Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Eastside Sex Workers United Against Violence

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Introduction

In 2012 the Supreme Court of Canada issued its decision in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence* (*SWUAV*).[1] The case centered on whether or not those involved in protecting vulnerable sex workers have standing to challenge the criminalization of prostitution-related activities on their behalf. *SWUAV* represents a significant break with previous jurisprudence on standing: it saw the Court transform its vision of public interest standing, viewing it for the first time as an access to justice issue.

The law of standing operates as the "gatekeeping role that judges play inside the courtroom,"[2] pronouncing upon *who* is allowed to bring *what* issues before the court. Traditionally, the only way through that gate has been 'private standing,' which requires litigants to have a direct stake in the cases they bring.[3] However, beginning with the case of *Thorson v Canada (AG)* (*No 2*) in 1974, Canadian courts have, in limited circumstances, allowed litigants without a direct stake to proceed under 'public interest standing.'[4] Public interest standing tends to arise when litigants seek to challenge government actions that have broad social effects. It is therefore of special importance to litigation under the *Canadian Charter of Rights and Freedoms*,[5] and to the *Charter*'s capacity to strengthen Canadian democracy.

The *Charter* is not universally recognized as a democracy-enhancing instrument, with some commentators arguing that it shifts power from democratically elected representatives to appointed elites.[6] In this paper, however, I adopt the view of former Supreme Court Justice Frank Iacobucci who argues that the *Charter* has the potential to bolster Canadian democracy in multiple ways.[7] A full defence of this position is beyond the scope of this paper but, put simply, it holds that democracy means more than "blunt majoritarian rule";[8] it calls for equal consideration of all voices, which in turn requires the protection of minorities and the proactive advancement of marginalized interests.[9] Under this view, the Charter was enacted not to detract from democracy but to sustain it in a broader sense.

The realization of the *Charter*'s democratic potential, however, depends on the ability of those most in need of *Charter* protection to have their claims heard in a meaningful way. In my view, this requires two things of judges hearing *Charter* claims: 1) an active promotion of access to justice, especially for marginalized groups; and 2) a systemic perspective on *Charter* rights. As I will demonstrate, the expansion of public interest standing seen in *SWUAV* serves both ends.

In this comment I argue that *SWUAV* represents a major shift in the Court's approach to public interest standing and to *Charter* litiga-

tion more generally. I contend that in *SWUAV*, the Court finally breaks free of the private law paradigm restraining the previous jurisprudence and recognizes the crucial role of public interest perspectives in *Charter* litigation. This, in turn, furthers the realization of the *Charter*'s democratic potential. I begin in Part I by outlining the law of public interest standing prior to *SWUAV*. In Part II, I highlight the importance of public interest standing under the *Charter*, and critique the Court's narrow approach to it prior to *SWUAV*. In Part III, I discuss *SWUAV*'s contribution to the law of public interest standing as an important step forward in supporting the *Charter*'s democratic promise.

I. Public interest standing

Public interest standing was first established in a trilogy of cases beginning with *Thorson.* Each case in the trilogy involved a plaintiff who sought to challenge the constitutionality of legislation with broad public effects, but no unique impact on a particular subset of society. In *Thorson,* the Supreme Court held that the courts have a discretionary power to allow members of the public to bring constitutional challenges to legislation where no individual or class is particularly aggrieved by it, and where the Attorney General — the traditional guardian of the public interest — refuses to act.[10] The next two cases in the trilogy, *MacNeil v Nova Scotia (Board of Censors)*[11] and *Borowski v Canada (Minister of Justice)*[12], saw the Court refine and slightly expand the newly minted doctrine of public interest standing, finding that it could apply to situations where other avenues of judicial review were theoretically possible but practically unlikely.[13] In *Borowski,* the Court laid the foundation of the three-part test for public interest standing as follows:

> to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its validity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.[14]

At the heart of these cases lies the principle that legislation should never be immune from constitutional review.[15] While this principle provided a positive impetus for the establishment of public interest standing, traditional concerns about overextending the role and resources of the courts limited further development of the doctrine. These concerns were formally articulated in *Finlay v. Canada (Minister of Finance)*, 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.[16]

These are the principles that continue to govern the public interest standing jurisprudence.[17] As noted in *Finlay,* each one accords with a branch of the test set out in *Borowski.*[18] The implicit requirement of justiciability under the first branch of the test addresses the concern about the proper role of the courts.[19] The litigant's genuine interest in the issue (second branch) alleviates the concern about scarce judicial resources. Finally, the lack of other reasonable and effective means to adjudicate the issue (third branch) ensures an appropriate adversarial context — i.e. contending points of view by those most directly affected.

The doctrine set out in the trilogy and *Finlay* was cemented in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*.[20] The case concerned a broad constitutional challenge to proposed amendments to the *Immigration Act* brought by a religious organization with a longstanding record of protecting the rights of refugees. Drawing upon *Borowski*, the Court established a clear test for public interest standing:

> [f]irst, 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?[21]

As in the majority of cases to follow, the true controversy arose with respect to the third branch of the test.[22] The Court found that this part of the test was not met because refugee claimants regularly appealed administrative decisions made against them, raising issues akin to those raised by the plaintiff on a daily basis.[23]

While *MacNeil, Borowski* and *Finlay* took steps to broaden the scope of public interest standing, the Court in *Canadian Council* harkened back to the narrow conception of the doctrine articulated in *Thorson,* re-emphasizing legality as the "whole purpose" of public interest standing.[24] Over a decade later, *Chaoulli v Quebec (AG)*[25] opened the door to a more liberal approach in granting standing to a patient and physician seeking to challenge the constitutionality of a statutory prohibition on private health insurance in Quebec.[26] Most recently, a narrow conception reigned once again in *Canadian Bar Association v British Columbia*, albeit in a lower court, when the Canadian Bar Association (CBA) was denied standing to bring a constitutional challenge to B.C.'s legal aid scheme due to the sweeping nature of the claim and the fact that private interest litigants could challenge specific provisions of the scheme.[27]

The main justification for granting public interest standing in the jurisprudence up to *SWUAV* was the need to avoid immunizing government laws and actions from judicial scrutiny — the principle of legality. While the establishment of the doctrine provided an important opening for greater access to the courts, access to justice was never acknowledged as a separate rationale for granting public interest standing. Furthermore, the principles set out in *Finlay,* and the corresponding *Borowski/Canadian Council* test, focused not on the reasons *for* granting public interest standing, but rather on the reasons for *limiting* the scope of the doctrine.[28] The result was a stop-start rollercoaster of jurisprudence, wavering between moments of liberalization and restriction, and lacking a clear vision of the key democratic function served by public interest standing, especially under the *Charter.*

II. Critique of the pre-*SWUAV* jurisprudence

As has been recognized by many judges and academics, public interest standing carries particular import in *Charter* litigation.[29] Because the *Charter* raises questions of fundamental societal significance, access to *Charter* justice enables the resolution of public interest issues important to the whole community.[30] It also brings critical perspectives to the adjudication of important social issues. The effective participation of marginalized groups is particularly important in this regard, given the *Charter*'s objectives.[31] If the perspectives of those whose fundamental rights are most in peril are excluded from the courtroom, *Charter* litigation risks perpetuating the very injustices it seeks to rectify. Marginalized groups, however, often lack the resources needed to bring costly *Charter* litigation without the assistance of public interest advocacy organizations.[32]

In addition to allowing marginalized groups to access the rights and protections promised by the *Charter*, public interest litigants are crucial to realizing the *Charter*'s democratic potential because they illustrate the systemic impacts of the law on the most vulnerable people. To bring a systemic claim requires not only substantial resources but an overarching understanding of the issue. Public interest litigants may actually provide a stronger factual context for a systemic issue by furnishing statistical evidence, or highlighting common experiences among multiple individuals.[33] For example, the plaintiffs in *SWUAV* referred to over 90 affidavits from current and past sex workers. In their factum, they note: "Organizations such as SWUAV have the benefit of the collective knowledge and experiences of individuals over time, [and] are not subject to the personal constraints and vulnerability of individuals subject to criminal sanction."[34] The CBA undoubtedly brought similar expertise to the question of legal aid.[35]

Unfortunately, despite widespread agreement that *Charter* cases call for a more liberal approach to public interest standing, courts have struggled to depart from a private law paradigm that prioritizes highly individualized disputes

about discrete issues.[36] I illustrate this below by examining how each of the three rationales articulated in *Finlay* and their corresponding test branches have operated to bar the expansion of public interest standing, with a particular focus on the controversial third branch.

The proper role of the court

The tendency for public interest litigation to raise politically charged questions has made courts wary of overstepping their institutional boundaries. The courts have addressed this in part by establishing justiciability as a requirement under the first branch of the test.[37] In fact, most of the case law on justiciability comes from the law of standing.[38] This is hardly surprising; where else, after all, has justiciability been inserted as an explicit threshold to be overcome prior to the hearing of a claim? The concern underlying the rule is undoubtedly important, but it is important to all actions, not just those involving public interest litigants. To uniquely target the latter at the outset seems to arbitrarily impose an additional barrier upon them.

The preservation of judicial resources

The concern about scarce judicial resources[39] is also overblown, as has been recognized by many scholars and judges.[40] The extensive resources required to initiate litigation (especially *Charter* litigation) make a tide of suits improbable.[41] In addition, the court has at its disposal a variety of tools apart from standing that may be used to control the proliferation of litigation.[42] In the words of Professor K.E. Scott, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom."[43]

On the contrary, the efficient use of judicial resources may actually favour a systemic action brought by a public interest litigant over a multitude of more particularized suits brought by individuals with private interest standing.[44] Even where individual suits are not pending, Iacobucci notes that the capacity of *Charter* litigation to resolve "broad policy issues of general importance" mitigates the worry about judicial economy.[45]

An appropriate adversarial context

In a similar vein, unquestioned assumptions about what makes for an appropriate adversarial context have allowed the judiciary to cling to a private interest model of standing that fails to serve the highest *Charter* ideals. Traditionally courts have asserted that a specific factual context is necessary to ground a dispute, represent the views of those most directly affected by the issue, and ensure the best advocacy (on the premise that self-interest is the greatest motivator).[46] However, these assumptions must be reconsidered within the public context of *Charter* litigation.

Firstly, the assumption that public interest litigants are less motivated advocates rings false, given the resources required to undertake (especially constitutional) litigation.[47] This harkens back to the floodgates argument, and the corresponding requirement that public interest plaintiffs have a "genuine interest" in the claim. Tellingly, public interest litigants have had little trouble meeting this branch of the test. Lorne Sossin suggests that a more useful question at this stage would be whether the litigant has the required resources, perspective and relationship to those directly affected by the claim.[48] Unlike the genuine interest test, this would ensure that constitutional litigation is pursued skillfully and appropriately.

Secondly, the logic underlying the preference for private interest litigants often fails to hold up in the *Charter* context. Unlike private law disputes, *Charter* actions raise broad, systemic issues; they thereby demand a systemic approach. This is already reflected in many aspects of *Charter* litigation, such as the consideration of hypothetical scenarios,[49] and the increased reliance on legislative facts, theory, social science evidence and international jurisprudence.[50] However, courts have sometimes failed to recognize how these changes fit the very nature of actions brought under the *Charter*, maintaining what Sossin calls an "artificial dichotomy between 'individual' and 'systemic' *Charter* litigation."[51]

For example, in refusing to grant public interest standing in *CBA*, Chief Justice Brenner distin-

guished the CBA's systemic challenge to legal aid from the challenge to Quebec's public health care system brought in *Chaoulli*. Chief Justice Brenner recognized that *Chaoulli* called for "systemic evidence and analysis," and acknowledged that this was typical of *Charter* challenges.[52] He emphasized, however, that *Chaoulli* was an individual challenge to specific legislative provisions, and thus different in kind from the claim before him.[53]

What this type of reasoning fails to recognize is that even when *Charter* litigation is pursued by individuals with a private interest, the threat to their rights stems from systemic social phenomena.[54] Hence the need for evidence related to broad social trends, and the diffuse public impact of the outcome. When the Court ignores the social context of a *Charter* issue and instead zooms in on the individual case, the point of the claim is often lost. Carissima Mathen offers the example of *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*,[55] where the Court obfuscated the heart of the issue — the ongoing censorship of gay and lesbian erotica by customs officials — by viewing the case merely in terms of one bookstore's mistreatment.[56] On a more general level, Bailey articulates the issue this way: "where the problem is systemic in nature, a preference for individualized litigation is highly likely to produce individualized remedies and solutions that do not resolve the issues systemically."[57] In fact, Bailey argues, a piecemeal approach may allow legislatures to skirt systemic reforms.[58] The ongoing lack of meaningful legal aid reform in B.C., despite the court's recognition of a constitutional right to legal aid in certain cases, illustrates this point.[59]

Given the importance of systemic perspectives in *Charter* litigation, and the reliance of vulnerable groups on public interest organizations, requiring *Charter* claims to be brought by private individuals makes little sense. In their factum to the Supreme Court, the plaintiffs in *SWUAV* liken private standing to "a 'Trojan Horse'; an individual with private standing is but a technical entryway for a much more fulsome factual record."[60] Bringing a challenge to a specific statutory provision (e.g. *Chaoulli*), as opposed to a more comprehensive legislative scheme (e.g. *CBA*), seems to serve the same function. This approach is not only illogical but counterproductive, and arguably discriminatory.[61] It threatens to exclude marginalized voices from the courtroom, and thereby fails to serve the *Charter*'s democratic ideals.

III. The *SWUAV* case

The judicial approach to public interest standing shifted significantly in *SWUAV*, reflecting a clear break from previous jurisprudence. The litigants seeking standing were Sheryl Kiselbach — a former sex worker — and the Downtown Eastside Sex Workers United Against Violence Society (SWUAV) — a non-profit organization run by and for sex workers in the Downtown Eastside of Vancouver. SWUAV's members are women, mostly of Aboriginal origin, struggling with poverty, addiction, abuse and violence.[62]

In August 2007, Ms. Kiselbach and SWUAV sought a declaration that the provisions of the *Criminal Code*[63] which prohibit bawdy houses,[64] communicating for the purpose of prostitution,[65] and procurement activities[66] violate ss 7, 15, 2(b) and 2(d) of the *Charter*. As described by Justice Saunders in the British Columbia Court of Appeal, "[t]he central thesis of the action is that the impugned provisions of the *Criminal Code* deprive sex workers, whose work itself is lawful, of the ability to conduct their work safely."[67] The federal Attorney General brought an application to dismiss the action on the grounds that the plaintiffs lacked standing to bring the case.[68]

Procedural history

The Chambers judge found that Ms. Kiselbach did not have private interest standing, and declined to grant public interest standing to either plaintiff, because they did not meet the third branch of the *Canadian Council* test. In his view, the provisions could be reasonably and effectively challenged by individuals facing criminal charges under them, who would have standing as of right. The judge also found that the action could have been brought by individual members of SWUAV (who presumably would have had private interest standing), especially

given that they were already participating as witnesses. He dismissed the argument that their vulnerability prevented them from bringing their own case, and pointed to similar litigation being heard in Ontario — *Bedford v Canada (AG)*[69] — as indicative of the potential for plaintiffs with private interest standing to come forward.

The majority of the Court of Appeal reversed the BCSC decision, granting public interest standing to both plaintiffs. In determining whether there were other reasonable and effective means of adjudicating the issue, the majority noted the provincial courts' lack of constitutional authority to grant a formal declaration of invalidity as a factor casting doubt on the criminal defendant as a viable alternate litigant.[70] It also acknowledged the vulnerability of SWUAV members, agreeing with the plaintiffs that they should not be required to bring the challenge.[71] Finally, the majority emphasized that the claim was broad and systemic; the plaintiffs were asking the court to consider the combined effect of the provisions on an already vulnerable group.[72] The claim was therefore different in scope from the types of challenges that could be brought by individuals charged under specific provisions.[73] Relying on *Chaoulli*, the majority held that cases which raise systemic challenges call for a more generous approach to public interest standing.[74]

Reasons of the Supreme Court of Canada

The Supreme Court agreed with the Court of Appeal's approach, and unanimously upheld their decision.[75] Writing for the Court, Justice Cromwell began by calling for a flexible and purposive approach to the test for public interest standing, especially with respect to the all-important third branch:

> These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.[76]

Justice Cromwell proceeded to reformulate the third branch of the test. Rather than requiring "no other reasonable and effective means," he asserted that the third criterion should simply ask whether the action at issue is a reasonable and effective means.[77] He offered a list of factors to be considered under this criterion, including: the plaintiff's capacity to bring the claim (in terms of resources, expertise and an appropriate factual context); whether the case is of public interest; whether there are realistic alternative means which would be more efficient and more suitable to adjudication; and the potential impact of the proceedings on the rights of others with a direct stake in the issue.[78]

Application to the case

In applying this framework to SWUAV's claim, Justice Cromwell addressed each of the Chambers judge's reservations. He found that *Bedford* was not a more reasonable and effective means of adjudication, noting that it fails to raise several issues raised in *SWUAV*, fails to give the perspective of street-level sex workers, and is not binding on B.C. courts.[79] He went on to dismiss criminal proceedings as an acceptable alternative platform, noting that criminal litigants would not likely bring the same type of sweeping claim with the same level of competence and skill, and finding that civil declaratory actions offer a more predictable and efficient forum for resolving the issue.[80] Finally, Justice Cromwell rejected the contention that the sex workers themselves could have acted as plaintiffs. He asserted that acting as a witness differs in kind from acting as a plaintiff, noted the stability required to engage in constitutional litigation, and recognized that SWUAV members had valid reasons not to bring the suit themselves, including the fear of losing privacy and safety, revealing their occupation to loved ones, having their children apprehended, and limiting their educational and employment opportunities.[81] Justice Cromwell ended the decision by highlighting a few other important considerations. He noted, for one thing, that the plaintiffs were pursuing the action competently, and drawing upon a strong factual background. He also emphasized the systemic nature of the challenge, and the broad interests it touches, as factors which tipped the scale towards granting public interest standing.[82]

A win for access to justice

While the Court of Appeal in *SWUAV* took an important step towards increased access to justice and the advancement of democracy under the *Charter*, the Supreme Court's decision truly turned the corner. Firstly, Justice Cromwell's call for a flexible approach effectively transformed what was quite clearly a discrete, three-part test into a purposive balancing of factors. Justice Cromwell attempted to draw support for this approach within the existing jurisprudence, but the break is undeniable; even the Court of Appeal decision found that standing could not be granted where all three branches were not met.[83] Reversing this finding removed a major barrier to public interest litigants, who frequently struggle to meet the third branch.[84]

Secondly, the rewording of the third branch amounts to a major change in the test. Once again here, Justice Cromwell downplayed the move, tying it to jurisprudential moments where the Court has taken a pragmatic approach to this branch.[85] His restatement of the criterion, however, does not merely call for pragmatism; it changes the question entirely, shifting public interest standing from the exception (which it has always been) to the rule.

SWUAV also gives unprecedented recognition to important contextual factors in the public interest standing analysis. For instance, Justice Cromwell picks up on Sossin's suggested alternative to the 'genuine interest' criterion by setting out the "capacity of the plaintiff" as a factor under the third branch.[86] In a related factor, he acknowledges the need to bear in mind how the litigation might affect others with an equal or greater stake in the matter. These considerations help to ensure that *Charter* (and other) claims are brought in a manner that best serves those whose rights lay on the line. In addition, Justice Cromwell recognizes and supports the distinctive perspective brought by systemic claims, paving the way for *Charter* challenges to advance equality.

Finally, *SWUAV* validates the importance of claims brought in the public interest. As in *Chaoulli*, the Court affirms its proclivity to hear cases which "transcend[s] the interests of those most directly affected."[87] However, in *SWUAV*, this factor is connected specifically to disadvantaged groups: "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."[88] With these words, the Court expands the purpose of public interest standing to include not only the principle of legality, but also access to justice. In doing so, it shifts the focus from the legitimacy of government action to the needs and interests of social groups.

Suggestions moving forward

While *SWUAV* makes major strides towards a public interest approach to *Charter* justice, some vestiges of the private law paradigm remain. Despite validating the systemic nature of *Charter* claims, the Court in *SWUAV* continues to assert that plaintiffs with private interest standing ought to take priority in the courtroom.[89] I therefore end my paper by providing two suggestions on how public interest standing law might develop to further realize the *Charter*'s democratic potential.

First, I suggest eliminating the three-branch test altogether. The three branches have always been tied to the rationales underlying public interest standing, and *SWUAV* emphasized the importance of weighing each branch in light of these purposes. However, the rationales do not match their respective criteria perfectly, nor do the criteria always serve their respective rationales. For example, the concern about preserving judicial resources actually applies to all branches of the test, and also depends on extraneous considerations, such as whether the action at hand may avoid a multiplicity of suits. The result is a confusing mix of criteria and principles. *SWUAV* increases the confusion by adding several other factors that don't seem to fit neatly within any one category. It seems simpler to focus directly on the underlying rationales, both for and against granting standing. The purposive approach established in *SWUAV* is a first step in this direction.

My second suggestion relates to a concern raised by both Mathen and Bailey that a

generous approach to public interest standing may sometimes allow claims by privileged parties seeking to curtail the rights of disadvantaged groups.[90] Mathen gives the example of Joe Borowski, who sought to limit women's reproductive rights in *Borowski*; Bailey points to *Chaoulli*, where litigants in a position to benefit from private health insurance sought to strike out provisions intended to protect public health care. To address this, I propose setting out the following as an explicit contextual factor: Does the public interest litigant represent a disadvantaged or marginalized group? This factor should be applied only to tip the scale towards granting standing, and not the other way. It follows naturally from the Court's statement about access to justice as an underlying purpose of public interest standing, and touches on the notion, elucidated by Ross, that questions of standing with respect to *Charter* claims ought to be guided by "the substantive law of the *Charter*" itself.[91] If the *Charter* seeks to enhance democracy by drawing formerly excluded groups into the legal system, then it seems entirely appropriate to consider whether a particular *Charter* claim would in fact fulfill that objective.[92]

Conclusion

The advent of public interest standing opened the door to a more public conception of constitutional litigation. This became especially important in the *Charter* context, due to the increasing adjudication of controversial social issues, and the *Charter*'s potential to advance democratic values such as equality. For many years, however, the Canadian judiciary was reluctant to widen that opening, continuing to rely on the public interest standing test and its corresponding rationales, without questioning their private law foundation. While previous jurisprudence is dotted with moments of liberalization, it was not until *SWUAV* that the Court truly shed its private law trappings and transformed its understanding of the role played by public interest standing.

It would, of course, be premature to call that transformation complete. For one thing, *SWUAV* was a challenge to a limited set of specific legislative provisions; how the Court will treat broader challenges to whole government schemes (such as the challenge to B.C.'s legal aid scheme in *CBA*) remains to be seen. Furthermore, as elucidated above, vestiges of the private law paradigm remain, and the doctrine calls for further improvements. Nevertheless, by opening the courtroom doors to a broader public, *SWUAV* takes an encouraging first step towards realizing the *Charter*'s democratic promise.

Endnotes

1 2012 SCC 45, [2012] 2 SCR 524 [*SWUAV* cited to SCC].
2 Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44 UBC L Rev, 25 at 256.
3 Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Vancouver: Carswell, 1986) at 9.
4 [1975] 1 SCR 138, 43 DLR (3d) 1 [*Thorson*].
5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
6 See for example: FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: University of Toronto Press, 2000).
7 Frank Iacobucci, "The *Charter*: Twenty Years Later" (2002) 21 Windsor YB Access Just 3 at 18.
8 *Ibid* at 4.
9 Sonja Grover, "The Equality and Liberty Rights of the Destitute: A Canadian Charter Case Example" (2005) 12 International Journal on Minority and Group Rights 43 at 44.
10 The case refers to challenging the validity of legislation on a justiciable issue, but goes on to affirm that constitutionality is always a justiciable issue: *Thorson, supra* note 4 at paras 12, 22.
11 [1976] 2 SCR 265, 55 DLR (3d) 632 [*MacNeil*].
12 [1981] 2 SCR 575, 130 DLR (3d) 588 [*Borowski* cited to SCR].
13 *MacNeil, supra* note 11 at para 13; *Borowski , supra note 12* at paras 50-52.
14 *Borowski, supra note 12* at para 56.
15 *Thorson, supra* note 4 at para 39.
16 [1986] 2 SCR 607, 33 DLR (4th) 321 at para 36 [*Finlay* cited to SCR].
17 These three rationales have been reiterated countless times by courts and academics. See for example Cromwell, *supra* note 3 at 9-11; *SWUAV, supra* note 1 at para 25.

18 *Finlay, supra* note 16 at para 36.

19 *Ibid* at paras 36-39. Although not explicitly included in the first branch of the test in *Borowski*, the justiciability requirement has been implicitly incorporated under this branch, and is now an established part of the law of public interest standing: Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 6 [Sossin, *Boundaries*].

20 [1992] 1 SCR 236, 88 DLR (4th) 193 [*Canadian Council* cited to SCR]

21 *Ibid* at para 37.

22 The Court has noted that this criterion "lies at the heart of the discretion to grant public interest standing". *Hy and Zel's Inc v Ontario (AG)*, [1993] 3 SCR 675, 107 DLR (4th) 634 at para 16.

23 *Canadian Council, supra* note 20 at paras 40-42.

24 *Ibid* at para 36.

25 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli* cited to SCC].

26 Writing for the majority, Justice Deschamps granted public interest standing to the litigants on the grounds that their only means of challenging the provision was by recourse to the courts. In doing so, Justice Deschamps seems to have interpreted the third branch of the test as asking not whether other more directly interested litigants were available, but whether other non-litigious means were available. This could be seen as a serious expansion of the test, however it is anomalous in the jurisprudence and Justice Deschamps herself does not appear to have given it great thought (she breezes through the entire test in a single paragraph : para 35). The dissent of Justices Binnie and LeBel points to a more intentionally liberal approach to public interest standing. They note that "it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan […]" and find that the third branch of the test is met on this basis (para 189).

27 2006 BCSC 1342, 59 BCLR (4th) 38 [*CBA* cited to BCSC]. The decision was upheld by the British Columbia Court of Appeal , but on the grounds that the CBA had no reasonable cause of action. The Court of Appeal did not address the standing issue: *Canadian Bar Association v British Columbia,* 2008 BCCA 92, 290 DLR (4th) 617.

28 Although, as I will argue, the preservation of scarce judicial resources can actually cut both ways.

29 *Canadian Council*, *supra* note 20 at para 31; Iacobucci, *supra* note 7 at 12; Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2008) 25 NJCL 191 at 191; Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40 UBC L Rev 727 at 727 [Sossin, "Justice of Access"].

30 *British Columbia (Minister of Forests) v Okanagan Indian Band,* 2003 SCC 71, [2003] 3 SCR 371 at para 27.

31 Sheila McIntyre, "Above and Beyond Equality Rights: *Canadian Council of Churches v. Canada*" (1992) 12 Windsor YB Access Just 293 at 301.

32 The lack of emotional resources relates back to the point made by Justices Binnie and LeBel in *Chaoulli*, *supra* note 25 at para 189. On the financial side, June M Ross points out that *Charter* litigation tends to be even more costly than other litigation: June M Ross, "Standing in Charter Declaratory Actions" (1995) 33 Osgoode Hall LJ 151 at 182.

33 Ross, *ibid* at 168-169.

34 *Canada (AG) v Downtown Eastside Sex Workers United Against Violence,* 2012 SCC 45, [2012] 2 SCR 524 (Factum of the Respondents at para 70).

35 Sossin, "Justice of Access", *supra* note 29 at 737.

36 Patrick Keyzer makes a similar argument regarding the Australian constitutional justice system: Patrick Keyzer, *Open Constitutional Courts* (Sydney: The Federation Press, 2010) at 22.

37 See note 19.

38 Sossin, *Boundaries*, *supra* note 19 at 203.

39 The traditional floodgates concern is well articulated in *Canadian Council:* "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 well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important." *Canadian Council, supra* note 20 at para 35.

40 See for example *Thorson*, *supra* note 4 at para 12; Ross, *supra* note 32 at 156.

41 Ross, *supra* note 32 at 156.

42 For example, courts may direct a stay or impose costs: *Thorson*, *supra* note 4 at para 12. They may also screen for merit early in the case, or intervene as necessary: *SWUAV*, *supra* note 6 at para 28.

43 KE Scott, "Standing in the Supreme Court: A Functional Analysis" (1973), 86 Harv L Rev 645 at 674.

44 This has been noted by many scholars. See for example Ross, *supra* note 32 at 156-157, 167; Bailey, *supra* note 2 at 266.

45 Iacobucci, *supra* note 7 at 11.

46 Cromwell, *supra* note 3 at 10; Ross, *supra* note 32 at 158.

47 See note 32.
48 Sossin, "Justice of Access", *supra* note 29 at 734-735
49 *Ibid* at 736.
50 Iacobucci, *supra* note 7 at 6-10. Ross points out that provincial courts may be an inappropriate venue for hearing the type of social science evidence commonly tendered in *Charter* cases (*supra* note 32 at 198).
51 Sossin, "Justice of Access", *supra* note 29 at 727.
52 *CBA*, *supra* note 27 at para 70.
53 *CBA, supra* note 27 at paras 68-70. The preference for challenges to specific statutory provisions over broad-based executive actions also arises from justiciability concerns. Indeed, in *CBA,* Chief Justice Brenner narrowly interpreted *Finlay* as extending public interest standing "only in those circumstances where a challenge to administrative action was analogous to a challenge to legislation" and found that CBA failed to meet the first branch of the test on that basis (para 42). Chief Justice Brenner's hesitation to review an entire government scheme may seem understandable, but as Sossin argues, "[t]he distinction between *ultra vires* public acts and public acts that flow from policy preferences is not a sustainable distinction in light of the *Charter.*" (Sossin, "Justice of Access", *supra* note 55 at 729-730). In other words, the court must step boldly into its new role under the *Charter*, rather than shying away from it.
54 Bailey notes that *Canadian Council* "articulated a preference for approaches based on individuated litigation and case-by-case analysis without deep reflection on the social context in which those directly affected exist or the systemic nature of the challenge." (*supra* note 2 at 267)
55 *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue),* 2007 SCC 2, [2007] 1 SCR 38.
56 Mathen, *supra* note 29 at 199.
57 Bailey, *supra* note 2 at 265.
58 *Ibid* at 267.
59 Leonard T Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: Public Commission on Legal Aid, 2011) at 6; *CBA, supra* note 27 at para 15.
60 *SWUAV* Respondents' factum, *supra* note 34 at para 62.
61 In Bailey's words: "favouring private litigation can itself effect discrimination by imposing the burden of testing the constitutionality of our nation's laws on the individual shoulders of our most vulnerable community members." (*supra* note 2 at 284)
62 *SWUAV* Respondents' factum, *supra* note 34 at para 9.
63 *Criminal Code,* RSC 1985, c C-46.
64 *Ibid* at, ss 210-211
65 *Ibid* at s 213.
66 *Ibid* at s 212.
67 *Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)*, 2010 BCCA 439 at para 7, 324 DLR (4th) 1 [*SWUAV* (BCCA)].
68 In addition to the question of whether public interest standing should be granted to Ms. Kiselbach and SWUAV respectively, the case also considered whether Ms. Kiselbach had private interest standing. For the purposes of this paper, however, I will focus on the public interest standing issue.
69 *Bedford v Canada (Attorney General)*, 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford*].
70 *SWUAV* (BCCA), *supra* note 67 at para 54.
71 *Ibid* at para 63.
72 *Ibid* at para 56.
73 *Ibid* at para 62.
74 *Ibid* at para 59.
75 It is interesting to note that the judgment of the Court was penned by Justice Cromwell, who, many years ago, authored the first major treatise on the law of standing in Canada, Cromwell, *supra* note 3.
76 *SWUAV*, *supra* note 1 at para 20.
77 *Ibid* at para 52. The Court is not entirely clear on whether this is to be a comparative analysis (i.e. "more reasonable and effective means") or a free-standing one (is the action being brought a "reasonable and effective means" regardless of what other means there may be). There is some suggestion of the former approach at para 65.
78 *Ibid* at para 51.
79 *Ibid* at paras 63-65. He also noted the potential use of other litigation strategies to address the issue of parallel litigation. For example, the plaintiffs in *SWUAV* applied (unsuccessfully) to stay the appeal to the Supreme Court until the results of *Bedford* were in.
80 *Ibid* at paras 66-69.
81 *Ibid* at para 71.
82 *Ibid* at paras 73-74.
83 *SWUAV* (BCCA), *supra* note 67 at para 43.
84 It is worth noting that Justice Cromwell emphasized the need for flexibility particularly with respect to the third branch.
85 *SWUAV, supra* note 1 at paras 45-48.
86 *Ibid* at para 51.
87 *Ibid*.
88 *Ibid.*

89 *Ibid* at para 27.
90 Bailey, *supra* note 2 at 258 (see note 15); Mathen, *supra* note 29 at 194.
91 Ross, *supra* note 32 at194.
92 C Lynn Smith makes a similar argument: C Lynn Smith, "Judicial Interpretation of Equality Rights under the *Canadian Charter of Rights and Freedoms*: Some Clear and Present Dangers" (1988) 23 UBC L Rev 65 at 84.