plaintiff with private standing presents risks to the individual and may miss an opportunity to build solidarity for the society in which the litigants will continue to live beyond the case.

For these and additional reasons, we argue that the test articulated in *SWUAV* represents a turn to substantive rationalization in the procedural law that governs Charter[11] litigation. Max Weber described "substantive rationality" as a stage of legal development wherein formal approaches are overcome in favour of modes of analysis that are responsive to social realities.[12] In their classic law and society text, *Law and Society in Transition: Toward Responsive Law*, Philippe Nonet and Philip Selznick build on the Weberian frame to identify "responsive law" as a type of law that arrives to ameliorate the shortcomings of formal law.[13] We argue that the *SWUAV* decision is best understood as an instance of responsive law as developed by Nonet and Selznick.

The chapter proceeds as follows. Part II introduces the idea of "responsive law" from Nonet and Selznick as a lens through which to analyze the legitimacy of the holding in *SWUAV*. Typically, questions of

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[10] Ruth Buchanan & Louise G. Trubek, "Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering" (1992) 19 N.Y.U. Rev. L. & Soc. 687. This means that social justice lawyers should find ways to serve goals set by affected communities and should carefully select litigation according to collective decision-making.

[11] (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[12] See, generally, Max Weber, *Economy and Society* (Berkeley: University of California Press, 1968).

[13] Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Jersey: Transaction Publishers, 2001) [hereinafter "Nonet & Selznick"].

legitimacy in law are focused on whether a law or decision is rightful, in the sense that it meets a set of normative criteria about the exercise of power.[14] Legal decisions are often assessed on the basis of a particular view about the legitimate bounds of the judicial role. The sociological lens deployed by Nonet and Selznick is distinct, though it retains a concern with law's legitimacy. Nonet and Selznick construe law as a mode of organizing social life that will have particular features at different moments in time according to a number of variables. Their perspective generates insight into why the Supreme Court engaged in a purposive approach to the law of public interest standing at this moment in time, and the costs and benefits of doing so.

Part III tells the social and legal story of the *SWUAV* litigation. The story of how this case came to be adds a layer of significance to the Court's ruling. The *SWUAV* litigation was a collective effort in a profound sense, and Cromwell J.'s decision respects the reality that sometimes the group can pursue what the individual cannot. We pay particular attention to how the litigation fared at each level of court. The case is notable for the diverse range of judicial reactions that it invoked along the way: from the *formalism* of the chambers judge, to the provincial appellate court's attention to the *systemic* character of the suit, to the *pragmatism and legality* that animates Cromwell J.'s Supreme Court opinion. The spectrum of responses highlights the legitimacy debates that can arise when litigants seek novel forms of adjudication.

## II. NONET AND SELZNICK: FROM REPRESSIVE TO RESPONSIVE LAW

Many commentators consider the question of standing to be one about the legitimate role of courts. This perspective depends on underlying views about democratic authority and the function of judicial review. Those concerned about a more liberal standing doctrine claim that such a policy can usurp the exclusive authority of legislatures to decide broad policy issues by allowing courts to roam beyond their legitimate dispute

[14] See, *e.g.*, David Beetham, *The Legitimation of Power* (London: Macmillan, 1991). Another branch of the discussion of law's legitimacy considers the conditions under which those who exercise power enjoy moral authority and credibility. See, *e.g.*, Tomas Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006).

resolution function.[15] In the traditional view, courts overreach both their authority and capacity when they order far-reaching changes that affect social policy, or when they allow parties who lack a current, direct interest to seek adjudication.[16]

In their classic law and society text, Nonet and Selznick set out a developmental theory of law that avoids the standard positions on the roles of courts and legislatures. They identify three *types* or *modes* of law, and suggest that each appears at successive stages of legal or political development, and overlap and respond to the strengths and weaknesses of the adjacent type. Each type or mode has a particular method and a particular claim to legitimacy. The typology acknowledges that some legal systems are oppressive, and that law is often constricting and rigid. But the types also capture how law can be a means of realizing freedom and equality.

Legal philosophers tend to engage in questions about what judges can legitimately do by making large conceptual claims, such as that law contains moral principles that judges can draw upon to decide hard cases.[17] Nonet and Selznick take a more *sociological* or *developmental* approach to classic jurisprudential questions, showing how the character of law is different according to stages of social and political development. The answer to the question *what is law* will simply change over time and place according to institutional, political and cultural factors. For this reason, the sociologist sees that legal order has a variable relationship to coercion: law can tame power but it can also be an instrument of the powerful according to the wider context.

The first type of law identified by Nonet and Selznick is *repressive law*. This form is most present in authoritarian legal settings, where state power is dedicated exclusively to the project of state building, establishing authority and securing the monopoly on violence necessary for nationhood. The repressive law model is marked by little separation of power between branches of government. Legal officials are acknowledged to be "pliable

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[15] For the various debates, see Peter Hogg, *Constitutional law of Canada*, 5th ed., looseleaf (Scarborough, ON: Carswell, 2007) vol. 2, at 59; Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), at 152.

[16] Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv. L. Rev. 353. Fuller's classic analysis of legal process summarizes the traditional view of the proper role of courts: that the distinctive competence of judges resides in their ability to resolve disputes according to an established regime of rules where only those who are directly affected by a legal issue can present proofs and arguments on their own behalf.

[17] See, *e.g.*, Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

instruments of the government in power".[18] The position of the legal subject is precarious: coercion may be neither restrained nor tailored to specific goals or harms. Repressive law may begin to give way when a leader sets up a process for the enforcement and administration of power. Such a process may be a convenient way for the leader to stabilize and extend control, but the process itself can give rise to change and the emergence of the next type of law.

*Autonomous law* is likely to emerge where political stability is sufficiently established such that law is no longer required to work in *exclusive* service to the governing authority. Law now becomes a potential resource for "*taming* repression".[19] In this setting, legal officials become preoccupied with the defence of institutional autonomy in accordance with democratic principles. Procedural adherence, fidelity to law and the separation of law and politics are the chief virtues, as law "insulates itself, narrows its responsibilities, and accepts a blind formalism as the price of integrity".[20] Law develops internal independent rules.[21] These features signify the accomplishment of a "government of laws and not of men".[22] Here, the judiciary will be institutionally separated from the realm of politics, and will decide disputes and punish violations with reference to formally promulgated rules or precedents, equally applicable to all litigants, rich or poor, favoured or denigrated.

Whereas *repressive law* secures the basic conditions of social order, *autonomous law* serves as a "strategy of legitimation".[23] Repressive law requires the army or police, whereas autonomous law relies on a more complex form of consent at times when accountability is more vigorously demanded. As Nonet and Selznick write, this is the emergence of the separation of courts from politics:

> In effect, a historic bargain is struck: Legal institutions purchase procedural autonomy at the price of substantive subordination. The political community delegates to the jurists a limited authority to be exercised free of political intrusion, but the condition of that immunity

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[18] Nonet & Selznick, *supra*, note 13, at 34.

[19] *Id.*, at 63 (emphasis added).

[20] *Id.*, at 76.

[21] *Id.*, at 12. Internal independent legal rules may be akin to what Fuller called an implicit procedural morality: Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

[22] Nonet & Selznick, *supra*, note 13, at 53.

[23] *Id.*, at 55, 59.

> is that they remove themselves from the formation of public policy. Those are the terms on which the judiciary wins its independence.[24]

Political authorities in autonomous legal regimes still make the primary rules — like, for example, immigration quotas established in legislation. Judges have the power to interpret and apply these rules, but must do so in a predictable, unbiased manner and without regard to the underlying policy. The judge is not entitled to "examine basic issues of justice or public policy, or even the larger social effects of his own decisions".[25] Like repressive regimes, autonomous law encounters moments of internal strain. Just as repressive law sets up the conditions for legal autonomy, so too does this paradigm give rise to new modalities.

Autonomous law, keenly aware of the neutrality that grounds its legitimacy, tends to "insulate itself" and "narrow its responsibilities".[26] The price to pay is that institutions can become rigid and fail to cope with demands for change. As Marc Galanter powerfully conveyed, the blindfolded, neutral application of law tends to mean that the "haves come out ahead".[27] A purely procedural law can fail to appreciate the impact of neutrality on the ground. Out of this failure can emerge the final type: responsive law.

*Responsive law* can emerge when the limits of autonomous law produce dissatisfaction among legal subjects, such that consent and obedience to the ruling order is undermined. Responsive law is pragmatic, flexible and purposive. With this flexibility, the system will "open up the boundaries of legal knowledge".[28] Trials are increasingly shaped by expert knowledge and jurists pay attention to the grounded realities of law-in-action. Law will increasingly consider the actual consequences of legal rules and decisions.

By making law more flexible, responsive law also bears risks. A legal system can become too malleable, too responsive — authority can decline and political institutions can be delegitimized. This may occur, for example, if a high court precedent is overturned soon after it is decided and without justification for departure from the doctrine of *stare decisis*. This form of law runs the risk of degenerating into the *ad hoc* balancing of

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[24] *Id.*, at 58.

[25] *Id.*, at 58.

[26] *Id.*, at 77.

[27] Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change" (1974) 9:1 L. & Soc. Rev. 95 (Litigation and Dispute Processing: Part One). See also Nonet & Selznick, *supra*, note 13, at xi.

[28] *Id.*, at 74.

competing interests.[29] Under responsive law, the risk is that institutions can become responsive to social knowledge at the price of becoming unmoored from the virtues of predictability and accountability fostered under purely autonomous regimes. Nonet and Selznick argue that a system that seeks to combine responsive and autonomous elements must accomplish the correct "interplay of rule and principle", and must sacrifice the former only in order to better serve the latter.[30]

Law is a different kind of tool in each mode, with distinct virtues and functions. The Nonet and Selznick framework shows how law can be both a mode of legitimizing political power and of exercising power. Repressive law is a quest for order; autonomous law seeks procedural regularity and legitimacy; responsive law attends to substance and public purpose. Elements of each model can exist to a degree and at certain points in time within a single context. In the conclusion to this chapter, we identify both autonomous and responsive strands within Cromwell J.'s decision. Indeed, the *SWUAV* decision is a model of well-balanced interplay between rule and principle, and between the concerns of the autonomous and responsive law types.

As we discuss below, the *SWUAV* decision can be seen as a rich example of the enigmatic category of responsive law.[31] Responsive law broadens "access to legal institutions"[32] and delivers upon the "implicit values"[33] of the law of standing. Justice Cromwell considers the concrete facts that make clear how the traditional private law of standing — and even the more expansive test for public interest standing that existed prior to *SWUAV* — would deny sex workers the right to bring their claim. In this sense he is not confined by the blind neutrality of an autonomous law posture.

Justice Cromwell nonetheless remains attentive to the concerns of autonomous law. Notice how he pitches the ruling in the uncontroversial language of the "rule of law". Simultaneously, his decision enables marginalized groups to access courts in an innovative way, when to find otherwise would be a blow for the notion of equal and fair access to judicial review. The Nonet and Selznick model helps to illuminate the risks

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[29] The latter concern is echoed, for example, in the work of contemporary critics of proportionality "as a decision-making tool": see Grégoire Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23:1 Can. J.L. & Jur. 179, at 179–180.

[30] Nonet & Selznick, *supra*, note 13, at 80.

[31] See Malcolm Feeley, "Law, Legitimacy, and Symbols: An Expanded View of Law and Society in Transition" (1979) 77:3 Mich. L. Rev. 899. Feeley criticizes the text for a number of reasons, including the ambiguity of the responsive law category.

[32] Nonet & Selznick, *supra*, note 13, at 97.

[33] *Id.*, at 79.

and rewards of liberalizing the law of public interest standing. Justice Cromwell, sensitive to these tradeoffs, renders the law of standing more responsive to social realities while tethering the ruling to traditional values associated with the judicial function. Before we arrive at that argument in full, let us turn to the origins of the case. The issues at stake in *SWUAV* are best illuminated if we begin the story before pleadings were filed.

## III. THE SWUAV LITIGATION

### 1. The SWUAV Story[34]

In 2005, a parliamentary committee was tasked with a review of the *Criminal Code*[35] provisions regulating prostitution. The committee conducted a Canada-wide study and heard evidence of the dysfunction and harms of the criminalized landscape faced by sex workers. This review took place in the shadow of the numerous women from the Downtown Eastside of Vancouver who had been murdered by a serial killer who preyed on sex workers in vulnerable circumstances. Sex worker organizations from across the country, including the organization that would become SWUAV, provided evidence to the committee that criminal laws made them unable to live and work safely.

Sex workers in the Downtown Eastside provided written evidence in the form of 94 sworn (anonymized) affidavits and a legal and policy report.[36] That report, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* (*Voices for Dignity*), was created in collaboration with a local human rights organization, Pivot Legal Society. The report aimed to document sex workers' experiences under Canada's prostitution laws and to develop an evidence and human rights-based position on law reform. With the creation of *Voices for Dignity*, Pivot Legal Society took on a central coordinating role in this movement and would eventually represent SWUAV in court.[37]

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[34] This section draws extensively from the case history set out in Darcie Bennett, Jill Chettiar, DJ Joe, Lisa Kerr, Sheryl Kiselbach, Katrina Pacey & Elin Sigurdson, "*Sex Workers United Against Violence and Kiselbach v Canada*: An innovative approach to strategic litigation on behalf of marginalized communities" (2013) 17:3 INTERIGHTS Bulletin 110 [hereinafter "Bennett *et al*."].

[35] R.S.C. 1985, c. C-46.

[36] For the novel methodology that led to the creation of those affidavits, see *supra*, note 34, at 111.

[37] On the role of Pivot Legal Society and lead counsel Katrina Pacey in this case history, see *id*., at 111–113.

It was difficult for sex workers to participate in the public forum of the parliamentary committee process. Counsel and advocates worked to establish a means of participating that would accommodate their concerns, persuading committee members to engage with them on terms of confidentiality, in a safe location, and under circumstances that would not jeopardize their safety or security.[38] The individual sex workers who participated in these efforts would go on to form the organization that became SWUAV.

The committee's review ultimately concluded that the laws were dysfunctional and dangerous, and that the *status quo* was unacceptable. However, the committee was unable to reach consensus on recommendations for change other than to suggest further study.[39] The committee process made clear that the federal government understood the harms of criminalization, but that it would not act.[40] Sex workers turned to the courts. In 2007, two cases were filed: one in British Columbia and another in Ontario.[41] The case in British Columbia was initially brought by SWUAV.[42]

For sex workers living and working in Vancouver's Downtown Eastside, the decision to litigate collectively was both strategic and necessary given the practical realities of their lives and circumstances. SWUAV was chosen by its members as the plaintiff for two reasons: the unacceptable burden that would be placed on an individual plaintiff, and a desire to ensure that the litigation represented the collective concerns of street-based sex workers.[43]

### *(a) Practical Risks to an Individual Plaintiff*

Aware of the challenges of litigation, SWUAV determined that an individual member would face an unacceptable level of increased vulnerability if she were to be named as a plaintiff.

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[38] Evidence about this process was before the Courts in *SWUAV* and *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) [hereinafter "*Bedford*"] to show that specific measures were required for active street-level sex workers to engage in public forums.

[39] Canada, Senate Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2599932&Language=E&Mode=1&Parl=39&Ses=1>.

[40] For fuller discussion of this point, see Bennett *et al.*, *supra*, note 34, at 111.

[41] The Ontario case eventually resulted in a declaration that several of Canada's prostitution laws were unconstitutional: *Bedford*, *supra*, note 38.

[42] Sheryl Kiselbach — a former sex worker with 30 years of experience — was later added as a plaintiff, as we discuss below.

[43] For a fuller discussion of the risks of naming an individual litigant and the strategic benefits of a group litigant, see Bennett *et al.*, *supra*, note 34, at 112–113.

If their occupation becomes known, sex workers can lose access to social assistance and custody or access to children. The stigma of sex work can lead to discrimination in the medical system and eviction from housing. Publicity attracts police attention, risking not only criminal sanction but also the loss of clients. Destabilized working conditions can make sex workers more vulnerable to violence, as they take unusual risks in order to sustain income. By acting as the plaintiff, SWUAV offered its members a chance to be involved in this essential and complex litigation in a meaningful way, while maintaining crucial protections through the anonymity provided to SWUAV members.

Complex and controversial litigation also brings personal stress and strain to an individual named litigant. Challenging Canada's prostitution laws would require ongoing engagement with counsel and the ability to endure a lengthy trial and appeals over the course of years. For SWUAV members facing poverty, violent working conditions, significant health issues and unstable living situations, this depth of commitment was an unsurpassable barrier. SWUAV was a stable entity that could endure the pressures of litigation. SWUAV could ensure consistent contact with legal counsel and provide the structure required for individual members to engage fully with the litigation at times that suited their lives. Decision-making powers were shared and consultation between legal counsel and the group was ongoing.[44]

Finally, for SWUAV members, the litigation was not an academic or theoretical exercise. The legal issues raised by the claim were connected to the traumas of their daily working lives. By litigating as a group, SWUAV members could support one another throughout the process of remembering and reporting their experiences.

### *(b) Strategic Advantage of a Group Plaintiff*

SWUAV members were also clear that the litigation strategy should reflect their actual experience rather than a disembodied legal theory or argument. SWUAV was comprised of members actively engaged in street-level sex work — meaning that they worked in the most vulnerable conditions of the industry. SWUAV wanted the unique perspective of street-based workers to govern the arguments at the core of their case. An organization of street-based sex workers would be best positioned to give

[44] For the mechanics of how the litigation committee of SWUAV shared responsibility to instruct counsel, see Bennett *et al.*, *supra*, note 34, at 113.

the instructions to counsel that reflected the specific harms they endured. The organization provided the benefit of stability, and the group was uniquely positioned to generate the evidence that could speak to the concerns at the heart of the constitutional complaint.

### *(c) The Unplanned Fight for Standing*

SWUAV filed its action in August 2007. The claim asserted that the interrelated provisions of the *Criminal Code* that prohibited sex workers from communicating in public, working indoors and working together had the effect of infringing their constitutional rights.[45] The claim alleged that the laws prohibit sex workers from taking a range of steps that would significantly improve their safety, such as working from a fixed indoor location, having clear negotiations with clients in the safety of public spaces, and accessing police protection.

SWUAV anticipated that the government would strenuously defend its laws. But even before receiving a defence, counsel for SWUAV received a letter that indicated Canada's fight would first focus on the right of a sex workers' group to access the courts at all. The government declared their position that SWUAV did not have standing — that a challenge must either occur as part of a criminal prosecution or in a civil action where an individual active sex worker is named as the plaintiff.

Counsel for SWUAV responded with a letter outlining how individual SWUAV members face insurmountable barriers to initiating legal action. The government was not satisfied and indicated that they would bring a motion to strike. Eager to proceed quickly to the merits, SWUAV revisited the question of whether an individual currently active sex worker could be added to the claim. But the same challenges arose. An active sex worker member, already coping with the effects of criminalization and various other challenges, could not take on the risks of major, public, complex and controversial litigation.

One way SWUAV and its counsel determined they might avoid a procedural fight was to add an individual plaintiff with significant past experience as a sex worker. Sheryl Kiselbach was a former Vancouver sex

[45] Four provisions of the *Criminal Code* were at issue: s. 213, which prohibited communication in public for the purpose of engaging in prostitution; ss. 210, 211, which prohibited being found in, occupying, keeping or transporting a person to a common bawdy house; and the aspects of s. 212 that prohibited procuring persons over the age of 18 and living on the avails of adult prostitution. In *Bedford*, *supra*, note 38, the Supreme Court declared three of those provisions, ss. 210, 212(1)(j), 213(1)(c), unconstitutional.

worker who had become an outreach worker supporting those still involved in the sex trade. Kiselbach worked for 30 years in many different aspects of sex work, she had experienced the violence from clients and the alienation from police that flow from criminalization, and continued to experience the stigma resulting from her experience in a criminalized sex trade. Kiselbach was aligned with SWUAV's goals, in that she was committed to the fight for decriminalization and she believed that street-based workers, who are the most intensely criminalized and suffer the most egregious violence, should drive the litigation.

In early 2008, Kiselbach joined the action as a second plaintiff. But this did not prompt the government to revise their position on standing. The government maintained that Kiselbach, despite her vast experience working under these laws, did not possess the required standing because she was not currently at risk of arrest and conviction for a prostitution-related offence. Despite several convictions for prostitution-related offences, the government would argue that the laws at issue in the litigation no longer affected Kiselbach.

### 2. The Test for Public Interest Standing Before SWUAV

Public interest standing developed as an equitable alternative to the strict requirement of private interest standing. In a series of pre-Charter cases, the Supreme Court recognized that public interest standing may be granted where no one with standing to sue in relation to a justiciable constitutional issue could come forward.[46] The purpose was to ensure that laws or state action not be immune from review. In the 1992 decision of *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, the Supreme Court affirmed the various principles that had emerged: that laws should not be immune from review, but also that court resources should not be drained by improper cases and litigants.[47] Public interest standing required asking three questions:

1) Is there a serious issue raised as to the invalidity of legislation in question?

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[46] *Thorson v. Canada (Attorney General)*, [1974] S.C.J. No. 45, [1975] 1 S.C.R. 138, at 162 (S.C.C.); *Nova Scotia (Board of Censors) v. McNeil*, [1975] S.C.J. No. 77, [1976] 2 S.C.R. 265, at 271 (S.C.C.); *Canada (Minister of Justice) v. Borowski*, [1981] S.C.J. No. 103, [1981] 2 S.C.R. 575, at 597 (S.C.C.).

[47] [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236 (S.C.C.) [hereinafter "*Council of Churches*"].

2) Does the plaintiff have a genuine interest in the validity of the legislation?

3) Is there another reasonable and effective way to bring the issue before the court?

Most cases, including *Council of Churches*, turn on the third branch of the test. There, the Court had to decide whether an organization (the Council of Churches) that represented the interests of marginalized and vulnerable people (refugees) should be permitted to stand in their place as a public interest plaintiff for the purposes of challenging immigration legislation on Charter grounds. The Court concluded that there was a serious issue before it and that the Council was genuinely interested, having proven itself as an advocate for the affected population. However, the Court found that the legislation faced frequent individual challenges. The refugee system regularly resolved status claims, and the laws could be and often were challenged in these proceedings. As such, the laws could not be said to be immune from review. In the Court's view, there was another reasonable or effective manner of raising and adjudicating the constitutionality of the relevant provisions.[48]

The issue of SWUAV's standing, too, hinged on the third factor: whether there was another "reasonable and effective way" that the claim could be brought. What started as a challenge about the rights of sex workers to personal safety transformed into a test of courts' willingness to hear from people in their vulnerable circumstances *at all*.

### 3. British Columbia Supreme Court: Formalism

The Vancouver sex workers behind *SWUAV* never intended to advance a test case on the law of public interest standing. The case took its diverted path when the federal government opted to bring a procedural motion arguing that SWUAV and Kiselbach lacked the standing to challenge Canada's prostitution laws. In October 2008, Ehrcke J. of the British Columbia Supreme Court heard the government's motion.

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[48] *Council of Churches*, *supra*, note 47, does not address the potential difference between individual refugee challenges and a group-based claim. As we discuss below, the British Columbia Court of Appeal in *SWUAV* BCCA, *supra*, note 1, was particularly appreciative of the systemic nature of the public interest claim, which attached the interlocking effect of the prostitution provisions as a whole. An individual case is likely to be shaped by an individual provision. An individual litigant is unlikely to attack the interlocking effects of a scheme, and may not have standing to do so in any event. Interlocking or systemic complaints about a legislative scheme will rarely, if ever, be made by an individual litigant with private interest standing.

The focus of the argument was the third branch of the *Council of Churches* test: whether the claim could be brought in "another reasonable and effective way". First, the government argued that a constitutional challenge could be brought in the context of a criminal trial, namely as a defence to a prostitution-related offence raised a constitutional challenge as part of their defence. Second, the government pointed to the case of *Bedford* underway in Ontario.[49] *Bedford* raised some of the same legal issues as the SWUAV/Kiselbach litigation, and an active sex worker had come forward as a plaintiff in that case. Third, the government argued that an affidavit from a British Columbia sex worker had been filed in *Bedford*, suggesting this was proof that an active sex worker *could* be expected to come forward and engage openly in civil litigation of this sort.

The plaintiffs argued, in response, that a person charged under a single section of the *Criminal Code* could not raise the constitutionality of other sections or advance an argument about the intersecting effects of the sections. Indeed, there had never been a case where most or all of the provisions of the *Criminal Code* that relate to adult sex work were at issue in a criminal trial. Second, the plaintiffs argued that Ontario decisions, while persuasive, are not binding on courts in other provinces. Further, the *Bedford* application did not challenge all of the provisions at issue in the British Columbia claim, nor did it allege the same Charter breaches. The British Columbia plaintiffs also brought a distinct perspective on criminalization given their involvement in street-based sex work and given the particular context of murdered and missing sex workers in the Downtown Eastside of Vancouver. Finally, the plaintiffs pointed to important differences between being a plaintiff and being a witness, arguing that the latter is a role with far fewer risks and demands.[50]

Regarding Kiselbach, the government argued that she should have brought her Charter challenge when she was criminally charged. The plaintiffs pointed to the many reasons she was unable to do so at that time, when her primary goal was to quickly resolve her legal issues and maintain her privacy. In contrast, her evidence was that in her current situation — in stable employment and housing, and no longer struggling with addiction — she was well-positioned to handle litigation.[51] Without this stability, she was not.

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[49] See *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057, 2010 ONSC 4264 (Ont. S.C.J.); *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 2012 ONCA 186 (Ont. C.A.); *Bedford*, *supra*, note 38.

[50] Justice Cromwell endorsed this distinction in *SWUAV*, *supra*, note 2, at para. 71.

[51] *Id.*, at para. 45.

In December 2008, Ehrcke J. ruled that neither plaintiff had standing to challenge the laws.[52] Justice Ehrcke pointed to the existence of criminal prosecutions under the provisions and the *Bedford* case.[53] He noted that since members of SWUAV intended to be witnesses in the claim, this meant that they could come forward as plaintiffs.[54] He found that the case could be brought by an applicant with private interest standing, such that refusing to grant public interest standing would not result in the legislation being effectively immune from judicial scrutiny.[55]

Justice Ehrcke also held that Kiselbach did not even have private interest standing. He found that because she was no longer involved in the sex trade and did not have immediate plans to re-enter, she faced no unique jeopardy under the laws and had no unique interest in their being struck. Justice Ehrcke remarked that Kiselbach was in the same position as any other Canadian; he characterized her interest as "hypothetical" despite her 30 years of involvement in the sex trade and the violent experiences and prosecutions she suffered under the laws.[56]

Justice Ehrcke interpreted the words of the third branch of the *Council of Churches* test strictly and narrowly, focusing on their formal meaning. It was the formal prospect of a potential litigant that drove his decision, rather than the pragmatic reality and clear evidence that no such litigant existed or would exist in future. In particular, Ehrcke J. relied on the hypothesis that a person accused of a prostitution-related offence could or would advance a complex constitutional challenge rather than plead out. He neglected the fact that the Crown in a criminal matter can simply issue a stay of proceedings to end the claim. Justice Ehrcke's approach placed an extraordinary burden on public interest plaintiffs to prove a negative: that there is no imaginable alternative scenario in which one or some of the laws might be challenged.

### 4. British Columbia Court of Appeal: Systemic Analysis

On appeal, Saunders and Neilson JJ.A. for a majority of the British Columbia Court of Appeal reversed, holding that both SWUAV and

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[52] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, [2008] B.C.J. No. 2447, 2008 BCSC 1726 (B.C.S.C.).

[53] *Id.*, at paras. 75, 77.

[54] *Id.*, at para. 76.

[55] *Id.*, at para. 87.

[56] *Id.*, at para. 47.

Kiselbach were entitled to public interest standing.[57] The majority emphasized the systemic nature of the claim, which set out to scrutinize a matrix of laws for their individual and intersecting effects. They characterized the case as follows:

> 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.[58]

The intersecting nature of the claim was central to the majority's analysis. SWUAV and Kiselbach alleged the following: (1) the prohibition on public communication means that street-based sex workers cannot take time to negotiate the terms of their work with clients without fear of prosecution; (2) the prohibition on bawdy houses means that sex workers cannot work indoors, which is the safest place to do sex work; (3) portions of the procuring provisions mean that sex workers cannot cooperate or hire staff so as to enhance their safety and security. This was not a complaint about a single provision. The claim was that this legislative matrix, taken as a whole, heightens the dangers of sex work across multiple settings.

In constitutional terms, the claim was that the scheme implicates the life, liberty and security of the person of sex workers by depriving them of the ability to take steps to improve their safety. It deprives them of their freedoms of expression and association and, given the intersecting grounds of marginalization faced by street level sex workers — including sex, disability and race — it discriminates against them in a manner contrary to equality protections. The challenge advanced by the plaintiffs — one to a network of laws — was also based on multiple constitutional grounds.

Justice Ehrcke had relied on the number of prostitution-related charges laid to conclude that a reasonable and effective alternative to public interest standing exists. At the Court of Appeal, the majority found that he erred because he stripped the action of its "central thesis".[59] The "essence of the complaint" was that the legislative scheme as a whole exacerbates the vulnerability of sex workers.[60] Among other things, the effects of the scheme itself made it difficult for sex workers to be in a position to bring a complex legal challenge. Justice Ehrcke also failed to give sufficient weight

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57 *SWUAV* BCCA, *supra*, note 1.
58 *Id.*, at para. 9.
59 *Id.*, at para. 62.
60 *Id.*, at para. 63.

to the systemic nature of the claim. Public interest standing was required in order to enable this form of judicial review of the legislation.[61]

The government argued that standing would improperly extend the judicial role, but the majority noted the contradiction at the heart of the government's position:

> 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.[62]

Justice Groberman, in dissent, would not have granted public interest standing to either plaintiff. Justice Groberman agreed with the majority that the prospect of a hypothetical plaintiff or accused should not be enough to deny standing. But he did not agree that a broader challenge, rather than a confined one, should more readily attract public interest standing.[63] Indeed, the dissenting justice had reservations that flowed from the wide-ranging judicial inquiry that the claim called for.

The majority of the Court of Appeal focused on the substantive nature of the claim that SWUAV and Kiselbach had brought and the practical realities associated with advancing such a systemic challenge. At the Supreme Court of Canada, SWUAV and Kiselbach emphasized the barriers that stood in the way of an individual, active sex worker bringing a claim of this kind.

### 5. Supreme Court of Canada: Legality and Pragmatism

Numerous public interest organizations, representing a wide range of social justice oriented interests, applied to intervene at the Supreme Court level in support of SWUAV in recognition of the arbitrary barriers generated by the existing law governing public interest standing.[64] Even groups that

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[61] *Id.*, at para. 66.

[62] *Id.*, at para. 64.

[63] *Id.*, at paras. 84, 96. Justice Groberman also cautioned against confusion arising from the term "systemic" and its multiple meanings: *id.*, at para. 95.

[64] Including: David Asper Centre for Constitutional Rights; Community Legal Assistance Society; Canadian Association of Refugee Lawyers and Canadian Council for Refugees; Canadian Civil Liberties Association; Canadian HIV/AIDS Legal Network, Coalition of West Coast Women's Legal Education and Action Fund, HIV & AIDS Legal Clinic Ontario and Positive Living Society of British Columbia; Ecojustice Canada; Conseil scolaire francophone de la Colombie-Britannique; British Columbia Civil Liberties Association; Trial Lawyers Association of British Columbia; Prostitutes of Ottawa-Gatineau, Work, Educate and Resist, Maggie's: The Toronto Sex Workers Action Project and Stella, l'amie de Maimie.

did not necessarily endorse the underlying plea for decriminalization of prostitution supported the plaintiffs' right to access the court. The problem was that the *Council of Churches* test suggested to lower courts that if an imagined private interest litigant *may* come forward, that option, hypothetical as it may be, should be preferred and public interest standing should be refused. The test thus encouraged government lawyers to bring motions to strike as a matter of course so as to resist adjudication on the merits of public interest litigation. The test failed to direct government lawyers and judges to consider the meaningful difference between a busybody litigant and grounded, well-organized plaintiffs such as SWUAV and Kiselbach.

Before the Supreme Court, SWUAV and Kiselbach advanced two main arguments. First, they argued that SWUAV and Kiselbach should be granted standing under the existing *Council of Churches* test, given that there is no other reasonable and effective way for their claim to be tried. Second, they argued that the Court should revise the test for public interest standing to allow the plaintiffs and similarly positioned groups the right to seek adjudication. The plaintiffs suggested revising the language of the third branch of the existing test, which asked "whether there is another reasonable and effective way to bring the issue before the court".[65]

SWUAV and Kiselbach argued that it should not matter whether there is another (theoretical) reasonable and effective way for the issues to be litigated (such as by a litigant with private interest standing). Instead, the test should focus on the appropriateness of the claim before the court. The heart of the plaintiffs' submission was that an organization, acting as a collective of individually affected persons, is in a unique position to effectively advance a complex public interest claim. In a portion of their written argument that was largely adopted by Cromwell J., the plaintiffs said this about the appropriate factors that should guide the analysis:

> The Court should also endorse a more detailed list of *factors to guide the discretion* of lower courts in applying the new third branch of the test. In asking "whether the action is a reasonable and effective way to bring the issue before the court," appropriate factors, already supported in the caselaw, can be summarized as follows:
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> a. whether the case is public interest litigation;
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> b. whether the plaintiff is a "public interest litigant" or at least represents a significant sector of the public alleged to be affected by the impugned laws;

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[65] *SWUAV*, *supra*, note 2, at para. 39.

c. whether the plaintiff represents a vulnerable group in economic, emotional or social terms;

d. whether the impugned laws may detract from the ability of affected individuals to mount and sustain an individual legal challenge;

e. whether the litigation raises issues that are likely to deter individuals from advancing them, such as issues of an intimate, private, or stigmatized nature;

and

f. whether the litigation is systemic and/or raises a comprehensive challenge to legislation or state action. [66]

The plaintiffs argued that the first two factors are the most important, and that public interest claims should presumptively warrant public interest standing. They argued that the law of intervention is rich with examples of how to identify an organization that can represent the public interest or the segment of the public most affected by the impugned laws. Canadian courts are therefore equipped to make such determinations.

Further, litigation brought by an organization in the public interest may be best positioned to locate lay witnesses, attract superior expert witnesses, retain *pro bono* counsel, raise funds, explore evidence comprehensively, and achieve a relatively quick and final legal outcome. For these reasons, the plaintiffs argued that a public interest litigant will in fact often be a *more* reasonable and effective means of advancing public interest litigation than a private litigant. It will, at the very least and in the vast majority of cases, be no less reasonable and effective than litigation commenced by persons with private interest standing. Where such an organization is composed of or represents the interests of marginalized and vulnerable individuals who allege that the law violates their constitutional rights or freedoms, the plaintiffs argued that the presumption in favour of public interest standing should be virtually irrebuttable. They continued:

> If the purpose of public interest standing is to prevent the immunization of unconstitutional conduct by government — a purpose related to nothing short of the healthy maintenance of our political institutions — then it is

[66] Supreme Court of Canada, *Factum of the Respondents Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach*, File No. 33981, at para. 110 (footnotes omitted), online: <http://scc-csc.ca/WebDocuments-DocumentsWeb/33981/FM020_Respondents_Downtown-Eastside-Sex-Workers-United-Against-Violence-Society-and-Sheryl-Kiselbach.pdf>.

> submitted that the reformulation and discretionary factors outlined above will more fully deliver the aspirations of the law in this respect.[67]

The reformulated test proposed by SWUAV and Kiselbach — whether *this* claim is *a* "reasonable and effective" way to bring the matter before the court — would provide more principled guidance to trial courts. The new approach would remove an arbitrary preference for individual litigation, particularly in cases of broad systemic impact.

In a unanimous ruling, SWUAV and Kiselbach were granted public interest standing and the Court agreed to reformulate the test proposed by the plaintiffs. Justice Cromwell wrote that the third branch of the test would now ask "whether the proposed suit is, in all of the circumstances, **a** reasonable and effective means of bringing the matter before the court".[68] The minor textual change marked a substantial change in the law, directing lower courts to consider the features of the suit before them rather than formal or hypothetical possibilities in other cases.

Justice Cromwell noted that the core principle underlying the doctrine of public interest standing is legality. That core principle must drive the development of the doctrine and govern the exercise of judicial discretion:

> The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action.[69]

In a rejection of the reasoning of Ehrcke J., Cromwell J. said that if other prosecutions under the law at issue *may* occur, that possibility should not be determinative of the standing of a party before the court. In addition, "the existence of potential plaintiffs" must be considered "in light of practical realities".[70] The practical position of the plaintiffs, the reality of criminal prosecutions, and the nature of the claim in issue must be considered. Here, it was "very unlikely that persons charged under these provisions would bring a claim similar to the respondents".[71] Finally, the fact that some challenges had been advanced by accused persons in numerous prostitution-related criminal trials was not dispositive. Justice Cromwell reasoned:

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67 *Id.*, at para. 114 (footnotes omitted).
68 *SWUAV*, *supra*, note 2, at para. 52 (emphasis added).
69 *Id.*, at para. 31.
70 *Id.*, at para. 67.
71 *Id.*, at para. 67.

> The cases to which we have been referred did not challenge nearly the entire legislative scheme as the respondents do. As the respondents point out, almost all the cases referred to were challenges to the communication law alone … . From the record, the only criminal cases that challenge more than one section of the prostitution provisions were commenced after this case … . At the time of writing these reasons, one case had been dismissed, the other held in abeyance pending the outcome of this case and the last one was set for a preliminary inquiry.
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> …
>
> Moreover, the fact that many challenges could be or have been brought in the context of criminal prosecutions may in fact support the view that a comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised. There could be a multitude of similar challenges in the context of a host of criminal prosecutions. Encouraging that approach does not serve the goal of preserving scarce judicial resources. Moreover, a summary conviction proceeding may not necessarily be a more appropriate setting for a complex constitutional challenge.[72]

While he endorsed the importance of preserving judicial resources as a factor in the discretionary grant of standing, Cromwell J. was skeptical of the oft-noted concern with litigious "busybodies". He noted that while this spectre has often been raised, it has rarely been seen.[73] As such, in an age when scarce access to courts is the *real* problem of the system, Cromwell J. directed that the test should be applied flexibly and generously in light of the underlying purposes of the doctrine.[74]

The *Bedford* litigation advanced by Terri-Jean Bedford, Amy Lebovich and Valerie Scott in Ontario was also not dispositive of the standing of SWUAV and Sheryl Kiselbach in British Columbia. Again, Cromwell J. cites practical realities: the non-binding nature of an Ontario decision in British Columbia; the fact that *Bedford* raised distinct legal claims; the focus on the experience of street-based sex workers in the British Columbia pleadings; and the fact that there are many other litigation management strategies, such as a temporary stay of proceedings, that could ensure the effective use of judicial resources. The "blunt instrument" of a denial of standing was not required.[75]

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72 *Id.*, at paras. 68, 70.
73 *Id.*, at paras. 28, 41.
74 *Id.*, at paras. 20, 36, 49.
75 *Id.*, at paras. 63-64.

Justice Cromwell embraced the plaintiffs' arguments about the power of association, pointing to evidence of the vulnerability of individual sex workers which prevented them from advancing litigation in their own names. Only a collective claim could enable access to the courts. Here, Cromwell J. took issue with the chambers judge more directly:

> The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names.[76]

In fact, there would be practical advantages to this format for the litigation:

> There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.[77]

Justice Cromwell emphasized that the claim proposed is public interest litigation: it transcends individual interests and "provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it".[78] Allowing the suit may actually

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[76] *Id.*, at para. 71.
[77] *Id.*, at para. 72.
[78] *Id.*, at para. 73.

address the issue of scarce judicial resources by preventing a "multiplicity of individual challenges" in the context of criminal prosecutions.[79]

With SWUAV there was no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. Justice Cromwell wrote it was "obvious" that this claim was being pursued with "thoroughness and skill".[80] There was no suggestion that others more directly or personally affected had deliberately chosen not to challenge these provisions. SWUAV and Kiselbach were well-positioned to engage in the ongoing project of litigation:

> The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (R.F., at para. 20).[81]

To guide the decisions of lower courts, Cromwell J. set out a list of "interrelated matters" for judges to consider when assessing the third discretionary factor.[82] The following topics drove his discussion:

> *Capacity.* "The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting."[83]
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> *Public Interest.* "The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized."[84]

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79 *Id.*
80 *Id.*
81 *Id.*, at para. 74.
82 *Id.*, at para. 51.
83 *Id.*
84 *Id.*

> *Realistic Alternatives*. "The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing."[85]
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> *The Rights of Others*. "The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. … [T]he court should consider, for example, whether 'the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints'. The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing."[86]

Justice Cromwell made clear that the list was "illustrative" rather than "exhaustive", but there is little doubt that lower court judges will make careful use of Cromwell J.'s factors in their assessment of what is a reasonable and effective claim.

To return to Nonet and Selznick, it is striking to see how Cromwell J.'s list of discretionary factors serves the values of both autonomous and responsive law. Law in the autonomous mode is concerned with the independent, neutral functioning of courts. The categories of *Capacity* and *The Rights of Others* are meant to ensure a live, legitimate dispute

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[85] *Id.*
[86] *Id.*

and a proper evidentiary record. Law in the responsive mode attends to practical realities and is willing to adjust rules in order to achieve an underlying purpose. The discussions under the categories of *Public Interest* and *Realistic Alternatives* do just that, by emphasizing the justice issue at the heart of a claim and the question of whether an alternative mode of litigation is practically possible.

There are risks to the delicate balance in our systems of governance when we enhance the powers of courts. Power accrues to unelected and largely unaccountable officials — this flags the return of the dangers of repressive law and may mean constitutional claims are decided on the basis of a narrow set of interests. Justice Cromwell's list of discretionary factors is attentive to these risks. He stops far short of directing that public interest standing be granted in all cases. His reasons direct judges to balance the tension between autonomous and responsive law.

## IV. CONCLUSION: *SWUAV* AS RESPONSIVE LAW

Justice Cromwell refused to deny standing on the basis of a formal, theoretical possibility that the *SWUAV* case could be brought in another, more traditional way. While a more narrowly drawn ruling was open to the Court, this would have neglected the difficulties that street-based sex workers — and other marginalized groups — face in accessing courts.[87] *SWUAV* avoids the perils of formal law in favour of a largely responsive law approach, but the decision is also sensitive to the fact that the latter has costs of its own in terms of legal legitimacy. The factors that Justice Cromwell directs trial judges to consider when exercising their discretion on standing responds to each of these potential costs and benefits in a subtle, sophisticated and pragmatic way.

Nonet and Selznick remind us that law in the "responsive" mode will adjust rules so as to achieve an underlying purpose or a substantively fair outcome. In their typology, responsive law is an ends-oriented mode of reasoning concerned with the actual effects and consequences of the application of formal rules. A responsive decision may come when a strictly

[87] The notion of "access" here means the ability to bring forward positive claims as plaintiffs, rather than simply to appear in court as a criminal defendant accused of wrongdoing. Justice Ehrcke thought that the high number of criminal prosecutions brought against sex workers meant that they were able to bring forward complex, intersecting constitutional claims. He failed to appreciate the unique context of a defendant in provincial court who is facing prosecution under a single Code provision. Such a criminal defendant is likely to have substantial anxiety and little assistance, and will be eager to bring the proceedings to a close.

autonomous approach will cost too much in terms of law's legitimacy. Both the Supreme Court and the majority of the British Columbia Court of Appeal saw that SWUAV brought a systemic challenge to *all* of the *Criminal Code* provisions governing adult sex work. They saw that individual claims against single provisions would leave a court unable to discern and adjudicate the interlocking effects of the scheme as a whole. It was the contemporaneous prohibition of indoor and outdoor sex work, and the restrictions on cooperation and hiring third parties, that worked in tandem to increase the dangers of prostitution. Practically speaking, a comprehensive challenge by a group like SWUAV was the best and perhaps only prospect for adjudicating *this* claim.

The responsiveness of the Court's approach is also evident in Cromwell J.'s analysis of the practical realities of litigation. An individual sex worker plaintiff was an unlikely prospect for reasons that flowed from the effects of criminalization itself. An active sex worker plaintiff could fear the loss of privacy and an increase in police attention. Children could be removed and future employment opportunities could be lost. The responsibilities of litigation over a protracted period would be no small burden. Justice Cromwell appreciated that these factors, in addition to the uniquely systemic nature of the claim, rendered the prostitution laws immune from this type of review.

*SWUAV* is certainly an instance of responsive law in its effect. For Nonet and Selznick, a key feature of responsive law is expanding opportunities for participation in legal order. Rather than law being used exclusively to vindicate individual claims, legal action becomes a "vehicle by which groups and organizations may participate in the determination of public policy".[88] *SWUAV* opened up new modes for the pursuit of judicial review, and thereby increased the potential for law to serve as an instrument of social justice. The *SWUAV* precedent has subsequently been relied upon in novel cases brought by refugees, homeless people and prison inmates.[89]

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[88] Nonet & Selznick, *supra*, note 13, at 96.

[89] *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, [2014] F.C.J. No. 679, 2014 FC 651 (F.C.); *British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, [2014] B.C.J. No. 2439, 2014 BCSC 1817 (B.C.S.C.), vard [2015] B.C.J. No. 838, 2015 BCCA 178 (B.C.C.A.), affd [2015] B.C.J. No. 733, 2015 BCCA 142 (B.C.C.A.). See also the pleadings in a BC challenge to federal laws governing administrative segregation in penitentiaries: Supreme Court of British Columbia, Notice of Civil Claim, online: <https://bccla.org/wp-content/uploads/2015/01/2015-01-19-Notice-of-Civil-Claim1.pdf>. The *SWUAV* authority has been relied upon in dozens of other cases.

The *SWUAV* decision also contains features of autonomous law. Justice Cromwell's central, express concern is legality. He finds that a more liberal standing rule is required so as to ensure that legislation is not insulated from judicial review. The official concern is with the rule of constitutional law and the healthy functioning of the *autonomous* legal system. From this angle, the case is not about any particular value. It is not, for example, about the rights of sex workers to operate free of criminal law. *SWUAV* is a case concerned with the policy-neutral importance of judicial review and the rule of law.

It should come as no surprise that courts continue to protect and articulate the features of autonomous law, upon which so much of their legitimacy is based. Nonet and Selznick predict this and advocate for it: to preserve the benefits of autonomous law while introducing appropriate responsive elements. In this light, we see how Cromwell J. strikes a remarkable balance in the list of discretionary factors that he sets out to guide lower courts.

Two of Cromwell J.'s discretionary factors sit comfortably in the autonomous law column. First, judges should consider the capacity of the proposed plaintiff to adduce a sufficiently concrete factual setting. This allows judges to ensure their neutral position of assessing the interpretation and application of law, rather than questions of substantive policy in the abstract. Second, Cromwell J. directs that judges should consider whether and how the resolution of the claim is likely to affect the rights of others. This factor may weigh against the grant of standing, and prevent courts from deciding cases in ways that will have widespread, potentially unintended effects — risks best left to legislatures.

In the responsive law column, Cromwell J. directs judges to consider whether a claim is in the public interest and whether it transcends the interests of the plaintiff. This factor helps to further the responsive law value that the law should work in service of social justice. Responsive law is also attentive to the facts on the ground. Justice Cromwell makes clear that courts should consider whether alternative means of litigation are a practical option or a formal impossibility. The Court viewed the *SWUAV* case as an effective use of resources, along with being the only real way that sex workers could seek adjudication of their particular constitutional complaint.

The Nonet and Selznick framework opens up the language we have for thinking about the prospect of using law as a tool for social change. Using law to pursue a social goal will always generate tension, but the legal system will also pay a price if courts are indifferent to society. If the Supreme Court had upheld the Chambers judge, a group of highly

marginalized citizens would have felt that the court system was not theirs to share. The sex workers of Vancouver's Downtown Eastside would have understood that the court system would prosecute them, but would not otherwise hear their legal claims.

Justice Ehrcke's decision would have barred the very plaintiffs who were best positioned to genuinely and substantively litigate an important set of constitutional issues. Ironically, the plaintiffs would have been excluded on the basis of a doctrine concerned with keeping illegitimate, vexatious litigants from our courts. The technical possibility that a claim could be brought by a hypothetical figure with private interest standing was determinative to that analysis. The decision conformed to the demands of autonomous law, but its consequences would generate new problems in terms of the law's legitimacy.

The Supreme Court — with its greater store of law-making authority, and the pen of Cromwell J., a leading scholar on the law of standing — was prepared to introduce a responsive law element to the legal test. The decision in *SWUAV* changed the settled doctrine, but did so in a way that furthered the underlying logic of the law — a logic Cromwell J. was well-positioned to name and utilize.

In the dance between autonomous and responsive law, the question is one of balance. Justice Cromwell's ruling achieves a sophisticated balance that avoids a binary of formalism versus justice. His opinion engages the practical realities faced by marginalized Canadians, while preserving the function of judges as adjudicators of disputes. Justice Cromwell said this of the good that would come from granting standing in this case:

> All three factors, applied purposively, favour exercising discretion to grant public interest standing to the respondents to bring their claim. Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society, but it will also promote the economical use of scarce judicial resources … .[90]

Nonet and Selznick warn that responsive law can be a "high risk strategy" in which the legal order "loses the protection of firm institutional boundaries and becomes an integral part of government and politics".[91] Legal institutions become "at once more accessible and more

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[90] *SWUAV*, *supra*, note 2, at para. 76.

[91] Nonet & Selznick, *supra*, note 13, at 117.

vulnerable".[92] As Bob Kagan writes in his introduction to their book, the risks of responsive law must be moderated by legal action that builds wisely on the steadier foundations of autonomous law.[93] That process depends on the "competence of legal officials, on their capacity to develop new institutional methods for gauging social needs and to devise sensible, politically feasible, and socially acceptable legal remedies".[94] They must walk a "fine line" between "the responsive pursuit of justice and over-responsiveness to particular ideologies and interest".[95] This is precisely what Cromwell J.'s opinion manages to do. He is no radical; nor is he law's mere servant.

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92 *Id*.
93 See Kagan's Introduction in Nonet & Selznick, *supra*, note 13, at xii.
94 *Id*.
95 *Id*.