

**SEX WORK IN CANADA:
EXAMINING LEGAL, MORAL, AND THEORETICAL PERSPECTIVES ON THE
ISSUES**

By
Spencer Millis



Under the Supervision of
Professor Doug King

An Honours Project submitted
in partial fulfilment
of the Degree requirements for the degree of

Bachelor of Arts – Criminal Justice (Honours)
Mount Royal University

Date Submitted:
April 11, 2019

Table of Contents

Abstract	p. 3
Introduction	p. 4
Methodology	p. 6
Relevant Supreme Court Cases	p. 7
<i>1990 Prostitution Reference Question</i>	p. 7
<i>Majority Decision delivered by Dickson C.J. (La Forest & Sopinka JJ.)</i>	p. 8
<i>Concurring Reasons of Lamer J.</i>	p. 10
<i>Dissenting Reasons of Wilson J. (L'Heureux-Dubé J.)</i>	p. 11
<i>Bedford Decision (2013)</i>	p. 15
<i>Unanimous Majority Decision Delivered by McLachlin C.J.</i>	p. 15
Discussion: Supreme Court Decisions and the Principles of Fundamental Justice	p. 22
Bill C-36: Parliament's Response	p. 26
Issues with Bill C-36 and Similar Laws: Morality, Functionality, and Constitutionality	p. 27
Why Legalize?	p. 37
Conclusion	p. 40
References	p. 43

Abstract

In Canada, the sale of sex for money was not illegal under the former legislative structure. Regardless, the laws making up that structure were challenged for constitutionality in two cases and were heard by the Supreme Court of Canada. Two vastly different decisions were delivered in the 1990 *Prostitution Reference* and *Bedford* decisions, with the latter case repealing the old sex work laws. The Canadian government drafted new laws in response to the repealed laws. Evidence suggests that the new model of sex work regulation is harmful and does little to address the constitutional defects identified in the *Bedford* decision. This legislative approach comes from the adoption of perspectives from a moral crusade against prostitution, and similar legal structures in other parts of the world. The shortcomings of the law, and the questionable framework it stems from suggests that the government must do more to meet the needs of sex workers in Canada. The examination of this topic raises several philosophical questions that might be considered in future research.

Prostitution in Canada: Examining Legal, Moral, and Theoretical Perspectives on the Issues

In 1990, the Supreme Court of Canada delivered a decision stating that the prostitution laws in effect at the time were constitutional. Approximately 23 years later in 2013, that same Court delivered a decision stating the opposite, ultimately repealing the challenged laws. The Canadian government enacted laws to replace those struck down in the 2013 decision. This paper examines the rationale delivered for both the *1990 Prostitution Reference* and *Bedford* decisions, and examines the effects the new laws enacted by the government have had. The evolution of the principles of fundamental justice under s. 7 of the *Charter* are discussed and are suggested to have played a large role in the vastly different conclusions reached in both cases. Also considered are critiques of the new laws as well as research highlighting issues with a similarly structured law in Sweden. The foundation for where anti-prostitution morality stems from is discussed. An argument suggesting the unconstitutionality of the new laws is used to justify the conclusion that, should the new laws be repealed in a future Supreme Court decision, the government must re-evaluate its approach to sex work regulation.

The two Supreme Court cases examine the *Criminal Code* provisions regulating prostitution. They do so primarily under the context of s. 7 of the *Charter*. Both cases also address arguments against the laws through consideration of s. 2(b) of the *Charter*. While there is lengthy discussion regarding the s. 2(b) arguments, for the purposes of this thesis these arguments will not be examined in detail. For ease of reference, s. 2(b) and s. 7 of the *Charter*, and the *Criminal Code* provisions that were addressed in the *1990 Reference* and *Bedford* decisions will be reproduced here.¹

¹ The following Criminal Code provisions were repealed or amended as a result of the *Bedford* decision.

Section 2(b) of the *Charter* states that:

Everyone has the following fundamental freedoms, (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication. (*Charter of Rights and Freedoms*, 1982, s. 2(b))

Section 7 of the *Charter* states that:

Everyone has the rights 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. (*Charter of Rights and Freedoms*, 1982, s. 7)

Section 210² of the *Criminal Code* states that:

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. 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. (*Criminal Code*, 1985, s. 210)

Section 212 (1)(j) states that:

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. (*Criminal Code*, 1985, s. 212(1)(j))

² Numbered s. 193 in the *1990 Reference* case.

Section 213 (1)(c)³ states that:

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 offense punishable on summary conviction. (*Criminal Code*, 1985, s. 213(1)(c))

Section 213 (2) defines a public place as:

... 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. (*Criminal Code*, 1985, s. 213(2))

Methodology

This thesis uses a case study design. A limited number of resources were consulted to reach a conclusion regarding how sex work should be regulated in Canada. The literature review consists of summarizing the two central Supreme Court cases, followed by the consultation of various resources to answer the following question; why were the two Supreme Court decisions different? Following this, literature was examined to establish the background and critiques of the new sex work laws, ranging from a case study looking at a similar law in Sweden, to the discussion of where anti-prostitution sentiment may come from.

This design has the following limitations. It does not allow for a definitive argument for the legalization of prostitution as it is limited in its scope and is not generalizable nor is it

³ Numbered s. 195(1)(c) in the 1990 *Reference* case.

scientifically reliable in its findings. The consultation of different resources, or a more comprehensive approach may present different conclusions. There is inherent bias in this study that guided the selection of resources in order to establish a one-sided argument. Nor are all the pieces of evidence regarding prostitution arguments, theories, legal frameworks, etc., provided.

The summary of this research design was influenced by Labaree (2019, “Types of Research Designs”, “Case Study Design”). As this study did not involve any interaction with human subjects, no ethics approval was needed. This study also received no funding and was written in part for the completion of the Bachelor of Arts: Criminal Justice (Honours) program at Mount Royal University.

Relevant Supreme Court Cases

The two cases central to this discussion are the *1990 Prostitution Reference Question* and the *Bedford* decision of 2013. Summaries of the rationale delivered in both cases are provided below. In the *1990 Reference* the majority rationale of Dickson C.J., the concurring reasons of Lamer J., and the dissenting judgement of Wilson J. are all summarized. In *Bedford*, there was only one decision, the unanimous majority decision delivered by McLachlin C.J., thus it is the only one summarized. Following this is a discussion regarding the similarities and differences between the two cases, as well as a discussion about the evolution of the principles of fundamental justice under s. 7, as these are argued to be the central factors influencing the different conclusions reached in *Bedford* versus the *1990 Reference*.

1990 Prostitution Reference Question

The questions brought forth by this appeal were whether sections 193 and 195.1(1)(c) of the *Criminal Code* were (either on their own or in combination with each other) in violation of s.

2(b) or s. 7 of the *Charter* (*Reference re ss. 193 and 195.1(1)(c) of the criminal code* (Man.), 1990, p. 1124).

Majority Decision delivered by Dickson C.J. (La Forest & Sopinka JJ.)

In writing for the majority, Dickson C.J. considers s. 195(1)(c) (the communication provision) to be a *prima facie* infringement of s. 2(b) of the *Charter* (p. 1134). However, he does not consider s. 193 (the bawdy house provision) to be an infringement of s. 2(b) (p. 1134). Ultimately, he believes the communication provision to be justifiable under s. 1, and thus is saved (p. 1134). He characterizes the legislative objective of the communication provision to be the dealing of solicitation in public places with the aim of eradicating the social nuisance that comes from the public display of the sale of sex (p. 1134). The Chief Justice disagrees with Lamer J.'s characterization of the objective⁴, saying it is too broad. Dickson C.J. says that the legislation does not directly seek to address the issues of exploitation, degradation, or subordination of women as it relates to prostitution (pp. 1134-1135). The legislation meets the interests of homeowners and businesses in dealing with the related nuisance. Justice Dickson deems the protection from nuisance to be a pressing and substantive concern for legislators, and that rational connection exists between the legislation and the stated purpose (p. 1135).

Dickson C.J. states that the communication provision focuses on communication for economic intent, and that an economic interest as it relates to the selling of sex for money is nowhere near the core guaranteed freedom of expression protection (p. 1136). Dickson C.J. says that the legislation is not overly broad and refutes the argument that the legislation extends to areas where there will not necessarily be people present to witness the solicitation. He says the

⁴ Lamer J.'s characterization is discussed later.

legislation is not limited to dealing with the nuisance itself, but also the issues related to nuisance (drugs, violence, witnessing by children). Therefore, the legislation discourages prostitutes and their clients from concentrating in certain areas (p. 1136).

While the legislative aim is to target nuisance, from a practical standpoint Parliament can only target individual transactions in order to meet the objective (p. 1136). The Chief Justice rejects the appellants' argument that the legislation is too broad in its wording. The wording says that it is a crime if someone "in any manner communicates or attempts to communicate". But Dickson C.J. points out that this phrase cannot be considered in isolation from the phrase "for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute". When read together, the scope is narrowed. He argues Parliament needs to be granted some flexibility given the wide range of communication that can occur for the purposes of obtaining sexual services (p. 1137). He says that a less intrusive means of regulation could exist if the aim was solely to deal with street nuisance. However, since the focus is "... the general curtailment of visible solicitation for the purposes of prostitution...", it is not unduly intrusive (p. 1137). The legislation meets the minimal impairment requirement in his analysis. Dickson C.J. says that because Parliament carefully considered alternative approaches, and ultimately determined this to be the best legislative approach; seeing as there is no such thing as "perfect" legislation, and assuming parliament carefully crafted the legislation to respect infringed rights, it is minimally impairing (pp. 1137-1138).

Finally, with respect to s. 1, Justice Dickson finds that the negative effects of the legislation's enforcement are outweighed by the positive outcome of the decrease in instances of nuisance associated with street solicitation. Thus, s. 195.1(1)(c) satisfies the requirements set out in the *Oakes* analysis and is saved by s. 1 of the *Charter*.

Next, Dickson C.J. tackles the question of if the two challenged pieces of legislation (separate or combined) are in violation of s. 7 of the *Charter*. He finds that there is a clear infringement of s. 7's liberty rights as the consequence for breaking the laws is imprisonment (p. 1140). He rejects the appellants' argument that economic liberty is infringed if prostitutes are prevented from practicing their trade. The appellants argue further that the security of the person interest of s. 7 is engaged, as the prevention of working their chosen profession does not allow sex workers to obtain the necessities of life. The appellants also submit that prostitution itself is not illegal, and that imposing regulations on a legal activity to the point where it is impossible to conduct the act is contrary to the principles of fundamental justice (p. 1140). Dickson C.J. considers the infringement of liberty by way of physical imprisonment to be the strongest argument, so he does not find it necessary to consider the economic liberty argument (p. 1140).

The Chief Justice agrees that vagueness is a principle of fundamental justice but does not find the laws in question to be impermissibly vague (p. 1141). He points out that while the legislative path taken by parliament is convoluted, it is allowable. The requirement is that legislation respects the basic tenets of the legal system. Parliament is within their purview to send the message of disapproval of the sale of sex (p. 1142). Having found that neither section is in violation of the *Charter*, he dismisses the appeal (p. 1143).

Concurring Reasons of Lamer J.

Justice Lamer writes his concurring decision and goes into much greater detail than Dickson C.J. does. For the sake of brevity, a very brief summary focusing primarily on key points will be provided.

Lamer J. characterizes the objective of s. 195.1(1)(c) as two-fold. It indeed aims to deal with the nuisances associated with street prostitution (which Dickson C.J. agrees with). However it also serves the purpose of eliminating the exposure of prostitution to those most vulnerable of being swept up into an environment (he considers) inherently exploitative of and degrading to women (pp. 1191-1194). This characterization means the legislation deals with a pressing and substantive issue (p. 1195).

Lamer J. also determines that neither the communication provision, nor the bawdy house provision are impermissibly vague, as the courts are able to provide sensible meaning to their interpretation (p. 1160, p. 1161). After a detailed discussion of precedent, he determines that the appellant's arguments regarding liberty and security of the person do not stand (p. 1179). Justice Lamer finds that the communication provision is a violation of s. 2(b) of the *Charter*. He does not consider it necessary to determine if the communication provision in combination with the bawdy house provision violate s. 2(b) (p. 1189). Ultimately he reaches the conclusion that the communication provision is justified under s. 1 as it relates to the s. 2(b) violation (p. 1202).

Dissenting Reasons of Wilson J. (L'Heureux-Dubé J.)

Wilson J. suggests that the communication provision seeks to eliminate the consequences of street solicitation (nuisance associated with solicitation) by dealing with the communicative act that brings the consequences forth, as opposed to dealing with the consequences themselves (p. 1205). She disagrees with Dickson C.J. and Lamer J. by saying that she believes economic expression is protected under s. 2(b) so long as it is an option that is legally available (p. 1206). She does not believe the bawdy house provision to be in violation of s. 2(b) (p. 1206).

Justice Wilson summarizes the positions taken by the parties and interveners in this case as well as the two cases that establish the legislative objective of the communication provision. She categorizes the perspectives into three categories of widening scope; nuisance in the streets, social nuisance, and prostitution-related activities.

The narrowest of the three interpretation of the legislation's objective is described as the protection of the public's right to use streets and sidewalks without being obstructed (p. 1207).

The next interpretation argued that s. 195.1 itself seeks to deal with the secondary issues that arise from street solicitation (noise, traffic congestion, trespassing, reduced property values, etc.), while s. 195.1(1)(c) specifically was created to deal with the communicative activity these harms stem from (p. 1207). Wilson J. notes that the objectives under the social nuisance category do not suggest that the intent is the eradication of prostitution. In fact, the Attorney General of Nova Scotia argued the intent of the legislation was not the elimination of prostitution, but rather to send the message of the "... undesirability of bringing prostitution into the public forum" (p. 1208).

The final interpretation was brought forth only by the Attorney General of Ontario, who argued the legislation was meant to deal with a broad scope of issues relating to prostitution including violence, drug addiction, crime, and the prostitution of young people (p. 1209).

While Justice Wilson agrees with Lamer J. that prostitution is a degrading way for a woman to earn a living, she does not believe that the objective of s.195.1(1)(c) is to deal with this issue (p. 1210). She concludes that the objective addresses the social nuisances relating to prostitution. While prostitution and solicitation themselves are not illegal, it is the visibility that

is offensive to the public and has harms associated with the public witnessing it, especially when it is witnessed by children (p. 1211).

Justice Wilson finds the nuisance resulting from solicitation is of pressing and substantial importance. It is rationally connected to the objective as well, as criminalizing the communication acts as a deterrent itself (p. 1212). When discussing the proportionality aspect of the *Oakes* test, she summarizes how the Attorney General of Canada argued the legislation acts as “time and place regulation”, to which many businesses are subject. It also serves to discourage prostitutes from conducting their business on the streets and encourages them to take their business to private properties. Wilson J. points out the contradictory nature of this submission in that the bawdy house provision prevents a prostitute from working indoors (p. 1213).

The legislation prevents communication or attempted communication in a public place or a place open to public view (including places the public can access by right or by invitation). Communication in a secluded area would still be illegal because someone may be around to witness it. Wilson J. says this goes beyond any meaningful concern over preventing street nuisance. She states that it is unreasonable to criminalize all expressive activity of a certain kind because it might cause a nuisance (p. 1214). The language of “in any manner communicates or attempts to communicate” is also too broad as it can include any type of conceivable form of human communication, including non-verbal communication. Justice Wilson presents a hypothetical worst-case scenario in which, under this provision, an innocent bystander could be arrested for hailing a taxi if their communication was misinterpreted as solicitation (p. 1214). No harm or nuisance needs to occur for this law to be violated. Since the objective was to deal with street nuisance, criminalizing a legal activity that harms no one does not meet this objective. The

infringement of rights outweighs the objective. In her view, the legislation does not meet the proportionality requirement of the *Oakes* test, and is not saved by s. 1 (p. 1215).

Wilson J. then examines the s. 7 challenge for both the bawdy house and communication provisions. Her analysis is based on the punitive nature of the legislation governing prostitution. She also makes it a point to re-emphasize that selling sex for money is not illegal. She says that Parliament's decision not to criminalize prostitution itself indicates that punitive measures to deal with prostitution were not deemed to be appropriate (p. 1216). The potential for deprivation of liberty is what triggers the s. 7 analysis (p. 1217).

Wilson J. cites Justice Lamer's words in *B.C. Motor Vehicle Act* (1985) that giving too narrow of an interpretation of the s. 7 principles of fundamental justice should be avoided. The narrower the interpretation the more likely s. 7 protected rights will be violated. This should also be avoided due to the extreme consequences deprivation of these rights can cause (p. 1218). Justice Wilson does not, however, believe the laws in question are impermissibly vague to warrant s. 7 violation (p. 1219). While both provisions limit what a prostitute can do, this does not mean they are vague (p. 1220). In her opinion, the communication provision infringes freedom of expression and a prostitute's liberty interests. Because she concluded that the provision was in violation of s. 2(b) and not saved by s. 1, she says that a person cannot have their liberty deprived as a result of their exercising their constitutionally protected right of expression freedom (p. 1221). The bawdy house provision is not in violation of s. 2(b), so this is not an issue. Nor are the two provisions linked in such a way that the violation of rights caused by one provision causes the entire legislative scheme to be unconstitutional (p. 1221). In Justice Wilson's s. 1 analysis, she says that the pressing and substantive need as well as the rational connection requirements are met. However, imprisonment for someone who is exercising their

constitutionally protected rights is not a proportionate way to deal with this issue. Thus, in her view s. 1 does not save this law (p. 1223).

Bedford Decision (2013)

Like in the *1990 Reference* case, the communication and bawdy house provisions were also challenged, in addition to the “living on the avails of prostitution” provision. The questions to be answered in this appeal to the Supreme Court of Canada were if the three provisions violated the *Charter’s* s. 7 security of the person interests, and if so could the infringement be justified by s. 1. It was also proposed that the communication provision in the criminal law was in violation of freedom of expression guarantees under s. 2 of the *Charter* (*Canada (Attorney General) v. Bedford*, 2013, p. 1102).

Unanimous Majority Decision Delivered by McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, & Wagner JJ.)

McLachlin C.J. begins her decision by pointing out that the appeal in question is not directed at determining if prostitution should be legal, but rather if the impugned pieces of legislation are in line with the *Charter* (para. 2). As previously mentioned, the section numbers for the communication and bawdy house provisions are different in this case and a summary of these provisions is provided on pages 5 and 6. The pieces of legislation under scrutiny are: s. 210 (the bawdy house provision), s. 212(1)(j) (the “living on the avails of prostitution” provision), and s. 213(1)(c) (the communication provision) (para. 3-4). The Chief Justice argues that these provisions force prostitution into two legal categories: out-calls (where a prostitute meets a client at a designated indoor location like the client’s home) or street prostitution (para. 5). She points out that Parliament has the ability to regulate when, where, and how prostitution takes place so

long as it is constitutional (para. 5). The applicant's argument is that all three provisions violate s. 7 security of the person interests as they prevent the implementation of safety measures to make their practice safer. They also argue that the communication provision is in violation of s. 2(b), and that none of the provisions are saved under s. 1 (para. 6).

At the Ontario Superior Court of Justice, Himel J. determined that the decision rendered in the *1990 Reference* case did not prevent her from reviewing the constitutionality of the laws (para. 17). This was because s. 7 jurisprudence had evolved significantly between the two cases and there was a greater body of evidence present including research that was not available back at the time of the *Reference* case. Further, assumptions made in the *Reference* case may not be applicable in a modern-day context. Additionally, the "violation of s. 2(b) expression rights" argument presented in *Bedford* differed from the one presented in the *1990 Reference* (para. 17). McLachlin C.J. says it is unnecessary to determine if the court can review the expression claim, as the entire case can be resolved in terms of s. 7 (para. 47).

The applicants argued that the three impugned provisions increase the risks associated with prostitution. Himel J. and the Ontario Court of Appeal agreed with the applicants on this point (para. 59). McLachlin C.J. agrees and states that the laws do not merely place limitations on how prostitution may be conducted, rather they place dangerous limitations on the practice of an already risky (but legal) activity. Limitations that prevent prostitutes from taking steps to protect themselves (para. 60). She also highlights a constraint this legislative scheme creates; the breaking of these laws places a prostitute's liberty at risk, while the compliance with the laws places their safety and security of the person interests at risk (p. 1133, footnote #1).

In discussing the s. 7 analysis, McLachlin C.J. reiterates that the bawdy house provision divides prostitution into two legal categories, street prostitution and out-calls. The former is

severely limited by the communication provision (para. 62). The initial application judge determined that this provision negatively impacted safety, as the research had shown working out of a fixed location to be safer than answering to out-calls. This is further impacted by the living on the avails provision that prevents a prostitute from hiring a bodyguard or a driver to help with safety during out-calls. McLachlin C.J. agrees with this (para. 63). Working at a fixed location allows the implementation of measures to reduce the likelihood of violence. These include things like the presence of receptionists, body guards, assistants, and audio recording systems, among others. The bawdy house provision prevents this from happening (para. 64).

The bawdy house provision also prevents street prostitutes from accessing safe houses where they can take clients. Not allowing these safe houses denies the most vulnerable class of prostitutes the ability to protect themselves, especially at a time when a serial killer such as Robert Pickton walked the streets (para. 64). McLachlin C.J. concludes that the bawdy house provision negatively affects security of the person interests and engages s. 7 (para. 65).

The living on the avails provision of the Criminal Code prevents prostitutes from hiring people to act as safeguards. The inability to hire bodyguards, drivers, etc., negatively impacts security of the person, and engages s. 7 scrutiny (paras. 66-67). The communication provision prevents prostitutes from screening clients at early stages for intoxication or propensity for violence (para. 69). It has the effect of displacing prostitutes to secluded areas to conduct business, increasing vulnerability (para. 70). The law also prevents prostitutes from discussing conditions upfront such as condom or safe house usage, significantly increasing risks (para. 71). McLachlin C.J. concludes that the communication provision also engages s. 7 analysis (para. 72).

The Attorneys General argued that s. 7 was not engaged because not enough evidence existed to prove a causal connection between the laws and the risks prostitutes face. They argued

that the prostitute's decision to engage in prostitution is the causal link to the harms they face, not the laws. McLachlin C.J. disagrees with this (para. 73). She rejects the notion that prostitutes "freely" choose to engage in prostitution. She cites the experience of Terri-Jean Bedford (one of the three applicants for this case) who said she initially sold her body in order to have enough money for food (para. 86). Through financial means, addictions, mental illness, or the influence of pimps; street prostitutes exist as a marginalized population. A population that largely lacks the ability to make meaningful decisions not to engage in prostitution (para. 86). Justice McLachlin states that violence perpetrated by "johns" or "pimps" does not absolve the government of its role in making a risky (yet legal) activity more dangerous (para. 89). The argument that the actions of third parties and the prostitutes themselves are the cause of the risks, and not the laws; must fail in the Chief Justice's view (para. 92).

In discussing s. 7's principles of fundamental justice, McLachlin C.J. states that a grossly disproportionate effect on a single person's rights is enough to violate the principles of fundamental justice (para. 122). The principles of fundamental justice compare the effects of the law with its objective, not with the law's effectiveness. In the context of the s. 7 discussion in *Bedford*, the concern is if anyone's life, liberty, or security of the person is denied by a law that is arbitrary, overbroad, or grossly disproportionate (para. 123). She saves the discussion of broader social benefit the laws provide for the s. 1 analysis (para. 125). She also highlights that while it is uncommon for a law that violates s. 7 to be saved by s. 1, it is not impossible. If it is determined that the legislative goals are important enough, a s. 7 violation could be justified under s. 1. Therefore, it is important to still conduct the s. 1 analysis (para. 129).

Regarding the bawdy house provision of the Criminal Code, McLachlin C.J. rejects the Attorneys General's argument that the objective of the law is to deter prostitution. The purpose is

to deal with the community harms associated with prostitution (para. 131). It cannot be interpreted to (on its own or in conjunction with the other provisions) deter prostitution as the legislative scheme allows out-calls and does not address prostitution directly (para. 132). She concludes that the negative effects on security of the person interests is grossly disproportionate to the stated objective (para. 134). The initial application judge determined that being allowed to move to a bawdy house increases safety benefits, and that complaints about nuisance from indoor prostitution were rare. The initial application judge also determined the law to be grossly disproportionate (para. 134). The Ontario Court of Appeal agreed and found the high homicide rates among street prostitutes made the effects of the laws disproportionate (para. 135). McLachlin C.J. agrees. She notes that while Parliament is allowed to create legislation that deals with nuisance, they cannot do so by adversely affecting health and safety (para. 136).

McLachlin C.J. makes a powerful assertion in that:

A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose. (Bedford, 2013, para. 136)

McLachlin C.J. cites Cory J. in the Supreme Court's decision in *Downey* (1992) that the objective of the living on the avails of prostitution provision is to deal with pimps and the exploitative conduct they engage in (as cited in para. 137). Lower courts determined this provision to be overbroad in that it can render non-exploitative relationships liable (receptionists, bodyguards, drivers, etc.), thus it is also grossly disproportionate as it negatively affects the safety of a prostitute (para. 139). McLachlin C.J. agrees that it is overbroad (para. 140). She then finds it unnecessary to determine if the provision is grossly disproportionate (para. 145).

McLachlin C.J. cites former Chief Justice Dickson in that the objective of the communication provision is not the elimination of prostitution, but the removing of it from public view to curb the nuisance street prostitution can contribute to (*Prostitution Reference*, 1990; as cited in para. 147). It is grossly disproportionate in its effects in relation to its objective of preventing nuisance (para. 159).

McLachlin criticizes the Ontario Court of Appeal's approach to analyzing this provision. She says they were in error to criticize the application judge's weighing of the legislative objective even though it was in line with jurisprudence established in the *Prostitution Reference* case (para.151). The lower appeal court erred in inflating the objective of the legislation to include the curbing of drug trafficking and other related crimes when Dickson C.J. specifically indicated these factors not to be a part of the objective (para. 152). It also incorrectly accused the application judge of making her decision based on anecdotal evidence and her own common sense, when the evidence had been supplied by prostitutes' own accounts as well as evidence provided by experts (para. 154).

In continuing her objection to the appeal court's decision, McLachlin C.J. states that the appeal court ignored the reality that the communication provision has the effect of displacing prostitutes to isolated locations (para. 155). The Chief Justice also rejects the appeal court's majority position that the application judge was incorrect in her assessment of the impact of this provision. A hypothetical analysis was offered by the appeal court, where some clients may pass the initial communicative screening stage and later become violent, or a prostitute may be too drunk, high, or desperate for money to say no (para. 157). While this scenario is possible, the Chief Justice suggests, it does not minimize the law's effects on the criminalization of communication. McLachlin C.J. argues that "[if] screening could have prevented one woman

from jumping into Robert Pickton's car, the severity of the harmful effects [of the legislation] is established" (para. 158). It is also interesting to note that in the the Ontario Court of Appeal's decision, blame was ascribed onto the prostitute's lifestyle choice or financial situation, suggesting it to be the prostitute's own issues that place them at risk. This could be argued to be an extremely disturbing narrative for a higher court to present.

The appellants did not strongly argue in favor of a s. 1 justification, thus McLachlin C.J. does not deem it necessary to do a full s. 1 analysis. She does however address an argument made by the Attorneys General that she believes to be more appropriate to analyze under s. 1 instead of s. 7 (para. 161). It was argued that the living on the avails of prostitution provision needed to be broad in order to deal with exploitative relationships in all its forms. Justice McLachlin notes that in attempting to capture a pimp masquerading as a non-exploitative person, a driver, receptionist or an accountant could also be captured and held liable under the law; therefore, making the law not minimally impairing. Nor are the positive effects of protection from exploitative relationships able to outweigh the adverse effects of reduced safety (para. 162).

McLachlin C.J. concludes that all three provisions fail the s. 1 analysis (s. 163). She dismisses the appeals and allows the cross appeals. It is found that s. 210 in relation to prostitution, as well as ss. 212(1)(j) and 213(1)(c) are in violation of the *Charter* (para. 164). She orders a suspended declaration of invalidity for one year (para. 169). This would leave the provisions in effect for one year, giving Parliament time to consider alternative legislation, or to take no action at all.

Discussion: Supreme Court Decisions and the Principles of Fundamental Justice

A question that arises from examining these two cases is why did *Bedford* (2013) have such a different outcome than that of the *1990 Reference*? There are two clear reasons for this. The first is that the nature of the arguments were different in each case. In the *1990 Reference*, the argument was that the bawdy house and communication provisions were in violation of s. 7 liberty interests and s. 2 freedom of expression interests. The liberty interests were argued from the perspective of sex worker's economic liberty, which ultimately was determined to not be a protected interest under s. 7. The communication provision was found to violate expression guarantees, but it was determined to be justified under s. 1 of the *Charter*. Both provisions were argued to be unconstitutional on the basis of vagueness, however this argument failed. Stewart (2012) suggests that proving a law to be impermissibly vague is difficult, as the courts provide content through interpretation and application, and the requirement of sufficient precision is easy for legislation to follow (pp. 128-129).

In *Bedford*, the argument focused primarily on how the three provisions (bawdy house, living on the avails, and communication) adversely affected sex worker's s. 7 security of the person interests as they related to safety. While freedom of expression rights were argued to be violated as well, the egregious violations of safety interests rendered a discussion surrounding expression interests unnecessary. It must be noted that while the nature of the arguments were different, the decision delivered in *Bedford* was additionally influenced by the evolution of s. 7 jurisprudence and the evolution of the principles of fundamental justice.

This leads into the second primary difference between the two cases. Between 1990 and 2013, the courts gained new understanding into how to interpret and apply the principles of overbreadth, arbitrariness, and gross disproportionality. Stewart (2012) suggests that in the early

1980s, the principles of fundamental justice were likely considered as principles of procedural fairness or natural justice. Meaning that the rights to procedural fairness would be protected when an individual's life, liberty, or security of the person was affected (p. 99). The principles could be expanded to include substantive principles as well (p. 100). The Supreme Court of Canada has held that the principles of fundamental justice were not to be interpreted by the intentions of the original drafters of the *Charter*, suggesting that the principles have the potential to evolve and be interpreted accordingly (p. 100). They are necessary for a system of justice that recognizes and acknowledges the "... dignity and worth of the human person and the rule of law" (*Re BC Motor Vehicle Act*, 1985; as cited in Stewart, 2012, p. 100). The principle of overbreadth was not recognized until 1994 in the *Heywood* case. Arbitrariness was not recognized until 1993 in the *Rodriguez* case. And in 2003, the principle of gross disproportionality was recognized as a principle of fundamental justice in the *Malmo-Levine* case (Hudson & Meulen, 2013, p. 128).

The principle of overbreadth became recognized as a principle in *R v Heywood* (1994). Cory J. described this principle as looking if the means used to achieve a legislative objective are necessary. If the means are determined to be broader than necessary, it violates this principle as *Charter* protected rights are violated for no reason. In *Heywood*, the legislation in question violated the overbreadth principle meaning it also failed the minimal impairment piece of the *Oakes* test under s. 1 (*Heywood*, 1994; as cited in Stewart, 2012, pp. 133-134). It is argued that the overbreadth principle as a standard (as opposed to that of gross disproportionality) requires legislation be crafted with greater precision (pp. 135-136).

According to Stewart (2012), successful challenges of arbitrariness are uncommon. This is because determining a law to be arbitrary sends the message that the legislature responsible for

the law had a reasonable objective in mind but took an irrational path to achieve that goal. The courts are hesitant to suggest that the legislature has acted irrationally (p. 136). A law can be arbitrary if it is found to be unnecessary to achieve the objective in question, or if it is not related or connected to the legislative objective (p. 136). In *Morgentaler* (1988), the law in question was struck down as a violation of s. 7. There was a lack of agreement among the majority as to which principle of fundamental justice was violated. Though the reasons provided seem to suggest that the law was found to be arbitrary (pp. 139-140). In *PHS Community Services Society* (2011) the Court struck down the decision made by the Federal Minister of Health not to renew a “safe injection” site’s exemption from the trafficking and possession provisions under the *Controlled Drugs and Substances Act* (CDSA). This was found to be arbitrary as the evidence had shown a decrease in overdose related deaths without an increase in crime within the area. The Minister’s denial of renewal was not connected to the objectives of the CDSA in protecting health and safety, and was in fact contrary to the objectives (pp. 142-143).

Gross disproportionality occurs when a law’s negative effects are grossly disproportionate the positive ones. If a law has positive effects that are in line with its legislative objective, but the adverse effects are so extreme as to outweigh the positive effects, then the law violates the principle against gross disproportionality (Stewart, 2012, p. 149). At the time of this publication, it is highlighted that the Supreme Court had never invalidated a law on these grounds, as it is rare for a *Charter* applicant to successfully demonstrate that a law fails the standard of gross disproportionality, and not mere disproportionality or overbreadth (p. 149).

Social science evidence is usually needed to assess the effectiveness of a law in achieving its objectives (Stewart, 2012, p. 143). However, the more a court is willing to defer to the

legislature's position that a law will have beneficial effects related to the specified objectives, the less weight social science evidence will have (p. 143).

What this suggests is that the three principles central in *Bedford* did not exist or have deep enough meaning in 1990 to have had an effect on the outcome of the *1990 Reference*. While it could be argued that these two decisions were different due to being products of their respective time periods, had the principles of fundamental justice not evolved, it is difficult to say whether or not the three challenged provisions would have been struck down. Or perhaps they would still have been struck down, but through using a different path of legal analysis.

Hudson and Meulen (2013) discuss how in the *1990 Reference*, the stakes for the Supreme Court's decision were high. It had to decide whether to provide a constitutional right to engage in sex work, or to leave the laws as they were. There was a stronger emphasis on ideological debate as empirical evidence was not accessible. In *Bedford*, as stated previously the arguments made had a different focus. The arguments were centred on the government's role in allowing sex workers to be subjected to violence, arguments that were made possible by the existence of empirical research in applicable areas. It is also suggested that events such as the high rates of violence and murder sex workers experienced in Vancouver's Downtown Eastside influenced the willingness to examine the failures of the government in relation to sex work (pp. 141-142).

However, it is important to note that the decision in *Bedford* (and the analysis of the principles of fundamental justice), does not suggest that sex work should be regulated, decriminalized, or legalized. Rather it suggests that the laws themselves and the ways they were enforced contributed to higher risks of violence and exploitation experienced by sex workers

(Hudson & Meulen, 2013, p. 117). This is the argument made by the Attorneys General that McLachlin C.J. rejects. She disagrees with the argument that the central claim of the applicants in the *Bedford* case was the right to vocational safety and the right to engage in a risky activity (*Bedford*, 2013, para. 81). The applicants were not asking for the government to make sex work safer, rather they were asking the government to remove legislation that made sex work more dangerous (para. 88). This is important to keep in consideration when discussing Parliament's response to *Bedford's* invalidating of the three provisions.

Bill C-36: Parliament's Response

In 2014, Parliament enacted Bill C-36, the *Protection of Communities and Exploited Persons Act* (PCEPA). This piece of legislation "... treats prostitution as a form of exploitation that disproportionately impacts women and girls." (Department of Justice, 2018, "Fact Sheet", para. 1). The objectives of PCEPA are stated to be the protection of those selling their own sexual services; the protection of communities and children from the harms associated with prostitution; and the reduction of the demand and occurrence of prostitution ("Fact Sheet", para. 1).

The preamble to the information sheet says the following:

The new criminal law regime seeks to protect the dignity and equality of all Canadians by denouncing and prohibiting the purchase of sexual services, the exploitation of the prostitution of others, the development of economic interests in the sexual exploitation of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies that offer sexual services for

sale. It also seeks to encourage victims to report incidents of violence to the police and to leave prostitution. (Department of Justice, 2018, “Fact Sheet” para. 2).

The new offences under PCEPA are meant to modernize old laws (Department of Justice, 2018, “Prostitution Offences”). There is the purchasing offence which makes it an offence to obtain sexual services for remuneration (a fee) or to communicate for that purpose (s. 286.1 of the *Criminal Code*). Individuals who sell their own sexual services are not criminally liable (ss. 286.5(2)) (“Purchasing Offence”, para. 1). There is the advertising offence which makes it an offense to advertise the sale of sexual services (s. 286. 4) with the selling or the advertisement of one’s own sexual services being protected from criminal liability (ss. 286.5(1)(b) and ss. 286.5(2) respectively) (“Advertising Offence”, para. 1). There is the material benefit offence which makes it an offense to obtain financial benefit or otherwise from the commission of the purchasing of sexual services (s. 286.2) with the selling of one’s own sexual services not being held liable (“Material Benefit Offence”, para. 1). The procuring offence makes it an offence to procure someone else to provide or offer sexual services (s. 286.3) (“Procuring Offence”, para. 1). Finally, there is the communicating offense which makes it an offense to communicate for the purposes of obtaining or offering sexual services in a public place next to a school ground, playground, or daycare (ss. 213(1.1)) (“Communicating Offence”, para. 1). PCEPA also includes various offences related to sex trafficking (“Trafficking in Persons Offences”).

Issues with Bill C-36 and Similar Laws: Morality, Functionality, and Constitutionality

Stewart (2016) points out that the laws under Bill C-36 were inspired by the Nordic model of regulating sex work. A model in which the purchaser of sex is criminally responsible but the seller is not. However, Bill C-36 does not have a section that absolves a sex worker of

any criminal liability. Instead it has section 286.5(2) which says that no one shall be prosecuted for “... aiding, abetting, conspiring or attempting to commit...” any of the aforementioned offences in the selling of their own sexual services. Stewart (2016) argues that this implies a sex worker to be guilty of these offences, hence the need for a section granting prosecutorial immunity. He also explains how the sex worker would be criminally liable under this law as many of the prohibited acts are aided or abetted by the sex worker selling to a potential customer (p. 74). Sex workers could be prosecuted for recommending a client to another sex worker, thus making it criminal for sex workers to work together (p. 75).

At issue is how easily issues of criminal liability arise under this legislative model, as well as the fact that the law sends the message to sex workers that their acts are criminal, but not acts they can be prosecuted for (Stewart, 2016, p. 76). The objectives of the legislation are said to be the denouncing of prostitution, and the response to the constitutional defects identified in *Bedford*. Stewart (2016) argues that these two policy objectives are so fundamentally in opposition that it is hard not to expect constitutional issues to arise (p. 71).

From a different perspective, it is argued that Bill C-36 operates under the assumption that sex work is inherently dangerous, violent, and exploitative. An assumption necessary for the law to be more than just a regulation on morality (Bruckert, 2015, p. 1). When considering how most violence against sex workers takes place on the street level, and the fact that most sex work takes place indoors; examining sex work through a lens of paid labor becomes important. It would seem outlandish to suggest that nothing could be done to deal with health and safety concerns in the context of any other occupation, but assuming “... that sex work is *inherently* violent erases the need to...” address these issues for sex workers (Bruckert, 2015, pp 1-2, emphasis in original).

The inherent exploitation attitude fits with the mandatory victim status that gets ascribed to sex workers, where they must be under the control of pimps, addicted to drugs, or so mentally challenged that they would participate in the sex industry (Bruckert, 2015, p. 2). “Questions of consent and agency are rendered irrelevant, and we are left with incompetent subjects in need of rescue rather than rights” (p. 2). The defining of sex workers as victims does nothing to address the underlying issues of gender, race, or class inequalities that can push people to engage in sex work. Criticism is given towards to government’s pledge to allocate twenty-million dollars to law enforcement and agencies that work to “save” “victims” from the inherently dangerous trade of sex work. Victims and women who want to leave sex work are championed, while sex workers speaking of the law’s harms are dismissed (p. 2).

Conservative Senator Donald Plett is credited in saying that the government does not want to make sex work safe, but to eradicate prostitution, claiming this to be the central intent of the bill (Bruckert, 2015, p. 3). Bruckert suggests that feminists have fought for a long time to respect a woman’s right to make decisions about her body, and this is the reason they fight against politics that seek to protect women by limiting their freedoms (2015, p. 3).

But where does the assumption of sex work being inherently dangerous and exploitative come from? Weitzer (2007) argues the presence of a moral crusade against prostitution. A crusade with claims that are unverifiable and non-empirical (p. 447). This perspective presents prostitution as a social problem. A claim that only exists as a problem due to claims made by crusade supporters and may not be conducive to reality. It presents this social problem as an absolute evil, with the agenda of eliminating prostitution represented as just. The moral crusade raises public concern and lobbies politicians into action. Action can range from harshening punishments for engaging in these “evil” acts, or the criminalizing of acts previously legal (p.

448). The issues are presented in dramatic ways, to horrify the public and justify the harsh methods used to combat them. This perspective views the issues as black and white; there is a right or a wrong answer with no room for debate or discussion. The claims cited are over-inflated and not verifiable by available evidence or research (such as numbers of victims) (p. 448).

Sex work is presented as an inherently evil and dangerous form of exploitation that is always harmful. It is not the same as other types of work, and it can never have policies or practices implemented to advance the interests of the workers themselves (Weitzer, 2007, p. 451). The view that prostitution erodes the very fabric of social morality is prominent its arguments (p. 451). Argued is that prostitution is a form of violence itself, as opposed to an activity that can have violence present. Sexual acts are presented as degrading and violent, and the line between voluntary participation and trafficking is blurred. Claims that are also unverifiable (pp. 451-452). People who make the decision to enter into and stay within sex work are dismissed by supporters of these claims, as their stories are in direct opposition to the crusade's claims (p. 453). The crusade attempts to justify its conflation of sex work and trafficking with the ultimate goal of eliminating trafficking, which supporters argue prostitution is the root cause of. Claims have been made that most sex workers started out as trafficked. A claim not supported by research (pp. 454-455).

The differences between sex work and trafficking are important as they are centred on individual agency. The claim that sex work and trafficking are the same thing ignores the choice made by women to sell sex (for numerous reasons, not all of them economic or financial) thus abolitionists operate from a moral framework separate from that of the women they claim they want to save (Butcher, 2003, p. 1983). The crusade has described sex trafficking as having reached epidemic levels, relying on shock factor to garner support (Weitzer, 2007, p. 455).

Legalization is rejected, for its role in a “guaranteed” increase in prostitution/trafficking, as well as for the complacency the state demonstrates in allowing the “degrading” practice of prostitution to continue (p. 456). Weitzer points out that (at the time of publishing in 2007) no causal link between increased amounts of prostitution and its legalization has been shown (p. 457). If these claims are supported by the government, then the crusade becomes institutionalized. Forms of institutionalization can range from merely consulting with anti-prostitution activists to the enacting of legislation in line with their goals (p. 458). Harsher penalties against prostitution appear more justified when it can be intrinsically linked to sex trafficking (p. 466).

Bill C-36 is characterized as an abolitionist approach to the regulating of sex work (Galbally, 2016, p. 2). Its foundation is rooted in the claim that prostitution is inherently exploitative, similar to the moral crusade’s claims as discussed by Weitzer (2007). This foundation prevents Bill C-36 from adequately dealing with the human rights issues⁵ sex workers experience (Galbally, 2016, p. 3). It is conceded that the radical feminist views against prostitution are helpful in identifying underlying constructs that subjugate women. However, when these views are reproduced through law, they strip women of the agency to make their own decisions when it comes to sex work (p. 3). The sex worker becomes the victim who must be saved. Thus, this becomes the only appropriate form of intervention. The need for improvement of conditions within sex work is ignored (p. 4). A critique of the abolitionist perspective is that it dismisses the diverse experiences sex workers have lived, as well as ignores the structural and systemic barriers that can push people into sex work (p. 12).

⁵ “Human rights” likely refers to the s. 7 security of the person rights that were identified in *Bedford* as being negatively affected by the old legislative scheme.

As mentioned earlier, Stewart (2016) identifies the two main policy objectives of Bill C-36 as being the denouncing of prostitution, as well as the responding to the issues the old laws faced as highlighted in *Bedford*. He expects there to be a constitutional challenge to Bill C-36 at some point in the future. In fact, groups representing the interests of sex workers asserted that the laws were unconstitutional, for reasons ranging from deliberate contempt of the Supreme Court by the Harper government, to the unlikelihood of the new laws doing much to help sex workers, ultimately failing to fulfil the objective of responding to *Bedford* (pp. 70-71).

The laws may be unconstitutional, but those reasons may not be immediately obvious. This is because the law responds to *Bedford* in two ways (Stewart, 2016, p. 71).

This first is the denouncing and deterring of prostitution, as opposed to the handling of issues of nuisance that the old laws did. It is suggested that the objective of denouncing and deterring prostitution is a constitutionally valid objective, one that a court would be hesitant to say otherwise. This means that for a s. 7 claim, the negative effects of the laws will be weighed against a potentially more serious objective (Stewart, 2016, p 71).

The second way Bill C-36 responds to *Bedford* is by specifically addressing the safety issues raised in *Bedford* and decriminalizing aspects of sex work that were illegal under the old legislative regime (Stewart, 2016, p. 71).

Stewart (2016) argues that considered separately, these two approaches appear to be valid under the *Charter*. However, the two approaches are fundamentally in opposition to each other, so much so that they will create arbitrary and grossly disproportionate effects on sex worker's security of the person interests. One side criminalizes prostitution, while the other tries to improve safety conditions for sex workers themselves; "In practice, these two objectives are

likely to frustrate each other, and that frustration generates a plausible constitutional argument against Bill C-36” (Stewart, 2016, p. 71).

When looking at the specifics, the new law responds to *Bedford* by repealing the bawdy house provision entirely, replaces the living on the avails provision with the material benefit provision, and modifies the communicating provision to be narrower in terms of how sex workers could be prosecuted. These approaches do not fit well with the punitive framework Bill C-36 presents (Stewart, 2016, p. 76). The material benefit provision makes it nearly if not entirely difficult to conduct indoor sex work (p. 76). The material benefit offences do not apply in instances of legitimate living arrangements, legal or moral obligations to the person receiving the benefit from the sex work, or if the service or good offered to a sex worker in exchange for payment would be offered to any member of the general public (*Criminal Code*, 1985, s. 286.2(4); as cited in Stewart, 2016, p. 77). This offence may be considered void for vagueness as it is unclear what a “legitimate living arrangement” or a “moral obligation” is in a legal context. But the uncommon success of vagueness challenges means the courts will be likely to provide broad interpretation of these terms (pp. 77-78).

Additionally, the material benefit offence makes it so a sex worker is unable to hire a receptionist, accountant, bodyguard, or even rent property to conduct their work. S. 286.2(5)(e) grants exceptions to the material benefit offence so long as the person receiving the benefit is not receiving it in the context of a commercial enterprise. A landlord renting a property to a sex worker would be guilty because they would be receiving benefit in a commercial context, and a similar issue arises for services such as receptionists and bodyguards. This suggests the only lawful way for indoor sex work to be conducted, is if a sex worker buys and owns their own property, while operating and running their business practice entirely by themselves (Stewart,

2016, p. 78). This seems to indicate that sex workers are largely prohibited from operating indoors as purchasing their own place to conduct these services may be difficult, given the number of systemic and structural barriers to other meaningful employment they may experience.

The narrowed communicating law's validity is based on the validity of the new sex work law as a whole. Therefore, Stewart does not consider its defects separately (2016, p. 79). The clash between the two policy objectives creates a potentially valid constitutional argument. The contradiction causes the law to be arbitrary or grossly disproportionate in terms of s. 7, regardless of the effectiveness of the law in achieving either objective (p. 86).

Stewart (2016) analyzes and critiques the clash between the two policy objectives:

It is possible that Bill C-36 will succeed in its objective of discouraging sex work, that it will have no effect whatsoever, or that it will in practice aggravate the insecurity of sex workers by driving sex work outdoors. The last possibility is by far the most likely. There is little in the history of sex work to suggest that criminalizing it is an effective means of preventing it. The crucial findings of fact in *Bedford* were that street-level sex work is dangerous and that sex work from a fixed indoor location, with the assistance of staff, is the safest. ... Bill C-36 does little or nothing to make indoor sex work lawful and, by expanding the criminalization of communicating by clients, makes outdoor sex work harder too. These effects would be inconsistent with the second purpose of Bill C-36. That would suggest, in turn, that Bill C-36 violated section 7. (Stewart, 2016, p. 86)

In an attempt to highlight some of the other issues that may arise from the enforcement of Bill C-36, it is useful to turn to commentary provided regarding the enforcement of the Nordic

model of sex work regulation. It is interesting to note that Chu and Glass' (2013) article was written before the enactment of Bill C-36. While Bill C-36 has been compared to the Nordic model already, the parallels between the two laws raises the question as to why Parliament decided to take this legislative approach despite the already demonstrated issues.

In 1999, the Swedish government, under influence from anti-prostitution feminist discourse, enacted a law that criminalized individuals who purchase sex (Chu & Glass, 2013, p. 103). This law was created without input from sex workers themselves and was presented as a means to achieve "gender equality". Punishment could range from a fine to a maximum of one year of imprisonment under the *Penal Code of Sweden*. The law operates from the perspective that all men are aggressors, and all women are victims, sex work is clumped together with sex trafficking.

The law has the added effect of making male and transgender sex workers invisible (Chu & Glass, 2013, p. 104). The Swedish law criminalizes individuals who allow sex workers to use their premises for the purpose of sex work (as it is said to encourage sex work), forcing sex workers to lie in order to rent places to stay (p. 104). The law has been critiqued as allowing violence against sex workers to continue, and for creating barriers to sex workers accessing HIV related prevention and care (p. 105). Since the law came into effect, sex workers operating on the streets have reported increased instances of violence (p. 106). Regular clients steer away for fear of being criminalized, but drunk and violent potential clients remain. This also has had the effect of reducing a sex worker's agency in negotiating with clients, as they are essentially forced to provide riskier services for lower prices. Sex workers have been forced to seclude themselves when conducting their services, and informal networks where colleagues could warn each other of potential violent clients have diminished. Additionally, clients who may have been willing to

report instances of violence in support of sex workers are less likely to do so for fear of criminalization (p. 106).

Police enforcement of the law has been described as aggressive, with instances of police harassment, persecution at the hands of police, and the general mistrust of the police taking place (Chu & Glass, 2013, p. 106). In Canada, the amendments made by Bill C-36 have created increased fears of the police. Jenn Clamen, co-ordinator of the Canadian Alliance for Sex Work Law Reform has said that criminalizing any part of sex work creates and promotes antagonism with the police, causing sex workers to avoid the police even in instances where violence or exploitation is taking place (Silliker, 2017, “Amendments”, paras. 21, 23-24).

Beth, a street based sex worker who had participated in research conducted by POWER (Prostitutes of Ottawa-Gatineau Work Educate & Resist) provides the following account of an interaction with a police officer:

I was just coming out of an alley; I had just been raped. I had been hit over my head with a brick. My head was gushing blood. I flagged a cop and he told me to call my own fucking ambulance... and he told me he had no time for me. Then he left, I couldn't even walk. (as cited in Silliker, 2017, “Amendments”, paras. 26-27).

So even though both the Swedish and Canadian laws are presented as having the intention of creating equality for sex workers and protecting people on the basis of gender, stigma still exists and negative perceptions and treatments of sex workers by police are present. In fact, Swedish sex workers have reported increased stigma from healthcare and social work service providers, anti-prostitution activists, and the general public (Chu & Glass, 2013, p. 107).

So, the laws may appear to be beneficial and appropriate in theory, yet in practice there is so much stigma that prevents sex workers from accessing the support they may require.

Why Legalize?

There are a variety of arguments for or against the decriminalization of prostitution. Instead of focusing too much attention on the arguments centred on morality, Shrage (2006) presents an interesting argument in favor of decriminalization. The argument begins by criticizing the idea that prostitution would disappear if other issues related to moral decay were to disappear. Prostitution is not merely a single thing (defined as a "... unitary social phenomenon with a particular origin..."), rather it is a complex phenomenon with many different elements associated with it (p. 240).

Arguments made in favor of decriminalization can be made in the context of worker and labourer rights, and the respect and dignity that should be given to low-status work (Shrage, 2006, p. 241). Shrage asks if the legal structures designed to suppress and denounce prostitution (including voluntary participation) are oppressive to women. Women who are or are suspected of being sex workers (typically women of colour of low socio-economic status) are stigmatized, this stigma plays a role in making sex workers more vulnerable to hate crimes, housing and employment discrimination, and other human rights violations. Shrage highlights the irony of the mentality that legalizing prostitution will cause more prostitution and more "inherent" violation of women and children, thus making it acceptable for brutal legal suppression to continue. The regulation of sex business practices is more likely to reduce exploitation (p. 242).

She summarizes this argument rather succinctly:

If businesses that provide customers with personal sexual services could operate legally, then they would be subject to the same labor regulations that apply to other businesses... Such businesses would not be allowed to treat workers like slaves, hire underage workers, deprive them of compensation for which they contracted, or expose them to unnecessary risks. The businesses could be required to enforce health and safety codes, provide workers with a minimum income and health insurance, and allow them to form collectives to negotiate for improved working conditions, compensations, and benefits. (Shrage, 2006, p. 243)

Shrage rejects the slippery slope argument of “if we allow this, then what’s next?” and argues that if supporting the sale of sex (with some limitations) would protect the rights of those purchasing and making the choice to sell, then that becomes the appropriate “what’s next” scenario to consider (2006, p. 243). She concedes that treating the sex trade industry like other industries would not result in a perfect situation (underpaid labour, exploitation, unmet needs may still exist), but it would result in an improved one (p. 244).

Indeed, it is suggested that instead of opposing prostitution, it would be more prudent to support human rights. Such as the right to be protected under the law from harm (rape, violence, etc.) or perhaps the harms associated with labour in general (Butcher, 2003, p. 1983). The harms sex workers experience when working are not limited to sexual health. In fact, many sex workers are well versed in protecting their sexual health, as their bodies are the tool they use for their trade. Things such as arthritis, gastrointestinal problems, mental and emotional health related issues (issues that people working in sectors other than the sex trade experience) are argued to

stem from the stigma and stress from being marginalized as sex workers (Silliker, 2017, “Other OHS issues”, paras. 1-6).

Regarding the presence of the criminal laws themselves, it is questioned why existing criminal laws (against nuisance, homicide, assault, extortion, etc.) are not sufficient enough to address the harms associated with prostitution. It is questioned why there needs to be sex worker specific laws (Hudson & Meulen, 2013, p. 124). Another flaw with sex work specific laws is offered in the critique that Bill C-36 does not protect sex workers from exposure to violence unrelated to sexual transactions; violence committed by someone other than the client or a third party to the transaction (presumably pimps or those in exploitative relationships with the sex worker) (Galbally, 2016, p. 24).

Arguments against decriminalization or legalization that are based on morality are weak. Arguments such as the slippery slope argument, or the “would you want your daughter to be a sex worker?” argument are meant to present those in support of sex work legalization as hypocrites (Shrage, 2006, p. 246). But when there is evidence to suggest that regulation under a criminal law scheme causes more harm, or that this type of regulation does little to make meaningful change; these finger pointing arguments intended to expose hypocrisy are a waste of time. Indeed, the Nordic model in Sweden has had the effect of displacing instances of sex work, as opposed to reducing them (Chu & Glass, 2013, p. 114).

This raises the question of what the actual intention of criminal models are for regulation of sex work. If one is to take to heart the words of Senator Plett referred to earlier, then the intent is not to protect sex workers, but to eradicate sex work entirely. Why? If one is to take to heart the anti-prostitution feminist perspective, then it is because it is inherently dangerous and

exploitative to women. Is this true? Potentially. But this approach still has the effect of minimizing the decisions women make for themselves, which is counter to feminist notions of respecting women's agency. Is it that sex work is inherently damaging? Or is it that it is unsightly to look at, so displacing sex work underground is considered a positive effect?

This leads to the question of if Bill C-36 actually intends to combat prostitution? Or if it actually intends to treat it as a nuisance similar to how the old laws did but under the false pretense of denouncing prostitution? Conjecture aside, if one is to agree with the argument presented by Stewart (2016), then these laws are likely to be challenged under the *Charter*, and if the courts agree that the laws are unconstitutional, it would become the government's duty to craft new laws once more. It would seem prudent for the government to consult the experts and the research that reflects the reality of sex work in making their decisions, as opposed to being guided by "utopic" notions of how to rid Canada of sex work. Just as the government needs to include Indigenous voices in its approach to reconciliation, the government must also include the voices of sex workers in discussions around sex work regulation. People who are affected primarily by these decisions need to have their voices heard.

Conclusion

Through two Supreme Court decisions, the constitutionality of the old sex work laws were challenged. Different arguments were presented, and s. 7 jurisprudence was in different stages of evolution. It was ultimately determined that the laws had a negative effect on sex worker's security of the person interests protected under s. 7. The Canadian government responded by enacting legislation, claiming the legislation had a different objective than the old laws did. Advocates, experts, and activist groups spoke on the problems with the new laws.

Research examining legal frameworks similar to Bill C-36 also highlighted issues. Regardless, the government went ahead, perhaps influenced by the claims of the moral crusade against prostitution. Harms with the new laws have been established, and it has been suggested that the laws themselves will be vulnerable to *Charter* challenges. While focusing on the buyers and not the sellers, the laws still have negative effects on sex worker's security of the person. Their displacement, the difficulty in conducting sex work indoors (demonstrated to be the safest form of sex work), the antagonistic relationship with law enforcement; these are just a few of the harms that have been established. Future governments should take heed not to repeat these mistakes in the event that Bill C-36 is repealed by the courts. Just because the appeal process exists to remedy unjust laws, exposing Canadian sex workers to unjust laws is still unacceptable. The appeal process should be used as a worst-case scenario, not as a safety net for poor law making.

Examining these arguments bring to mind a few questions. First, if it is the courts that are the legal experts, why is it Parliament that is responsible for crafting laws. Laws that may be unconstitutional, or influenced by the political whims of the day? Second, are *Charter* arguments entirely bound by stated legislative objective? If Bill C-36's stated objective was simply the eradication of prostitution (not in conjunction with the objective of responding to *Bedford*), would these laws be found to be unconstitutional? Do law makers have the power to safeguard their laws by drafting them against the backdrop of weighty objectives? Third, for divisive issues such as prostitution, abortion, or same-sex marriage, is there room for morality to be considered in the making of laws to regulate these issues? It is likely safe to say that crimes such as murder can be universally agreed upon to be immoral. But for other issues that have strong conflicting opinions, do these opinions have a place in law formation? Or should they be bound solely by

empirical evidence that reflect reality and not idyllic notions of right and wrong? Does the political aspect of law-making cause more problems than it solves?

These philosophical, sociological, and legal questions are beyond the scope of this paper. They may be nothing more than the musings of someone who has crafted their own opinions about these issues in response to reading related literature. Not being a legal expert, it is impossible to provide meaningful answers to these questions. But perhaps these questions may be the focus of future research. When the answers to these questions have profound effects on the lives of Canadians, perhaps they are still important questions. Regardless, a simple fact still remains; sex workers are people and deserve the same rights as everyone else. Regardless of what different sects of morality may say.

References

- Bruckert, C. (2015). *Protection of communities and exploited persons act: Misogynistic law making in action*. *Canadian Journal of Law and Society*, 30(1), 1-3.
- Butcher, K. (2003). Confusion between prostitution and sex trafficking. *The Lancet*, 361, 1983.
- Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101.
- Charter of Rights and Freedoms*, s. 2(b), s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
- Chu, S. K. H., & Glass, R. (2013). Sex work law reform in Canada: Considering problems with the Nordic model. *Alberta Law Review*, 51(1), 101-124.
- Criminal Code*, RSC 1985, c C-46.
- Department of Justice. (2018). *Prostitution criminal law reform: Bill c-36, the protection of communities and exploited persons act*. Retrieved from https://www.justice.gc.ca/eng/rp-pr/other-autre/c36fs_fi/
- Galbally, P. J. (2016). Playing the victim: A critical analysis of Canada's bill c-36 from an international human rights perspective. *Melbourne Journal of International Law*, 17, 1-35.
- Hudson, G., & Meulen, E. V. D. (2013). Sex work, law, and violence: *Bedford v. Canada* and the human rights of sex workers. *Windsor Yearbook of Access to Justice*, 31(1), 115-145.
- Labaree, R. V. (2019). Organizing your social sciences research paper. *USC Libraries: Research Guides*. Retrieved from <https://libguides.usc.edu/writingguide>

Reference re ss. 193 and 195.1(1)(c) of the criminal code (Man.), [1990] 1 SCR 1123.

Shrage, L. (2006). Prostitution and the case for decriminalization. In J. Spector (Ed.), *Prostitution and pornography: Philosophical debate about the sex industry* (pp. 240-246). Stanford, CA: Stanford University Press.

Silliker, A. (2017, January 30). Sex workers facing increased safety risks. *Canadian Occupational Safety*. Retrieved from <https://www.cos-mag.com/ohs-laws-regulations/32364-sex-workers-facing-increased-safety-risks/>

Stewart, H. (2012). *Fundamental justice: Section 7 of the Canadian charter of rights and freedoms*. Toronto, Canada: Irwin Law.

Stewart, H. (2016). The constitutionality of the new sex work law. *Alberta Law Review*, 54(1).

Weitzer, R. (2007). The social construction of sex trafficking: Ideology and institutionalization of a moral crusade. *Politics and Society*, 35(3), 447-475.