

**CITATION:** Bedford v. Canada, 2010 ONSC 4264  
**COURT FILE NO.:** 07-CV-329807 PD1  
**DATE:** 2010/09/28

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
)  
TERRI JEAN BEDFORD, AMY ) Alan N. Young, for the Applicant Terri Jean  
LEBOVITCH AND VALERIE SCOTT ) Bedford  
Applicants ) Ron Marzel, for the Applicant Amy  
) Lebovitch  
- and - ) Stacey Nichols, for the Applicant Valerie  
) Scott  
)  
ATTORNEY GENERAL OF CANADA ) Michael H. Morris and Gail Sinclair, for the  
Respondent ) Respondent  
)  
- and - )  
)  
ATTORNEY GENERAL OF ONTARIO ) Shelley Hallet and Christine Bartlett-  
Intervener ) Hughes, for the Intervener Attorney General  
) of Ontario  
- and - )  
)  
THE CHRISTIAN LEGAL FELLOWSHIP, ) Robert W. Staley, Derek J. Bell, and Ranjan  
REAL WOMEN OF CANADA AND THE ) K. Agarwal, for the Intervener the Christian  
CATHOLIC CIVIL RIGHTS LEAGUE ) Legal Fellowship, REAL Women of Canada  
Intervener ) and the Catholic Civil Rights League  
)  
)  
) **HEARD:** October 6, 7, 8, 9, 19, 20 and 26,  
2009

**REASONS FOR JUDGMENT**

**HIMEL J.:**

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## REASONS FOR JUDGMENT

### HIMEL J.:

[1] There has been a long-standing debate in this country and elsewhere about the subject of prostitution. The only consensus that exists is that there is no consensus on the issue. Governments in Canada, as well as internationally, have studied the topic and produced recommendations ranging from creating laws aimed at protecting individuals, families and communities by promulgating tough criminal laws to decriminalizing or legalizing prostitution. Other legal solutions look at the reasons for the existence of prostitution in our society and emphasize the need for social and economic responses. None of the schemes proposed are without controversy.

[2] This case demonstrates the tension that exists around the moral, social and historical perspectives on the issue of prostitution and the effect of certain criminal law provisions on the constitutional rights of those affected. It highlights the role of the courts and their relationship to the other branches of government.

[3] Prostitution is not illegal in Canada. However, Parliament has seen fit to criminalize most aspects of prostitution. The conclusion I have reached is that three provisions of the *Criminal Code* that seek to address facets of prostitution (living on the avails of prostitution, keeping a common bawdy-house and communicating in a public place for the purpose of engaging in prostitution) are not in accord with the principles of fundamental justice and must be struck down. These laws, individually and together, force prostitutes to choose between their liberty interest and their right to security of the person as protected under the *Canadian Charter of Rights and Freedoms*. I have found that these laws infringe the core values protected by

section 7 and that this infringement is not saved by section 1 as a reasonable limit demonstrably justified in a free and democratic society.

## **I. INTRODUCTION**

[4] This is an application brought pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, by Terri Jean Bedford, Amy Lebovitch, and Valerie Scott (“the applicants”) seeking declaratory relief in the nature of:

(a) an order declaring that ss. 210, 212(1)(j), and 213(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, violate s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 (the “*Charter*”), and as such are unconstitutional and of no force or effect;

(b) an order declaring that s. 213(1)(c) of the *Criminal Code* violates s. 2(b) of the *Charter* and as such is unconstitutional and of no force and effect.

[5] The application is opposed by the Attorney General of Canada (“the respondent”) and by the two interveners: the Attorney General of Ontario (“AG Ontario”) and the Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League (“CLF”).

## **II. THE IMPUGNED PROVISIONS**

[6] The applicants do not challenge all of the prostitution-related provisions in the *Criminal Code*. They only challenge three provisions dealing with adult prostitution: ss. 210, 212(1)(j), and 213(1)(c). The laws relating to living on the avails of a person under the age of 18 and obtaining sexual services from a person under the age of 18 are not being challenged. The impugned provisions are as follows:

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

(2) Every one who

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

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

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

is guilty of an offence punishable on summary conviction.

<sup>1</sup> “Common bawdy-house” is defined in s. 197(1) of the *Criminal Code* as “a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency.”

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

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

212. (1) 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.<sup>2</sup>

213. (1) Every person who in a public place or in any place open to public view<sup>3</sup>

...

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

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

[7] The indictable offences of keeping a common bawdy-house and living on the avails of prostitution are deemed “designated offences” for the purposes of the forfeiture provisions dealing with proceeds of crime as set out in Part XII.2 of the *Criminal Code*. They are also included in the list of offences found in s. 183 of the *Criminal Code* for which judicial authorization for electronic surveillance can be obtained by the police. As well, the living on the

<sup>2</sup> I also note that s. 212(3) of the *Criminal Code* provides that “[e]vidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j)....” The Supreme Court in *R. v. Downey*, [1992] 2 S.C.R. 10, held that this provision does not violate the presumption of innocence set forth in s. 11(d) of the *Charter*.

<sup>3</sup> “Public place” is defined in s. 213(2) of the *Criminal Code*: “In this section, ‘public place’ includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.”

avails of prostitution provision is deemed a “primary designated offence” under s. 487.04 of the *Criminal Code* for the purposes of obtaining DNA samples from offenders.

### **III. THE POSITIONS OF THE PARTIES**

#### **1. The Applicants**

[8] Prostitution *per se* is not illegal in Canada, although many prostitution-related activities are prohibited by provisions in the *Criminal Code*. The applicants’ case is based on the proposition that the impugned provisions prevent prostitutes from conducting their lawful business in a safe environment.<sup>4</sup>

[9] The applicants allege that s. 213(1)(c) of the *Criminal Code* violates s. 2(b) of the *Charter* and ss. 210, 212(1)(j), and 213(1)(c) of the *Criminal Code* violate s. 7 of the *Charter*, and that these provisions are not saved as a reasonable limit under s. 1 of the *Charter*. They argue that the Supreme Court’s decision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, [1990] 1 S.C.R. 1123 (“the *Prostitution Reference*”), in which the Court dismissed *Charter* challenges to ss. 193 (now s. 210) and 195.1(1)(c) (now s. 213(1)(c)) of the *Criminal Code*, is distinguishable and/or no longer binding on the case at bar.

[10] With respect to s. 7 of the *Charter*, the applicants argue that not only do the impugned provisions violate liberty, due to the possibility of imprisonment upon conviction for each of the offences, but also security of the person as the operation and intersection of the impugned provisions materially contribute to the violence faced by prostitutes.

[11] Under s. 210, the bawdy-house provisions, it is illegal to conduct prostitution in an indoor location on a habitual and frequent basis. The applicants maintain that the evidence demonstrates that violence is significantly reduced or eliminated in most indoor settings. Under s. 212(1)(j), the living on the avails of prostitution provision, the applicants argue that it is illegal to hire managers, drivers, and security personnel and that these type of services can reduce or eliminate the incidence of violence faced by prostitutes. Finally, it is illegal under s. 213(1)(c) to communicate in public for the purposes of prostitution. The applicants take the position that this prohibition has compelled prostitutes to make hasty decisions without properly screening customers when working on the streets, thereby increasing their risk of danger.

[12] The applicants assert that the liberty and security violations are not in accordance with the principles of fundamental justice, as they run contrary to the principles that laws must not be arbitrary, overbroad, and grossly disproportionate and that the government must obey the law. They submit that none of the provisions are saved by s. 1 of the *Charter*.

[13] With respect to s. 2(b) of the *Charter* the applicants argue that, in light of new evidence and a material change in circumstance since the *Prostitution Reference*, the s. 1 analysis should

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<sup>4</sup> It has been brought to my attention that some people prefer the term “sex worker” to “prostitute,” which they consider to be pejorative. Others decry the use of sex worker as they claim it ignores the plight of victimized women forced into prostitution. This judgment uses the term prostitute as a legal term in accordance with the *Criminal Code*, and should not be understood to enter the debate over the proper political term to be used.



be reconsidered. They ask the court to find that the violation of the communicating provision is not a reasonable limit in light of numerous government reports attesting to the inefficacy of the law.

## 2. The Attorney General of Canada (the “Respondent”)

[14] The respondent submits that Parliament has made difficult choices in determining which aspects of prostitution should be criminalized, and has decided to criminalize the most harmful and public emanations of prostitution.

[15] The respondent maintains that the applicants have failed to demonstrate any basis in new evidence or in law that would justify a reconsideration of the Supreme Court’s conclusions in the *Prostitution Reference* or cast doubt on the constitutionality of the impugned provisions.

[16] However, if this court decides to reconsider the constitutionality of the provisions, the respondent argues that the applicants have not met their evidentiary burden of proving a *Charter* violation. The respondent states that the applicants’ s. 7 argument is based on the false premise that there is a constitutional right to engage in prostitution. The *Charter*, according to the respondent, does not mandate Parliament to design a regime allowing the applicants to engage in prostitution with fewer hindrances.

[17] According to the respondent, prostitution entails a high level of risk for individuals who engage in it and significant harms to society at large. The respondent asserts that social science evidence in Canada and internationally demonstrates that the risks and harms flowing from prostitution are inherent to the nature of the activity itself. Thus, the risks and harms exist regardless of the many ways in which prostitution is practised, whether “street” or “off-street,” and regardless of the legal regime in place. Moreover, prostitution is associated with other harmful activities that include physical violence, drug addiction and trafficking, the involvement of organized crime and the globalization of the sex industry and trafficking in persons.

[18] In the event that this court finds a violation of ss. 2(b) or 7 of the *Charter*, the respondent submits that such a violation is demonstrably justified as a reasonable limit under s. 1 of the *Charter*.

## 3. The Attorney General of Ontario (“AG Ontario”)

[19] Much of the AG Ontario’s argument mirrored what is submitted by the respondent.

[20] According to the AG Ontario, the physical and psychological harms experienced by prostitutes stem from the inherent inequality that characterizes the prostitute-customer relationship, and not from the *Criminal Code*. In fact, AG Ontario states that the impugned provisions operate to limit the negative effects of prostitution on both the prostitute and the public, as they curtail commercialized institutional prostitution and prohibit public prostitution.

[21] The AG Ontario stresses the importance of societal values and human dignity in interpreting the legislative objectives of the impugned provisions.

4. The Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League (“CLF”)

[22] The CLF was granted leave to intervene in this application as a friend of the court pursuant to rule 13.02 of the *Rules of Civil Procedure: Bedford v. Canada (Attorney General)*, 2009 ONCA 669. The Court of Appeal held that the CLF met several of the criteria for intervention outlined in *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Gen. Div.): they have a real, substantial, and identifiable interest in the subject matter of the application and an important perspective different from the parties. A description of the Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League can be found at para. 8 of *Bedford v. Canada (Attorney General)*, 2009 CanLII 33518 (Ont. Sup. Ct.).

[23] The CLF agrees with the respondent and the AG Ontario that the impugned provisions are not unconstitutional from the standpoint of actual harm caused to prostitutes and to society. They add that the impugned provisions are a reflection of society’s views, soundly rooted in interfaith morality, which is that prostitution is an act that offends the conscience of ordinary Canadian citizens. The thrust of the CLF’s argument deals with the legislative objectives of the impugned provisions.

[24] The CLF agrees with the applicants that mere moral assertions cannot sustain a law, but argues that there are certain core values entrenched in society that must be valid as legislative objectives. The CLF submits that prostitution is immoral and should be stigmatized, and that these sensibilities are fundamental social values that are rooted in *Charter* values. According to the CLF, the government’s decisions to enact these laws are based on legitimate, pressing and substantial concerns. If the laws are struck down, the CLF argues, it would send a signal to vulnerable people in society that they can always make a living as a last resort by selling their bodies.

#### IV. THE ROLE OF THE COURT

[25] It is important to state at the outset what this case is not about: the court has not been called upon to decide whether or not there is a constitutional right to sell sex or to decide which policy model regarding prostitution is better. That is the role of Parliament. Rather, it is this court’s task to decide the merits of this particular legal challenge, which is whether certain provisions of the *Criminal Code* are in violation of the *Charter*: see *R. v. Malmö Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 at p. 591. The fact that prostitution is a controversial and complex issue is not a bar to *Charter* review. I find the words of Rowles J.A. instructive, in her concurring reasons in *PHS Community Services Society v. Canada (Attorney General)* (2010), 250 C.C.C. (3d) 443, 2010 BCCA 15, at para. 61:

Canada argues that the question of whether safe injection sites such as Insite ought to exist in Canada is a “controversial one”. That is not a reason to cause the court to fail to carry out its constitutional function and duty. There are many cases where the courts have intervened to invalidate laws that might be described as controversial: laws pertaining to abortion, gay and lesbian rights, private health

care, collective bargaining and any number of criminal laws such as constructive murder. The fact that a law may be controversial law does not, for that reason alone, bar judicial review and invalidation. Chief Justice McLachlin's comments in *Chaoulli*, at para. 107, are apposite:

[107] While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. As this Court has said on a number of occasions, “it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power”: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 497, *per* Lamer J. (as he then was), quoting *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, *per* Dickson J. (as he then was). [Emphasis added.]

## V. THE APPLICANTS

### 1. Terri Jean Bedford

[26] Terri Jean Bedford has 14 years of experience working as a prostitute in Windsor, Calgary, Vancouver, Toronto, Edmonton, and Fort McMurray. Ms. Bedford has, at various times in her life, worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. Ms. Bedford says she encountered brutal violence while working as a street prostitute in Windsor, Calgary, and Vancouver. She stated in her affidavit that she was “raped and gang-raped too many times to talk about,” beaten on the head with a baseball bat, and tortured physically and psychologically. She added, “when a streetwalker goes to meet a john, she never knows what will happen to her.” In her experience, indoor prostitution is safer than prostitution on the street, although she conceded that the safety of an indoor location can vary, depending on how it is run and the safety measures implemented. Ms. Bedford has been convicted of both keeping and being an inmate of a common bawdy-house for the purpose of prostitution. Although she is not currently working in prostitution, Ms. Bedford wishes to resume work as a dominatrix.

[27] Ms. Bedford was born on October 15, 1959, in Collingwood, Ontario. She had a difficult childhood, and was subjected to physical, psychological, and sexual abuse. At the age of 16, she was sent to a boarding house in Windsor, Ontario by the Children’s Aid Society. Shortly thereafter, she met an abusive 37-year-old drug dealer and drug addict who became her live-in boyfriend. He introduced her to drugs and she became addicted. Ms. Bedford says that she began prostituting as a “necessary evil” to fund her and her boyfriend’s addictions. During this

period, she worked as a street prostitute and in massage parlours. It appears her relationship with her boyfriend ended following his arrest for murder.

[28] From 1984 to 1986, Ms. Bedford ran an escort service from her house, and later, from a studio, eventually employing 18 escorts. She claims that she was not aware of any incidents of violence by the clientele towards her employees. Ms. Bedford outlined some safety measures she instituted: ensuring someone was present during in-calls,<sup>5</sup> except during appointments with well-known clients; ensuring that escorts were accompanied by a boyfriend, husband, or driver during out-call appointments; if an appointment was at a hotel, calling the hotel to verify the client's name and address; if an appointment was at a client's home, calling the client's phone to ensure it was the correct number; turning down appointments from clients who sounded intoxicated; and verifying credit card numbers and names of clients. Ms. Bedford maintained that the work environment provided the escorts with a sense of security, dignity, and self-respect. In 1986, the escort service was raided by the police and Ms. Bedford was charged with a number of prostitution-related offences. She absconded to Calgary and Vancouver, where she worked as a street prostitute and as an escort. Ms. Bedford returned to Windsor in 1988 to face the charges. She served 15 months in prison.

[29] In 1989, Ms. Bedford moved to Toronto and found work as an administrative assistant. Shortly after, she was laid off and found herself ineligible for unemployment insurance and with few marketable employment skills. In the early 1990s, she returned to work at massage parlours and was charged multiple times with being an inmate in a bawdy-house.

[30] In 1993, at age 33, Ms. Bedford was at a turning point in her life and decided to become a dominatrix and to stop working as a prostitute. She opened a business, the Bondage Bungalow, which offered sado-masochistic services. She stated that she did not offer sex or extreme sado-masochistic role play. Ms. Bedford held consultation sessions with potential clients to screen out those who might be violent. As well, she hired a male employee to provide security and she utilized a baby monitor during an appointment so that someone on the receiving end could hear sounds of distress and intervene. She only experienced one incident of "real violence" at Bondage Bungalow when a client choked her. She managed to call for help, and her male employee intervened. In 1994, the police raided Bondage Bungalow. On October 9, 1998, she was convicted of unlawfully keeping a bawdy-house (*R. v. Bedford*, [1998] O.J. No. 4033 (Ct. J. (Prov. Div.)) (QL), aff'd (2000), 184 D.L.R. (4th) 727 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 328). The Ontario Court of Appeal affirmed, *inter alia*, that the services Ms. Bedford was providing constituted prostitution under the *Criminal Code*.

[31] In 2001, Ms. Bedford opened the Sissy Maid Academy and Charm School for Crossdressers, a business that did not offer sexual services. Ms. Bedford maintained that she stopped working due to illness. She asserted that she would like to return to working as a dominatrix in a secure, indoor location; however, she is concerned that in doing so, she would be exposed to criminal liability. Furthermore, she does not want the people assisting her to be subject to criminal liability due to the living on the avails of prostitution provision.

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<sup>5</sup> Indoor prostitution can occur "in-call," where the clients attend at a fixed indoor location such as a prostitute's home or a massage parlour, or "out-call," where prostitutes meet clients at different locations such as in hotel rooms or clients' homes.

## 2. Amy Lebovitch

[32] Since approximately 1997, Amy Lebovitch has worked as a prostitute in Montreal, Ottawa, and Toronto. She has worked as a street prostitute, as an escort, and in a fetish house. She is the only applicant who currently works as a prostitute, which she does independently out of her home. Ms. Lebovitch fears being charged and convicted under the bawdy-house provisions and the consequent possibility of forfeiture of her home. She is also concerned that her partner, with whom she co-habits, will be charged with living on the avails of prostitution. Ms. Lebovitch has never been charged with a criminal offence, prostitution-related, or otherwise. Ms. Lebovitch is a spokesperson for Sex Professionals of Canada (SPOC), a political group that works towards decriminalization through political activism, community building and public awareness. In that capacity, she gives talks at universities and to the media and records information from women calling to report “bad dates.”<sup>6</sup>

[33] Ms. Lebovitch was born on January 24, 1979, in Montreal, Quebec. She says that she had a good relationship with her parents, was not abused, and had no problems with drugs or alcohol. Ms. Lebovitch graduated from high school and CEGEP with high academic standing. Although she says that she had other options for employment, Ms. Lebovitch decided to work as a street prostitute in Montreal in order to make money quickly and gain independence. She stated that she was lucky that she was not subjected to serious violence during her year on the streets. She moved off the streets to work at an escort agency after seeing other street prostitutes “black and blue,” and hearing frightening accounts of dangerous clients.

[34] Ms. Lebovitch maintained that she was able to achieve more control over her environment than she had on the street. However, she admitted that out-calls “still carry with them the potential for danger,” and that she was often compelled by the owner of the escort agency to work inconvenient hours. She attributed the reduced safety she experienced to poor management.

[35] In 1999, Ms. Lebovitch moved to Ottawa to study criminology and psychology at the University of Ottawa. In Ottawa, she worked at an indoor fetish house where she performed BDSM (bondage, discipline, sado-masochism), as well as traditional sex services. She says that she felt safer than she did on the streets, but that she still had a low level of control over her environment. As with the escort agency, she attributed the reduced safety she experienced to poor management that did not take safety precautions, such as screening clients. She experienced one notable instance of violence at this location, when she was tied up and raped by a client. Ms. Lebovitch did not report this incident to the police, out of fear of police scrutiny and the possibility of criminal charges.

[36] In 2001, she moved to Toronto to attend the social work program at Ryerson University. She decided to work independently as a prostitute from her home, and occasionally from hotel rooms. She says that she takes security precautions such as making sure client telephone calls are

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<sup>6</sup> One of the applicants’ experts defined the term “bad date” as meaning slang for incidents which ended in violence or theft at the expense of prostitutes. Some prostitutes’ rights organizations keep lists of bad dates and distribute them to street prostitutes.

from unblocked numbers; not taking calls from clients who sound drunk, high, or in another manner undesirable; asking for expectations upfront; taking clients' full names and verifying them using directory assistance; and getting referrals from regular clients. When she has an appointment with a client, she gives the name of the client to her "safe call" (either her partner or a friend). She telephones her safe call when the client arrives, so that the client is aware that someone is downstairs or nearby, and again ten minutes before he leaves. She feels safer in her home where she knows how to escape if necessary. Ms. Lebovitch stated that if she was attacked by a client, she would not likely report the incident to the police as she wants to avoid prostitution-related charges laid against her. She says that the fear of being criminally charged for working out of her home has caused her to work on the street on occasion. She stated that she enjoys her job and does not plan to leave it in the foreseeable future.

### 3. Valerie Scott

[37] Valerie Scott is currently the executive director of SPOC. In the past, she worked as a prostitute on the street, in massage parlours, and independently from her home or in hotels. For a period of four and a half years she ran a small escort business with another colleague. She left prostitution in 1993 due to chronic pain. Ms. Scott stated that she would like to resume working in prostitution in an indoor location; however, she feels compelled to abstain from this work due to the consequences of the bawdy-house provisions. She has never been charged with an offence under the *Criminal Code*.

[38] Ms. Scott was born on April 9, 1958, in Moncton, New Brunswick. When she was approximately 15 years old, she "dabbled" in the sex trade when she worked at a massage parlour. In the mid-1970s, she moved to Toronto with her boyfriend. From the age of 18, until she was 24 years old, she worked as an erotic dancer. At the age of 24, Ms. Scott decided to engage in prostitution. She worked from home by responding to newspaper advertisements. Ms. Scott stated that she would ask clients for their home or office telephone number and their name, which she would verify using the telephone book. She screened clients by meeting new clients in public locations, such as a library or a cafe. She maintained that she never experienced significant harm working from home.

[39] Sometime in 1983-1984, Ms. Scott became aware of the AIDS epidemic. Consequently, she turned away clients who refused to wear condoms. She saw an 85 per cent reduction in business. She believes that these clients felt entitled not to wear condoms because they were paying a higher price for an indoor prostitute. She says that she felt compelled to work as a street prostitute. While working on the street she was subjected to many instances of threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong. After four months on the street, she was able to move back indoors as AIDS awareness grew and clients were prepared to practise safe sex.

[40] In the mid-1980s, Ms. Scott joined the Canadian Organization for the Rights of Prostitutes (CORP), a group which advocated decriminalization of prostitution. In 1984, Ms.

Scott provided submissions to the Legislative Committee on Bill C-49 (which included the current communicating provision). She warned that the enactment of the communicating law would result in the death and injury of street prostitutes. Following the enactment of Bill C-49 in 1985, Ms. Scott issued an emergency resolution with the National Action Committee on the Status of Women, which called for the repeal of the new law, as well as the bawdy-house and living on the avails provisions. Ms. Scott stated that following the enactment of the communicating law, CORP received an increased number calls from women working in prostitution reporting bad dates.

[41] Ms. Scott helped establish Maggie's, a drop-in and phone centre for people working in prostitution in Toronto. In the first year, Ms. Scott spoke to approximately 250 prostitutes whose main concerns were client violence and legal matters arising from arrests. Maggie's began compiling bad date lists that were distributed to prostitutes. Ms. Scott ended her involvement with Maggie's in approximately 1990.

[42] In 2000, Ms. Scott formed SPOC. As part of her advocacy, she began a new, expanded bad date list. As executive director of SPOC, she testified before the 2005 House of Commons Subcommittee on Solicitation Laws about legal reform. Ms. Scott estimates that she has spoken with approximately 1,500 women working in prostitution, during her years working as a prostitute, at Maggie's, and at SPOC.

[43] If this challenge is successful, Ms. Scott would like to operate an indoor prostitution business. While she recognizes that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

## **VI. STANDING**

[44] In order to challenge the constitutional validity of a law, a person must demonstrate a "special interest" in the impugned legislation: see Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto, ON: Carswell, 1986) at p. 9. The respondent argues that Ms. Bedford and Ms. Scott do not have private interest standing to bring this application as they are no longer engaged in the practice of prostitution and, accordingly, do not have any direct right or interest at stake engaged in the current claim. Although both Ms. Bedford and Ms. Scott say that they would like to return to work in the sex industry if the laws are struck down, the respondent argues that these aspirations are too speculative and hypothetical. The respondent further submits that Ms. Bedford and Ms. Scott have failed to apply for public interest standing. The respondent does not take issue with the private interest standing of Ms. Lebovitch as she says that she continues to be engaged in prostitution.

[45] The applicants argue that there is no issue that Ms. Lebovitch has private interest standing and that Ms. Bedford and Ms. Scott have public interest standing as they have a genuine and informed interest in this application, and both wish to return to the sex industry. Counsel for the applicants submitted that Canadians should not have to break the law in order to challenge its validity.

## 1. Private Interest Standing

[46] Parties assert private standing by simply beginning their action or application, although they must present facts and relevant evidence to support their assertion of standing. It falls to the party challenging standing to raise the issue. In a civil application for declaratory relief, the applicant bears the burden to establish his or her standing to raise *Charter* issues: *Hy and Zel's Inc. v. Ontario (Attorney General)*; *Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 at p. 692.

[47] Private standing refers to the standing of parties who have a “direct, personal interest” in the proceedings. The causal relationship between the prejudice caused to the plaintiff and the legislation cannot be “too indirect, remote or speculative”: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

[48] In some cases, a private party can initiate proceedings for the sole purpose of challenging the constitutional validity of legislation, even if he or she has no right to damages or other coercive relief: see Peter Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. looseleaf (Scarborough: Carswell, 2007) vol. 2 at 59-4. A party will not have private standing to pursue such an action when he or she is affected by the statute no differently than any other member of society. However, if the law applies to a party differently from other members of the general public, he or she is said to be “exceptionally prejudiced” and is entitled to seek a declaration of invalidity: *Smith v. The Attorney General of Ontario*, [1924] S.C.R. 331.

[49] None of the applicants in this case are defending a criminal offence or a civil wrong under the provisions they seek to challenge. However, the respondent has conceded, and I agree, that parties do not have to wait to be charged with an offence before they can challenge criminal provisions provided their interest in the constitutionality of the law(s) is real and not speculative.

[50] Ms. Lebovitch is currently working as a prostitute and has been since 1997. As such, she is in jeopardy of being charged or convicted under some of the impugned provisions. She stated that she fears being charged and convicted under the bawdy-house provisions and also fears that her live-in partner will be charged and convicted under the living on the avails of prostitution provision. This fear of being charged and convicted under these provisions (and the possible consequences such convictions may entail) has led her to work as a street prostitute on occasion, which she believes increases the risk to her personal safety.

[51] Consequently, Ms. Lebovitch has an interest in the validity of the impugned provisions, which is different from that of a member of the general public. Ms. Lebovitch is thus exceptionally prejudiced by the application of the challenged laws and is entitled to private standing to seek a declaration that these laws are constitutionally invalid. The respondent does not challenge Ms. Lebovitch’s standing to bring this application.

[52] However, the respondent argues that Ms. Bedford and Ms. Scott are in a different position. Neither one is presently engaged in prostitution. Ms. Bedford says that since her conviction for keeping a common bawdy-house for the purposes of prostitution was upheld in



2000, she has been struggling with illness and has not been working in the sex industry. She states:

However, it is my hope and intention to resume work as a dominatrix once all of my health concerns have been addressed. I do not know if this hope will ever be realized because working as a dominatrix in a secure, indoor setting exposes me to criminal liability for bawdy-house charges and I do not wish to be exposed to this risk. I also do not wish to expose those who will assist me to laws relating to living on the avails. The financial and emotional toll of my arrest and prosecution in the late 90's was devastating and I will only return to my vocation if and when the bawdy-house law is repealed or invalidated.

[53] Similarly, Ms. Scott, who left prostitution in the 1990's due to chronic pain, deposes that:

In the future, I hope to be able to continue my involvement in sex work in an indoor location where I can have the ability to better protect myself. At the present, however, I am compelled to abstain from this work as I feel that the consequences of receiving a conviction under the 'bawdy-house legislation' are too great.

[54] The respondent argues that these aspirations are too speculative to allow Ms. Bedford and Ms. Scott standing as of right. The respondent relies upon the words of Noël J.A. in *Canadian Council for Refugees v. Canada*, [2009] 3 F.C.R. 136, 2008 FCA 229, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 422, who stated at para. 102: "*Charter* challenges cannot be mounted on the basis of hypothetical situations."

[55] In my view, to distinguish between Ms. Lebovitch, who is currently engaged in prostitution, and Ms. Bedford and Ms. Scott, who wish to return to prostitution, is to draw an illusory distinction. All three applicants allege that they are prevented from engaging in their livelihood, either safely or at all, by the provisions. This gives all three applicants a direct, personal interest in the outcome of this application that is different than the general member of the public.

[56] In a very recent case concerning similar issues, Ehrcke J. of the Supreme Court of British Columbia held that the plaintiff, Ms. Kiselbach, a former prostitute, did not have private standing to bring a claim challenging the validity of various *Criminal Code* provisions relating to prostitution: see *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)* (2008), 305 D.L.R. (4th) 713, 2008 BCSC 1726, currently under appeal to the British Columbia Court of Appeal. Ehrcke J. stated at para. 48:

The impugned laws do not presently cause Ms. Kiselbach to work in unsafe conditions because she is not currently engaged in sex work. For the same reason, she is not currently in jeopardy of being charged or convicted, because she is not doing any of the activities that the impugned laws prohibit.

[57] Ehrcke J. determined that the plaintiff was not entitled to private interest standing as the impugned laws applied to Ms. Kiselbach in the same way as other members of the general public. However, in that case, Ms. Kiselbach had deposed that she had no solid plan to return to prostitution, but could not “rule it out” in the future. Ehrcke J. found that this potential future interest was too speculative to sustain private interest standing. In contrast, Ms. Bedford and Ms. Scott have genuine plans to return to prostitution-related activities pending the outcome of this application. Their situations are different in my view and, accordingly, I find that all three applicants in the case before me have private interest standing.

## 2. Public Interest Standing

[58] Unlike private standing, public interest standing may be granted by the court at its discretion, provided certain requirements are met. The requirements for a discretionary grant of public interest standing to challenge the validity of legislation were recognized by the Supreme Court in a trilogy of cases: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575. Public interest standing was reviewed several years later by the Supreme Court in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. The Supreme Court wrote at para. 37 that the court must be satisfied of the following criteria before it will exercise its discretion in favour of an applicant:

- a) There is a serious issue raised as to the validity of the legislation in question;
- b) The applicant must be directly affected by the legislation or have a genuine interest in its validity; and
- c) There is no other reasonable and effective way this issue could be brought before the court.

[59] The proper approach to these criteria was discussed in the case of *Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General)* (1998), 40 O.R. (3d) 489 where the Ontario Court of Appeal said at para. 18:

...the criteria should not be considered as mere technical requirements to be applied in a mechanistic fashion. They have been extracted from various judicial responses to concerns arising out of any proposed extension of the scope of public interest standing. In order to understand and to apply these criteria properly these underlying concerns should be kept in mind.

## 3. Should Ms. Bedford and Ms. Scott be Granted Public Interest Standing?

[60] Although I have found that all three applicants have private interest standing, in the event that I am not correct, I consider whether Ms. Bedford and Ms. Scott should be granted public interest standing.

[61] I have no difficulty concluding that Ms. Bedford and Ms. Scott raise a serious issue as to the constitutional validity of the impugned provisions and have a genuine interest in their validity. However, I am of the view that neither Ms. Bedford nor Ms. Scott can succeed in

gaining public interest standing as they must establish that there exists no other reasonable and effective way to bring the issues raised in this application to court. Justice Major, for the majority of the Court, explained the role of this final factor in *Hy and Zel's*, *supra* at para. 16:

The third criteria, that there be no other reasonable and effective way to bring the issue before the court, lies at the heart of the discretion to grant public interest standing. If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations.

[62] Justice Major affirmed the comments of Cory J. in *Canadian Council of Churches* that “[t]he granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.” Ms. Lebovitch is a private litigant who has standing to challenge the validity of the provisions that Ms. Bedford and Ms. Scott also seek to challenge. If public interest standing is denied to Ms. Bedford and Ms. Scott, the provisions in question will not be immunized from constitutional review. Accordingly, there are other reasonable methods of bringing the matter before the court.

## VII. STARE DECISIS

[63] In the *Prostitution Reference*, the Supreme Court considered whether ss. 193 (now s. 210) and 195.1(1)(c) (now s. 213(1)(c)), or a combination of both, violated s. 2(b) or s. 7 of the *Charter*; and if so, whether either one or a combination of both could be justified under s. 1 of the *Charter*.

[64] The entire Court found that s. 195.1(1)(c), the communicating offence, represented a *prima facie* infringement of s. 2(b) of the *Charter*. Chief Justice Dickson, for the majority, upheld the provision as a reasonable limit on expression under s. 1 of the *Charter*, whereas Wilson and L’Heureux-Dubé J.J. found that the impugned provision was not sufficiently tailored to its objective.

[65] With respect to s. 7, the majority held that both provisions clearly infringed the right to liberty as the impugned provisions contained the possibility of imprisonment. The majority found it unnecessary to address the question of whether s. 7 protected the economic liberty of individuals to pursue their chosen professions, although Lamer J. considered this question in his separate, concurring reasons. With respect to the principles of fundamental justice, the majority considered whether the impugned provisions were void for vagueness and whether it is impermissible for Parliament to send out conflicting messages whereby the criminal law says one thing but means another. They rejected both arguments and found that the liberty infringement was in accordance with the principles of fundamental justice. Thus, the constitutional challenge to both provisions failed.

[66] The *Prostitution Reference* is *prima facie* binding on this court.

[67] The Ontario Court of Appeal provided a review of the values underlying *stare decisis* in *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2006), 76 O.R. (3d) 161. Laskin J.A. for the court held as follows at paras. 119-120:

The values underlying the principle of *stare decisis* are well known: consistency, certainty, predictability and sound judicial administration. Adherence to precedent promotes these values. The more willing a court is to abandon its own previous judgments, the greater the prospect for confusion and uncertainty. "Consistency", wrote Lord Scarman, "is necessary to certainty -- one of the great objectives of law": see *Farrell v. Alexander*, [1976] 1 All E.R. 129, [1977] A.C. 59 (H.L.), at p. 147 All E.R. People should be able to know the law so that they can conduct themselves in accordance with it.

Adherence to precedent also enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case. Justice Cardozo put it this way in his brilliant lectures on *The Nature of the Judicial Process* (New Haven: Yale University Press, 1960) at p. 149:

[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.

[68] However, Justice Laskin suggested a flexible approach to the application of the principle of *stare decisis*, as a rigid adherence might lead to "injustices in individual cases, continued application of legal principles long since outdated as society has changed, and uncertainty bred by judges who draw overly fine distinctions to avoid *stare decisis*."

[69] The applicants make a number of arguments in favour of reconsidering the issues addressed by the *Prostitution Reference*. First, the applicants contend that this case deals with legal arguments that were not considered by the Court in 1990. The *Prostitution Reference* only dealt with the right to liberty and the vagueness principle of fundamental justice and that it is impermissible for Parliament to send out conflicting messages. In the present case, the applicants argue that the impugned laws violate both liberty and security of the person and are not in accordance with four principles of fundamental justice: arbitrariness, overbreadth, gross disproportionality, and what the applicants refer to as "the rule of law."

[70] The applicants point out that s. 7 jurisprudence has greatly developed since 1990 by subsequent decisions of the Supreme Court which have recognized the constitutional "vices" of arbitrariness, overbreadth, and gross disproportionality: *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35; *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46; *R. v. Heywood*, [1994] 3 S.C.R. 761; *Malmo-Levine, supra*; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577; *R. v. Zundel*, [1992] 2 S.C.R. 731. In 2003, the Ontario Court of Appeal held that it is a principle of

fundamental justice that the state must obey the law and promote compliance with the law: *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104, 177 C.C.C. (3d) 449, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 5. The applicants argue that in light of the evolution of the principles of fundamental justice, the new arguments ought to be heard.

[71] Second, the applicants submit that the context in which this case is being heard has changed dramatically. In part, as a result of the serial murders of prostitutes in Vancouver's Downtown Eastside, as well as the work of advocacy groups and academics, new light has been shed upon the violence faced by prostitutes in Canada. Although undoubtedly present in 1990, the issue of harm faced by prostitutes is forefront in the present case, and supported by two decades of new research.

[72] Third, the applicants argue that the 1990 decision was a reference, whereas this court is hearing these arguments by way of application with the benefit of a full factual record. Twenty years ago, the Supreme Court did not have most of the empirical evidence that is before this court when it decided that the communicating provision was a reasonable limit on freedom of expression. This evidence is said to reveal a material change in circumstances, which demonstrates that the law cannot be reasonably justified. Furthermore, the applicants take the position that the evidence that the international legal context has evolved in the last two decades suggests that the communicating provision no longer represents a minimal impairment of s. 2(b) of the *Charter*.

[73] The applicants submit that the government's own research has acknowledged the need to revisit the decision. In 1992, a Working Group on Prostitution was established by the Federal, Provincial and Territorial Deputy Ministers Responsible for Justice. The task of the Working Group was to review legislation, policy, and practices concerning prostitution-related activities and to present recommendations. At p. 7 of its 1998 report, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-related Activities* [the "Working Group Report"], the Working Group commented upon an earlier report by the House of Commons' Standing Committee on Justice and the Solicitor General, which conducted a three-year review of s. 213, and which was released a few months after the *Prostitution Reference*:

The research results indicated that the law was not meeting its objectives as its main effect in most centres has been to move street prostitutes from one downtown area to another, thus merely displacing the problem. However, as mentioned in the previous paragraph, the Supreme Court of Canada had already ruled that the communicating law was a justifiable infringement because its strengths (reducing the street nuisance associated with street prostitution) outweighed the infringement on freedom of expression. Had the research results been made available prior to the Supreme Court decision, the question whether s. 213 is a justifiable infringement on freedom of expression might have been considered differently. [Emphasis added.]

[74] In response, the respondent denies that there is any basis in law or in the evidence to justify revisiting the *Prostitution Reference*. The respondent recognizes that the Supreme Court

has the discretion to overrule its own decisions in limited circumstances and that the standard it has set for itself is very high. The respondent argues that the applicants have not cited any decisions from the Supreme Court that have questioned the conclusions of the *Prostitution Reference*. According to the respondent, a lower court may only disregard a higher court's decision in cases that are "beyond compelling."

[75] I am persuaded that I am not foreclosed from hearing the challenge based on s. 7 of the *Charter* as the issues argued in this case are different than those argued in the *Prostitution Reference*. Although "the principles of fundamental justice are to be found in the basic tenets of our legal system" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J. at p. 503), the principles at issue in this case were not clearly articulated as such when the reference was heard. The jurisprudence on s. 7 of the *Charter* has evolved considerably in the last two decades.

[76] I am also persuaded that I may reconsider whether s. 213(1)(c) of the *Criminal Code* is in violation of s. 2(b) of the *Charter*.

[77] There is an implicit need for courts to reconsider constitutional interpretation in particular due to the difficult process of constitutional amendment that serves as the only alternative to judicial reconsideration: see J.D. Murphy and R. Rueter, *Stare Decisis in Commonwealth Appellate Courts* (Toronto: Butterworths, 1981), and P. Hogg, *Constitutional Law in Canada*, *supra*, at 8.7. The constitution is a "living tree capable of growth and expansion within its natural limits," and the rights therein ought to be subject to changing judicial interpretations over time: see *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at p. 136 (P.C.), *per* Lord Sankey.

[78] It is clear that the Supreme Court has the authority to revisit its previous decisions: *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *R. v. Bernard*, [1988] 2 S.C.R. 833, *per* Dickson C.J.; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, *per* Lamer C.J.; *R. v. Salituro*, [1991] 3 S.C.R. 654. Lower courts must only do so in very limited circumstances.

[79] In *Wakeford v. Canada (Attorney General)* (2001), 81 C.R.R. (2d) 342, 2001 CanLII 28318 (Ont. Sup. Ct.), *aff'd* (2001), 156 O.A.C. 385, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 72, Swinton J. commented as follows at para. 14:

It is true that the Supreme Court of Canada has the power to overrule its past decisions. However, a lower Court should not be quick to assume that it will do so, given the importance of the principle of *stare decisis* in our legal system. In my view, on a motion such as this, where there is a decision of the Supreme Court squarely on point, there must be some indication - either in the facts pleaded or in the decisions of the Supreme Court - that the prior decision may be open for reconsideration. ...

[80] In *Wakeford v. Canada*, there was no indication that the Supreme Court decision at issue was open to reconsideration due to a shift in the jurisprudence. Furthermore, there were no new developments in public policy or new facts that may have called into question the basis for the

Supreme Court decision, so that there would be a realistic possibility that the decision might change, should it be reconsidered.

[81] In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, *supra*, at paras. 124-25, Laskin J.A. discussed the circumstances that would lead the Supreme Court to revisit one of its own decisions:

In *Bernard* [[1988] 2 S.C.R. 833], *Chaulk* [[1990] 3 S.C.R. 1303], *Salituro* [[1991] 3 S.C.R. 654], and other cases, the Supreme Court has articulated five factors that would allow it to overrule one of its previous decisions: 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 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.

These five factors were not meant to be a comprehensive list, nor need they all be present to justify overruling a previous decision. Instead, as Lamer C.J.C. said in *Chaulk* at p. 1353 S.C.R., “They are . . . guidelines to assist this Court in exercising its discretion.” But overruling a previous decision based on one or more of these five factors promotes the interests of justice and the court’s own sense of justice by bringing judge-made law into line with constitutional, legislative, or social changes, by removing conflicts and uncertainties in the law, or by protecting individual liberty.

[82] In *Leeson v. University of Regina* (2007), 301 Sask. R. 316, 2007 SKQB 252, Laing C.J. cited Laskin J.A.’s reasoning, and outlined when a lower court may revisit the decisions of a higher court at para. 9:

...there are reasons why earlier decisions can and should be revisited, and necessarily such revisitations must commence at the trial court level....The position of the applicants is that [the Supreme Court decision at issue] should be revisited because in the 17 years since it was decided, the social, political or economic assumptions underlying the decision are no longer valid. When such change is alleged, and there are at least some facts alleged which support such change, it is not appropriate to prevent the matter from proceeding on the basis of *stare decisis*.

[83] In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today. Indeed, several western democracies have made legal reforms decriminalizing prostitution to varying degrees. As well, the type of expression at issue in this case is different from that considered in the *Prostitution Reference*. Here, the

expression at issue is that which would allow prostitutes to screen potential clients for a propensity for violence. I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me. As will become evident following a review of the evidence filed by the parties, there is a substantial amount of research that was not before the Supreme Court in 1990.

### **VIII. THE EVIDENCE**

[84] Evidence in this case was presented by way of a joint application record and a supplementary joint application record. Over 25,000 pages of evidence in 88 volumes, amassed over two and a half years, were presented to the court. The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents.

#### **1. Evidence from Prostitutes and Former Prostitutes**

[85] The applicants submitted affidavits from eight witnesses who described their perceptions and experiences of working as prostitutes. During oral argument, the applicants' counsel submitted that the purpose of these witnesses was to provide "corroborative voices" to demonstrate that the applicants' experiences are shared with many other women.

[86] The affiants came from varied backgrounds and from across Canada, but largely shared the experience of finding prostitution in indoor venues generally safer than street prostitution (indeed, a few experienced no violence at all working indoors). However, some suggested that the level of safety in indoor venues could decrease with poor management. The women described various strategies to increase their personal safety, such as working in a familiar environment; having regulars as clients; verifying price, services, and contact information with a potential client before a session; and hiring a driver to wait during appointments. The affiants recounted that they entered into prostitution without coercion (although financial constraints were a large factor) and most reported being addiction-free and working without a pimp.<sup>7</sup>

[87] The respondent tendered nine affidavits from prostitutes and former prostitutes, whose stories painted a much different picture. The respondent's witnesses gave detailed accounts of horrific violence in indoor locations and on the street, controlling and abusive pimps, and the rampant use of drugs and alcohol.

[88] While this evidence provided helpful background information, it is clear that there is no one person who can be said to be representative of prostitutes in Canada; the affiants are an

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<sup>7</sup> A pimp has been defined in *Downey, supra* at p. 32, *per* Cory J. for the majority, as a "person who lives parasitically off a prostitute's earnings."



extremely diverse group of people whose reasons for entry into prostitution, lifestyles, and experiences differ.

## 2. Evidence from Police Officers and an Assistant Crown Attorney

[89] The respondent submitted affidavits from nine police officers who have experience in enforcing prostitution-related provisions or in investigating crimes against prostitutes. The officers worked in various police forces and divisions (for example, a Special Victims Unit, the Royal Canadian Mounted Police (RCMP), Vice/Morality Squad) in Toronto, Brampton, Edmonton, Vancouver, and Winnipeg. The officers were in agreement that prostitution occurs mainly in indoor locations, with ten to 20 per cent of prostitution occurring on the street. Most of the officers' experiences appear to be with street prostitution and enforcing the communicating provision.

[90] Prostitution was generally described as being a harmful activity with links to drugs, violence, organized crime, child exploitation, and human trafficking (one officer called prostitution a form of "slavery"). Prostitutes were characterized as victims, commonly poverty-stricken, abused, and drug-addicted (although some officers described a street hierarchy where those on top were drug-free and earned more money). A few officers deposed that aboriginal women are over-represented on the street. Clients, in contrast, were twice described as being "from all walks of life;" that is, of varying social and economic backgrounds. Some officers detailed the exploitive pimp-prostitute dynamic, while another officer stated that there were very few pimps working on the street.

[91] The police officers outlined different enforcement strategies used by their particular units to enforce the communicating provision, such as "sweeps" (generally, a concerted effort at charging numerous suspects in a short period of time, in a particular geographic area) or "compassionate enforcement" (only arresting prostitutes if a complaint is made or for the purpose of getting them to attend a diversion program). Diversion programs, for the most part, were seen as a useful strategy to encourage prostitutes to exit prostitution.

[92] An RCMP officer described Project KARE, an operation established in 2003 in response to a growing number of missing persons and unsolved homicide cases in Alberta, a number of which involved missing female prostitutes. Project KARE's Pro Active Team focused on the missing prostitutes; one "proactive" strategy they used was to collect identifying information and DNA samples from women currently working as street prostitutes, in order to provide the team with information and assistance in identifying remains, if necessary.

[93] Many police officers described the difficulties of enforcement of the bawdy-house and living on the avails offences. In Toronto, for example, between 2005 and 2007, only 49 charges were laid under s. 212(1)(j) and 82 charges under ss. 210(1) and 210(2)(c); whereas 2,377 charges were laid under s. 213(1)(c) in the same years. Despite these difficulties and the low conviction rate, two officers maintained that bawdy-house laws were important in human trafficking investigations. The respondent also submitted an affidavit from an assistant Crown attorney in Toronto, who confirmed the difficulties of successful prosecution under the bawdy-house and procuring provisions.

[94] Officers who were cross-examined admitted that the level of violence faced by prostitutes on the streets is worse than it is indoors, and that safety precautions can be taken in indoor locations to reduce the level of violence.

### 3. Evidence from Other Lay Witnesses

[95] The applicants tendered evidence from an advocate from an organization that seeks to improve the safety and work conditions of prostitutes, and to assist prostitutes in exiting from the trade; a politician highly concerned with the victimization of street prostitutes; and a journalist who has written extensively on the sex trade. Much of this evidence mirrored what was said by other witnesses.

[96] The respondent presented affidavits from a social worker and three advocates concerned about the negative effects of prostitution. These witnesses almost exclusively focused on street prostitution and its impact on the community, such as: increased traffic, the presence of used condoms and needles, foul language, explicit sexual behaviour, and harassment of community members.

### 4. Expert Evidence

#### (A) Prostitution Research and its Limitations

[97] Due to the relatively hard-to-reach and fluid nature of prostitution, research on the subject has some limitations. This was acknowledged by both parties. Much of the research presented by the parties' experts has been designed as qualitative, as opposed to quantitative research. In *Research Decisions: Quantitative and Qualitative Perspectives*, 3<sup>rd</sup> ed. (Scarborough: Thomson, 2003) at p. 313, Professor Ted Palys describes qualitative research as follows:

...typically inductive..., places a high value on preliminary exploration..., extols the virtues of target or purposive sampling..., and emphasizes that one should maintain flexibility and reap the advantages of more open-ended research instruments.

[98] The method and degree to which qualitative researchers can make causal inferences was debated amongst the experts in this case. Random sampling methods, which minimize sampling error, are generally not possible in prostitution research because the overall population size (or "sampling frame") is typically not known. It is, therefore, important for researchers to limit their conclusions to the discrete sample studied and avoid making generalizations. Both parties also agreed that most prostitution-related research to date has focused on street-based populations, largely due to their accessibility to researchers. Indoor prostitution, which both sides agreed is much larger than street prostitution, is under-researched.

[99] While neither party disputed that the other party's witnesses were, in fact, experts, a great deal of argument and evidence was devoted to criticizing these witnesses. Both parties alleged that certain experts were biased, that conclusions were generalized beyond the sample studied,

that studies were methodologically flawed (for example, for using former prostitutes as researchers or only interviewing prostitutes from a particular social class or venue), and that conclusions were not properly drawn from the research. In order to properly consider and assess the evidence, it is necessary to understand the role of the expert in a case such as this.

a. The Role of the Expert

[100] The role of any expert in litigation is to assist the court. This role does not change regardless of whether the expert is appointed by the court or retained by a party to the litigation. The duties and responsibilities of expert witnesses are set out in the U.K. case, *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd. (The "Ikarian Reefer")*, [1993] 2 Lloyd's Rep. 68 (Q.B. (Comm. Ct.)), at pp. 81-82:<sup>8</sup>

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his [or her] expertise. An expert witness...should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his [or her] opinion is based. He [or she] should not omit to consider material facts which could detract from his [or her] concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his [or her] expertise.
5. If an expert's opinion is not properly researched because he [or she] considers [there to be] insufficient data...available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.... [Citations omitted.]

[101] Qualified expert witnesses are granted a right to give opinions for the assistance of the court. Lay witnesses are not granted this right. Corollary to this right is a responsibility of maintaining an attitude of strict independence and impartiality. The expert's evidence must be uninfluenced as to form and content by the exigencies of the litigation: *Ikarian Reefer*. The expert evidence should not be influenced by the interests of the party calling him or her. The judge's role as gatekeeper requires vigilance to ensure that the necessary responsibilities of an expert are adhered to: *Southcott Estates Inc. v. Toronto Catholic District School Board* (2009), 78 R.P.R. (4th) 285 at para. 110 (Ont. Sup. Ct.), varied on other grounds, 2010 ONCA 310.

[102] To remedy concerns about expert opinions and their misuse (including bias and advocacy), the Inquiry into Pediatric Forensic Pathology in Ontario (the "Goudge Inquiry") recommended using an evidence-based approach to evaluating expert opinions. An evidence-

<sup>8</sup> This case has been cited with approval by a number of Canadian courts, including the Ontario Court of Appeal recently in *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.*, 2009 ONCA 388.

based approach was summarized by Professor David Paciocco in “Taking a ‘Goudge’ out of Bluster and Blarney: an ‘Evidence-Based Approach’ to Expert Testimony” (2009) 13 Can. Crim. L.Rev. 135. Professor Paciocco stated that an evidence-based approach can be “synthesized into four predicates” at pp. 146-47:

- (1) the theory or technique utilized by the expert must be reliable, and used in a manner that is reliable;
- (2) the expert must keep an open mind to a “broad menu of possibilities” (not be biased);
- (3) the expert must be objective and comprehensive in collecting evidence – including rejecting information not germane and transparent about the information and influences involved; and
- (4) the expert must proffer more than the mere opinion, including the complete reasoning process, shortcomings and fair guidance on the confidence in the opinion.

[103] The concerns about expert evidence are not limited to the criminal sphere. The Honourable Coulter A. Osborne, Q.C. devoted an entire chapter of his 2007 *Civil Justice Reform Project: Summary of Findings & Recommendations* to the problems of expert evidence. Although his focus was more on the proliferation of experts and the negative effects this has on litigants, he noted and shared many of the same concerns underlying the Goudge Inquiry. Clearly, the potential pitfalls of expert opinion evidence cross the spectrum of cases in the judicial system.

#### b. Admissibility of Expert Evidence

[104] The procedure used in this application was to place large volumes of expert opinion on the record. Simply placing this evidence before the court does not automatically render it admissible. In a trial, any inadmissible information would be distilled and segregated. The application process is not generally amenable to that same process. It can facilitate a litigation strategy where parties may be more concerned with placing potentially important information on the record, as opposed to engaging in a rigorous admissibility analysis. As an impartial adjudicator, an application judge cannot disregard his or her role as gatekeeper simply because there is no jury.

[105] The leading case on expert evidence admissibility is *R. v. Mohan*, [1994] 2 S.C.R. 9, which held that there are four criteria to be met for expert opinion evidence to be admissible: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert.

[106] The Ontario Court of Appeal recently proposed a helpful approach to consider the *Mohan* criteria in *R. v. Abbey* (2009), 97 O.R. (3d) 330, 2009 ONCA 624, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 125. At para. 76, Doherty J.A., for the court, explained the suggested two-step approach:

First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This “gatekeeper” component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence [citations omitted.]

[107] Justice Doherty listed at para. 80 the four preconditions that must be established at the first stage of the analysis:

- the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
- the witness must be qualified to give the opinion;
- the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
- the proposed opinion must be logically relevant to a material issue.

[108] Evidence is to be excluded when it fails to meet all of the preconditions. Where the trial judge is satisfied that all of the preconditions have been met, he or she is to engage in a discretionary cost-benefit analysis to determine legal relevance. Justice Doherty referred to this as the “gatekeeper” stage.

[109] Weighing the benefits involves a consideration of “the probative potential of the evidence and the significance of the issue to which the evidence is directed.” Looking at the potential probative value requires a consideration of the reliability of the evidence. Determining reliability includes looking at the subject-matter of the evidence, the methodology used by the proposed expert, the expert’s expertise, and the extent to which the expert is shown to be impartial and objective.

[110] The opinion evidence at issue in *Abbey* was based on qualitative research, as is much of the expert opinion in the present case. Justice Doherty suggested a useful series of potentially relevant questions to determine the reliability of such evidence at para. 119.

[111] Weighing the costs involves “address[ing] the various risks inherent in the admissibility of expert opinion evidence, described succinctly by Binnie J. in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600 at para. 47 as ‘consumption of time, prejudice and confusion.’”

[112] This gatekeeper stage requires a consideration of “the extent to which the proffered opinion evidence is necessary to a proper adjudication of the fact(s) to which that evidence is directed”: *Abbey* at para. 93.

[113] In the case before me, it is not practicable to engage in an admissibility analysis for each piece of evidence contained in the record. Furthermore, the parties did not object to the opinion

evidence tendered by the opposing side. I am aware that in *Charter* cases, judges are also the triers of fact. Judges are expected to disabuse themselves of irrelevant and inflammatory evidence: see *Masters' Association of Ontario v. Ontario (Attorney General)*, [2001] O.J. No. 1444 (Div. Ct.) (QL). While the evidence may be received at the hearing, it may not meet the strict rules of admissibility outlined in the *Mohan* and *Abbey* cases. Rather than engage in a time-consuming analysis of each piece of evidence, I have chosen to exercise the gatekeeper function by assigning little or no weight to evidence which does not meet the *Mohan* and *Abbey* requirements. This is the most practical method to address the concerns raised about the legal relevance and reliability of certain expert opinions in the circumstances of this case.

c. Independence of Expert Witnesses

[114] The following factors are relevant to the consideration of the weight to be given to expert evidence:

- a) Unwillingness of the expert to qualify an opinion or update it in the face of new facts provided (often in cross-examination);
- b) Bold assertions without a properly outlined basis for the claim;
- c) Refusal to restrict opinions to expertise or the expertise demarked by the judge as required by the court;
- d) Lack of sufficient independence from the party proffering the expert; and
- e) Prior history as an advocate on the topic.

[115] This list is not necessarily exhaustive. Certain facts or areas of expertise may be more vulnerable to some of these indicia than others. Each case must be analyzed on its own facts in deciding what weight should be given to the evidence of experts.

(B) Areas of Agreement and Disagreement amongst the Experts

[116] The experts generally agree on the following statements:

- a) Street prostitution is a dangerous activity;
- b) All prostitution, regardless of venue, carries a risk of violence;
- c) Prostitution conducted in indoor venues can be dangerous;
- d) There is significant social stigma attached to prostitution; and
- e) There are multiple factors responsible for the violence faced by prostitutes.

[117] The following are the key matters in dispute amongst the experts:

- a) Whether indoor prostitution is, or can be made, less dangerous than street prostitution;
- b) Whether indoor prostitutes are in a better position to prevent harm to themselves than street prostitutes; and
- c) Whether the impugned provisions materially contribute to the risk of harm suffered by prostitutes.

(C) Summary of the Applicants' Expert Evidence

[118] The following is a brief summary of the evidence given by the applicants' expert witnesses.

a. The Nature of Prostitution in Canada

[119] Most prostitutes in Canada are women. It is estimated that approximately 80 per cent of prostitution occurs predominantly in indoor locations, although the exact number is not known. Indoor prostitution can occur "in-call," where the clients attend at a fixed indoor location such as a prostitute's home or a massage parlour, or "out-call," where prostitutes meet clients at different locations such as in hotel rooms or clients' homes. Street prostitution was described as being divided between low and high "tracks" or "strolls" (which are areas where prostitutes congregate). Prostitutes working the low track were described as being on the bottom of the spectrum of prostitution in terms of health, safety, and earnings.

[120] Many of the applicants' experts gave opinions on stereotypes and misperceptions about the sex trade in Canada. For example, some experts challenged the notion of the prostitute as a victim, maintaining that some turn to prostitution not out of desperation, but because they see it as a better option than other opportunities, such as unskilled labour. As well, evidence was led that homeless, drug-addicted prostitutes represent a small percentage of prostitutes, also known as "survival sex workers." Some experts opined that pimping is far less prevalent in Canada than some popular literature and media depictions would hold, and that the "mythology of the pimp" is rooted in racial and sexual bias.

b. Violence in Prostitution<sup>9</sup>

[121] Violence in prostitution is primarily inflicted by male clients against female prostitutes. The applicants' experts maintained that street prostitution is much riskier, in terms of violence, than indoor prostitution. Some of the experts stated that street prostitutes are more likely to be victims of homicide than other prostitutes and much more likely than women in the general population. Factors that can increase safety levels for indoor prostitutes include greater control over their physical environment, close proximity to others who can intervene if help is needed, the ability to better screen out dangerous clients (taking names and credit cards in advance for example), a more regular clientele, the use of drivers to get to and from appointments, and response plans for dangerous situations.

[122] As mentioned above, the applicants' experts did not state that working in indoor locations eradicates the risk of violence; they agreed that there is always the potential for danger from any client. Additionally, in some of the experts' opinions, conducting indoor in-call work is relatively

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<sup>9</sup> The way "violence" towards prostitutes was characterized by the various experts had an impact upon their opinions as to whether violence was inherent to prostitution or whether there were ways that prostitution could be made safer. For example, one view is that violence means a systemic power imbalance. Another view is that violence includes physical *and* psychological violence. When referring to violence, I am referring to physical violence, unless stated otherwise.

safer than indoor out-call work. Some of the dangers associated with out-call work include that it is difficult to assess the safety of a destination beforehand, the client may not be alone, and exit routes may not be easily identifiable or accessible. As well, many of the applicants' experts asserted that how an indoor location is run (for example, what screening measures and other safety precautions are taken) can have an impact on the level of safety.

[123] Dr. Elliott Leyton, Professor Emeritus at Memorial University and an expert in serial murder, asserted that prostitutes are often targeted by serial killers. He maintained that while the case of Robert Pickton may have brought this to the attention of Canadians in recent years, there are many other examples of persons who have targeted prostitutes in the past. For example, Jack the Ripper murdered between five and eleven prostitutes in London in the late-nineteenth century; in the same period, Dr. Thomas Cream, the "Lambeth Poisoner" killed up to nine victims, many of whom were prostitutes. In 2003, Gary Ridgway, also known as the Green River Killer, confessed to killing and disposing of the bodies of 48 women, most of whom were prostitutes. In the late 1970s, Peter Sutcliffe, the Yorkshire Ripper, killed at least 13 women, many of whom were prostitutes. Arthur Shawcross, the Genesee River Killer, strangled 11 victims, most of them prostitutes, in the late 1980s. Joel Rifkin was convicted of murdering nine women in New York State in the early 1990s, most of whom were young prostitutes. In December of 2006, the bodies of five prostitutes were discovered in England; two men were arrested for these murders.

[124] The RCMP established Project KARE in Edmonton in 2003. It was a special division created to attempt to solve 41 unsolved homicides and locate more than 30 missing persons from "high-risk lifestyles" involving prostitution and drugs. Since its inception, only two of the murders have been solved, while five additional prostitutes have been killed.

c. Effect of the Impugned Provisions

[125] Many of the applicants' experts provided the opinion that the impugned provisions increase the level and risk of violence against prostitutes. For example, they contended that the provisions at issue:

- a) Limit the places and ways in which prostitution can be practised that can lower the risk of violence;
- b) Sustain stigmatization of prostitutes and prostitution; and
- c) Create a conflicting victim/criminal status in the eyes of the police, which leads many prostitutes to believe that the police are not willing to protect them.

[126] Thus, according to the applicants' experts, safer ways to conduct prostitution are criminalized, whereas riskier ways are not.

[127] For example, the applicants' experts tended to agree that working in-call is the safest way to conduct prostitution; however, it is illegal due to the bawdy-house provisions. Working out-call can be done without violating the law, but carries its own set of risks. Some strategies to



reduce these risks, such as hiring a driver or bodyguard or meeting a client in a public place beforehand, run afoul of the law, according to the experts.

[128] Additionally, street prostitutes reported employing client-screening strategies (such as working out client expectations in advance and checking for weapons and the presence or absence of door handles and lock release buttons); however, many reported that such strategies take time, which elevates the risk of arrest under the communicating provision. Consequently, some prostitutes reported feeling rushed and reluctant to work out the details of a transaction before moving to a private location, thereby limiting their ability to screen for potentially violent clients. Similarly, working in isolated areas minimizes arrest under the communicating provision, but increases the risk of potential violence, and limits the ability for prostitutes to share information with each other (such as the identity of dangerous clients).

[129] Dr. John Lowman, one the applicants' key witnesses, is a Professor at the School of Criminology at Simon Fraser University. He has a Ph.D. in geography from the University of British Columbia. Dr. Lowman has studied prostitution in and around Vancouver for over 30 years and has published extensively in the area. He has been commissioned by the Department of Justice on a number of occasions to research prostitution in Canada. The respondent acknowledges that Dr. Lowman has expertise in the fields of criminology and sociology but not in psychology or law.

[130] Dr. Lowman reported how various law enforcement initiatives to enforce the communicating provision in Vancouver have had the effect of displacing street prostitutes from some of the city's traditional strolls into a more isolated commercial and industrial area. Dr. Lowman described this area as an "orange light district," which was not actively patrolled by police in order to diminish complaints from residents in more populated areas. He says that from 1995 to 2001, approximately 50 women who worked in this orange-light district went missing.

#### (D) Summary of Respondent's Expert Evidence

[131] Most of the respondent's experts did not comment specifically on the impugned provisions or on prostitution in Canada. Rather, the focus of their evidence was on prostitution in general. The respondent's experts largely maintained that all prostitution is inherently harmful, as prostitution is a form of violence against women.<sup>10</sup> According to some of the respondent's experts, prostitution is violent or harmful because of a systemic power imbalance between female prostitutes and male clients.

[132] Dr. Melissa Farley was one of the respondent's key witnesses. Dr. Farley has a Ph.D. in counselling psychology from the University of Iowa and has been a practising psychologist and researcher for over 40 years. For the last 15 years, she has conducted social science research on the harms associated with prostitution and human trafficking. She has published 17 peer-reviewed articles on prostitution, and has provided testimony on prostitution to the governments of South Africa and New Zealand. Dr. Farley's research has involved interviews with over 900 prostitutes and former prostitutes in ten countries. In 1995, she founded Prostitution Research

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<sup>10</sup> Discussion of male, transgender, and transsexual prostitutes was absent from much of the respondent's expert opinions.

and Education (PRE), a non-profit organization that seeks to abolish prostitution. She is currently the executive director of PRE. According to Dr. Farley, prostitution is better understood as domestic violence, rather than as a job.

[133] The respondent's experts stated that prostitution is linked to a number of harmful activities, such as violence, drug and alcohol addiction, organized crime, and human trafficking. The respondent's experts concluded, for the most part, that there is fluidity between different prostitution venues, and, consequently, distinctions between indoor and outdoor prostitution are not meaningful. That said, Dr. Farley, who has arguably conducted more research on prostitution than the respondent's other experts, found in one of her major studies "significantly" more physical violence in street prostitution, as compared to prostitution in brothels. In Dr. Farley's opinion, however, there is little difference in the level of psychological violence as between indoor and outdoor venues.

[134] Prostitutes were described by the respondent's experts as a vulnerable, victimized population. Most of the prostitutes interviewed by their experts were street prostitutes or victims of trafficking. Some of the experts opined that childhood abuse overwhelmingly precedes entry into prostitution. One expert's view was that the average age of recruitment into prostitution in Canada is 14 years old. Some of the respondent's experts went into detail explaining tactics that pimps use to control and manipulate prostitutes. Finally, the respondent's experts commented that the vast majority of prostitutes want to "exit" or leave prostitution, but face difficulties in doing so.

## 5. Evidence Contained in Government Debates and Reports

[135] The parties submitted several volumes of legislative and other government-generated evidence. This evidence tends to support the notion that prostitution is an intractable social problem, one which researchers have a difficult time accessing, and policy-makers have a difficult time solving. There is disagreement about the proper legislative approach to prostitution.

### (A) Early Developments

[136] Canada's vagrancy laws, inherited from England and unchanged for over 80 years, were removed from the *Criminal Code* in 1972: *Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13. The provisions aimed at street prostitutes were replaced by s. 195.1, which prohibited "solicitation" for the purpose of prostitution. In *Hutt v. The Queen*, [1978] 2 S.C.R. 476, the Supreme Court held at p. 482 that the solicitation in question had to be "pressing or persistent" to make out the offence. This interpretation led to law enforcement officials complaining that the control of street prostitution had become very difficult.

[137] In March of 1983, the House of Commons Standing Committee on Justice and Legal Affairs agreed that existing *Criminal Code* provisions were not sufficient to halt solicitation for the purposes of prostitution. The Committee recommended that the law preventing any person from soliciting be defined to include the person soliciting the service of the prostitute, that public place be defined to include private places in public view (for example, a vehicle), that offering or

accepting an offer to engage in prostitution in public be punishable on summary conviction, that a new offence of being involved with a prostitute under the age of 18 be created, and that a review of the amendments be conducted three years after their coming into force.

[138] In June of 1983, the Minister of Justice rejected the Committee’s recommendations and instead formed the Special Committee on Pornography and Prostitution, chaired by Vancouver lawyer Paul Fraser. This Committee commissioned a great deal of empirical research and ultimately published the *Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and Services Canada, 1985) [the “*Fraser Report*”] in April 1985.

(B) The *Fraser Report* - 1985

[139] The *Fraser Report* began by mapping the ideological landscape and philosophical and ethical traditions within which debates on prostitution were taking place, concluding that policies addressing prostitution ought to be guided by the principles of equality, individual adult responsibility, liberty, human dignity, and an appreciation of human sexuality.

[140] In light of these principles, the *Fraser Report* recommended that the adult prostitute be given leeway to conduct his or her business in privacy and dignity, by moving indoors in small numbers in order to better protect safety. Further, the *Fraser Report* recommended that adults engaging in prostitution could and should be counted on to be responsible for themselves, and therefore should be entitled to give their earnings to whomever they wish provided no coercion or threats were present.

[141] After touring the country for several years, the Committee was unequivocal in concluding at p. 345 that “there is no consensus on the subject of prostitution in this country.” The *Fraser Report* identified the causes of prostitution as economic disadvantage, childhood sexual abuse, drug use, and the effect of pornography on young persons. The *Fraser Report* rejected the idea that most prostitutes work to support a drug habit at p. 375:

The notion that prostitutes are on the street in order to earn the large amounts of money necessary to support a serious drug habit, does not find significant support from the research. There are some prostitutes who are in this position but they appear to be a very small part of the business and not at all typical. While some use alcohol and drugs in order to be able to cope with their work, the majority are not heavy users and do not use these substances while working because they do not want to lower their levels of awareness. In what is often a violent business, prostitutes need to keep all their wits about them.

[142] Many of the applicants’ arguments find support in the *Fraser Report*. For example, the *Fraser Report* concluded at p. 378 that “the way in which street prostitution is currently carried out, results in a profession which is often dangerous, especially to the prostitute, but also to the customer at times.” The *Fraser Report* found no evidence to support a connection between prostitution and organized crime. The *Fraser Report* noted that prostitutes were aware that a husband or lover with whom they shared a voluntary and supportive relationship could be seen

as their pimp, and were therefore unwilling to be open about these relationships for fear of the repercussions for their partners.

[143] At pp. 388 and 392, the *Fraser Report* stated:

Laws which are designed to control activities such as extortion, fraud, blackmail or intimidation in normal businesses, are seen to be inadequate with respect to prostitution. Instead we have a series of special laws. This legislation reflects the thinking of earlier generations which saw prostitution and related activities as immoral, the people engaged in these activities as truly depraved or of sub-normal intelligence, and always, the danger of innocent women being seduced into the business.

...

The fact that we have special laws surrounding prostitution does not, however, result in curtailing all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public. Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens.

[144] Some of the arguments made by the respondent are also supported by findings in the *Fraser Report*, which found at p. 383 that:

Street prostitution increases traffic and impedes the flow of traffic as potential customers and simple onlookers cruise the streets. It increases the noise in neighbourhoods, particularly in the early morning hours, as car doors are slammed or altercations occur between the various parties to the business. Although prostitutes are rarely pressing and persistent in their solicitation of customers, most prostitutes have at some time approached someone they thought was a potential customer, but who, in fact, was not looking for sexual services. Similarly, women walking through these areas have sometimes been approached by men who thought they were prostitutes.

[145] In assessing the overall effect of the matrix of laws preventing aggressive solicitation, living on the avails of prostitution, and keeping a bawdy-house, the *Fraser Report* stated at p. 532:

Because of the haphazard and inconsistent way in which the law of prostitution has developed, it ignores the tensile quality of prostitution and the linkages between the various forms of prostitution. More particularly, the law, in both its substance and enforcement, fails to recognize the reality that if pressure by the law is exerted in one context or location, it will produce a shift of the activity to another setting or location. This is seen in street prostitution where police charges or harassment in one location will produce a migration or dispersal of prostitutes

to other areas which appear to be less subject to police scrutiny and public concern.

[146] Members of the Fraser Committee concluded that in those jurisdictions where prostitution or its related activities were criminalized, the laws had failed to eliminate prostitution.

[147] The Committee presented sixteen recommendations on prostitution to the Minister of Justice, concluding that an overall strategy to deal with prostitution ought to emphasize both legal and social change. Five of these recommendations were directed at social reform. The remaining recommendations addressed legal reform. The *Fraser Report* was critical of the matrix of prostitution laws at p. 531: “as so often happens with the development of criminal law, the present *Criminal Code* provisions reflect a number of underlying policies introduced at different times which do not sit well with each other.” Some of the recommendations included the following:

- a. Removing the prostitution-related activities of both street prostitutes and customers from the *Criminal Code* except where they contravene existing *Criminal Code* provisions by creating a definable nuisance;
- b. Rewriting the procuring and living on the avails sections of the *Criminal Code* that deal with exploitive behaviours (pimping) to prohibit instead behaviour which involves force or threats of force; and
- c. Rewriting the bawdy-house sections to enable small numbers of prostitutes to work from their homes and to permit provinces (and municipalities) to regulate small scale prostitution establishments through zoning, licensing, and health and safety provisions.

[148] The *Fraser Report* ultimately concluded that the law on prostitution had failed to achieve its underlying objective of reducing prostitution. Instead, it operated to victimize and dehumanize prostitutes.

[149] Parliament did not adopt the recommendations of the *Fraser Report*. Instead, in November of 1985, it introduced Bill C-49, which included the current communicating provision. Some Members of Parliament criticized the Bill as a hasty response to a complicated problem. Justice Minister John Crosbie promised the House that the remainder of the recommendations in the *Fraser Report* would be addressed in the following year. Bill C-49 became law in December of 1985, subject to a three-year review of its effectiveness. No further legislative changes were made.

(C) The Three-Year Review: *Synthesis Report* - 1989

[150] In 1989, the Department of Justice published research that was conducted as part of the three-year review of Bill C-49 in a report titled *Street Prostitution: Assessing the Impact of the Law Synthesis Report* (Ottawa: Department of Justice Canada, 1989) [the “*Synthesis Report*”].

The *Synthesis Report* integrated research commissioned by the Department of Justice in five jurisdictions across Canada from a variety of leading researchers, including Dr. John Lowman and Dr. Augustine Brannigan, who are affiants for the applicants. The research was designed to evaluate whether Bill C-49 had caused a reduction in the nuisance associated with street prostitution.

[151] The *Synthesis Report* concluded that while the law had had a short-term effect in reducing street prostitution in Halifax, Niagara Falls, London, and Ottawa, in the cities where street prostitution posed the largest problem, Toronto, Vancouver, Winnipeg, Regina, and Montreal, the law had little or no effect besides displacing prostitutes from their usual strolls. While the profile of street prostitutes had not been changed by the law, those working after the legal change tended to have lengthier criminal records than street prostitutes surveyed before the legal change.

[152] The *Synthesis Report* found that police enforced the communicating subsection of s. 195.1 (now s. 213) rather than subsections referring to stopping vehicles or impeding traffic, as these were regarded by police as imprecise and difficult to prosecute. With the exception of London, Ontario, in all major cities studied, prostitutes were arrested under the communicating provision more often than customers. Conviction rates were high, between 75 per cent and 90 per cent across the country. While fines of up to \$400 were imposed more frequently in Montreal, Halifax, and Calgary, courts in Vancouver and Toronto were more likely to discharge or sentence those convicted to custodial sentences. Neither sentences nor fines were viewed as deterrents; instead, the *Synthesis Report* found that fines were viewed by most in the prostitution business as a “licence fee.”

[153] In addition, the *Synthesis Report* noted instances where police had been able to reduce street prostitution in residential areas without the use of the communicating provision as an enforcement tool.

[154] In Montreal, Winnipeg, Toronto and Vancouver, bail practices with area restrictions had forced prostitutes into remote areas, prostitutes worked later at night or on weekends to avoid police, and the working atmosphere had become more tense. In Calgary, the numbers of bad dates had increased, while in Vancouver, prostitutes reported being less likely to report bad dates to police for fear of being arrested themselves.

[155] In October of 1990, the House of Commons Standing Committee on Justice and the Solicitor General responded to the *Synthesis Report* and the decision of the Supreme Court of Canada in the *Prostitution Reference* by recommending funding for services to assist prostitutes in leaving prostitution and recommending statutory amendments to allow prostitutes and customers to be fingerprinted and photographed.

(D) The Calgary/Winnipeg Study on the Victimization of Prostitutes - 1994

[156] In 1994, the Solicitor General and the Department of Justice funded a field study in Calgary and Winnipeg investigating whether or not s. 213 had put prostitutes at an increased risk of harm. Dr. Augustine Brannigan, a professor of sociology at the University of Calgary, was

the head researcher and drafter of the formal report, *Victimization of Prostitutes in Calgary and Winnipeg* (Ottawa: Department of Justice Canada, 1994) [the “*Calgary/Winnipeg Study*”].

[157] The *Calgary/Winnipeg Study* made use of statistics available through the Canadian Centre for Justice Statistics showing that 63 known prostitutes were killed between 1991 and 1995, making up five per cent of all female homicides in Canada. While 20 per cent of all homicides remained unsolved, 54 per cent of the homicides of known prostitutes remained unsolved at the end of 1995. The *Calgary/Winnipeg Study* concluded the following at p. 2:

Since the law outlaws simple communication in public for the purposes of prostitution, it has been suggested that to escape surveillance prostitutes might be pressured to work in more remote locations and might be less careful in screening potential dates. In addition, the increased liability of arrest might make the prostitutes more dependent on exploitative pimps for protection in order to work, and subject to violence and coercion to ensure continued dependency. As a consequence, the suppression of street communication might increase the exposure of sellers to dangerous johns and pimps and might further entrench them in the street trade.

[158] The *Calgary/Winnipeg Study* found that while the street prostitution industry appeared to be growing in Canada, due to innovative policing, street prostitution in Calgary was shrinking. Police in Calgary had turned their attention away from enforcing s. 213, and had made the detection and prosecution of pimps their primary task. By erecting traffic barricades and asking prostitutes to relocate to other known strolls outside of residential areas, nuisance had been largely controlled.

[159] Dr. Brannigan was reluctant to draw direct connections between s. 213 and incidents of violence or homicide. The *Calgary/Winnipeg Study* concluded at p. 36 as follows:

The role of s. 213 is remote. This section, along with all the other laws designed to suppress prostitution, simply make the buying and selling of sex a comparatively underground activity. The secrecy of the trade not only shields prostitution from public view but provides a cover for violence against prostitutes which would be more likely to be detected and deterred if the activities operated completely in the open.

(E) The Federal, Provincial and Territorial Deputy Justice Ministers’ Working Group on Prostitution - 1998

[160] In 1992, the Federal, Provincial and Territorial Deputy Ministers responsible for Justice established the Working Group on Prostitution to review legislation, policy and practices related to prostitution and to present recommendations. In 1998, the Working Group released its formal report, the *Working Group Report*, paying particular attention to street prostitution and the effects of s. 213. The *Working Group Report* concluded that strategies related to street prostitution should have two major objectives: (1) to reduce the community harm associated with street prostitution, and (2) to prevent violence to prostitutes. The *Working Group Report*

concluded that these two objectives could most effectively be met if prostitution were permitted to occur indoors as “indoor establishments appear to provide some protection to prostitutes as well as decreasing the level of street prostitution and its associated harm.”

[161] The *Working Group Report* recognized the dangers faced by street prostitutes at p. 32:

There is little doubt that the street is a particularly dangerous place for prostitutes. Research indicates a relationship between victimization of prostitutes, including assaults and homicides, and the venue of the sex trade. Nearly all assaults and murders of prostitutes occur while the prostitute is working on the street (Lowman and Fraser, 1995). Street prostitution often involves women getting into vehicles with strangers and travelling to remote areas, which is very risky. There have been few known murders of prostitutes who work indoors.

The *Working Group Report* went on to explain that violence against prostitutes is perpetrated primarily by customers and pimps. Due to inconsistent enforcement, informal zones of tolerance have emerged. The *Working Group Report* concluded at p. 58 that the “legislation has not had a serious impact on controlling street prostitution.”

[162] The *Working Group Report* considered the Supreme Court of Canada’s decision in *Westendorp v. the Queen*, [1983] 1 S.C.R. 43, where the Court held that municipal by-laws in Calgary prohibiting street solicitation were in pith and substance criminal, and thus an unconstitutional foray into federal criminal law-making power. The *Working Group Report* observed that despite this decision, many municipalities continued to require escort services and massage parlours, which are “more likely than not” bawdy-houses, to comply with licensing and zoning regulations. Moreover, s. 210, the bawdy-house provisions, were found by the *Working Group Report* to be infrequently used; this was said at p. 64 to result in a “a two-tier system of enforcement: more affluent buyers and sellers engage in prostitution-related activities with relative impunity while those who are poorer and less well organized are subject to arrest.”

[163] The *Working Group Report* concluded that the recommendation in the *Fraser Report* allowing one or two prostitutes to operate out of their home would make the law consistent and would prevent some of the problems associated with street prostitution. As a corollary, the *Working Group Report* recommended regulatory power over such venues be exercised by interested municipalities.

(F) House of Commons Standing Committee on Justice and Human Rights  
Subcommittee on Solicitation Laws - 2006

[164] In May of 2003, the House of Commons Standing Committee on Justice and Human Rights established a Subcommittee on Solicitation Laws. Member of Parliament Libby Davies, who was an affiant on behalf of the applicants, was a member. The mandate of the Subcommittee was to “review the solicitation laws in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex-trade workers.” In December of 2006, the Subcommittee presented its



report entitled *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada, 2006) ["*Subcommittee Report*"].

[165] The *Subcommittee Report* suggested that although street prostitution is highly visible, and arrests under the communicating provision represent over 90 per cent of prostitution-related incidents reported by police, street prostitution represents only five per cent to 20 per cent of all prostitution activity in the country. Between 75 per cent and 85 per cent of those selling sexual services in Canada are women, with a disproportionately high prevalence of aboriginal women. As well, 20 per cent of those involved in street prostitution are transgendered or transvestites. While those charged under the communicating provision tended to be relatively even as between prostitutes and clients, prostitutes ultimately had higher conviction rates and faced harsher sentences than clients.

[166] In contrast, the *Subcommittee Report* found that police rarely laid charges under the bawdy-house provisions, as sting operations are time-consuming and expensive, and complaints about indoor prostitution activities are rare. Witnesses appearing before the Subcommittee stated at p. 56 that "across Canada our law enforcement approach is detrimentally unbalanced, targeting...an already vulnerable population of street sex workers while overlooking the johns and pimps...."

[167] Similarly, the *Subcommittee Report* found that activities prohibited by all of s. 212 made up less than one per cent of all prostitution-related incidents reported. In 2003-2004, only 38 per cent of charges laid under this provision resulted in conviction. The Subcommittee found that this was most likely because these charges are dependent upon prostitutes turning to police for help, and testifying against their pimp. The mistrust between police and prostitutes, and the types of questions typically directed against prostitutes in cross-examination in court tended to discourage prostitutes from coming forward. The Subcommittee expressed concern that the provision was broad enough to encompass the employers and security guards of prostitutes who are "essential to ensuring the prostitutes' safety."

[168] The nuisances associated with street prostitution were identified by the *Subcommittee Report* at p. 29 as "screaming and fighting, abusive behaviour, harassment by clients, used condoms and needles littering public places, noise, etc." Some witnesses told the Subcommittee that harassment of women mistaken for prostitutes tended to worsen after police "cracked-down" on an area, as prostitutes then tended to disperse and disguise themselves to avoid arrest. This made it more difficult for clients to distinguish who was and was not a prostitute. As well, for many residents the most frightening aspect of street prostitution was said to be the accompanying drug-related activities, including "turf wars," violence among street gangs and drug dealers, or strange behaviour exhibited by drug users. The *Subcommittee Report* noted at p. 62 that s. 213 "has not adequately reduced the incidence of street prostitution or even the social nuisance associated with its practice."

[169] The Subcommittee also explored the prevalence of violence against prostitutes in Canada, finding that the violence to which prostitutes are subjected ranges from whistles and insults to rape and murder. According to the *Subcommittee Report*, violence towards street prostitutes is perpetrated by clients, pimps, drug dealers, the public, and even police officers. Indoors,

working conditions range from clean, respectful environments to establishments with management policies akin to slavery. Based on information from the Canadian Centre for Justice Statistics, the *Subcommittee Report* stated that between 1994 and 2003, at least 79 prostitutes were killed while engaging in prostitution activities, and that 95 per cent of these victims were women. Three quarters of the 79 homicides occurred in Vancouver, Edmonton, Toronto, Montreal, Winnipeg, and Ottawa-Gatineau. The *Subcommittee Report* cited a study conducted by Statistics Canada in the 1990s, which found that over 85 per cent of the victims were killed by a client. The Subcommittee concluded at p. 19 that it appears that “off-street prostitutes are generally subject to less violence.”

[170] The *Subcommittee Report* summarized the views provided by witnesses on the relationship between prostitution laws and violence at pp. 61-66:

Like many of the witnesses heard during the Subcommittee's study, the literature concerning the impact of prostitution laws on the health, safety and wellbeing of prostitutes indicates that criminalization intended to control prostitution related activities in Canada jeopardizes the safety of prostitutes, as well as their access to health and social services.

...

During our hearings, a number of witnesses maintained that the introduction of the communicating law (section 213) also led to the scattering of prostitutes, making them more vulnerable to violence and exploitation. Whereas in the past street prostitutes frequently worked in teams in an effort to reduce the risk of violence (for example by helping take down information such as clients' licence plate numbers and descriptions), they now tend to work in isolation from one another. While this practice has the advantage of attracting less attention from police, it also minimizes information-sharing, making prostitutes more vulnerable to meeting violent clients since they are not as well informed and are often less aware of the resources available to assist them.

...

The vulnerability of persons engaging in street prostitution is also related to the fact that they frequently change locations. As a result of an arrest, fear of arrest, or a court order, [street prostitutes] are often forced to move to another area, effectively separating them from friends, co-workers, regular customers and familiar places. A number of witnesses indicated that this instability jeopardizes prostitutes' health, safety and well-being.

...

Although section 210, which prohibits bawdy-houses, is seldom enforced, witnesses indicated that many people are at risk every day of being charged with being found in a common bawdy-house. Throughout our study, witnesses also

maintained that this section leaves prostitutes with few options if they wish to sell their sexual services under safer conditions. One prostitute made the following points in [an anonymous] brief submitted to the Subcommittee:

Preventing those with the objective of engaging in prostitution from creating a safe place to do so only serves to create unsafe places to do business. As the law is now, the only possible way to carry out sex work is by going to the home of a client. The unknown factors involved in a home visit (under current code) for the sex worker create a dangerous situation. One does not know if the client has any cemented connections to the address provided and therefore cannot be provided with security even if measures are taken to inform a friend or colleague where they are and who they are with. In fact, article 212 actually prevents a sex worker from taking such precautionary measures.

...

According to the testimony of a number of former prostitutes, section 212 increases the isolation of those who engage in prostitution by criminalizing cohabitation and the establishment of an employer-employee relationship. ...

[171] Dr. Gayle MacDonald, who is a Professor of sociology and an affiant for the applicants, told the Subcommittee at p. 64 that:

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 the police, she may misjudge - at great peril to her - the safety of a client.

[172] The *Subcommittee Report* suggested that most prostitutes do not report incidents of violence against them out of fear that they might be arrested and incur other consequences such as losing custody of their children, losing their lawful employment, and being stigmatized as a result of being found guilty of a prostitution-related activity. The Subcommittee also discussed the impact of criminalization on the economic security of prostitutes, who may lose housing, employment, or savings as a result of fines, imprisonment, or proceeds of crime legislation.

[173] The Subcommittee heard testimony from those who believed the laws remained an important message against prostitution in all its forms and thus an important part of the campaign to end the oppression of women by men. As well, many law enforcement and social service officials felt that the laws represented an important point of prevention and contact with prostitutes and their clients, acting as a temporary “wedge between the sex trade worker and her pimp,” or a tool for compelling a prostitute through “a condition of probation that requires they meet with a counsellor who can help them develop exit strategies.”

[174] Members of the Subcommittee were concerned about the unequal application of the existing laws such that many indoor prostitutes operate with virtual impunity, while vulnerable and marginalized street prostitutes, especially aboriginal and transgendered persons as well as drug addicts, are routinely criminalized. Just like their predecessors, the Subcommittee recommended funding for further prostitution research, exit programs, and social services.

[175] A majority of the Subcommittee concluded that Canada's approach to adult prostitution is contradictory and inefficient, and ought to reserve criminal sanction for harmful situations rather than sexual activities between consenting adults that do not harm others. At p. 90, the *Subcommittee Report* stated:

In order to ensure that both individuals selling sexual services and communities are protected from violence, exploitation and nuisance, the majority of the Subcommittee urges reliance on *Criminal Code* provisions of general application targeting various forms of exploitation and nuisance, such as public disturbance, indecent exhibition, coercion, sexual assault, trafficking in persons, extortion, kidnapping, etc....

[176] Meanwhile, a minority of the Subcommittee concluded that prostitution is a form of violence, not commerce, and that as such, prostitutes are victims. Therefore, there can be no such thing as consent to prostitution or harmless sales of sexual services. These members advocated for legal reform criminalizing pimps and clients, who would pay hefty fines upon conviction, while largely decriminalizing prostitutes, who would benefit from programs funded by the fines paid.

[177] On March 30, 2007, the government of Canada issued a formal response to the *Subcommittee Report*. In its response, the government stated that it continues to view prostitution as a form of exploitation and does not support legal reform that would facilitate this exploitation. Instead, the government suggested that it would continue to focus on reducing the prevalence of prostitution by supporting education initiatives, programs to assist individuals to exit prostitution, and consistent law enforcement.

## 6. International Evidence

[178] Evidence of the legal framework in other jurisdictions is often considered during constitutional litigation in order to provide a context and for particular reference to the application of section 1 of the *Charter*. In this case, the parties tendered expert evidence from several foreign jurisdictions that have responded legislatively to prostitution. They explained that these jurisdictions were chosen because they represent political regimes similar to Canada's, that is, western liberal democracies; and because there is adequate information available to accurately describe these regimes.

[179] The applicants argue that this evidence is demonstrative of an evolving international trend of decriminalization that often improves prostitutes' access to social services including job

training, health care, and contractual rights of compensation, improves relations between police and prostitutes, and is accompanied by municipal regulation and taxation.

[180] The respondent submits that this evidence demonstrates that the risk of harm is inherent to prostitution regardless of the legal regime in which it is practised. Furthermore, indoor prostitution is not safer and sex tourism, human trafficking and child exploitation often increase as a result of decriminalization.

[181] The following section is a summary of the background of the affiants and the nature of the opinions of these international experts on the issue of prostitution.

(A) Respondent's Witnesses: International Experts

- a) Dr. Lotte Constance Van de Pol - She has a Ph.D. in history from Erasmus University, Rotterdam. She has studied the history of prostitution in the Netherlands, especially in Amsterdam, from the 15<sup>th</sup> century to the present day. She has not engaged in any present day empirical research. It is her view that the Dutch experience with decriminalization has, on balance, negatively impacted prostitutes. She asserted that, because drugs and crime remain a part of decriminalized prostitution, the state should not sanction it, even if this makes individual prostitutes more vulnerable.
- b) Dr. John Pratt - He is a Professor of criminology at Victoria University of Wellington, New Zealand. He holds a Ph.D. from the Centre for Criminological Studies, University of Sheffield and is an expert in research methodology. He has not studied prostitution nor has he done any research on the subject. He presented evidence of methodological weaknesses in the official follow-up studies commissioned by the New Zealand government to measure the effects of decriminalization. He also conceded that the number of street-based sex workers in Christchurch has not increased since decriminalization.
- c) Dr. Janice Raymond - She is a Professor Emerita at the University of Massachusetts, Amherst. She holds a Ph.D. in medical ethics from Boston College. From 1994 to 2007, she served as the co-executive director of the Coalition Against Trafficking in Women ("CATW"), a non-governmental organization that seeks to abolish prostitution and advocates against decriminalization of prostitution. She has published extensively on the subject of prostitution, and argues that prostitution is a form of violence against women. It is her view that there is a connection between decriminalization of the sex industry and human trafficking, and has testified about this before legislative committees around the world. She takes the position that the legislative regime in Sweden that criminalizes buying sex has been more beneficial to prostitutes than the regime in Germany which decriminalizes prostitution.
- d) Dr. Mary Lucille Sullivan - She is a public policy consultant on the issue of prostitution legislation. She holds a Ph.D. in political science from the University of Melbourne, Victoria, and completed her doctoral thesis on prostitution in Victoria,

where selling sex has been decriminalized for two decades. She is an active member of CATW. She asserts that the sex industry has grown in Victoria since decriminalization, that it is connected to organized crime, and that prostitution is inherently dangerous regardless of where it takes place.

- e) Dr. Melissa Farley - As outlined earlier, Dr. Farley has conducted social science research on the harms associated with prostitution and human trafficking. In 1995, she founded Prostitution Research and Education (PRE), a non-profit organization that seeks to abolish prostitution and is the organization's executive director. She concluded that legal indoor prostitution in Nevada has not succeeded in ameliorating violence and forced prostitution.

(B) Applicants' Reply Witnesses: International Experts

- f) Dr. Barbara Sullivan - She has a Ph.D. and is a senior lecturer in political science at the University of Queensland, Australia. Her scholarly studies have focused on prostitution-related issues. She concluded that indoor prostitution reduces the risk of violence to prostitutes and that decriminalization does not result in the growth of the sex industry. She was very critical of Dr. Mary Sullivan's assertions regarding the effects of decriminalization across Australia.
- g) Dr. Ronald Weitzer - He is a Professor of sociology at George Washington University in Washington, D.C. He holds a Ph.D. in sociology from the University of California, Berkeley. He is an expert on research on the sex industry. His comments focused upon the research methodology of Drs. Farley and Raymond. He was critical of Dr. Farley's conclusions on the brothel system in Nevada.

[182] In reviewing the extensive record presented, I was struck by the fact that many of those proffered as experts to provide international evidence to this court had entered the realm of advocacy and had given evidence in a manner that was designed to persuade rather than assist the court. For example, some experts made bold assertions without properly outlined bases for their claims and were unwilling to qualify their opinions in the face of new facts provided. While it is natural for persons immersed in a field of study to begin to take positions as a result of their research over time, where these witnesses act primarily as advocates, their opinions are of lesser value to the court.

[183] The evidence from some of these witnesses tended to focus upon issues that are, in my view, incidental to the case at bar, including human trafficking, sex tourism, and child prostitution. While important, none of these issues are directly relevant to assessing potential violations of the *Charter* rights of the applicants.

[184] Fortunately, these witnesses relied in large part upon comprehensive studies generated by the governments of the foreign jurisdictions that have undergone legal change. I have relied significantly upon the underlying government reports in summarizing the experiences of foreign jurisdictions.

(C) The Netherlands

[185] Dutch law dating back to the early 20<sup>th</sup> century prohibited living on the avails of prostitution and owning a brothel. Prostitution itself was lawful. Yet by the end of the 20<sup>th</sup> century, the law prohibiting brothel ownership was rarely enforced due to a policy of tolerance in the interests of harm reduction. On October 1, 2000, these laws were repealed.

[186] The goal of this legislative change was to eliminate forced prostitution, de-link organized crime and the sex trade, and improve the position of prostitutes by allowing municipalities to regulate and control the sex trade through licensed brothels subject to health and safety regulations. Other existing laws were reformed at the same time to prevent violence towards and the exploitation of prostitutes, as well as to prevent human trafficking<sup>11</sup> and the exploitation of children.

[187] The law requires that all prostitutes working in licensed brothels hold a European Union work permit, and prevents anyone with a criminal record from operating such a business. Approximately half of all prostitution occurring today in the Netherlands happens outside of this legal sector, and often involves foreign prostitutes providing out-calls set up by telephone and over the internet.<sup>12</sup> Some evidence of the continuing involvement of organized crime in prostitution has emerged in recent years, and new regulatory reforms are being aimed at these syndicates. Recent United Nations reports suggest that there are approximately 20,000 women involved in prostitution in the Netherlands, with two-thirds of them coming from Eastern Europe and developing countries.

[188] According to reports commissioned by the Ministry of Justice, Dutch decriminalization has been moderately successful in improving working conditions and safety in the legal practice of prostitution. The reports suggest that the women working in the licensed sector are neither underage nor exploited. Sexually transmitted diseases are now less prevalent among prostitutes than among the population at large, and free anonymous health services are available within Amsterdam's Red Light District. Approximately 90 per cent of reported incidents of violence against prostitutes are against women working illegally. These reports conclude that the supply of and demand for prostitution in the Netherlands has decreased since the legislative changes.

[189] Despite the option to move indoors, up to ten per cent of prostitution continues to occur on the street. Street prostitutes are often drug addicts or suffer from mental illness, are unwanted in brothels, and unable to pay to rent a window. Some Dutch municipalities have created zones of tolerance, "tippelzones," where street prostitution is permitted. Nurses, doctors and social workers inhabit tippelzones, providing needle exchanges, drop-in shower facilities, and advice to women who want to stop taking drugs or receive mental health treatment.

[190] Through ease of access to social services, many addicted prostitutes are connected with social welfare benefits, and this is at times enough to help them leave the sex industry. For those

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<sup>11</sup> Dutch use of the term human trafficking includes pimping, forced prostitution, and all other instances of sexual exploitation.

<sup>12</sup> Both of these may be attributable to a loosening of European mobility restrictions and a global shift in communication technology, and are not necessarily consequences of the new legal regime.

not yet ready to quit prostitution, the police tolerate a few well-behaved drug dealers, whose presence prevents the prostitutes from working outside the tippelzone. Less than a kilometre from the Utrecht tippelzone, Dutch authorities built a set of 14 parking stalls, divided by concrete barriers, so that prostitutes and their customers would not conduct business in residential areas; the proximity to other prostitutes at the stalls also contributes to safety.

(D) New Zealand

[191] Before 2003, New Zealand's criminal legislation prohibited brothel-keeping, living on the earnings of prostitution, procuring, and soliciting sexual services. Prostitution itself was not a crime. Law reform was undertaken to address the health and safety of prostitutes.

[192] In June 2003, New Zealand introduced the *Prostitution Reform Act 2003* (N.Z.) 2003/28 ("PRA"). The stated objectives of the legislation were to safeguard the human rights of prostitutes, protect public health, and prevent the prostitution of persons under the age of 18. The law decriminalized consensual adult prostitution in all forms, and implemented a licensing regime for brothels. Small owner-operator brothels comprising four or fewer prostitutes were permitted without a licence. The law was reviewed five years after its enactment by the Prostitution Law Review Committee ("PLRC"), culminating in the *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) [the "PLRC Report"].

[193] The PRA created a certification system for brothel operators and made it a summary conviction offence for clients, prostitutes, or brothel operators to fail to promote or adopt safer sex practices. This particular legal change gave prostitutes greater power to demand safer sex. Those who previously had not carried condoms or lubrication for fear of it being used as evidence for a conviction told the PLRC that they now felt safe being in possession of these items.

[194] According to the *PLRC Report*, incidents of violence, threats, forcible confinement, theft, and refusal to pay for services have continued after the PRA. However, these incidents are infrequent, except among street-based prostitutes. One noted change since the law reform was an increased likelihood that prostitutes would report incidents of violence to the police. Street prostitutes are now more likely to work during daylight hours or in well-lit areas and are taking greater care to screen clients before entering their vehicles. Under-aged prostitution does not appear to have increased post-decriminalization and, as of 2007, no situations involving trafficking in the sex industry had been identified.

[195] The PRA permits territorial authorities to make bylaws addressing the location and promotion of commercial sexual services. Seven territorial authorities (out of 73 across New Zealand) have implemented local licensing systems for the commercial sex business. In one territory, closed-circuit television cameras were installed in areas known for street prostitution.

[196] The *PLRC Report* concluded that the size of the sex industry has not been affected by the legal changes; however prostitutes are slowly moving from the managed sector (brothels, massage parlours, escort services) to the private indoor sector. While it was hoped that the PRA



would lead street-based prostitutes (11 per cent of the New Zealand sex trade) to move indoors, evidence suggests there is little movement between the street and indoor sectors of the industry.

(E) Germany

[197] Before 2002, German law prohibited anything done in “furtherance of prostitution,” including operating a brothel. Prostitution was deemed legally immoral, and this made contracts for sale of sexual services unenforceable by the prostitute seeking payment for services rendered. Prostitutes were compelled to register with the government and undergo mandatory disease screening.

[198] In 2002, Germany passed *An Act Regulating the Legal Situation of Prostitutes (Prostitution Act) 2001* [“*Prostitution Act*”], which decriminalized brothels and lifted the prohibition against promoting prostitution. The *Prostitution Act* adopted the position that the law must “respect a person’s voluntary, autonomous decision to engage in prostitution as long as it does not violate any rights of others.” Pimping, “for material benefit to supervise another person’s engagement in prostitution, to determine the place, time, extent of other circumstances of the engagement in prostitution,” in the absence of a voluntary agreement, remains a crime. Mandatory disease screening was abandoned. The statute also mandated a three-year review of the legislation which led to an official report in 2007, *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)* (Berlin: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2007) [“*German Report*”].

[199] According to the *German Report*, the goals of the *Prostitution Act* were to remove the illegality of prostitution which “acts as a breeding ground for crime,” improve working conditions for prostitutes, increase their access to social benefits, and facilitate exit. Legislators also hoped that the *Prostitution Act* would protect children from exploitation and curb human trafficking. Although not widely used, prostitutes are now able to receive social assistance and pursue civil remedies in order to claim unpaid remuneration. Germany funds community programs that include support for prostitutes with mental health issues, financial planning, drug counselling, and assistance in leaving the trade.

[200] One of the major goals of the *Prostitution Act* was to add transparency to the sex industry to deter organized crime, as it was believed that legal isolation is what leads to dependence on pimps and criminals. While there is no real evidence that prostitution has become more transparent, the *German Report* indicates that the fear that prosecutions of trafficking and other serious crimes would be more difficult after the legal change is not supported by the evidence.

[201] The *German Report* states that no measurable improvements are detectable in achieving social protection for prostitutes, improving working conditions, encouraging prostitutes to exit the industry, or reducing crime. However, the fears that decriminalization would open the floodgates to organized crime, human trafficking, or the exploitation of minors have not materialized as a result of the legal changes. The *German Report* concludes at p. 12 that:

In a free democratic state ruled by law, the risks, disadvantages and problematical implications associated with prostitution cannot be countered by forcing

prostitution into the shadows using repressive measures. Rather, it must be possible to limit the problematical aspects associated with it by taking prostitution out of the shadows and monitoring the conditions under which it is practiced in a manner that is based on the principles of the rule of law.

(F) Australia

[202] Australia's federal system of government assigns jurisdiction over prostitution to the state or territorial level of government. Decriminalization has occurred in six of Australia's eight jurisdictions. The current situation in each is described below:

- a) *South Australia*: Prostitution-related activities remain criminal.
- b) *Western Australia*: Passed the *Prostitution Amendment Act 2008* (W.A.) but has yet to bring its decriminalization provisions (allowing brothels) into force. Public soliciting for the purpose of prostitution is illegal.
- c) *New South Wales*: Since law reform occurred in 1979, there have been few restrictions on soliciting (it is not permitted near schools or places of worship, for example), and indoor prostitution is governed only by municipal rules.
- d) *Victoria*: Has permitted indoor prostitution since 1984. The law requires all brothels (maximum six rooms), home-based businesses, and escort agencies to obtain a licence (pending a police check) and demands all prostitutes undergo disease screening. Soliciting remains illegal.
- e) *Australian Capital Territory*: Since 1992, brothels, escorts, and independent operators (who must work alone) have been permitted provided they register with the government; condom use is required by law. Street prostitution remains illegal.
- f) *Northern Territory*: Licensed escort agencies and indoor operators (working alone) are permitted, while brothels and street prostitution remain illegal.
- g) *Tasmania*: Individual workers operating indoors are permitted (and can work in pairs), while brothels, escort agencies, and street solicitation remain illegal. The 2005 legislation permitting indoor operations adds provisions against intimidating, assaulting, and threatening prostitutes, and mandates higher sentences for these crimes.
- h) *Queensland*: In response to a scandal that revealed the police had been operating brothels and were engaged in racketeering, Queensland's *Prostitution Act 1999* (Qld.) allowed licensed brothels to operate in restricted locations. Escort agencies and street prostitution remain illegal (in fact, the fine for solicitation has increased). Unique to Queensland, the legislation mandated a five-year review published as *Regulating Prostitution: An*

*Evaluation of the Prostitution Act 1999 (QLD)* (Brisbane: Crime and Misconduct Commission, 2004) [*“Queensland Report”*].

[203] Queensland’s government opted to permit indoor prostitution. The Honourable T.A. Barton, Member for Waterford-ALP, and the Minister for Police and Corrective Services, stated the reasons for this change at the Second Reading of the Bill on November 10, 1999 at 4826:

Licensed brothels are the Government's preferred option as they provide a safer work environment for workers and clients; workers can receive peer support from other workers; workers can be relieved of the responsibility of running a business; brothels provide an access point for health and other service providers; and it is easier to monitor and control safe sex practices in a brothel environment.

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

[205] In New South Wales, which permits public soliciting except in proximity to schools, homes, or places of worship, the government has established “safe house brothels” where, for a small fee, street prostitutes can bring their clients and they will be protected by a monitored intercom, a single entrance with cameras, and they can have access to health and welfare services.

#### (G) Sweden

[206] After decades of decriminalization, Sweden introduced a unique legal response to prostitution in 1999. The *Act on Violence Against Women 1999*, 1 January 1999, criminalized buying sex and pimping, while the selling of sex by prostitutes remains legal. According to the *Fact Sheet on Prostitution and Trafficking in Human Beings* (Stockholm: Ministry of Industry, Employment and Communications, Division for Gender Equality, 2005), the *Act on Violence Against Women* treats prostitutes as victims:

In Sweden, prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children that constitutes a significant social problem, which is harmful not only to the individual prostituted woman or child, but also to society at large. The Swedish Government has long given priority to combating prostitution and trafficking in human beings for sexual purposes. This objective is an important part of Sweden’s goal of achieving equality between women and men at the national level as well as internationally. Gender equality will remain unattainable as long as men buy, sell and exploit women and children by prostituting them.

[207] Promoting or encouraging casual sexual relations for commercial services can be punished by up to eight years' imprisonment where significant exploitation is present. State-run exit programs are accompanied by poverty-reduction measures aimed at women in order to prevent their entry into the sex trade. Estimates suggest that the number of women involved in prostitution in Sweden has decreased from 2,500 in 1999 to less than 1,500 in 2002. The number of women in street prostitution has decreased from 650 in 1999 to less than 500 in 2002. Government reports suggest that there are almost no foreign women remaining in street prostitution, and there is some suggestion that human traffickers may now find Sweden to be an unattractive destination for trafficked women.

[208] The legal change has been accompanied by activities targeting male demand for prostitution including a nationwide poster campaign raising awareness about prostitution and trafficking in women. Additional education programs have been established for police personnel to increase their understanding of the conditions that make women vulnerable to becoming victims of prostitution and trafficking. According to the government fact sheet, after this program began in 2003, complaints that the law was difficult to enforce ceased and there was a 300 per cent increase in arrests. Convictions, however, remain rare. The law applies equally to Swedish peacekeeping forces stationed abroad; in 2002, three Swedish soldiers stationed in Kosovo who were found with prostitutes were arrested and discharged from the military.

(H) Nevada, United States of America

[209] Since 1971, licensed brothels have been permitted throughout the state of Nevada, except in Las Vegas, while procuring and forced prostitution are illegal. A more recent law requires condom use in prostitution and the regular testing of prostitutes for sexually transmitted infections, including HIV.

[210] No government report was submitted reviewing Nevada's experiences with legal indoor prostitution. However, a study by Barbara Brents and Kathryn Hausbeck of the University of Nevada entitled: "Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk and Prostitution Policy" (2005) 20 *Journal of Interpersonal Violence* 270, was filed as an exhibit to the affidavits of Drs. Lowman and Weitzer. Furthermore, Dr. Melissa Farley's 2006 study, *Prostitution and Trafficking in Nevada*, published as a book (San Francisco: Prostitution Research & Education, 2007), was filed on this application.

[211] According to Barbara Brents and Kathryn Hausbeck, a number of safety measures are in place in licensed Nevada brothels in order to protect prostitutes from customer violence. For example:

- a) Prices are negotiated up front while management listens in over an intercom;
- b) Cash is taken up front and brought to a manager, providing the prostitute with an opportunity to communicate any reservations she may have about the client;
- c) Panic buttons are available in every room to call management or set off an alarm if pressed;

- d) The brothel setting prevents clients from leaving very quickly and removes client anonymity; and
- e) After payment and before the sexual encounter, prostitutes perform a visual scan for sores or other indications of sexually transmitted infections; if there are issues, the money is returned and the client is asked to leave.

[212] Dr. Farley suggested that the intercom system is in place to prevent prostitutes from denying a share of their earnings to their pimp. Dr. Farley also suggested that panic buttons may not be enough to prevent violence which can occur very quickly. At p. 21, Dr. Farley commented upon the conclusions of Brents and Hausbeck:

In another study, women were asked if they felt safe in legal prostitution and many responded affirmatively. Usually, however, women mean safe in comparison to other prostitution. Thus the concept of safety is relative, given that prostitution is associated with a high likelihood of violence. One woman described a near-lethal assault by a john in a brothel where he cornered and choked her, fracturing her larynx. She stated that she would probably be dead if another woman hadn't heard the scuffle and broken into her room.

[213] While Brents and Hausbeck cited numerous problems with brothel prostitution in the state, with respect to the issue of violence, the study found that only two and a half per cent of prostitutes surveyed had experienced violence while working lawfully indoors and 84 per cent of licensed prostitutes agreed that their job was safe. The authors concluded at p. 293 that, "Legal brothels generally offer a safer working environment than their illegal counterparts."

## **IX. THE CHARTER ANALYSIS**

### **1. General Approach to Charter Analysis**

[214] It is well-established that courts are to take a generous, purposive, and contextual approach to *Charter* interpretation: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Therens*, [1985] 1 S.C.R. 613; *Re B.C. Motor Vehicle Act, supra*; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Young v. Young*, [1993] 4 S.C.R. 3; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Mills*, [1999] 3 S.C.R. 668; *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, [2009] 2 S.C.R. 295, 2009 SCC 31.

[215] In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2000), 49 O.R. (3d) 662 (Sup. Ct.), aff'd (2002), 57 O.R. (3d) 511 (C.A.), aff'd, [2004] 1 S.C.R. 76, 2004 SCC 4, McCombs J. summarized the general approach to constitutional analysis at paras. 37-39:

Constitutional analysis must proceed with the legislative purpose in mind and in its broader social and political context: *R. v. Mills*, [1999] 3 S.C.R. 668 at 714-15,

139 C.C.C. (3d) 321. Courts must presume that Parliament intended to act constitutionally, and give effect to this intention where possible: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078; *R. v. Mills*, *supra*, at 711.

It is irrelevant that [the impugned provision] of the *Criminal Code* was in place long before the *Charter of Rights and Freedoms*. Parliament has chosen to leave it intact. If possible, therefore, the section must be construed so that it meets constitutional criteria.

The specific constitutional questions raised by this case should be considered with the history and purpose of the legislation in mind. Further, the issues should be viewed in the light of the expert evidence gathered by the parties, and in the current social, political and legal context. [...]

## 2. Legislative Objectives

[216] In light of the fact that the s. 7 arguments raised in this case call into question the means chosen by Parliament to achieve its objectives, it is essential to properly identify the state objective underlying each of the impugned provisions. Each of the parties presented detailed arguments outlining why their interpretation of the objective of Parliament was the correct one.

[217] Before analyzing the objective of each of the impugned provisions, I turn to an issue raised by the parties concerning whether or not moral disapproval of prostitution represents a constitutionally permissible legislative objective.

### (A) Is Morality a Constitutionally Valid Legislative Objective?

[218] The applicants argue that the historical moral objectives of the impugned provisions are no longer constitutionally permissible and should not be considered during the *Charter* analysis.

[219] The CLF argues that prostitution is immoral, should be stigmatized and that it demeans the dignity of the prostitute and her client and harms women and the community at large. The CLF takes the position that morally based legislative objectives are constitutionally permissible where the laws are a reflection of society's core values that are otherwise compatible with *Charter* values.

[220] The AG Ontario submits that all sexual gratification in exchange for payment is inconsistent with respect for the human dignity of the seller of sexual services. Because the law requires that a criminal prohibition must be founded upon a demonstrable apprehension of harm, the AG Ontario argues that the term "harm" should be interpreted to include the commodification of sex and attitudinal harm that would accrue to women as a result of legally sanctioned prostitution. Accordingly, the prevention of harm to and exploitation of prostitutes, and the protection of their dignity as human beings are valid constitutional objectives.

[221] The framework of the *Charter* provides for a balancing of individual rights and societal objectives to be conducted in accordance with the values that underlie our legal system.

[222] It is clear that Parliament is entitled to legislate in order to protect societal values where there is a reasonable apprehension that harm will result if the legislature fails to act. It is also the case that Parliament may pass criminal laws which are based on a notion of right and wrong.

[223] In *R. v. Butler*, [1992] 1 S.C.R. 452, the accused shop owner was charged with selling and possessing for distribution or sale obscene material consisting of pornographic videotapes, magazines and sexual paraphernalia. The Supreme Court was asked to decide whether possession of these materials was protected by the guarantee of freedom of expression under s. 2(b) of the *Charter*. The Supreme Court held that s. 163 of the *Criminal Code* seeks to prohibit certain types of expressive activity and thereby infringes s. 2(b) of the *Charter*. However, the Court held that such an infringement is justifiable under s. 1 of the *Charter*. In conducting the s. 1 analysis, Sopinka J., discussed the morality issue and wrote at p. 492:

I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, “Obscenity and the Charter: Autonomy and Equality” (1991), 1 C.R. (4<sup>th</sup>) 367, at p. 370, refers to this as “legal moralism”, of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of “dirt for dirt’s sake” is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.

On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society. As Dyzenhaus, *supra*, at p. 376, writes:

Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values.

As the respondent and many of the interveners have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate. In this regard, criminalizing the proliferation of materials which undermine another basic *Charter* right may indeed be a legitimate objective.

In my view, however, the overriding objective of s. 163 is not moral disapprobation but the avoidance of harm to society. In *Towne Cinema*, Dickson C.J. stated, at p. 507:

It is harm to society from undue exploitation that is aimed at by the section, not simply lapses in propriety or good taste.

[224] In *R.v. Malmo-Levine, supra*, the Supreme Court considered the constitutionality of a law prohibiting possession of marijuana and wrote at p. 635:

No doubt, as stated, the *presence* of harm to others may justify legislative action under the criminal law power. However, we do not think that the *absence* of proven harm creates the unqualified barrier to legislative action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused.

The appellants cite in aid of their position the observation of Sopinka J., writing for the majority in *Butler, supra*, that “[t]he objective of maintaining conventional standards or propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*” (p. 498). However, Sopinka J. went on to clarify that it is open to Parliament to legislate “on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society” (p. 498 (emphasis added)).

[225] These decisions recognize that a law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values. While the avoidance of harm is not a principle of fundamental justice, the Court recognized that there is a state interest in the avoidance of harm to those subject to its laws which may justify parliamentary action.

#### (B) Canada’s Prostitution Laws: History, Interpretation, Objectives

[226] In order to consider the constitutionality of the prostitution laws in issue, it is necessary to review the legislative history, objectives, and the interpretation of the impugned provisions.

[227] Adult prostitution has never been a crime in Canada. Rather, Parliament has chosen to control prostitution indirectly, by making many of the acts related to prostitution illegal: *Prostitution Reference* at p. 1141. Prostitution laws have a long history in Canada, pre-dating Confederation, and have developed in a rather *ad hoc* manner, reflecting differing concerns of legislators over the years. The authors of the *Fraser Report* summarized the history of prostitution-related laws in Canada as follows, at p. 403:

The earliest provisions in Canadian criminal law relating specifically to prostitution dealt with bawdy-houses and street walking. The bawdy-house provisions which were ‘received’ from England made it an offence to ‘keep’ a bawdy-house (typically a brothel). However, unlike the parallel English law, they also embraced both being an inmate of or one ‘found in’ (a customer in) a bawdy-house. The law on streetwalkers which developed from more general provisions



on vagrancy made it an offence to be a prostitute or streetwalker ‘not giving a satisfactory account of [herself]’.

In the 1860s, in the wake of concern in official circles in Britain about the supposed connection between prostitutes, venereal disease and demoralization in the armed forces, Canada, following the British lead, introduced a regulatory regime which made it possible for prostitutes to be subjected to medical inspection and, if found to be diseased, detained for compulsory treatment in a certified hospital. However, in Canada the legislation was rarely enforced and was soon allowed to lapse.

In all of this early legislation, with the partial exception of the bawdy-house provisions, the emphasis of the law was on penalizing the prostitute. The philosophy seems to have been that the male population was entitled, without sanction, to seek the services of prostitutes, but insofar as the morality or health of the community might be compromised by such activity, the target of the law was properly the purveyors and not the customers of the business.

In the late 19th and early 20th century, the emergence of a more paternalistic concern on the part of the legislators with the protection of girls and young women from the ravages of vice, often associated with the alleged scourge of ‘white slavery’, led to the addition of a series of provisions which had the protection of ‘virtuous womanhood’ as their objective. These included a litany of offences proscribing procuring, and ‘living on the avails’ of prostitutes. Together with the earlier streetwalker and bawdy-house offences, they were included in the Canadian *Criminal Code*.

Largely as a result of the efforts of women involved in the so-called ‘social purity movement’, legislation designed both to rehabilitate prostitutes and to prevent children opting for that way of life was also enacted across the country at the provincial level. These regimes, which allowed for special detention orders for prostitutes and the removal of female adolescents from their own homes, were often as repressive in application as the streetwalking provisions.

The dual elements in the thinking of lawmakers of the prostitute as both moral and legal outcast, and the need to protect respectable women from the wiles of perverse males, has continued to influence the law and its enforcement through the 20th century. The bawdy-house provisions, with their uniquely Canadian focus on keeper, prostitute and customer, remain in the *Criminal Code* in sections 193 and 194. The purely status offence of streetwalking was retained in the *Code* until 1972 when it was replaced by the present soliciting provision, section 195.1.

The list of procuring offences continues to exist in section 195(1) of the *Code*, subject to recent changes which extend their application to both males and females. Although the special regulatory regimes designed to deal with the public health or morals problems caused by prostitution are now historic memories, more

general legislation on public health and child welfare exists which provides the possibility of regulatory control over prostitution and its side effects.

[228] I now examine the history, interpretation, and legislative objective of each of the impugned provisions.

a. History of s. 210 - Bawdy-House Provisions

[229] The bawdy-house provisions “find their roots in ancient English criminal law”: *R. v. Corbeil*, [1991] 1 S.C.R. 830 at p. 841. The first post-Confederation legislative provisions dealing with bawdy-houses can be found in *An Act respecting Vagrants*, S.C. 1869, c. 28, which defined a “vagrant” as including “all keepers of bawdy-houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves.” In 1886, inmates of bawdy-houses were included in the definition of a “vagrant”: *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157.

[230] In Canada’s first *Criminal Code* (*The Criminal Code, 1892*, S.C. 1892, c. 29), prostitution laws were found under Title IV, “Offences against Religion, Morals and Public Convenience,” which was subdivided into further parts.<sup>13</sup>

[231] In Part XIV, “Nuisances,” keeping a common bawdy-house was an indictable offence, liable to one year imprisonment. “Common bawdy-house” was defined as “a house, room, set of rooms or place of any kind kept for purposes of prostitution.”

[232] In Part XV, “Vagrancy,” it was a summary offence, liable to six months’ imprisonment (with or without hard labour) to be a “loose, idle or disorderly person or vagrant.” Such people included a keeper or inmate of a bawdy-house or “house for the resort of prostitutes,” and a person in the habit of frequenting such houses without giving a satisfactory account of himself or herself.

[233] Parliament amended the definition of “common bawdy-house” in 1907 to include any place “kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes” (*The Criminal Code Amendment Act, 1907*, S.C. 1907, c. 8)

[234] Amendments to the *Criminal Code* in 1913 (*The Criminal Code, Amendment Act, 1913*, S.C. 1913, c. 13) included extending the offence of keeping a common bawdy-house to include those who assisted in keeping a common bawdy-house. It also became an offence for a landlord, lessor, tenant, occupier or agent of a place to knowingly permit the place to be used as a bawdy-house. As well, the language of “frequenting” a common bawdy-house was replaced by being “found in” a disorderly house without a lawful excuse.

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<sup>13</sup> Other prostitution-related provisions were found in Part XIII, “Offences against Morality” which included provisions that dealt with the seduction of girls and women of “previously chaste character,” the procuring of girls and women by parents or guardians, and the prostitution of “Indian” women.

[235] In 1915, further amendments were made to the *Criminal Code* (*The Criminal Code Amendment Act, 1915*, S.C. 1915, c. 12), which included the addition of an offence for being an inmate of a common bawdy-house and removing the bawdy-house provisions from the vagrancy section. In 1917, the definition of a common bawdy-house was amended to include premises used for “acts of indecency”: (S.C. 1917, c. 14). In 1947, a summary conviction offence of transporting a person to a bawdy-house was added to the *Criminal Code*, and the maximum penalty for keeping a bawdy-house was increased to three years’ imprisonment (*An Act to amend the Criminal Code*, S. C. 1947, c. 55).

[236] In the 1953-54 revision of the *Criminal Code* (*An Act respecting the Criminal Law*, S.C. 1954, c. 51), bawdy-house offences were moved into Part V, “Disorderly Houses, Gaming and Betting.” This served to distance these offences from the vagrancy and nuisance provisions, which were located in Part IV, “Sexual Offences, Public Morals and Disorderly Conduct.” The definition of “common bawdy-house” was amended to mean “a place that is (i) kept or occupied, or (ii) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency.” The penalty for keeping a bawdy-house was reduced to two years’ imprisonment.

[237] Since the revision in 1953-54, the core elements of the bawdy-house provisions have remained largely unchanged.

b. Objective of s. 210 - Bawdy-House Provisions

[238] In *R. v. Rockert*, [1978] 2 S.C.R. 704, Estey J., writing for a majority of the Supreme Court, considered the objective of the common gaming house provisions in the *Criminal Code*. In doing so, he examined the objective of offences relating to disorderly houses generally, which includes common bawdy-houses at pp. 711-12:

This conclusion as to the proper construction of the word “used” as employed in the definition of ‘common gaming house’ in s. 179 of the *Code* is further reinforced by an examination of the historical antecedents and development of the offences relating to disorderly houses. These offences are collectively dealt with in Part V of the *Code*. This task was ably carried out by the learned trial judge in the case at bar with reference to common gaming houses, and it is sufficient in this regard to refer to that part of his reasons for judgment in which he discussed this point:

Historically, the keeping of a common gaming house was also a common or public nuisance, as distinct from a private nuisance, and as such was also an offence, indictable as a misdemeanour, at common law. Common gaming houses were said to be “detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property persons whose time might otherwise be employed for the good of the community.” Bac. Abr. Tit. “Nuisances” (4); 1 Hawk. c. 75, s. 6; *Russell on Crime*, 12th ed., vol. 2, p. 1442.

The authorities leave little, if any, doubt that the mischief to which these offences were directed was not the betting, gaming and prostitution *per se*, but rather the harm to the interests of the community in which such activities were carried on in a notorious and habitual manner. (*Vide Jenks v. Turpin* [(1864), 13 Q.B.D. 505].)

A similar historical analysis of the offence of keeping a common bawdy-house was carried out by Schroeder J.A. in *R. v. Patterson* [[1967] 1 O.R. 429, 3 C.C.C. 39, rev'd. [1968] S.C.R. 157], at p. 46 C.C.C., cited with approval by this Court on appeal [1968] S.C.R. 157 at p. 161:

Viewed in historical perspective the keeping of a brothel or a common bawdy-house was a common nuisance and, as such, was indictable as a misdemeanour at common law. It was treated as a public nuisance “not only in respect of its endangering the public peace by drawing together dissolute and debauched persons but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness”: *Russell on Crime*, 12th ed., vol. 2, p. 1440. It consisted of maintaining a place to the disturbance of the neighbourhood or for purposes which were injurious to the public morals, health, convenience or safety. The maintenance of a nuisance of this character later became the subject of legislation in England in 1752 when the *Disorderly Houses Act, 1752* (U.K.), c. 36, was enacted and the offence is now embraced (sic) in the provisions of the *Sexual Offences Act, 1956* (U.K.), c. 69, s. 33, the English counterpart of s. 168(1) (b), (h) and (i) of our *Criminal Code*. [Emphasis added.]

[239] Although morality was clearly one of the original objectives of the bawdy-house provisions, the provisions were intended to address a number of concerns under the relatively broad objective of preventing common or public nuisance. These concerns included health, safety, and neighbourhood disruption or disorder, as well as the prevention of immorality: see Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: E. and R. Brooke, 1797) at p. 204; William Hawkins, *Pleas of the Crown, 1716-1721*, 3<sup>rd</sup> ed. (London: Professional Books, 1973) at p. 196; J.W. Ehrlich, *Ehrlich’s Blackstone* (Westport: Greenwood Press, 1973) vol. 1 at pp. 823-24; *R. v. Mercier* (1908), 13 C.C.C. 475 at 485 (Yuk. Terr. Ct.); *R. v. Jones*, [1921] 62 D.L.R. 413 at p. 414 (Alta. C.A.) *per* Beck J.A.; *R. v. Patterson* (1967), 1 O.R. 429 at p. 435 (C.A.), *per* Schroeder J.A. (dissenting), rev’d [1968] S.C.R. 157; *R. v. Wong*, [1976] A.J. No. 329 at para. 5 (Alta. Dist. Ct.) (QL); *Marceau c. R.*, 2010 QCCA 1155.

[240] The applicants argue that it is no longer constitutionally valid to justify criminal law on the basis of legal moralism. As stated by Sopinka J. in *Butler* at pp. 492-93, “the prevention of ‘dirt for dirt’s sake’ is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.”

[241] Bawdy-houses include places for the purpose of prostitution or for the practice of acts of indecency: s. 197(1) of the *Criminal Code*. In *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80,

the appellant appealed from a conviction of keeping a bawdy-house for the practice of acts of indecency. In its analysis, the Supreme Court outlined the history and meaning of criminal indecency in Canada. While indecency was historically inspired and informed by the moral views of the community, “courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices.” [Emphasis added.]: *Labaye* at para. 14. Today, criminal indecency is defined using an objective harm-based approach. Three types of harm that are capable of supporting a finding of indecency include: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct, (2) harm to society by predisposing others to anti-social conduct, and (3) harm to individuals participating in the conduct: *Labaye* at para. 36. Harm, or a significant risk of harm, must be of a degree that is incompatible with society’s proper functioning, and must be established on the evidence. Unlike criminal indecency, “[p]rostitution does not require as a component factor the performance of acts that are indecent or harmful”: *Marceau c. R.*, *supra* at para. 21.

[242] In my view, the subjective moral component of the objective (for example, “dissolute and debauched persons”) is no longer properly regarded as a legislative objective of the provision in light of the interpretation of that provision in *Labaye*. Thus, I find that the objectives of the bawdy-house provisions for the purpose of prostitution are combating neighbourhood disruption or disorder and safeguarding public health and safety.

[243] The AG Ontario argues that the modern objective of the bawdy-house provisions in general is a concern for the dignity of persons involved in prostitution and the prevention of physical and psychological harm to them. I cannot find any support in the history of s. 210(1) for such a conclusion: see also *Marceau c. R.*, *supra*, at para. 72 *per* Dalphond J.A. in dissent. It is, therefore, not a permissible shift in emphasis of the legislative objective: *R. v. Zundel*, [1992] 2 S.C.R. 731 at pp. 746-47.

### c. Interpretation of s. 210 - Bawdy-House Provisions

[244] Section 210 targets all direct participants of bawdy-house prostitution: operators, prostitutes, and clients. Section 210(1) makes it an indictable offence for anyone to keep a common bawdy-house. Section 210(2) creates three different summary conviction offences: (a) being an inmate of a common bawdy-house; (b) being found without lawful excuse in a common bawdy-house; and (c) knowingly permitting a place to be let or used for the purposes of a common bawdy-house, as an owner or someone in charge or control of the place. Sections 210(3) and (4) create a duty on the owner, landlord, or lessor of a bawdy-house which has been the subject of conviction under s. 210(1).

[245] The terms “keeper,” “common bawdy-house,” and “place” are defined in s. 197(1) of the *Criminal Code*.

[246] To constitute a common bawdy-house under s. 197(1), premises must have been used “frequently or habitually” either for the purposes of prostitution or for acts of indecency: *R. v. Patterson*, [1968] S.C.R. 157 at pp. 162-63.

[247] In *R. v. Pierce and Golloher* (1982), 37 O.R. (2d) 721 (C.A.), MacKinnon A.C.J.O. held the following about the location of bawdy-houses at p. 725:

...In my opinion, any defined space is capable of being a common bawdy-house if there is localization of a number of acts of prostitution within its specified boundaries. This does not mean that acts of prostitution must take place in every nook and cranny of the defined place for it to be held to be a common bawdy-house although it obviously must take place within a reasonably substantial portion of the defined place. Hotels or floors of hotels have been held to be a common bawdy-house although there has not been proof that every room in the hotel or on the particular floor has been used for acts of prostitution. *R. v. Jerry Wong* (B.C.C.A.) released February 7, 1980; *R. v. McLellan* (1980), 55 C.C.C. (2d) 543 at 544. By definition “place” does not have to be covered or enclosed, and it can be used temporarily whether or not any person has an exclusive right of user with respect to it....

[248] “Prostitution” has been defined as “lewd acts for payment for the sexual gratification of the purchaser”: *R. v. Bedford* (2000), 184 D.L.R. (4th) 727 at paras. 19 and 25 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 328.

1) s. 210(1)

[249] To constitute the offence of keeping a common bawdy-house there must be proof that the accused (a) had some degree of control over the care and management of the premises, and (b) participated, to some extent, in the “illicit” activities of the common bawdy-house. The accused does not need to personally participate in the “illicit” activities that occur in the place, provided that he or she participates in the use of the house as a common bawdy-house: *Corbeil, supra* at p. 834.

[250] The offence of keeping a common bawdy-house implies a higher degree of participation and involvement than s. 210(2)(c). The owner’s wilful blindness or the mere delegation of responsibility is not sufficient to justify a conviction under s. 210(1): *R. v. Kouri* (2004), 191 C.C.C. (3d) 42 at para. 24 (Que. C.A.), aff’d [2005] 3 S.C.R. 789. However, it is unnecessary to show that the accused participated in the day-to-day running of the premises where he or she is shown to be the directing mind of the corporation which owned the premises, to have participated in the management, to have received the proceeds, and to have been aware of the activities taking place on the premises: *R. v. Woszczyzna* (1983), 6 C.C.C. (3d) 221 at p. 226 (Ont. C.A.). An accused person may be found guilty under this provision for using his or her own residence for the purpose of prostitution: *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.).

2) s. 210(2)(a) and s. 210(2)(b)

[251] “Inmate” in s. 210(2)(a) is not defined in the *Criminal Code*, but has been defined by the court as “inmate for the purposes of prostitution”: *R. v. Knowles* (1913), 12 D.L.R. 639 (Alta.

S.C.). In the annotations to *Martin's Annual Criminal Code 2010* (Aurora, Ont.: Canada Law Book, 2009) at p. 417, an inmate is described to include “a resident or regular occupant.”

[252] A person must be “found in” a bawdy-house to be found guilty under s. 210(2)(b). The accused must have been perceived there or seen by someone; mere proof of presence on the premises in question at some earlier time is not sufficient: *R. v. Lemieux* (1991), 70 C.C.C. (3d) 434 (Que. C.A.).

[253] In *Corbeil, supra*, L’Heureux-Dubé J., dissenting on other grounds, clarified the meaning of ss. 210(2)(a) and 210(2)(b) at pp. 857-58:

Persons who are regularly in a common bawdy-house as employees and who are actively engaged in activities other than, or in addition to, sexual activities, cannot be said to be simple “inmates” under s. 210(2)(a) or “found-ins” for the purposes of subs. (2)(b). Inmates and “found-ins” are not involved in the operation of the business beyond the simple provision and partaking of “services”. The inmate under subs. (2)(a) is the prostitute who works on the premises with some regularity but is not responsible for any of the organizational duties involved in running the business as a business. The so-called “found-in” is simply the client who is caught in the premises. These persons only commit an offence punishable on summary conviction. Other persons who are on the premises solely for the purposes of their trade (for example, an electrician, plumber, or gardener), and who are not intended to fall within the offences in s. 210, would, under the present interpretation, escape liability.

### 3) s. 210(2)(c)

[254] The “permitting” offence is directed towards the “owner, landlord, etc...” who has actual charge or control of the premises and “who has the right to intervene forthwith and prevent the continued use of the premises as a common bawdy-house and whose failure to do so can be considered as the granting of permission to make such use of the premises as and from the time [he or she] gained such knowledge”: *R. v. Wong* (1977), 33 C.C.C. (2d) 6 at p. 10 (Alta. S.C. (A.D.)).

[255] In summary, I have found that the legislative objective of the bawdy-house provisions is the control of common or public nuisance. The bawdy-house provisions apply to all direct participants in bawdy-house prostitution. Bawdy-house has been interpreted broadly to include any defined space if there is localization of a number of acts of prostitution within its boundaries.

### d. History of s. 212(1)(j) - Living on the Avails of Prostitution

[256] The legislative history of s. 212(1)(j) of the *Criminal Code* was reviewed by Arbour J.A., in *R. v. Grilo* (1991), 2 O.R. (3d) 514 at pp. 516-518 (C.A.):

As had been the case in England, the offence of living on the avails of prostitution was originally part of the offence of vagrancy. From 1892 [S.C. 1892, c. 29] until

the reform of the *Criminal Code* in 1953-54 [S.C. 1953-54, c. 51], the *Code* contained the two separate offences of vagrancy and procuring. “Vagrancy” was defined as follows:

Every one is a loose, idle or disorderly person or vagrant who...having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.

(*Criminal Code*, S.C. 1892, c. 29, s. 207(l); s. 207(a) was substituted by the *Criminal Code Amendment Act, 1900*, S.C. 1900, c. 46, s. 3; *Criminal Code*, R.S.C. 1906, c. 146, s. 238(l); subss. 238(j) and (k) were repealed by the *Criminal Code Amendment Act, 1915*, S.C. 1915, c. 12, s. 7; s. 238(b) was repealed and substituted by the *Act to Amend the Criminal Code*, S.C. 1936, c. 29, s. 8; s. 238(f) was repealed and substituted by the *Act to Amend the Criminal Code*, S.C. 1938, c. 44, s. 14, and then repealed by the *Act to Amend the Criminal Code*, S.C. 1947, c. 55, s. 5)

The *Code* made that conduct an offence in the following terms:

Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both...

(*Criminal Code*, S.C. 1892, c. 29, s. 208; *Criminal Code*, R.S.C. 1906, c. 146, s. 239)

The section on ‘procuring’ dealt specifically with prostitution-related offences. In 1913, the procuring provisions were expanded to include living on the earnings of prostitution. It was an indictable offence punishable by a maximum of five (later ten) years’ imprisonment for anyone who:

- (i) for the purposes of gain, exercises control, direction or influence over the movements of any woman or girl in such a manner as to show that he is aiding, abetting or compelling her prostitution with any person or generally; or
- (l) being a male person, lives wholly or in part on the earnings of prostitution.

(*Criminal Code*, R.S.C. 1906, c. 146, s. 216; s. 216 was repealed and replaced by the *Criminal Code Amendment Act, 1913*, S.C. 1913, c. 13, s. 9; the maximum term of imprisonment was altered by the *Act to Amend the Criminal Code*, S.C. 1920, c. 43, s. 18; sub s. (2) was repealed and replaced by the *Act to Amend the Criminal Code*, S.C. 1939, c. 30, s. 5)



The vagrancy offences imported an element of bad character, as they were “status” offences, *i.e.*, the isolated commission of acts falling within the section was not necessarily sufficient to warrant conviction if the accused was not a vagrant by nature. Persons “following a lawful occupation or having legitimate means of maintaining themselves, and enjoying a generally good reputation” had a valid defence: see *R. v. Kneeland* (1902), 6 C.C.C. 81, 11 Que. Q.B. 85 (C.A.), at p. 86 C.C.C.; *Presseau v. Paquette* (1951), 101 C.C.C. 256, [1952] 1 D.L.R. 642, [1952] Que. S.C. 6 (S.C.), at p. 259 C.C.C.

The difference between the “vagrancy” (then s. 238(*j*)) and “procuring” (then s. 216(*l*)) offences of living on the avails of prostitution was explained as follows (*R. v. Novasad* (1939), 72 C.C.C. 21, [1939] 3 D.L.R. 479, [1939] 2 W.W.R. 293 (Sask. C.A.), *per Mackenzie J.A.* at p. 26 C.C.C.):

The distinction between the two sections really seems to be that s. 238(*j*) is intended for the transient who wanders about and occasionally falls back upon the avails of prostitution as a means of eking out a precarious existence, while s. 216(*l*) is aimed at the man who engages himself in gleaning the earnings of prostitution as a business or stable means of livelihood. As supporting this view reference may be had to the second paragraph of s. 216.

(The second paragraph of the then s. 216 was equivalent to the present s. 212(3) [rep. & sub. R.S.C. 1985, c. 19 (3rd Supp.), s. 9], which creates the presumption that a person is living on the avails (then earnings) of prostitution on evidence that he is living with a prostitute.)

In the 1953-54 amendments to the *Code*, prostitution offences were consolidated in the procuring section, then s. 184. Vagrancy and disorderly conduct appeared separately and without any reference to prostitution. Moreover, the language of the procuring section was modified from living on the “earnings” to living on the “avails” of prostitution, the latter being the terminology of the original vagrancy provision. It is that provision which now appears as s. 212(*l*)(*j*).

The old s. 216(*l*)(*i*), which dealt with exercising control or influence remained practically unchanged in s. 184(*h*) of the 1953-54 *Code* and today appears as s. 212(*l*)(*h*).

[257] Recent amendments to the procuring provisions, including the living on the avails offence, have been in relation to child prostitution: (*An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, s. 9; *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, S.C. 1997, c. 16, s. 2(3); *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 10.1).

e. Objective of s. 212(1)(j) - Living on the Avails of Prostitution

[258] As stated above, the living on the avails of prostitution provision has its origin in the old offence of vagrancy. It is currently situated within a group of indictable offences in s. 212 of the *Criminal Code*, the majority of which “are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution”: *R. v. Downey, supra*, at p. 11. Section 212 reads as follows:

212. (1) Every one who

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

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

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

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

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

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

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

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

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

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

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

[259] The living on the avails provision, s. 212(1)(j), is aimed at preventing the exploitation of prostitutes and profiting from prostitution by pimps.

[260] In *Shaw v. Director of Public Prosecutions*, [1961] 2 All E.R. 446 (H.L.), the House of Lords considered the purpose of s. 30(1) of the *Sexual Offences Act, 1956* (U.K.), 4 & 5 Eliz. II, c. 69, a provision comparable to the current s. 212(1)(j). Section 30 read as follows:

(1) It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution.

(2) For the purposes of this section a man who lives with or is habitually in the company of a prostitute or who exercises control, direction or influence over a prostitute's movements in a way which shows he is aiding, abetting or compelling her prostitution with others shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary.

[261] At p. 453, Lord Reid stated:

The mischief is plain enough. It is well-known that there were and are men who live parasitically on prostitutes and their earnings. They may be welcome and merely cohabit, or they may bully women into earning money in this way. They prey or batten on the women. Such men are clearly living on the earnings of prostitution: if they have or earn some other income then they are living in part on such earnings.

[262] The objective of s. 212(1)(j) was considered by Cory J., for the majority of the Supreme Court, in *Downey* at p. 32:

Section 195(1)(j) [now s. 212(1)(j)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(j) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [Citations omitted]

[263] At p. 36, Cory J. further defined a pimp as one who “personifies abusive and exploitative malevolence.”

f. Interpretation of s. 212(1)(j) - Living on the Avails of Prostitution

[264] In *Shaw*, Viscount Simonds considered the potential breadth of s. 30(1) of the *Sexual Offences Act* and enunciated a test for determining when a person can be said to be living on the earnings of prostitution at pp. 449-50:

What, then, is meant by living in whole or in part on the earnings of prostitution? It was not contended by the Crown that these words in their context bear the very

wide meaning which might possibly be ascribed to them. The subsection does not cover every person whose livelihood depends in whole or in part upon payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution. The grocer who supplies groceries, the doctor or lawyer who renders professional service, to a prostitute do not commit an offence under the Act. It is not to be supposed that it is its policy to deny to her the necessities or even the luxuries of life if she can pay for them.

...

My Lords, I think that (apart from the operation of subsection (2)) a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes. [Emphasis added.]

[265] Lord Reid, in separate reasons, introduced the notion of a parasitic relationship into the meaning of the provision at p. 454:

‘Living on’ normally, I think, connotes living parasitically. It could have a wider meaning but, if it is to be applied at all to those who are in no sense parasites, then I think its meaning must be the same whether we are considering the earnings of prostitution or of any other occupation or trade.

If a merchant sells goods to tradesmen is he living on the earnings of their trades? or if a landlord lets premises for business purposes is he living on the earnings of those businesses? or if he lets them to a man of leisure is he living on that man's dividends? Those are the sources of the rent which he receives but I do not think that one would normally say that he is living on those sources. It is not an impossible use of the words -- only unusual. And a penal statute ought not to be widened by reading its words in an unusual sense unless there is very good reason for doing so.

[266] Like Viscount Simonds, Lord Reid found that a person lives on the avails of prostitution where a service is rendered to the prostitute precisely because she is a prostitute. At p. 453-54 Lord Reid stated:

Such men may render services as protectors or as touts, but that cannot make any difference even if their relationship were dressed up as a contract of service. And a man could not escape because he acted in some such capacity for a number of women. His occupation would still be parasitic: it would not exist if the women were not prostitutes.

[267] The reasoning in *Shaw* was adopted by the British Columbia Court of Appeal in *R. v. Celebrity Enterprises Ltd.* (1977), 41 C.C.C. (2d) 540. The case concerned the liability of owners of a nightclub patronized by prostitutes. Prostitutes, like all other patrons of the

nightclub, were required to pay an admission fee. Consequently, the court found at p. 580 that the nightclub “was in the position of the grocer, the doctor, the lawyer and the landlord referred to in *Shaw*,” it did not supply anything to the prostitutes that it would not have supplied to any other patron.

[268] In *R. v. Grilo*, *supra*, the Ontario Court of Appeal dealt with the issue of to what extent a person may derive benefits from living with a prostitute before that person can be said to be living on the avails. Justice Arbour, for the court, adopted the requirement of a parasitic relationship, but modified the test in *Shaw* at p. 521:

...In the case of a person living with a prostitute, one must turn to indicia which will serve to distinguish between legitimate living arrangements between roommates or spouses, and living on the avails of prostitution. When a person receives money directly or indirectly from a prostitute in exchange for services rendered, the test, according to *Shaw*, is whether the service is rendered to the prostitute because she is a prostitute or, alternatively, whether the same service would be rendered to anybody else. In the case of living arrangements the test obviously must be modified. In my view, the proper question is whether the accused and the prostitute had entered into a normal and legitimate living arrangement which included a sharing of expenses for their mutual benefit or whether, instead, the accused was living parasitically on the earnings of the prostitute for his own advantage. The occasional buying of a donut or a cup of coffee would hardly amount to feeding a parasite in the ordinary acceptance of that word.

Insofar as this test refers to mutual benefits, it is not to be taken to mean that each of the parties living together must make an equal contribution to the living expenses. There may not be a parasitic relationship when people contribute, for instance, in proportion to their means, unless one partner makes little or no contribution because he chooses to live as a parasite.

[269] According to the court, the relationship is parasitic when there is an element of exploitation present. At pp. 521-22, Arbour J.A. explained:

The parasitic aspect of the relationship contains, in my view, an element of exploitation which is essential to the concept of living on the avails of prostitution. For example, when a prostitute financially supports a disabled parent or a dependent child, she clearly provides an unreciprocated benefit to the recipient. However, in light of her legal or moral obligations towards her parent or child, the recipient does not commit an offence by accepting that support. The prostitute does not give money to the dependent parent or child because she is a prostitute but because, like everybody else, she has personal needs and obligations. The true parasite whom s. 212(1)(j) seeks to punish is someone the prostitute is not otherwise legally or morally obliged to support. Being a prostitute is not an offence, nor is marrying or living with a prostitute. A person may choose to marry or live with a prostitute without incurring criminal responsibility as a

result of the financial benefits likely to be derived from the pooling of resources and the sharing of expenses or other benefits which would normally accrue to all persons in similar situations. [Emphasis added.]

[270] In *R. v. Barrow* (2001), 54 O.R. (3d) 417, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 431, the Court of Appeal confirmed that the *Shaw* test still applied to the provision of business services to prostitutes, and that Arbour J.A.’s analysis, which modified *Shaw*, be applied only in instances involving shared living arrangements with prostitutes.

[271] In *Barrow*, the appellant ran an escort agency where she kept one-third of the fee charged for the escorts’ services. Although the evidence “tended to show that the appellant did not coerce the escorts and that she was supportive of them,” Rosenberg J.A., for the court, held at p. 420 that the required element of parasitism was nonetheless present because “she was in the business of rendering services to prostitutes because they are prostitutes” (emphasis added).

[272] In summary, the legislative aim of the living on the avails of prostitution provision is to prevent the exploitation of prostitutes and profiting from prostitution by pimps. A parasitic relationship is required in order to make out the offence. However, the determination of what is parasitic appears to be different based on whether the person lives with a prostitute, or provides business services to a prostitute. In the former circumstance, parasitism requires an element of exploitation. In the latter circumstance, parasitism is found solely on the basis that the service is provided to a prostitute because they are a prostitute. No proof of exploitation is required.

g. History of s. 213(1)(c) - Communicating for the Purpose of Prostitution

[273] The history of s. 213(1)(c) was summarized by Lamer J., concurring in the result, in the *Prostitution Reference* at pp. 1191-92:

At one point in our history, specifically between the years 1869-1972, our legislation made prostitution a “status offence”. This was accomplished through the use of vagrancy laws such as the one that appeared in the *Criminal Code*, R.S.C. 1970, c. C-34, s. 175(1)(c):

(c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;

That provision was repealed by S.C. 1972, c. 13, s. 12, and was replaced by a law based on the concept of “solicitation”. The new s. 195.1 made it a summary conviction offence to solicit any person in a public place for the purpose of prostitution. Courts differed on the interpretation of the term “solicit” until this Court’s decision in *Hutt v. The Queen*, [1978] 2 S.C.R. 476. In that case Spence J., speaking for the majority, held at p. 482 that in order to be seen as a crime, “soliciting” had to be “pressing or persistent”. In support of this conclusion Spence J. had occasion to pass comment on the purpose underlying this section of the *Code*, at p. 484:

Section 195.1 is enacted in Part V which is entitled “DISORDERLY HOUSES, GAMING AND BETTING”. Offences in reference to all three of these subject-matters are offences which do contribute to public inconvenience or unrest and ... Parliament was indicating that what it desired to prohibit was a contribution to public inconvenience or unrest.

In light of this decision, law enforcement officials indicated that the control of street prostitution was made very difficult if not impossible. In 1983, the federal government established the Special Committee on Pornography and Prostitution, hereinafter referred to as the Fraser Committee, to study the problem of street prostitution and to report to the Minister of Justice. The Fraser Committee reported its findings in 1985, and concluded that prostitution was a social problem that required both legal and social reforms. The Committee recommended that s. 195.1 be repealed, and that the nuisance aspect of street prostitution be dealt with via amendments to the sections of the Code in respect of disorderly conduct. The legislative response came in the form of Bill C-49 which was passed in December of 1985, and which established the current provision of the *Code* that is under constitutional scrutiny in the case at bar.

h. Objective of s. 213(1)(c) - Communicating for the Purpose of Prostitution

[274] The legislative objective of the communicating provision was considered by the Supreme Court in the *Prostitution Reference*. In the judgment for the majority, Dickson C.J. referred to the objective of the provision as seeking to curtail street solicitation and the *social* nuisance which it creates. Chief Justice Dickson explained his reasoning at pp. 1134-35:

..Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(c) [now s. 213(1)(c)] in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(c) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.

The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban

neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. In my opinion, the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern. I find, therefore, that sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim.

i. Interpretation of s. 213(1)(c) - Communicating for the Purpose of Prostitution

[275] Section 213 reads as follows:

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

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

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

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

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

[276] “Place” is defined in s. 197(1) as including “any place, whether or not (a) it is covered or enclosed, (b) it is used permanently or temporarily, or (c) any person has an exclusive right of user with respect to it.” “Prostitute” is defined in s. 197(1) as “a person of either sex who engages in prostitution.” “Public place” is defined in s. 213(2) as including “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.”

[277] There have been a number of cases interpreting aspects of the communicating provision:

- a) Any one of the four types of conduct (stop, attempt to stop, communicate, attempt to communicate) is sufficient to establish the offence of communicating: *R. v. Head* (1987), 36 C.C.C. (3d) 562 (B.C.C.A.).
- b) There is no legal requirement that the communication specify the sexual services and the money to be paid for them so long as these elements can be inferred from the context of the communication: *R. v. Lawrence* (2002), 332 A.R. 188, 2002 ABPC 189 at para. 19.
- c) There is no requirement in law for an actual agreement to be reached between the prostitute and the customer for the sale of sexual services in order to



constitute an offence, (for example, shopping for sex may constitute an offence): *R. v. Searle* (1994), 163 N.B.R. (2d) 123 at para. 21 (N.B. Prov. Ct.); *R. v. Lawrence*, *supra* at para. 19.

- d) Something more than mere communication is required to make out the offence; there must be a purpose for the communication, other than the communication itself: *R. v. Pake* (1995), 103 C.C.C. (3d) 524 at p. 529 (Alta. C.A.). It must be established that the accused had an intention to engage in prostitution or to obtain the sexual services of a prostitute; this intention may be inferred from the circumstances. The court looks at the intent at the time of the conversation; a change of heart to not follow through after the conversation would not afford a defence: *ibid* at pp. 530-31.
- e) Communication for a collateral or indirect purpose (such as a prostitute stopping a taxi to ask for transportation to a well-known downtown location or a prostitute asking a pharmacist for a package of condoms) has been held not to fall within the meaning of s. 213(1)(c): *R. v. Wasylyshyn*, [1988] B.C.J. No. 3210 at para. 8 (Co. Ct.) (QL); *R. v. Lawrence*, *supra* at para. 20.

[278] In summary, the Supreme Court has established that the communicating offence has as its purpose controlling the social nuisance associated with street prostitution. The provision applies to a broad range of expressive behaviour (as long as it is for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute) and it applies to a broad geographical area, as defined in s. 213(2) of the *Criminal Code*.

## **X. SECTION 7 OF THE CHARTER**

[279] Section 7 of the *Charter* provides:

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.

[280] A person who alleges a breach of s. 7 must prove that there has been or could be a deprivation of the right to life, liberty and security of the person, and that the deprivation was not or would not be in accordance with the principles of fundamental justice. If a claimant is successful in doing so, the burden shifts to the government to justify the deprivation under s. 1, which provides that the rights guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society: *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, at para. 12.

### **1. Do the Laws Deprive the Applicants of Liberty?**

[281] The availability of imprisonment for all of the impugned provisions is sufficient to trigger s. 7 scrutiny: *Re B.C. Motor Vehicle Act*, *supra* at p. 500; *Prostitution Reference*, *supra* at p.

1140. Thus, the first branch of the s. 7 analysis is made out; however, the applicants also argue that the impugned provisions violate their security of the person.

## 2. Do the Laws Deprive the Applicants of Security of the Person?

[282] The Supreme Court has held that security of the person protects both the physical and psychological integrity of the individual: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 56, *per* Dickson C.J., and at p. 173, *per* Wilson J.; *Rodriguez*, *supra* at pp. 587-88, *per* Sopinka J.; *Prostitution Reference*, *supra* at p. 1174, *per* Lamer J.).

[283] Only psychological stress which is “serious” and “state-imposed” will engage s. 7: *Morgentaler*, *per* Dickson C.J. at p. 56. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, Basterache J. for the majority stated at p. 344: “[t]he words ‘serious state-imposed psychological stress’ delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious.” [Emphasis in original.]

[284] In *Rodriguez*, Sopinka J. held, at pp. 587-88, that security of the person encompasses “personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity...at least to the extent of freedom from criminal prohibitions which interfere with these.” Interests that have been held to be basic to individual dignity and autonomy have included “a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed”: *Blencoe* at p. 358, *per* Basterache J.

[285] The applicants submit that the operation and intersection of ss. 210, 212(1)(j) and 213(1)(c) deprive them of security of the person. They recognize that the impugned provisions do not directly cause harm to prostitutes, as it is generally male clients that directly inflict violence upon female prostitutes. Rather, they argue that these provisions “materially contribute” to the harm faced by prostitutes by creating legal prohibitions on the conditions required for prostitution to be conducted in safe and secure settings.

[286] The respondent relies on *Blencoe* to argue that there needs to be a direct causal connection between the harm alleged and the state action in order to find a violation of security of the person. Even if “material contribution” is found to be a sufficient causal standard, it argues that there is no causal connection between the impugned provisions and the harm alleged by the applicants, as prostitution is inherently harmful. The respondent argues that many of the complaints by the applicants are due to the enforcement of the laws, rather than the laws themselves. Furthermore, the respondent contends that many of the harms alleged by the applicants stem from violations of the impugned provisions. The respondent states that refusing to comply with the law and experiencing adverse consequences associated with the criminal justice system are not adverse effects that can support a finding of constitutional invalidity.

(A) What Level of Causality is Required to Find a Threshold Violation of Security of the Person?

[287] As part of the s. 7 analysis, the applicants must show a connection between the impugned provisions and the alleged deprivation of security of the person. There is disagreement between the parties about the degree of causality required. The impugned provisions do not need to directly cause the deprivation. Rather, the guarantee of fundamental justice applies to deprivations of life, liberty, and security of the person if there is a sufficient causal connection between the state action and the deprivation ultimately effected: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Blencoe, supra*; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3.

[288] The central issue in *Blencoe* was whether the respondent's s. 7 rights were violated by state-caused delay in a human rights proceeding against him. Justice Basterache, for the majority, held that there must be a "sufficient causal connection" or a "significant connection" between the harm alleged and the impugned state action to invoke s. 7 of the *Charter*. Justice Basterache found that the most prejudicial impact on the respondent, namely anxiety, stress, and stigma, was caused by events occurring prior to the human rights complaint by non-governmental actors such as the press, employers, and a soccer association. Justice Basterache held that unlike the situations in *Morgentaler* and *Rodriguez*, the state action at issue in *Blencoe* was not the direct cause of the prejudice to the respondent. He then went on to consider whether the delay in the human rights process was a "contributing cause" to the respondent's prejudice. At p. 351, Basterache J. "assume[d] without deciding that there [was] a sufficient nexus between the state-caused delay and the prejudice to Mr. Blencoe." Ultimately, he found that the harm alleged by the respondent did not amount to a violation of security of the person as the type of prejudice suffered by the respondent was not constitutionally protected. He did not foreclose the possibility that state-caused delays in human rights proceedings could never trigger an individual's s. 7 rights. Thus, in my view, Basterache J. did not preclude a security of the person violation where the direct cause of the deprivation is not due to the state. What is required, rather, is a sufficient causal connection between the state action and the alleged violation of security of the person.

[289] In *Suresh*, the Court held that there was a sufficient connection between the government's decision to deport a refugee to a place where he faced a substantial risk of torture and the deprivation of life, liberty, and security of the person. At pp. 35-36, the Court held as follows:

While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here. In *Burns*, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than *refoulement*. Rather, the governing principle was a general one — namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not

avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand. [Emphasis added.]

We therefore disagree with the Federal Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary" (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security. [Emphasis in original.]

[290] The Supreme Court recently reaffirmed the requirement of a sufficient causal connection between government action and a deprivation of life, liberty, or security of the person in *Canada (Prime Minister) v. Khadr, supra*. Omar Khadr was held by the United States of America for the purpose of trying him on charges of war crimes; thus, the United States was the primary source of the deprivation of Mr. Khadr's liberty and security of the person. The Court found that interviews conducted by the Canadian Security Intelligence Service and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade provided significant evidence in relation to the war crimes charges. At paras. 19 and 21, the Court stated as follows:

The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).

...

An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

[291] In *Khadr*, unlike in *Suresh* or *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, it does not appear that Canada’s actions were a “necessary precondition” to the deprivation; rather, the Court held that the government need only contribute to the deprivation in a way the Court finds to be sufficient.

[292] Thus, using the principle as articulated in *Suresh*, the applicants must demonstrate that there is a sufficient connection between the impugned provisions and the deprivation of security of the person alleged. I do not agree with the respondent that a direct causal connection is required.

(B) What is the Harm Faced by Prostitutes in Canada?

[293] Evidence from nearly all of the witnesses, the government reports, and additional statistical information provided to the court confirms that prostitutes in Canada face a high risk of physical violence. It should be noted, however, that most of the evidence provided was in relation to street prostitutes.

[294] Statistics Canada has reported that some people are at a heightened risk of violence and homicide due to their profession. These “occupations at risk” are said to include those in the sex trade, police officers, and taxi drivers.

[295] In its 1997 report, *Street Prostitution in Canada* by Doreen Dushesne (Ottawa: Minister of Industry, 1997), Statistics Canada found that between 1991 and 1995, 63 known prostitutes were murdered. Almost all were female, seven were aged 15 to 17, and most were thought to have been killed by clients. During this period, known prostitutes accounted for five per cent of all female homicides reported (1,118 deaths).

[296] Subsequent Statistics Canada *Homicide in Canada* reports note that prostitutes continue to be killed as a direct result of their profession. From approximately 1996 to 2006, seven prostitutes per year were killed on average as a result of their profession. The reports qualify the results by stating that the number of prostitutes reported killed as a result of their profession most likely *under-represents* the actual figure, as only those incidents where the police are certain that the victim was killed in the course of engaging in prostitution-related activities were counted.

[297] According to the 2007 *Homicide in Canada* report by Geoffrey Li (Ottawa: Minister of Industry, 2008), 15 prostitutes were reported killed due to their profession (although five deaths occurred in previous years).<sup>14</sup>

[298] There are additional examples of evidence presented in this case respecting the high degree of violence experienced by prostitutes:

- a) In 1985, the *Fraser Report* stated that “it is apparent that [prostitutes] suffer enormous indignities and violence” and that “[c]ustomers are the primary source of sexual violence against prostitutes and may be the cause of most of

<sup>14</sup> According to the report, it is less common to be a homicide victim as a direct result of legal employment: there were an average of 17 victims killed annually “on-the-job” from 1997 to 2007.

the violence the prostitutes experience, depending on the prevalence of pimps. The majority of prostitutes have been sexually assaulted at least once by a customer, and have had money stolen from them or withheld despite the provision of services.”

- b) The 1989 *Synthesis Report* stated at p. 13, “[s]treet prostitution is certainly not a healthy, safe or productive means to earn a livelihood. Indeed, for many prostitutes, the street becomes another source of violence and intimidation.”
- c) In 1995, Dr. Lowman was commissioned (along with another researcher, Laura Fraser) by the federal Department of Justice to investigate an apparent increase in violence against street prostitutes after the passage of the communicating law. In the study, Dr. Lowman included the results of a 1993 Vancouver study on victimization of prostitutes. Street prostitutes from Vancouver’s Downtown Eastside and Strathcona districts were interviewed. Nearly every respondent stated that they were victims of violence on multiple occasions; over three quarters had experienced violence in the past six months with an average of seven incidents per person. Extremely high rates of physical assault and sexual assault were reported.
- d) In 2003, Dr. Melissa Farley and seven other researchers published the results of their nine-country study (which included Canada) on the harms of prostitution. Interviews were conducted with 854 people currently or recently working in prostitution; interviewees were asked about their current and lifetime history of sexual and physical violence. As well, participants were given a self-report inventory for assessing the symptoms of post-traumatic stress disorder (PTSD). The authors found that physical and emotional violence among the interviewees was “overwhelming.” They found that 71 per cent of respondents had been assaulted; 63 per cent had been raped; and 68 per cent met the criteria for post-traumatic stress disorder (Melissa Farley et. al., “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder” (2003) The Haworth Press 33.)
- e) Dr. Gayle MacDonald has researched prostitution for over eight years and has written four publications, including a book on the sex trade in the Maritimes. In 2006, Dr. MacDonald co-authored a three-year study of prostitutes in Halifax, Moncton, and Saint John. Of the 66 prostitutes interviewed, 90 per cent were engaged in street work. Violence was experienced by all interviewees, and was primarily inflicted by clients (Leslie Ann Jeffrey and Gayle MacDonald, “‘It’s the Money, Honey’: The Economy of Sex Work in the Maritimes” (2006) 43 *CRSA/RCSA* 313.)
- f) The 2006 *Subcommittee Report* noted the following at p. 17:

...[w]ith the disappearances and sadistic murders of a number of prostitutes, particularly in Vancouver and Edmonton, the public

has become aware of the violence to which many prostitutes fall prey in Canada. This violence is not new, and is by no means confined to Vancouver or Edmonton. People who engage in prostitution, particularly street prostitution, are faced with many different types of abuse and violence, ranging from whistles and insults to assault, rape and murder. The violence comes from clients, pimps, drug pushers, members of the public, coworkers and even police officers.

[299] While both parties agree that prostitutes in Canada face a high risk of violence, they disagree as to whether violence is intrinsic to prostitution, or whether there are ways that prostitution can be practised that may reduce the risk of violence to prostitutes.

a. Can the Harm Faced by Prostitutes in Canada be Reduced?

[300] The evidence led on this application demonstrates on a balance of probabilities that the risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location or venue of work and individual working conditions. With respect to venue, working indoors is generally safer than working on the streets. Working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada. That said, working conditions can vary indoors, affecting the level of safety. For example, working indoors at an escort agency (out-call) with poor management may be just as dangerous as working on the streets.

[301] Factors that may enhance the safety of a prostitute include being in close proximity to people who can intervene if needed, taking the time to screen a client (for example, smelling a potential client's breath, taking credit card numbers, working out expectations and prices), having a more regular clientele, and planning an escape route. While such measures may seem basic in their ability to reduce the risk of danger, the evidence supports these findings on a balance of probabilities.

b. Government Reports

[302] The authors of the *Fraser Report* believed that as long as prostitution exists, it should operate in the "least offensive setting," which in their opinion, was indoors. At p. 535 they stated:

To its credit, the law has traditionally sought to deprecate and punish the commercialization and exploitation associated with prostitution. We are inclined to believe, however, that the concern has been too broad. We are of the opinion that prostitution-related activities should not take place in public places because of the offence involved and the proven dangers to prostitutes which the street life produces. The question thus arises whether some leeway should be provided to it off the street. We believe that it should. However, if some allowance is made for its legal operation in private, it should operate in a way which will minimize the chances of harm to third parties and the community at large, reduce the

opportunities for commercial crime, and ensure the health and welfare of the prostitutes. The question is how far to go in removing or limiting the present *Criminal Code* provisions in order to achieve these objectives.

[303] The Fraser Committee recommended at p. 538 meeting these objectives by allowing small numbers of prostitutes to organize their activities out of a place of residence or provincially-regulated “small-scale, non-residential commercial prostitution establishments employing adult prostitutes.”

[304] The 1998 *Working Group Report* concluded at p. 3 that “[t]he street is a dangerous place for prostitutes. There is a relationship between violence against prostitutes, including assaults and homicides, and the venue of its occurrence. Nearly all assaults and murders of prostitutes occur while the prostitute is working on the street.” Similarly, at p. 33 the Working Group stated:

Results of the research and the consultations suggest that the two objectives of harm reduction and violence prevention could most likely occur if prostitution was conducted indoors. Indoor establishments appear to provide some protection to prostitutes as well as decreasing the level of street prostitution and its associated harm.

[305] Furthermore, the Working Group found at p. 63:

Available data tends to demonstrate that indoor prostitution is less harmful physically than that which takes place on the street. The vast majority of crimes against prostitutes, including murders, are perpetrated against street prostitutes by customers and pimps, largely because of the anonymity, tension and high level of drug use that characterize street prostitution.

[306] More recently, the 2006 *Subcommittee Report* stated the following at pp. 19-20:

Much less is known about violence against people involved in off-street prostitution. As we have seen, these people are often invisible to conventional research, or at least more difficult to reach. However, according to witnesses, it would appear that off-street prostitutes are generally subject to less violence.

c. Expert Evidence

1) The Applicants’ Experts

[307] Dr. Augustine Brannigan described street prostitution as a “far riskier sector” than indoor prostitution because street workers are not able to make use of the safety precautions and screening mechanisms available to indoor prostitutes.

[308] In Dr. Gayle MacDonald’s 2006 study on the experiences of prostitutes in the Maritimes, indoor prostitution was generally viewed as safer by the interviewees. Many escorts felt “much safer” because of their ability to screen and refuse clients if they perceive the potential for



violence and/or have someone know where they are. However, Dr. MacDonald notes that violence is a continuing threat for indoor workers, particularly out-call workers who are exposed to a heightened risk of violence because they may find themselves in a secluded location with a client.

[309] Dr. Eleanor Maticka-Tyndale is a Professor in the Department of Sociology and Anthropology at the University of Windsor, and is the Canada Research Chair in Social Justice and Sexual Health. She received her Ph.D. in sociology from the University of Calgary. Dr. Maticka-Tyndale has published over 100 journal articles, chapters in books and reports. Her research focus has been on the sexual health of marginalized populations and general health of populations marginalized because of how they express or practice their sexuality. She has published five peer-reviewed articles on the sex industry, with topics including methodology in prostitution research, safety of people who work in prostitution, licensing prostitution, and public health issues affecting prostitutes.

[310] From 2001 to 2004, Dr. Maticka-Tyndale and others (including Dr. Shaver, who is discussed below) interviewed 120 prostitutes who worked in indoor and outdoor locations in Toronto and Montreal. In Dr. Maticka-Tyndale's opinion, the physical safety of prostitutes depends on the location (for example, indoors or outdoors) and organization of the work (for example, independently, with colleagues, for someone else), and the extent to which the work environment is made secure. Dr. Maticka-Tyndale described a hierarchy within prostitution, with street-based prostitutes on the lower end experiencing the greatest amount of harassment and violence, and independent off-street workers on the higher end experiencing the least amount of harassment and violence.

[311] Dr. Cecilia Benoit is a Professor of sociology at the University of Victoria, and a research associate at the Population Research Group at the University of Washington. Dr. Benoit received her Ph.D. in sociology from the University of Toronto. She has published several books, monographs, government reports, and peer-reviewed articles on the health and safety of prostitutes. Over her career, Dr. Benoit has interviewed over 300 prostitutes. Dr. Benoit's opinions are largely based on a qualitative study she co-conducted in Victoria, British Columbia of 201 current and former, indoor and street prostitutes. Those interviewed were asked about their level of control over four key dimensions of the job: earnings, pace of work, clientele and activities performed, and job danger and harassment.

[312] According to Dr. Benoit, in the hierarchy of prostitution, street prostitutes are at the bottom. Their public visibility makes them the primary targets of public complaints and law-enforcement efforts. Prostitutes operating independently out of their own homes are in the best relative position regarding safety, earnings, pace of work, and activities performed. Dr. Benoit also provided the view that street prostitutes are more likely to experience violence because they are more exposed and accessible to those who would harm them. As well, street prostitutes are more vulnerable to exploitation by third parties, especially pimps, than those working in less visible, indoor venues.

[313] Some factors that can increase safety for indoor prostitutes include greater control over their environment, close proximity to others who can intervene if help is needed, the ability to

better screen out dangerous clients, a more regular clientele, the use of drivers to get to and from appointments, and response plans for dangerous situations. Dr. Benoit acknowledged that indoor prostitution can still present risks. Those interviewed expressed alienation from the police and a reluctance to report violence or turn to the police for help. Many felt that because of the nature of their work they would not be helped by police or would not be taken seriously.

[314] Dr. Frances Shaver is a Professor of sociology, and Chair of the Department of Sociology and Anthropology at Concordia University. She received her Ph.D. in sociology from the Université de Montréal. Dr. Shaver has worked as a research officer for the Canadian Advisory Council on the Status of Women and has conducted research for the Department of Justice.

[315] Dr. Shaver is a founding member of Sex Trade Advocacy and Research (“STAR”), a group that allows researchers and community partners to work together to “improve the health safety, and well-being of sex workers.” STAR is funded by the Social Sciences and Humanities Research Council and the National Network on Environments and Women’s Health. Drs. Benoit and Maticka-Tyndale are also contributing researchers to STAR. Dr. Shaver and her STAR colleagues presented a report to the House of Commons Subcommittee on Solicitation Laws recommending the decriminalization of prostitution in Canada; she also appeared before the subcommittee in her academic capacity. During her career, Dr. Shaver has written or contributed to 15 peer-reviewed publications on prostitution and has conducted or supervised the interviews of some 500 male, female, and transgendered prostitutes in San Francisco, Montreal, and Toronto.

[316] Dr. Shaver is of the view that the physical safety of individuals in the sex industry depends on the location and organization of the work and the extent to which the work environment can be made secure. In Dr. Shaver’s opinion, street-based venues hold the greatest risk to safety. Independent in-call and out-call workers, who had a list of regular clients, and relied on classified advertisement to meet clients seemed to feel the farthest removed from violence and victimization. In-call prostitutes are familiar with their space and can make advance plans for how to protect themselves and what to do in potentially dangerous situations. In addition, in-call prostitutes report that when clients are guests in their space, the clients tend to be better behaved.

[317] In Dr. John Lowman’s opinion, street prostitution is more violent than prostitution that occurs in indoor venues. Dr. Lowman’s 1995 study on violence against prostitutes in Vancouver involved interviews with “key players” in prostitution (three prostitutes, one pimp, seven police officers, and six social service providers), and a review of the following: a victimization survey completed by 65 prostitutes, Vancouver Police Department records on sexual assaults of prostitutes and on prosecutions for procuring and living on the avails offences, bad date lists, newspaper articles, a study on violence against street prostitutes, and the RCMP Violent Crime Unit database. A key finding in Dr. Lowman’s report was that prostitutes experienced a lesser degree of violence when working from indoor locations.

[318] One of the studies to which Dr. Lowman referred in his affidavit for the assertion that prostitution is not inherently dangerous is the 2007 M.A. Thesis of Tamara O’Doherty: *Off-street Commercial Sex: An Exploratory Study* (Master of Arts Thesis, Simon Fraser University School

of Criminology, 2007 [unpublished]. Dr. Lowman acted as Ms. O’Doherty’s senior advisor. She conducted victimization surveys and in-depth interviews with women working in the middle and upper echelons of Vancouver’s sex trade in massage parlours, as escorts, or independently (or a combination thereof). Ms. O’Doherty found that while violence and exploitation occur in the off-street industry, her study indicated that some women sell sex without experiencing any violence. Some of her specific findings include:

- a) The majority of the women who participated in the project had not experienced any violence while working in the sex industry;
- b) Independent workers reported the lowest rates of victimization, whereas escorts comparatively faced the highest rates of violence; and
- c) The majority of respondents used specific safety strategies. The most frequently used strategies included screening clients, using intuition, and ensuring an emergency plan was in place. Other security measures included use of security cameras, weapons and personal alarms, meeting clients in upscale hotels because the client’s reservation can be easily confirmed, avoiding working in isolation (such as checking in with the escort agency or a friend), discussing fees upfront, using references from other clients and getting money upfront.

## 2) The Respondent’s Experts

[319] Dr. Melissa Farley asserts that there is little difference in prostitution’s link with violence, whether it occurs indoors or outdoors. Dr. Farley includes psychological violence in her definition of violence.

[320] In a 1998 five country study on prostitution, Dr. Farley and her co-authors found “significantly more physical violence in street as opposed to brothel prostitution.” Furthermore, in a 2005 article Dr. Farley wrote that “some types of prostitution are associated with more severe harm than others” and that “[t]here is some research evidence suggesting that outdoor prostitution may subject women in prostitution to higher rates of physical violence [than indoor prostitution]”: “Prostitution Harms Women Even if Indoors: Reply to Weitzer” (2005) 11 *Violence Against Women* 950 at pp. 954-955. In cross-examination Dr. Farley stated that she is not aware of any study that shows that indoor prostitution is as risky, or riskier, than street prostitution.

[321] With respect to psychological violence, Dr. Farley deposed that there is no difference between extreme emotional distress or post-traumatic stress disorder (“PTSD”) in indoor and outdoor prostitution. However, on cross-examination, she acknowledged the difficulty in directly linking PTSD with prostitution, as opposed to events unrelated to prostitution, such as childhood abuse.

[322] Dr. Janice Raymond was a principal investigator for two studies on the harms associated with prostitution and trafficking. Like Dr. Farley, Dr. Raymond advocates for the abolition of prostitution, but sees the role of her research as separate from her role as a board member with the Coalition Against Trafficking in Women (“CATW”). One of Dr. Raymond’s assertions was

that the distinction between indoor and outdoor prostitution is illusory. However, Dr. Raymond admitted during cross-examination that she has not conducted any empirical research on the topic. Her opinions on this subject appear to be largely based on a report on sex trafficking for the European Parliament (Transcrime, “Study on National Legislation on Prostitution and the Trafficking in Women and Children” (2005) European Parliament: Policy Department C – Citizen’s Rights and Constitutional Affairs [“*Transcrime Report*”]) and a study on prostitution in Chicago (Jody Raphael and Deborah Shapiro, “Violence in Indoor and Outdoor Prostitution Venues” (2004) 10 *Violence Against Women* 126 [the “Chicago Study”]). The authors of the *Transcrime Report* write that if “trafficked prostitution” (that is, human trafficking for the purpose of sexual exploitation in the sex industry) is exercised much more in one of the two sectors (indoors or outdoors), this could be the sector that has a higher level of violence, probably due to a concentration of criminal actors and increased competition. The Chicago study measured the prevalence of violence that customers, managers, pimps, and intimate partners perpetrated against 222 women in indoor and outdoor prostitution venues in Chicago. They found that street prostitutes generally reported higher levels of physical violence, but women working indoors were frequently victims of sexual violence and threatened with weapons.

[323] Dr. Ronald Weitzer, a reply witness for the applicants, was critical of the Chicago study as the researchers themselves explained that the study was designed within a framework of prostitution as a form of violence against women and likely biased to some degree. Furthermore, the researchers included domestic violence in their total figures on violence faced by prostitutes, meaning the findings conflated violence at home and violence at work.

[324] Dr. M. Alexis Kennedy is an Assistant Professor in the Department of Criminal Justice at the University of Nevada. She has a Ph.D. in forensic psychology from the University of British Columbia. Dr. Kennedy’s evidence is largely based on two peer-reviewed empirical studies in which she was one of the principal researchers. One study was on techniques used to recruit women into street prostitution and was based on interviews with 43 prostitutes in Vancouver’s Downtown Eastside. The other study focused on male clients of prostitutes completing a diversion program in British Columbia. While Dr. Kennedy has not conducted any research on indoor prostitution, six of the 43 street prostitutes she interviewed in the former study had some experience working in indoor venues. Some of those women described exploitative experiences working indoors.

### 3) Other Evidence

[325] There were a number of studies filed as evidence on this application which had findings that were relevant to the issue of whether the risk of violence towards prostitutes can be reduced. Some of the most relevant studies include the following:

- a) Stephanie Church *et al.*, “Violence by Clients Towards Female Prostitutes in Different Work Settings: Questionnaire Survey” (2001) 322 *British Medical Journal* 524: This is a report on the prevalence of violence by clients against female prostitutes working outdoors or indoors in three major British cities. Here, 240 female prostitutes (115 outdoors, 125 indoors) were contacted. The authors of the study found that prostitutes working outdoors were younger, involved in prostitution

earlier, reported more illegal drug use, and experienced significantly more violence from clients than those who worked in indoor venues (81 per cent vs. 48 per cent). Prostitutes who worked outdoors most frequently reported being slapped, punched, and kicked, whereas those who worked indoors most frequently reported attempted rape.

- b) Libby Plumridge & Gillian Abel, “A ‘Segmented’ Sex Industry in New Zealand: Sexual and Personal Safety of Female Sex Workers” (2001) 25 *Australian and New Zealand Journal of Public Health* 78: The authors of this study stated that their objective was to assess differences in personal circumstances, risk exposure and risk-taking among female prostitutes in different sectors of the New Zealand sex industry regarding issues of sexual safety, drug use, violence, and coercion. A cross-sectional survey of 303 female prostitutes in Christchurch was conducted, comprised of 26 per cent street workers, 47 per cent parlour workers, 23 per cent escorts, and four per cent who worked in bars. The authors found that street prostitutes generally experienced more frequent and more severe violence, harassment and adversity and were more likely to have had money stolen by a client, been physically assaulted, held against their will, subjected to verbal abuse, raped or forced to have unprotected sex.
- c) Priscilla Pyett & Deborah Warr, “Women at Risk in Sex Work: Strategies for Survival” (1999) 35 *Journal of Sociology* 183: This paper reports findings from a qualitative study of 24 female prostitutes in Melbourne, Australia who were identified by the researchers as potentially vulnerable to risks to their sexual health and physical safety. Physical assault and difficulties with enforcing condom usage were reported more frequently by street workers than by brothel workers. All of the street prostitutes interviewed had been exposed to frequent and considerable risks of violence from clients and had experienced at least one serious assault. Most of the women interviewed who worked in legal brothels reported feeling safe, and only one reported a violent incident while working. The study revealed that brothel workers’ security was enhanced by supportive management, firm policies relating to condom use and price, duration and type of service, alarm systems, proximity to others and the right to legal protection. The authors noted a potential for rape and police raids in illegal massage parlours.
- d) Dawn Whittaker & Graham Hart, “Research note: Managing Risks: the Social Organisation of Indoor Sex Work” (1996) 18 *Sociology of Health & Illness* 399: This U.K. study looks at the occupational risk of violence, and the protective strategies used to reduce risks to prostitutes working out of “flats” and to prostitutes working on the street. The authors found that working in a flat was safer. Safety was defined in terms of guaranteed payment, sex with condoms, and less potential for client violence. The authors concluded that there are two characteristics of “flat work” that make it safer: (1) it takes place indoors in a lit, contained environment (2) the prostitutes work with an assistant, or “maid.” The maid makes a provisional assessment of prospective clients through a peephole and can veto undesirable clients (such as those that appear drunk), and sits in an adjacent room during the transaction.

- e) Barbara Brents & Kathryn Hausbeck, “Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy” (2005) 20 *Journal of Interpersonal Violence* 270: This article examines the issue of violence within legalized brothels in Nevada, U.S.A. The authors conducted eight years of fieldwork in the Nevada brothel system, visited 13 of the 26 brothels in Nevada, participated in debates, analyzed laws, interviewed 40 prostitutes, surveyed 25 prostitutes, interviewed 11 managers/owners, interviewed approximately ten state regulators and activists, and informally interviewed five clients. Of the prostitutes interviewed, only one reported any personal experience with violence in the brothels. The interviewees reported that they worked in brothels because they feel safe there. The authors reported that the mechanisms most commonly in place in brothels for safety included: guidelines for the negotiation process, call buttons and audio room monitoring, control of customer behaviour, good relations with the police, limiting out-of-brothel services, limiting the movement of prostitutes, adhering to health regulations, and engaging in preventative practices.

[326] These studies, as with the other prostitution-related studies before me, must be viewed in context and the discreet findings cannot be generalized. That said, upon a consideration of the evidence *as a whole* presented on this issue, in my view, the applicants have established on a balance of probabilities that there are ways in which the risk of violence towards prostitutes can be reduced.

(C) Do the Impugned Provisions Sufficiently Contribute to the Harm Faced by Prostitutes?

[327] As discussed above, the onus is on the applicants to demonstrate on a balance of probabilities that the impugned provisions sufficiently contribute to the harm suffered by prostitutes and that there is a sufficient connection between the impugned provisions and the deprivation of security of the person.

a. Government Evidence

[328] The *Fraser Report* emphasized a connection between the laws dealing with prostitution and the safety and dignity of prostitutes, particularly those that are the most vulnerable:

The fact that we have special laws surrounding prostitution does not, however, result in curtailing all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public. Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens. [p. 392]

The current special status of prostitution in the *Criminal Code* does not appear to have given society the protection it seeks from the harmful consequences of prostitution, nor to have given prostitutes the right to dignity and equal treatment

in society. Information from the public hearings and the Department of Justice's research program, leads to the conclusion that the current law and its practice is unsatisfactory from virtually everyone's point of view: prostitutes, public and police. [p. 393]

Although, as we have pointed out, the law on prostitution is only enforced in a perfunctory way, it is nevertheless enforced from time to time, even in relation to activities in private. The result is that there is just enough in the way of uncertainty about the prostitute's legal status whether on the street, using a private residence, or while employed by an escort service or massage parlour, that the individual concerned has the sense of being a legal outcast. Needless to say, the greater facility one has for operating in complete privacy and confidence, a facility which is typically a reflection of relative wealth, the easier it is to escape scrutiny. Accordingly, the law in its operation favours those who have the resources to be discreet, while victimizing those who are not so blessed. In the result, while we talk of prostitution being free of legal sanction, we in reality use the law indirectly and capriciously to condemn or harass it, providing no safe context for its operation except that which can be bought by the prostitute of means, or, as is more likely, the well-heeled sponsor or sponsors. [p. 533]

The law on prostitution, as presently constituted, has not achieved what is presumably its theoretical object, that of reducing prostitution (or even of controlling it within manageable limits). Moreover, it operates in a way which victimizes and dehumanizes the prostitute. Change in the law is, in our opinion, clearly needed. [p. 533] [Emphasis added.]

[329] The Department of Justice's 1989 *Synthesis Report* looked at whether the practice of street prostitution changed as a result of the enforcement of the communicating law. The *Synthesis Report* found that some prostitutes in all of the main study sites stated that they worked under more tense conditions and that they were more likely to be "less choosy" with respect to accepting clients. Violence between customers and prostitutes was said to have increased in Vancouver and Calgary since the enactment of the communicating law.

[330] In 1998, the Federal, Provincial, and Territorial Working Group on Prostitution observed that the research before it suggested the existence of a nexus between the prostitution laws and violence towards prostitutes. However, the Working Group did not believe that the evidence revealed a specific causal link between the enforcement of the communicating provision and the deaths of street prostitutes. The *Working Group Report* stated at p. 60:

Some participants [in consultations that were held] argued that decriminalizing or regulating prostitution would reduce violence towards prostitutes. In fact, as mentioned earlier, this view is supported by current research, which suggests that the illegal status of prostitution activities, especially those that occur in public or on the street, has contributed to a large amount of violence. The reasons for this were discussed previously and include the anonymity and isolation associated

with street prostitution. Violent acts have increased since enforcement of the 1985 street prostitution law. [Emphasis added.]

[331] The 2006 *Subcommittee Report* stated as follows at pp. 62-65:

In many of the cities we visited, a number of witnesses indicated that the enforcement of section 213 forced street prostitution activities into isolated areas, where they asserted that the risk of abuse and violence is very high. These witnesses told us that by forcing people to work in secrecy, far from protection services, and by allowing clients complete anonymity, section 213 endangers those who are already very vulnerable selling sexual service on the street....

...

During our hearings, a number of witnesses maintained that the introduction of the communicating law (section 213) also led to the scattering of prostitutes, making them more vulnerable to violence and exploitation. Whereas in the past street prostitutes frequently worked in teams in an effort to reduce the risk of violence (for example by helping take down information such as clients' licence plate numbers and descriptions), they now tend to work in isolation from one another. While this practice has the advantage of attracting less attention from police, it also minimizes information-sharing, making prostitutes more vulnerable to meeting violent clients since they are not as well informed and are often less aware of the resources available to assist them.

...

According to a number of witnesses, section 213 also places street prostitutes in danger by forcing them to conclude their negotiations with clients more quickly, often leading them to get into the client's car too quickly....

...

Working out the details of the transaction before getting into a vehicle or going to a private location was considered important by all the prostitutes who testified. They told us that public bargaining would give them an opportunity to assess the likelihood of a potential client having violent tendencies.

[332] The majority of the Subcommittee concluded at p. 89 that Canada's "quasi-legal" approach to adult prostitution "causes more harm than good" and "marginalizes prostitutes, often leaving them isolated and afraid to report abuse and violence to law enforcement authorities."

b. Expert Evidence

1) The Applicants' Experts



[333] In Dr. Augustine Brannigan’s opinion, the prostitution-related provisions of the *Criminal Code* put prostitutes into risky situations, as they feel compelled to make hasty decisions due to the communicating provision, are made dependant on strangers in vehicles for their safety due to the bawdy-house provisions, and work without a security guard due to the living on the avails provision.

[334] In 1987, the Department of Justice commissioned a series of studies on the effectiveness of Bill-C-49 throughout Canada. Dr. Brannigan was one the researchers selected to conduct the study on the Prairies, which focused on Calgary, Winnipeg, and Regina: Minister of Justice and Attorney General of Canada, *Street Prostitution: Assessing the Impact of the Law – Calgary, Regina, Winnipeg* (Ottawa: Minister of Supply and Services Canada, 1989). They found, *inter alia*, that as a result of the communicating law, prostitutes were more passive in their behaviour on the stroll, more evasive in their conversations with clients, and more paranoid about undercover entrapment by the police. In Calgary, nearly half of the street prostitutes interviewed felt that the streets were more dangerous since the enactment of the communicating law.

[335] In 1994, Dr. Brannigan conducted the *Calgary/Winnipeg Study*. Eleven out of 16 prostitutes and former prostitutes interviewed in Calgary agreed with the proposition that the communicating provision “forces women to work in more remote and less safe places.” However, in the study Dr. Brannigan wrote at p. 42 that “violence [against prostitutes] does not appear to be related to the communicating law, at least not directly.” He described street work as a “far riskier sector” regardless of the communicating provision, because street workers are not able to make use of the safety precautions and screening mechanisms that indoor workers may utilize.

[336] In Dr. Gayle MacDonald’s opinion, the criminal law increases the level and risk of violence against prostitutes: (1) by sustaining stigmatization of prostitutes, (2) by creating a conflicting victim/criminal status in the eyes of the police, which may dissuade prostitutes from accessing police protection, and (3) by limiting the ways in which prostitution may be made safer. For example, Dr. MacDonald described the negotiation between a street prostitute and a potential client as the most critical point for the prostitute to assess the client’s propensity for violence. If a prostitute increases the speed of the communication, out of fear of arrest under s. 213(1)(c), she may misjudge a client. Furthermore, she may not be able to move to a safer indoor location, due to the bawdy-house provisions.

[337] According to Dr. Eleanor Maticka-Tyndale, certain strategies that are used by prostitutes in order to minimize health and safety risks run contrary to the prostitution-related provisions in the *Criminal Code*. In her opinion, safer ways to conduct prostitution are criminalized, whereas riskier ways are not. For example, street prostitutes reported employing client-screening strategies (such as checking for the presence or absence of door handles and lock release buttons); however, many reported that such strategies take time, which elevates the risk of arrest under s. 213(1)(c). Consequently, some prostitutes reported being reluctant to work out the details of a transaction before moving to a private location, or working in isolated areas to avoid police detection. Working in-call increased the sense of control and personal safety of prostitutes; this type of work, however, is illegal due to the bawdy-house provision.

[338] In the report prepared for the House of Commons Subcommittee on Solicitation Laws, Dr. Maticka-Tyndale and her co-authors detailed some risks of conducting legal out-call work: it is difficult to assess the safety of a destination beforehand, the client may not be alone, exit routes may not be easily identifiable or accessible, and prostitutes may be filmed without their knowledge. Some strategies to reduce these risks, such as hiring a driver or bodyguard or meeting and communicating with a client in a public place beforehand, run afoul of the law.

[339] According to Dr. Cecilia Benoit, the prostitution laws exacerbate the vulnerable situation of street prostitutes. Out of fear of being detected by police when negotiating sexual transactions in public, street prostitutes tend to deal with clients hastily, often in the client's car. The negotiation of the terms and conditions of the sexual act is then done in isolation from others. In this situation, street prostitutes have little or no opportunity to screen clientele or control the venue for the sexual act.

[340] Like Dr. Maticka-Tyndale, Dr. Frances Shaver described how actions taken by street prostitutes to increase their security often conflict with the law, forcing prostitutes to choose between their personal safety and violating the law. For example, working in isolated areas minimizes arrest under s. 213(1)(c), but increases the risk of violence, and limits the ability for prostitutes to share information with each other (such as the identity of dangerous clients). Some interviewees stated that they and their clients were reluctant to take the time to fully work out expectations (for example, agreement of services to be provided, fees, condom use) before moving to a private location due to fear of arrest. According to Dr. Shaver, this limits prostitutes' ability to screen for potential bad dates, thereby increasing their risk of violence. Furthermore, in Dr. Shaver's opinion, the bawdy-house provisions prevent prostitutes from working in-call, which is the safest way to conduct prostitution.

[341] In his research, Dr. John Lowman found an increase in the rate of violence and murder of street prostitutes in British Columbia after the 1985 enactment of the communicating law. It was his opinion that the impugned provisions "materially contribute" to violence against prostitutes (along with other causal factors such as poverty, drug addiction, and lack of education) in the following ways:

- a) the impugned provisions force "survival sex workers"<sup>15</sup> to work outdoors and into vulnerable areas, such as isolated streets and industrial areas;
- b) street prostitution is more violent than working in off-street venues; and
- c) in spite of this increased vulnerability, prostitutes do not benefit from the same level of protection and response from police authorities, especially when compared to other citizens.

[342] In Dr. Lowman's opinion, the impugned provisions are a sufficient and indirect cause of violence because, by preventing prostitutes from organizing safe work conditions, they play a decisive role in creating opportunities for violence against prostitutes to occur.

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<sup>15</sup> In discussing commercial sex, Dr. Lowman draws a distinction between "sexual slavery" (a person who is forced to be a prostitute), "survival sex" (a person who engages in prostitution because he/she has few or no choices), and "opportunistic prostitution" (a person who makes an economic decision to work in prostitution).

[343] One of the questions Dr. Lowman researched in his 1995 study for the Department of Justice was whether there had been an increase of violence against prostitutes since the enactment of the communicating law in 1985. According to Dr. Lowman, the data suggested there was such an increase in violence. He highlighted in particular the apparent increase in homicides against prostitutes (almost entirely street prostitutes) after 1985. However, he qualified his opinion by stating that it was uncertain whether the apparent increase in violence was a reflection of a greater incidence of violence, more violence being reported, or both.

## 2) The Respondent's Experts

[344] The respondent's experts provided the opinion generally that prostitution is inherently violent, regardless of the legal regime in place or how or where prostitution is practised, citing high rates of violence against prostitutes internationally. Most of their opinions did not deal directly with the legal regime in Canada or its impact, or lack thereof, on violence against prostitutes.

[345] According to Dr. Melissa Farley, prostitution is violent regardless of the legal regime in place. She deposed that the definition of the "job" of prostitution is sexual harassment and sexual exploitation. In her Nevada study of legal brothels, Dr. Farley reported that 27 per cent of legal brothel workers interviewed had been pressured or coerced into an act of prostitution, 25 per cent had been physically assaulted, and 15 per cent had been threatened with a weapon. Dr. Farley adds that legalization of prostitution does not reduce the stigma of prostitution as legal brothel workers in Nevada are treated as social outcasts.

[346] It is Dr. Farley's view that prostitution in general damages women's sexuality as it treats the female prostitute as a "receptacle."

[347] In Dr. Janice Raymond's opinion, it is not the "work conditions" of prostitution nor the laws designed to suppress prostitution that make female prostitutes vulnerable; rather, it is the construction of prostitution itself, especially under decriminalized conditions, in which women are treated as sexual commodities, and where buyers, mostly men, are allowed to purchase women for use as sexual instruments. It is Dr. Raymond's view that under both legal and illegal conditions, the sexual interaction between buyers and female prostitutes is exploitative, and very often violent.

[348] According to Dr. Raymond, the German legislation, which decriminalized aspects of prostitution, has had no appreciable impact on the protection of women in prostitution, nor has it reduced crime related to prostitution activities.

[349] In Dr. Alexis Kennedy's opinion, removing the communicating provision from the *Criminal Code* will not alleviate the dangerous conditions of street prostitution, which include abusive pimps, abusive customers, a traumatic history of child abuse, sexual abuse, and drug abuse. Dr. Kennedy's view that high levels of dissociation and drug use among street prostitutes interfere with their ability to assess the risk of a potential client. However, she stated during

cross-examination that speaking to a potential client for a greater length of time could minimize the ill effects of impaired decision making.

[350] Dr. Kennedy's position is that if the bawdy-house provisions were removed from the *Criminal Code*, many female prostitutes would continue to work on the street due to high fees charged to prostitutes at indoor locations, hygiene and age requirements, sexual exploitation by owners, and because drug-addicted women would not be able to show up to work on a regular basis. However, on cross-examination, she stated that her views are largely based on her study of street prostitutes and that she does not know "what works and doesn't work" about bawdy-houses or how street prostitutes would be affected by the removal of the bawdy-house provisions.

[351] Dr. Richard Poulin is a Professor in the Department of Sociology and Anthropology at the University of Ottawa. He has a Ph.D. in sociology from the Université de Montréal and has published extensively. His research has focused on prostitution, human trafficking, pornography, and the dynamics of the global sex trade, with a particular focus on minors. Like Drs. Farley and Raymond, Dr. Poulin supports the abolition of prostitution, and states that his position stems from his research. In his affidavit, Dr. Poulin says that physical and sexual violence in prostitution is substantial, regardless of the legal regime in place. Changing the legality of prostitution does not change the "essential violence" that exists in prostitution; in cross-examination, Dr. Poulin defined violence as meaning a systemic power imbalance.

(D) Conclusion: Expert Evidence

[352] I find that some of the evidence tendered on this application did not meet the standards set by Canadian courts for the admission of expert evidence. The parties did not challenge the admissibility of evidence tendered but asked the court to afford little weight to the evidence of the other party.

[353] I found the evidence of Dr. Melissa Farley to be problematic. Although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions. For example, Dr. Farley's unqualified assertion in her affidavit that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence. Furthermore, in her affidavit, she failed to qualify her opinion regarding the causal relationship between post-traumatic stress disorder and prostitution, namely that it could be caused by events unrelated to prostitution.

[354] Dr. Farley's choice of language is at times inflammatory and detracts from her conclusions. For example, comments such as, "prostitution is to the community what incest is to the family," and "just as pedophiles justify sexual assault of children....men who use prostitutes develop elaborate cognitive schemes to justify purchase and use of women" make her opinions less persuasive.

[355] Dr. Farley stated during cross-examination that some of her opinions on prostitution were formed prior to her research, including, "that prostitution is a terrible harm to women, that

prostitution is abusive in its very nature, and that prostitution amounts to men paying a woman for the right to rape her.”

[356] Accordingly, for these reasons, I assign less weight to Dr. Farley’s evidence.

[357] Similarly, I find that Drs. Raymond and Poulin were more like advocates than experts offering independent opinions to the court. At times, they made bold, sweeping statements that were not reflected in their research. For example, some of Dr. Raymond’s statements on prostitutes were based on her research on trafficked women. As well, during cross-examination, it was revealed that some of Dr. Poulin’s citations for his claim that the average age of recruitment into prostitution is 14 years old were misleading or incorrect. In his affidavit, Dr. Poulin suggested that there have been instances of serial killers targeting prostitutes who worked at indoor locations; however, his sources do not appear to support his assertion. I found it troubling that Dr. Poulin stated during cross-examination that it is not important for scholars to present information that contradicts their own findings (or findings which they support).

[358] The applicants’ witnesses are not immune to criticism. The respondent asks this court to assign little weight to Dr. Lowman’s opinion. The respondent called Dr. Melchers, a research methodologist, to provide an opinion on Dr. Lowman’s three major prostitution-related studies. Dr. Melchers was highly critical of Dr. Lowman’s empirical observations, largely based on the language of causality used in his affidavit. During cross-examination, Dr. Lowman expressed discontent with portions of his affidavit, citing “careless” language and “poorly reasoned argument.” Dr. Lowman rightly takes responsibility for the content of his affidavit, which was drafted for him by law students. In his affidavit, Dr. Lowman made a direct causal link between the *Criminal Code* provisions at issue and violence against prostitutes; however, during cross-examination he gave the opinion that there was, rather, an indirect causal relationship. Such inattentiveness on such a crucial issue is indeed concerning. During cross-examination, Dr. Lowman gave nuanced and qualified opinions, which more accurately reflect his research.

(E) Conclusion: The Applicants Have Been Deprived of Security of the Person by the Impugned Provisions

[359] Despite the multiple problems with the expert evidence, I find that there is sufficient evidence from other experts and government reports to conclude that the applicants have proven on a balance of probabilities, that the impugned provisions sufficiently contribute to a deprivation of their security of the person.

[360] I accept that there are ways of conducting prostitution that may reduce the risk of violence towards prostitutes, and that the impugned provisions make many of these “safety-enhancing” methods or techniques illegal. The two factors that appear to impact the level of violence against prostitutes are the location or venue in which the prostitution occurs and individual working conditions of the prostitute.

[361] With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(j), prostitution, including legal out-call work, may be made

less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(c) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.

[362] In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.

(F) The Reasonable Hypothetical

[363] The applicants also presented an alternative s. 7 argument grounded in the use of “reasonable hypotheticals,” which are potential fact scenarios constructed to demonstrate the unconstitutional impact of an impugned law.

[364] The use of reasonable hypotheticals arose in challenges to mandatory minimum sentences under s. 12 of the *Charter* with the case of *R. v. Smith*, [1987] 1 S.C.R. 1045 and subsequently, the case of *R. v. Goltz*, [1991] 3 S.C.R. 485. The Court extended their use to s. 7 overbreadth analysis in *Heywood*, *supra*. In *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, the Supreme Court held that reasonable hypotheticals could be used to decide whether a law was overbroad or a punishment was cruel and unusual because those issues require a proportionality analysis comparing law to facts. Fact scenarios beyond the immediate can only assist in that comparison. In *Morgentaler*, *supra*, the Court used a hypothetical set of facts in their s. 7 analysis to determine whether therapeutic abortions, in theory permitted by the *Criminal Code*, were actually attainable in practice. The use of reasonable hypotheticals has been curtailed in the ensuing years.

[365] As a result of the voluminous evidentiary record put before me in this case, I have found on a balance of probabilities that the impugned provisions materially contribute to the decreased personal security of the applicants. I therefore do not find it necessary to find a deprivation of security of the person based upon “reasonable hypotheticals.”

[366] Nonetheless, at the next stage of the s. 7 analysis, reasonable hypotheticals are available as a limited means of demonstrating that the effects caused by the impugned provisions are not proportionate to the underlying legislative objectives. This will only be the case where the principle of fundamental justice that the impugned provision violates requires a proportionality analysis.

3. Are These Deprivations in Accordance with the Principles of Fundamental Justice?

[367] The applicants have proven that the impugned provisions deprive them of liberty and security of the person. To succeed in their argument, the applicants must now show that these

deprivations are not in accordance with the principles of fundamental justice.

[368] The applicants submit that each of the impugned provisions operate contrary to four such principles: (1) laws must not arbitrarily deprive individuals of their protected rights; (2) laws must not be broader than necessary to accomplish their purpose; (3) the harmful effects of a law must not be grossly disproportionate to the benefits gained; and (4) the state must legislate in accordance with the rule of law. I will consider each of these arguments in turn.

(A) Do the Impugned Provisions Arbitrarily Deprive the Applicants of Liberty and Security of the Person?

a. The Law: Arbitrariness

[369] It is a well-recognized principle of fundamental justice that laws should not be arbitrary: *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30, at para. 103; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, at paras. 129 and 231; *Malmo-Levine, supra* at para. 135; *Rodriguez, supra* at pp. 594-95. In *Chaoulli*, McLachlin C.J. and Major J. (with Basterache J. concurring) stated at paras. 130-131:

A law is arbitrary where ‘it bears no relation to, or is inconsistent with, the objective that lies behind [it]’. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.

In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

[370] The applicants submit that all three impugned provisions constitute an arbitrary deprivation of liberty and security of the person. They acknowledge that the provisions bear some relation to their objectives; however, they argue that the current and broad application of the provisions undercuts the rational connection between the offences and their objectives.

[371] The applicants argue that the communicating provision has not achieved its purpose of reducing or eradicating public nuisance caused by street prostitution, and therefore “the deprivation of the right in question does little or nothing to enhance the state’s interest” (citing Sopinka J. in *Rodriguez* at p. 594).

[372] The applicants submit that the bawdy-house and living on the avails provisions also do little or nothing to enhance the state’s objectives because the provisions extend far beyond the

activities for which they were created. As well, they argue, there exists a *de facto* form of decriminalization for these offences in light of evidence of low police enforcement, a priority placed on policing street prostitution, licensing by some municipalities of various forms of indoor prostitution, and the fact that the majority of prostitution takes place indoors.

[373] Finally, the applicants argue that the state objective underlying all three offences will never be achieved because the interplay of all three provisions is a “contradiction in action.” They state that the Court held that the communicating provision is aimed at removing solicitation for the purposes of prostitution “off the streets and out of public view” (citing Dickson C.J. in the *Prostitution Reference* at p. 1136); yet, the other impugned provisions foreclose the possibility of moving indoors legally. As well, they maintain that those who move off the street face more significant and serious legal sanctions.

[374] The respondent submits that the provisions each have legitimate state objectives and that the applicants have not established that the provisions bear no relation to or are inconsistent with their objectives.

[375] The respondent argues that the alleged ineffectiveness of a criminal prohibition is of little or no relevance to its validity under s. 7 of the *Charter*; in any event, the communicating provision is an effective tool regularly used by police forces across the country to address the problem of solicitation in public places.

[376] The respondent maintains that the applicants’ claim that the interplay of the impugned provisions is arbitrary is a misinterpretation of Dickson C.J.’s reasoning in the *Prostitution Reference*. The respondent states that the aim of taking solicitation “off the streets and out of public view” does not imply an intention to authorize it in an off-street, private setting.

[377] In *Chaoulli*, McLachlin C.J. and Major J. held that laws must not be arbitrary both theoretically and on the facts. I find, on a theoretical level, that there does exist at least some connection between all of the impugned provisions and their respective objectives. Therefore, the question I must answer is whether the impugned provisions lack a real connection on the facts to their objectives?

1) Does s. 210 - Bawdy-House - Lack a Real Connection on the Facts to its Objective?

[378] The bawdy-house provisions are generally aimed at combating neighbourhood disorder and risks to public health and safety. Evidence from a number of sources supported the view that enforcement of the bawdy-house provisions is generally complaint-driven, and that the low enforcement rate suggests that bawdy-houses do not have a high “nuisance” factor (see, for example, the 1998 *Working Group Report* at p. 58). Just because a provision is not widely enforced does not automatically render it arbitrary. Based on the record before me, I am satisfied that there is some evidence that bawdy-houses can cause nuisance to the community; therefore, I find there is at least some real connection on the facts to the objective, and that the provisions are not arbitrary.



2) Does s. 212(1)(j) - Living on the Avails - Lack a Real Connection on the Facts to its Objective?

[379] As stated above, the legislative objective of this provision is to prevent the exploitation of prostitutes as well as the profiting from prostitution by pimps. Evidence was presented from a number of experts that the effect of this provision is that prostitutes are not able to legally enter into certain business relationships that can enhance their safety. The courts have interpreted the provision to extend to those who are in the business of rendering services to prostitutes, because they are prostitutes. Thus, the provision would appear to capture a security guard, a personal driver, or even an assistant who answers telephone calls to pre-screen potential clientele. Prostitutes, then, are left with some difficult choices including working alone (which can increase vulnerability) or working with a form of illegal protection with people willing to risk criminal charges or conviction (perhaps with the very type of person this provision was intended to address). Such an effect cannot be said to be connected to or consistent with Parliament's objective, as it may actually serve to increase the vulnerability and exploitation of the very group it intends to protect. For these reasons, I find that the living on the avails provision is inconsistent with its objective, and is, therefore, arbitrary.

3) Does s. 213(1)(c) - Communicating for the Purposes of Prostitution - Lack a Real Connection on the Facts to its Objective?

[380] The state objective in enacting the communicating provision is to “address solicitation in public places and, to that end...eradicate the various forms of social nuisance arising from the public display of the sale of sex”: *Prostitution Reference*, at p. 1134 *per* Dickson C.J. The evidence in this case demonstrates that the communicating law has had a minimal impact on reducing street solicitation in public places, merely displacing street prostitution to different areas in some instances (see, for example, the 1989 *Synthesis Report*, p. 92), and has not, consequently, had an appreciable effect on social nuisance. In addition to many of the applicants' witnesses who deposed to this, the government reports also support such a finding. For example, at p. 76 of the 1989 *Synthesis Report*, the authors found:

In the two Canadian cities where street prostitution presented the greatest problem, Vancouver and Toronto, the legislation had virtually no success in moving prostitutes off the street. Both street counts and interviews with key respondents in these cities suggested that, at best, prostitutes were simply displaced to new areas.

[381] Nearly a decade later, the 1998 *Working Group Report* stated at p. 58 that the prostitution-related provisions in the *Criminal Code* “[have] not had a serious impact on controlling street prostitution.”

[382] Most recently, the 2006 *Subcommittee Report* found the following at pp. 62 and 86:

Section 213 is the most frequently enforced of all criminal law provisions relating to prostitution. Since it was introduced in 1985, this provision has accounted for 90 per cent of prostitution-related offences reported by the police. Yet numerous

studies have shown that section 213 has not had the deterrent effect desired. It has not adequately reduced the incidence of street prostitution or even the social nuisance associated with its practice. These studies indicate that enforcement of section 213 has instead served to move prostitution activities from one place to another, and in so doing, has made those selling sexual services more vulnerable.

...

...The social and legal framework pertaining to adult prostitution does not effectively prevent and address prostitution or the exploitation and abuse occurring in prostitution, nor does it prevent or address harms to communities. This framework must therefore be reformed or reinforced. This view reflects the position of the vast majority of witnesses who appeared before the Subcommittee, as well as the conclusions of the major studies on prostitution conducted over the last 20 years. [Footnotes omitted; emphasis added.]

[383] However, just because a law is largely ineffective does not necessarily mean that it is arbitrary or irrational. I am guided by the reasons of the majority in *Malmo-Levine* at p. 657:

This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that "[t]he efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis" (para. 57). While somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills.

Questions about which types of measures and associated sanctions are best able to deter conduct that Parliament considers undesirable is a matter of legitimate ongoing debate. The so-called "ineffectiveness" is simply another way of characterizing the refusal of people in the appellants' position to comply with the law. It is difficult to see how that refusal can be elevated to a constitutional argument against validity based on the invocation of fundamental principles of justice. Indeed, it would be inconsistent with the rule of law to allow compliance with a criminal prohibition to be determined by each individual's personal discretion and taste.

[384] Thus, although I find that the law has only minimally impacted the state's interest, I cannot find that the communicating law bears no relation to, or is inconsistent with, the state's objective. Consequently, the communicating provision is not arbitrary.

#### 4) Are the Impugned Provisions Acting in Concert Arbitrary?

[385] Although I do not find that the bawdy-house provisions are themselves arbitrary, I find that their interplay with the other impugned provisions renders them so. I have found that the safest way to conduct prostitution is generally in-call. The bawdy-house provisions make this

type of prostitution illegal. Prostitutes can legally work out-call, which is not as safe, particularly as prostitutes are precluded by virtue of the living on the avails provision from forming certain “safety-enhancing” business relationships (such as hiring a driver or security guard). The other option is for prostitutes to work on the street, which would put them at risk of violating the communicating provision and further contributing to a form of public nuisance. Additionally, putting prostitutes at greater risk of violence cannot be said to be consistent with the goal of protecting public health or safety. Thus, when seen in conjunction with the other impugned provisions, the bawdy-house provisions are arbitrary in the sense that they may actually exacerbate the nuisance Parliament intends to eradicate. The evidence from the government reports and of Dr. Lowman on the issue of displacement supports the notion that when indoor prostitution is targeted by the police, street prostitution increases (and vice versa).

[386] This evidence was not before the Supreme Court in 1990 when the Court held that the fact that the sale of sex for money is not a criminal act under Canadian law does not mean Parliament must refrain from using the criminal law to express society’s disapprobation of street solicitation”: *Prostitution Reference* at p. 1141, *per* Dickson C.J.

[387] A similar argument can be made when looking at the communicating provision in conjunction with the other impugned provisions. Moving prostitutes “off the streets and out of public view” in order to combat social nuisance may serve to exacerbate the harm that the bawdy-house provisions target if prostitutes are forced to move indoors. Although prostitutes could conduct out-call work legally, it would be at a risk to their safety, particularly as they are precluded from hiring security guards or drivers. Such an outcome cannot be said to be consistent with Parliament’s objectives.

[388] I find the impugned provisions acting in concert are arbitrary in that taken together they are inconsistent with the objective and there is no rational connection between the provisions and their objectives.

(B) Are the Impugned Provisions Overbroad?

a. The Law: Overbreadth

[389] The Supreme Court has recognized that it is a principle of fundamental justice that criminal legislation must not be overbroad: *Demers, supra*; *Heywood, supra*; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, *supra*; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

[390] In *Heywood*, Cory J., for the majority of the Supreme Court, discussed the overbreadth principle at pp. 792-94:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is

necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

...

In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the *Charter* has a wide scope. This was stressed by Lamer J. (as he then was) in *Re B.C. Motor Vehicles Act*, *supra*, at p. 502. There he observed:

Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.

However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

[391] This approach to determining overbreadth was reaffirmed by the Supreme Court in *Demers*, *supra*.

[392] Vagueness, which was considered by the Supreme Court in the *Prostitution Reference*, is different than, but related to, overbreadth. In *Heywood*, Cory J. explained the distinction at p. 792:

Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

[393] The applicants submit that all three impugned provisions are overbroad. They argue that the elements of all three provisions are not narrowly circumscribed to address situations of nuisance and exploitation, and both the case law and the Crown's evidence from various police officers demonstrate that the enforcement of the provisions extends far beyond the objectives of the legislation.

[394] The applicants assert that Parliament does not have a sufficient basis to conclude that a blanket prohibition on indoor prostitution with the assistance of third parties is necessary for the protection of public safety. Such a prohibition, according to the applicants, disregards the

legitimate needs of prostitutes who wish to increase their safety and security and unnecessarily exposes them to an increased risk of violence.

[395] The respondent argues that the impugned provisions are not overbroad. With regard to the living on the avails offence, the scope of the provision is properly interpreted as applicable only to those who live parasitically on a prostitute's earnings. As for the bawdy-house provisions, the respondent submits that the evidence shows that a risk of harm is always present and it is up to Parliament to determine that public safety is best served by criminalizing all bawdy-houses.

[396] In the *Prostitution Reference*, the majority of the Supreme Court held that the communicating provision was not “unduly intrusive” during its minimal impairment analysis under s. 2(b) of the *Charter*. The respondent argues that these reasons apply to the current analysis of whether the communicating provision is overbroad under s. 7 of the *Charter*.

1) Is s. 210 - Bawdy-House - Overbroad?

[397] The applicants argue that a blanket prohibition on indoor prostitution is a complete disregard for the legitimate needs of prostitutes who wish to increase personal safety and security, and that this blanket prohibition unnecessarily exposes prostitutes to an increased risk of violence. In fact, there is no blanket prohibition on indoor prostitution, as prostitutes can legally work out-call in indoor locations, albeit at a greater risk to their safety.

[398] The issue is whether the provisions are necessary to achieve the state objective, which I have found to be eliminating neighbourhood disorder and a concern for public health and safety.

[399] A bawdy-house for the purpose of prostitution has been defined to include “any defined space...if there is localization of a number of acts of prostitution within its specified boundaries.... [It] does not have to be covered or enclosed, and it can be used temporarily whether or not any person has an exclusive right of user with respect to it”: *R. v. Pierce and Golloher, supra* at p. 725 (emphasis added). As stated at p. 407 of the *Fraser Report*, the definition is “very extensive” and “covers a far greater range of establishments than the traditional brothel, embracing even very transitory locales, such as parking garages or lots.”

[400] In addition to having a wide geographic scope, bawdy-houses vary in size and sophistication of operation: included are small, independent operations as well as large-scale commercial establishments. The impact on a neighbourhood of a prostitute working independently and discreetly from home, or with another person in order to enhance safety, may be different than the impact of a large “brothel-style” establishment overseen by an owner/manager employing a large number of prostitutes. The evidence in this case shows that in Canada most prostitutes are independent operators, not managed by anyone other than themselves (see p. 378 of the *Fraser Report*).

[401] To convict a person of a bawdy-house offence, none of the harms the provision is aimed at need to be shown, such as neighbourhood disorder, or threats to public health or safety. The evidence from both parties demonstrates that there are few community complaints about indoor

prostitution establishments. In my view, because they assign criminal liability to those direct participants of bawdy-house prostitution who do not contribute to the harms Parliament seeks to prevent, the bawdy-house provisions are overly broad as they restrict liberty and security of the person more than is necessary to accomplish their goal.

2) Is s. 212(1)(j) - Living on the Avails - Overbroad?

[402] In considering the living on the avails provision in relation to its purpose (the exploitation of prostitutes and profiting from prostitution by pimps), it is clear that the means chosen are broader than necessary to accomplish the objective. As mentioned earlier, the House of Lords in *Shaw* recognized the potential breadth of a similar provision, and attempted to limit its scope by introducing the notion of parasitism: consequently, “[t]he grocer who supplies groceries, the doctor or lawyer who renders professional service” to prostitutes were excluded from liability. Parasitism, as interpreted by the Ontario Court of Appeal, appears to have a different meaning based on whether the person lives with a prostitute, or provides business services to a prostitute. Exploitation is only required in the former circumstance. If the mischief of the provision is aimed at the “abusive and exploitative malevolence” of pimps, to cite Cory J. in *Downey* at p. 36, then the provision is overbroad as a number of non-exploitative arrangements are caught by this provision. Accordingly, this provision restricts the liberty of such persons “for no reason”: *per* Cory J. in *Heywood* at p. 793.

3) Is s. 213(1)(c) - Communicating for the Purpose of Prostitution - Overbroad?

[403] In the *Prostitution Reference*, the majority of the Supreme Court held that the communicating provision was not “unduly intrusive” during its minimal impairment analysis under s. 2(b) of the *Charter*. The respondent argues that this settles the issue of whether the communicating provision is overbroad pursuant to s. 7 of the *Charter*.

[404] Overbreadth is a concept that is relevant both to the consideration of an infringement of a *Charter* right and, if a *prima facie* infringement is found, the assessment of the s. 1 justification: *R. v. Clay*, [2003] 3 S.C.R. 735, 2003 SCC 75 at p. 751 *per* Gonthier and Binnie J.J., for the majority.

[405] In *Heywood*, the Court stated at pp. 802-03 that “[o]verbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.”

[406] In the *Prostitution Reference*, Chief Justice Dickson, in his section 1 analysis, found that the communicating provision minimally impaired the right to freedom of expression. Dickson C.J. considered whether the provision was overly broad at pp. 1136-37:

...It is argued that the legislation is over broad because it is not confined to places where there will necessarily be many people, or, in fact, any people, who will be offended by the activity. The objective of this provision, however, is not restricted to the control of actual disturbances or nuisances. It is broader, in the

sense that it is directed at controlling, in general, the nuisance related problems identified above that stem from street soliciting. Much street soliciting occurs in specified areas where the congregation of prostitutes and their customers amounts to a nuisance. In effect, the legislation discourages prostitutes and customers from concentrating their activities in any particular location. While it is the cumulative impact of individual transactions concentrated in a public area that effectively produces the social nuisance at which the legislation in part aims, Parliament can only act by focusing on individual transactions. The notion of nuisance in connection with street soliciting extends beyond interference with the individual citizen to interference with the public at large, that is with the environment represented by streets, public places and neighbouring premises.

The appellants' argument that the provision is too broad and therefore cannot be found to be appropriately tailored also focuses on the phrase "in any manner communicate or attempt to communicate". The communication in question cannot be read without the phrase "for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute" which follows and qualifies it. In my opinion, the definition of communication may be, and indeed is, very wide, but the need for flexibility on the part of Parliament in this regard must be taken into account. Certain acts or gestures in addition to certain words can reasonably be interpreted as attracting customers for the purposes of prostitution or as indicating a desire to procure the services of a prostitute. This provides the necessary delineation of the scope of the communication that may be criminalized by s. 195.1(1)(c)...

Can effective yet less intrusive legislation be imagined? The means used to attain the objective of the legislation may well be broader than would be appropriate were actual street nuisance the only focus. However, as I find the objective to extend to the general curtailment of visible solicitation for the purposes of prostitution, it is my view that the legislation is not unduly intrusive. [Emphasis in original.]

[407] Wilson J. disagreed at pp. 1213-15, finding that the impugned provision was not sufficiently tailored to the objective as the scope of the communication and the places where an offence could occur were overly broad. She further noted that "no nuisance or adverse impact of any kind on other people need be shown, or even be shown to be a possibility, in order that the offence be complete." Justice Wilson wrote at p. 1214:

It is not reasonable, in my view, to prohibit all expressive activity conveying a certain meaning that takes place in public simply because in some circumstances and in some areas that activity may give rise to a public or social nuisance. [Emphasis in original.]

[408] *Charter* interpretation is contextual. In the *Prostitution Reference*, Dickson C.J. analyzed whether the communicating provision minimally impaired the right to free expression;

furthermore, the communication at issue was one that did not lie near the core of the guarantee. Dickson C.J. stated at p. 1137:

...The legislative scheme that was eventually implemented and has now been challenged need not be the “perfect” scheme that could be imagined by this Court or any other court. Rather, it is sufficient if it is appropriately and carefully tailored in the context of the infringed right. I find that this legislation meets the test of minimum impairment of the right in question. [Emphasis added.]

The finding by Chief Justice Dickson that the legislation is not “unduly intrusive” must be viewed within the context of the right at issue.

[409] In this case, I have determined that the communicating provision sufficiently contributes to a deprivation of the liberty and security of the person of prostitutes. I find that it represents a threshold violation of section 7. In particular, a communication that would allow prostitutes to screen potential clients for a propensity for violence is caught by this provision. It is within this context that I evaluate the applicants’ overbreadth argument. The question that must be addressed here is whether the communicating provision is necessary in order to curtail the harmful effects associated with visible solicitation for the purposes of prostitution: *Heywood* at pp. 792-93. Such effects, as outlined by Dickson C.J., were said to include “street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children”: *Prostitution Reference*, at p. 1135.

[410] I recognize that the geographical overbreadth argument was rejected by the majority of the Supreme Court in the *Prostitution Reference* in its minimal impairment analysis. In that case, the right being intruded upon was the right to free expression for a commercial purpose. Here, the rights violated are liberty and security of the person. However, I find that the communicating provision is necessary to achieve the objective of eliminating social nuisance as stated by Dickson C.J. who held that Parliament’s aim was to discourage the concentration of prostitution activities in any one area as it was the cumulative effect of public solicitation that produces the social nuisance: see *Prostitution Reference*, *supra* at p. 1136. In my view, the alternatives proposed by the applicant for a narrowly tailored law would have the potential effects of moving prostitution activities to an isolated industrial area or a secluded area of a park. That may result in even more dangerous scenarios with an increase to the harm to the security of the person of prostitutes and may fail to achieve the state’s objective of curtailment of visible solicitation.

(C) Are the Impugned Provisions Grossly Disproportionate?

[411] The principle of gross disproportionality was articulated by the Supreme Court of Canada in the case of *Malmo-Levine*. The majority of the court stated at p. 653:

In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.



[412] In deciding whether a particular law is grossly disproportionate to its objective, I am not to import from s. 1 into s. 7 a balancing of the “salutary” and “deleterious” effects of the law: see *Malmo-Levine*, at p. 658, citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Instead, a gross disproportionality analysis proceeds by first determining whether the impugned law pursues a legitimate state interest, and then by considering the gravity of the alleged *Charter* infringement in relation to the state interest pursued: *Malmo-Levine* at p. 645; *PHS Community Services Society*, *supra* at paras. 58 and 296; *Cochrane v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 321 at p. 332 (C.A.), leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 105.

[413] The onus of proving that the negative effects of a law are grossly disproportionate to its objective lies with the applicants: see *Flora v. Ontario Health Insurance Plan (General Manager)* (2007), 83 O.R. (3d) 721 at para. 220 (Sup. Ct.).

[414] The standard is a high one. Fundamental justice is not breached by laws that are merely disproportionate. Legislation must be *grossly* disproportionate in order to be found unconstitutional. The ultimate question to be answered is whether the legislative measures are, in effect, “so extreme that they are *per se* disproportionate to any legitimate government interest”: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, at p. 32; *Malmo-Levine* at pp. 644-45. Only one law has been held unconstitutional based on a finding that its effects are grossly disproportionate to its legislative objective: *PHS Community Services Society*, *supra*. In that case, the British Columbia Court of Appeal upheld the lower court’s decision that a law preventing the continued operation of Insite, a safe-injection site and health care facility frequented by drug addicts in Vancouver’s Downtown Eastside, was grossly disproportionate to the effects the denial of access would have on those who frequented Insite.

[415] In *PHS Community Services Society*, Smith J.A., dissenting in the result, articulated the test for gross disproportionality at para. 296:

The principle of disproportionality was discussed in *Malmo-Levine*. The test for disproportionality requires the court to determine whether the impugned law pursues a legitimate state interest, and if so, whether the law is grossly disproportionate to the state interest (at para. 143). The principle does not involve a consideration of the law's penalty, which is dealt with under s. 12 of the *Charter*, but of the broader consequences of the impugned law and whether its effects on the claimants' s. 7 rights are so extreme that they are *per se* disproportionate to the state interest, or whether Canadians would find the effects abhorrent or intolerable when considered in light of the state interest (*Malmo-Levine* at paras. 143, 159 and 169).

[416] To apply the principle of disproportionality to the case before me, I ask the following questions:

- a) Does the law pursue a legitimate state interest?

- b) Are the effects of the law so extreme that they are *per se* disproportionate to the state interest?

[417] The second question has two components: (1) the consequences of the impugned law (beyond a term of imprisonment) on the claimant, and (2) the law's effects on the claimant's s. 7 rights.

- a. Do the Impugned Provisions Pursue Legitimate State Interests?

[418] The communicating provision is aimed at curbing the social nuisance associated with public solicitation for the purposes of prostitution, including traffic congestion, noise, harassment of persons in the area, and the harmful effect of the open display of prostitution on bystanders, including children. Similarly, the bawdy-house provisions seek to prevent harm to the community by protecting community health and safety, and preventing neighbourhood disruption. The living on the avails provision is aimed at preventing the exploitation of prostitutes and profiting from prostitution by pimps.

[419] Each of the aforementioned legislative objectives reflects a legitimate state purpose.

- b. Are the Effects of the Laws so Extreme that they are *per se* Disproportionate to the State Interest?

[420] In order to answer this question, I must first identify the consequences of the impugned provisions and their effects on the claimants' s. 7 rights.

[421] I find the following facts after weighing all of the evidence presented to me:

1. Prostitutes, particularly those who work on the street, are at a high risk of being the victims of physical violence.
2. The risk that a prostitute will experience violence can be reduced in the following ways:
  - a. Working indoors is generally safer than working on the streets;
  - b. Working in close proximity to others, including paid security staff, can increase safety;
  - c. Taking the time to screen clients for intoxication or propensity to violence can increase safety;
  - d. Having a regular clientele can increase safety;
  - e. When a prostitute's client is aware that the sexual acts will occur in a location that is pre-determined, known to others, or monitored in some way, safety can be increased;
  - f. The use of drivers, receptionists and bodyguards can increase safety; and
  - g. Indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring; financial negotiations done in advance

can increase safety.

3. The bawdy-house provisions can place prostitutes in danger by preventing them from working in-call in a regular indoor location and gaining the safety benefits of proximity to others, security staff, closed-circuit television and other monitoring.
4. The living on the avails of prostitution provision can make prostitutes more susceptible to violence by preventing them from legally hiring bodyguards or drivers while working. Without these supports, prostitutes may proceed to unknown locations and be left alone with clients who have the benefit of complete anonymity with no one nearby to hear and interrupt a violent act, and no one but the prostitute able to identify the aggressor.
5. The communicating provision can increase the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction.

[422] The effect of the impugned provisions is to force prostitutes to choose between their liberty interest and their own personal security. The provisions place prostitutes at greater risk of experiencing violence. These risks represent a severe deprivation of the applicants' right to security of the person.

[423] In my view, the effects of the laws are disproportionate to the identified state interests. But what considerations lead to a finding that the effects of a law are so extreme as to be *per se* disproportionate to its objective?

[424] In *R. v. Dyck* (2008), 90 O.R. (3d) 409, 2008 ONCA 309, Blair, J.A., writing for the court, found that the Ontario Sex Offender Registry, which required designated offenders to register with the police by attending a police station at designated times in violation of their liberty rights, was not grossly disproportionate to its objective of community protection. In so finding, Blair J.A. noted that the law only modestly infringed upon the right in question, did not restrict the appellant's freedom to make independent choices, and did not prevent the appellant from engaging in a range of lawful activities.

[425] In *Cochrane v. Ontario (Attorney General)*, *supra*, Sharpe J.A., writing for the court, considered whether Ontario's law banning pit bull dogs, which provided for imprisonment on violation, deprived the applicant of liberty in a manner grossly disproportionate to its objective of safeguarding the public from dog attacks. In finding that the law was in accordance with the principles of fundamental justice, Sharpe J.A. held that the *Charter* violation was neither grave nor severe and that the impairment of the right in question was not significant.

[426] The circumstances in the case before me are significantly different from those in *Dyck*, *supra* and *Cochrane*, *supra*. The impugned provisions constrain the independent choices of prostitutes in relation to their personal safety. Each of the provisions represents a violation of the their right to security of the person that is serious and far-reaching. Furthermore, in looking at

each of the specific provisions, I find the effects of the laws are grossly disproportionate to their legislative purposes.

1) Is s. 210 - Bawdy-House - Grossly Disproportionate?

[427] The evidence demonstrates that complaints about nuisance arising from indoor prostitution establishments are rare. The nuisance targeted includes neighbourhood disruption, and interference with public health and safety. These objectives are to be balanced against the fact that the provision prevents prostitutes from gaining the safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate.

[428] The considerations in *Dyck, supra* and *Cochrane, supra* that justified upholding the impugned provisions are absent in the case before me with respect to the effects of the bawdy-house provisions. The provisions drastically infringe upon the applicants' right to security of the person by placing them at a high risk of experiencing violence when practising prostitution outdoors. Specifically, the laws restrict the applicants' ability to make choices capable of reducing the risk of harm to their well-being under threat of penal sanction. I am of the view that the effects of the bawdy-house provisions on the applicants are grossly disproportionate to their purpose.

2) Is s. 212(1)(j) - Living on the Avails - Grossly Disproportionate?

[429] The living on the avails provision targets the exploitation of prostitutes and prohibiting others from gaining financially from prostitution. This objective is to be balanced against my conclusion that, by preventing prostitutes from legally hiring bodyguards, drivers, or other security staff, the provision places prostitutes at greater risk of harm and may make it more likely that a prostitute will be exploited.

[430] The circumstances considered in *Dyck, supra* and *Cochrane, supra* that justified upholding the impugned provisions are different from those described in the evidence on the effects of the living on the avails provision. The effect of this provision is to prevent prostitutes from lawfully hiring individuals who may be able to protect them from harm. Prostitutes may in turn be forced to rely upon individuals who are willing to face criminal sanctions, and may be more likely to be exploited as a result. The net effect is to make it more likely that a prostitute will be harmed by a client, or in an effort to avoid this, exploited by a pimp.

[431] The provision represents a severe violation of the applicants' *Charter* rights by threatening their security of the person. The law presents them with a perverse choice: the applicants can safeguard their security, but only at the expense of *another's* liberty. In my view, the living on the avails of prostitution provision is, in effect, grossly disproportionate to its objective.

3) Is s. 213(1)(c) - Communicating for the Purpose of Prostitution - Grossly Disproportionate?

[432] The nuisance targeted by the communicating provision includes noise, street congestion, and the possibility that the practice of prostitution will interfere with those nearby. These objectives are to be balanced against the fact that the provision forces prostitutes to forego screening clients which I found to be an essential tool to enhance their safety.

[433] In *PHS Community Services Society*, Rowles J.A. for the majority, held that:

The effect of the application of the [*Controlled Drugs and Substances Act*, S.C. 1996, c. 19] provisions to Insite would deny persons with a very serious and chronic illness access to necessary health care and would come without any ameliorating benefit to those persons or to society at large. Indeed, application of those provisions to Insite would have the effect of putting the larger society at risk on matters of public health with its attendant human and economic cost.

[434] Similarly, in this case, one effect of the communicating provision (as well as the bawdy-house provisions) is to endanger prostitutes while providing little benefit to communities. In fact, by putting prostitutes at greater risk of violence, these sections have the effect of putting the larger society at risk on matters of public health and safety. The harm suffered by prostitutes carries with it a great cost to families, law enforcement, and communities and impacts upon the well-being of the larger society. In my view, the effects of the communicating provision are grossly disproportionate to the goal of combating social nuisance.

c. Conclusion: Gross Disproportionality

[435] In light of all of these considerations, I am of the view that the effects of each of these provisions are *per se* disproportionate to their legislative objective. The overall effect of the impugned provisions is to force prostitutes to choose between their liberty interest and their personal security.

[436] Accordingly, I conclude that the impugned provisions are grossly disproportionate to their legislative objectives and are not in accordance with the principles of fundamental justice.

[437] It seems to me that there is some confusion in the jurisprudence regarding the relationship between the principle of overbreadth and that of gross disproportionality. I am of the view that they represent two distinct, yet closely related principles of fundamental justice. If I am wrong, and gross disproportionality is the standard against which allegations of overbreadth are to be measured, my conclusions are the same.

(D) Do the Impugned Provisions Promote Non-Compliance with the Law?

[438] The rule of law principle of fundamental justice, articulated by the Ontario Court of Appeal in *Hitzig v. Canada*, *supra*, holds that the state has an obligation to obey its own laws, and must promote compliance with the law.

[439] In that I have found that the impugned provisions are not in accordance with the principles of fundamental justice, it is not necessary for me to consider whether the impugned

provisions also offend this principle. Moreover, I am of the view that this principle is not applicable to this case: see *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 where the Supreme Court held at paras. 58 and 59:

This Court has described the rule of law as embracing three principles. The first recognizes that “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power”.... The second “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”.... The third requires that “the relationship between the state and the individual...be regulated by law”....

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials’ actions be legally founded. [Citations omitted.]

#### 4. Are any of the Section 7 Violations Salvageable by Section 1?

[440] The Supreme Court has stated that s. 7 violations are rarely salvageable by s. 1 of the *Charter*: *R. v. D.B.*, [2008] 2 S.C.R. 3, 2008 SCC 25 at para. 89, *per* Abella J. for the majority. In *Re B.C. Motor Vehicle Act*, at p. 518, Lamer J. observed that “[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.” Wilson J., who concurred in the judgment, wrote at p. 531: “I cannot think that the guaranteed right in s. 7 which is to be subject *only* to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system” (emphasis in original).

[441] In the case at bar, where I have found all the impugned provisions to be grossly disproportionate, and some to be arbitrary and overbroad, it is not possible to say that the provisions are proportionate or minimally impair the applicants’ rights to liberty and security of the person. I, therefore, find that none of the impugned provisions are saved by s. 1.

### **XI. SECTION 2(b) OF THE CHARTER**

[442] I turn now to a consideration of whether the communicating provision can continue to be upheld as a reasonable limit on freedom of expression as guaranteed by s. 2(b) of the *Charter*. Section 2(b) states:

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[443] In 1990, a majority of the Supreme Court of Canada upheld the communicating provision as a reasonable limit on freedom of expression. For the reasons outlined above, I am of the view that the evidence before me requires that this issue be reconsidered.

1. Is there a Violation of Section 2(b) of the Charter?

[444] In 1990, the Supreme Court unanimously found the communicating provision to be a *prima facie* infringement of s. 2(b) of the *Charter*. None of the parties to this proceeding made submissions to the contrary. I see no reason to revisit this finding.

**XII. SECTION 1 OF THE CHARTER**

[445] Section 1 of the *Charter* states as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[446] Following the analytical framework set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and expanded upon in *Dagenais, supra*, the Crown bears the burden at this stage to demonstrate that: (1) the legislative objective serves a pressing and substantial purpose that is sufficiently important to warrant restricting expression, and that (2) the measures chosen to achieve this objective are in their effect proportionate to the importance of the underlying legislative purpose.

[447] As discussed earlier, Parliament's objective when prohibiting communication for the purpose of prostitution was to remove such communications from public view, thereby preventing the various forms of social nuisance associated with such activities.

1. Does s. 213(1)(c) - Communicating for the Purposes of Prostitution - Serve a Pressing and Substantial Purpose?

[448] In the *Prostitution Reference*, Dickson C.J. found that the communication provision had a pressing and substantial objective. At p. 1135, he wrote:

The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. In my opinion, the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern. I find, therefore, that sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim.

The evidence presented in this case affirms the connection between the concentration of street prostitution and this mix of associated ills. I have no difficulty in finding that combating social nuisance is a valid legislative purpose of pressing and substantial concern.

2. Is s. 213(1)(c) - Communicating for the Purposes of Prostitution - in Effect Proportionate to its Objective?

[449] To determine whether the communicating provision's impairment of s. 2(b) is proportionate to its objective, I must consider: (1) whether the law is rationally connected to its legislative objective, (2) whether the means chosen to achieve the objective impair the right as little as possible, and (3) whether the deleterious effects of the law are outweighed by the importance of the objective and its salutary effects: *Oakes, supra* and *Dagenais, supra*.

[450] In undertaking this analysis, I am mindful of a governing consideration that reasonable limits on rights and freedoms are to be assessed in context: see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais, supra*; *R. v. Lucas*, [1998] 1 S.C.R. 439. While neither the law under consideration nor the legal test for overriding fundamental freedoms has changed since 1990, the context in which this analysis occurs has.

(A) What is the Nature of the Expression Prohibited by s. 213(1)(c) - Communicating for the Purposes of Prostitution?

[451] In *R. v. Keegstra*, [1990] 3 S.C.R. 697, Dickson C.J. described the value of free expression as follows at pp. 726-28:

That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian courts prior to the enactment of the *Charter*. The treatment of freedom of expression by this Court in both division of powers and other cases was examined in *Dolphin Delivery Ltd., supra*, at pp. 583-88, and it was noted that well before the advent of the *Charter* -- before even the *Canadian Bill of Rights* was passed by Parliament in 1960, S.C. 1960, c. 44 -- freedom of expression was seen as an essential value of Canadian parliamentary democracy. This freedom was thus protected by the Canadian judiciary to the extent possible before its entrenchment in the *Charter*, and occasionally even appeared to take on the guise of a constitutionally protected freedom (see, e.g., *Reference re Alberta Statutes*, [1938] S.C.R. 100, *per* Duff C.J., at pp. 132-33; and *Switzman v. Elbling*, [1957] S.C.R. 285, *per* Abbott J., at p. 326).

...

...the reach of s. 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society". In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the



majority decision in *Irwin Toy* perhaps goes further towards stressing as primary the "democratic commitment" said to delineate the protected sphere of liberty (p. 971). Moreover, the Court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in *Irwin Toy* (at p. 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

[452] While the focus of protecting free expression has often been on preserving the underlying conditions necessary to maintain an open and functioning democracy, the Supreme Court has, at times, recognized other reasons for protecting expressive freedom. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, Binnie J., for the majority, wrote at p. 1197 that “[f]reedom of expression is central to our identity as individuals and to our collective well-being as a society.”

[453] In *Edmonton Journal*, *supra*, Wilson J., in concurring reasons, emphasized the importance of considering limits upon free expression in light of the particular factual context of the case at pp. 1355-56:

... [A] particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

[454] Chief Justice Dickson in *Keegstra*, *supra*, followed the approach of Wilson J. in *Edmonton Journal*, and went on to describe a scale of importance of expressive content at pp. 760-62:

While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b).

...

Applying the *Royal College* approach to the context of this appeal is a key aspect of the s. 1 analysis. One must ask whether the expression prohibited by s. 319(2) is tenuously connected to the values underlying s. 2(b) so as to make the

restriction "easier to justify than other infringements." In this regard, let me begin by saying that, in my opinion, there can be no real disagreement about the subject matter of the messages and teachings communicated by the respondent, Mr. Keegstra: it is deeply offensive, hurtful and damaging to target group members, misleading to his listeners, and antithetical to the furtherance of tolerance and understanding in society. Furthermore, as will be clear when I come to discuss in detail the interpretation of s. 319(2), there is no doubt that all expression fitting within the terms of the offence can be similarly described. To say merely that expression is offensive and disturbing, however, fails to address satisfactorily the question of whether, and to what extent, the expressive activity prohibited by s. 319(2) promotes the values underlying the freedom of expression.

[455] Chief Justice Dickson then went on to consider the values underlying freedom of expression that were identified in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927: the need to ensure that truth and the common good are attained through the betterment of the political and social milieu, the need to ensure individuals are able to develop and maintain autonomy by crafting and expressing ideas, and the importance of open participation in the political process which is in turn supported by the associated tenet that "all persons are equally deserving of respect and dignity."

[456] When applying this scale of importance to hate speech, Dickson C.J. concluded at pp. 766-67 of *Keegstra*:

As I have said already, I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)" (*Royal College, supra*, at p. 247).

As a final point, it should be stressed that in discussing the relationship between hate propaganda and freedom of expression values I do not wish to be taken as advocating an inflexible "levels of scrutiny" categorization of expressive activity. The contextual approach necessitates an open discussion of the manner in which s. 2(b) values are engaged in the circumstances of an appeal. To become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles, and I would be loath to sanction such a result.

[457] In the *Prostitution Reference*, Dickson C.J. employed the same approach at p. 1136:

...expressive activity, as with any infringed *Charter* right, should also be analysed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. 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 expression.

[458] The evidence presented in this application goes well beyond conceptualizing street prostitution as a simple exercise of economic liberty. Evidence commissioned and generated by the Canadian government over the last two decades has repeatedly found that individuals engaging in street prostitution are, with some exceptions, marginalized people who are at a high risk of being victims of violent crime. Much of this evidence was not before the Supreme Court in 1990.

[459] In my view, the Supreme Court's s. 1 analysis in the *Prostitution Reference* flows naturally from placing communication for the purposes of prostitution at the periphery of constitutionally protected expression.

[460] I accept the applicants' evidence that the communicating law and its threat of penal sanction leads street prostitutes to forego proper screening of customers, compelling them instead into making hasty decisions which compromise their personal safety.

[461] Communication for the purpose of engaging in prostitution by necessity includes communications that serve to screen customers for safety purposes, as these communications are ultimately in furtherance of the eventual transaction. The language of the section is broad enough to capture these safety-driven communications. A conversation aimed at detecting whether or not a potential customer is belligerent, armed, or intoxicated, even one about something as banal as the weather, is a communication that is ultimately directed at safely exchanging sexual services for payment.

[462] In *Keegstra*, Dickson C.J. placed political speech at the core of the fundamental expression the *Charter* guarantee protects. Speech protecting individual autonomy, and an underlying respect for human dignity were also said to be at the core of constitutionally protected expression. In my view, speech meant to safeguard the physical and psychological integrity of individuals is also at the core of the constitutional guarantee. Weighing the prohibition on communication for the purpose of prostitution against the core values underlying free expression, including seeking the common good, protecting individual autonomy, political participation and the associated tenet that all people deserve respect and dignity, I find that the applicants' 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.

[463] Where the state is preventing communication that may reduce the risk of harm, the burden on the Crown to present justification for that prohibition is necessarily high. The state cannot limit protected rights involving core *Charter* values except where the state can provide compelling, evidence-based justifications for those limits. As Dickson C.J. stated in *Oakes* at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

(B) Is s. 213(1)(c) - Communicating for the Purposes of Prostitution - Rationally Connected to its Objective?

[464] The question to be answered at this stage of the proportionality analysis is whether the communicating provision is rationally connected to the social nuisance it is aimed at curtailing. In *Oakes*, the Court described this branch of the test, at p. 139:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

[465] The applicants argue that the communicating provision is not a reasonable limit on free expression because it is arbitrary, irrational, and unfair. This argument is predicated upon the assertion that the communicating provision is fundamentally ineffective and cannot meet its objectives.

[466] In a small number of cases, arguments have been made that a law is not rationally connected to its objective because it is fundamentally ineffective. These arguments have not been successful: see *Reference Re: Firearms Act (Can.)*, [2000] 1 S.C.R. 783. In *Malmo-Levine*, at p. 657 the majority rejected the notion that the prohibition against marijuana possession was not a reasonable limit due to the law's ineffectiveness as a deterrent.

[467] The respondent suggests that what the applicants describe as inefficacy is simply widespread non-compliance with the law. I do not accept that all ineffective laws will be ineffective as a result of non-compliance. However, in the circumstances of this case, I am of the view that questions about the efficacy of this law are best considered in the final stage of the proportionality analysis. In the text of Professor Kent Roach and Justice Robert J. Sharpe, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 2009), the authors write at p. 74:

Courts should be cautious about demanding an unrealistically high level of proof or requiring that the government demonstrate success or effectiveness in pursuing its objective at [the rational connection] stage of section 1 analysis. The effectiveness of the government's measure can be evaluated at a later stage in section 1 analysis when the court assesses the overall balance of the harms and benefits of the impugned measure.

[468] In the *Prostitution Reference*, Wilson J., cited with approval by the majority on this point, found that the communicating provision was rationally connected to its objective at p. 1212:

The next question under *Oakes* is whether s. 195.1(1)(c) is rationally connected to the prevention of the nuisance. I believe it is. The logical way to prevent the public display of the sale of sex and any harmful consequences that flow from it is through the twofold step of prohibiting the prostitute from soliciting prospective customers in places open to public view and prohibiting the customer from propositioning the prostitute likewise in places open to public view.

I conclude that the communicating provision is rationally connected to its purpose.

(C) Does s. 213(1)(c) - Communicating for the Purposes of Prostitution - Represent a Minimal Impairment of Expressive Freedom?

[469] At this stage of the proportionality analysis, I must determine whether the means chosen to achieve the objective, even if rationally connected to the legislative purpose, minimally impair the applicants' freedom of expression. In the *Prostitution Reference*, Dickson C.J. held that the legislation was not unduly intrusive and met the test of minimal impairment at pp. 1137-38.

[470] Justice Lamer, concurring in the result, found at pp. 1197-99 that because the provision was limited in "place and purpose," it impaired free expression as little as reasonably possible.

[471] In my view, as a result of the changed context, the impugned provision can no longer be considered to be sufficiently tailored to its objective and does not meet the minimal impairment test. The expression being curtailed is not purely for an economic purpose, but is also for the purpose of guarding personal security, an expressive purpose that lies at or near the core of the guarantee. In light of this conclusion, I find the minority decision of Justices Wilson and L'Heureux-Dubé at pp. 1213-15 of the *Prostitution Reference* to be persuasive:

I believe, with respect, that the Attorney General has overlooked a number of significant aspects of the impugned legislation which go directly to the question of its proportionality. The first is that it criminalizes communication or attempted communication for the prohibited purpose in any public place or place open to public view. "Public place" is then expanded in subs. (2) to include any place to which the public have access as of right or by invitation express or implied. In other words, the prohibition is not confined to places where there will necessarily be lots of people to be offended or inconvenienced by it. The prohibited communication may be taking place in a secluded area of a park where there is no-one to see or hear it. It will still be a criminal offence under the section. Such a broad prohibition as to the locale of the communication would seem to go far beyond a genuine concern over the nuisance caused by street solicitation in Canada's major centres of population. It enables the police to arrest citizens who are disturbing no-one solely because they are engaged in communicative acts concerning something not prohibited by the *Code*. It is not reasonable, in my

view, to prohibit all expressive activity conveying a certain meaning that takes place in public simply because in some circumstances and in some areas that activity may give rise to a public or social nuisance.

...

Directly relevant to the issue of proportionality, it seems to me, is the fact already referred to that under para. (c) no nuisance or adverse impact of any kind on other people need be shown, or even be shown to be a possibility, in order that the offence be complete. Yet communicating or attempting to communicate with someone in a public place with respect to the sale of sexual services does not automatically create a nuisance any more than communicating or attempting to communicate with someone on the sidewalk to promote a candidate for municipal election. Moreover, as already mentioned, prostitution is itself a perfectly legal activity and the avowed objective of the legislature was not to make it illegal but only, as the Minister of Justice emphasized at the time, to deal with the nuisance created by street solicitation. It seems to me that to render criminal the communicative acts of persons engaged in a lawful activity which is not shown to be harming anybody cannot be justified by the legislative objective advanced in its support. The impugned provision is not sufficiently tailored to that objective and constitutes a more serious impairment of the individual's freedom than the avowed legislative objective would warrant. Section 195.1(1)(c) therefore fails to meet the proportionality test in *Oakes*. [Emphasis in original.]

[472] The impugned provision prohibits all communicative activity for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute, not merely those communications which tend to contribute to social nuisance. Moreover, the evidence presented in this case tends to demonstrate that some of the communication being curtailed is capable of reducing the risk of harm to street-based prostitutes who are statistically more likely than the general population to be victims of violence. Curtailing these communications “constitutes a more serious impairment of the individual’s freedom than the avowed legislative objective would warrant.” On this basis alone, I find that the communicating provision does not minimally impair the expressive rights of the applicants and cannot be upheld as a reasonable limit under s. 1.

[473] Furthermore, a great deal of the evidence presented to me suggests that a number of other jurisdictions have introduced legislative regimes that address the social nuisance often associated with street prostitution without curtailing the fundamental rights and freedoms of prostitutes. I note the comments of Lamer J. in the *Prostitution Reference* regarding international responses to prostitution at p. 1200:

In addition it cannot be said that Canada's response to the problem is out of step with international responses. In fact, the Fraser Committee noted in its review of foreign legislation, that some jurisdictions, specifically the United States, have adopted regimes that are draconian by our standards: see Chapter 38 of the Fraser Committee report.

As I have outlined, the evidence on this application shows that a number of foreign jurisdictions over the past twenty years have implemented laws decriminalizing prostitution to varying degrees. These laws recognize an intention to minimize harm to prostitutes.

[474] Over the last two decades in the Netherlands, New Zealand, Germany, most of Nevada, and some jurisdictions of Australia, legislators have chosen to introduce municipally-based licensing policies that permit cities to address the social harms particular to their localities. Local regulations in these jurisdictions have included citizenship requirements for licensed prostitutes, health and safety requirements for indoor work environments, proscription of daytime outdoor working hours, preventing street prostitution from occurring near schools, homes, or places of worship, and restrictions on the issuance of new licences in order to prevent the location of brothels in residential neighbourhoods or their proliferation in any one area.

[475] The Dutch legislation also permits the creation of zones of tolerance (“tippelzones”) wherein street prostitution is permitted. In these non-residential areas, prostitutes are able to work in groups, transactions are monitored by dedicated police officers, and health and social service supports are made available to prostitutes free of charge. Less than a kilometre from the Utrecht tippelzone, a fourteen-stall concrete parking structure was created so that sexual transactions occurring in vehicles would not occur in residential areas and public parks; the proximity of the vehicles to one another also offers a measure of safety to the prostitutes. When prostitutes working in tippelzones are victims of violence, the zones promote positive relations with, and reporting of incidents to, the police. Police in New Zealand, Germany and Australia confirm increasing reporting of incidents of violence since decriminalization.

[476] In New Zealand, street prostitutes reported greater comfort in carrying condoms and lubrication, without fear of having these items used as evidence against them, since soliciting for the purpose of prostitution ceased to be an offence. Some New Zealand jurisdictions have installed closed-circuit television cameras in areas known for street prostitution, while others have implemented street ambassador schemes in order to connect with vulnerable communities and prevent youth from engaging in prostitution.

[477] In Germany, funding is provided for community run “drop-out programs” that provide support for prostitutes with mental health issues, addictions, and financial troubles, and seek to assist them in exiting prostitution.

[478] In Tasmania, Australia, the legislation has provisions prohibiting intimidating, assaulting and threatening prostitutes, such that crimes committed against prostitutes may result in higher penalties as a result of the circumstances of the crime and the vulnerability of the victim.

[479] In New South Wales, Australia, soliciting is permitted except in proximity to schools, homes, places of worship, and hospitals. Safe-house brothels have been established, which permit street prostitutes to serve clients indoors for a small fee while being protected by a monitored intercom, a single entrance with closed-circuit television cameras. Local health and welfare services are available. These safe houses protect prostitutes while removing the sexual transaction from public view.

[480] In Sweden, where prostitution is approached as an aspect of male violence against women and children, buying sex and pimping are illegal, but the seller of sexual services is seen as a victim and not criminalized. Public education campaigns targeting buyers of sexual services have reduced demand. Intensive police training has led to a 300 per cent increase in arrests and a reduction of complaints that the law is too difficult to enforce.

[481] This evidence suggests to me that Canada's prohibition of all public communications for the purpose of prostitution is no longer in step with changing international responses. These legal regimes demonstrate that legislatures around the world are turning their minds to the protection of prostitutes, as well as preventing social nuisance. The communicating provision impairs the ability of prostitutes to communicate in order to minimize their risk of harm and, as such, does not constitute a minimal impairment of their rights.

[482] The communicating provision, therefore, fails to meet the proportionality test in *Oakes*.

(D) Is there Proportionality Between the Effects and the Objective of s. 213(1)(c) - Communicating for the Purposes of Prostitution?

[483] At this final stage of the *Oakes* test, I must satisfy myself that the deleterious effects of the measure on individuals are not disproportionate to the importance of the legislative objective identified and its salutary effects: see *Dagenais, supra*. As was explained in *Oakes*, at p. 140, "[t]he more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

[484] The final balancing at this stage moves the analysis beyond questioning the law's relationship to its legislative purpose. Instead, the purpose is now weighed against the effects, both intended and unintended, of the impugned provision. While neither the law nor its purpose have changed since 1990, the available evidence demonstrating the effects of the law has grown in strength and volume in the intervening years. It is on the basis of this change that I proceed to weigh the effect that the communicating provision has on prostitutes against the benefit it confers upon communities.

[485] In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson C.J. described this balancing at p. 768 by saying that the effects of the limiting measures "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights."

[486] Constitutional scholar Peter Hogg puts it this way: "[this prong of the test] asks whether the *Charter* infringement is too high a price to pay for the benefit of the law": Hogg, *Constitutional Law of Canada, supra* at 38-43.

[487] In *Canada (Attorney General) v. JTI-MacDonald Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30, at para. 46, McLachlin C.J. for the Court described this step as "essential" because if the analysis were to end at the minimal impairment stage, "the result might be to uphold a severe impairment on a right in the face of a less important objective."



[488] In *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37, at paras. 76-77, McLachlin C.J. for the majority highlighted the importance of the application of this stage of the *Oakes* test and held as follows:

It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis -- pressing goal, rational connection, and minimum impairment -- could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups". As President Barak [former Israeli President and Head of the Israeli Supreme Court] explains:

Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right.... It requires placing colliding values and interests side by side and balancing them according to their weight.  
[p. 374]

In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.

The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Bastarache J. explained:

The third stage of the proportionality analysis performs a fundamentally distinct role. The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to

which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [Emphasis in original; para. 125.]

[489] In light of the evidence presented to me and after weighing the importance of the objective and the salutary effects against the deleterious effects of the law, I find the communicating provision to be an unreasonable limit on the freedom of expression.

a. The Salutary Effects of s. 213(1)(c) - Communicating for the Purposes of Prostitution

[490] In the *Prostitution Reference* at p. 1201, Lamer J. wrote that “concerns about the wisdom or effectiveness of the section have been taken into account by Parliament.” Justice Lamer then noted that the law as written mandated a comprehensive review of its provisions three years after the date of enactment, with a report to be tabled in the House of Commons including any recommended changes to the law. In fact, the evidence gathered for the review in question did not support the law; however, this information was not presented to the Supreme Court.

[491] On the issue of the salutary effects of the law, the applicants have presented a great deal of evidence, including a number of reports published by the government, suggesting that the law has not been effective in curtailing the social nuisance associated with prostitution.

[492] The 1989 *Synthesis Report* found that while the law had a short-term effect in reducing street prostitution in smaller cities, in major centres where street prostitution posed the largest problem, the law had little or no effect besides displacing prostitutes from their usual strolls.

[493] In the October, 1990, *Fourth Report of the Standing Committee on Justice and the Solicitor General on Section 213 of the Criminal Code (Prostitution-Soliciting)*, the House of Commons Standing Committee on Justice and the Solicitor General found that the main effect of the communicating law in most centres was to move street prostitutes from one downtown area to another, thus merely displacing the problem.

[494] In the 1994 *Calgary/Winnipeg Study*, Dr. Augustine Brannigan found no substantial decline in the rate of prostitution in Calgary or Winnipeg. One quarter of all female and one third of all male prostitutes he interviewed in Calgary had entered the industry *after* the enactment of the new provision.

[495] The 1998 *Working Group Report* concluded the following about the communicating provisions at p. 58:

...[The] legislation has not had a serious impact on controlling street prostitution. It continues to thrive. The police are only able to use s. 213 of the *Criminal Code* selectively because of the high resource implications of undercover operations, which police report is the only method of enforcing this section. As a result, informal zones of tolerance have come about.

[496] In 2006, the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws *Subcommittee Report* concluded that s. 213 had not “adequately reduced” street prostitution nor the social nuisance associated with it. The Subcommittee suggested that the current legal framework governing adult prostitution failed to effectively address exploitation in prostitution and failed to curtail harms to communities.

[497] The respondent presented evidence from police and community groups to counter the suggestion that the communicating provision is ineffective in curtailing social nuisance. The respondent argued that the provision is regularly used by police forces to successfully reduce the presence of solicitation in specified public places. The respondent also suggested that the communicating law is a useful tool that police use to keep prostitutes away from their pimps and the prostitution environment, and that this can lead to the prostitute leaving the sex industry. The respondent summarized this evidence as follows:

[Edmonton] Det. Jim Morrissey stated that he receives calls about once a month from prostitutes asking to be arrested to recover from fatigue, illness, addiction or to avoid threats made by other prostitutes, their pimps or johns.

Det. Const. Ramos with the Vancouver Police Department stated that officers would regularly talk to prostitutes and check on their well-being to gain their trust, so that they would see the police as their window to get out of prostitution. When the women were ready, they would set up meetings with social service agencies and arrange for transportation to another city and safe housing to help them exit. Sometimes charges under s. 213 would be necessary to get under-age girls out of prostitution, and the conditions of release “*gave them the ability and strength to say no and removed them from the negative influence of their pimps and took them to a more positive environment.*”

...

In some situations, sometimes at the request of the prostitute, police officers may charge prostitutes under s. 213 in order to get them into a diversion program to help them to get away from their pimp or from their drug addiction and increase their chances of exiting prostitution. [Emphasis in original.]

The respondent further submits that the applicants’ own evidence, describing evasive manoeuvres taken by prostitutes to avoid detection, demonstrates the deterrent effect of the law.

[498] I find, based upon the evidence before me, that the law does not effectively curtail the social nuisance associated with street prostitution. While the law may allow the police to direct

prostitutes towards social service supports or capture pimps on occasion, I conclude that the salutary effects of the communicating provision in combating the social nuisance associated with street prostitution are minimal.

b. The Deleterious Effects of s. 213(1)(c) - Communicating for the Purposes of Prostitution

[499] In the *Prostitution Reference* at p. 1138, Dickson C.J. found that the control of social nuisance achieved by the communicating provision far outweighed the importance of protecting “legitimate expression in the form of communication for the purposes of a commercial agreement exchanging sex for money.” In that case, the Court considered the communicating law as an imposition on free expression for an economic purpose. In the case before me, I am considering communication for the purpose of maintaining personal security. The most significant deleterious effect of the communicating provision is that it prevents communications that may reduce the risk of harm to prostitutes. The communicating law prevents street prostitutes from screening customers, resulting in an increased risk of them being subjected to violence.

[500] The 1989 *Synthesis Report* reviewing the communicating provision found that while the profile of street prostitutes had not been changed by the law, those working after the legal change tended to have lengthier criminal records than street prostitutes surveyed before the legal change. In the major centres, bail practices with area restrictions had forced prostitutes into remote areas, prostitutes worked later at night or on weekends to avoid police, and the working atmosphere had become more tense. In Calgary, the numbers of bad dates had increased, while in Vancouver, prostitutes reported being less likely to report bad dates to police for fear of being arrested themselves.

[501] In his 1994 *Calgary/Winnipeg Study*, Dr. Brannigan suggested that the communicating provision pushed street prostitution underground. This secrecy served to remove prostitution from public view and provided a cover for violence against prostitutes, which would be more easily detected if prostitution was not conducted in secret.

[502] In the 2006 *Subcommittee Report*, the Subcommittee reiterated that the communicating provision has not reduced the nuisance associated with street prostitution; instead, its effect has been to displace regular strolls and in so doing, has made prostitutes more vulnerable. The Subcommittee stated that this section makes it more likely that a prostitute who works in a familiar area near friends, co-workers and regular customers, will be arrested. To avoid arrest, the Subcommittee found that a street prostitute must forego these measures that may assist in safety and well-being. The Subcommittee also recognized that the section encourages street prostitutes to conclude negotiations very quickly, impairing their ability to check if clients are sober, in possession of weapons, or likely to demand that the prostitutes engage in activities with which they are not comfortable. The Report noted that abridged negotiations make it difficult for a prostitute to determine if the potential client has appeared on a list of clients known for behaving violently towards another prostitute in the past.

c. The Final Balancing

[503] At this stage, I must weigh the pressing and substantial purpose of controlling the social nuisance associated with prostitution and the minimal salutary effects I have identified against the deleterious effects on the right of prostitutes to express themselves in an effort to protect their personal safety. As I concluded earlier, this sort of communication is at the very core of the *Charter* guarantee.

[504] In my view, in pursuing its legislative objective, the communicating provision so severely trenches upon the rights of prostitutes that its pressing and substantial purpose is outweighed by the resulting infringement of rights. This rights infringement is even more severe given the evidence demonstrating the law's general ineffectiveness in achieving its purpose. By 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.

[505] The communicating provision, therefore, fails to meet the proportionality test in *Oakes, supra*. I find that s. 213(1)(c) represents an unjustifiable limit on the right to freedom of expression.

### **XIII. CONCLUSION**

[506] I am satisfied that the applicants have met their onus and have proven on a balance of probabilities that the impugned provisions infringe the *Charter* rights of the applicants. The respondent has not been able to demonstrate that the infringement of those rights is justified under s.1 of the *Charter*. Accordingly, I declare that the bawdy-house provision, the living on the avails of prostitution provision, and the communicating provision (ss. 210, 212(1)(j), and 213(1)(c) of the *Criminal Code*) violate s. 7 of the *Charter*, and cannot be saved by s. 1, and are, therefore, unconstitutional.

[507] I further declare that the communicating provision (s. 213(1)(c) of the *Criminal Code*) violates s. 2(b) of the *Charter*, and cannot be saved by s. 1, and is, therefore, unconstitutional.

### **XIV. REMEDY**

[508] Section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, states that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” I have found all of the impugned provisions to be inconsistent with the *Charter*.

[509] In determining which remedy to order, I have taken into consideration the analysis laid out by the Supreme Court in *Schachter v. Canada*, [1992] 2 S.C.R. 679, including consideration of the twin guiding principles of respect for the role of the legislature and respect for the purposes of the *Charter*: *Schachter, per* Lamer C.J. at pp. 700-702. I find that in this case it is appropriate to strike down ss. 212(1)(j) and 213(1)(c), and to strike the word “prostitution” from the definition of “common bawdy-house” in s. 197(1) as it applies to s. 210, as the applicants did not challenge s. 210 insofar as it relates to bawdy-houses for the practice of acts of indecency.

[510] The respondent requests that the court suspend the declaration of constitutional invalidity for a period of 18 months in order to allow Parliament a reasonable period of time to enact an appropriate legislative response and to protect public safety in the interim. The applicants made no submissions on this issue.

[511] In *Schachter*, Lamer C.J., for the majority, held at p. 716 that a temporary suspension of a declaration of invalidity is “a serious matter from the point of view of the enforcement of the *Charter*” as such a delay “allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation.” Chief Justice Lamer outlined the situations where a temporary suspension of a declaration of invalidity is appropriate. He wrote at para. 85 that a suspension is appropriate where:

- A. striking down the legislation without enacting something in its place would pose a danger to the public;
- B. striking down the legislation without enacting something in its place would threaten the rule of law; or,
- C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

[512] These factors were re-affirmed recently in *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10 at paras. 121 and 161.

[513] The respondent argues that striking these provisions will leave a legal vacuum. However, I note that there are a number of legal provisions capable of addressing many of the harms associated with prostitution. I include a brief review of these provisions below.

#### 1. Related Legal Provisions

[514] This challenge relates only to a sample of *Criminal Code* sections that prohibit prostitution-related activities. A number of sections that address prostitution have not been challenged. For example, ss. 213(1)(a) and (b), which prohibit stopping or attempting to stop a motor vehicle, or impeding or redirecting pedestrian or vehicular traffic for the purposes of prostitution, remain in effect.

[515] Sections 212(1)(a) through (i), which deal with procuring, were also not challenged by the applicants. These provisions remain in effect.

[516] Child prostitution remains unlawful. Sections 151, 152, and 153 create the offences against sexual exploitation of minors, sections 170 and 171 address procuring minors, 172.1 prohibits luring a child, s. 173(2) prohibits indecent exposure, and s. 280 penalizes non-parental child abduction.

[517] Besides laws that directly target prostitution-related activities, a number of existing *Criminal Code* provisions offer protection to prostitutes from violence and exploitation, and to communities from the various forms of nuisance associated with prostitution. I will briefly review some of the available provisions.

(A) *Criminal Code* Provisions that Offer Protection to Communities

[518] The harm accruing to communities as a result of street prostitution has been said to include areas where prostitutes, customers, and others congregate may be noisy and intimidating for residents, and where the flow of pedestrian and vehicular traffic may be impeded. As well, Dickson C.J., for the majority of the Supreme Court, stated that there is a general detrimental effect on bystanders and passers-by, especially children.

[519] There are a number of *Criminal Code* provisions to address the problem of street disturbances. Section 175 creates the offence of causing a disturbance, including fighting, indecent exhibition, loitering, and other public nuisance activities. Section 177 prohibits loitering at night on another person's property. In both cases, the maximum sentence is six months' imprisonment. Section 180 creates the offence of common nuisance with a maximum sentence of two years' imprisonment.

[520] Unwanted confrontations are addressed in the *Criminal Code* as well. Section 264 prohibits criminal harassment through repeated unwanted communications or threatening conduct such that the individual fears for his or her safety. The maximum sentence is ten years' imprisonment. Section 173 prohibits committing an indecent act in a public place, and s. 174 creates the offence of public nudity. The maximum sentence for both is six months' imprisonment; the Attorney General must consent before nudity charges are laid.

[521] The 2006 *Subcommittee Report* suggested that these provisions, otherwise available to protect communities from prostitution-related nuisance, are rarely used because police are either unaware of them or are unwilling to use them.

[522] However, some prosecutions have occurred. In *R. v. Gowan*, [1998] O.J. No. 1629 (Ct. J. (Prov. Div.)) (QL), the accused was convicted of indecent exhibition as a result of walking down a busy street during rush hour with uncovered breasts, fondling her breasts while making suggestive comments to motorists, and leaning into passing cars and soliciting drivers. In *R. v. Dalli*, [1996] O.J. No. 762 (Ct. J. (Prov. Div.)) (QL), the accused was convicted of indecent exposure after a police officer observed him picking up a prostitute, followed his vehicle to a parking lot near a city beach, and watched him have sexual intercourse with the prostitute in his car. In *R. v. Sheikh*, [2008] O.J. No. 1544 (Sup. Ct.) (QL), the accused was convicted of indecent exposure after police observed him in a busy high school parking lot engaging in sexual acts with a prostitute in his vehicle.

[523] There may also be provincial legislation able to offer protection to communities in certain circumstances: see, for example, the *Safe Streets Act, 1999*, S.O. 1999, C. 8.

(B) Criminal Code Provisions that Offer Protection to Prostitutes

[524] In many cases, attacks against prostitutes by pimps involve charges laid under both general and specific prostitution-related provisions of the *Criminal Code*. For example, in *R. v. Patterson* (2003), 64 O.R. (3d) 275, the Court of Appeal upheld a seven-year sentence for a number of offences including kidnapping, forcible confinement, procuring, living on the avails of prostitution, and uttering threats, where a woman was kidnapped, abused, and forced into prostitution. In *R. v. Graves*, [1999] M.J. No. 413 (C.A.) (QL), the accused was sentenced to four years' imprisonment on charges of living on the avails of prostitution, robbery, assault, and uttering threats where the complainant was a prostitute.

[525] In *R. v. Senior*, [1997] 2 S.C.R. 288, the Supreme Court upheld an 18-year sentence for a man who had assaulted his girlfriend and forced her to work as a prostitute. He was convicted of kidnapping, for which he received 12 years, use of a firearm in the commission of an offence, for which he received three years consecutive, living on the avails of prostitution, for which he received three years consecutive, and aggravated assault, assault with a weapon, and uttering threats, for which he received concurrent sentences totalling 22 years' imprisonment. In *R. v. Murray* (1995), 169 A.R. 307, a global sentence of five years for a number of offences including living on the avails, uttering threats (two counts), and assault causing bodily harm was upheld by the Alberta Court of Appeal.

[526] In other cases, pimps have been successfully tried without resort to these provisions. For example, in *R. v. Hayes*, [1998] B.C.J. No. 2752 (C.A.) (QL), a five-year sentence for extortion, three counts of simple assault, and three counts of uttering threats, was upheld by the Court of Appeal after a young woman was forced to attempt to prostitute herself as a result of threats and violence.

[527] In many of these cases, the crime of uttering threats found in s. 264.1 of the *Criminal Code*, punishable by up to five years' imprisonment, is used to punish the exploitive conduct of the pimp. In others, s. 423 (intimidation) has been used. This section makes it an offence to use violence or threaten violence or injury to property, intimidate or threaten a person in order to compel them to do something that they have the right to abstain from doing. Intimidation is a hybrid offence; the maximum sentence on indictment is five years' imprisonment. In *R. v. Yu* (2002), 317 A.R. 345, 2002 ABCA 305, convictions for kidnapping, intimidating, assaulting, menacing, beating, and degrading a prostitute to recover a debt were upheld.

[528] In contrast to the aforementioned cases, violent attacks against prostitutes by customers are prosecuted without the use of specific prostitution-related provisions. For example, in *R. v. Bodnaruk* (2002), 217 Sask. R. 89, the Saskatchewan Court of Appeal sentenced a man to three years' imprisonment and a DNA order for sexual assault, assault with a weapon, common assault and uttering threats after he had beaten and threatened serious harm to three prostitutes. In *R. v. Nest* (1999), 228 A.R. 369, 1999 ABCA 46, the Alberta Court of Appeal upheld convictions for sexual assault, uttering death threats, attempted anal intercourse, choking, and unlawful confinement arising out of attacks on two prostitutes. In *R. v. Mooney* (1993), 23 B.C.A.C. 274 (C.A.), a sentence of eight years for sexual assault, robbery and uttering a threat was deemed fit and upheld by the Court of Appeal.



[529] Both s. 322 (theft) and s. 343 (robbery) have been used to punish clients of prostitutes who refused to pay for sexual services or stole property from a prostitute: see *R. v. Boivin* (1993), 27 B.C.A.C. 17 (C.A.); *R. v. Gregory*, 2001 BCCA 358; *R. v. Roper* (1997), 32 O.R. (3d) 204 (C.A.), *R. v. Omer* (1990), 66 Man. R. (2d) 45 (C.A.); *Graves, supra* and *Mooney, supra*.

[530] Section 346, which creates the offence of extortion, has been used to punish crimes against prostitutes both by customers (*R. v. Yews*, 1999 BCCA 699; *Gregory, supra*) and by pimps (*R. v. Allan*, [1993] O.J. No. 3432 (C.A.) (QL); *Hayes, supra*). In *Allan, supra*, the accused was sentenced to three years for extortion, as well as forcible confinement and living on the avails of prostitution for two years less a day, which was to be served concurrently to the extortion sentence. He had locked a prostitute who worked for him at his escort agency into a room and assaulted her to get more money.

[531] Other sections of the *Criminal Code* are available to police to charge pimps and customers who threaten or cause harm to prostitutes: s. 279 (kidnapping/forcible confinement), s. 269 (unlawfully causing bodily harm), s. 266 (assault), s. 267 (assault with a weapon or causing bodily harm), s. 268 (aggravated assault), s. 269.1 (torture), s. 271 (sexual assault), s. 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), and s. 273 (aggravated sexual assault).

[532] In *R. v. Ford* (1993), 15 O.R. (3d) 173 (C.A.), the accused was charged with six prostitution-related offences against two young women, as well as kidnapping, confinement, aggravated assault, and assault against one of them. He had taken the two fifteen-year-olds from Etobicoke to Montreal to work as prostitutes for him. The jury found him not guilty of kidnapping, but convicted him on all other counts. He was sentenced to eight years' imprisonment. As a result of a statutory limitation period which has since been repealed, the prostitution-related convictions were set aside. Nonetheless, the Ontario Court of Appeal imposed a sentence of five years for the remaining convictions.

[533] Introduced in November 2005, s. 279.01 prohibits trafficking in persons:

279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

- (a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or
- (b) to imprisonment for a term of not more than fourteen years in any other case.

(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

[534] Section 279.02 punishes individuals who benefit economically from trafficking in persons and carries a maximum penalty of ten years' imprisonment. In *R. v. Nakpangi*, 2008 CarswellOnt 9334 (Ct. J.), the accused was charged under both this section and s. 212(2) in relation to his control over two young persons involved in prostitution, and received a global sentence of five years' imprisonment.

[535] In conclusion, I respectfully reject the argument made by the respondent that a legal vacuum would be created by an immediate declaration of invalidity in this case.

## 2. Conclusion: Remedy

[536] The respondent argues that striking down the impugned provisions without enacting something in its place would pose a danger to the public. I am not persuaded that this would be the case. The evidence before me suggests that ss. 210 and 212(1)(j) are rarely enforced and that s. 213(1)(c) is largely ineffective. As well, the Supreme Court has held that s. 213(1)(c) is aimed at curtailing social nuisance, not protecting public safety. Moreover, I have found that the law as it stands is currently contributing to danger faced by prostitutes.

[537] In his text, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2009), Professor Kent Roach writes at 14-97 that “[d]elayed declarations of invalidity will not be appropriate if they expose individuals and groups to irreparable harm caused by the continued operation of a law that has been found unconstitutional.”

[538] I find that the danger faced by prostitutes greatly outweighs any harm which may be faced by other members of the public. I, therefore, do not consider that a temporary suspension of a declaration of invalidity is appropriate in this case.

[539] I am mindful of the fact that legislating in response to prostitution raises difficult, contentious, and serious policy issues and that it is for Parliament to fashion corrective legislation. This decision does not preclude such a response from Parliament. It is my view that in the meantime, these unconstitutional provisions should be of no force and effect, particularly given the seriousness of the *Charter* violations. However, I also recognize that a consequence of this decision may be that unlicensed brothels may be operated and in a way that may not be in the public interest. It is legitimate for government to study, consult and determine how to best address this issue. In light of this, I have determined that a stay of my decision for up to 30 days should be granted to enable the parties to make fuller submissions to me on this question or to seek an order for a stay of my judgment.

## **XV. COSTS**

[540] Counsel did not address the issue of costs in their argument. If costs are being sought, the parties shall file written submissions according to the following timetable: the applicants shall file their submissions within 60 days of the release of this decision, and the respondent shall file its submissions within 20 days of receipt of the applicants' submissions. Should there be a claim for costs against the interveners, the interveners have 20 days to file submissions following receipt of the applicants' submissions.

[541] I thank counsel for their detailed, able submissions in presenting these complex issues to the court.

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HIMEL J.

**Released:** September 28, 2010

**CITATION:** Bedford v. Canada, 2010 ONSC 4264  
**COURT FILE NO.:** 07-CV-329807 PD1  
**DATE:** 2010/09/28

2010 ONSC 4264 (CanLII)

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

TERRI JEAN BEDFORD, AMY LEOVITCH  
AND VALERIE SCOTT

Applicants

**- and -**

ATTORNEY GENERAL OF CANADA

Respondent

**- and -**

ATTORNEY GENERAL OF ONTARIO

Intervener

**- and -**

THE CHRISTIAN LEGAL FELLOWSHIP, REAL  
WOMEN OF CANADA AND THE CATHOLIC  
CIVIL RIGHTS LEAGUE

Intervener

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**REASONS FOR JUDGMENT**

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HIMEL J.

Released: September 28, 2010