

JUDGING SEX WORK

Bedford and the Attenuation of Rights

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INTRODUCTION

IN *BEDFORD V CANADA*,¹ Terri-Jean Bedford, Valerie Scott, and Amy Lebovitch – all current or former sex workers – brought an application to the Ontario Superior Court of Justice to strike down three laws restricting the practice of sex work. These laws prohibited sex workers from working out of bawdy houses² or communicating in public for the purpose of sex work.³ It was also an offence for other people to live on the avails of sex work.⁴ Sex workers were therefore forced to conduct their otherwise legal work in unfamiliar areas and without safeguards such as being able to screen clientele or hire protective staff. The trial judge found that these laws increased the risk of violence that sex workers face when conducting their work.⁵ Given the objectives of the impugned legislation – preventing either public nuisance or exploitation of sex workers – the trial judge concluded that the sex work laws were unconstitutional since they struck an illogical or unacceptable balance between their objectives and effects.⁶

On 20 December 2013, the Supreme Court of Canada unanimously endorsed the trial judge's decision despite having upheld the same three laws two decades earlier.⁷ As Chief Justice McLachlin explained, there were two important differences between the earlier constitutional challenges and the *Bedford* decision. First, the evidence submitted provided much more detail about the dangers faced by sex workers. Whereas limited evidence existed in the early 1990s, the trial judge in *Bedford* based her decision on over 25,000 pages of social science evidence.⁸ Second, the legal principles pleaded in *Bedford* differed from those of its predecessors.⁹ In the earlier cases, the Supreme Court considered

whether the sex work laws unjustifiably violated the presumption of innocence,¹⁰ the rights to freedom of association and expression,¹¹ and whether the laws were unduly vague.¹² The Supreme Court in *Bedford* struck down the sex work laws by employing principles of “means-ends” or “instrumental rationality.” The relevant principles of fundamental justice – prohibiting laws with overbroad (illogical) or grossly disproportionate (harsh) effects – did not have constitutional status when the earlier cases were decided.¹³

The *Bedford* decision is a landmark case in part because of the particular laws that it struck down. The sex work laws at issue were part of a controversial approach to sex work governance that many believe unduly undermined the autonomy and safety interests of sex workers. For these advocates, striking down the sex work laws constituted a major social justice victory and an important step on the road toward decriminalizing sex work. However, others believe that the criminalization of sex work in some form is necessary to deter its practice. Only by preventing sex work to the extent possible can the equality interests of women in particular be upheld. The *Bedford* case unsurprisingly served to reinvigorate political tensions surrounding the regulation of sex work. As will become evident, Parliament’s response to *Bedford* should serve as a cautionary tale to those seeking to employ the Charter to create social change.

From a legal perspective, the *Bedford* case is a landmark decision for several reasons. Not only did it constitute the first time that the Supreme Court overturned its own precedent upholding a law under the Canadian Charter of Rights and Freedoms,¹⁴ but it also dramatically affected the constitutional litigation process. The conclusion that even lower courts may overturn appellate rulings if there is a “substantial change” in the evidence or if a “new legal issue” arises has generally been met with approval.¹⁵ The Supreme Court nevertheless also determined that appellate courts must show significant deference to a trial judge’s findings of fact based on social science evidence.¹⁶ This ruling is particularly controversial since the Supreme Court elsewhere recognized that findings of “social” or “legislative” facts are often dispositive of constitutional challenges.¹⁷ Should a single trial judge – typically trained in

law, not social science methods – be trusted to interpret competing accounts of social science evidence? Relatedly, would often indigent litigants be able to amass the necessary evidence to plead their cases? Although this occurred in *Bedford*, the lead counsel for the applicants – Alan Young – volunteered his services and convinced all expert witnesses to follow suit.

The Supreme Court attempted to address the access to justice challenge by developing constitutional principles that ease the applicant's burden of proof when challenging a law under section 7 of the Charter. That section requires any law that engages an individual's life, liberty, or security of the person to accord with the "principles of fundamental justice." In *Bedford*, the Supreme Court restructured the instrumental rationality principles of fundamental justice. When applying these principles, judges first identify the law's objective and then consider whether the law is connected to its objective. If not, then the law is arbitrary.¹⁸ If the law is connected to its objective but applies to any individual in a manner that bears no connection to its objective, then the law is overbroad.¹⁹ And if the law's effect on any individual is too harsh when compared to its objective, then the law violates the gross disproportionality principle.²⁰ This focus on a law's rationality as applied to an individual – as opposed to these principles' prior focus on a law's rationality vis-à-vis all members of society – allows litigants to use their own experiences or those of a hypothetical litigant to establish a section 7 violation. This approach greatly lessens the burden of proof on applicants because it requires the state to explain why a law's overall burdens and benefits ought to result in the law being upheld under section 1 of the Charter.²¹

The Supreme Court's restructuring of the instrumental rationality principles nevertheless had two controversial effects. First, it vastly expanded the purview of judicial review under section 7 of the Charter. Moving forward, any law that engaged the threshold interests and was not perfectly connected to its objective or had severe effects on even a single person would violate the Charter.²² Although this change in law made it easier for constitutional issues to be raised, it also resulted in charges of "judicial activism" since judges were now much more

capable of finding a Charter violation.²³ Second, and less intuitively, the Supreme Court's use of the instrumental rationality principles made it possible for a legislature to sidestep judicial rulings without justifying a rights breach under section 1 or passing a reply law using the Charter's "notwithstanding clause."²⁴ By slightly modifying a law's objective or effects, the government can reasonably claim that any reply law is *prima facie* constitutional since it will be necessary to "rebalance" the relevant interests to determine the new law's constitutionality.²⁵

Parliament provided such a response to the *Bedford* decision. Controversially, the Supreme Court granted Parliament a one-year "suspended declaration of invalidity" during which the sex work laws remained in force despite their unconstitutionality.²⁶ Parliament used this time to develop and ultimately pass a law – Bill C-36 – that many contend did little to improve the safety of sex workers.²⁷ Instead, Parliament changed the context and objective of sex work regulation. Several of the previous prohibitions were re-enacted in a narrower form. More drastically, purchasing and selling sex became illegal (though the latter was non-prosecutable), and Parliament declared that eradicating sex work was the best means to uphold the equality and dignity interests of sex workers.²⁸ Given this novel context, Parliament maintained that the new sex work laws did not clearly violate any Charter rights.²⁹ This claim was plausible since the *Bedford* case had little precedential value given the different objectives and effects of those laws. Defendants have nevertheless begun the lengthy process of constitutionally challenging the new sex work laws using the same constitutional principles invoked in *Bedford*.³⁰ It is only a matter of time before the Supreme Court will decide the merits of those arguments.

My aim in this book is to provide a critical take on the legal aspects of the *Bedford* case. Building on the existing literature, I contend that the Supreme Court's ruling did little to protect the safety interests of sex workers, jeopardized the ability of courts to decide rights cases implicating social science evidence coherently, rendered the most important rights provision under the Charter incomprehensible, and unduly widened the scope of judicial review while providing legislatures with an unprincipled legal means to sidestep judicial precedents. Put

differently, I maintain that a decision widely considered a landmark social justice victory did much more to weaken than strengthen rights.

I nevertheless maintain that all of these results could have been avoided by viewing the constitutional challenge in *Bedford* through the lens of choice. Central to this novel response to the *Bedford* decision is the Supreme Court's recognition that some sex workers choose to engage in sex work whereas others have no "realistic choice" but to engage in the trade.³¹ Given the "alarming amount of violence" faced by the latter category of sex workers,³² I contend that they also have no realistic choice but to take basic safety precautions – such as screening clientele or setting up bawdy houses – while conducting their work. This conclusion is important for two reasons. First, the Supreme Court has observed that a person who acts without a realistic choice acts in a "morally involuntary" manner.³³ Second, it is contrary to the principles of fundamental justice to convict a person for morally involuntary conduct.³⁴

The constitutionality of the sex work laws should therefore have been scrutinized based on their application to those who *choose* to perform sex work. Although I conclude that the sex work laws still caused harm to voluntarily acting sex workers, my reframing of the *Bedford* case provides important context for considering whether the sex work laws ought to have been upheld under section 1 of the Charter. In my view, the choice of some sex workers to engage in the trade suggests that any harms to them were largely caused by their choice to engage in a dangerous trade. The fact that the harms endured by voluntarily acting sex workers were largely attributable to their own behaviour dampens the impact of the social science evidence admitted in *Bedford* under the proportionality aspect of the section 1 test.

I further contend that the Supreme Court misconstrued the objectives of the sex work laws. In addition to avoiding nuisances and preventing pimps from exploiting sex workers, the sex work laws sought to deter people from choosing to enter the trade. Although ascribing multiple objectives to a law is contrary to the Supreme Court's constitutional jurisprudence, this approach ought to be abandoned since it relies on a legal fiction. As the Supreme Court writes elsewhere,

legislation often “does not simply further one goal but rather strikes a balance among several goals, some of which may be in tension.”³⁵ There is no principled reason to utilize a different understanding of legislative intent in the constitutional context. I utilize my conception of choice in relation to sex work and the broader objectives of the sex work laws to bolster my view that each law was justifiable under section 1 of the Charter.

In making this argument, I do not intend to take a side in the increasingly polarized debate about the best means for regulating sex work. My analysis – which I suspect might raise some eyebrows – should nevertheless signal the need to consider a more fundamental question concerning the relationship between criminal law and constitutional law: Is it constitutional to criminalize sex work at all? This important question has received inadequate attention in Canadian law. I contend that this result derives from the Supreme Court’s refusal to constitutionalize any of the principles typically thought to delineate the permissible scope of criminal law. By filtering the Supreme Court’s constitutional analysis in *Bedford* through the lens of criminal defences, my analysis not only affirms the importance of the Anglo-American structure of criminal law when conducting constitutional analysis but also encourages criminal lawyers to unpack their grievances with sex work regulation in a way that reveals their true constitutional concern: whether the impugned activities of sex workers are a proper object of criminal prohibition. This path, I suggest, can serve to open the door to more meaningful regulatory reform than that achieved in *Bedford*.

The book unfolds in three parts. [Part 1](#) reviews the *Bedford* case and the Supreme Court’s prior precedents upholding the sex work laws. In [Chapter 1](#), I identify the two main gaps in the Supreme Court’s early jurisprudence that resulted in the sex work laws being upheld: limited social science evidence and inadequate judicial engagement with the “principles of fundamental justice.” In [Chapter 2](#), I detail the changing social and legal landscape that allowed the applicants to re-raise the constitutionality of the sex work laws a mere decade and a half after they were upheld.³⁶ In so doing, I draw from a personal interview with Alan Young, who shed light on his litigation strategy and the barriers

that he faced in bringing the constitutional challenge. In [Chapter 3](#), I summarize the social science evidence submitted in *Bedford* and the legal arguments for and against striking down the sex work laws. I distinguish the empirical record and legal arguments in *Bedford* from the Supreme Court's earlier decisions, enabling readers to gain a clearer sense of the deficiencies underlying the latter cases and the subsequent controversy underlying the *Bedford* decision.

In [Part 2](#), I take aim at the logic of *Bedford* and explain how the decision – contrary to its intent – served to attenuate rights. I contend in [Chapter 4](#) that the Supreme Court's decision to defer to the trial judge's findings of fact pertaining to social science evidence risks undermining constitutional rule. This follows for two reasons. First, trial judges are highly susceptible to making questionable findings of fact because of their well-documented struggle to understand social science evidence.³⁷ Second, social science evidence is frequently dispositive of constitutional issues.³⁸ As such, showing deference to the trial judge's factual findings subjects democratically enacted legislation to the trial judge's ability to understand that evidence as opposed to constitutional principles. Absent legislative prescriptions to address this issue, allowing an increased number of appellate justices to screen factual findings is the most promising means to minimize the chance that a law's constitutionality will be decided based on faulty evidence.

In [Chapter 5](#), I then explain how the Supreme Court's decision to “individualize” the instrumental rationality principles gave rise to controversy for both those who support and those who oppose judicial review. Those who charged that the Supreme Court's decision unduly expanded judicial review failed to channel their criticisms at the substance of the law. Put differently, it is questionable whether the Supreme Court's favoured principle – overbreadth – qualified as a principle of fundamental justice. The Supreme Court's insistence that the instrumental rationality principles “presume” that the law achieves its objective also gave rise to challenges. Although this presumption ensures that litigants need not submit voluminous empirical evidence to establish a rights infringement, it also rendered the arbitrariness and gross disproportionality principles either unworkable or unduly protective of

state legislation in readily identifiable scenarios. Finally, the Supreme Court's preference for employing the instrumental rationality principles made it easier for legislatures to evade judicial rulings. By slightly modifying a law's objective or effects, the government can reasonably claim that it is necessary to "rebalance" the relevant interests even though the new law has a similar impact on section 7 interests.

In [Chapter 6](#), I consider the implications of the Supreme Court's decision to suspend the sex work laws' declaration of invalidity. In a few short paragraphs, the Supreme Court determined that a suspended declaration of invalidity was warranted, and the sex workers just afforded protection under section 7 of the Charter were required to endure another year of those laws to allow Parliament adequate time to respond. This aspect of the judgment has been criticized for ignoring the substantial effects of a suspension of invalidity on the security interests of sex workers. It is also a questionable practice based on the text of the Constitution, which arguably does not permit courts to suspend a declaration of invalidity.³⁹ The fallout from *Bedford* illustrates the need to develop a principled framework for suspending declarations of invalidity especially when serious harm is likely to result from such a declaration.

In response to these problems, I contend that it is best to require legislatures to suspend declarations of invalidity using constitutional tools readily available to them and that courts should suspend a declaration of invalidity only in rare circumstances in which an unwritten constitutional principle compels such action. Even in those circumstances, however, it is necessary to suspend a declaration of invalidity only for as long as it might take the affected legislature to invoke the same unwritten constitutional principle as a means of determining the duration of the suspension. This approach is prudent since I maintain that courts are ill equipped to determine the appropriate lengths of suspended declarations of invalidity.⁴⁰ Applying this approach to the *Bedford* case, I contend that there was no principled basis for the Supreme Court to suspend the sex work laws' declaration of invalidity.

In [Part 3](#), I offer a rethink of the *Bedford* decision and consider the implications of the legal framework that I provide for the future of sex

work regulation in Canada. I begin in [Chapter 7](#) by outlining the choice-based argument for upholding the sex work laws at issue in *Bedford*. I maintain that my approach would have better respected the will of Parliament to restrict voluntary sex work while protecting those who engage in sex work in a morally involuntary manner.

In [Chapter 8](#), I contend that my choice-based framework applies with equal force to several of Parliament's new laws. Parliament responded with both narrower versions of the sex work laws at issue in *Bedford* and new prohibitions against advertising and procuring sexual services. More controversially, Parliament also decided to criminalize the purchase of sex. The choice-based framework for assessing the constitutionality of the sex work laws should prevent the former prohibitions from being struck down. However, the constitutionality of the key provision of the new sex work laws – the criminalization of purchasers – will turn uncomfortably on the trial judge's interpretation of the social science evidence concerning the efficacy of the new sex work laws. Given the limited available evidence and the difficulties courts face in interpreting social science evidence, I maintain that courts ought to show the new sex work legislation deference at this early stage of its adoption.

In [Chapter 9](#), I respond to anticipated objections to my choice-based analysis by reframing the constitutional question for future litigants. Drawing from the section 7 jurisprudence, I contend that the *Bedford* case was pleaded using the instrumental rationality principles because of the Supreme Court's unwillingness to utilize constitutional law to meaningfully delineate the boundaries of what may be criminalized. Framing the argument in this way resulted in the analysis being divorced from the theory underlying criminal law. Although filtering the constitutional analysis through the law of defences might give rise to objections – the unfairness of requiring vulnerable sex workers to endure the criminal process to obtain an acquittal – I contend that these retorts do not undermine my doctrinal critique. Instead, any unfairness resulting from the Anglo-American structure of criminal law should bring litigants back to first principles of criminal law. Put differently, my hope is that my critique of *Bedford* results in litigants

asking whether the impugned sex work laws further any of the legitimate aims of the criminal law.

I conclude by unpacking a peculiar aspect of the *Bedford* decision: it was unanimous. The various controversial legal rulings in *Bedford* belie the conclusion that nine critical-thinking justices were in perfect agreement about the merits of the case. In my view, the unanimity in the *Bedford* case was a result of the judicial culture cultivated by Chief Justice McLachlin during her tenure on the Supreme Court. By fostering a culture of cooperation among justices, concurring and dissenting reasons became much less frequent.⁴¹ Such a perspective nevertheless would have been valuable to guide litigants in future Charter challenges, especially those currently arising in response to Bill C-36. I therefore maintain that the *Bedford* decision casts doubt on the high value that the former Chief Justice placed on cooperation and emphasizes the need to encourage more robust concurring and dissenting reasons on the bench.

Before proceeding, I want to make two further observations. First, I use the terms “sex work” and “sex worker” – terms coined by the recently deceased Carol Leigh – instead of “prostitution” and “prostitute” except when directly quoting courts or scholars using the latter terms. The distinction between these terms is in part political. As the trial judge explained in *Bedford*, the term “sex worker” is typically employed to avoid the stigma associated with the term “prostitute.”⁴² Debra Haak also observes that a more robust understanding of the two terms can help to bring conceptual clarity for legal decision makers.⁴³ The term “sex work” is typically used to refer to those who sell sexual services “bearing certain characteristics, most notably that they are adults, who engage as a matter of consent and in the absence of third party coercion.”⁴⁴ These characteristics are contrasted with those underlying prostitution, which connotes coerced and nonconsensual activity.⁴⁵

The question therefore arises whether the political purpose underlying use of the term “sex work” can be preserved without glossing over the important distinction between “prostitution” and “sex work.” In my view, allowing “sex work” to serve as an umbrella term need not result in the distinction being lost. In its place, some scholars distinguish

between categories of sex work, identifying it as either “voluntary” or “survival.”⁴⁶ This terminology is more appropriate since it serves the laudable goal of lessening the stigma faced by sex workers while also recognizing that many of them do not act in a normatively voluntary manner. Although this distinction is contested,⁴⁷ the Anglo-American criminal law has long drawn a line between voluntary and involuntary actions. As I contend in [Part 3](#) of the book, it is both acceptable and prudent to rely on a distinction that operates as a central piece of the criminal law when structuring the relationship between it and sex work.

Second, and despite the political underpinnings of my preferred terminology, I have not written this book as an advocate of any form of sex work regulation. Nor have I written it as a social scientist deeply immersed in the empirics of sex work. I necessarily engage with the empirical evidence as it was understood by the various levels of courts in *Bedford*. It is also important to engage with the history of sex work regulation in Canada. Without such a review, it is difficult to appreciate fully the moral, political, and social gravity of the judicial decisions considering the constitutionality of the sex work laws. My aim, however, is not to turn my analysis into an empirical review of sex work regulation or its history. Instead, this is a book about a landmark case in Canadian law and why I think that the case was misguided in its reasoning. With the purpose of the book set out, I turn now to an overview of the Supreme Court’s early cases engaging with the constitutionality of the sex work laws.

PART 1

THE LOGIC OF
BEDFORD

Setting the Stage

THE PLIGHT OF SEX workers in Canada is intrinsically tied to the regulation of sex work and other forms of sexual morality. A review of this history can help to explain why sex workers – typically women and often women of colour – are among the most disadvantaged populations in Canadian society. As Constance Backhouse explains, “[d]iscriminatory laws ... were used to attack a social problem that was itself a reflection of a discriminatory society.”¹ Put differently, social and economic discrimination against women explained why many turned to sex work. The state in turn used the criminal law to stigmatize and ostracize these women for “choosing” their “unvirtuous” occupation. By reinforcing discrimination with more discrimination, sex workers were destined to become an increasingly marginalized population.

This history can also help to explain the judicial failure to strike down the sex work laws when they were first constitutionally challenged in the early 1990s. It is likely that society’s prejudice against sex workers hampered the investigation of the perils of sex work. Although limited research existed, it was insufficient to establish that the dangers of sex work were intricately connected to the sex work prohibitions. The fact that the “principles of fundamental justice” protected under section 7 of the Canadian Charter of Rights and Freedoms were underdeveloped when the sex work laws were first challenged also helps to explain why

these laws were initially upheld. Limited engagement with section 7 unfortunately rendered courts ill equipped to account for the harms caused by the sex work laws.² To develop these arguments, I review the historical governance of sex work in Canada, the Supreme Court of Canada's interpretation of the impugned sex work laws, the relevant provisions of the Charter as they were then understood, and the Supreme Court's reasons for initially upholding the sex work laws.

THE GOVERNANCE OF SEX WORK PRE-CHARTER

Governance of sex work in Canada during the nineteenth and twentieth centuries took on various forms depending on the political and social attitudes of the day. Canada's experiment with a noncriminal, regulatory form of governance around the time of Confederation was brief. Attempts to employ rehabilitative principles to "reform" sex workers were similarly unsuccessful in early Canada. Instead, the criminal law – guided by Victorian morality – constituted the dominant method of governing sex work. No matter the approach to governance, gender, race, and class discrimination permeated the law.

The passing of the *Contagious Disease Act (CDA)*³ in Upper and Lower Canada in 1865 is illustrative of the Canadian experience with sex work regulation. The *CDA* permitted "diseased" sex workers to be detained for up to three months upon any person swearing before a judge that the sex worker suffered from a venereal disease and was conducting sex work in a prohibited place.⁴ As the full title of the legislation confirmed,⁵ the *CDA* was passed to slow the spread of venereal disease among the many military and naval men who hired sex workers in the newly united province of Canada. Importantly, the *CDA* was passed as a result of lobbying not only by military and naval men but also by upper-class citizens who accepted that sex work was a "necessary social evil" to satisfy the insatiable sexual appetites of men.⁶ The law's double standard was well illustrated by the fact that a similar law in place for screening military men for venereal disease was repealed half a decade earlier because the procedure was considered "unpopular"

with soldiers and “distasteful” to the medical officers performing the inspection.⁷

The *CDA*’s implicit endorsement of Victorian attitudes toward sexual morality was defended by numerous journalists who noted that sex workers provided married men with an outlet when their wives were unwilling to have sex. Sex work also provided unmarried men with a means to satisfy their sexual desires in a more socially acceptable way than other forms of sexual conduct, such as masturbation or seduction.⁸ For these reasons, Judith Walkowitz concluded, the *CDA* represented “the high water mark of an officially sanctioned double standard of sexual morality, one that upheld different standards of chastity for men and women and carefully tried to demarcate pure women from the impure.”⁹ Fortunately, a lack of approved medical facilities made the *CDA* difficult to enforce, and the legislation’s natural expiration five years after its enactment passed with little debate on the legislation’s merits.¹⁰

Underenforcement of the *CDA* and changing political tides nevertheless brought Canada’s brief experiment with sex work regulation to an end. Near the time of Confederation, social puritans began widely condemning the practice of sex work as immoral.¹¹ Begrudging the decline of family values, many calls for reform centred on preserving women’s historical role within the family. Sexual passivity was viewed as a key means of preserving female virtue and thus the family unit.¹² Organizations such as the Women’s Christian Temperance Union, the Young Women’s Christian Association, and the National Council of Women led this purist crusade alongside various religious bodies.¹³

The impetus for law reform was also heavily influenced by concerns about women being forced into the sex trade, a practice known as “white slavery.”¹⁴ Although for some scholars this phenomenon captured the practice of sex work more generally, others used the phrase to refer to sex workers who were physically coerced or tricked into participating in the trade.¹⁵ As Ruth Rosen explained, these women entered the sex trade for various reasons, including “false promises of marriage, mock marriages that had no legal status, and deliberate attempts to entangle a woman in foreign debt or emotional dependency.”¹⁶ Although this latter category of sex worker existed, records show that most sex workers

engaged in the practice out of economic necessity, a fact underappreciated by social purists.¹⁷

Culminating with Canada's first *Criminal Code* in 1892, various federal laws restricted the practice of sex work in response to its perceived social ills. In 1869, Parliament passed *An Act Respecting Vagrants*,¹⁸ which not only criminalized sex workers merely for *being* sex workers but also prohibited anyone from keeping a bawdy house, frequenting a bawdy house, and living on the avails of sex work.¹⁹ The same year Parliament passed *An Act Respecting Offences of the Person*,²⁰ which criminalized procuring the "defilement" of any woman under the age of twenty-one.²¹ The criminalization of sex work further expanded during the decades leading up to the enactment of the *Criminal Code*. For example, it became an offence to entice a woman to a bawdy house for the purpose of sex work or to conceal a woman in such a house.²² Men were also prohibited from seducing women of "previously chaste character" between the ages of twelve and sixteen.²³ Furthermore, it became illegal to procure women for "unlawful carnal connection" or for parents or guardians to promote the defilement of their daughters.²⁴ By the end of the nineteenth century, these and other related laws criminalized "every aspect of prostitution except the ... act of commercial exchange for sexual services."²⁵

During the same time period, other reformers adopted a rehabilitative approach to sex work. The premise of this approach was that sex workers were "blameless ... because they had been entirely duped by the deceit and predatory wiles of evil men."²⁶ As a result, it was possible for these sex workers to be fully reformed and reintegrated into society. Their children could also be raised in such a manner that they would refuse to enter the sex work trade. To achieve these ends, charitable organizations were tasked with providing religious, moral, and economic instruction to sex workers who "volunteered" to stay at their institutions for lengthy periods of time.²⁷ Unfortunately, the moral and religious instruction was offensive to many women, and the typical economic training provided – domestic service – was often redundant and generally viewed as inadequate to gain economic independence given its poor remuneration.²⁸

As it became apparent that women were not consenting to stays at reformatory houses, the rehabilitative model shifted its focus to the prison context. Many women began receiving lengthy sentences in reformatory prisons – a minimum of five years in some instances – upon being convicted of a vagrancy offence.²⁹ Some reformatory prisons even permitted indefinite detention if a woman contracted a “contagious or infectious disease.”³⁰ Lengthy prison terms were considered desirable since they provided sufficient time for individual reform.³¹ Predictably, these tactics were unsuccessful. As Backhouse opines, “[i]t was practically useless to attempt to reform prostitutes without simultaneously altering the various factors which drove them to prostitution – poverty, restricted employment options, sexual victimization ... lack of access to birth control and abortion, and the all-pervasive sexual double standard.”³² Failure to regulate the johns who purchased sex also ensured that demand for sexual services remained high, thereby rendering sex work one of the most viable options for many of these women upon their release from prison.³³

Renewed concerns about white slavery and lax enforcement of the existing sex work laws nevertheless fuelled a continued call for law reform early in the twentieth century.³⁴ Amendments to the *Criminal Code* in 1913 dropped the twenty-one-year age restriction for committing the procurement offence and permitted whipping as a punishment for any person convicted of multiple procurement offences.³⁵ Parliament also added prohibitions against concealing women in a bawdy house, encouraging new immigrants to join bawdy houses, and “exercising control, direction or influence over a female for purposes of prostitution.”³⁶ The modern iteration of the living on the avails offence was also adopted. This provision prohibited “living wholly or in part on the avails of prostitution” and was bolstered by a presumption of guilt if the accused either lived with or was “habitually in the company of prostitutes with no visible means of support, or residing in a house of prostitution.”³⁷ The bawdy house provisions were also amended by adding a presumption of guilt when a person “appeared to be a master or mistress.”³⁸ Furthermore, the amendments treated landlords as keepers of bawdy houses if they permitted a property to be used as such and prohibited anyone from being “found in” a bawdy house.³⁹

The only other major legal change after the amendments in 1913 was the repeal in 1972 of the offence of “being” a sex worker. The requirement that sex workers provide a satisfactory account of themselves to avoid conviction was increasingly criticized for its inconsistency with the common law privilege against self-incrimination, which had recently received legislative protection under the *Canadian Bill of Rights*.⁴⁰ As a result, the status offence was replaced by a prohibition against “soliciting” sex work in public places. Since the narrow judicial interpretation of the term “solicit” is relevant to the first constitutional challenge of the sex work laws, I undertake a more detailed account of the initial iteration of the soliciting offence below when reviewing the judicial interpretation of the sex work laws.

Throughout its history, application of the sex work laws by the authorities was exceedingly gendered.⁴¹ Not only did the police primarily enforce the sex work laws against women, but also trial judges commonly ordered women to pay significant fines and serve lengthy sentences of hard labour for what would be considered a minor infraction today.⁴² As Harvey Graff observed, sex workers were specifically targeted by the state because they “were seen as failing in the society’s expected standards of feminine behaviour” since they “were not at home nurturing a family or properly domesticated; their perceived deviance endangered the maintenance and propagation of the moral order, the family, and the training of children.”⁴³

There were also important racial dimensions in the application of the sex work prohibitions. Although sex workers of various minority backgrounds were disproportionately affected,⁴⁴ the treatment of Indigenous sex workers constitutes the most egregious and sustained form of discrimination against any group of sex workers. Despite contact during the fur trade between white settlers and Indigenous communities resulting in many family unions, more sustained colonization during the early nineteenth century relegated Indigenous women to “second status.”⁴⁵ As settlement increased, many Indigenous women were sexually exploited by settlers and Indigenous men who sold the sexual services of their female relatives.⁴⁶ The persistent overrepresentation of Indigenous women in sex work, and street sex work in particular, is

now understood to have direct ties to colonialism and its attendant consequences, such as poverty, familial violence, childhood abuse, racial discrimination, addiction, homelessness, and lack of education.⁴⁷

Appellate courts in early Canada nevertheless provided what might be viewed as a check on majoritarian biases toward sex workers.⁴⁸ In various cases, appellate courts provided narrow interpretations of the elements of sex work offences to avoid using the criminal law as a means of compelling social reform.⁴⁹ The decision in *R v Levesque* is illustrative.⁵⁰ A woman found engaged with a soldier in a barrack yard was convicted at trial for being a “common prostitute” unable to provide a “satisfactory account of herself.” The conviction followed from eye-witness evidence of her conduct during the day in question and hearsay evidence of her poor moral character. The court not only found the hearsay evidence to be inadequate proof of her status as a common prostitute but also questioned whether the evidence showed that the sexual act took place in public, thus implying a narrow interpretation of a “public place.”⁵¹ The court also restrictively interpreted the requirement that evidence exist whether the accused could provide a “satisfactory account of herself.” Wandering the streets without any accompanying harmful or indecent conduct was held to be insufficient proof of the offence despite its gravamen constituting the mere state of *being* a sex worker in a public place.⁵²

In *R v Clark*,⁵³ the Ontario Court of Queen’s Bench provided a similarly narrow interpretation of the requirement for proving the early offence of “frequenting” a bawdy house. To meet the elements of the offence, Justice Armour required that the Crown prove that the accused person “habitually” frequented the bawdy house.⁵⁴ Justice McMahon of the same court later expanded this requirement in *R v Remon*.⁵⁵ Before a conviction could follow, the police must also have asked the client or sex worker “to give an account of himself or herself; for it may be that the person charged as being a ‘frequenter’ is there for a lawful purpose ... who might readily give a satisfactory account of his or her presence in such a house.”⁵⁶ Read together, these requirements ensured that police would need to prove both numerous and illegitimate occupations of a bawdy house before a conviction could be sustained.

Other courts originally provided a narrow interpretation of the term “prostitution.”⁵⁷ In *R v Gareau*,⁵⁸ Justice Dorion of the Quebec Court of Appeal overturned the accused’s conviction for keeping a disorderly house because it was based on providing sexual services to only one man. Without broader evidence of indiscriminate sexual intercourse, the court refused to find that the appellant’s action constituted “prostitution.”⁵⁹ The Quebec Court of Queen’s Bench came to a similar conclusion in *The Queen v Rebe*.⁶⁰ A mistress paid by a married man to provide sexual services was acquitted of engaging in “prostitution” on appeal. Justice Wurtele reasoned that “prostitution in the general sense of a woman submitting herself to illicit sexual intercourse with a man may have existed[, but] prostitution in a restricted and legal sense did not exist.”⁶¹ In his view, the purpose of the sex work laws was “the repression of acts which outrage public decency and are injurious to public morals.”⁶² The woman’s private behaviour in the case “did not outrage public decency nor violate any provision of the criminal law of the land.”⁶³

These and similar judgments⁶⁴ must nevertheless be read alongside other types of cases implicating women’s rights during this time period. Although appellate judges seemed to be empathetic toward sex workers,⁶⁵ Backhouse persuasively contends that the judicial sympathy shown toward sex workers was motivated by a broader acceptance of the pervasive double standard in sexual morality.⁶⁶ This intent is inferable when one considers the infamous sexual stereotypes of the day that permeated sexual assault law and family law. If appellate courts were truly concerned about women’s rights, then they would have shown a similar empathy in these and other areas of law relevant to gender equality.⁶⁷ Their failure to do so suggests that the driving rationale for narrowly interpreting the sex work laws was to facilitate “a significant range of male access to the sexual services of women.”⁶⁸

The above review of sex work governance in Canada provides necessary context for understanding the ensuing constitutional challenges. Importantly, it suggests that the sex work laws served multiple purposes. Although Parliament’s laws endorsed traditional roles for women, the impetus for imposing these roles arose from demands by social puritans

to deter development of the sex trade via the criminal law.⁶⁹ Although appellate courts interfered with Parliament's attempts to criminalize sex work, their motivation for doing so was to perpetuate the pervasive double standard of sexual morality. Without providing a meaningful check on legislatures, it was unlikely that the social conditions for many sex workers would improve. With the adoption of the Charter, litigants were given a new tool to compel social change. It did not take long before litigants attempted to use that tool to shape sex work governance. The most important early cases are the *Sex Work Reference*⁷⁰ and *R v Downey*.⁷¹ Before describing these cases, however, I provide a more nuanced review of the relevant sex work laws when they were constitutionally challenged.

THE SEX WORK LAWS POST-CHARTER

As the *Criminal Code* was revised in 1985, the sections at issue in the *Sex Work Reference* and *Downey* were numbered differently from those in *Bedford*, though the substance of the provisions remained constant after 1985.⁷² Subsection 193(1) (subsequently subsection 210(1)) prohibited “keeping” a common bawdy house. Subsection 193(2) (subsequently subsection 210(2)) further made it an offence to be an inmate of a bawdy house, to be found in a bawdy house without lawful excuse, or knowingly to permit one's property to be used as a bawdy house. The former prohibition constituted an indictable offence punishable by a maximum of two years of imprisonment, whereas the latter prohibition was a less serious summary conviction offence and subjected offenders to a maximum of one year of imprisonment.

The term “bawdy house” was defined in section 179 of the *Criminal Code* (subsequently section 197) as a place “frequently or habitually” used “by one or more persons for the purpose of prostitution or the practice of acts of indecency.”⁷³ To be a “keeper” of a bawdy house, the accused must have exercised “some degree of control over the care and management of the premises” and “participate[d] to some extent ... in the ‘illicit’ activities of the common bawdy-house.”⁷⁴ However, it was not required that the accused's participation be sexual in nature. Instead,

the accused must have “participate[d] in the use of the bawdy house as a bawdy house.”⁷⁵ As for acts of “prostitution” that rendered a place a “bawdy house,” the Supreme Court defined the term as any exchange of sex for money.⁷⁶

The various modes of liability for the summary conviction offences listed under subsection 193(2) of the *Criminal Code* were also defined by the courts. The term “inmate” was defined as a “resident or regular occupant” and typically referred to sex workers.⁷⁷ To be “found in” a bawdy house, the person – usually a client or pimp – must have been seen by someone at the bawdy house. Other proof that the person was present on the premises was insufficient to warrant a conviction.⁷⁸ The “permitting” offence was directed at the owner of the premises, regardless of whether they were running the bawdy house as a business. An owner was therefore liable if they knew that their premises was being used as a bawdy house and failed to “intervene forthwith” to prevent such use, and their failure could be “considered as the granting of permission to make such use of the premises as and from the time [they] gained such knowledge.”⁷⁹

Subsection 195.1(1)(c) of the *Criminal Code* (later subsection 213(1)(c)) prohibited communicating in public for the purpose of sex work. As mentioned previously, an earlier version of this provision criminalized “every person who solicits any person in a public place for the purpose of prostitution.”⁸⁰ In *R v Hutt*,⁸¹ the Supreme Court interpreted the term “solicits” as requiring that the sex worker engage in “pressing and persistent” communications.⁸² The Supreme Court’s decision was extensively criticized for making street prostitution easier to practise since the public believed that the communication prohibition failed to provide police with adequate power to regulate the sale of sex in public.⁸³

Parliament responded by amending the communication offence in 1985.⁸⁴ The new provision criminalized anyone in a place open to public view who “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.” The relevant communication need not specify the

particular sexual services or money to be paid. Nor was it required that an agreement be reached between the negotiating parties. A conviction would enter if a court found that the communication was “for the purpose” of selling sex,⁸⁵ which included nonverbal communications.⁸⁶ Subsection 195.1(2) further defined “public place” broadly as “any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.” Such an offender would be guilty of a summary conviction offence and subject to a maximum of six months of imprisonment.

Finally, subsection 195(1)(j) of the *Criminal Code* (subsequently subsection 212(1)(j)) prohibited “liv[ing] wholly or in part on the avails of prostitution of another person.” The scope of the provision was limited to those who provided a service or good to a sex worker because they were a sex worker. Thus, those who provided common services such as grocers and doctors were excluded from the provision.⁸⁷ The phrase “wholly or in part” was also interpreted narrowly. Those who ran a business such as an escort agency were found to be living parasitically on the avails of sex work.⁸⁸ However, courts would not convict a person merely for living with a sex worker. As the Ontario Court of Appeal observed in *R v Grilo*,⁸⁹ “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.”⁹⁰

Despite the different contexts within which a person could run afoul of the living on the avails prohibition, the provision required that courts presume that a person who “lives with or is habitually in the company of a prostitute” is living on the avails of sex work.⁹¹ This presumption was included to make it more difficult for pimps to escape conviction by masquerading as nonexploitive acquaintances of sex workers.⁹² Despite the provision’s laudable objective, it also required that spouses, partners, roommates, drivers, and bodyguards who lived with or were habitually in the company of sex workers prove that they were in legitimate living arrangements. These nonexploitive parties could be

convicted unless they were able to raise a reasonable doubt about the nature of their relationship with the sex worker.⁹³ If they failed to do so, then they were liable to a maximum of ten years of imprisonment.⁹⁴

APPLYING THE CHARTER

The constitutional challenge in the *Sex Work Reference* arrived on the Supreme Court's docket in a manner different from that of most cases. As opposed to a legal dispute between opposing parties, reference decisions are sent directly to a court via the legislature. The case was instituted by the Manitoba government pursuant to the *Constitutional Questions Act*.⁹⁵ The decision to send the reference question arose from an earlier decision by the Manitoba Provincial Court that found the communication provision unconstitutional and suggested that the bawdy house provision meet a similar fate.⁹⁶ The Manitoba Court of Appeal disagreed.⁹⁷ At the Supreme Court, the appellant maintained that the sex work laws violated two provisions of the Charter: first, the right to freedom of expression under section 2(b); second, the principles of fundamental justice preserved under section 7 because of the laws being both impermissibly vague and sending out conflicting messages about the legality of sex work.

Shortly after the Supreme Court upheld the Manitoba Court of Appeal's judgment, two further constitutional challenges arrived on the Supreme Court's docket. The first case, *R v Skinner*,⁹⁸ challenged the communication provision based on the rights to freedom of expression and association, protected in sections 2(b) and 2(d) of the Charter. However, the Supreme Court found that the freedom of association challenge depended on the argument pertaining to freedom of expression.⁹⁹ Since the latter argument was addressed in the *Sex Work Reference*, the *Skinner* case is of little moment. The second case, *Downey*, challenged the constitutionality of the third law at issue in *Bedford*: the prohibition against living on the avails of sex work. The applicant maintained that the impugned prohibition unjustifiably violated the presumption of innocence, constitutionally enshrined in section 11(d) of the Charter.

Below I review each rights challenge as well as whether any infringements were justifiable under section 1.

Section 2(b)

The right to freedom of expression serves three purposes: increasing democratic discourse, truth finding, and self-fulfillment.¹⁰⁰ Given these broader objectives, the term “expression” has been defined expansively to include any activity that “attempts to convey meaning.”¹⁰¹ The Supreme Court nevertheless devised one exception to this rule: violence can never constitute expression.¹⁰² As a result, any restriction on nonviolent conduct that expresses meaning will violate the Charter, raising the more pressing question of whether the impugned law constitutes a justifiable infringement under section 1.

Since the Manitoba Court of Appeal rendered its decision before the Supreme Court interpreted the right to freedom of expression, it was afforded significant latitude in determining whether the communication provision violated the Charter. A unanimous Court of Appeal answered this question in the negative. In its view, “when a prostitute propositions a customer, or *vice versa*, we are not dealing with the free expression of ideas, nor with the real or imagined factual data to support an idea.”¹⁰³ The Manitoba Court of Appeal’s understanding of expression solely as a means to forward the pursuit of knowledge necessarily excluded more mundane forms of interaction.¹⁰⁴ Since the Supreme Court determined in the *Sex Work Reference* that a proper interpretation of the right to freedom of expression protected any attempt to convey meaning, it had little difficulty concluding that a sex worker propositioning a customer or *vice versa* constituted a form of expression.¹⁰⁵

Section 7

The text of section 7 of the Charter provides that “[e]veryone 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.” Upon first reading, the inclusion of the second conjunction “and” suggests that section 7 provides multiple rights: first, a

general right to “life, liberty and security of the person” and, second, a right not to be deprived of those interests “except in accordance with the principles of fundamental justice.” Although the Supreme Court has not ruled out this reading,¹⁰⁶ the “rights” to “life, liberty and security of the person” are consistently applied as threshold interests that do not themselves establish a breach of the Charter. A breach arises only when the state deprives an individual of a threshold interest in a manner inconsistent with a principle of fundamental justice.¹⁰⁷

In the *Sex Work Reference*, Chief Justice Dickson, writing for a unanimous court on this point, concluded that the impugned laws clearly engaged the liberty interests of sex workers because those laws could result in a prison sentence.¹⁰⁸ Given this conclusion, he did not entertain broader arguments related to sex workers’ economic freedoms or security of the person interests.¹⁰⁹ In his concurring reasons, Justice Lamer considered the latter arguments. The appellants maintained that the liberty interests of sex workers were violated because they were not allowed to participate in a legal profession.¹¹⁰ Similarly, they contended that their security of the person interest was engaged because the impugned laws prevented sex workers from working in a legal trade to earn the basic necessities of life.¹¹¹

The appellants’ broader interpretation of liberty derived from both legal philosophy and American jurisprudence. John Stuart Mill famously proclaimed that harm to others was the only basis on which a citizen’s actions could be restricted.¹¹² Building on this understanding of liberty, the American Supreme Court, in *Lochner v New York*,¹¹³ found that the Fourteenth Amendment of the American Constitution provided a right to contract.¹¹⁴ Justice Lamer nevertheless disagreed that the terms “liberty” and “security of the person” ought to be defined so broadly. The Fourteenth Amendment prohibits depriving “any person of life, liberty, or property, without due process of law.” The decision to exclude “property” from section 7 of the Charter strongly implied that the threshold interests were “not synonymous with unconstrained freedom.”¹¹⁵ This interpretation was bolstered by a purposive reading of the Charter. Although section 7 protects individual liberty and security of the person, more specific rights – such as freedom of expression, religion, conscience,

and association – were explicitly provided elsewhere in the Charter.¹¹⁶ This strongly implied that the threshold interests in section 7 were meant to be circumscribed by the context within which that section sought to govern: the justice system.¹¹⁷

Despite Justice Lamer’s narrow interpretation of the threshold interests, the unanimous conclusion that the liberty interest was engaged made it necessary to determine whether the two principles pleaded in the *Sex Work Reference* constituted principles of fundamental justice. The first principle requires that laws not be unduly vague. As Chief Justice Dickson observed, “where a person’s liberty is at stake it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not.”¹¹⁸ Lamer similarly concluded that “[i]t is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct, in order that persons be given fair notice of what to avoid.”¹¹⁹ The Supreme Court nevertheless found “that the terms ‘prostitution,’ ‘keeps’ a bawdy house, ‘communicate’ and ‘attempts to communicate’ are not so vague, given the benefit of judicial interpretation, that their meaning is impossible to discern in advance.”¹²⁰

The second proposed principle of fundamental justice would prohibit legislatures from “send[ing] out conflicting messages whereby the criminal law says one thing but means another.”¹²¹ Although sex work was legal, the impugned provisions rendered almost every aspect of it illegal. The bawdy house provision prohibited operating from a fixed indoor location, and the communication provision made it impossible to negotiate in public for the sale of sex. The applicant therefore contended that the legislative scheme attached the stigma of criminalization to one “lawful activity (communication) directed at the achievement of another lawful activity (sale of sex).”¹²² Although the Supreme Court recognized that Parliament’s laws made it practically impossible to sell sex legally,¹²³ it did not agree that the principles of fundamental justice require direct criminalization of an activity. Although it was a “circuitous” path to criminalizing sex work, Chief Justice Dickson found it “difficult to say that Parliament *cannot* take this route.”¹²⁴ He continued, observing that “[u]nless or until this court is faced with the direct

question of Parliament's competence to criminalize prostitution, it is difficult to say that Parliament cannot criminalize, and thereby indirectly control, some element of prostitution."¹²⁵

Section 11(d)

Section 11(d) of the Charter provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Interpreting this provision in *Downey*, the Supreme Court concluded that the presumption of innocence is violated if an accused might be convicted despite the Crown's case giving rise to a reasonable doubt about whether the offence was committed.¹²⁶ Thus, any provision that requires the accused to prove some fact to avoid a finding of guilt will violate the presumption of innocence.¹²⁷

There is nevertheless one exception to this general rule. As the Supreme Court held in *R v Whyte*,¹²⁸ "substituting proof of one element for proof of an essential element will not infringe the presumption of innocence if, upon proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the essential element."¹²⁹ In other words, "[o]nly if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid."¹³⁰

The Supreme Court in *Downey* concluded that the living on the avails provision violated the presumption of innocence. Although the two accused were charged with running an escort agency, the constitutional challenge relied on a hypothetical scenario related to a person who cohabits with a sex worker. As the Supreme Court observed, a self-supporting spouse or companion of a sex worker could live with the sex worker without relying on the latter's income.¹³¹ For the Supreme Court, "[t]he fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on avails."¹³² Since hypothetically the accused person could be convicted if they failed to raise a reasonable doubt about their living arrangement, the living on the avails provision was found to violate the presumption of innocence.¹³³

Section 1

Since the communication and living on the avails offences infringed rights, the Supreme Court in both the *Sex Work Reference* and *Downey* was asked to consider whether each provision could be upheld under section 1 of the Charter. Section 1 provides that the rights and freedoms in the Charter are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In *R v Oakes*,¹³⁴ the Supreme Court concluded that a law justifiably infringes a Charter right if two criteria are established.¹³⁵ First, the law must promote a “pressing and substantial” objective.¹³⁶ Second, in forwarding that objective, the law must constitute a proportionate infringement of the right.¹³⁷ To do so, the law must be rationally connected to its objective. In other words, the law must not be arbitrary, unfair, or based on irrational considerations.¹³⁸ In addition, the law must impair the constitutional right as minimally as reasonably possible.¹³⁹ Finally, the law’s salutary and deleterious effects on Charter interests must be proportionate.¹⁴⁰ As the Supreme Court concluded in *Oakes*, “[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.”¹⁴¹

Communication Offence

The prohibition against communicating in public for the purposes of sex work was upheld by the majority of the Supreme Court, consisting of Chief Justice Dickson (Justices La Forest and Sopinka concurring) and Justice Lamer. Dickson found that the purpose of the communication provision was to avoid the societal nuisances caused by sex work.¹⁴² As he explained, such activity “is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children.”¹⁴³ Later in his judgment, he also maintained that the law sought to curtail street solicitation more generally.¹⁴⁴ These objectives were found to be pressing and substantial, thereby satisfying the first branch of the *Oakes* test.¹⁴⁵ Given the law’s likely ability to deter such conduct, the law was also found to be rationally connected to its objective.¹⁴⁶

Chief Justice Dickson further found that the law minimally impaired the right to freedom of expression. He maintained that communicating in public for the purpose of sex work was primarily motivated by the desire to make money.¹⁴⁷ For Dickson, such a purpose does not lie anywhere near the core guarantees of the right to freedom of expression: promoting democratic discourse, truth finding, and self-fulfillment.¹⁴⁸ The fact that the prohibition on communicating in public for the purpose of sex work caught conduct that might not give rise to a social nuisance if done in a remote public place did not render the law unjustifiable. For Dickson, “[t]he 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.”¹⁴⁹ The impugned law’s ability to curtail solicitation more generally therefore rendered it minimally impairing of the right to freedom of expression.¹⁵⁰

Similarly, the fact that the law applied to any communication – even one that does not require making noise – did not render it unjustifiable because the definition of “communication” was qualified by the phrase “for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute.”¹⁵¹ Even though the law might apply to some nonvisible sexual communications, Chief Justice Dickson’s conclusion that it also sought to curtail street solicitation resulted in it adequately pursuing its objective.¹⁵² In passing a new law, Parliament took into account various alternatives – including the narrower communication offence repealed following the Supreme Court’s decision in *Hutt* – and found that the broader definition of communication best balanced the need to curtail street solicitation and sex workers’ economically motivated expression interests. As Dickson concluded, the legislation “challenged need not be the ‘perfect’ scheme that could be imagined ... Rather, it is sufficient [since] it is appropriately and carefully tailored in the context of the infringed right.”¹⁵³

In considering whether the law balanced its salutary and deleterious effects, Chief Justice Dickson weighed its ability to curtail street solicitation and avoidance of the social nuisances that it targeted against the economic interests of those who sell sex in public. Although Dickson

did not explain precisely the deleterious effects arising from street solicitation, Justice Wilson later summarized the government's concerns as related to "the harassment of women, street congestion, noise, decreased property values, adverse effects on businesses, increased incidents of violence, and the impact of street soliciting on children who cannot avoid seeing what goes on."¹⁵⁴ When weighed against the minimal constitutional value inherent in economic expression, Dickson concluded that the law struck an appropriate balance between its objective and effects.¹⁵⁵

Justice Lamer took a broader view of the legislation's objective. As opposed to reading each provision individually, the fact that Parliament made sex work practically impossible to practise meant that the objective of the laws was to eradicate sex work more generally.¹⁵⁶ His rationale for this conclusion was tied to the history of sex work governance. As he observed, "[t]his rather odd situation wherein almost everything related to prostitution has been criminalized save for the act itself gives one reason to ponder why Parliament has not taken the logical step of criminalizing the act of prostitution."¹⁵⁷ For Lamer, the most plausible explanation was "that, as a carryover of the Victorian Age, if the act itself had been made criminal, the gentleman customer of a prostitute would have been also guilty as a party to the offence."¹⁵⁸ Put differently, criminalizing the sale of sex also would have resulted in the criminalization of purchasing sex, unlikely to sit well with a voting population who supported the notion that men needed sex workers to satisfy "natural" sexual urges.¹⁵⁹

Justice Lamer also provided more detailed evidence of legislative intent with respect to the solicitation offence. In particular, he cited the broader work of the legislative committee considering Bill C-49 and numerous working papers from the Department of Justice in support of the view that the solicitation offence was directed at more than curbing "nuisances."¹⁶⁰ As Lamer explained, these and other pieces of evidence bolstered his conclusion that the communication prohibition possessed an "additional objective of minimizing the public exposure of an activity that is degrading to women, with the hope that potential entrants in the trade can be deflected at an early stage."¹⁶¹

In upholding the legislation under section 1 of the Charter, Justice Lamer concluded that prohibiting a basic element of sex work – communicating for the purpose of selling sexual services – was readily connected to the solicitation offence’s deterrence-based objective.¹⁶² Since the law applied only to sex workers and their customers communicating in a public place, Lamer also agreed that the impugned provision’s effects minimally impaired the right to freedom of expression.¹⁶³ Finally, given the law’s pressing objective and the tenuous connection between the communication at issue and the purposes underlying freedom of expression, Lamer found that the provision readily balanced its salutary and deleterious effects.¹⁶⁴

Justice Wilson came to the opposite conclusion. In her view, the law’s objective was simply to avoid social nuisances, not to eradicate sex work more generally.¹⁶⁵ As with Chief Justice Dickson, however, minimal evidence was put forward to justify this narrow reading of the sex work law’s objective.¹⁶⁶ Although Wilson agreed with the other members that the law’s objective was pressing and substantial and that its effects were rationally connected to its objective,¹⁶⁷ she found that the law did not minimally impair its objective because its broad definition of “public place” caught activity that could not plausibly give rise to a nuisance.¹⁶⁸ As an example, she noted that a person would commit an offence while communicating in a remote public park late at night for the purpose of sex work. For Wilson, “[s]uch a broad prohibition as to the locale of the communication ... [goes] far beyond a genuine concern over the nuisance caused by street solicitation.”¹⁶⁹ Relatedly, the law was not minimally impairing because it did not require proof that the accused’s communication gave rise to an actual nuisance to ground a conviction.¹⁷⁰ Wilson therefore would not have upheld the communication provision.

Living On the Avails Offence

In considering whether the living on the avails prohibition was justifiable under section 1 of the Charter, the Supreme Court relied heavily on two studies commissioned by the federal government commonly

cited as the Fraser and Badgley Reports.¹⁷¹ The Fraser Report found that pimps typically control groups of women within a defined territory.¹⁷² It further found that, in cases in which a sex worker speaks out against a pimp, “physical violence, forced acts of sexual degradation and subtle forms of coercion ... were used by the pimps to keep them on the streets.”¹⁷³ The relationship between sex workers and pimps was therefore “most closely analogous to slavery.”¹⁷⁴ The Badgley Report similarly found that sex workers feared for their lives if they spoke to law enforcement about their pimps.¹⁷⁵ The level of control that pimps exercised over sex workers also gave rise to significant psychological dependency, resulting in some sex workers having extreme difficulties functioning without their pimps.¹⁷⁶

Given the available evidence, Justice Cory, writing for a majority of the Supreme Court, concluded that the purpose of the living on the avails offence was to prevent the exploitation of sex workers.¹⁷⁷ The law was rationally connected to its objective because it gave rise to a reasonable inference – even if not always true – that the person living with a sex worker was doing so in an exploitive manner.¹⁷⁸ Although it is difficult to determine the prevalence of this social problem, this was largely because pimps control, abuse, and threaten sex workers to deter them from discussing these relationships with others. The need to draw an evidentiary presumption was therefore necessary to combat the practice of pimping.¹⁷⁹

The majority further found that the presumption at issue in *Downey* minimally impaired the infringed right because there were no other alternative means of pursuing Parliament’s pressing and substantial objective in as effective a manner. To eliminate the presumption completely “would reward [pimps] for the intimidation of vulnerable witnesses in a situation where it has been demonstrated that just such intimidation is widespread.”¹⁸⁰ The majority also observed that Parliament could have adopted a more extreme policy and reversed the onus of proof, requiring that accused persons prove on a balance of probabilities that they were innocent. This approach, however, would operate unfairly for those who live with sex workers in a nonexploitive manner.¹⁸¹ Parliament

therefore struck a middle ground by requiring only that the accused raise a reasonable doubt about whether they were living on the avails of sex work.¹⁸²

Finally, the majority of the Supreme Court concluded that the presumption struck a reasonable balance between the competing societal and individual interests at stake. Society's interest in prosecuting pimps is severely hampered by their ability to control sex workers either via intimidation tactics or by creating psychological dependency. A presumption in favour of those living with sex workers for exploitive purposes therefore makes prosecuting pimps feasible in many scenarios in which otherwise they would be untouchable. At the same time, an accused who does not live on the avails of sex work should have little difficulty providing evidence to raise a reasonable doubt about this fact.¹⁸³

The minority justices refused to uphold the law under section 1 of the Charter. Writing for himself, Justice La Forest concluded that the prohibition against living on the avails of sex work was not minimally impairing for two interrelated reasons. First, the provision was drafted broadly enough to catch many "people who have legitimate, non-parasitic living arrangements with prostitutes."¹⁸⁴ Second, and more importantly, the Crown provided inadequate empirical evidence that it was necessary for Parliament to cast the prohibition so broadly to attain its objective of facilitating the prosecution of pimps.¹⁸⁵

Justice McLachlin (Justice Iacobucci concurring) went further and found that the prohibition against living on the avails of sex work was not rationally connected to its objective. For a law to be connected to its objective, she maintained, it must be both internally and externally valid.¹⁸⁶ The law was internally illogical because it was not *likely* that the presumed fact would follow from the fact substituted by the presumption.¹⁸⁷ There were simply too many exceptions to make the impugned presumption reasonable. As McLachlin observed, "[s]pouses, lovers, friends, children, parents, room-mates, business associates, [and] providers of goods and services" could all fall into this category.¹⁸⁸

A law's external rationality turns on whether the law furthers its purported objective.¹⁸⁹ For Justice McLachlin, it was unlikely that the law actually served to protect sex workers from exploitation by pimps.

As she observed, “[t]he effect of the presumption is to compel prostitutes to live and work alone, deprived of human relationships save with those whom they are prepared to expose to the risk of a criminal charge and conviction and who are themselves prepared to flaunt that possibility.”¹⁹⁰ As such, sex workers cannot live with friends and family members or enter into protective arrangements with others. McLachlin therefore inferred that the living on the avails offence forced sex workers onto the streets and into the hands of exploitive pimps, thereby undermining Parliament’s purpose. Legislation that undermines its own purpose cannot be rationally connected to its objective.¹⁹¹

LEGAL AND EVIDENTIARY GAPS

The Supreme Court’s early jurisprudence rightly has been criticized for failing to consider the various harms posed to sex workers by the impugned sex work laws. As Maria Powell suggests, “[t]he issue of harms and the wealth of evidence supporting the fact that the impugned provisions of the *Criminal Code* aggravate the harms faced by sex workers were not put forward in the *Prostitution Reference*.”¹⁹² In her view, “[a]part from the recommendations of the Special Committee on Pornography and Prostitution [the Fraser Committee] which were released in 1985, much of the evidence relied upon in the *Bedford* case was not available at the time of the *Prostitution Reference*.”¹⁹³

Alan Young agrees that there was limited evidence before the courts pertaining to the harms caused by the sex work laws.¹⁹⁴ Citing various documents related to the legislative history of Bill C-49, Young nevertheless observes that Parliament was clearly “aware of the risk of harm increasing [from outdoor sex work] but mistakenly concluded that moving inside was an available legal option to mitigate the risks of working on the streets.”¹⁹⁵ Since some evidence was before the Supreme Court, Young maintains, the primary problem was that the evidence was not tied to appropriate constitutional principles.¹⁹⁶ Yet, as he concedes, it is unlikely that the Supreme Court would strike down a law without a substantial amount of empirical evidence.¹⁹⁷ The limited evidence cited therefore renders it doubtful that the Supreme Court

had sufficient evidence to base its decision on any harms that accrued to sex workers.¹⁹⁸

Young is nevertheless correct that the underdeveloped nature of the Charter is partially responsible for the sex work laws initially surviving constitutional scrutiny.¹⁹⁹ The relatively young age of the Charter resulted in the section 7 challenge considering only whether the impugned laws were unconstitutionally vague. Given the ability of judges to interpret legislation, it is difficult to prove that a law is so vague that courts cannot understand it.²⁰⁰ Yet a more detailed assessment of the law's effects on sex worker safety raised the prospect of a broader legal challenge. Unfortunately for the applicants, the two principles used to strike down laws based on flawed means-ends rationality – overbreadth and gross disproportionality – had not yet been recognized as principles of fundamental justice.²⁰¹

A final explanation of the limited evidence and constitutional arguments relates to the parties that participated in the proceedings. One of the most important and long-standing Canadian feminist organizations – the Women's Legal Education and Advocacy Fund (LEAF) – was not involved in the litigation. When asked why LEAF did not apply for intervenor status, Kathleen Mahoney replied that the organization was very busy at the time.²⁰² More illuminating, she stated that, “no matter what these women say about themselves, they are all ‘tortured, drug-addicted, extremely unhappy, abused people.’”²⁰³ As Janice McGinnis later observed, LEAF happily contributed to a variety of anti-pornography cases but was unwilling to engage with women's rights in the sex work context.²⁰⁴ This was because LEAF explicitly viewed sex workers as victims, not as autonomous agents. The emphasis from a law reform perspective was therefore to control pimps and johns, which might have distracted from LEAF's ability to listen to the concerns of sex workers. Without representation from LEAF, it was much less likely that the various feminist perspectives on sex work regulation would be raised.²⁰⁵

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