MOVING BEYOND THE PROSTITUTION REFERENCE: *BEDFORD V CANADA*

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Canada's *Criminal Code*[1] does not criminalize the sale of sex, but instead regulates the activities which surround commercial sexual acts. In 2007, Terri Jean Bedford, Amy Lebovitch and Valerie Scott launched a constitutional challenge on the provisions of the *Criminal Code* prohibiting: keeping a common bawdy house (s. 210), living on the avails of prostitution (s. 212(1)(j)) and communicating for the purposes of prostitution (s. 213 (1)(c)).[2] They argued these provisions contribute to the risk that sex trade workers will become victims of violence, in violation of their rights to liberty and security of the person under s. 7 of the *Charter*.[3] The applicants also submitted that the communicating provision was a violation of their s. 2(b) right to freedom of expression under the *Charter*.[4] Each of the women has a lengthy history of work in the sex trade. Lebovitch continues to earn a living through sex work, while both Bedford and Scott expressed a desire to return to the profession. All three are members of Sex Professionals of Canada, an organization that advocates for the decriminalization of sex work. Their victory at the Ontario Superior Court of Justice and partial victory at the Ontario Court of Appeal[5] signals that the dialogue about how prostitution is regulated in Canada has been re-opened. On June 12, 2013, the Supreme Court of Canada will hear the appeal of the Attorney General and Bedford's cross-appeal.[6]

Bedford argued the bawdy-house provision forces sex workers to practice their trade in public places, rather than from safer, indoor locations.[7] A bawdy-house

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1 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

2 *Bedford v Canada (Attorney General),* 2010 ONSC 4264 [*Bedford*].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s.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.

4 See *Charter, Ibid* s 2(b). Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

5 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at 325 [*Bedford Appeal*].

6 *Canada (Attorney General) v. Bedford*, [2012] SCCA 159.

7 *Bedford*, *supra* note 2 at 11.

is defined in s. 197 (1) as: "a place that is kept or occupied, or resorted to by one or more persons, for the purpose of prostitution or to practice acts of indecency".[8] Courts have interpreted "place" broadly to mean that "any defined space is capable of being a bawdy-house, from a hotel, to a house, to a parking lot – provided that there is frequent or habitual use of it for the purposes of prostitution."[9] As a result, virtually wherever a sex worker chooses to work may make them liable under the criminal law. The offence carries a maximum penalty of two years imprisonment.

Section 212 of the *Criminal Code* lists various offences, under the general heading of "procuring" including enticing a person to enter into prostitution, and exercising control or force over a person who has been compelled into the sex trade. The applicants challenged only the constitutionality of s. 212 (1)(j), which creates the offence of living wholly or partly on the avails of prostitution, commonly referred to as "pimping." A conviction under this section carries a maximum penalty of ten years in prison. Under s. 212(3), anyone who "lives with or is habitually in the company of a prostitute" is presumed to be "living on the avails of prostitution." Thus, spouses, partners and even roommates of a sex worker could be convicted of pimping, unless they can introduce evidence rebutting the presumption.[10] This section also creates the risk of prosecution for people the sex worker might hire to work as drivers, security, or reception staff. As the applicants argued in *Bedford*, having such staff creates a safer environment for those in the sex trade.[11] The ability to have staff is often closely linked to the being able to work in an indoor location.

The communicating provision in s. 213 of the *Criminal Code* prohibits: stopping or attempting to stop a motor vehicle or a person, or impeding access to or from a public place for the purposes of prostitution.[12] The applicants argued that this provision forces sex workers to operate covertly, often without the necessary time to assess whether a client is potentially threatening, prior to accepting them.[13]

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8 *Criminal Code*, supra note 1, s 197 (1).

9 Parliamentary Information and Research Service, Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction by Laura Barnett (Ottawa: Library of Parliament, 2004) Online: Government of Canada Publications <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0330-e.htm#criminalcode>.

10 The authority that allows the presumption to be rebutted was developed by the court in *R. v. Grilo* (1991), 2 OR (3d) 514. Justice Arbour stated: "The true parasite whom s. 212(1)(j) seeks to punish is someone the prostitute is not otherwise legally or morally obligated to support.

11 *Bedford*, *supra* note 2 at 11; *Criminal Code*, *supra* note 1, s 3.; Karin Galldin et al, "Bedford v. Canada: a paradigmatic case toward ensuring the human and health rights of sex workers" (2011) 15 HIV/AIDS Policy Review at 5 [*Galldin et al*].

12 *Criminal Code*, *supra* note 1.

13 *Bedford*, *supra* note 2 at 11.

This paper will offer insight into how the Supreme Court will decide the *Bedford* appeal by closely examining the issues presented through the trial and the appeal. The paper will also weigh the decision of the Supreme Court in the 1990 *Prostitution Reference*[14] upholding the impugned provisions and the 2011 Supreme Court decision *Canada (Attorney General) v. PHS Community Services Society*[15] (*PHS*), which offers a way to move forward. The harms that sex workers face are at the heart of the *Bedford* case, which is what separates it from the *Prostitution Reference*. Instead of considering sex work generally, the Bedford appeal gives the issue a human face and asks for the striking of laws that put sex workers at risk of violence. The issue of harms and the wealth of evidence supporting the fact that the impugned provisions of the *Criminal Code* aggravate the harms faced by sex workers were not put forward in the *Prostitution Reference*. In addition, the principles of fundamental justice that the Court uses to scrutinize provisions challenged under s. 7 of the *Charter* have also evolved considerably in the intervening years. The principles that define when a government needs to consider the adverse harms caused by legislative and decision-making processes set out in *PHS* offer insight into how the issues raised in *Bedford* may be interpreted. Examining the evidence presented at trial and the Court of Appeal leads to an appreciation for the need to decriminalize sex work. The Supreme Court should not feel bound by the *Prostitution Reference*, which focused on different issues and did not have the benefit of the recent *PHS* case, which I argue indicates a way for the Supreme Court to decriminalize sex work in Canada.

THE PROSTITUTION REFERENCE

The Supreme Court upheld the constitutionality of both the bawdy-house and communicating provisions of the *Criminal Code* in the 1990 *Prostitution Reference*. An understanding of the *Prostitution Reference* is essential to appreciating the issues raised in *Bedford.* At trial and on appeal, Bedford submitted the *Prostitution Reference* was distinguishable and the Attorney General contended that it is a binding authority.

In the *Prostitution Reference,* the Supreme Court was asked to determine whether the provisions of the *Criminal Code* dealing with bawdy-houses (s. 193, now s. 210) and communicating for the purposes of prostitution (s. 195 (1)(c), now s. 213 (1)(c)), separately or in combination, were a violation of ss. 2(b) or 7 of the *Charter*. Chief Justice Dickson, writing for the majority concluded both provisions

14 *Reference re ss. 193 and 195.1 (1)(C) of the Criminal Code (Man.)* [1990] 1 SCR 1123 at 21 [*Prostitution Reference*].

15 *Canada (Attorney General) v. PHS Community Services Society* 2011 SCC 44 [*PHS*].

were consistent with s.7.[16] While the liberty interests were engaged by the possibility of imprisonment, the provisions could not be determined to be sufficiently "unfair as to violate the principles of fundamental justice".[17] The majority also found the bawdy-house provision did not infringe on a person's right to freedom of expression.[18] With respect to communicating, the majority determined that while there was an infringement to the s. 2(b) right of freedom of expression it could be upheld as a justifiable limit.[19] Dickson CJ described the legislative objective of the communicating provision as suppressing the social nuisance caused by public solicitation and keeping it out of the view of the public.[20]

Despite reaching the same conclusions in his own reasons, Lamer J's opinion in the *Prostitution Reference* branched into a discussion of economic liberty, which highlights the difference between what the Supreme Court was asked to decide in 1990 and what *Bedford* is asking the Court to decide now. The argument in 1990, as summarized by Lamer J, was that the impugned provisions violated liberty under s. 7 because sex workers were unable to "exercise their chosen profession", which then violated their right to security of the person by rendering them unable to provide for themselves.[21] While he could not accept that the infringement was contrary to the principles of fundamental justice, he encapsulated when s. 7 is triggered, stating that it is "implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity",[22] which is precisely the argument being made in *Bedford*. Lamer J also characterized the legislative objective of communicating differently from the majority of the court. His definition extended to "general confusion and congestion that is accompanied by an increase in related criminal activity such as possession and trafficking of drugs, violence and pimping".[23] It is important to remember that this view was that of Lamer J alone as his characterization is raised by the Ontario Court of Appeal in *Bedford*.

16 *Prostitution Reference*, *supra* note 14 at 21.

17 *Ibid* at 19.

18 *Ibid* at 1.

19 *Ibid* at 11.

20 *Ibid* at 2.

21 *Ibid* at 49

22 *Ibid* at 68.

23 *Ibid* at 95 & 97.

In dissent, in her s.7 analysis, Wilson J found that while the bawdy-house provision could be considered consistent with s. 7 of the *Charter*, the communicating provision did constitute a breach.[24] In her view, the risk of incarceration was disproportionate to the legislative objective of curbing public nuisance, especially in light of her finding that the communicating provision also violated a person's right to freedom of expression and could not be upheld by s. 1.[25]

The Trial Decision

The arguments of both Bedford and the Attorney General presented the Application Judge (Justice Susan Himel) with a formidable task because of the stigma attached to sex work. Bedford's position was that the criminal prohibitions make sex work more dangerous and that the Supreme Court decision in the *Prostitution Reference* relating to communicating and freedom of expression needed to be revisited in light of "new evidence and a material change in circumstances."[26] The Attorney General of Canada argued Bedford had not shown sufficient reasons in law or new evidence which would warrant a re-evaluation of the Supreme Court's previous ruling and that the danger inherent in the sex trade was not caused by the impugned provisions.[27] Interveners, the Attorney General of Ontario, the Christian Legal Fellowship, REAL Women of Canada and the Catholic Civil Rights League all spoke to human dignity and vulnerability of the people that the impugned provisions were enacted to protect.[28] The judgment of Himel J shows thoughtful consideration of the issues, presented in a manner that demonstrated that she anticipated an appeal of the decision. Himel J found the impugned provisions unconstitutional for exacerbating the harms faced by sex workers.

The risk of imprisonment is sufficient to initiate a review of the impugned provisions under s. 7 of the *Charter* because of the threat to a person's liberty.[29] Bedford argued their security of the person was also at issue because of the risk of violence sex workers face. Himel J. found the threat of violence forced sex workers to choose "between their liberty and their security of the person" and the evidence demonstrated that the impugned provisions played "significantly contributory role"

24 *Ibid* at 158.

25 *Ibid* at 157.

26 *Bedford*, *supra* note 2 at 13.

27 *Ibid* at 15-17.

28 *Ibid* at 21-24.

29 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 74; *Bedford*, *Supra* note 2 at 281; *Prostitution Reference*, *supra* note 18 at 15.

by prohibiting actions that would make sex work safer. [30] With s. 7 engaged, Himel J was then tasked with determining if the interference with the rights to liberty and security of the person were in accordance with the principles of fundamental justice.[31] Her analysis included the principles against: arbitrariness, overbreadth and gross disproportionality and she determined that it was unnecessary to consider the principle of the rule of law as it was inapplicable in this case.[32]

To determine if any or all of the provisions violated these principles of fundamental justice, Himel J surveyed the history of each provision to determine the legislative objectives. She found that the bawdy-house provision was aimed at "combating neighbourhood disruption and disorder and safeguarding public health and safety".[33] The objective of the provision prohibiting living on the avails of prostitution is to protect prostitutes from those who may seek to profit from their work.[34] Finally, relying on the determination of the Supreme Court in the *Prostitution Reference*, the communicating provision is an attempt to "eradicate the various forms of social nuisance arising from the public display of the sale of sex".[35]

Based on these determinations, Himel J found that the bawdy-house provision was both overbroad, because the "wide geographic scope" that encompasses areas beyond a "traditional brothel"[36] and grossly disproportionate to the intended objectives, because sex workers are denied the safety and stability that a permanent indoor location can provide.[37] She found the living on the avails provision to be arbitrary, because sex workers are prohibited from hiring anyone who could make their work safer,[38] overbroad for its inclusion of "non-exploitive arrangements",[39] and grossly disproportionate as it forces sex workers to choose

30 *Bedford*, *supra* note 2 at 362.

31 *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at 109, *per* McLachlin C.J. and Major J.; *Malmo-Levine*; *R v. Clay* [2003] 3 SCR 571 at 83.

32 *Bedford*, *supra* note 2 at 439.

33 *Bedford*, *supra* note 2 at 242.

34 *Ibid at* 259.

35 *Ibid* at 374; *Prostitution Reference*, *supra* note 14 at 2.

36 *Bedford*, *supra* note 2 at 400-401.

37 *Ibid* at 428.

38 *Ibid* at 379.

39 *Ibid* at 402.

between their own safety and jeopardizing the liberty of another.[40] The communicating provision was determined to be grossly disproportionate in light of the evidence that the provision prevents the screening of clients and disperses sex workers to more isolated areas.[41] In Himel J's weighing of the evidence she found that the breach of the s.7 *Charter* rights could not be saved by an analysis under s. 1, because the challenged provisions are disproportionate and cause more than a minimal impairment to the rights of sex workers.[42]

Bedford also challenged the communicating provision under s. 2(b) of the *Charter*, as an unconstitutional limit on freedom of expression. Previously this provision had been determined- by the Supreme Court in the *Prostitution Reference*- as a "*prima facie* infringement of s. 2(b)", which Himel J accepted.[43] Given the established infringement of the right, she moved on to consider the infringement in light of the test developed in *R v Oakes*.[44] The test dictates that the impugned provision must have a "pressing and substantial" objective.[45] Concurring with the finding of Dickson CJ in the *Prostitution Reference*, Himel J found that eliminating social nuisance represented a legitimate pressing and substantial objective.[46]

The second part of the test requires that the provision is rationally connected to the objective, while impairing the right "as little as possible" and the impairment of the right must be proportional to the objective.[47] Himel J found the "need to safeguard their own bodily integrity through communication with customers lies at or near the core of expression s. 2(b) of the *Charter* seeks to protect."[48] Her assessment departed greatly from Dickson CJ in the *Prostitution Reference* who stated: "It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of

40 *Ibid* at 431.

41 *Ibid* at 434.

42 *Ibid* at 441. Being that Himel J. only included a very succinct analysis of s. 1, the full test is articulated below, in relation to the challenge of the communicating provision to freedom of expression, as guaranteed by s. 2(b).

43 *Ibid* at 444; *Prostitution Reference*, *supra* note 14 at 1.

44 *Bedford, supra* note 2 at 446; *R v. Oakes*, [1986] 1 SCR 103 [*Oakes*].

45 *Ibid* at 69.

46 *Bedford*, *supra* note 2 at 448.

47 *Oakes, supra* note 44 at 70

48 *Bedford*, *supra* note 2 at 462.

expression."[49] The difference of opinion is understandable considering Himel J had the benefit of over 25,000 pages of evidence, in addition to witnesses ranging from sex workers, to police, to social workers, and academics.[50] Apart from the recommendations of the Special Committee on Pornography and Prostitution which were released in 1985, much of the evidence relied upon in the Bedford case was not available at the time of the *Prostitution Reference*.

Himel J found the communicating provision was rationally connected to the objective of curbing social nuisance, but (just as Wilson J found in her dissent in the *Prostitution Reference*) the provision represented more than a minimal impairment to the right of freedom of expression.[51] In the final balancing, Himel J found the prohibition on communicating adds to the risk that sex workers will become victims of violence and that this was "simply too high a price to pay" to curb social nuisance and represented an "unjustifiable limit" on freedom of expression.[52]

Himel J struck down the three challenged provisions, because of the infringement of the rights of sex workers. The judgment was stayed for 30 days to avoid a legislative gap.[53] A stay of Himel J's judgment remained in effect pending the outcome of the appeal.

THE ONTARIO COURT OF APPEAL DECISION

The Attorney General of Canada and the Attorney General of Ontario, appealed the decision to the Ontario Court of Appeal. The decision was released on March 26, 2012 upholding the decision of Himel J that the bawdy-house and living on the avails provisions are unconstitutional.[54] All five judges were unanimous in their decision on these two provisions. With respect to living on the avails of prostitution in s. 212(1)(j), the court read in the words "in the circumstances of exploitation" to clarify when it will be permissible to benefit from the proceeds of sex work.[55] While the partial remedy granted by the Court of Appeal represents a victory for sex workers generally, the failure of the majority to uphold the application judge's ruling

49 *Prostitution Reference*, supra note 14 at 5.

50 *Bedford, supra* note 2 at 84.

51 *Ibid* at 481.

52 *Ibid* at 504-505.

53 *Ibid* at 539.

54 *Bedford Appeal supra*, note 5 at 325.

55 *Ibid* at 327.

on the communicating provision means that street-based sex workers will continue to rush into transactions with clients that they have not had time to screen.

The majority of the Court of Appeal held that the decision of the Supreme Court in the *Prostitution Reference* deeming the communicating provision to be a reasonable limit on freedom of expression under s. 2(b) of the *Charter* remained binding on the trial judge.[56] When it came to the constitutionality of the communicating provision with respect to s. 7, there was a stark difference of opinion. The majority disagreed with Himel J's finding that the communicating provision was grossly disproportionate and did not find a s. 7 violation. In dissent, MacPherson JA agreed with the application judge's finding that the impugned provision was grossly disproportionate.

In the majority's assessment of the communicating provision and the principles of fundamental justice, they agreed with Himel J that a provision is not rendered arbitrary because it is ineffective.[57] Thus, they concurred with the application judge that the communicating provision is not arbitrary, despite their disagreement with her finding that the law was ineffective in reducing street solicitation.[58] The majority also agreed with Himel J's finding that the communicating provision was not overbroad.[59] However, they concluded that Himel J's analysis of the communicating provision and principles of gross disproportionality was flawed.[60] They found that in the balancing of the objective and the effects of the law, too little weight had been given by Himel J to the objective, while too much was assigned to the effects.[61]

At the appeal, the Attorney General of Canada argued Himel J "failed to take into account the seriousness of nuisance presented by street prostitution, which is attended by drug use and other crimes."[62] This argument was a parallel of Lamer J's characterization of the legislative objective in the *Prostitution Reference*;[63] a view

56 *Ibid* at 328.

57 *Ibid* at 287; *Bedford*, *supra* note 2 at 383.

58 *Bedford Appeal, supra* note 5 at 289; *Bedford*, supra note 2 at 383.

59 *Bedford Appeal, supra* note 5 at 290.

60 *Ibid* at 280.

61 *Ibid.*

62 *Bedford Appeal*, *supra* note 5 at 285.

63 *Prostitution Reference*, *supra* note 14 at 95

rejected by the majority.[64] The majority of the Court of Appeal in *Bedford* controversially agreed with the Attorney General and found that Himel J "under-emphasized the importance of the legislative objective", for failing to take into account the same activities that were included in Lamer J's rejected characterization of the legislative objective. The majority also found that given the striking down of the bawdy-house provision less weight should be accorded to harms caused by the communicating provision, because sex workers would now have the option to move to indoor locations.[65]

The majority in the *Bedford* appeal also held that the application judge had placed too much weight on the impact the communicating provision has on sex workers.[66] Himel J saw the ability to screen clients as an "essential tool" to enhancing the safety of sex workers. The majority at the Court of Appeal was not convinced that the evidence supported this.[67] Instead, they found that Himel J drew her conclusion from the "anecdotal evidence from prostitutes."[68] This reinforcement of the outdated notion that sex workers are unreliable witnesses, because of their chosen profession is an error by the Court of Appeal. Beyond sex workers themselves, the screening of clients is discussed several times in Himel J's judgment. Dr. Gayle MacDonald's 2006 presentation to the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation, which Himel J quotes, supports the use of screening as a safety mechanism:

> Continued criminalization, specifically the communications provision of the *Criminal Code*, puts the sex worker in danger by increasing the speed of the negotiation of terms between the sex worker and her client, which is the most critical point for her to assess the client's propensity to violence. If the sex worker is rushing to avoid encounters with police, she may misjudge – at great peril to her – the safety of a client.[69]

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64 Dickson CJ, in the *Prostitution Reference*, *supra* note 14 at 2.

65 *Bedford Appeal*, *supra* note 5 at 309.

66 *Ibid* at 305.

67 *Ibid* at 310.

68 *Bedford Appeal*, *supra* note 5 at 311.

69 *Bedford*, *supra* note 2 at 171. Dr. MacDonald is a Professor of Sociology at St. Thomas University, where she is also the Assistant Vice-President (Research). She holds a BA (Dalhousie), MA (Ottawa) and a PhD (UNB). She has published extensively on sex work including the book "Sex Workers of the Maritimes Talk Back (2006) with co-author with Leslie Jeffrey. Dr. MacDonald also contributed to the forthcoming book Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada (UBC Press, 2013).

The views of MacDonald, who also served as an affiant for Bedford, are echoed by other expert witnesses including: Dr. Augustine Brannigan,[70] Dr. Eleanor Maticka-Tyndale,[71] Dr. Cecilia Benoit,[72] and Dr. Frances Shaver.[73] Himel J also referenced the ability of decriminalized sex workers in New Zealand to make better assessments of potential clients because they no longer fear prosecution.[74] While decriminalized sex workers in New Zealand still face stigma, "the realisation of employment and legal rights has given many sex workers confidence to avert or react to situations that hold the potential for violence".[75] While the majority of the Court of Appeal felt Himel J's conclusion on the effectiveness of screening as a safety tool reached "well beyond the limits of the evidence," the support for screening is actually quite robust.[76]

The majority of the Court of Appeal also disagreed with Himel J's comparison of the case at bar with *PHS*, finding it "is simply not comparable" to draw parallels between the communicating provision's effects on sex workers with the consequences of the Minister's denial of an exemption from the *Controlled Drugs and Substances Act*[77] on drug addicts.[78] While the court recognized the distinct vulnerability of sex workers on the streets and acknowledged that, even with the ability to move to indoor sites many would not have the resources to facilitate such a move. The majority was unconvinced that the impact of the communicating provision was a factor that, when combined with the other evidence, would tip the balance towards a finding of gross disproportionality.[79]

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70 *Ibid* at 307.

71 *Ibid* at 337.

72 *Ibid* at 339.

73 *Ibid* at 340.

74 *Ibid* at 194.

75 Gillian Abel and Lisa Fitzgerald, "Risk and risk management in sex work post-Prostitution Reform Act: a public health perspective" in Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation, Gillian Abel et al Eds. (Portland: Policy Press, 2010).

76 *Bedford Appeal*, *supra* note 5 at 311.

77 *Controlled Drugs and Substances Act* SC 1996, c 19.

78 *Bedford Appeal*, *supra* note 5 at 315.

79 *Ibid* at 322

THE DISSENT OF MACPHERSON JA

Writing in dissent, MacPherson JA concurred with the analysis of the majority on all points except for their finding that the communicating provision was not grossly disproportionate. MacPherson JA would have upheld the application judge's finding of gross disproportionality in violation of s. 7 of the *Charter*.[80] MacPherson JA alleged that the majority without reason, used a different method is assessing the communicating provision and that the analysis was in stark opposition to the method and reasoning which was used to amend the provisions concerning bawdy-houses and living on the avails. It was MacPherson JA's opinion that even with the amendments to the bawdy-house and living on the avails provisions, the communicating provision still prevents sex workers from using all available means to protect themselves. He offers seven reasons to support his conclusion that the communicating provision is grossly disproportionate and should be found unconstitutional.

MacPherson JA took support for a finding of gross disproportionality within the majority's own conclusions on the bawdy-house and living on the avails provisions. He disagreed with the change in the tone of the analysis for communicating and the incorporation of the concepts of "cruel and unusual punishment" and "abhorrent or intolerable" to the analysis.[81] While it is correct that the test for gross disproportionality under s. 12 of the *Charter*[82] requires a similar balancing test including these notions, these "touchstones" were not brought into consideration in determining the previous two provisions.[83] Further, this treatment was not only different from the treatment given to the other provisions, but it was contradictory to statements made by the majority that found that the communicating provision contributed "equally" to the violence sex workers face.[84] MacPerson JA's position was that if the bawdy-house and living on the avails provisions could not be upheld then the communicating provision "with its equally serious – and perhaps worse – effects on prostitutes" should not be upheld either.[85]

The opinion of MacPherson JA that these provisions are so closely linked that they should receive similar treatment, could lend itself to an argument that

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80 *Ibid* at 333.

81 *Ibid* at 339; Source of quote on which MacPherson J.A. relies at 300.

82 *Charter*, supra note 3, s. 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

83 *Bedford Appeal, supra* note 5 at 340.

84 *Ibid* at 343. Source of quote on which MacPherson J.A. relies at 206.

85 *Ibid* at 344.

perhaps all three provisions should be upheld as constitutional. However, each of the provisions contributes to the risk of violence faced by sex workers. It is difficult to separate the effects of the impugned provisions. Kara Gillies is a long time sex worker and an activist with Maggie's, an intervening organization. She describes the inter-play between the impugned provisions and how the communicating provision still hinders a sex workers ability to work safely:

> It is not tenable to have a safe place to see a client if you can't screen him first or clearly set out what you offer, your rates and your safe sex requirements. Further, many street-based workers don't have access to an indoor place to work.[86]

If the concepts of "cruel and unusual punishment", "abhorrent" and "intolerable" are to be incorporated into the analysis, the evidence before the court clearly indicates that violence is occurring and that the impugned provisions prevent sex workers from protecting themselves and from working with police to see that perpetrators of violence are punished. It is difficult to make an argument that violence is an acceptable alternative to calm and orderly neighbourhoods, which is the legislative objective of the communicating provision that the Supreme Court agreed upon in the *Prostitution Reference*. Further, the reasons of MacPherson JA point out that the application judge was correct in her appraisal of the legislative objective of the communicating provision. MacPherson JA found that by including criminal conduct commonly associated with street solicitation, the majority had inflated the actual legislative objective than what was accepted by the majority of the Supreme Court in the *Prostitution Reference*.[87]

MacPherson JA also took issue with the weight assigned to the importance of sex workers being able to screen their clients, largely prevented by the communicating provision. His opinion was that the fallibleness of screening as a means of protection against violence does not diminish its value.[88] MacPherson JA reasoned further that the majority took a narrow view by failing to consider the other risks to safety, beyond an inability to screen clients, which are caused by the provision.[89] In agreement with the application judge, MacPherson JA found that the effect of the provision also displaced and dispersed sex workers, which added to their

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86 Maggie's Toronto Sex Workers Action Project, Press Release, "Ontario Court Leaves Most Vulnerable Sex Workers Unprotected"(26 March 2012) Online: Maggie's Toronto Sex Workers Action Project <http://maggiestoronto.ca/press-releases?news_id=86>.

87 *Bedford Appeal, supra* note 5 at 345-47. Source of quote on which MacPherson J.A. relies at 307.

88 *Ibid* at 348.

89 *Ibid* at 351.

vulnerability, and that these factors could not be discounted in the balancing exercise.[90]

MacPherson JA recognized that the provision "denies an already vulnerable person the opportunity to protect herself from serious physical violence."[91] He referenced the interveners who advocated that the communicating provision adversely affect street prostitutes who are already part of groups who are traditionally marginalized. This is particularly clear from research conducted in Vancouver's Downtown Eastside that found "almost 70% of women working in the lowest paying and most dangerous street sex work tracts are women of Aboriginal ancestry".[92] MacPherson JA cited the Supreme Court authority of *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, which compels a consideration of s. 7 rights with a view to the equality rights granted under s. 15 of the *Charter*.[93] MacPherson JA recognized the reality that street prostitution will not disappear, because of the changes to the bawdy-house provision and that the communicating provision would continue to limit the means of street prostitutes to protect themselves.[94]

The Attorneys General argued the impugned provisions were not the cause of the depravation of security of the person, because it is the actions of others – namely clients - at the root of the violence faced by sex workers. In considering this argument, the majority acknowledged similarities between sex workers and the addicts who sought access to a safe-injection site in *PHS*.[95] MacPherson JA took issue with their sudden change in position, finding that "the application judge also erred by equating this case with *PHS*."[96] The majority offered no explanation for the reversal.

The final reason for MacPherson JA's dissent is that he found that the amendments made to the bawdy-house and living on the avails provisions were not

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90 *Ibid* at 353.

91 *Ibid* at 360.

92 Dara Culhane, "Their spirits live within us: Aboriginal Women in Downtown Eastside Vancouver Emerging into Visibility" (2003) 27 Am Indian Q 593-601 at 597.

93*Bedford Appeal, supra* note 5 at 356; citing *New Brunswick Minister of Health and Community Services v. GJ*, [1999] 3 SCR 46 at 115.

94*Bedford Appeal, supra* note 5 at 360.

95*Ibid* at 116.

96 *Ibid* at 315.

enough to provide a sufficient remedy. Again he acknowledged street prostitution will continue and that the communicating provision, if it is allowed to stand, will continue to put sex workers at an increased risk of becoming victims of violence. MacPherson JA concluded by concurring with the application judge's assessment that the communicating provision is unconstitutional.

REVISITING THE PROSTITUTION REFERENCE

The argument of Bedford et al in asking the court to reexamine the bawdy-house and communicating provisions under s. 7 of the *Charter* was that the *Prostitution Reference* only considered the right to liberty and the vagueness of the impugned provisions, in contrast to their contention that the provisions also violated security of the person and are not in accordance with the principles of fundamental justice against arbitrariness, overbreadth and gross disproportionality and the rule of law, which had not been developed at the time of the reference.[97]

Bedford asserted that they were asking the court to reconsider the communicating provision under s. 2(b) in a different context than the previous case because the situation facing sex workers had changed in the intervening years. Whereas the *Prostitution Reference* focused on the impugned provisions as a barrier to economic liberty, the core of the *Bedford* case was centered on the harms that sex workers faced because of the impugned provisions.[98] Finally, they pointed out that unlike the reference, this case presented empirical evidence that was not available in 1990. It was their position that a "material change in circumstances" justifies a full hearing on the merits.[99]

The Attorneys General argued the standard for overturning a Supreme Court decision is high and requires reasons that are "beyond compelling".[100] It was their position that taking a second look at the conclusions of the Supreme Court in the *Prostitution Reference* would need to be grounded in either law or evidence, which they contended Bedford had not shown. This is despite the fact that the Federal government completed some of the research on which Bedford relies.[101]

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97 *Bedford*, *supra* note 2 at 70.

98 *Ibid* at 71.

99 *Ibid* at 72.

100 *Ibid* at 74.

101 *Ibid* at 73.

Himel J recognized the principle of *stare decisis*, but also considered the body of jurisprudence that provided guidance on when a court can revisit an issue. She used Laskin JA's reasoning in *Polowin Real Estate Ltd* as a justification to reconsider the issue.[102] *Polowin* contended that firm reliance on *stare decisis* "might lead to injustices in individual cases."[103] She also relied on the authority of the five factors listed by the Supreme Court in *Bernard,*[104] *Chaulk,*[105] and *Salituro*[106] which establish when the top court can overrule an earlier decision. The factors are:

> Where a previous decision does not reflect the values of the *Canadian Charter of Rights and Freedoms*; where a previous decision is inconsistent with or "attenuated" by a later decision of the Court; where the social, political or economic assumptions underlying a previous decision are no longer valid in a contemporary society; where the previous state of the law was uncertain or where a previous decision caused uncertainty; and, in criminal cases, where the result of overruling is to establish a rule favourable to the accused.[107]

The factors are echoed by the trial decision *Leeson* v. *University of Regina,* which stated: "necessarily such revisitations must commence at the trial court level."[108] Himel J interpreted the authorities as allowing a lower court to deviate from a Supreme Court decision when the years between the decisions have yielded new jurisprudence and social facts justify readdressing the issue at bar.[109] The evidence before Himel J was not present when the Supreme Court ruled in 1990 and she reasoned that the "social, political and economic assumptions underlying the *Prostitution Reference* are no longer valid today."[110]

The Court of Appeal agreed the issues and evolution of s.7 warranted reexamining the bawdy-house and communicating provisions, because security of

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102 *Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2006) 76 OR (3d) 161 [*Polowin Real Estate*].

103 *Bedford*, *supra* note 2 at 68; *Polowin Real Estate*, *supra* note 119 at 121.

104 *R v Bernard*, [1988] 2 SCR 833.

105 *R v Chaulk*, [1990] 3 SCR 1303.

106 *R v Salituro*, [1991] 3 SCR 654.

107 *Bedford*, *supra* note 2 at 81.

108 *Leeson v. University of Regina* (2007), 301 Sask R 316, 2007 SKQB 252 qtd. in *Bedford, supra,* note 2 at 82.

109 *Bedford*, *supra* note 2 at 83.

110 *Ibid* at 83.

the person was not at issue in the *Prostitution Reference*.[111] However, with regard to the argument that the communicating provision violated s. 2(b) and needed to be revisited, the Court of Appeal found it was not open for Himel J to overrule the decision of the highest court, only to develop the record so the Supreme Court can determine whether or not it believes their previous position should be reevaluated.[112] The Court of Appeal also found that Himel J's reliance on the authority of *Polowin Real Estate* was misguided as it only allows for a court of the same level to reconsider its own decisions.[113] The Court of Appeal also held it was not open for Himel J. to rule on the issue just because it had been framed differently from the previous decision of the Supreme Court.[114] The Court of Appeal was concerned this would open decisions of the Supreme Court to reevaluation by the lower courts too frequently and relegate the "vibrant living tree" of constitutional interpretation to be recast into a "garden of annuals to be regularly uprooted and replaced."[115]

While the two levels of courts disagreed in their approach to when previously decided issues warrant revisiting, the more important point is that the Supreme Court has agreed to take a fresh look at the communicating provision. It will rest with the top court to decide whether the provision can remain in its current form or whether it will fail to pass constitutional muster in light of the evolved circumstances. With the benefit of the record from both levels of court and the overwhelming evidence of the harms that are worsened by the impugned provision, a Supreme Court decision to strike down the communicating provision would not be a moral endorsement of sex work. It would be a welcome move to help protect a vulnerable group, by allowing them to use techniques which prevent violence in sex work, which in and of itself is not a criminal act. It would also pave the way for community groups to expand upon programs that help move sex workers off the streets such as safe-house brothels.[116] A Vancouver study, the results of which will be used as affiant evidence in the *Bedford* appeal to the Supreme Court, found that when safe spaces were offered for sex workers, the result was not only increased safety, but facilitated better relationships with police, access to informal safety mechanisms, an enhanced ability to negotiate transactions and a greater sense of dignity.[117] The positive impact of these programs

111*Ibid* at 52, 66.

112 *Bedford Appeal*, *supra* note 5 at 76.

113 *Ibid* at 81.

114 *Ibid* at 82.

115 *Ibid* at 84.

116Safe house brothels provide spaces for sex workers to bring clients but sex workers are still dependant on soliciting those clients as currently prohibited by the communicating provision. See *Bedford Appeal*, *supra* note 5 at 368.

117 Andrea Krüsi et al "Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study", (June 2012) 102 American Journal of Public

cannot be continued without law reform.

The report of the Missing Women Commission of Inquiry in British Columbia echoes many of the arguments that were made about the dangers faced by street-based sex workers, as many of them became victims of serial murderer Robert Pickton. Although the Commission, lead by former BC Attorney General Wally Oppal, was criticized for not going far enough to include the voices of marginalized women during the hearing process,[118] the Commission confirmed "[t] here is no dispute that women engaged in the survival sex trade are at an extremely elevated risk for various forms of severe violence".[119]

THE IMPACT OF THE INSITE DECISION

The 2011 Supreme Court decision in *PHS* will have a large impact on the *Bedford* case. The Supreme Court in *PHS* held that the government does have an obligation to protect those who are harmed by a law, when it can be empirically shown that the harms created by the law are more severe than the harms prevented. The Court found that the Minister of Health's refusal to grant a s. 56 exemption to the application of ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act* which would allow for the continued operation of Insite, a safe-injection site in Vancouver's Downtown East Side, represented a breach of s. 7 rights that was both arbitrary and grossly disproportionate to the health and safety objectives of the Act and could not be upheld by the limitations in s.1 of the *Charter*.[120]

As anticipated, the decision in *PHS* has reverberated within the courts, who have already considered the implications of the ruling in relation to sex work.[121] In *Bedford*, a wealth of evidence was presented showing the impugned provisions

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Health, No 6, 1154-1159.

118 "Legal Group pulls out of B.C.'s Missing Women Inquiry" CBC News (20 September 2011), Online: CBC News <http://www.cbc.ca/news/canada/british-columbia/story/2011/09/20/bc-pivot-missing-women.html>.; Darcie Bennett, "New report critical of Missing Women Inquiry issued weeks before Inquiry's deadline" Pivot Legal Society (19 November 2012), Online: Pivot Legal Society <http://www.pivotlegal.org/new_report_critical_of_missing_women_inquiry_issued_weeks_before_inquiry_s_deadline>.

119 Forsaken: Report of the Missing Women Commission of Inquiry: Nobodies: How and Why We Failed the Missing and Murdered Women, Vol IIA (Victoria: Distribution Centre, 2012) at 1.

120 *PHS*, *supra* note 15 at 127.

121 Cameron Ward, "*Canada (A.G.) v. PHS Community Services Society* – The Insite Decision" Case Comment (2012) 50:1 Alta L Rev 195. *PHS* has also been cited in *Carter v. Canada (Attorney General)* 2012 BCSC 886, which granted a constitutional exemption for Gloria Taylor from the Criminal Code provisions that prohibit assisted suicide.

prevent sex workers from taking precautions which would help protect themselves from violence. The government's own research validated claims made by Bedford: "[a] review of s. 213 by the Standing Committee on Justice and the Solicitor General in 1990 concluded that street prostitution in cities across the country either had not decreased or had been displaced to other neighbourhoods."[122] In reference to the ineffectiveness of s. 213, Himel J held that "[b]y increasing the risk of harm to street prostitutes, the communicating law is simply too high a price to pay for the alleviation of social nuisance."[123] She turned to the appeal decision in *PHS*, the most recent at the time, to reinforce that the government needs to balance both the intended effects of a law and the actual effects of a law.[124] While safe, orderly communities are a laudable goal, this order should not be achieved at the expense of the lives and wellbeing of sex workers.

As Galldin, Robertson and Wiseman stated, "the autonomy protected by Section 7 does not differentiate between state-approved choices and those that may be unpopular."[125] The government has conducted research on sex work and different modes of regulating the sex trade. While those reports have been collecting dust, sex workers have continued to be the victims of violence. Not every choice rises to the level of Charter protection, however, in *Rodriguez v. British Columbia (Attorney General),*[126] the Supreme Court, referencing *Morgentaler,*[127] recognized the importance of personal autonomy and to what degree s.7 can be asserted to protects the rights that it grants. They stated: "personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress".[128] To hold true to those values, it is imperative that the Supreme Court now strike down the impugned provisions.

On appeal, the Attorney General stated "the court below erred in assuming that an individual is entitled to engage in prostitution and that Parliament is obligated to minimize hindrances and maximize safety for those that do so contrary to law."[129]

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122 Parliamentary Information and Research Service, Prostitution in Canada: An Overview by Julie Cool (Ottawa: Library of Parliament, 2004), Online: Government of Canada Publications <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0443-e.pdf>.

123*Bedford*, *supra* note 2 at 504.

124 *Ibid* at 434.

125 *Galldin et al*, *supra*, note 12 at 26.

126 *Rodriguez v. British Columbia (AG)*, [1993] 3 SCR 519 [*Rodriguez*].

127 *R v Morgentaler* [1988] 1 SCR 30.

128 *Rodriguiez*, supra note 126 at 136.

129 *Bedford v. Canada (Attorney General)*, 2010 ONCA 814 (Factum of Appellant).

The Court of Appeal found the authority of *PHS* was an apt comparison for the case that the sex workers had made.[130] For sex workers, the situation is similar in that it is not sex work that poses the danger, but the client. The impugned provisions add to the danger of sex work by creating a situation where most precautions sex workers could take are prohibited by the criminal law. The Court of Appeal stated "in one sense, the prostitutes' claim is even stronger in that prostitution, unlike illicit possession and use of narcotics, is not an unlawful activity."[131] The majority of the Court of Appeal later criticized Himel J's reliance on *PHS*. MacPherson JA disagreed with the reversal of the majority's opinion on the authority of *PHS*. It was his opinion that "*PHS* supports the conclusion that the communicating provision in this case, like the Ministerial decision in *PHS* violates s.7".[132]

While several cases have already turned to *PHS* as demonstrating that the principles of fundamental justice against arbitrariness, overbreadth and gross disproportionality are distinct and should be considered individually, it remains to be seen how the Supreme Court will apply the analysis to the *Bedford* case. Given MacPherson JA's strong dissent, the reasons of the Supreme Court in *PHS* and the changes in circumstances since the *Prostitution Reference*, the Supreme Court should strike down the impugned provisions. Due to the fact that a finding of gross disproportionality is a high standard to meet, the Supreme Court has yet to overturn a law on this basis under s. 7.[133] It is possible *Bedford* will become a first in that regard. Deference must be paid to the objectives of legislation; however, the opportunity to protect an already marginalized group who face violence in the course of a legal activity warrants judicial intervention.

CONCLUSION

Bedford should serve as a call to action. In the wake of the murder conviction of Robert Pickton, the dangers faced by sex workers have become more evident. The comments of Williams J, the British Columbia Supreme Court judge who sentenced Pickton, spoke to the fragile position of the murdered women which struck at the core of the *Bedford* case: "[t]he women who were murdered, each of them, were members of our community. They were women who had troubled lives and who found themselves in positions of extreme vulnerability."[134] That sex workers face a

130 *Bedford Appeal, supra* note 5 at 116.

131 *Ibid*

132 *Ibid* at 363.

133 Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law Inc, 2012) at 149.

134 *R v. Pickton*, 2007 BCSC 2039 at 16.

greater propensity to violence, because of the criminal provisions that prevent them from taking measures to protect themselves should have been enough to compel the government to take action.

A finding of unconstitutionality by Canada's highest court would force the change necessary to bring Canada's sex work laws in line with other liberal democracies like New Zealand where sex work was decriminalized in 2003 with the passing of the *Prostitution Reform Act*.[135] The *PRA*, which commenced as a health initiative, repealed the criminal provisions surrounding the sex trade, and introduced new measures to criminalize only aspects that involve children. What was created is a comprehensive piece of legislation that offers sex workers not only greater protection from exploitation, but grants them the same occupational health and safety rights as any other worker. After being in force for five years, *PRA* underwent a review to ascertain its effectiveness. The report concluded that:

> During that time, the sex industry has not increased in size, and many of the social evils predicted by some who opposed the decriminalisation of the sex industry have not been experienced. On the whole, the *PRA* has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off under the PRA than they were previously.[136]

The Director of HIV, Health and Development practice for the UNDP commended New Zealand's law for "promoting safety and slowing the spread of HIV".[137] With positive implications for both the safety and the health of sex workers, and a legislative model that has been proven effective, Canada should be confident in moving forward with law reform that would decriminalize the sex trade.

Putting this issue back on the shelf for another twenty years would only put Canada further behind progressive nations that have already implemented legal reform to liberalize the sex trade. Prostitution will always find a place in society; decriminalizing the sex trade would mean that the law is no longer contributing to the violence that sex workers face.

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135 *Prostitution Reform Act 2003* (NZ), 2003/28.

136 New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) Online: Ministry of Justice <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report> at 14.

137 Josh Martin, "NZ - it's a great place to be a prostitute" The New Zealand Herald (26 Oct 2012), Online: The New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10842882>.