

THE MANY LIVES OF A “WIN”: CANADA (*ATTORNEY
GENERAL*) *V. DOWNTOWN EASTSIDE SEX WORKERS
UNITED AGAINST VIOLENCE SOCIETY*

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INTRODUCTION

Even before the Supreme Court of Canada's landmark decision in *Canada (Attorney General) v. Bedford*,¹ it was not illegal to sell sex for money in Canada.² However, the country's Criminal Code prohibited many acts ancillary to sex work,³ including keeping a "bawdy house,"⁴ living on the avails of prostitution,⁵ and communicating in public about acts of prostitution.⁶ The plaintiffs in *Bedford*, and the many civil society groups who intervened to support them,⁷ claimed that "these restrictions on prostitution put the safety and lives of prostitutes at risk and [were] therefore unconstitutional."⁸ A unanimous Court agreed and declared the impugned Criminal Code provisions violative of the Canadian Charter of Rights and Freedoms ("Charter"),⁹ and therefore void.¹⁰ The Court suspended this declaration of invalidity for a year to allow the federal government—then led by the Conservative Party—to enact constitutionally compliant legislation on prostitution.¹¹

Many hailed *Bedford* as a "victory" for sex workers,¹² including the plaintiffs and counsel in a parallel constitutional claim, *Canada (Attorney*

1. Att'y Gen. v. Bedford, [2013] 3 S.C.R. 1101 (Can.).

2. Factum of the Respondents at paras. 6–7, Att'y Gen. v. Downtown Eastside Sex Workers United Against Violence Soc'y, [2012] 2 S.C.R. 524 (Can.) [hereinafter Respondents' Factum].

3. This Article relies on the definitions provided by the Canadian Public Health Association, which defines "sex work" as "the consensual exchange of sexual services between adults for money or goods" and "prostitution" as "the term used by Canadian law to describe the exchange of sexual activity for monetary payment." CAN. PUB. HEALTH ASS'N, SEX WORK IN CANADA: THE PUBLIC HEALTH PERSPECTIVE 3 (2014), available at https://www.cpha.ca/sites/default/files/assets/policy/sex-work_e.pdf [<https://perma.cc/NGV2-Q9PG>].

4. Canada Criminal Code, R.S.C. 1985, c C-46 § 210 (repealed 2019) (Can.).

5. *Id.* § 212(1)(j).

6. *Id.* § 213(1)(c); *Bedford*, 3 S.C.R. paras. 3–4 (describing the relief sought by the plaintiffs, including an order finding the Criminal Code's prohibition of public communication about acts of sex work unconstitutional).

7. Intervening groups included a coalition of Downtown Eastside Sex Workers United Against Violence Society, Pace Society, and Pivot Legal Society. *Bedford*, 3 S.C.R. at 1101–02.

8. *Id.* para. 1.

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

10. *Bedford*, 3 S.C.R. para. 164.

11. *Id.* para. 169.

12. *See, e.g., Bedford Supreme Court Victory*, PIVOT (2020), http://www.pivotlegal.org/supreme_court_victory [<https://perma.cc/R42J-SSG6>] (calling *Bedford* a victory for sex workers).

General) v. *Downtown Eastside Sex Workers United Against Violence Society* (*SWUAV*).¹³ As will be discussed below, the *SWUAV* case, which also challenged the restrictions on prostitution as unconstitutional, made it to the Supreme Court before *Bedford* but only on the preliminary issue of whether the plaintiffs had standing to bring the claim.¹⁴ In deciding whether to grant public interest standing to the plaintiffs—a former sex worker and a society run “by and for” sex workers in Vancouver’s Downtown Eastside neighborhood¹⁵—the Court in *SWUAV* rearticulated the test for public interest standing to allow better access to the courts for marginalized groups.¹⁶ However, given the Court’s ruling in *Bedford*, *SWUAV* never reached the merits stage.¹⁷

Notwithstanding the *Bedford* plaintiffs’ “win” in the Supreme Court, the federal government’s legislative response to the decision has been a disappointment to sex workers and their allies. Not only do the new laws likely violate the *Charter* once again, but they also depart from the Court’s articulated reasoning by reframing the regulation of sex work as a moral imperative instead of as a public nuisance—the framing the *Bedford* Court utilized.¹⁸ Under the new laws, sex workers—particularly those living in poverty—are still criminalized and face unnecessary risk of violence as a result.¹⁹ Little has changed for the *SWUAV* plaintiffs, and the sex workers that they represent, since they first brought their claim over a decade ago.

This Article argues that *SWUAV* is a positive example of strategic litigation. Although it did not achieve the substantive “win” for sex workers that its proponents had hoped, it significantly contributed to access to justice in Canada. Part I provides background on the Downtown Eastside and the vibrant civil society advocating for the rights of the sex workers who work in that neighborhood. Part II offers an overview of the *SWUAV* case, which

13. *We Won! Supreme Court Of Canada Strikes Down Federal Sex Work Laws!*, PACE (Dec. 20, 2013), <https://www.pace-society.org/won/> [<https://perma.cc/JAM2-T7MW>].

14. *Att’y Gen. v. Downtown Eastside Sex Workers United Against Violence Soc’y*, para. 1 [2012] 2 S.C.R. 524 (Can.) [hereinafter *SWUAV*].

15. *Protecting the Health, Safety, and Human Rights of Sex Workers*, PIVOT (2020), pivotlegal.org/sex_workers_rights [<https://perma.cc/4Y64-NSZ3>].

16. *SWUAV*, 2. S.C.R. para. 1. For a detailed explanation of Canada’s public interest standing doctrine, see *infra* Part III.

17. *Id.*

18. Carissima Mathen, *A Recent History of Government Responses to Constitutional Litigation*, 25 CONST. F. 101, 103 (2016).

19. BRENDA BELAK & DARCIE BENNETT, PIVOT LEGAL SOC’Y, *EVALUATING CANADA’S SEX WORK LAWS: THE CASE FOR REPEAL* 25 (2016), available at https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/1960/attachments/original/1480910826/PIVOT_Sex_workers_Report_FINAL_hires_ONLINE.pdf?1480910826 [<https://perma.cc/E6PP-WPT8>].

challenged the constitutionality of Criminal Code provisions criminalizing acts ancillary to sex work but never reached the merits of the case. Part III traces the evolution of the public interest standing doctrine in Canadian courts leading up to the *SWUAV* case and explains the Supreme Court's re-articulation of the public interest standing test in *SWUAV*. Part IV describes the *Bedford* case, which ran parallel to *SWUAV*, and which was considered a "win" until it opened the door for the Conservative government to entrench anti-sex work sentiment further through new legislation. Finally, Part V highlights the expanded availability of public interest litigation after *SWUAV* and argues that *SWUAV* should be considered a "win" for access to justice in Canada in spite of the fact that the Supreme Court did not reach the merits of the case. Although access to the courts is only one element of access to justice, particularly for individuals and groups experiencing intersecting marginalization, it is nevertheless an important one.²⁰ The procedural "win" of expanding the test for public interest standing has had the effect of allowing other groups to bring public interest litigation, and its impact will only increase with time. In this way, this Article considers the myriad—and sometimes unexpected—ways in which strategic litigation can advance the rights of the most marginalized.

I. SEX WORK IN THE DOWNTOWN EASTSIDE

The Downtown Eastside, a neighborhood comprising a few blocks in downtown Vancouver, has been called Canada's "poorest postal code."²¹ With the "lowest per capita income" in the country, it has "a high concentration of social problems, including poverty, disease and violence."²² The Supreme Court of Canada has taken judicial notice of the fact that "living conditions [in the Downtown Eastside] would shock many Canadians."²³ As the Court described, the neighborhood "is one of the few places where Vancouver's poorest people, crippled by disability and addiction, can afford to live. Twenty percent of its population is homeless. Of those who are not

20. Roderick A. Macdonald, *Access to Justice and Law Reform #2*, 19 WINDSOR Y.B. ACCESS TO JUST. 317, 319–20 (2001).

21. *Weighing in on Future of Vancouver's Downtown Eastside*, CBC (July 18, 2013), <https://www.cbc.ca/news/canada/british-columbia/weighing-in-on-future-of-vancouver-s-downtown-eastside-1.1356400> [<https://perma.cc/H7UN-KBYC>].

22. PIVOT LEGAL SOC'Y SEX WORK SUBCOMM., VOICES FOR DIGNITY: A CALL TO END THE HARMS CAUSED BY CANADA'S SEX TRADE LAWS 4 (2004), available at http://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/legacy_url/273/voicesfordignity.pdf?1345765612 [<https://perma.cc/YU2N-BHT5>] [hereinafter VOICES FOR DIGNITY].

23. *Att'y Gen. v. PHS Cmty. Servs. Soc'y*, [2011] 3 S.C.R. 134, 145 (Can.).

homeless, many live in squalid conditions in single-occupancy hotels . . . Existence is bleak.”²⁴

Many sex workers—particularly those working in the street—live and work in the Downtown Eastside.²⁵ This population is disproportionately female, Indigenous, and poor.²⁶ Various national news stories have brought public attention to the extreme risks that street-level sex workers face, including news coverage of the conviction of pig farmer Robert Pickton for the murder of multiple sex workers whom he picked up in the Downtown Eastside, killed, and buried on his farm.²⁷ Current and former sex workers also testified about the “killing fields” of the Downtown Eastside to the National Inquiry into Missing and Murdered Indigenous Women and Girls.²⁸

The vibrant civil society of the Downtown Eastside, including organizations like Pivot Legal Society, has been aware of these risks and has spent years working to address them. Pivot is a non-profit organization that uses the law to combat poverty and social exclusion.²⁹ In 2003, Pivot’s Sex Work Subcommittee began consulting with sex workers living in poverty in order to be able to communicate to the government the expertise and lived experience of those whom the criminalization of sex work most directly affects.³⁰ This consultation culminated in the 2004 publication of a report, *Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws*, which called for changes to the criminal laws surrounding sex work.³¹ The

24. *Id.*

25. VOICES FOR DIGNITY, *supra* note 22, at 4.

26. *Id.*

27. Petti Fong, *Pickton Convicted*, TORONTO STAR (Dec. 10, 2007), https://www.thestar.com/news/canada/2007/12/10/pickton_convicted.html [<https://perma.cc/BY7W-PFFW>].

28. Linda Givetash, *Activist Tells Inquiry that Women Working in Vancouver Sex Trade Were Seen as ‘Disposable,’* GLOBE & MAIL (Apr. 4, 2018), <https://www.theglobeandmail.com/canada/article-commissioners-urge-more-time-for-missing-women-inquiry-at-bc-hearing/> [<https://perma.cc/XPE3-JCQQ>] (citing Jamie Lee Hamilton, a former sex worker and activist in Vancouver, as using the term “killing fields” in reference to the Downtown Eastside); *see also* 1A NAT’L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS 656, 667 (2019), available at https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf [<https://perma.cc/6NDH-CKCT>] (highlighting the testimony of sex workers in the Downtown Eastside).

29. *About Page*, PIVOT LEGAL SOC’Y, <http://www.pivotlegal.org/about> [<https://perma.cc/M2M9-VTFB>].

30. VOICES FOR DIGNITY, *supra* note 22, at 1, 6–8.

31. *Id.* at 2. In *Voices for Dignity*, Pivot called for the repeal of several Criminal Code provisions in effect at the time, namely § 213 (the “Communication Law”), §§ 210–211 (collectively, the “Bawdy House Law”), and most of § 212 (the “Procuring Law”). For more detail on this, see *infra* Part II.

report maintained that the "human rights of sex workers must be vigorously defended in all levels of court using legal reasoning that recognizes the intersecting violations of constitutional guarantees to freedom of expression, equality and the right to life, liberty and security of the person."³²

Additionally, in *Voices for Dignity*, Pivot called for more systemic changes outside of the criminal law.³³ The report outlined the intersecting types of marginalization that low-income sex workers in the Downtown Eastside experience.³⁴ Affidavits taken from current and former sex workers documented that "[p]overty, housing, violence, health, addiction and law enforcement were [also] major areas of concern."³⁵ Therefore, policy changes beyond decriminalization were necessary to improve sex workers' safety and well-being.

II. CHALLENGING THE *CRIMINAL CODE* PROVISIONS IN *SWUAV*

Building on *Voices for Dignity*, in August 2007, Pivot lent public support to *SWUAV*, a constitutional challenge to the Criminal Code provisions restricting the practice of sex work. Although selling sex was not criminalized *per se*, the Criminal Code prohibited many acts ancillary to sex work in § 213 (the "Communication Law"), which "prohibit[ed] any person from stopping or communicating with any person in a public place for the purpose of engaging in prostitution."³⁶ Similarly, Criminal Code § 210 "prohibit[ed] being a keeper, inmate, or occupant of a common bawdy house or knowingly permitting a place to be let or used for the purposes of a common bawdy-house, as an owner or someone in charge or control of the place"³⁷ and Criminal Code § 211 "prohibit[ed] taking, transporting, or directing any other person to a common bawdy-house (collectively, the "Bawdy House Law")."³⁸ Finally, *Criminal Code* § 212 (the "Procuring Law"), "prohibit[ed] procuring and related conduct, including facilitating or managing another person's involvement in prostitution and living on the avails of prostitution."³⁹ The plaintiffs in *SWUAV* argued that the impugned provisions had the effect of criminalizing sex workers even though their profession was not itself illegal.⁴⁰

32. VOICES FOR DIGNITY, *supra* note 22, at 27.

33. *Id.* at 2.

34. *Id.*

35. *Id.* at 13.

36. Respondents' Factum, *supra* note 2, at para. 6.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* paras. 6-7.

The plaintiffs petitioned the British Columbia Supreme Court to invalidate these provisions on the basis that they violated the constitutional rights of sex workers.⁴¹ In particular, the plaintiffs argued that these provisions violated sex workers' rights under the following provisions of the Charter:

§ 7 [of the Charter] liberty interests due to the possibility of arrest and imprisonment;

§ 7 rights to security of the person, given that the [impugned provisions] prevent sex workers from taking steps to improve the health and safety conditions of their work;

§ 15 equality rights, given the [impugned provisions'] discriminatory effects on sex workers who are a disadvantaged group;

§ 2(b) expression rights in that s. 213 of the Criminal Code limits communication that could serve to increase their safety; and

§ 2(d) association rights because sex workers are prevented from joining together to increase their personal safety.⁴²

The individual plaintiff was Sheryl Kiselbach, a former sex worker. In her approximately thirty years engaging in sex work, Ms. Kiselbach had been convicted "under the former prohibition on solicitation and under the bawdy house provisions."⁴³ The institutional plaintiff was the Downtown Eastside Sex Workers United Against Violence Society, a society run "by and for" sex workers, which works to improve conditions for sex workers living and working in the Downtown Eastside.⁴⁴

41. *Id.* at para. 7.

42. *Id.* at paras. 3-4; VOICES FOR DIGNITY, *supra* note 22, at 23-26 (describing the impact of the impugned provisions on the civil rights and wellbeing of sex workers); *see also* Canadian Charter of Rights and Freedoms, *supra* note 9, at § 2(b) ("Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; . . ."); *id.* § 2(d) ("Everyone has the following fundamental freedoms: . . . (d) freedom of association."); *id.* § 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."); *id.* § 15 ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.").

43. Downtown Eastside Sex Workers United Against Violence Soc'y v. Att'y Gen., 2010 BCCA 439, 10 B.C.L.R. 5th 1, 33, para. 5 (Can. BCCA) [hereinafter *SWUAV-BCCA*].

44. Respondents' Factum, *supra* note 2, at para. 8.

The plaintiffs' evidence showed that police rigorously enforced the sex work laws in Vancouver's Downtown Eastside, which pushed an already marginalized group of sex workers further into the margins of society in order to avoid criminal liability.⁴⁵ They argued that continuing to criminalize sex workers would "worsen the already harmful [and unsafe] conditions under which sex workers live, add to the stigma of their employment and social position, and support the inference that sex workers are less worthy than other members of society."⁴⁶ Before the case could begin on the merits, the Court heard defendant Attorney General of Canada's application to dismiss the claim on the basis that the plaintiffs lacked either private or public interest standing.⁴⁷

III. EVOLUTION OF THE PUBLIC INTEREST STANDING TEST IN CANADA

Although Canadian courts have long maintained the need to limit which parties have sufficient interest to bring a claim, over time they have developed the doctrine of public interest standing to promote access to justice and ensure accountability for government action. This Part traces the development of the three-prong test for public interest standing prior to the *SWUAV* decision. This Part then describes the Supreme Court's re-articulation of the third prong of the public interest standing test in *SWUAV*, which recognizes the practical realities of public interest claims and adopts a more permissive construction of public interest standing in legal challenges such as the *SWUAV* case.

A. The Test for Public Interest Standing Pre-*SWUAV*

Canadian courts have long recognized the practical and prudential need to limit who has standing to bring a claim. Traditionally, only individuals with a direct stake in a case could bring it.⁴⁸ This is known as "private interest standing."⁴⁹ As the Supreme Court noted, "not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so," and the law of standing serves this

45. VOICES FOR DIGNITY, *supra* note 22, at 15–18.

46. *Id.* at 2.

47. *SWUAV*, 2 S.C.R. at 534.

48. Dana Phillips, *Public Interest Standing, Access to Justice, and Democracy Under the Charter: Canada (Att'y Gen.) v. Downtown Eastside Sex Workers United Against Violence*, 22(2) CONST. F. 25, 25 (2013); Lorne Sossin, *The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?*, 40 U.B.C. L. REV. 727, 728 (2007) (explaining that aside from public interest standing, there is no third party standing available in Canadian courts).

49. Phillips, *supra* note 48, at 26.

gatekeeping function.⁵⁰ The “traditional concerns” that purport to justify limitations on standing are the following:

[P]roperly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government.⁵¹

Despite these concerns, over time, courts have developed the doctrine of public interest standing as a mechanism to promote access to the courts and ensure that the public can challenge government action. In a trilogy of cases in the 1970s and 1980s, the Court found that, in certain circumstances, a claim could proceed even where the plaintiffs lacked a direct stake in the matter.⁵² In particular, the Court recognized that constitutional questions should not be immune from review: “state action should conform to the Constitution and statutory authority and . . . there must be practical and effective ways to challenge the legality of state action.”⁵³ The test that the majority set forth for determining public interest standing in *Minister of Justice of Canada v. Borowski* is as follows:

[T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a *serious issue* as to its invalidity, a person need only to show that he is affected by it directly or that he has a *genuine interest* as a citizen in the validity of the legislation and that there is *no other reasonable and effective manner* in which the issue may be brought before the Court.⁵⁴

50. *SWUAV*, 2 S.C.R. para. 22.

51. *Id.* para. 25.

52. *Thorson v. Att’y Gen.*, [1975] 1 S.C.R. 138, 163 (Can.) (finding that in federal tax cases, the decision to allow standing is supported by the right of the citizenry to constitutional behavior by the government when that behavior is in question); *Nova Scotia Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 271 (Can.) (finding that a court could, in its discretion, grant standing to a party not directly affected if there appears to be no other way to get judicial review of a challenged act); *Minister of Just. v. Borowski*, [1981] 2 S.C.R. 575, 598 (Can.) (finding prior case history to establish that a person not directly affected by legislation only needs to have interest its validity as a citizen and show that there is no other means of bringing the legislation to judicial review to have standing).

53. *SWUAV*, 2 S.C.R. at para. 31 (describing the precedent defining this “principle of legality”).

54. *Borowski*, 2 S.C.R. at 598 (emphasis added). In *Canadian Council of Churches v. Minister of Employment and Immigration*, the Supreme Court relied on *Borowski* to frame a clear test for public interest standing, asking first whether “there a serious issue raised as to the invalidity of the legislation in question,” then whether “it been established that the plaintiff is directly affected by the legislation” or otherwise has “a genuine interest in its validity,” and finally whether there is “another reasonable and effective way to bring

Each of these three factors accords with one of the traditional concerns motivating the law on standing, noted above:

The implicit requirement of justiciability under the first branch of the test addresses the concern about the proper role of the courts. 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.⁵⁵

In a subsequent case concerning public interest standing, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, the Supreme Court affirmed this test, but applied it restrictively.⁵⁶ The Council, an organization working with refugees, brought a constitutional challenge⁵⁷ to the amendments to the 1976 Immigration Act,⁵⁸ which affected who was considered a Convention Refugee under the 1951 Convention Relating to the Status of Refugees.⁵⁹ The Attorney General claimed that the Council lacked public interest standing to bring the claim.⁶⁰ The Court found that the Council passed the first two prongs of the test—the claim raised a serious issue about the legislation's validity and the Council had a genuine interest in it.⁶¹ However, the Court held that the Council did not meet the third prong—it was possible for individual refugees in the context of the proceedings against them to challenge the validity of the legislation—and therefore refused to grant public interest standing to the Council and dismissed the underlying claim.⁶² The Court did not consider that the uniquely vulnerable situation of refugees facing deportation might preclude impacted individuals from bringing litigation to meaningfully challenge the legislation.⁶³

In *Canadian Council of Churches*, the Supreme Court stated that the "whole purpose" of standing is "to prevent the immunization of legislation or

the issue before the court." [1992] 1 S.C.R. 236, 253 (Can.); see also *Finlay v. Minister of Fin.*, [1986] 2 S.C.R. 607, 631–34 (Can.) (clearly articulating, subsequent to *Borowski*, the justification for limiting standing).

55. Phillips, *supra* note 48, at 26.

56. *Canadian Council of Churches*, 1 S.C.R. at 255–56.

57. *Id.* at 240.

58. Immigration Act, 1976, S.C. 1976–77, c 52, amended by S.C. 1988, c 35 and c 36 (Can.).

59. Convention Relating to the Status of Refugees, adopted July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

60. *Canadian Council of Churches*, 1 S.C.R. at 240–41.

61. *Id.* at 253.

62. *Id.* at 254.

63. *Id.*

public acts from any challenge.”⁶⁴ The Court therefore concluded that public interest standing should not be granted “when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant,” and it expressly refused to broaden the test for public interest standing in favor of increased access to the courts.⁶⁵ The Court expressed the fear that allowing even “well-meaning organizations” to bring “important” cases “would be detrimental, if not devastating, to our system of justice and unfair to private litigants.”⁶⁶ Yet at the same time, despite its analysis to the contrary, the Court found that the test for public interest standing “should be interpreted in a liberal and generous manner.”⁶⁷

Some legal scholars have criticized the Supreme Court’s articulation of public interest standing in *Canadian Council of Churches* as impeding access to justice for marginalized groups. As Professor Jane Bailey summarized, the Court was driven by “[a]t least three unacknowledged policy and equality choices.”⁶⁸ First, the Court’s approach to the third prong of the test was overly individualistic.⁶⁹ Under the third prong of the test, the existence of other “reasonable and effective” challenges militates against granting public interest standing. Individual litigation is more likely to result in individualized outcomes than systemic change.⁷⁰ Second, the Court’s emphasis on “efficiency” suggested that private litigation is inherently more efficient than public interest litigation. However, in cases where litigation seeks to effect systemic changes that benefit an entire marginalized group, public interest litigation is often more efficient than individual claims.⁷¹ And finally, by failing to recognize the particular social context out of which the claim arose, the Court placed a “discriminatory burden” on marginalized individuals and groups.⁷² Although the Court relied on the fact that some refugees did challenge aspects of the legislation in the context of their refugee hearings, it failed to consider either the material and other resources necessary to engage in litigation or the “lived realities” of those whom the impugned legislation or administrative action impacts.⁷³

64. *Id.* at 252.

65. *Id.* at 237.

66. *Id.* at 252.

67. *Id.* at 253.

68. Jane Bailey, *Reopening Law's Gate: Public Interest Standing and Access to Justice*, 44 U.B.C. L. REV. 255, 264 (2011).

69. *Id.*

70. *Id.* at 265.

71. *Id.* at 266.

72. *Id.* at 267.

73. *Id.* at 268.

In its next seminal case on public interest standing, *Chaoulli v. Quebec (Attorney General)*,⁷⁴ the Supreme Court appeared to interpret the test more liberally and generously than in *Canadian Council for Churches*. *Chaoulli* did not seek to promote the rights of marginalized groups, but instead advocated for those with financial means to access private health care in the province of Quebec.⁷⁵ The plaintiffs in *Chaoulli*, a physician and a former patient in Quebec's public health care system, claimed that the province's prohibition on private health services was unconstitutional and in violation of Quebec's Charter of Human Rights and Freedoms.⁷⁶ The majority of the Court held that people in Quebec should be free to purchase private insurance for health services.⁷⁷ Departing from the Court's lengthy analysis in *Canadian Council of Churches*, the Court in *Chaoulli* found without much consideration that the plaintiffs had public interest standing pursuant to the three-prong test.⁷⁸ Regarding the third prong, which examines whether there are other reasonable methods available to address the issue, the majority simply held that "there is no effective way to challenge the validity of the provisions other than by recourse to the courts."⁷⁹ The dissenting opinion of Justices Binnie, LeBel, and Fish, which agreed with the majority on the point of public interest standing,⁸⁰ provided a bit more by way of analysis. Their analysis seemed to turn on the fact that the plaintiffs were bringing a "systemic" constitutional challenge to Quebec's health plan, rather than an "argument . . . limited to a case-by-case consideration."⁸¹ The dissenters expressly recognized the difficulty of expecting ailing or dying individuals, who were directly affected by the Quebec health plan, to mount a lengthy and costly systemic challenge to the regime.⁸²

Canadian courts were inconsistent in their approach to public interest standing after *Chaoulli*. The British Columbia Supreme Court dismissed a claim by the Canadian Bar Association challenging that province's reduction in legal aid services in part on the basis that the Association lacked public interest standing to bring the claim.⁸³ The Court—somewhat inexplicably—held that *Chaoulli* was not a systemic challenge and

74. *Chaoulli v. Quebec (Att'y Gen.)*, [2005] 1 S.C.R. 791, paras. 188–89 (Can.).

75. *Id.* para. 11.

76. Quebec Charter of Human Rights and Freedoms, C.Q.L.R. c C-12 (Can.).

77. *Chaoulli*, 1 S.C.R. at paras. 100–01.

78. *Id.* para. 35.

79. *Id.*

80. *Id.* paras. 186–89.

81. *Id.* para. 189.

82. *Id.*

83. *Canadian Bar Ass'n v. HMTQ et al.*, 2006 BCSC 1342, paras. 57, 83 (Can.), *aff'd on other grounds* 2008 BCCA 92 (Can.).

distinguished it on that basis from the Association's claim.⁸⁴ The Court effectively "denied [the Association] standing to constitutionally challenge the inadequacy of public funding [for legal aid], which it alleged prevented marginalized persons from bringing claims before the law, because the Court found that marginalized people themselves could bring that challenge before the law."⁸⁵

Conversely, New Brunswick's trial and appellate courts found that an abortion doctor had public interest standing to challenge that province's legislation restricting the provision of abortion services.⁸⁶ The appellate court rejected the argument that standing should be denied because a pregnant woman who was denied an abortion as a result of the restrictions could challenge the legislation. In a contextualized analysis of the type that was not done in *Canadian Council of Churches*, the Court noted that the social context made it unreasonable to expect individual pregnant women to challenge the legislation instead.⁸⁷ Only when the question of public interest standing reached the Supreme Court in *SWUAV* was some clarity reached as to the appropriate test and manner of applying it.

B. *SWUAV* and the Supreme Court's Re-Articulation of the Test for Public Interest Standing

As outlined above, in 2007, Sheryl Kiselbach and the Downtown Eastside Sex Workers United Against Violence Society brought a claim in the British Columbia Supreme Court challenging the constitutional validity of §§ 210–213 of the Criminal Code.⁸⁸ However, before the merits of *SWUAV* could be decided, the Court considered the government's argument that the plaintiffs lacked standing to bring the claim.

On the question of public interest standing, Justice Ehrcke of the British Columbia Supreme Court easily found that the first two prongs of the test were met—the plaintiffs' claim raised a serious issue to be tried, and they had a genuine interest in the validity of the impugned legislation.⁸⁹ However, he refused to grant public interest standing on the basis of the third prong—"whether there is no other reasonable and effective way to bring the issue before the court."⁹⁰ In line with the Supreme Court's reasoning in *Canadian*

84. *Id.* paras. 70–71.

85. Bailey, *supra* note 68, at 273.

86. Morgentaler v. New Brunswick, 2008 NBQB 258, 336 N.B.R. (2nd) 10 (Can.), *aff'd* 2009 NBCA 26, N.B.R. (2nd) 39 (Can.).

87. Bailey, *supra* note 68, at 274–75.

88. Respondents' Factum, *supra* note 2, para. 6.

89. *SWUAV-BCSC*, 2008 BCSC paras. 67, 69.

90. *Id.* paras. 85, 87.

Council of Churches, the trial judge held that individual sex workers, when charged with one of the impugned provisions, could raise a constitutional objection in the context of their prosecution.⁹¹ Further, the trial judge pointed to *Bedford v. Canada*,⁹² another constitutional claim challenging sex work laws in the Superior Court of Justice of Ontario in which one of the plaintiffs was a current sex worker. He rejected the plaintiffs' argument that the unique vulnerabilities of SWUAV's members—mostly street-level sex workers, unlike the applicants in *Bedford*—precluded them from bringing a constitutional challenge: "I cannot see how their vulnerability makes it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses."⁹³

A majority of the British Columbia Court of Appeal reversed the trial judge's decision, favoring a "liberal and generous" approach to public interest standing.⁹⁴ The Court acknowledged that the availability of a private litigant is usually preferable to litigation by public interest standing, but found that "[w]here, as here, the essence of the complaint is that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities, and exacerbates their vulnerability, the law on standing does not require the challenge to be by a person with private interest standing" in the context of criminal prosecution.⁹⁵ In finding that the third prong of the test was met, the Court found that the trial judge failed to consider the "breadth" and "comprehensive and systemic nature" of the claim.⁹⁶ Whereas challenges arising in individual prosecutions would be more likely to relate to specific provisions of the *Criminal Code*, the plaintiffs' challenges to the sex work laws were "multi-faceted, and interrelated."⁹⁷ The trial judge's narrow analysis "stripped [the claim] of its central thesis."⁹⁸ The Court also rejected the argument that *Bedford* militated against the granting of public interest standing, explaining that the decision was not binding upon the British Columbia courts because it was not decided by the Supreme Court.⁹⁹ The Court's analysis seemed to give effect to *Chaoulli*, in which "considerable weight [was given] to the generic nature of the challenge, characterizing it as a systemic challenge."¹⁰⁰

91. *Id.* para. 73.

92. *Bedford v. Canada*, 2010 ONSC 4264, para. 56 (Can.).

93. *SWUAV-BCSC*, 2008 BCSC para. 76.

94. *Id.* at 3–4.

95. *SWUAV-BCCA*, 2010 BCCA paras. 49, 63.

96. *Id.* para. 66.

97. *Id.* para. 51.

98. *Id.* para. 62.

99. *Id.* para. 64.

100. *Id.* para. 57.

When the question of public interest standing made its way to the Supreme Court in September 2012, the Court not only found that the plaintiffs had public interest standing to bring the claim but also took the opportunity to rearticulate the public interest standing test and encourage its application “in a flexible and purposive manner.”¹⁰¹ The Court made two significant changes to the test. First, the Court stated the following about the three “prongs” of the public interest standing test:

[The three prongs] . . . are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. 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.¹⁰²

This was a clear break from previous cases, in which courts found it necessary for all three prongs to be met before they were able to exercise discretion to grant public interest standing.

Second, and most importantly, the Court reworded the third prong of the test, which had been the primary subject of debate in earlier cases. Instead of requiring that there be “no other reasonable and effective manner in which the issue may be brought before the Court” in order for public interest standing to be granted, the new third prong considers “whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court.”¹⁰³ This much more flexible wording has been championed as “[changing] the question entirely, shifting public interest standing from the exception (which it has always been) to the rule.”¹⁰⁴ As discussed below, the Supreme Court’s new approach to public interest standing was widely considered a “win” for access to justice and public interest litigation in Canada.

IV. THE STATUS OF SEX WORKERS’ RIGHTS IN CANADA

In the *Bedford* case, which ran parallel to *SWUAV*, the Supreme Court found that several provisions of the Criminal Code, which criminalized acts ancillary to sex work, violated the Charter. As described in this Part, though,

101. *SWUAV*, 2 S.C.R. para. 52.

102. *Id.* para. 20.

103. *Id.* para. 52.

104. Phillips, *supra* note 48, at 27.

the *Bedford* decision was largely considered a "win" for sex workers' rights, the government's legislative response ultimately left them unprotected.

A. *Canada (Attorney General) v. Bedford*

While the issue of public interest standing in *SWUAV* made its way up to the Supreme Court, Ontario's courts heard a parallel case, *Bedford*, on the merits. In *Bedford*, three current and former sex workers brought an application seeking declarations that sections 210, 212(1)(j) and 213(1)(c) of the Criminal Code—which prohibited the keeping of a "bawdy house," living on the avails of prostitution, and communicating in public regarding an act of prostitution—were unconstitutional.¹⁰⁵ The Attorney General appealed *Bedford* to the Supreme Court, and in December 2013 a unanimous Court issued a landmark decision striking down the challenged provisions on the grounds that they violated the applicants' rights to security of the person protected by § 7 of the Charter.¹⁰⁶

The first step of the Court's § 7 analysis was to determine whether the impugned provisions negatively impacted or limited the applicants' security of the person.¹⁰⁷ First, the Court found that the "bawdy house" prohibition, which criminalized indoor sex work (in-calls), had the effect of restricting sex workers to engage in their profession on the street (out-calls).¹⁰⁸ The evidence showed that in-calls, where sex workers could take safety precautions and control the surroundings in which they work, were far safer than out-calls.¹⁰⁹ The Court noted in particular the "alarming amount of violence" faced by street-level sex workers, which are "the most vulnerable class of [sex workers]," with particular reference to those working in the Downtown Eastside.¹¹⁰ On this basis, the Court found that the "bawdy house" prohibition engaged § 7.¹¹¹

The Court then turned to the second impugned provision, section 212(1)(j), which prohibited a person from living off the avails of the prostitution of another person. Because the provision was so broad, the Court found that it prevented sex workers from employing individuals who could make their work safer, such as "drivers, receptionists, and bodyguards."¹¹² Determining that "the evidence amply supports" the

105. *Bedford*, 3 S.C.R. para. 1.

106. *Id.* para. 165.

107. *Id.* para. 58.

108. *Id.* para. 132.

109. *Id.* paras. 63–64.

110. *Id.* para. 64.

111. *Id.* para. 65.

112. *Id.* para. 67.

conclusion that sex workers' inability to employ such "security-enhancing safeguards" rendered them unable to mitigate the risks they faced in their work, the Court found that the law negatively impacted sex workers' § 7 right to security of the person.¹¹³

Finally, the Court considered the provision prohibiting communication or attempted communication regarding an act of prostitution. The Court noted the evidence that "face-to-face communication is an 'essential tool' in enhancing street prostitutes' safety" as it "allows prostitutes to screen prospective clients for intoxication or propensity to violence, which can reduce the risks they face."¹¹⁴ Because the impugned provision prohibited communication, and therefore had the effect of pushing street-level sex workers into more isolated places and vulnerable situations, it impeded their security of the person and engaged § 7.¹¹⁵ Both Pivot and the Downtown Eastside Sex Workers United Against Violence Society intervened before the Supreme Court in *Bedford*, with their submissions relating primarily to the communication provision and its disproportionate effects on street-level sex workers.¹¹⁶

Importantly, the Court also rejected the government's argument that there was an insufficient causal connection between the laws and the risks that the sex workers faced. The government claimed that sex workers could avoid the risks "simply by choosing not to engage in this activity."¹¹⁷ In its analysis, the Court recognized the socio-economic reality that many sex workers face, noting that "many [sex workers] have no meaningful choice" but to engage in sex work.¹¹⁸ The impugned laws made sex work, an otherwise legal profession, more dangerous by preventing sex workers from taking steps to protect themselves.¹¹⁹

At step two of its § 7 analysis, the Court considered whether the violation of plaintiffs' rights to security of the person was done in accordance with the principles of fundamental justice. These principles, or basic Canadian values, protect against laws that are arbitrary ("where there is *no connection* between the effect and object of the law"),¹²⁰ overbroad (where "the law goes too far and interferes with *some conduct* that bears no connection to its objective"),¹²¹ or grossly disproportionate ("when the effect

113. *Id.* para. 66.

114. *Id.* para. 69.

115. *Id.* paras. 71–72.

116. Factum of the Interveners at 8, *SWUAV*, [2012] 2 S.C.R. 524 (Can.).

117. *Bedford*, 3 S.C.R. para. 79.

118. *Id.* para. 86.

119. *Id.* para. 87.

120. *Id.* para. 98 (emphasis added).

121. *Id.* para. 101.

of the law is grossly disproportionate to the state's objective").¹²² The Court found that the "bawdy house" and communication provisions had a public nuisance objective, and that their negative impact on the applicants' security of the person was grossly disproportionate to this object.¹²³ The prohibition against living on the avails of prostitution was intended to target pimps and the exploitation of sex workers, but it was overbroad as it applied to all individuals that a sex worker might employ to increase their safety.¹²⁴

On the basis of these findings,¹²⁵ the Court declared the impugned provisions to be inconsistent with the Charter and therefore void.¹²⁶ However, the Court found that it was within the federal government's legislative power to impose limits on sex work.¹²⁷ The Court suspended its declaration of invalidity for one year to allow for a legislative response to its decision.¹²⁸

The *Bedford* decision was hailed as a significant "win" in the fight for sex workers' rights, including by Pivot and the plaintiffs in *SWUAV*, but stakeholders were soon disappointed with the government's response.¹²⁹ The government treated its litigation defeat in *Bedford* as an opportunity to further criminalize sex work and reframe it as a moral issue. Instead of simply removing the impugned provisions from the Criminal Code (which was the response preferred by sex workers, experts in public health, and human rights advocates), the government elected to overhaul the sex work laws entirely.¹³⁰

B. The Conservative Federal Government's Legislative Response to *Bedford*

The government failed to meaningfully engage sex workers in its legislative process. In February 2014, a few months after *Bedford*, the government conducted an online survey to obtain input from Canadians about sex work.¹³¹ Groups like Pivot subsequently questioned the legitimacy

122. *Id.* para. 103.

123. *Id.* paras. 132, 134, 147, 159.

124. *Id.* paras. 137, 140.

125. The Court also determined that it was "unnecessary to engage in a full § 1 analysis for each of the impugned provisions" and concluded that "the impugned laws are not saved by § 1 of the *Charter*." *Id.* paras. 161-63.

126. *Id.* para. 165.

127. *Id.*

128. *Id.* para. 169.

129. Belak & Bennett, *supra* note 19, at 4-6.

130. *Id.*

131. RSCH. & STAT. DIV., CAN. DEP'T OF JUST., ONLINE PUBLIC CONSULTATION ON PROSTITUTION-RELATED OFFENCES IN CANADA: FINAL RESULTS (2014) at 1, available at

of this public consultation.¹³² The online format made the survey inaccessible to many sex workers, and the framing of the survey questions seemed to favor responses from those without first-hand knowledge or experience in sex work.¹³³ In June 2014, the Conservative government proposed sex work legislation titled *Bill C-36: The Protection of Communities and Exploited Persons Act*.¹³⁴ Sex workers across Canada rejected the proposed legislation on the basis that it made them more vulnerable to abuse than even the pre-*Bedford* laws.¹³⁵ Although sex workers had limited opportunities to provide feedback to the government about the proposed legislation, many “did not feel they were taken seriously or consulted in a meaningful way.”¹³⁶ The Act, which amended the Criminal Code provisions governing sex work, became law in December 2014.¹³⁷

According to those involved in *SWUAV*, the Act is deficient in many ways. First, it implemented the “Nordic model” of asymmetrical criminalization for the first time in Canada.¹³⁸ This approach (which is used in Norway, Sweden, and other countries) makes it a crime to pay for sexual services.¹³⁹ Specifically, the new § 286.1(1) of the Criminal Code imposed penalties on clients that varied by degree depending on the location in which the sex work transaction takes place. As described by Pivot, this approach “ostensibly aims to eliminate prostitution by making it illegal without punishing sex workers themselves, who are considered to be the ‘victims’ of prostitution.”¹⁴⁰ However, this provision perpetuates the criminalization of sex work and has various negative impacts on sex workers. Although the Nordic model only criminalizes clients, sex workers must still take measures to avoid detection by police to ensure that they have access to clients.¹⁴¹ Sex workers are therefore less able to ensure their own safety. For example, if a sex worker enters a client’s car quickly to avoid detection by police, they have

https://www.justice.gc.ca/eng/rp-pr/other-autre/rr14_09/rr14_09.pdf
[<https://perma.cc/LC9W-BK56>].

132. Belak & Bennett, *supra* note 19, at 25.

133. *Id.*

134. Bill C-36, *Protection of Communities and Exploited Persons Act*, 2nd Sess., 41st Parl., 2015 (as received Royal Assent), available at <http://www.parl.ca/DocumentViewer/en/41-2/bill/C-36/royal-assent> [<https://perma.cc/3RU6-93J4>].

135. Belak & Bennett, *supra* note 19, at 27.

136. *Id.*

137. *Protection of Communities and Exploited Persons Act*, S.C. 2014, c 25.

138. Canada Criminal Code, R.S.C. 1985, c. C-46 § 286.1(1) (Can.).

139. Belak & Bennett, *supra* note 19, at 10.

140. *Id.* at 5, 25 (citing Alison Crawford, *Peter MacKay Faces Balancing Act with Justice Agenda, Court Rules*, CANADIAN BROAD. CORP. (Jan. 16, 2014), <http://www.cbc.ca/news/politics/peter-mackay-facesbalancing-act-with-justice-agenda-courtrulings-1.2511220> [<https://perma.cc/WM65-Z5BH>]).

141. Belak & Bennett, *supra* note 19, at 10–11.

less time to assess the client for possible risks to their safety. Moreover, an increased police presence to enforce the criminalization of buying sex work decreases the likelihood that sex workers will trust or seek the protection of police when they do experience violence.¹⁴² Finally, the continued criminalization of sex work—particularly when it is described as a moral wrong—exacerbates the discrimination and stigma experienced by sex workers, who already face intersecting marginalization.¹⁴³

A second significant problem with the Act is that it does not meaningfully remedy the unconstitutional provisions that were struck down in *Bedford*. First, the Criminal Code still prohibits communication to sell or purchase sex. The new § 213(1.1) (which replaces the former provision § 213(1)(c), which was struck down) is “a marginally narrower version of its unconstitutional predecessor.”¹⁴⁴ Whereas the former provision prohibited sex workers from communicating in public places in furtherance of their work, the new provision now restricts the prohibition to public places, or places open to public view, near schools, playgrounds, or daycare centers.¹⁴⁵ Another new statutory provision, § 286.1(1), now makes it illegal for clients to communicate with sex workers in any context.¹⁴⁶

This ban on communication related to sex work appears to privilege public nuisance considerations (and possibly moral considerations) over the stated needs of sex workers to communicate as part of their work and suffers from many of the same flaws as its predecessor. For instance, as Pivot notes, it prevents sex workers from taking safety precautions like screening potential clients or negotiating terms of sexual services.¹⁴⁷ Additionally, in response to the unconstitutionality of the previous § 212(1)(j), which prohibited living on the avails of prostitution, the government introduced a series of problematic provisions which criminalize various relationships sex workers have on the basis that they are exploitative.¹⁴⁸ For instance, the new provision § 286.2(3) “contains a reverse onus that presumes, in the absence

142. Belak & Bennett, *supra* note 19, at 40–44.

143. *Id.* at 44–45.

144. *Id.* at 48.

145. Compare Canada Criminal Code, R.S.C. 1985, c. C-46 § 213(1.1) (Can.) (prohibiting communication offering, attempting to obtain, or providing sex work in public places near school grounds, playgrounds, or daycare centers), with *id.* § 213(1)(c) (repealed 2019) (prohibiting communication or attempts at communication for the purpose of providing, offering, or obtaining sex work in any public place).

146. Belak & Bennett, *supra* note 19, at 48.

147. *Id.* at 48–51.

148. *Id.* at 55; Canada Criminal Code §§ 286.2, 286.3, 286.4, 286.5 (describing the circumstances under which a person who receives a direct or indirect material benefits from sex work is guilty of a punishable offense, including relevant presumptions and exceptions).

of proof to the contrary, that anyone associating with a sex worker is an exploiter.”¹⁴⁹ While there are exemptions to this presumption—for example, to account for family relationships, or service providers (such as a taxi driver) who are being remunerated for a service provided to a sex worker—they are not sufficiently clear.¹⁵⁰

In addition to these substantive concerns, another major change the sex work laws precipitated is the government’s ideological rationale for restricting sex work. As noted above, the Supreme Court in *Bedford* emphasized the public nuisance concerns at the heart of the limitations on sex work. Conversely, as the government has expressly stated, the amended Criminal Code “reflects a significant paradigm shift away from the treatment of prostitution as a ‘nuisance.’”¹⁵¹ As the government observed, the “victims” of sex work extend beyond sex workers to “communities, in particular children, who are exposed to prostitution . . . as well as society itself.”¹⁵² The Act’s preamble affirms that the issue of criminalizing sex work is a moral one. Sex work is framed as “exploitation” against which the government must “protect” women and girls.¹⁵³ The preamble also “recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity” and expresses the government’s wish that sex workers “leave prostitution.”¹⁵⁴ Many sex workers “vehemently object” to framing sex work this way, as it undermines their agency and ability to give or withdraw consent.¹⁵⁵ Instead, they maintain that sex work should be viewed as a form of labor, and the focus should be on alleviating the systemic socio-economic conditions that preclude some sex workers from engaging in other work.¹⁵⁶

The sex work laws enacted after the government’s defeat in *Bedford* are an example of “a government treat[ing] a loss as an opportunity.”¹⁵⁷ As Professor Carissima Mathen has noted, because *Bedford* brought the issue of sex work to the forefront of public consciousness and Parliament’s legislative agenda, the government was able to enact sweeping changes to the sex work

149. Belak & Bennett, *supra* note 19, at 55.

150. *Id.* at 55–56 (explaining that the law leaves crucial terms undefined, such as “commercial enterprise” for which no exemption can apply, thus creating ambiguity in whether or how the exemptions apply to sex workers).

151. *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act*, CAN. DEP’T OF JUST. (Mar. 8, 2017), <https://www.justice.gc.ca/Eng/Rp-Pr/Other-Autre/Protect/P1.Html> [<https://perma.cc/K6YH-37Z6>].

152. *Id.*

153. Bill C-36, *supra* note 134, pmbl.

154. *Id.*

155. Belak & Bennett, *supra* note 19, at 33.

156. *Id.* at 35–36.

157. Mathen, *supra* note 18, at 103.

laws that had been in place for decades.¹⁵⁸ The government was also able to “revamp the law to reflect a particular brand of legal moralism” that reflected the Conservative Party’s brand of social conservatism.¹⁵⁹ Sex workers, and groups like Pivot which had been supporting them for over a decade, were returned to the position of having to mount a Charter challenge to the new sex work laws which had the effect of making their profession less safe.

V. PUBLIC INTEREST LITIGATION POST-*SWUAV* IS A “WIN”

Despite *SWUAV*’s inability to reach the Supreme Court on the merits and the failure of the *Bedford* “win” to have a lasting impact on Canada’s sex work laws, *SWUAV* was nevertheless an important victory for access to justice in Canada. Many have recognized that there is a crisis of access to justice in the Canadian legal system, largely due to the exorbitant cost of litigation.¹⁶⁰ This is particularly problematic in the context of Charter litigation, which is intensive both in terms of time and resources. One method to overcoming these barriers is public interest litigation. However, as noted above, courts have not always recognized the vulnerability of individuals whose Charter rights were violated when considering whether or not to grant public interest standing to a potential litigant. The Supreme Court’s decision in *SWUAV* has the potential to address this problem. In its reframing of the public interest standing test in *SWUAV*, the Court made the third prong of the test easier for public interest litigants to meet.¹⁶¹ Additionally, the Court encouraged a purposive and flexible application of the test.¹⁶² The Court also specifically advised lower courts to consider the importance of public interest litigation to “provide access to justice for disadvantaged persons in society whose legal rights are affected.”¹⁶³ Based on some of the cases that have followed *SWUAV*, it appears that the case is living up to its potential.

158. *Id.*

159. *Id.*

160. *See, e.g.*, Robert J. Sharpe, *Access to Charter Issues*, 63 SUP. CT. L. REV. 3, 3 (2013) (noting that “[t]he Canadian legal system faces an access to justice crisis”); Bailey, *supra* note 68, at 256–57 (describing the crisis of access to justice in Canada and the way in which the granting of public interest standing impacts access to the courts); Remarks of the Right Honourable Beverley McLachlin, P.C., at the Empire Club of Canada: The Challenges We Face (Mar. 8, 2007), transcript available at <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx> [<https://perma.cc/U7HH-CQFE>] (outlining “the challenge of access to justice” in Canada and its connection to the cost of litigation).

161. *SWUAV*, 2 S.C.R. para. 20.

162. *Id.* para. 21.

163. *Id.* para. 51.

The case of *Manitoba Métis Federation, Inc. v. Canada (Attorney General)*¹⁶⁴ is a clear example of the positive impact of *SWUAV*. The new public interest standing test from *SWUAV* was developed as *Manitoba Métis* was moving through the courts. The Supreme Court, able to apply the new standard on appeal, reached a different result from the courts below. The individual Métis plaintiffs and the Manitoba Métis Federation (a corporation representing many Métis residents of that province) challenged the way in which the federal government had distributed land to Métis pursuant to an agreement that was codified in the Manitoba Act of 1870.¹⁶⁵ Both the trial and appellate courts refused to grant the Federation public interest standing on the basis that the third prong of the test was not met.¹⁶⁶ On appeal, the Supreme Court recognized that the “courts below did not have the benefit of [*SWUAV*],” pursuant to which public interest standing could be granted despite the presence of individual plaintiffs when it “will bring any particularly useful or distinct perspective to the resolution of the issue at hand.”¹⁶⁷ Applying *SWUAV*, the Court noted that the plaintiffs were advancing “a collective claim,” which “merits allowing the body representing the collective Métis interest to come before the Court.”¹⁶⁸ Ultimately, the Court agreed with the courts below that the claim should be dismissed on the merits.¹⁶⁹ Nevertheless, the Court’s analysis is important as it clearly shows that public interest standing may be granted even where individual litigants are able to bring a claim.

In the immigration context, *SWUAV* led to the granting of public interest standing in both challenges to legislation¹⁷⁰ and individual refugee claims.¹⁷¹ *Canadian Doctors for Refugee Care v. Canada (Attorney General)* is particularly notable because in *Canadian Council of Churches*, a similar case which predated *SWUAV*, public interest standing was denied. In *Canadian Doctors*, the Federal Court of Canada considered changes made in 2012 to the Interim Federal Health Program (“the Program”) that reduced access to

164. *Manitoba Métis Fed’n, Inc. v. Att’y Gen.*, [2013] 1 S.C.R. 623 (Can.).

165. *Manitoba Act, 1870*, 33 Vict. c. 3 (U.K.), reprinted in R.S.C. 1985, app II, no. 8 (Can.); *Manitoba Métis*, 1 S.C.R. paras. 1–9 (describing the history leading to the Manitoba Act, the immediate and ongoing aftermath of its implementation, and that the Métis are entitled to a declaration regarding Canada’s failure to implement actions required by the agreement).

166. *Manitoba Métis*, 1 S.C.R. para. 42.

167. *Id.* para. 43.

168. *Id.* para. 44.

169. *Id.* para. 166.

170. *Canadian Drs. for Refugee Care v. Att’y Gen.*, 2014 F.C. 651, [2015] 2 F.C.R. 267, para. 338 (Can.).

171. *Canadian Council for Refugees v. Dep’t of Immigr., Refugees & Citizenship*, 2017 F.C. 1131, para. 74 (Can.).

health care for refugee claimants.¹⁷² Although there were individual refugee claimants challenging the Program, the Court relied on *SWUAV* to grant public interest standing to three organizations: Canadian Doctors for Refugee Care (a group of physicians who work specifically with refugees), Canadian Association of Refugee Lawyers (lawyers and academics who work with refugees, asylum seekers, and migrants), and Justice for Children and Youth (a non-profit legal aid clinic which serves young people).¹⁷³ The Court's analysis recognized, among other things, how the precarious legal status of refugees may prevent them from bringing a claim and the far-reaching impact of the impugned Program on groups of refugee claimants beyond those represented by the individual litigants.¹⁷⁴ In its opinion, the Court recognized the 2012 changes to the Interim Federal Health Program as "the intentional targeting of an admittedly poor, vulnerable and disadvantaged group for adverse treatment" and found that they violated the constitution.¹⁷⁵ Specifically, the changes constituted cruel and unusual treatment contrary to § 12 of the Charter and also violated the equality rights of the plaintiffs under § 15 of the Charter insofar as it treated some refugee claimant groups differently from others in the provision of health services.¹⁷⁶

A comprehensive review of all the post-*SWUAV* decisions is beyond the scope of this Article, but future work should analyze them systematically to identify any trends as to whether certain types of public interest litigants, or certain types of claims, have been more successful. For the purposes of this Article, it is sufficient to note that even the above-noted decisions illustrate that the new public interest standing test has had an impact by allowing marginalized groups to access the courts. The full impact of *SWUAV* on public interest litigation is as of yet unknown but will arguably be significant.

VI. NEXT STEPS FOR SEX WORKERS' RIGHTS

Even with the important procedural "win" of *SWUAV* with respect to public interest standing, Canada's sex workers have not yet achieved the substantive victory that they hoped for. The post-*Bedford* sex work laws remain in place. However, criminal defendants charged under the new provisions have challenged them in court. In *R. v. Boodhoo*, the Superior Court of Justice for Ontario upheld the constitutional validity of various

172. *Canadian Drs. for Refugee Care*, 2014 F.C. para. 1.

173. *Id.* para. 307.

174. *Id.* para. 342.

175. *Id.* para. 9.

176. *Id.* paras. 1080-81.

provisions.¹⁷⁷ This adverse decision does not mean that a strategic challenge to the sex work laws more broadly—in line with *Bedford*—would not be successful: the court did not benefit from a significant evidentiary record, and sex workers themselves were not central in the litigation. In fact, in a subsequent case, *R. v. Anwar*, the Ontario Court of Justice declined to follow the *Boodhoo* reasoning due to its incomplete evidentiary record and the fact that the constitutional issue was raised late in the trial.¹⁷⁸ Departing from *Boodhoo*, the Court held that the prohibitions against advertising, procuring, and materially benefitting from sex work are unconstitutional.¹⁷⁹ While a lower court cannot strike down these provisions, the Court stayed the charges against the defendants in that case on the basis of their unconstitutionality.¹⁸⁰

There is still hope to achieve a substantive “win” for sex workers. Groups like Pivot remain committed to using strategic litigation to attack the new sex work laws and pressure the government to reform. In a report, *Evaluating Canada’s Sex Work Laws: The Case for Repeal*, Pivot outlined several Criminal Code provisions and the bases for their unconstitutionality, suggesting that the Supreme Court may strike them down in a subsequent challenge.¹⁸¹ In addition to preparing for litigation, Pivot has kept the issue in the public consciousness by holding “Know Your Rights” trainings for sex workers, using social media, and garnering public support to decriminalize sex work.¹⁸² Finally, the political landscape in Canada has changed significantly since *Bedford* and *SWUAV* were in the courts. Prime Minister Justin Trudeau’s Liberal Party replaced the Conservative Party, which enacted the new sex work laws.¹⁸³ At the Liberal Party’s National Convention in 2018, the decriminalization of sex work was one of the top five priorities

177. *R v. Boodhoo & Others*, 2018 O.N.S.C. 7205, para. 59 (Can.).

178. *R v. Anwar*, 2020 O.N.C.J. 103, paras. 126–27 (Can.).

179. *Id.* para. 7.

180. *Id.* para. 5.

181. Belak & Bennett, *supra* note 19, at 64 and 75. In March 2021, after this paper was drafted, the Canadian Alliance for Sex Work Law Reform (which is comprised of sex worker led and allied organizations) announced that they were bringing a new Charter challenge to Canada’s sex work laws. Jen St. Denis, *Sex Worker Advocates Launch New Challenge to Prostitution Laws*, THE TYEE (Apr. 1, 2021), <https://theyee.ca/News/2021/04/01/Sex-Worker-Advocates-Launch-New-Challenge-Prostitution-Laws/> [https://perma.cc/3NJQ-QXBY]; see also Member Groups, CANADIAN ALLIANCE FOR SEX WORK REFORM, <https://sexworklawreform.com/about-us/member-groups/> [https://perma.cc/9CAC-VWHT] (outlining the member groups in the alliance).

182. *Protecting the Health, Safety, and Human Rights of Sex Workers*, *supra* note 15.

183. Rachel Browne, *Demands Grow for Canada to Decriminalize Sex Work After the Election*, GLOB. NEWS (Oct. 3, 2019), <https://globalnews.ca/news/5970549/canada-sex-work-decriminalization/> [https://perma.cc/DMF3-C2W5].

the delegates chose for their 2019 platform.¹⁸⁴ The topic remained in public discourse during the October 2019 national election in which Trudeau was re-elected. For instance, a public statement was issued before the election with over a hundred signatories from Canadian civil society, including Pivot.¹⁸⁵ The statement called for the removal of criminal and immigration laws specific to sex work, as well as broader legal reforms to dismantle the systemic discrimination and inequality that negatively impacts sex workers.¹⁸⁶ The government has not yet engaged in legal reform, but some reporting from mid-2020 suggests that Canada's Justice Minister and Attorney General intends to review the legislation.¹⁸⁷ With sustained pressure, the *SWUAV* and *Bedford* plaintiffs may finally get the constitutional legislation that they expected after the Supreme Court's decision in *Bedford*.

CONCLUSION

It is not easy to determine whether strategic litigation has been a "win" or not. The *SWUAV* litigation was developed as a way of addressing, in part, the risks facing sex workers in Vancouver's Downtown Eastside. The litigants realized that although decriminalizing acts ancillary to sex work would not fully address the intersecting marginalization that they faced, it would be an important first step.

Assessing whether there was a "substantive" victory for sex workers is complicated. Although *SWUAV* did not reach the merits, both Pivot and the Downtown Eastside Sex Workers United Against Violence were able to participate in, and celebrate, the Supreme Court's decision in *Bedford*. The

184. Rachel Aiello, *Sex Work, Drugs and Pharmacare: What Liberals Want in 2019 Platform*, CTV NEWS (Apr. 21, 2018), <https://www.ctvnews.ca/politics/sex-work-drugs-and-pharmacare-what-liberals-want-in-2019-platform-1.3892062> [https://perma.cc/B3UL-JBWS].

185. *Solidarity Statement for Sex Workers' Rights*, ACTION CAN. FOR SEXUAL HEALTH & RTS., <https://secure.actioncanadashr.org/en/solidarity-sex-workers-rights> [https://perma.cc/92UG-L7YM].

186. Rachel Browne, *supra* note 184 (discussing the Solidarity Statement, other civil society statements calling for decriminalization, as well as the different party platforms vis-à-vis sex work regulation going into the federal election); *Solidarity Statement for Sex Workers' Rights*, *supra* note 186 (discussing Solidarity Statement and list of signatories); H. G. Watson, *Here's Why Sex Workers' Rights Are a Big Issue This Election*, FLARE (Oct. 18, 2019), <https://www.flare.com/news/sex-worker-rights-canada-election/> [https://perma.cc/H8VY-92JS] (discussing the position of the federal Liberal Party and other parties' platforms vis-à-vis sex work regulation going into the federal election).

187. Charlie Smith, *Liberals Lay Groundwork for Amending Law that Criminalizes the Sale of Sex in Canada*, GA. STRAIGHT (July 2, 2020), <https://www.straight.com/living/liberals-lay-groundwork-for-amending-law-that-criminalizes-sale-of-sex-in-canada> [https://perma.cc/M6T6-AMR8].

lack of political will to decriminalize sex work has circumscribed the impact of the legal victory. Yet, there is still hope that the current laws will be changed—if not by government action, then as a result of new legal challenges.

In many ways, and despite its mixed results, the *SWUAV* case is an example of successful strategic litigation. It arose from a genuine partnership between an affected community and a legal organization that serves them. They made the decision to use litigation as a tool to effect social change with a full understanding that a legal victory would not solve the intersecting marginalization that they experience. Yet, they employed litigation—to the extent possible—to empower and raise awareness about a community that is usually pushed to the margins of society. Most importantly, those involved in the litigation did not give up the fight when the Supreme Court ruled in their favour, but instead have been actively challenging the government to respond in a meaningful way to the needs of sex workers.

It is also evident that strategic litigation can have unexpected and positive results that benefit not only the litigants in the case but other equity-seeking groups in the future. Although Pivot consistently aims to promote access to justice, it appears that it was only in response to the government's challenge that Pivot shifted the goal of their litigation to broadening the test for public interest standing. Without question, as evidenced by the Supreme Court's decision in *SWUAV* and the cases that followed it, the new public interest standing test presents an opportunity for marginalized groups to vindicate their rights in court. In this sense, the case was clearly a victory insofar as it changed the procedure by which public interest litigation can be brought in Canada. Given that "access, ultimately, is a matter of justice, just as justice, ultimately, is a matter of access," it is safe to say that *SWUAV*'s contribution to justice in Canada is immense and will likely continue to grow with time.¹⁸⁸

188. Sossin, *supra* note 48, at 744.