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Oldest Profession or Oldest Oppression?

Benjamin Perrin

JANUARY 2014



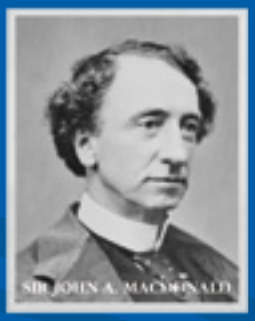


Addressing Prostitution after the Supreme Court of Canada Decision in *Canada v. Bedford*



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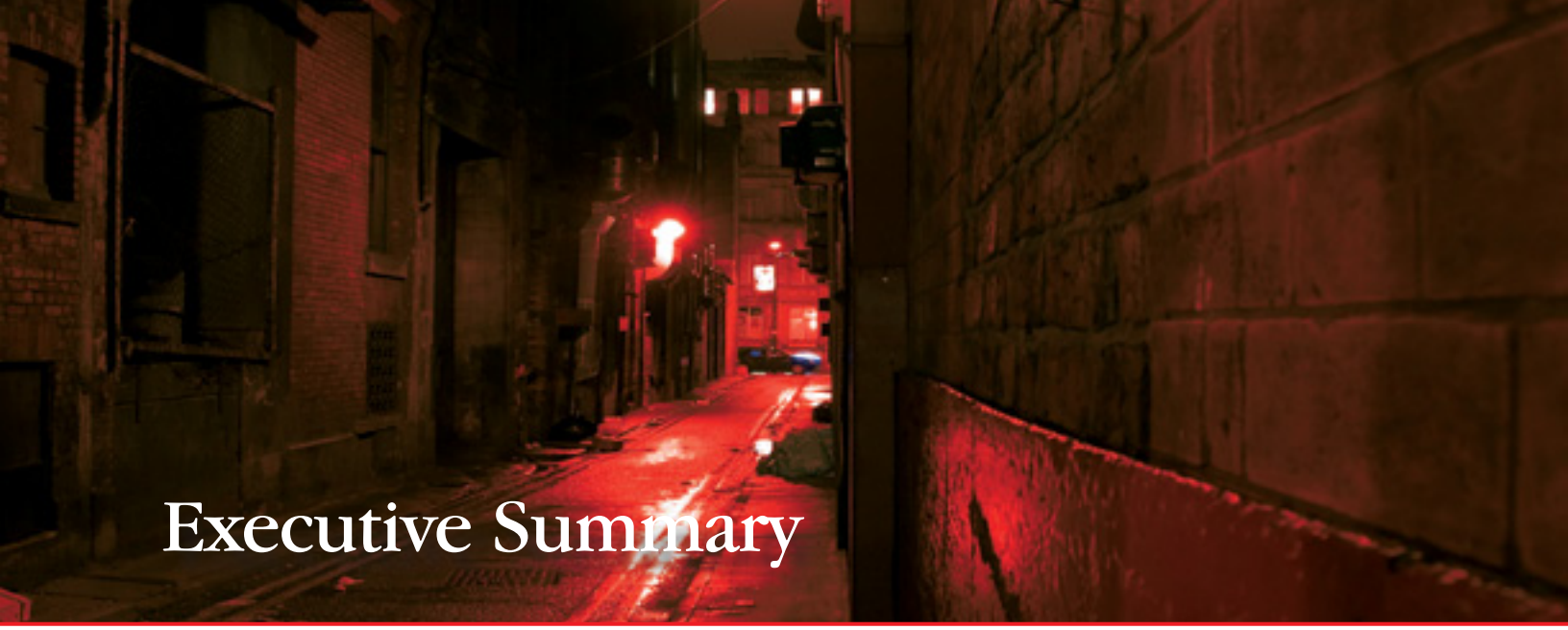
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The author of this document has worked independently and is solely responsible for the views presented here. The opinions are not necessarily those of the Macdonald-Laurier Institute, its Directors or Supporters.



Executive Summary

The future of Canada's laws related to prostitution has become an urgent public policy issue in the wake of the Supreme Court of Canada decision in *Canada (Attorney General) v. Bedford*.[1] Three prostitution-related offences in the *Criminal Code* were found to infringe the *Canadian Charter of Rights and Freedoms* and are to be struck down, effective within one year. The Court's decision of December 20, 2013 has spurred a national debate on the issue as Parliament has this limited timeline to adopt any new legislative approach, or else Canada will face the *de facto* legalization of adult prostitution.

Studies have painted a bleak picture of prostitution in Canada:

- Street-level prostitution represents between 5–20 percent of all prostitution, the rest occurring indoors;
- the majority of prostitutes entered prostitution between 14 and 20 years of age;
- a disproportionate number of prostitutes were sexually abused as children;
- substance abuse is significant among street prostitutes; and
- marginalized women, including Aboriginal women, are particularly vulnerable to prostitution and more likely to face violence (including assaults, sexual assaults, and murder).

Parliament has an opportunity to respond, within the general constitutional parameters that the Court has set. Decriminalizing/legalizing prostitution in the foreign jurisdictions reviewed in this paper (the Netherlands, New Zealand, Germany, Australia (Queensland), and the United States (Nevada)) has not been the hoped-for panacea for protecting prostitutes. Such an approach is not recommended.

Canada should instead overhaul its prostitution laws. The starting point for such an approach could consist of three key components, inspired by an abolitionist model developed by Sweden and since adopted by other countries. The evidence from an independent inquiry is that such a model is working to reduce prostitution, change public attitudes, and undermine criminal elements and sex trafficking.

First, going forward, Canada's objective should be to abolish prostitution. Its harms are inherent and cannot simply be regulated away. Second, prostitutes themselves should not be criminalized, but given support to help them exit. Leaving prostitution is the only way to truly protect prostitutes. In most provinces, this intensive assistance is sorely lacking. It has been suggested that the perpetrators of prostitution ("johns" and "pimps") should pay substantial fines that could be used to fund such services. There is merit in exploring this idea further. Finally, our criminal laws and enforcement should instead target pimps, traffickers, and johns with enhanced penalties – they are the perpetrators responsible for the harms of prostitution.

Sommaire

L'avenir des lois canadiennes sur la prostitution est devenu une question urgente de politique publique dans la foulée de la décision de la Cour suprême *Canada : (Procureur général) c Bedford*. La Cour a déterminé que trois infractions du *Code criminel* liées à la prostitution violent la *Charte canadienne des droits et libertés.* Ces lois seront invalidées d'ici un an. La décision rendue par la Cour le 20 décembre 2013 a provoqué un débat national sur la question, et le gouvernement ne dispose que d'une année pour procéder à l'adoption d'une nouvelle loi, sans quoi, le pays devra vivre *de facto* avec une prostitution qui est devenue légalisée.

Des études brossent un tableau sombre de la prostitution au Canada :

- la prostitution de rue représente entre 5 et 20 % de l'ensemble de la prostitution, le reste étant attribuable à celle exercée derrière les murs;
- la majorité des personnes prostituées commencent à s'adonner à leur activité alors qu'elles ont entre 14 et 20 ans;
- parmi les personnes prostituées, on compte un nombre disproportionné de victimes d'agressions sexuelles durant l'enfance;
- la toxicomanie est importante chez les personnes prostituées de rue; et
- les femmes marginalisées, notamment les Autochtones, sont particulièrement vulnérables à la prostitution et susceptibles d'être victimes de violence (voies de fait, agressions sexuelles et meurtres).

La législature a la possibilité de donner suite à la décision de la Cour dans le cadre des paramètres déterminés par cette dernière. La décriminalisation (ou la légalisation) de la prostitution qu'ont connue les pays étudiés dans ce document, par exemple les Pays-Bas, la Nouvelle-Zélande, l'Allemagne, l'Australie (le Queensland), et les États-Unis (le Nevada), n'a pas été la panacée attendue au problème de la protection des personnes prostituées. On ne recommande pas une telle approche.

Le Canada devrait plutôt revoir ses lois sur la prostitution. Au départ, cette approche pourrait se décliner en trois grands axes inspirés d'un modèle abolitionniste élaboré par la Suède, puis adopté par d'autres pays. Une enquête indépendante a démontré qu'un tel modèle est efficace pour réduire la prostitution, changer les attitudes de la population et contrecarrer la criminalité et le trafic sexuel.

Tout d'abord, l'objectif ultime du Canada devrait être de faire disparaître la prostitution. Les dangers sont inhérents à son exercice et imperméables à la réglementation. Deuxièmement, les personnes prostituées ne devraient pas être accusées d'actes criminels, mais plutôt obtenir de l'aide pour cesser leur activité. On ne peut vraiment les protéger que si elles abandonnent la prostitution. Dans la plupart des provinces, l'aide intensive à cette fin fait cruellement défaut. On a suggéré que les agresseurs – par exemple, les clients « john » et les proxénètes « pimp » – versent des amendes importantes, lesquelles pourraient financer ces services. Cette idée mérite d'être explorée. Enfin, les lois criminelles canadiennes devraient plutôt cibler les proxénètes, les trafiquants et les clients, en prévoyant des sanctions plus sévères, car c'est d'eux que résultent les dangers de la prostitution.

Introduction

The future of Canada's laws related to prostitution has become an urgent public policy issue in the wake of the Supreme Court of Canada decision in *Canada (Attorney General) v. Bedford*. The case involved a voluminous record of 25,000 pages with 25 interveners, many in groups, granted standing to make submissions. The Court released its decision on December 20, 2013.

The majority of prostitutes entered prostitution between 14 and 20 years of age.

The Court's decision has spurred a national debate on the issue of Canada's response to prostitution. Indeed, as the Ontario Court of Appeal previously recognized in this case, there are many possible legislative responses to address prostitution, and the only question directly before the courts was whether the current *Criminal Code* framework related to prostitution complies with the *Charter*:

> Prostitution is a controversial topic, one that provokes heated and heartfelt debate about morality, equality, personal autonomy, and public safety. It is not the court's role to engage in that debate. Our role is to decide whether or not the challenged laws accord with the Constitution, which is the supreme law of the land.[2]

Likewise, the Supreme Court of Canada was very cautious in its decision not to pre-judge any alternative approaches that may be taken by Parliament. Very little guidance was provided by the Court to assist Parliament in fashioning a new approach, allowing for a number of potential policy responses to prostitution.

This paper begins by describing the nature of prostitution in Canada and outlines the current approach taken in the *Criminal Code*, highlighting distinctions between prostitution involving adults versus minors, which are often glossed over. It then outlines the judicial history and current status of the *Bedford* case. In the discussion that follows, the experience and challenges faced by several foreign jurisdictions that take diverse approaches to addressing prostitution are then explored (the Netherlands, New Zealand, Germany, Australia (Queensland), the United States (Nevada), and Sweden). Finally, this paper proposes several key components of a new approach in Canada to addressing prostitution that seeks to abolish this inherently harmful activity, help prostitutes exit prostitution, and target criminal enforcement at pimps, traffickers, and johns.

Prostitution in Canada

Street-based prostitution is believed to represent just a fraction of the total prostitution-related activity in Canada. Indoor venues where prostitution is known to occur include massage parlours, strip clubs, and various locations through escort services.[3] The use of modern telecommunications, especially cellular telephones and the Internet, have also enabled prostitution to be organized and operated in a wide range of venues, including private apartments[4] (so-called "micro-brothels").

Studies by the Library of Parliament and the House of Commons Standing Committee on Justice and Human Rights have identified the following key features of prostitution in Canada:

- Street-level prostitution represents between 5–20 percent of all prostitution, with the rest occurring indoors;
- the majority of prostitutes[5] are female (75–80 percent), while almost all "clients" of prostitution are male;
- the majority of prostitutes entered prostitution between 14 and 20 years of age;
- a disproportionate number of prostitutes were sexually abused as children;
- substance abuse is significant among street prostitutes; and
- marginalized women, including Aboriginal women, are particularly vulnerable to prostitution and more likely to face violence (including assaults, sexual assaults, and murder).[6]

Violence, vulnerability, and victimization are the story of many young women and teenage girls who enter into prostitution.

Violence, vulnerability, and victimization are the story of many young women and teenage girls who enter into prostitution, as the harrowing experience of the lead applicant in the *Bedford* case illustrates:

> At the age of 16, she was sent to a boarding house in Windsor, Ontario by the Children's Aid Society. Shortly thereafter, she met an abusive 37-year-old drug dealer and drug addict who became her live-in boyfriend. He introduced her to drugs and she became addicted. Ms. Bedford says that she began prostituting as a 'necessary evil' to fund her and her boyfriend's addictions. During this period, she worked as a street prostitute and in massage parlours. It appears her relationship with her boyfriend ended following his arrest for murder.[7]

Current Approach to Addressing Prostitution in the *Criminal Code*

It is often said that "prostitution itself is legal" in Canada and is a "lawful activity".[8] The Ontario Court of Appeal went so far as to say that "prostitution is not criminal or in any way illegal"[9] and adopted the applicants' characterization that prostitution is a "lawful commercial activity"[10] – presumably analogous to accounting, landscaping, or practising law. With respect, this characterization is problematic and it drives much of the Court's analysis.

The Supreme Court of Canada was more circumspect, and accurate, in its characterization of the law related to prostitution in Canada, stating: "It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution . . ."[11] While the specific act of exchanging money for a sex act between *adults* is not an offence, there is a great deal of unlawful activity related to prostitution. Most obviously, as discussed below, it is a criminal offence to operate a common bawdy-house (a brothel) – no analogous criminal offence exists to prohibit restaurants, auto mechanic shops, or bakeries. Those are actual lawful activities under the criminal law regardless of where they occur. It would be an over-simplification to say that prostitution can be considered a lawful activity in the same way.[12]

Another key distinction in Canada's legal regime related to prostitution that is generally overlooked in such wide-sweeping statements as "prostitution is legal" relates to the age of the prostitute. Child prostitution[13] is illegal in Canada, full stop. Under no circumstances is it permissible to engage in

prostitution with a person under 18 years of age. Section 212(4) of the *Criminal Code*, which was not challenged in *Bedford*, creates the following offence:

> Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of six months.

There are several notable differences between section 212(4) and the provisions related to adult prostitution. First, the very act of obtaining "sexual services" for consideration from a minor is prohibited. Second, it is irrelevant where this act (or communicating for the purposes of obtaining the sexual services of a minor) occurs – it is prohibited "in any place" (street-level prostitution, "in-call", "out-call", massage parlours, and so forth.). Third, this provision focuses criminalization on the buyer (or "john" in colloquial terms).

Child prostitution is illegal in Canada, full stop.

As with adult prostitution, the *Criminal Code* also makes it illegal to live on the avails of prostitution of a person under 18 – but imposes stricter penalties.[14] A number of general *Criminal Code* offences (as they relate to a prostitute of any age) also operate to capture further activities involving child prostitution. For example, the owners, operators, and persons found without lawful excuse in bawdy-houses that have child prostitutes are also criminalized under the general offence related to bawdy-houses in section 210 of the *Criminal Code*.[15] A number of offences in sections 212(1)(a) to (i) and section 213 criminalize various aspects of procurement and communications in relation to prostitution of a person of any age.

With respect to the prostitution of a person 18 years and older ("adult prostitution"), the *Criminal Code* establishes a framework that "indirectly restrict[s] the practice of prostitution by criminalizing various related activities".[16] In particular, the general offences described above apply to adult prostitution (as well as child prostitution), namely: sections 210 (keeping a common bawdy-house), 211 (transporting a person to a bawdy-house), 212(1)(a) to (j) (procuring), and 213 (offences in relation to prostitution).

While it is true that the specific act of obtaining the "sexual services" of an adult prostitute is not prohibited in the *Criminal Code*, many of the surrounding activities are offences. In practical terms, the criminal law regime governing adult prostitution depends on *where* acts related to it occur:

(i) "In-call" adult prostitution (any place that is frequently or habitually used by one or more persons for the purpose of prostitution, such as massage parlours or "brothels")[17] and "street-level" adult prostitution are effectively illegal (due to the common bawdy-house offence in section 210 and the offence in relation to prostitution in section 213, respectively);

(ii) "Out-call" adult prostitution (where the sex act occurs in a place that is not frequently or habitually used for the purpose of prostitution, such as "escort services") is not itself illegal, unless it happens to run afoul of another prostitution-related offence (such as publicly communicating for the purpose of prostitution).

Taken together, these *Criminal Code* provisions make child prostitution and related activities illegal, and effectively prohibit adult prostitution that occurs at the street level and any place that is frequently or habitually used by one or more person for the purpose of prostitution, as well as certain prostitution-related activities (such as procuring offences, including living on the avails of prostitution).

The *Charter* Challenge in *Bedford v. Canada*

Three current or former prostitutes (Terri Jean Bedford, Amy Lebovitch, and Valerie Scott) brought an application in Ontario seeking a declaration that sections 210 (keeping a common bawdy-house), 212(1)(j) (living on the avails of prostitution), and 213(1)(c) (publicly communicating for the purpose of prostitution) of the *Criminal Code* infringed section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*): "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."[18] These criminal offences are considered by some to be the "core" prostitution-related offences in the *Criminal Code* and are reproduced in table 1.

TABLE 1 Prostitution-related sections of the *Charter* challenged by *Bedford*

Section	Description	Offence
210	Keeping a common-bawdy house	*(1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.* *(2) Every one who* *(a) is an inmate of a common bawdy-house,* *(b) is found, without lawful excuse, in a common bawdy-house, or* *(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,* *is guilty of an offence punishable on summary conviction.*
212(1)(j)	Living off the avails of prostitution	*Every one who . . . (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.*
213(1)(c)	Publicly communicating for the purpose of prostitution	*Every person who in a public place or in any place open to public view . . . (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.*

On September 28, 2010, the application judge, Justice Susan G. Himel of the Superior Court of Justice (Ontario), declared all three of the challenged provisions infringed the *Charter* and ordered that they be struck down.[19] She held that these offences exacerbate the risk of violence faced by prostitutes because they prevent them from taking steps that could enhance their safety, such as working indoors, paying "security staff", and "screening" customers on the street. Justice Himel's decision was stayed pending an appeal by the Attorney General of Canada and Attorney General of Ontario.

On March 26, 2012, the Court of Appeal for Ontario issued its decision allowing the Crown's appeal (in part), as summarized in table 2:[20]

TABLE 2 Decision of the Application Judge and the Court of Appeal in *Bedford*

Section	Offence	Decision of Justice Himel, the Application Judge, Superior Court of Justice (Ontario)	Decision of the majority of the Court of Appeal for Ontario
210	Keeping a common-bawdy house	Infringes s. 7 of the *Charter*, not saved by s. 1, and must be struck down.	Infringes s. 7 of the *Charter*, not saved by s. 1, and must be struck down.[21]
212(1)(j)	Living off the avails of prostitution	Infringes s. 7 of the *Charter*, not saved by s. 1, and must be struck down.	Infringes s. 7 of the *Charter* and not saved by s. 1 to the extent that it criminalizes non-exploitative commercial relationships between prostitutes and other people. Living off the avails of prostitution should only be prohibited "in circumstances of exploitation" (words "read-in" by the Court).
213(1)(c)	Communicating for the purpose of prostitution	Infringes s. 7 of the *Charter*, not saved by s. 1, and must be struck down.	No infringement of the *Charter*, the prohibition stands.[22]

The Supreme Court of Canada granted leave to appeal and cross-appeal in this case on October 25, 2012. The decision of the Ontario Court of Appeal was also ordered stayed pending the outcome of the appeal.

On December 17, 2012, Chief Justice Beverley McLachlin set the following constitutional questions:

1. Does s. 210 of the *Criminal Code*, R.S.C. 1985, c. C-46, as it relates to common bawdy-houses kept or occupied or resorted to for the purpose of prostitution, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Does section 212(1)(j) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
5. Does section 213(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
7. Does section 213(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

In addition to the appellants (Attorney General of Canada and Attorney General of Ontario) and respondents (Bedford, Lebovitch, and Scott), the Supreme Court of Canada granted numerous interveners standing to participate in the appeal:

- Attorney General of Quebec
- Attorney General of British Columbia
- Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence, and PACE Society
- Secretariat of the Joint United Nations Programme on HIV/AIDS
- British Columbia Civil Liberties Association
- Evangelical Fellowship of Canada
- Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, and HIV & AIDS Legal Clinic Ontario
- Canadian Association of Sexual Assault Centres
- Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle
- Regroupement québécois des centres d'aide et de lutte contre les agressions à caractère sexuel and Vancouver Rape Relief Society
- Christian Legal Fellowship, Catholic Civil Rights Leagues, and REAL Women of Canada
- David Asper Centre for Constitutional Rights
- L'Institut Simone de Beauvoir
- AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution
- Aboriginal Legal Services of Toronto Inc.

The hearing of this case occurred on June 13, 2013 and the Court reserved judgment, as is typical in such contested and complex cases. On December 20, 2013, the Court unanimously dismissed the appeal of the Attorney General of Canada and Attorney General of Ontario, and allowed the cross appeal of the applicants. The Court declared that sections 210, 212(1)(j), and 213(1)(c) are "inconsistent with the *Canadian Charter of Rights and Freedoms* and hence are void".[23] The remedy provided by the Court was to strike down these offences, but to suspend the declaration of invalidity for one year from the date of the decision.[24] This effectively means that the three impugned offences remain in force until December 19, 2014, and are void the following day. The Court indicated that this time was necessary to enable Parliament to consider adopting a different approach to prostitution:

> I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. […] The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.[25]

Discussion and Analysis

The Supreme Court of Canada decision in *Bedford* has given Parliament a window of one year to devise and adopt a new approach to addressing prostitution, or else Canada will have a *de facto* regime of legalized adult prostitution, with few remaining prohibitions.

The Supreme Court of Canada decision in* Bedford *has given Parliament a window of one year to devise and adopt a new approach to addressing prostitution.

The viability of the pre-*Bedford* status quo had been seriously questioned by Parliamentary committees over the years. For example, the House of Commons Standing Committee on Justice and Human Rights found that the current approach in the *Criminal Code* is "unacceptable" and "that the laws that exist are unequally applied".[26] Likewise, in 2007, the House of Commons Standing Committee on the Status of Women recommended that Canada adopt its own version of the Swedish model, discussed below.[27]

As Parliament considers how to respond to the *Bedford* decision, it may be helpful to look to the experience of other countries and how they have tackled the controversial issue of prostitution. After examining a range of potential approaches that have been taken, this paper explores key elements of a new Canadian approach to addressing prostitution.

International Approaches to Addressing Prostitution

Canada is not alone in grappling with how to address prostitution. A number of diverse approaches can be identified to help inform the debate on a Canadian approach to addressing prostitution, recognizing they all have different contexts. These case studies offer potential lessons – both positive and negative.

The main foreign jurisdictions that were examined in the *Bedford* proceedings were: the Netherlands, New Zealand, Germany, Australia (Queensland), the United States (Nevada), and Sweden. It will not be surprising to hear that the parties and interveners in *Bedford* have argued vigorously about the evidence regarding outcomes in these various jurisdictions. Competing expert witnesses were marshalled by both the applicants and the government respondents before Justice Himel. Given the voluminous and highly controversial nature of prostitution-related research, the sources relied on below in the cases studies are almost exclusively based on official reviews in the selected jurisdictions and, where none exist, only those studies cited by Justice Himel.

The judicial process helps to identify dominant claims about the outcomes of these diverse approaches that will be helpful to consider in the context of developing a modern Canadian approach to addressing prostitution in the wake of the decision in *Bedford*. It is notable that the Supreme Court of Canada made no mention whatsoever in its decision of any of these alternative models, consistent with its approach of giving Parliament an opportunity to adopt a new approach, which could then again be potentially subjected to constitutional scrutiny in a future case.

THE NETHERLANDS

Since October 1, 2000, the Netherlands has sought to regulate and control prostitution by means of licensing brothels, which are to abide by various health and safety regulations. In *Bedford*, Justice Himel found that this approach has been "moderately successful in improving working conditions

and safety in the legal practice of prostitution."[28] She also found that in certain instances access to social services has helped addicted prostitutes overcome substance abuse and exit prostitution.[29]

However, illegal prostitution has flourished alongside this legalized prostitution sector. In *Bedford*, Justice Himel found:

> Approximately half of all prostitution occurring today in the Netherlands happens outside of this legal sector, and often involves foreign prostitutes providing out-calls set up by telephone and over the internet. Some evidence of the continuing involvement of organized crime in prostitution has emerged in recent years, and new regulatory reforms are being aimed at these syndicates. Recent United Nations reports suggest that there are approximately 20,000 women involved in prostitution in the Netherlands, with two-thirds of them coming from Eastern Europe and developing countries.[30]

Despite licensed brothels, illegal prostitution continues to flourish in the Netherlands.

At the Ontario Court of Appeal, Justices MacPherson and Cronk reiterated the finding of Justice Himel that street prostitution has continued under the legalized prostitution regime in the Netherlands, and that these prostitutes consist of vulnerable individuals:

> Although the Netherlands has completely legalized prostitution and given prostitutes the option to move indoors, up to 10 percent of prostitution continues to occur on the street. Street prostitutes in the Netherlands are often addicted to drugs or suffer from mental illness, are unwanted in brothels, and are unable to pay to rent a window.[31]

In a bid to manage street prostitution, certain Dutch municipalities have resorted to a peculiar and unsettling tactic: "Less than a kilometre from the Utrecht tippelzone [where street prostitution is permitted in certain municipalities], Dutch authorities built a set of 14 parking stalls, divided by concrete barriers, so that prostitutes and their customers would not conduct business in residential areas".[32]

NEW ZEALAND

Since June 2003,[33] New Zealand has "decriminalized consensual adult prostitution in all forms, and implemented a licensing regime for brothels".[34] Licensing is not required for "small" brothels that have four or fewer prostitutes. In 2008, a five-year review of this regime was completed by the Prostitution Law Review Committee (PLRC), whose members were nominated by the government.[35]

Post-decriminalization, the PLRC reported an increased likelihood of prostitutes reporting violence to police and brothels possessing "safer sex" items. Citing the PLRC report, Justice Himel found that child prostitution and human trafficking did not appear to increase post-decriminalization in New Zealand.[36]

However, Justice Himel found that despite decriminalization, prostitutes continue to suffer "incidents of violence, threats, forcible confinement, theft, and refusal to pay for services", particularly among street-based prostitutes.[37] This form of prostitution has persisted in New Zealand, despite the hopes of proponents of decriminalization that it would decrease, and is believed to represent approximately 11 percent of all prostitution in the country.[38]

The Ontario Court of Appeal noted that the parties in *Bedford* tendered evidence related to the approach taken by New Zealand in addressing prostitution, but the Court offered no commentary on it.[39]

GERMANY

In 2002,[40] Germany decriminalized brothels, abolished mandatory medical screening for prostitutes, and opted to no longer prohibit the promotion of prostitution. Pimping remains a crime, however.

Post-decriminalization, Germany found no measurable improvements detectable in achieving social protection for prostitutes, improving working conditions, encouraging prostitutes to exit the industry, or reducing crime.

A three-year post-decriminalization review was completed by the German government and published in 2007.[41] Justice Himel summarized several key findings from the report as follows:

> The German Report states that no measurable improvements are detectable in achieving social protection for prostitutes, improving working conditions, encouraging prostitutes to exit the industry, or reducing crime. However, the fears that decriminalization would open the floodgates to organized crime, human trafficking, or the exploitation of minors have not materialized as a result of the legal changes.[42]

The Ontario Court of Appeal noted that the parties in *Bedford* tendered evidence related to the approach taken by Germany in addressing prostitution, but the Court offered no commentary on it.[43]

AUSTRALIA (QUEENSLAND)

Australia's eight jurisdictions have taken a variety of different approaches to addressing prostitution. Justice Himel's reasons in *Bedford*, however, only discuss the outcomes of the approach taken by the State of Queensland.

In Queensland, licensed brothels have been permitted since 1999, whereas escort agencies and street-based prostitution remain illegal. A five-year governmental review[44] of this regime was summarized by Justice Himel as follows:

> The Queensland Report concluded that sole operators, as a result of their complete isolation, are at greater risk of violence than their counterparts in legal brothels. Street-based prostitution, for which the legal reform created stiffer penalties, has been reduced through aggressive policing. According to the Queensland Report, 75 percent of the sex industry has not elected to move into the legal sector, and continues to operate contrary to the law. Decriminalization has not led to an increase in the size of the sex industry.[45]

The Ontario Court of Appeal noted that the parties in *Bedford* tendered evidence related to the approach taken by Australia in addressing prostitution, but the Court offered no commentary on it.[46]

UNITED STATES (NEVADA)

Since 1971, the State of Nevada has allowed licensed brothels to operate, except in Las Vegas. More recently, state law has required condom use during prostitution and mandatory sexually transmitted infection testing of prostitutes.[47]

The evidence in *Bedford* did not include any official reviews of the outcomes of Nevada's approach to addressing prostitution. One academic study cited by Justice Himel found "numerous problems with brothel prostitution in the state" but that "[l]egal brothels generally offer a safer working environment than their illegal counterparts."[48] Another study cited by Justice Himel, however, challenged the notion of "safety" in legal brothels, stating: "Usually, however, women mean safe in comparison

to other prostitution. Thus the concept of safety is relative, given that prostitution is associated with a high likelihood of violence."[49]

The Ontario Court of Appeal noted that the parties in *Bedford* tendered evidence related to the approach taken by "the United States" in addressing prostitution, but the Court offered no commentary on it.[50]

In prostitution, "safe" is a relative term given the high likelihood of violence whether legal and licensed or not.

SWEDEN

In 1999,[51] Sweden adopted a novel approach to addressing prostitution, leaving decades of decriminalization behind. It opted to criminalize the purchasers of sex acts (johns) and pimps, but not to criminalize prostitutes themselves – instead programmes exist to help them exit prostitution and alleviate poverty to prevent others from becoming prostitutes.[52] Public awareness campaigns targeted at male sex act purchasers were launched to raise awareness about prostitution and human trafficking, alongside education programs for police about conditions that make women vulnerable to these crimes.[53]

Justice Himel found the following outcomes from Sweden's approach to abolish prostitution and promote gender equality:

> Estimates suggest that the number of women involved in prostitution in Sweden has decreased from 2500 in 1999 to less than 1500 in 2002. The number of women in street prostitution has decreased from 650 in 1999 to less than 500 in 2002. Government reports suggest that there are almost no foreign women remaining in street prostitution, and there is some suggestion that human traffickers may now find Sweden to be an unattractive destination for trafficked women.[54]

However, Justice Himel noted that convictions of johns remain "rare" in Sweden, despite a 300 percent increase in arrests.[55]

The Ontario Court of Appeal noted that the parties in *Bedford* tendered evidence related to the approach taken by Sweden in addressing prostitution, but the Court offered no direct commentary on it.[56]

Sweden criminalized pimps and johns while creating programmes to help prostitutes exit.

In 2010, Sweden completed an independent inquiry, headed by a judge, to examine the impact of its approach in addressing prostitution.[57] Unfortunately, this report was released after the hearings in *Bedford* concluded in 2009 so it was not considered in Justice Himel's decision. A summary of the report follows:

> It found that the Swedish model has disrupted organized crime, deterred sex act purchasers, changed public attitudes, and cut street-level prostitution in half. Plus it found no evidence that the problem simply moved indoors as some skeptics had speculated.
>
> Importantly, the inquiry also found nothing whatsoever to suggest that Sweden's abolitionist model had negatively affected those being exploited. It recommended sustaining support for those being sold, creating a national centre against prostitution and human trafficking, and doubling the maximum penalty for purchasing sex acts to up to a year in prison.[58]

Sweden's approach is growing in popularity and has recently spread to neighbouring countries like Norway and Iceland, such that it is now called the "Nordic Model." Other countries, including France, are presently considering adopting it as well.

A Way Forward for Canada

Decriminalizing/legalizing prostitution in the foreign jurisdictions reviewed has not been the hoped-for panacea for protecting prostitutes. Where such an approach has been taken, the most vulnerable prostitutes (street-level) have generally remained in this precarious situation. This is very important to note because much of what has driven the *Bedford* case is the need to ensure that street-level prostitutes are given protection since they are considered to be most at risk to violence. The international evidence strongly suggests that they would not receive materially enhanced protection under a legalized or decriminalized approach to prostitution.

In decriminalized/legalized prostitution regimes, a large illegal prostitution sector will inevitably thrive.

The evidence described earlier also shows that in decriminalized/legalized prostitution regimes a large illegal prostitution sector will inevitably thrive (between 50–75 percent of prostitution occurs outside of the legal sector in the Netherlands and the State of Queensland in Australia, respectively). In New Zealand, decriminalization has not improved conditions in brothels that were already problematic before the introduction of the law, and exploitative contracts continue to be used.[59]

Accordingly, decriminalized/legalized prostitution could reasonably be expected to maintain street-level prostitution alongside a large illegal indoor prostitution sector, where none of the so-called "protections" exist, while lending prostitution a veneer of legitimacy and social approval by being authorized under law. This is particularly alarming given the high proportion of women from economically disadvantaged countries in decriminalized/legalized prostitution regimes, as in the Netherlands.

Margareta Winberg, former deputy prime minister of Sweden, has powerfully made the case against normalizing prostitution through law:

> I argue that any society that claims to defend principles of legal, political, economic, and social equality for women must reject the idea that women and children, mainly girls, are commodities that can be bought and sold. To do otherwise is to allow that a separate class of females, especially women who are economically and racially marginalized, is excluded from the universal protection of human dignity enshrined in the body of international human rights instruments developed during the last fifty years.[60]

The reason that decriminalizing/legalizing prostitution is ineffective in achieving its lofty goals of a regulated business like any other is that prostitution itself is inherently harmful. While it rejected submissions in support of the current law, the Ontario Court of Appeal acknowledged in *Bedford* that "prostitution is inherently dangerous in virtually any circumstance"[61] and that "[e]veryone agrees that prostitution is a dangerous activity for prostitutes".[62] With respect to street prostitution, the Ontario Court of Appeal found that "it also has a profound impact on members of the surrounding community . . . [and] is associated with serious criminal conduct including drug possession, drug trafficking, public intoxication, and organized crime."[63]

The Ontario Court of Appeal also found that human trafficking and child exploitation occur in bawdy houses:

> Frequently, police investigating residential bawdy-houses have found vulnerable women brought in from abroad or under-aged girls working as prostitutes. The appellants' witnesses gave evidence that bawdy-houses are often an integral part of human trafficking syndicates where victims are trained and housed, and then transported elsewhere for the purpose of sexual exploitation.[64]

RECOMMENDATION #1: CANADA'S OBJECTIVE SHOULD BE TO ABOLISH PROSTITUTION

Prostitution in Canada is devastating in its impacts on the most vulnerable. The fact is that prostitution in Canada overwhelmingly targets women. It is truly alarming that many, if not most, prostitutes became involved in prostitution when they were minors and were sexually abused as children.

A victim of child prostitution, who began being sold for sex at the age of 12 in Vancouver, expressed these thoughts about the sex acts committed by so many random men on her: "Abuse was all I knew. I felt I deserved it and that it would always happen so I might as well get paid for it."[65]

The disproportionate representation of Aboriginal women and girls in prostitution, and higher levels of violence that they suffer, are extremely disturbing. Prostitution is harmful, dangerous, and sometimes deadly, to these individuals. Canada's public policy must respond to them.

Canada's public policy should have as its objective the abolition of prostitution because it is inherently harmful.

Given the reality of prostitution in Canada, and the general failure of the decriminalization/legalization models to achieve their lofty objectives in numerous foreign jurisdictions, Canada's public policy should have as its objective the abolition of prostitution because it is inherently harmful. Most certainly, prostitution cannot be a "lawful commercial activity". To advance the elimination of prostitution, the most compelling model that can serve as a starting point is the approach taken by Sweden. It ensures that those who are responsible for controlling and abusing prostitutes (pimps and traffickers) are criminalized along with those driving demand for prostitution (johns). At the same time, prostitutes are not treated as criminals, but are given support to exit.

RECOMMENDATION #2: PROSTITUTES SHOULD NOT BE CRIMINALIZED, BUT GIVEN HELP TO EXIT

Exiting prostitution is the only way to truly protect prostitutes. Support services are needed to help them do so, not the threat of criminal prosecution. Canada's criminal law should be amended accordingly and a national strategy put in place to promote exit from prostitution.

Making exit from prostitution a choice that is available to more prostitutes should be a key objective of Canada's approach to addressing prostitution moving forward. Helping prostitutes exit prostitution requires focused outreach and significant resources, including "access to housing, drug detoxification services, mental health services, education, and employment."[66] It has been suggested that the perpetrators of prostitution (johns and pimps) should pay substantial fines that could be used to fund such services.[67] There is merit in exploring this idea further.

Exiting prostitution is the only way to truly protect prostitutes.

Provincial/territorial governments and municipal governments need to do much more to work with non-governmental organizations at the street level to intervene to help prostitutes exit, fund detox facilities to help overcome substance abuse issues, and provide intensive support and assistance for

those exiting prostitution to find gainful employment. Public and private resources would be better expended to help people exit prostitution than in attempting to adopt an ill-fated experiment in de-criminalized/legalized prostitution.

The *Charter* claim in *Bedford* has hinged on the argument that prostitutes face a stark choice of either complying with the law, thereby preventing them from taking certain safeguards that could mitigate the risk they face from violent johns and others, or breaking the law and facing the threat of criminal sanction.[68] This dichotomy in the *Charter* analysis has the potential to lead to a defeatist response that normalizes prostitution and ignores the better third public policy response that Parliament could adopt – seek to abolish prostitution by helping prostitutes exit. Furthermore, the efficacy of criminalizing prostitutes themselves for engaging in prostitution has been questioned for many years – it simply hasn't worked.[69] What is worse is that the majority of prostitutes are believed to generally not report acts of violence they suffer to police "for fear of not being taken seriously, of being judged or treated as criminals for engaging in prostitution".[70] This poses a serious problem if our goal is protecting them from violence and holding perpetrators of violence accountable.

Health risks and violence at the hands of johns, pimps, and traffickers are part and parcel of prostitution in every country examined (particularly given persistent illegal sectors in decriminalized/legalized prostitution regimes) – regardless of the means chosen by various governments to address the issue. As the international evidence set out above demonstrates, Sweden is the only jurisdiction that has achieved substantial positive outcomes over the long term. It is also notable because these outcomes were achieved after it abandoned a decriminalized approach to prostitution in favour of an abolitionist model. Simply put, by rejecting the defeatist argument that prostitution is inevitable, Sweden has devoted its resources to targeting johns, pimps, and traffickers, helping prevent vulnerable people from becoming trapped in prostitution, and helping prostitutes exit. These priorities have achieved results.

Sweden is the only jurisdiction that has achieved substantial positive outcomes over the long term.

John Picarelli and Anna Jonsson caution, however, that the Swedish approach's apparent success hinges on more than just changing legislation: "a country can adopt the Swedish criminalization of sex purchasing and de-criminalization of its sale, but without significant investment in programs designed to undercut patriarchal hierarchies and promote the equality of women the program is destined for failure."[71] Given Canada's federal structure, this would require all levels of government to work together, alongside front-line non-governmental organizations. Federal leadership and a commitment to not only reform the *Criminal Code*, but also for all levels of government to devote financial resources to prevention and exit programs would be needed. This is a tall order in the current fiscal climate. However, the alternative must be considered. The real costs and harms associated with prostitution, while inestimable, are already substantial. It may well be that the Supreme Court of Canada's decision will create the impetus for such resources to support a new way forward to address prostitution in Canada.

RECOMMENDATION #3: TARGET CRIMINAL LAWS AND ENFORCEMENT AT PIMPS, TRAFFICKERS, AND JOHNS

Prostitution would not exist without men who are willing to pay for sex acts. Their demand drives prostitution, yet few ever face criminal prosecution in Canada, and most remain completely anonymous. This needs to change.

While the pre-*Bedford* approach to prostitution made it illegal for both the prostitute and john to

engage in public communications for the purpose of prostitution, the historical reality is that female prostitutes have been significantly more likely to face harsher sanctions than their male "clients".[72] For example, the House of Commons Standing Committee on Justice and Human Rights found in a given year:

- 68 percent of women charged were found guilty under section 213 [communicating for the purpose of prostitution – which represented more than 90 percent of all prostitution-related offences], while 70 percent of charges were stayed or withdrawn for men charged under the same provision;
- Upon conviction, just under 40 percent of women were given prison sentences, while just under 40 percent of men convicted under the same provision were fined, and the prison sentence rate for men was just over 5 percent;
- 92 percent of those sentenced to prison for communicating offences . . . were female.[73]

The highly selective enforcement record targeting prostitutes as opposed to johns is a serious impediment to tackling demand by johns and promoting exit by prostitutes. The trend must be reversed so that johns, pimps, and traffickers bear the brunt of criminal sanctions – not prostitutes who instead should be given support to exit.

One of the criticisms of the implementation of the Swedish model has been that while arrests of johns increased dramatically, the actual conviction rate remained low. If we are to be serious about abolishing prostitution, our criminal law must enhance the penalties for the purchasers of sex acts, and police forces will need to direct their resources towards targeting pimps, traffickers, and johns. If there are concerns about prostitution occurring in a particular locality, it should be addressed by pursuing these perpetrators, not the prostitutes themselves, which has been the historical tendency.

If this recommended approach is adopted, then a new *Criminal Code* offence of purchasing sex acts would be required, which could be drafted similarly to section 212(4) but with a lesser penalty than obtaining the prostitution of a minor. With respect to criminalizing pimps, section 212(1)(h) of the *Criminal Code* (see appendix) remains in force – unchallenged in *Bedford* – and may be used to prosecute some pimps. However, it would be better for Parliament to create a new pimping offence as part of a comprehensive proposal that seeks to abolish prostitution. This is, in part, due to the Supreme Court of Canada's unwillingness to entertain arguments about the "shifting objectives"[74] of criminal offences.

The *Criminal Code* already has a number of human trafficking offences that are used by police in sex trafficking cases and they remain in force, unaffected by *Bedford*. Federal and provincial efforts to combat human trafficking involving sexual exploitation should also continue, including through the ongoing implementation of the *National Action Plan to Combat Human Trafficking*.[75]

FUTURE POTENTIAL *CHARTER* CHALLENGES

Any new legislative model that is adopted by Parliament to address prostitution is likely to face a fresh *Charter* challenge, sooner rather than later, given that the advocacy groups and litigants who are interested in legalizing/decriminalizing prostitution appear to be organized and motivated to achieve these ends through the judicial process, since they have been unsuccessful in doing so via the Parliamentary process. A full constitutional analysis of the approach recommended above is beyond the scope of this paper and would be premature since any new model would need some time to be implemented and establish outcomes in order to provide even *prima facie* evidence to support such a *Charter* challenge. Nevertheless, some preliminary observations may be helpful.

First, the Supreme Court of Canada indicated in *Bedford* that Parliament may, indeed, set limits related to prostitution, but must not infringe the constitutional rights of prostitutes.[76] While the Court offered little specific guidance on the constitutionality of future approaches to addressing prosti-

tution, based on the reasoning of the Ontario Court of Appeal there is reason to believe that the approach recommended above could be a constitutionally valid alternative in Canada. The majority of that Court stated: "We agree that a modern, comprehensive legislative scheme dealing with prostitution could reflect the values of dignity and equality, but that is not the legislative scheme currently in place."[77] A Canadian version of the Swedish approach would be just such a model.

Second, if the recommended approach is subject to a similar section 7 *Charter* challenge as in *Bedford*, the starting point of analysis would be very different because the impugned provisions that criminalize prostitutes would no longer exist. In short, the prostitute's liberty interest is no longer triggered because they are not subject to being criminalized for activities related to prostitution under the recommended approach – instead they are given support to exit prostitution since it is inherently harmful. This removes a primary concern that motivated the *Bedford* case, namely, that the current *Criminal Code* approach forced prostitutes "to choose between their liberty interest (obeying the law) and their personal security."[78] Without a sufficient liberty or security interest to trigger section 7 of the *Charter*, such a claim would fail.

Third, the objective under the recommended approach of abolishing prostitution because it is *inherently* harmful is quite different from the objectives of the provisions that were struck down in *Bedford* ("preventing public nuisance, as well as the exploitation of prostitutes").[79] If section 7 of the *Charter* is triggered in a challenge to the recommended approach, the strength of this connection would be central to the analysis of whether it would conform to the principles of fundamental justice. A strong argument could be made that seeking to abolish prostitution because it is inherently harmful is very closely connected with criminalizing the purchase of sex acts and supporting prostitutes to exit.

Fourth, under the recommended approach, there would be no criminal sanction against prostitutes, but johns who purchase (or attempt to purchase) sex acts would be liable. Prostitutes would no longer be exposed to criminal liability for prostitution-related activities so they would not be prevented from engaging in "screening" customers, for example – something that was considered important in *Bedford*. Additionally, under the recommended approach, johns would be criminalized in every location that prostitution occurs – not just on the street and in brothels.

Conclusion

Canada's public policy response to prostitution needs to be overhauled. This would have been the case even if the Supreme Court of Canada had instead upheld the impugned *Criminal Code* offences at issue in *Bedford*. Given the Court's decision, Parliament will more immediately have to consider how to address prostitution going forward in our country. While the Court has set certain broad constitutional parameters that must be respected, within those bounds Parliament may act within its legislative jurisdiction.

Canada's public policy response to prostitution needs to be overhauled.

Prostitution is inherently harmful. Exiting prostitution is the only way to truly protect prostitutes. At the same time, demand for prostitution must be tackled. A Canadian version of the Swedish model is most likely to advance the goal of abolishing prostitution and could be constitutionally valid, if implemented properly. In short, our criminal law and enforcement should focus sanctions on johns, pimps, and traffickers – while encouraging prostitutes to exit prostitution by receiving necessary programs and support.

About the Author



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Appendix: Prostitution Offences in the *Criminal Code*

BAWDY-HOUSES

Keeping common bawdy-house

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

Landlord, inmate, etc.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

Notice of conviction to be served on owner

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

Duty of landlord on notice

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

Transporting person to bawdy-house

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

PROCURING

Procuring

212. (1) Every one who

(a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,

(b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,

(c) knowingly conceals a person in a common bawdy-house,

(d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,

(e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,

(f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,

(g) procures a person to enter or leave Canada, for the purpose of prostitution,

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

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

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

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

Living on the avails of prostitution of person under eighteen

(2) Despite paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of two years.

Aggravated offence in relation to living on the avails of prostitution of a person under the age of eighteen years

(2.1) Notwithstanding paragraph (1)(j) and subsection (2), every person who lives wholly or in part on the avails of prostitution of another person under the age of eighteen years, and who

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

(b) uses, threatens to use or attempts to use violence, intimidation or coercion in relation to the person under that age,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years but not less than five years.

Presumption

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

Offence — prostitution of person under eighteen

(4) Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of six months.

OFFENCE IN RELATION TO PROSTITUTION

Offence in relation to prostitution

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

(a) stops or attempts to stop any motor vehicle,

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

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

Definition of "public place"

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

Endnotes

1 *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

2 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, para. 9.

3 Julie Cool, 2004, *Prostitution in Canada: An Overview* (Ottawa: Library of Parliament) at 1.

4 Standing Committee on Justice and Human Rights, 2006, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada) at 6.

5 As the Ontario Court of Appeal, I use the term "prostitute" in this paper as it is the term used in the *Criminal Code*. Other terms that are often used are "prostituted person" or "sex trade worker", both of which are said to carry normative connotations.

6 Julie Cool, 2004, *Prostitution in Canada: An Overview* (Ottawa: Library of Parliament) at 1-4; Standing Committee on Justice and Human Rights, 2006, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada) at 10, 12.

7 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 27 per Himel J.

8 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, paras. 2, 111. The Court also states at para. 123: "In the eyes of the criminal law, prostitution is as legal as any other non-prohibited commercial activity".

9 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, para. 133.

10 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, paras. 98, 123.

11 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 1. The Court recognized that while "some prostitutes . . . freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so": *ibid.*, para. 86.

12 See *Criminal Code*, R.S.C., 1985, c. C-46, ss. 210-213 (see appendix). For a discussion of provincial and municipal laws related to prostitution, see Laura Barnett & Julia Nicol, 2012, *Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction* (Ottawa: Library of Parliament), online: <http://www.parl.gc.ca/content/lop/researchpublications/2011-119-e.pdf>.

13 The term "child prostitution" is the term used to describe the prostitution of a person under eighteen years of age: see *Convention on the Rights of the Child*, United Nations, Treaty Series, vol. 1577, p. 3, art. 1 (signed by Canada on May 28, 1990 and ratified on December 13, 1991), and *Optional Protocol on the sale of children, child prostitution and child pornography*, United Nations, Treaty Series, vol. 2171, p. 227; Doc. A/RES/54/263 (signed by Canada on November 10, 2001 and ratified on September 14, 2005).

14 *Criminal Code*, ss. 212(2)-(2.1).

15 The offence in section 211 of the *Criminal Code* (transporting persons to bawdy-house) also applies in relation to a prostitute of any age.

16 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, para. 2 per Doherty, Rosenberg, and Feldman JJ.A.

17 See *Criminal Code*, s. 197 "common bawdy-house". The case law has determined that this can include a hotel in which various rooms are used in this manner, a parking lot, or any defined space where there is a "localization" of numerous acts of prostitution: *R. v. Patterson*, [1968] S.C.R. 157; *R. v. McLellan*, [1980] B.C.J. No. 982, 55 C.C.C. (2d) 543 (B.C.C.A.); *R. v. Pierce and Golloher*, (1982) 37 O.R. (2d) 721 (Ont. C.A.).

18 The "principles of fundamental justice" argued in this case relate to arbitrariness, overbreadth, and gross disproportionately. The claimants also argued that section 213(1)(c) of the *Criminal Code* infringed section 2(b) of the *Charter* (freedom of expression).

19 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 27 per Himel J. With respect to section 210, the specific approach was to strike down the word "prostitution" in the definition of "common bawdy-house" in section 197(1) of the *Criminal Code*. Thus, the common-bawdy house offence would only apply to places involving "acts of indecency" – not "prostitution".

20 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, per Doherty, Rosenberg, Feldman, MacPherson, and Cronk JJ.A.

21 In relation to prostitution as part of the definition of a "common bawdy-house": s. 197(1), Criminal Code as it applies *to s. 210.*

22 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, para. 9, MacPherson and Cronk JJ.A. dissented on this point and would have found s. 213(1)(c) infringed s. 7 of the *Charter*, was not saved by s. 1, and should be struck down.

23 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 164. The Court found that each offence infringed section 7 of the *Charter* and was not saved by section 1.

24 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 169.

25 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 165.

26 Standing Committee on Justice and Human Rights, 2006, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada) at 87.

27 Standing Committee on the Status of Women, *Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada* (Ottawa: Communication Canada, 2007) at 15-16, online: <http://www.parl.gc.ca/content/hoc/Committee/391/FEWO/Reports/RP2738918/feworp12/feworp12-e.pdf>.

28 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 188.

29 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 190.

30 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 187.

31 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at para. 367 per MacPherson and Cronk JJ.A.

32 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 189.

33 *Prostitution Reform Act 2003* (N.Z.) 2003/28.

34 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 192.

35 New Zealand Government, 2008, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice).

36 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at paras. 193-4.

37 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 194.

38 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 196.

39 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at para. 24.

40 *An Act Regulating the Legal Situation of Prostitutes (Prostitution Act) 2001* (Germany).

41 See 2007, *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)* (Berlin: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth).

42 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 201.

43 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at para. 24.

44 See 2004, *Regulating Prostitution: An Evaluation of the Prostitution Act 1999* (Brisbane: Crime and Misconduct Commission).

45 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 204.

46 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at para. 24.

47 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 209.

48 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 213.

49 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 212.

50 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at para. 24.

51 *Act on Violence Against Women 1999* (Sweden).

52 Sweden's law also applies extraterritorially to its nationals, including Swedish peacekeepers who have faced charges under it. See *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 208.

53 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at paras. 206-8.

54 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 207.

55 *Canada (Attorney General) v. Bedford*, 2010 ONSC 4264, [2010] O.J. No. 4057 at para. 208.

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67 Standing Committee on Justice and Human Rights, 2006, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada) at 91.

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72 Julie Cool, 2004, *Prostitution in Canada: An Overview* (Ottawa: Library of Parliament) at 9.

73 Standing Committee on Justice and Human Rights, 2006, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada) at 52–53.

74 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 132.

75 Government of Canada, 2012, *National Action Plan to Combat Human Trafficking* (Ottawa), online: Public Safety Canada <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>.

76 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 5.

77 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at para. 183. See also paras. 200, 217.

78 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 20, referring to Justice Himel's reasons.

79 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 4.

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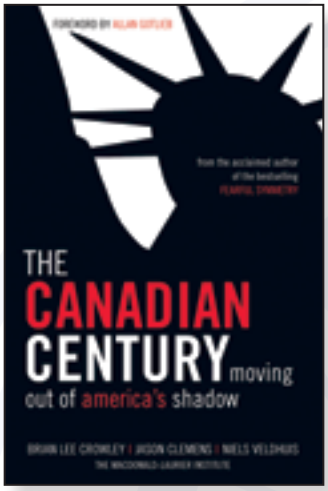
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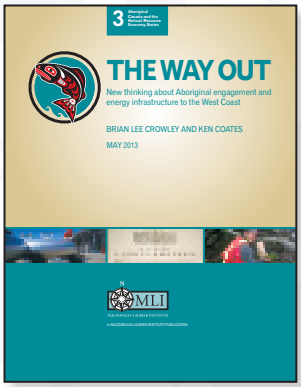
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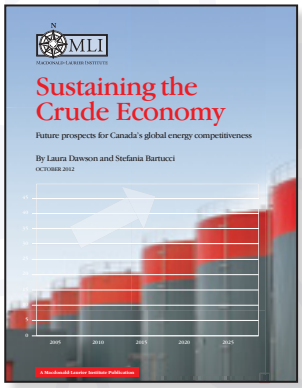
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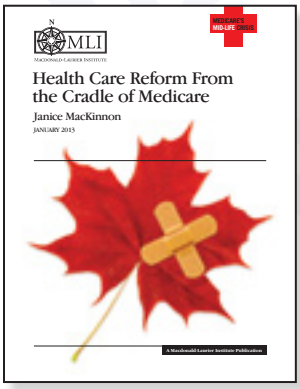
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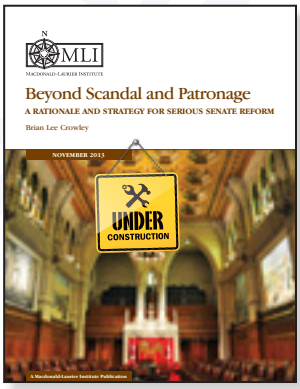
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Very much enjoyed your presentation this morning. It was first-rate and an excellent way of presenting the options which Canada faces during this period of "choice"... Best regards and keep up the good work.

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