

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN

**ATTORNEY GENERAL OF CANADA**

Appellant/Respondent on Cross Appeal

and

**TERRI JEAN BEDFORD, AMY LEOVITCH and VALERIE SCOTT**

Respondents/Appellants on Cross Appeal

and

**ATTORNEY GENERAL OF QUEBEC**  
**ATTORNEY GENERAL OF BRITISH COLUMBIA**

Interveners

**CONTINUED ON NEXT PAGE**

---

**FACTUM OF THE RESPONDENTS/APPELLANTS ON CROSS APPEAL**  
(Pursuant to Rules 42 and 43 of the *Rules of Supreme Court of Canada*)

---

**AND BETWEEN**

**ATTORNEY GENERAL OF ONTARIO**

Appellant/Respondent on Cross Appeal

and

**TERRI JEAN BEDFORD, AMY LEBOVITCH and VALERIE SCOTT**

Respondents/Appellants on Cross Appeal

and

**ATTORNEY GENERAL OF QUEBEC,  
ATTORNEY GENERAL OF BRITISH COLUMBIA,  
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,  
CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES,  
NATIVE WOMEN'S ASSOCIATION OF CANADA, CANADIAN  
ASSOCIATION OF ELIZABETH FRY SOCIETIES,  
ACTION ONTARIENNE CONTRE LA VIOLENCE FAITE  
AUX FEMMES, CONCERTATION DES LUTTES  
CONTRE L'EXPOITATION SEXUELLE,  
REGROUPEMENT QUÉBÉCOIS DES CENTRES D'AIDE ET  
DE LUTTE CONTRE LES AGRESSIONS À CARACTÈRE  
SEXUEL and VANCOUVER RAPE RELIEF SOCIETY,  
CHRISTIAN LEGAL FELLOWSHIP, CATHOLIC CIVIL  
RIGHTS LEAGUES and REAL WOMEN OF CANADA,  
PIVOT LEGAL SOCIETY, DOWNTOWN EASTSIDE SEX  
WORKERS UNITED AGAINST VIOLENCE and PACE SOCIETY,  
SECRETARIAT OF THE JOINT UNITED NATIONS  
PROGRAMME ON HIV/AIDS,  
EVANGELICAL FELLOWSHIP OF CANADA,  
CANADIAN HIV/AIDS LEGAL NETWORK, BRITISH COLUMBIA  
CENTRE FOR EXCELLENCE IN HIV/AIDS and HIV & AIDS  
LEGAL CLINIC ONTARIO,  
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,  
INSTITUT SIMONE DE BEAUVOIR,  
AWCEP ASIAN WOMEN FOR EQUALITY SOCIETY, OPERATING  
AS ASIAN WOMEN COALITION ENDING PROSTITUTION,  
ABORIGINAL LEGAL SERVICES OF TORONTO INC.**

Interveners

**OSGOODE HALL LAW SCHOOL**

Ignat Kaneff Building  
York University  
4700 Keele Street  
Toronto, ON M3J 1P3

Alan N. Young  
Tel: 416-736-5595  
Fax: 416-736-5736  
ayoung@osgoode.yorku.ca

**Counsel for the Respondent,  
Terri-Jean Bedford**

**SACK GOLDBLATT MITCHELL LLP**

20 Dundas Street West  
Suite 1100  
Toronto, ON M5G 2G8

Marlys A. Edwardh / Daniel Sheppard  
Tel: 416-979-6442  
Fax: 416-979-4430  
dsheppard@sgmlaw.com

**Counsel for the Respondent,  
Valerie Scott**

**NEUBERGER ROSE LLP**

1392 Eglinton Avenue West  
Toronto, ON M6C 3E4

Stacey Nichols  
Tel: 416-364-3111  
Fax: 416-364-3271  
stacey@nrlawyers.com

**MARZEL LAW**

265 Rimrock Road, Suite 200  
Toronto, ON, M3J 3C6

Ron Marzel  
Tel: 416-485-5800  
Fax: 416-485-1610  
ron@marzel-law.ca

**Counsel for the Respondent,  
Amy Lebovitch**

**SACK GOLDBLATT MITCHELL LLP**

30 Metcalfe Street  
Suite 500  
Ottawa, ON K1P 5L4

Fiona Campbell  
Tel: 613-482-2451  
Fax: 613-235-3041  
fcampbell@sgmlaw.com

**Ottawa Agent for the Respondent,  
Terri-Jean Bedford**

**SACK GOLDBLATT MITCHELL LLP**

30 Metcalfe Street  
Suite 500  
Ottawa, ON K1P 5L4

Fiona Campbell  
Tel: 613-482-2451  
Fax: 613-235-3041  
fcampbell@sgmlaw.com

**Ottawa Agent for the Respondent,  
Valerie Scott**

**SACK GOLDBLATT MITCHELL LLP**

30 Metcalfe Street  
Suite 500  
Ottawa, ON K1P 5L4

Fiona Campbell  
Tel: 613-482-2451  
Fax: 613-235-3041  
fcampbell@sgmlaw.com

**Ottawa Agent for the Respondent,  
Amy Lebovitch**

**TO:**

**THE REGISTRAR**

301 Wellington Street  
Ottawa, ON K1A 0J1

**AND TO:**

**DEPARTMENT OF JUSTICE**

Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, ON M5X 1K6

Michael H. Morris / Gail Sinclair / Nancy  
Dennison  
Tel: 416-973-9704  
Fax: 416-973-0809  
Michael.morris@justice.gc.ca

**Counsel for the Appellant,  
Attorney General of Canada**

**MINISTRY OF THE ATTORNEY  
GENERAL**

720 Bay Street, 10<sup>th</sup> Floor  
Toronto, ON M7A 2S9

Kamie Klukach / Christine Bartlett-Hughes /  
Megan Stephens  
Tel: 416-326-2351  
Fax: 416-326-4656  
Jamie.klukach@ontario.ca

**Counsel for the Appellant,  
Attorney General of Ontario**

**DEPARTMENT OF JUSTICE**

Deputy Attorney General of Canada  
East Memorial Building  
234 Wellington Street  
Ottawa, ON K1A 0H8

Christopher Rupar

Tel: 416-973-2341  
Fax: 613-954-1920  
Christopher.rupar@justice.gc.ca

**Ottawa Agent for the Appellant,  
Attorney General of Canada**

**BURKE-ROBERTSON**

20-441 MacLaren Street  
Ottawa, ON K2P 2H3

Robert E. Houston, Q.C.

Tel: 613-566-2058  
Fax: 613-235-4430  
rhouston@burkerobertson.com

**Ottawa Agent for the Appellant,  
Attorney General of Ontario**

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

940 Blanshard Street, 3<sup>rd</sup> Floor  
P.O. Box 9245 Stn Prov Govt  
Victoria, BC V8W 3E6

Rodney G. Garson  
Tel: 250-387-9087  
Fax: 250-387-4262  
Rodney.Garson@gov.bc.ca

**Counsel for the Intervener,  
Attorney General of British Columbia**

**PROCUREUR GÉNÉRAL DU QUÉBEC**

1200, Route de l'Église, 2<sup>ème</sup> étage  
Québec, QC G1V 4M1

Sylvain Leboeuf / Julie Dassylva  
Tel: 418-643-1477 Ex. 21010  
Fax: 418-644-7030  
sleboeuf@justice.gouv.qc.ca

**Counsel for the Intervener,  
Attorney General of Quebec**

**HUNTER LITIGATION CHAMBERS  
LAW CORPORATION**

1040 West George Street  
Suite 2100  
Vancouver, BC V6E 4H1

Brent Olthuis / Megan Vis-Dunbar  
Tel: 604-891-2400  
Fax: 604-647-4554  
bolthuis@litigationchambers.com

**Counsel for the Intervener,  
British Columbia Civil Liberties  
Association**

**BURKE-ROBERTSON**

20-441 MacLaren Street  
Ottawa, ON K2P 2H3

Robert E. Houston, Q.C.

Tel: 613-566-2058  
Fax: 613-235-4430  
rhouston@burkerobertson.com

**Ottawa Agent for the Intervener,  
Attorney General of British Columbia**

**NOËL & ASSOCIÉS, S.E.N.C.**

111, rue Champlain  
Gatineau, QC, J8X 3R1

Pierre Landry  
Tel: 819-771-7393  
Fax: 819-771-5397  
p.landry@noelassociés.com

**Ottawa Agent for the Intervener,  
Attorney General of Quebec**

**MICHAEL J. SOBKIN**

90 blvd. de Lucerne  
Unit 2  
Gatineau, QC J9H 7K8

Tel: 819-778-7794  
Fax: 819-778-1740  
msobkin@sympatico.ca

**Ottawa Agent for the Intervener,  
British Columbia Civil Liberties  
Association**

**FAY FARADAY / JANINE BENEDET**

860 Manning Ave.  
Toronto, ON M5G 2W8

Tel: 416-389-4399  
Fax: 647-776-3147  
Fay.faraday@faradaylaw.com

**Counsel for the Intervener,  
Canadian Association of Sexual Assault  
Centres**

**FAY FARADAY**

860 Manning Ave.  
Toronto, ON M5G 2W8

Tel: 416-389-4399  
Fax: 647-776-3147  
Fay.faraday@faradaylaw.com

**Counsel for the Intervener,  
Native Women's Association of Canada,  
Canadian Association of Elizabeth Fry  
Societies, Action ontarienne contre la  
violence faite aux femmes, Concertation des  
luttres contre l'exploitation sexuelle**

**FAY FARADAY**

860 Manning Ave.  
Toronto, ON M5G 2W8

Tel: 416-389-4399  
Fax: 647-776-3147  
Fay.faraday@faradaylaw.com

**Counsel for the Intervener,  
Regroupement québécois des centres d'aide  
et de lutte contre les agressions à caractère  
sexuel and Vancouver Rape Relief Society**

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
100 Queen Street, suite 1100  
Ottawa, ON K1P 1J9

Tel: 613-237-5160  
Fax: 613-230-8842  
neffendi@blg.com

**Ottawa Agent for the Intervener,  
Canadian Association of Sexual Assault  
Centres**

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
100 Queen Street, suite 1100  
Ottawa, ON K1P 1J9

Tel: 613-237-5160  
Fax: 613-230-8842  
neffendi@blg.com

**Ottawa Agent for the Intervener,  
Native Women's Association of Canada,  
Canadian Association of Elizabeth Fry  
Societies, Action ontarienne contre la  
violence faite aux femmes, Concertation des  
luttres contre l'exploitation sexuelle**

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
100 Queen Street, suite 1100  
Ottawa, ON K1P 1J9

Tel: 613-237-5160  
Fax: 613-230-8842  
neffendi@blg.com

**Ottawa Agent for the Intervener,  
Regroupement québécois des centres d'aide  
et de lutte contre les agressions à caractère  
sexuel and Vancouver Rape Relief Society**

**BENNETT JONES LLP**

Suite 3400, P.O. Box 130  
One First Canadian Place  
Toronto, ON M5Z 1A4

Robert W. Staley /Ranjan K. Agarwal

Tel: 416-777-4857

Fax: 416-863-1716

staley4@bennettjones.ca

**Agent for the Intervener,  
Christian Legal Fellowship, Catholic Civil  
Rights Leagues and REAL Women of  
Canada**

**PIVOT LEGAL LLP**

121 Heatley Avenue  
Vancouver, BC V6A 3E9

Katrina Pacey

Tel: 604-255-9700

Fax: 604-255-1552

kpacey@pivotlegal.com

**Counsel for the Interveners,  
Pivot Legal Society, Downtown Eastside  
Sex Workers United Against Violence and  
PACE Society**

**McCARTHY TÉTRAULT**

Suite 1300, 777 Dunsmuir Street  
Vancouver, BC V7Y 1K2

Michael A. Feder

Tel: 604-643-5983

Fax: 604-622-5614

**Counsel for the Intervener,  
Secretariat of the Joint United Nations  
Programme on HIV/AIDS**

**MCMILLAN LLP**

50 O'Connor Street, Suite 300  
Ottawa, ON K1P 6L2

Jeffrey W. Beedell

Tel: 613-232-7171

Fax: 613-231-3191

jeff.beedell@mcmillan.ca

**Ottawa Agent for the Interveners,  
Pivot Legal Society, Downtown Eastside Sex  
Workers United Against Violence and PACE  
Society**

**EVANGELICAL FELLOWSHIP OF  
CANADA**  
130 Albert Street, Suite 1810  
Ottawa, ON K1P 5G4

Georgiale A. Lang / Donald Hutchison  
Tel: 613-233-9868  
Fax: 613-233-0301  
[glang@georgialeelang.com](mailto:glang@georgialeelang.com)

**Counsel for the Intervener,  
Evangelical Fellowship of Canada**

**COOPER SANDLER SHIME &  
BERGMAN LLP**  
1900-439 University Avenue  
Toronto, ON M5G 1Y8

Jonathan A. Shime  
Megan Schwartzentruber  
Tel: 416-585-9191  
Fax: 416-408-2372  
[jshime@criminal-lawyers.ca](mailto:jshime@criminal-lawyers.ca)

**Counsel to the Interveners,  
Canadian HIV/AIDS Legal Network,  
British Columbia Centre for Excellence in  
HIV/AIDS and HIV & AIDS Legal Clinic  
Ontario**

**ARVAY FINLAY**  
1320 - 355 Burrard Street  
Vancouver, BC V6C 2G8

Joseph J. Arvay, Q.C. / Cheryl Milne  
Tel: 604-689-4421  
Fax: 888-575-3281  
[jarvay@arvayfinlay.com](mailto:jarvay@arvayfinlay.com)

**Counsel for the Intervener,  
David Asper Centre for Constitutional  
Rights**

**SUPREME ADVOCACY LLP**  
397 Gladstone Avenue, Suite 100  
Ottawa, On K2P 0Y9

Eugene Meehan, Q.C.  
Tel: 613-695-8855  
Fax: 613-695-8580  
[Emeehan@Supremeadvocacy.ca](mailto:Emeehan@Supremeadvocacy.ca)

**Ottawa Agent for the Intervener,  
Evangelical Fellowship Of Canada**

**SUPREME ADVOCACY LLP**  
397 Gladstone Avenue, Suite 100  
Ottawa, ON K2P 0Y9

Marie-France Major  
Tel: 613-695-8855  
Fax: 613-695-8580  
[mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent to the Interveners,  
Canadian HIV/AIDS Legal Network, British  
Columbia Centre for Excellence in  
HIV/AIDS and HIV & AIDS Legal Clinic  
Ontario**

**NORTON ROSE CANADA LLP**  
45 O'Connor Street  
Ottawa, ON K1P 1A4

Martha A. Healey  
Tel: 613-780-8638  
Fax: 613-230-5459  
[martha.healey@nortonrose.com](mailto:martha.healey@nortonrose.com)

**Ottawa Agent to the Intervener,  
David Asper Centre for Constitutional  
Rights**

**DESROSIERS, JONCAS, MASSICOTTE**

480, boul. St-Laurent, B-503  
Montréal, QC H2Y 3Y7

Walid Hijazi

Tel: 514-397-9284

Fax: 514-397-9922

walidhijazi@hotmail.com

**Counsel for the Intervener,  
Institut Simone de Beauvoir**

**FOY ALLISON LAW GROUP**

207 - 2438 Marine Drive  
West Vancouver, BC V7V 1L2

Gwendoline Allison

Tel: 604-922-9282

Fax: 604-922-9283

gwendoline.allison@foyallison.com

**Counsel for the Intervener,  
AWCEP Asian Women for Equality Society,  
operating as Asian Women Coalition  
Ending Prostitution**

**ABORIGINAL LEGAL SERVICES OF  
TORONTO INC.**

415 Yonge Street  
Suite 803  
Toronto, ON M5B 2E7

Christa Big Canoe

Emily Hill

Tel: 416-408-4041

Fax: 416-408-4268

**Counsel to the Intervener,  
Aboriginal Legal Services of Toronto Inc.**

**GOWLING LAFLEUR HENDERSON LLP**

160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel: 613-786-8695

Fax: 613-788-3509

lynne.watt@gowlings.com

**Ottawa Agent to the Intervener,  
AWCEP Asian Women for Equality Society,  
operating as Asian Women Coalition Ending  
Prostitution**

## INDEX

### **TAB 1 - FACTUM OF THE RESPONDENTS ON APPEAL**

PART I – OVERVIEW .....	1
1.    OVERVIEW .....	1
2.    THE RELEVANT FINDINGS OF FACT .....	7
3.    EVIDENTIARY SUPPORT FOR FINDINGS .....	9
A.    Occupation at Risk: Criminological Data .....	9
B.    Experiential Support .....	11
C.    Empirical Support .....	12
D.    Government Debates and Reports .....	15
E.    International Evidence .....	17
PART II: POSITION ON ISSUES .....	18
PART III: LAW AND ARGUMENT .....	19
1.    THE THRESHOLD ISSUE: LIBERTY AND SECURITY OF THE PERSON .....	19
2.    CAUSATION .....	20
A.    Money and Choice: Two Conceptual Fallacies .....	20
B.    The Test: Sufficient Connection .....	21
C.    Risk, Harm, and State Responsibility .....	23
3.    PRINCIPLES OF FUNDAMENTAL JUSTICE .....	25
A.    The Legislative Objectives .....	27
(i)    Bawdy House .....	29
(ii)   Living on the Avails .....	31
B.    Overbreadth and Gross Disproportionality .....	31
(i)    Overbreadth .....	32
(ii)   Blanket Prohibitions .....	35
(iii)  Salutary Effects and Fundamental Justice .....	36
(iv)   The Government’s Inflated Objectives .....	38
(v)    Gross Disproportionality .....	38
(vi)   Remedy .....	39
PART IV - COSTS .....	40
PART V – ORDER REQUESTED .....	40
PART VI – TABLE OF AUTHORITIES .....	41
PART VII – LEGISLATIVE PROVISIONS .....	44

### **TAB 2 - FACTUM OF THE APPELLANTS ON CROSS-APPEAL**

PART I - OVERVIEW .....	50
-------------------------	----

1.	INTRODUCTION .....	50
2.	THE RELEVANT FINDINGS OF FACT .....	53
	A. The Courts Below .....	53
	B. Supporting Evidence .....	54
	(i) Screening Clients .....	54
	(ii) Displacement Effects .....	57
	PART II – QUESTIONS IN ISSUE .....	60
	PART III – STATEMENT OF ARGUMENT .....	60
	1. THE DISSENTING REASONS OF MACPHERSON AND CRONK J.J.A.....	60
	2. A PROPER UNDERSTANDING OF LEGISLATIVE OBJECTIVES .....	61
	3. THE IMPACT ON THE SECURITY OF STREET-BASED WORKERS .....	64
	4. FREE EXPRESSION AND REASONABLE LIMITS .....	65
	PART IV – SUBMISSIONS RESPECTING COSTS .....	69
	PART V – ORDER REQUESTED .....	69
	PART VI – AUTHORITIES CITED .....	70
	PART VII – LEGISLATIVE PROVISIONS .....	71

**TAB A** - Appendix A: Government Debates and Reports: Risk of Harm and Displacement, 1983 to Present.

**TAB B** - Appendix B: Government Reports - International.

## FACTUM OF THE RESPONDENTS ON APPEAL

### PART I – OVERVIEW

#### 1. OVERVIEW

1. This appeal does not question the authority of Parliament to enact laws to govern, regulate or prohibit the sale of sexual services. However, the principles of fundamental justice enshrined in s.7 of the *Charter of Rights* impose minimum standards of rationality upon the means chosen by Parliament to achieve its stated objectives. In its wisdom Parliament has chosen not to prohibit the sale of sexual services, yet it has enacted a blanket prohibition on the operation of bawdy houses and a blanket prohibition on the provision of paid services to assist those working in the sex trade.

2. All six judges from the courts below concluded that the bawdy house offence (s. 210) and the living on the avails offence (s. 212(1)(j)) interfere with sex workers' rights to liberty and security of the person in a manner not in accordance with the principles of fundamental justice. Every judge agreed that the overbroad operation of these two provisions plays a significant role in the perpetuation of violence by the enactment of a blanket prohibition on conduct which could easily serve to enhance the safety of sex workers. The means chosen by Parliament to achieve its objective with respect to the sale of sex is constitutionally unsound because the legal regime contributes to the risk of harm faced by women engaged in lawful work.

3. The Attorney General of Canada asserts that the Court of Appeal erred in concluding that it was "not bound by this Court's decision in the *Prostitution Reference* as it relates to the constitutionality of s. 210."<sup>1</sup> This assertion is wrong and this appeal should be resolved on its merits. The 1990 decision of this Honourable Court was an advisory opinion on a reference on the question of whether s. 210 (and the communication provision in s. 213(1)(c) created an unduly vague deprivation of the right to economic liberty. This case raises an entirely different constitutional question: does the provision create an overbroad and grossly disproportionate interference with the right to security? The 1990 decision did not address the issue of security impairment, nor could it have, as it proceeded in the absence of any legislative facts regarding the operation and effect of the impugned laws.

4. Nonetheless, in upholding ss. 210 and 213(1)(c) (communication) in 1990, this Court did

---

<sup>1</sup> Factum of the Attorney General of Canada at para. 55 ["AGC Factum"].

note that it found the legal regime to be “odd” ,“bizarre”, “anomalous” and “circuitous”.<sup>2</sup> At the time of that decision, the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) had only been in operation for eight years and the courts had not yet developed the doctrinal tools needed to evaluate and analyze the constitutional implications of the perceived irrationality of the legislative regime. As the living tree of the *Charter* continued to grow, this Court developed doctrinal principles to address claims concerning the irrationality of law. Since 1990, arbitrariness, overbreadth and gross disproportionality have been developed as doctrinal tools for assessing the rationality of the state’s chosen means to achieve its legitimate objectives.<sup>3</sup> It is submitted that where a court is being asked to assess the constitutionality of a provision with doctrinal tools and evidence not available at the time of original assessment, the invaluable principle of *stare decisis* becomes nothing more than the invocation of the dead weight of precedent by the Appellants.

5. Both the Attorneys General of Canada and Ontario continue to try to foreclose an assessment or analysis of the irrationality of the regime by asserting that the Court of Appeal erred at the preliminary stage of analysis in finding a causal connection between the law and the impairment of security. They both assert that the law only has a limited and indirect impact on the security interests of sex workers. It is submitted that this assertion rings hollow in light of the fact that all six judges from the courts below found that the deprivation of “core values” caused by the legal regime was “self-evident,” “serious,” “severe,” “far-reaching,” “dramatic” and “extreme.”<sup>4</sup> In fact, the Court of Appeal noted that “if the application judge’s findings stand, her conclusion that the challenged provisions, individually or taken together, limit the respondent’s security of the person is **unassailable**.”<sup>5</sup>

6. Both levels of court carefully considered “over 25,000 pages of evidence in 88 volumes, amassed over two and a half years”<sup>6</sup> and both courts made similar findings of fact leading to an “unassailable conclusion” that the legislation substantially impacts upon the security interests of

---

<sup>2</sup> *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at 1142, 1162, 1191, **Book of Authorities of the Respondents / Appellants on Cross Appeal [“Resp. Auth.”]**, Tab 47 [“*Prostitution Reference*”].

<sup>3</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, , **Resp. Auth., Tab 50** [“*Rodriguez*”]; *R v. Heywood*, [1994] 3 S.C.R. 761, **Resp. Auth., Tab 23** [“*Heywood*”]; *R v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, , **Resp. Auth., Tab 29** [“*Malmo-Levine*”].

<sup>4</sup> *Bedford v. Canada*, 2010 ONSC 4264, at paras. 3, 422, 426, 428, 431, **AR, Vol. I, Tab 3, pp. 10-11, 112-114**. [“*Bedford SCJ*”]; *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at paras.125, 133, 134, 206, 207, 212, **AR, Vol. II, Tab 7, pp. 56, 59-60, 85, 87** [“*Bedford OCA*”].

<sup>5</sup> *Bedford OCA*, *supra*, at para 125, **AR, Vol. II, Tab 7, p. 56** [Emphasis added].

<sup>6</sup> *Bedford SCJ*, *supra*, at para 84, **AR, Vol. I, Tab 3, p. 29**.

sex workers governed by this legal regime. Given that the Appellants assert that the impact on security is merely indirect and insignificant, while the courts below found the deprivation to be severe and extreme, it should be incumbent upon the Appellants in this appeal to demonstrate that the courts below made serious errors in the apprehension of the evidence or in the application of the relevant constitutional doctrines. Neither Appellant can point to any discernible error with respect to the assessment of the voluminous record or with respect to the application of the principles of fundamental justice.

7. In challenging the “unassailable” finding of a causal connection between the law and an increased risk of harm, the Government of Canada begins its argument with the claim that “prostitution is dangerous regardless of the venue in which it takes place and the legal regime governing it.”<sup>7</sup> Putting aside the fact that this is not an evidence-based proposition but rather a mere statement of opinion, it is submitted that the “inherent” dangers of prostitution do not absolve the state of responsibility when its laws are material to the existence, severity, and actualization of the risk. Whether or not one believes that prostitution is morally undesirable or inherently dangerous, it is ethically unsound for the state to deter and control the activity by exposing its participants to an increased risk of significant harm.

8. This Honourable Court has already ruled that the principles of fundamental justice are violated when state action increases the risk of morbidity and mortality for those engaged in the illegal and dangerous activity of using heroin.<sup>8</sup> Surely the same level of constitutional responsibility should lie with respect to protecting those persons engaged in a legal activity. This Court noted that “where a law creates a risk to health by preventing access to health care, a deprivation of the right to security is made out...where the law creates a risk not just to health but also to the lives of the claimants, the deprivation is even clearer.”<sup>9</sup> There is no principled reason why this statement should not apply with equal force when the law creates a risk to physical security by preventing access to rudimentary safety measures.

9. There is an abundance of compelling evidence, both experiential and empirical, to demonstrate that state action materially contributes to a serious impairment of the security of sex workers. In fact, the government’s claim that a causal link with state action is lacking in this case is completely undermined by one simple but tragic piece of the evidentiary record - the evidence

---

<sup>7</sup> AGC Factum, *supra*, at para 8.

<sup>8</sup> *Canada v. (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, **Resp. Auth, Tab 5** [“PHS”].

<sup>9</sup> *PHS, supra*, at para 93, **Resp. Auth., Tab 5**.

pertaining to *Grandma's House*.<sup>10</sup> At the time when street sex workers started to go “missing” from the Downtown Lower East Side of Vancouver in the late 1990s, a co-operative housing unit was established in that neighbourhood to allow street workers to bring their clients to an indoor location. This safe haven was short-lived, as the premises was raided and bawdy house charges were laid. We now know that many of the missing women from the street of the Downtown Lower East Side were abducted from these streets, brutally murdered, and buried on Robert Pickton's pig farm. However, we will never know how many women may have been saved if they had been allowed to work from *Grandma's House* or similar establishments which are currently outlawed by the blanket prohibition on keeping a common bawdy house.

10. The closure and prohibition by operation of law of premises like *Grandma's House* cannot be trivialized as a “limited and indirect impact” on security.

11. The Attorney General of Ontario argues that sex workers consensually enter into a dangerous trade and that this somehow absolves the state of all responsibility.<sup>11</sup> In *PHS Community Services*, this Court clearly rejected this “choice argument” as being a “moral argument that those who commit crimes should be made to suffer the consequences.”<sup>12</sup> As the Court noted, “the morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s. 7 right.”<sup>13</sup> The moral value or worth of one's choices simply does not factor into the analysis of whether state action operates as a deprivation of one's right to security of the person. It is submitted that the relevant question is not whether the sex worker has chosen a dangerous profession. She is at liberty to make this choice and the cost of making this legal choice should not be the loss of *Charter* protection on the basis of a strained argument on causation. The relevant question for constitutional analysis is whether the sex worker's legal choice has been constrained and limited by state action (legislation) in a manner which affects her right to liberty and security.

12. For street-based sex workers who wish to improve their safety, their legal choices are highly constrained. As discussed in greater detail in the cross-appeal, the communicating law

---

<sup>10</sup> Supplementary Affidavit of John Lowman, at paras 52-53, **JAR, Vol. 20, Tab 52, p. 5744**; Cross-examination of John Lowman (Volume One), at p. 4 l. 10 - p. 5 l. 11, p. 130 ll. 9-19, p. 181 l.10 - p.185 l. 24, **JAR, Vol. 21, Tab 53, pp. 5893-5894, 6019, 6070-6074**.

<sup>11</sup> Factum of the Attorney General of Ontario, at paras. 19-22 [“AGO Factum”]. At the outset, the government's reliance upon the sex worker's informed and voluntary decision to enter the trade is somewhat paradoxical in light of the contradictory assertion made by both Appellants that prostitution is primarily, if not exclusively, undertaken by desperate and disadvantaged women with little real choice; however, this contradiction is not the primary flaw in the logic of relying upon choice as a removing state action from the chain of causation.

<sup>12</sup> *PHS, supra*, at para. 102, **Tab 5**.

<sup>13</sup> *PHS, supra*, at para. 102, **Tab 5**.

prohibits them from engaging in basic client screening or working in well-lit, high traffic areas where violence is less likely to occur. However, taking work to a secure indoor location, hiring security, or obtaining any form of paid assistance, carries even greater criminal consequences: unlike the communication offence, bawdy house and living on the avails are indictable offences which carry with it the specter of losing one's home or place of business to criminal forfeiture.<sup>14</sup> It is incongruous to suggest that the law only plays a limited and indirect role in the security violation when the taking of rudimentary safety precautions is met with serious criminal sanction.

13. Linda Shaikh has worked in the sex trade for 35 years. She has worked both on the streets and in indoor establishments. She testified that "working on the street as a sex worker poses a much higher degree of danger of bodily harm than working indoors." She then stated that "for most of my career I felt I had no choice but to work outdoors on the street due to the legal ramifications of being convicted of bawdy house offences. **I had to choose between my safety and my freedom**".<sup>15</sup> No civilized system of law should put those it governs on the horns of the dilemma of choosing between obedience to the law and personal safety. It defies logic and reason to claim that a law which constrains choice in this manner bears little causal relationship to the deprivation of security.

14. It is not surprising that the Appellants would both try to identify causation as the weak link in the chain of reasoning employed by the courts below. If the constitutional claims cannot be dismissed at the stage of the threshold issue of deprivation of security, the second stage of analysis will require the Appellants to find justification for the deprivation by resort to the legislative objectives of the impugned provisions. Simply put, the legislative objectives, properly understood, do not provide the Appellants with any viable argument to call into question the conclusion of the courts below that the provisions are overbroad and grossly disproportionate to the modest legislative objectives.

15. Both of the Appellants engage in a mythical recasting of the legislative objectives of the impugned provisions in search of some justification or explanation for the self-evident irrationality of the legislative regime. The historical record is clear and there is little doubt that the impugned offences were animated by concerns over moral dissolution, disorderly conduct, nuisance, vagrancy, and exploitation. The Attorneys-General claim that the legislation was created to operate as a comprehensive and unified catalogue of related provisions designed to

---

<sup>14</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 462.3(1), 462.37(1), **Resp. Auth., Tab 62**; *Civil Remedies Act*, 2001, S.O. 2001, c. 28, ss. 1, 3(1), **Resp. Auth., Tab 63**.

<sup>15</sup> Affidavit of Linda Shaikh, at para. 6, **JAR**, Vol. 8, Tab 31, pp. 1863-1864.

deter people from entering the sex trade, to fight the industrialization/commercialization of the trade, and to prevent the commodification and degradation of woman.

16. There is no question that in the modern era there have been scholars, commentators, and policy-makers who have argued that these broader objectives *should* be the animating concerns underlying the legislative regime. However, there is no evidence that this perspective or policy has ever been considered and adopted by Parliament.

17. Further, the historical record does not speak to a master plan but rather, as the 1985 Fraser Report noted, “the present Criminal Code provisions reflect a number of underlying policies introduced at different times which do not sit well with each other.”<sup>16</sup> The bawdy house and living on the avails offences are deeply rooted in the ancient common law of nuisance and vagrancy, respectively, and there has never been a modern reformulation of either offence in contemporary times. The third offence, communication, was enacted in 1985 as a precipitous response to a perceived crisis with respect to the inundation of street prostitution in various municipalities. To address concerns expressed in the House of Commons and Senate about the impact of this new law, the Minister of Justice clearly indicated that the new communication law was merely an interim response to a current crisis and that the government was undertaking to develop in the near future a more comprehensive law reform initiative with respect to the sex trade laws.<sup>17</sup> Thirty years later, Canadians continue to wait for this undertaking to be honoured.

18. The fundamental flaw permeating all of the arguments advanced by the Appellants is that they assign no juridical importance to the fact that selling sex is not illegal. The Appellants have failed to recognize Wilson J.’s admonition in the *Prostitution Reference* that “we cannot treat as a crime that which the legislature refrained from making as a crime....the persistent resistance to outright criminalization of the act of prostitution cannot be treated as inconsequential.... the legality of prostitution must be recognized in any s. 7 analysis and must be respected regardless of one’s personal views on the subject.”<sup>18</sup>

19. Once the legality of prostitution is properly “recognized in any s. 7 analysis”, it becomes readily apparent that the courts below reached the correct result. The impugned laws suffer from two constitutional infirmities: they both overshoot the mark by the needless criminalization of

---

<sup>16</sup> *Bedford SCJ, supra*, at para. 147, **AR, Vol. 1, Tab 3, p. 42**; *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, at p. 531, **JAR, Vol. 71, Tab 154(B), p. 21049**.

<sup>17</sup> *Report of the Standing Senate Committee on Legal and Constitutional Affairs on Bill C-49*, at pp. 35:8-10, **JAR, Vol. 73, Tab 155(N), pp. 21806, 21808**; Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49 (7 November 1985), at p. 8:10 (Mr. Crosbie), **JAR, Vol. 73, Tab 155(I), p. 21713**.

<sup>18</sup> *Prostitution Reference, supra*, at para 1217, **Resp. Auth., Tab 47**.

innocent conduct and, more significantly, the overly broad and inflexible operation of the impugned laws significantly contributes to an increased risk of physical harm for those engaged in lawful work.

20. It is submitted that the Government of Canada needs to revisit, reform and revise a legal regime it promised to reform close to 30 years ago. Laws that contribute to an impairment of the right to security undermine the primary duty of any civilized society – that is, to protect and enhance the security of its members. Whether by design or by blind accident, the current regime governing the operation of the sex trade has been shown to be one of those rare occasions in which the criminal law impairs the right to security of individuals who try to work within the four corners of the law. Nothing short of judicial invalidation of the impugned provisions can cure the constitutional infirmity and hopefully provide the framework and impetus for meaningful and rational legislative policy-making.

## 2. THE RELEVANT FINDINGS OF FACT

21. The Respondents do not adopt, nor do they contest, the recitation of facts as found in the factums of the Attorneys-General. As Himel J. noted, “most of the respondents’ [now Appellants’] experts did not comment specifically on the impugned provisions or on prostitution in Canada. Rather, the focus was on prostitution in general.”<sup>19</sup> The facts relied upon by the Attorneys General are simply not responsive to the factual issues raised in this constitutional challenge. They largely constitute general statements about the nature of street sex work, the characteristics of the survival street worker, and strategies adopted to assist exiting the trade. Although some of this evidence may be relevant to an analysis under s. 1 of the *Charter*, the Appellants’ evidence has little or nothing to do with the arguments relating to impairment of security, overbreadth, and gross disproportionality.

22. Although the facts relied upon by the Appellants are only incidentally relevant to the issues, much time and effort was spent in the lower courts addressing the methodological shortcomings and ideological distortions contained within the expert evidence tendered by the Attorney General of Canada.<sup>20</sup> Accordingly, the Respondents are not in agreement with many of the factual assertions made by the Attorneys-General. For example, the Attorney General of

---

<sup>19</sup> *Bedford SCJ, supra*, at para. 131, **AR, Vol. 1, Tab 3, p. 38.**

<sup>20</sup> Factum of the Applicants in the Superior Court of Justice [“SCJ App. Factum”], at paras. 276-330, **Electronic Materials Contained in the CD of the Attorney General of Canada [“AGC Electronic Materials”]**; Factum of the Respondents in the Court of Appeal [“ONT. C.A. Resp. Factum”], at paras. 72-81, *AGC Electronic Materials*.

Canada boldly asserts that “pimps are prevalent in prostitution,”<sup>21</sup> but this statement is contradicted by the conclusion drawn by the Fraser Committee that most sex workers are “independent operators.”<sup>22</sup> Similarly, the Attorney General of Ontario makes the assertion that “the average age of entry into prostitution is somewhere between 13 and 16 years”<sup>23</sup> but fails to mention that the only expert evidence to support this disturbing conclusion was largely based upon a series of studies that were confined to interviewees who were underage when entering the trade.<sup>24</sup>

23. The assertions relied upon by the Attorneys General should not distract from the relevant factual questions raised in this challenge. In order to prove an impairment of security and to lay the foundation for the application of the gross disproportionality doctrine, the Respondents asked the courts below to address three questions:

- 1) Can a sex worker enhance her safety and security by moving to an indoor location?
- 2) Can a sex worker enhance her safety and security by recruiting the assistance of third parties?
- 3) Can a sex worker enhance her safety and security by communicating with prospective customers in a public place?

24. The answer from both courts was unequivocal. Safety and security could be enhanced by these rudimentary, but prohibited, safety measures.<sup>25</sup> These findings were based upon and supported by a wide array of evidentiary sources, including experiential evidence, ethnographic studies, empirical evidence, and numerous government-commissioned reports and legislative committee reviews since 1985. Although the evidence introduced by the Attorneys-General was largely non-responsive to the safety issue, even that evidence supported the Respondents’ claims. For example, Detective Jim Morrissey stated: “It’s definitely safer for the girls who are inside than the ones working on the street. We’ve already discussed that, and I agree with that.”<sup>26</sup> In addition, he noted that the licensing of sex work in Edmonton could serve to facilitate safety.<sup>27</sup> Even two of the experiential witnesses called by Attorney General of Canada spoke to the relative

---

<sup>21</sup> AGC Factum, *supra*, at para 10.

<sup>22</sup> *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, at pp. 378-379, **JAR, Vol. 71, Tab 154(B), pp. 20896-20897**.

<sup>23</sup> AGO Factum, *supra*, at para. 92.

<sup>24</sup> Affidavit of Richard Poulin, at para. 28, **JAR, Vol. 40, Tab 102, p. 11388**; Cross-examination of Richard Poulin, at p. 39 l. 18 – p. 49 l. 22, **JAR, Vol. 43, Tab 105, pp. 12369-12379**.

<sup>25</sup> *Bedford SCJ, supra*, at para. 421, **AR, Vol. 1, Tab 3, pp. 111-112**; *Bedford OCA, supra*, at paras. 172, 207, 316, **AR, Vol. II, Tab 7, pp. 74, 85, 127**.

<sup>26</sup> Cross-Examination of Jim Morrissey, at p. 44 l. 1 – p. 45 l. 3, **JAR, Vol. 34, Tab 79, pp. 9814-9815**.

<sup>27</sup> Cross-examination of Jim Morrissey, at p. 109 l. 4 – p. 110 l. 7, **JAR, Vol. 34, Tab 79, p. 9879-9880**.

safety of working indoors.<sup>28</sup> Most significantly, in speaking to the issue of the low numbers of bawdy house investigations and charges, the police officers acknowledged that if they were receiving tips or information of brutal violence taking place in indoor venues, they would not hesitate to investigate and intervene. However, they were simply not receiving information of this nature when it came to indoor venues.<sup>29</sup>

### 3. EVIDENTIARY SUPPORT FOR FINDINGS

#### A. Occupation at Risk: Criminological Data<sup>30</sup>

25. Since 2000, Statistics Canada has characterized the “sex trade as an occupation at risk.”<sup>31</sup> The 2001 Juristat report, *Homicide in Canada*, found that “since 1991, 73 prostitutes have been killed while working.”<sup>32</sup> From 2002 to 2004 there were 47 homicides,<sup>33</sup> which include the continuing discovery of bodies in Port Coquitlam, British Columbia on the farm owned by convicted serial killer Robert Pickton.<sup>34</sup> However, even after all human remains had been located and removed from the Pickton farm, Statistics Canada has not seen a significant reduction in the homicide figures: from 2005 to 2007, 36 prostitutes were murdered.<sup>35</sup> In 1995, Statistics Canada

<sup>28</sup> Affidavit of T.D., at paras 23-27, **AR, Vol. V, Tab 44, pp. 51-52**; Affidavit of P.M., at paras 32-33, **AR, Vol. V, Tab 49, pp. 115-116**.

<sup>29</sup> Cross-Examination of Jim Morrissey, at p. 100 l. 15 – p. 103 l. 22, **JAR, Vol. 34, Tab 79, pp. 9870-9873**; Cross-Examination of Oscar Ramos, at p. 91 l. 5 – p. 92 l. 22, **JAR, Vol. 36, Tab 87, pp. 10506-10507**; Cross-Examination of Eduardo Dizon, at p. 75 l. 2 – p. 78 l. 20, **JAR, Vol. 37, Tab 92, pp. 10765-10768**.

<sup>30</sup> Most of the facts and figures outlined here were referred to and relied upon by Himel J. in her reasons for judgment: *Bedford SCJ, supra*, at paras. 92, 121-124, 294-299, **AR, Vol. I, Tab 3, pp. 30, 36-37, 82-84**.

<sup>31</sup> Statistics Canada, *Homicide in Canada, 2000* by Orest Fedorowycz (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2001), at p.15, **JAR, Vol. 86, Tab 167, p. 26256**; Statistics Canada, *Homicides in Canada, 2001* by Mia Dauvergne (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2002), at p.16, **JAR, Vol. 86, Tab 168, p. 26275**; Statistics Canada, *Homicide in Canada, 2002* by Josee Savoie (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2003), at p.11, **JAR, Vol. 86, Tab 169, p. 26290**; Statistics Canada, *Homicide in Canada, 2003* by Mia Dauvergne (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2004,) at p.11, **JAR, Vol. 86, Tab 170, p. 26311**; Statistics Canada, *Homicide in Canada, 2004* by Mia Dauvergne (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2005), at p.14, **JAR, Vol. 86, Tab 171, p. 26337**; Statistics Canada, *Homicide in Canada, 2005* by Mia Dauvergne and Geoffrey Li (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2006), at p.12, **JAR, Vol. 86, Tab 172, p. 26362**.

<sup>32</sup> Statistics Canada, *Homicide in Canada, 2001* by Mia Dauvergne (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2002), at p.16, **JAR, Vol. 86, Tab 168, p. 26275**.

<sup>33</sup> Statistics Canada, *Homicide in Canada, 2002* by Josee Savoie (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2003), at p. 11, **JAR, Vol. 86, Tab 169, p. 26290**; Statistics Canada, *Homicide in Canada, 2003* by Mia Dauvergne (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2004), at p. 11, **JAR, Vol. 86, Tab 170, p. 26311**; Statistics Canada, *Homicide in Canada, 2004* by Mia Dauvergne (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2005), at p. 14, **JAR, Vol. 86, Tab 171, p. 26337**.

<sup>34</sup> In 2006 the Report of the Standing Committee on Justice and Human Rights noted that in the past decade “at least 79 prostitutes were murdered while engaging in prostitution activities”: House of Commons, Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*, (December 2006), at p. 18, **JAR, Vol. 82, Tab 164, p. 24926**. Appellant's witness Susanne Wallace-Capretta reported that “between 1996 and 2006, there were 77 homicides against prostitutes as a result of their profession”: Affidavit of Suzanne Wallace-Capretta, at pp. 17-18, **JAR, Vol. 64, Tab 128, pp. 18932-18933**.

<sup>35</sup> Statistics Canada, *Homicide in Canada, 2005* by Mia Dauvergne and Geoffrey Li (Ottawa: Juristat: Canadian

released its only Juristat report focused specifically on prostitution. This report found that “physical and sexual assaults on street prostitutes are commonly carried out ... 63 known prostitutes were found murdered between 1991 and 1995. Most (50) appear to have been killed by customers” and 60 of the 63 were women.<sup>36</sup>

26. It is clear that the high rate of homicide in recent years was not solely the product of Robert Pickton, who was arrested in 2002 for the murders of 26 street sex workers who had gone missing from Vancouver’s lower east side. On October 14, 2003, the R.C.M.P. announced the creation of a special division, Project KARE, to deal with 82 cases of unsolved homicides and missing persons from “high-risk lifestyles” in the Edmonton/Calgary corridor.<sup>37</sup> Jody Paterson of PEERS (Prostitution Empowerment, Education and Resource Society) deposed that “it is naïve to blame all of the violence on a single serial killer... because the violence is systematic in outdoor prostitution.”<sup>38</sup> She pointed out that in her hometown of Victoria, British Columbia, there were “around twelve... in the last decade” missing outdoor sex workers and several unsolved murders of sex workers.<sup>39</sup>

27. Oscar Ramos of the Vancouver Police Department and Eduardo Dizon of the Toronto Police Service both acknowledged that the problem of street sex worker vulnerability to predatory killers has not subsided since the arrest of Robert Pickton and that similar incidents could occur in any major urban centre in Canada.<sup>40</sup> In fact, during the 1996 Victoria Day long weekend, Marcello Palma shot three prostitutes execution style in the period of one hour in the City of Toronto. All three victims worked on the street. Upon conviction for the three murders, he commented that he was “getting rid of the street scum.”<sup>41</sup>

28. Dr. Elliot Leyton, Professor Emeritus at Memorial University, a Canadian social anthropologist who specializes in the study of serial killing, expressed support in his affidavit for providing sex workers with a safe and clean place to work. From years of studying serial killers,

---

Centre for Justice Statistics, 2006), at p. 12, **JAR, Vol. 86, Tab 172, p. 26363**; Statistics Canada, Homicide in Canada 2006 by Geoffrey Li (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2007), at p.8, **JAR, Vol. 86, Tab 173, p. 26384**; Statistics Canada, Homicide in Canada, 2007 by Geoffrey Li (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2008), at p.11, **JAR, Vol. 86, Tab 174, p. 26406**.

<sup>36</sup> Statistics Canada, Street Prostitution in Canada by Doreen Duchesne (Ottawa: Juristat: Canadian Centre for Justice Statistics, 1997), at p.8, **JAR, Vol. 86, Tab 166, p. 26236**.

<sup>37</sup> Cross-examination of Jim Morrissey, at p. 47 l. 1 – 25, **JAR, Vol. 34, Tab 79, p. 9817**; Cross-examination of Sonia Joyal, p. 19 l. 3 – p. 22 l. 1, **JAR, Vol. 36, Tab 89, pp. 10593-10596**.

<sup>38</sup> Affidavit of Jody Paterson, at para. 11, **JAR, Vol. 7, Tab 30, pp. 1836**.

<sup>39</sup> Affidavit of Jody Paterson, at para. 11, **JAR, Vol. 7, Tab 30, pp. 1836**.

<sup>40</sup> Cross-examination of Oscar Ramos, at p. 46 l. 17 – p. 47 l. 18, **JAR, Vol. 36, Tab 87, pp. 10461-10462**; Cross-examination of Eduardo Dizon, p. 46 ll. 14-21, **JAR, Vol. 37, Tab 92, pp. 10736**.

<sup>41</sup> Affidavit of Kara Gillies, at para. 16, **JAR, Vol. 6, Tab 24, pp. 1305**.

he has “not come across any serial killer who kidnapped prostitutes from a [supervised] indoor location.”<sup>42</sup> However, since the late nineteenth-century, starting with the horrors of Jack the Ripper disemboweling street prostitutes with surgical precision, there has been a repeating pattern of serial killers targeting street prostitutes.<sup>43</sup>

29. The nature of the sex trade has changed over the past few decades.<sup>44</sup> The 2006 report of the Standing Committee on Justice and Human Rights stated that “street prostitution accounts for just 5% to 20% of all prostitution activity in this country.”<sup>45</sup> Statistics Canada’s 1995 Juristat report, *Street Prostitution in Canada*, noted that “since the communicating law has been in force, the focus of arrests has been on street prostitution. For example, in 1995 the vast majority of prostitution incidents involved communication (92%)” whereas in 1985, the majority of incidents were related to bawdy house activities (55%).<sup>46</sup>

30. The 2006 Report of the Standing Committee on Justice and Human Rights (the “Standing Committee”) noted that “unlike section 213, the bawdy house provisions are rarely enforced by police, as they often pass under the radar of the prosecution process that is driven primarily by complaints.”<sup>47</sup> The Standing Committee noted that bawdy house investigations are “time consuming and expensive,” and some of the police witnesses for the Crown also noted that there were few bawdy house charges (only 24 for the year 2007 in Toronto<sup>48</sup>) due to the labour intensive nature of such investigations.<sup>49</sup>

### B. Experiential Support

31. All three Respondents have worked extensively in the sex trade, in outdoor and indoor

---

<sup>42</sup> Affidavit of Elliott Leyton, at para. 15, **JAR, Vol. 10, Tab 40, p. 2682.**

<sup>43</sup> Eg., Gary Ridgway (Green River Killer – 48 victims, early 1980s); Peter Sutcliffe (The Yorkshire Ripper – 13 victims, late 1970s); Arthur Shawcross (Genessee River Killer – 10 victims, late 1980s), and Joel Rifkin (New York City – 9 victims, early 1990s: *see* Affidavit of Elliott Leyton, at para. 6, **JAR, Vol. 10, Tab 40, p. 2679.**

<sup>44</sup> Unlike in the past, it is estimated that 80% of sex work not occurs off-street: *See* Affidavit of Ronald Weitzer, at para. 11, **JAR, Vol. 30, Tab 64, p. 8530**; Cross-Examination of Jim Morrissey, at p. 98 ll. 6 - 18, **JAR, Vol. 34, Tab 79, p. 9868**; Affidavit of Randy Cowan, at para. 12, **JAR, Vol. 35, Tab 84, p. 10266**; Dan Gardner, “The hidden world of hookers” *Ottawa Citizen*, 8 June 2002, **JAR, Vol. 10, Tab 38(D), pp. 2559-2560**; Affidavit of John Lowman, at para. 44, **JAR, Vol. 15, Tab 51, p. 4169**; Cross-examination of John Lowman (Volume 1), at p. 52 l. 5 – p. 53 l. 4, **JAR, Vol. 21, Tab 53, pp. 5941-5942.**

<sup>45</sup> House of Commons, Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws* (December 2006), at p. 5, **JAR, Vol. 82, Tab 164, p. 24913.**

<sup>46</sup> *Street Prostitution in Canada*, Statistics Canada Report, at p. 4, **JAR, Vol. 86, Tab 166, p. 26232.**

<sup>47</sup> House of Commons, Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws* (December 2006), at p. 55, **JAR, Vol. 82, Tab 164, p. 24961.**

<sup>48</sup> Affidavit of Howard Page, at para 16, **JAR, Vol. 34, Tab 81, p. 10011.**

<sup>49</sup> Affidavit of Howard Page, at paras. 16-18, **JAR, Vol. 34, Tab 81, pp. 10011-10012**; Affidavit of Detective Constable Michelle Holm, **JAR, Vol. 35, Tab 83, p. 10247, para. 21**; Affidavit of Michelle Holm, at para. 21, **JAR, Vol. 35, Tab 83, pp. 10247-10248**; Cross-Examination of Oscar Ramos, at p. 56 l. 2 – p. 57 l. 4, **JAR, Vol. 36, Tab 87, pp. 10471-10472.**

settings. The three Respondents found that working indoors with the assistance of others increased their security and safety. While all three Respondents feel better able to protect themselves from violence indoors, they do not believe they should continue to do indoor work because of the risk of exposing themselves and others to criminal liability.<sup>50</sup>

32. Twenty-four witnesses tendered affidavit evidence on behalf of the Respondents regarding the nature and frequency of violence experienced by sex trade workers across Canada. Of the 24 witnesses, 12 have worked or are currently working in the sex trade. Of these twelve, six currently work for groups or associations that provide assistance to sex trade workers. All witnesses deposed that the current legal regime contributes to the risk of violence experienced by women in the sex trade.<sup>51</sup>

33. In particular, of the experiential witnesses, all twelve women who have worked in the trade concluded that street prostitution is less safe than indoor work.<sup>52</sup> Of these women, more than half have worked in the sex trade for more than 15 years.<sup>53</sup> The women attribute this increased safety to, amongst other things, ensuring that other people are aware of a worker's location and a client's information,<sup>54</sup> a familiarity with the environment should a worker need to call for help,<sup>55</sup> and an ability to control the number of people entering and occupying the space.<sup>56</sup> These conclusions are based on direct experience and interviews with hundreds of sex workers.<sup>57</sup>

### C. Empirical Support

---

<sup>50</sup> Affidavit of Terri-Jean Bedford, at paras 7-29, **JAR, Vol. 2, Tab 11, pp. 46-53**; Affidavit of Valerie Scott, at paras. 2-10, 37, **JAR, Vol. 3, Tab 16, pp. 293-295, 302**; Affidavit of Amy Lebovitch, at paras. 4-10, **JAR, Vol. 2, Tab 13, pp. 165-166**.

<sup>51</sup> *SCJ App. Factum, supra*, at paras 61-110, *AGC Electronic Materials*; *ONT. C.A. Resp. Factum, supra*, at paras 44-47, *AGC Electronic Materials*.

<sup>52</sup> Affidavit of Terri-Jean Bedford, at paras. 8-11, **JAR, Vol. 2, Tab 11, p. 47**; Affidavit of Amy Lebovitch, at paras. 3-7, **JAR, Vol. 2, Tab 13, pp. 164-166**; Affidavit of Valerie Scott, at paras. 1-24, **JAR, Vol. 3, Tab 16, pp. 293-299**; Affidavit of Wendy Harris, at paras. 4-7, **JAR, Vol. 7, Tab 27, p. 1574-1576**; Affidavit of Linda Shaikh, at paras. 3-4, **JAR, Vol. 8, Tab 31, p. 1862-1863**; Affidavit of Wendy Babcock, at para. 4, **JAR, Vol. 4, Tab 19, p. 752**; Statistical Compilation of the incidences of violence against sex workers gathered by Wendy Babcock, **JAR, Vol. 4, Tab 19(B), pp. 762-763**; Affidavit of Kara Gilles, at para. 8, **JAR, Vol. 6, Tab 24, p. 1301**; Affidavit of Darlene Maurganne Mooney, at para. 17, **JAR, Vol. 7, Tab 29, p. 1690**; Affidavit of Carol-Lynn Strachan, at paras. 1, 10-12, **JAR, Vol. 8, Tab 32, p. 1865, 1870**; Affidavit of Susan Davis, at paras. 11-15, **JAR, Vol. 5, Tab 22, p. 934-935**; Affidavit of Jody Paterson, at paras. 3-14, **JAR, Vol. 7, Tab 30, pp. 1834-1837**; Affidavit of Lauren Casey, at para. 11, **JAR, Vol. 26, Tab 58, p. 7423**.

<sup>53</sup> Affidavit of Wendy Harris, at para. 2, **JAR, Vol. 7, Tab 27, p. 1574**; Affidavit of Linda Shaikh, at para. 2, **JAR, Vol. 8, Tab 31, p. 1862**; Affidavit of Kara Gilles, at para. 1, **JAR, Vol. 6, Tab 24, pp. 1297, 1301**; Affidavit of Susan Davis, at paras. 2-3, **JAR, Vol. 5, Tab 22, pp. 930-931**; Affidavit of Lauren Casey, at para. 11, **JAR, Vol. 26, Tab 58, p. 7423**; Affidavit of Carol-Lynn Strachan, at para. 1, **JAR, Vol. 8, Tab 32, p. 1865**.

<sup>54</sup> Cross-examination of Wendy Babcock, at p. 9 ll. 5-20, **JAR, Vol. 4, Tab 20, p. 797**.

<sup>55</sup> Affidavit of Susan Davis, at paras. 15-17, **JAR Vol. 5, Tab 22, pp. 935-936**.

<sup>56</sup> Affidavit of Kara Gillies, at para. 8, **JAR, Vol. 6, Tab 24, pp. 1301**.

<sup>57</sup> Affidavit of Wendy Harris, at paras. 5-8, **JAR, Vol. 7, Tab 27, pp. 1574-75**; Affidavit of Darlene Maurganne Mooney, at paras. 3-15, **JAR, Vol. 7, Tab 29, pp. 1686-1690**; Affidavit of Jody Paterson, at paras. 3-5, **JAR, Vol. 7, Tab 30, p. 1834**; Affidavit of Linda Shaikh, at paras. 3-6, **JAR, Vol. 8, Tab 31, pp. 1862-1864**.

34. The Respondents relied upon eight witnesses with academic postings at various universities across Canada who had conducted empirical research into issues relating to violence against sex trade workers in various Canadian jurisdictions. The evidence included over 14 studies, conducted by 11 different academics across Canada. These studies collectively included interviews with over 800 sex workers.<sup>58</sup> All of the expert witnesses for the Respondents deposed that safety could be enhanced by moving indoors and by recruiting the assistance of third parties. Unlike the witnesses for the Appellants, all of the studies conducted by witnesses for the Respondents were conducted in Canadian cities and most had participation by indoor sex workers. The expert witnesses completed qualitative research and ethnographic studies with diverse populations of sex workers and all of the witnesses reached the conclusion, based upon their research, that the law plays a significant role in the perpetuation of violence.<sup>59</sup>

35. Professor John Lowman is a Professor at the School of Criminology at Simon Fraser University. He has been engaged in a 30-year case study of prostitution in Vancouver and has published extensively in the area. He has been commissioned by the Department of Justice on three occasions since 1984 to study the impact of enforcement of the laws relating to prostitution.<sup>60</sup> In his 1995 study, *Violence against Persons who Prostitute: The Experience in British Columbia*, Professor Lowman found that “77% of street-involved women said they had experienced violence (with an average of seven incidents per person) within the last 6 months in which they were interviewed. Of these incidents, 97% were with customers or people pretending to be customers”.<sup>61</sup> He also found that 92% of homicide victims from the sex trade met their assailant on the street.<sup>62</sup>

36. Further, Professor Lowman found a differential rate of violence between on-street and off-street venues supporting the assertion that indoor prostitution can be a significantly safer working environment. One of his primary conclusions was that “[w]hile working the street, a much larger proportion of respondents reported having been robbed, sexually assaulted, beaten, strangled, and

---

<sup>58</sup> See Chart from *Ont. C.A. Resp. Factum, supra*, at para. 47, *AGC Electronic Materials*.

<sup>59</sup> See, e.g., Affidavit of Augustine Brannigan, at para. 4, *JAR*, Vol. 8, Tab 34, p. 1967; Affidavit of Gayle MacDonald, at para. 14, *JAR*, Vol. 11, Tab 42, p. 2772; Affidavit of Cecilia Benoit, at paras. 17-20, *JAR*, Vol. 13, Tab 48, pp. 3422-3423.

<sup>60</sup> Affidavit of John Lowman, at paras. 1-2, *JAR*, Vol. 15, Tab 51, pp. 4145-4146; Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, submissions of John Lowman, at pp.1-2, *JAR*, Vol. 18, Tab 51(J), p. 5128-5129; John Lowman, *Vancouver Field Study of Prostitution Research Notes*, *JAR*, Vol. 16, Tab 51(F); *Street Prostitution: Assessing the Impact of the Law - Vancouver*, *JAR*, Vol. 17, Tab 51(G); John Lowman and J. Fraser, *Violence against Persons who Prostitute: The Experience in British Columbia*, *JAR*, Vol. 18, Tab 51(H).

<sup>61</sup> Affidavit of John Lowman, at para. 21, *JAR*, Vol. 15, Tab 51, p. 4154.

<sup>62</sup> Affidavit of John Lowman, at para. 24, *JAR*, Vol. 15, Tab 51, p. 4155.

kidnapped, and were more likely to have reported being involved in an incident where a weapon was used, or being the victim of an attempted murder.”<sup>63</sup> For example, the differential between street and indoor workers with respect to sexual assault was 37.1% vs. 9.1% and with respect to kidnapping, it was 32.3% vs. 4.5%.<sup>64</sup>

37. Based upon the entirety of his research, Professor Lowman asserted that the “Canadian prostitution law materially contributes to violence against prostitutes”<sup>65</sup> along with other causal factors such as poverty, drug addiction, and lack of education.<sup>66</sup> By preventing sex workers from organizing safe work conditions, it plays a decisive role in creating opportunities for violence against prostitutes to occur.<sup>67</sup> Beyond his recounting of the story of “Grandma’s House”, Professor Lowman provided another cogent illustration of the causal role of the law with respect to the increased risk of harm. In being cross-examined about the finding in a British study indicating that street workers in that jurisdiction were moving indoors, he responded:

That is highly likely in the British situation where a single prostitute working out of a premise is not susceptible to prosecution under bawdy house law, which is why they work with a maid rather than with another prostitute, the maid providing that safety, third party person. But here again you see the key role of the law in facilitating the move off-street because a woman can work in a single premise in Birmingham without running afoul of the law. If we were to do a similar change of law in Canada, one would be able to predict that you would see a greater movement off-street of certain kind of prostitutes, those who can afford the infrastructure, with a possibility that others would organize that infrastructure for those desperate and marginalized women on the Downtown Eastside who cannot pay for it themselves...<sup>68</sup>

38. Other researchers have found a similar differential in rates of violence between street work and indoor work. In 2007, Tamara O’Doherty’s study of indoor work in Vancouver demonstrated that the incidence of violence in the off-street sex trade was dramatically lower than the incidence of violence for those working the streets. For example, in comparing rates between indoor and outdoor sex workers, O’Doherty found that outdoor sex workers were more frequently

---

<sup>63</sup> John Lowman and J. Fraser, *Violence against Persons who Prostitute: The Experience in British Columbia*, **JAR**, Vol. 18, Tab 51(H), pp. 4934-4935.

<sup>64</sup> John Lowman and J. Fraser, *Violence against Persons who Prostitute: The Experience in British Columbia*, **JAR**, Vol. 18, Tab 51(H), pp. 4934-4935.

<sup>65</sup> Cross-examination of John Lowman (Volume One), at p. 6 ll. 1-4, **JAR**, Vol. 21, Tab 53, p. 5895.

<sup>66</sup> Affidavit of John Lowman, at para. 33, **JAR**, Vol. 15, Tab 51, p. 4162-4163; Cross-examination of John Lowman (Volume One), at p. 171 ll. 17-25, **JAR**, Vol. 21, Tab 53, p. 6060; Cross-examination of Eleanor Maticka-Tyndale, at p. 44 l. 10 – p. 45 l. 7, **JAR**, Vol. 12, Tab 46, pp. 3229-3230.

<sup>67</sup> Supplementary Affidavit of John Lowman, at paras. 34-35, **JAR**, Vol. 20, Tab 52, pp. 5736-5737.

<sup>68</sup> Cross-examination of John Lowman (Volume Two), at p. 449 l. 9 – p. 450 l. 4, **JAR**, Vol. 22, Tab 53, pp. 6339-6340.

the victims of violence: 13% of sex workers working in massage parlors vs. 44.5% of street workers faced threats with a weapon; 13% vs. 45.8% experienced sexual assault; 17.4% vs. 51.2% experienced physical assault; 8.7% vs. 41.2% experienced kidnapping.<sup>69</sup>

39. This differential rate of violence has been found in numerous international studies. For example, Church et al. found a significant differential in violence in a study of 240 sex workers in England.<sup>70</sup> Plumridge and Abel found a significant differential in a study of 303 female sex workers in New Zealand.<sup>71</sup> Pyett and Warr, in a smaller study of 24 workers in Australia reached the conclusion that legal brothels provided the safest environment for sex workers, finding that, “[s]treet workers were at much greater risk of coercion, threats, and physical assault by clients, had suffered more violence and experienced much poorer health, usually associated with drug use.”<sup>72</sup> Perkins and Lovejoy reached a similar conclusion in an Australian study of 219 sex workers, in which they found that call girls, along with escorts and street workers, were in potentially dangerous situations much more often than the brothel workers.<sup>73</sup>

#### D. Government Debates and Reports

40. In 1983, amidst concerns regarding the expansion of street prostitution and the ineffectiveness of current provisions found in the *Criminal Code*, a Special Committee on Pornography and Prostitution (the “Fraser Committee”) was tasked by the Minister of Justice to study the issue of prostitution in Canada and provide recommendations regarding a legal response. The Committee concluded that “the fact that we have special laws surrounding prostitution does not, however, result in the curtailing of all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public.”<sup>74</sup> The Fraser Committee found that the laws negatively affected the ability of sex workers to take their legal activities indoors, despite the fact that private indoor locations could eliminate many of the

<sup>69</sup> T. O’Doherty, “Off Street Commercial Sex: An Exploratory Study”, at p. 94, **JAR**, Vol. 20, Tab 52(A), p. 5846.

<sup>70</sup> Stephanie Church et al., *Violence by Clients Towards Female Prostitutes in Different Work Settings: Questionnaire Survey*, (2001) 322 *Brit. Med. J.* 524, at p. 525, **JAR**, Vol. 15, Tab 15(Q), p. 5418 (eg. beaten – 27% vs. 1%; raped – 22% vs. 2%).

<sup>71</sup> Libby Plumridge & Gilian 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, at 82 **JAR**, Vol. 30, Tab 64(J), p. 8746 (eg. threatened with violence – 65% vs. 26%; raped – 27% vs. 8%; physical assault – 41% vs. 21%).

<sup>72</sup> Precilla Pyett & Deborah Warr, “Women at Risk in Sex Work: Strategies for Survival” (1999) 35 *Journal of Sociology* 183, at p. 194, **JAR**, Vol. 19, Tab 51(U), p. 5481.

<sup>73</sup> Roberta Perkins & Frances Lovejoy, “Healthy and unhealthy life styles of female brothel workers and call girls (private sex workers) in Sydney” (1996) 20 *Australian & New Zealand Journal of Public Health* 512, at p. 516 **JAR**, Vol. 30, Tab 64(M), p. 8772. In addition, similar conclusions were reached in the following study: Barbara Brents & Kathryn Hausbeck, “Violence and Legalized Brothel: Prostitution in Nevada – Examining Safety, Risk, and Prostitution Policy” (2005) 20 *Journal of Interpersonal Violence* 270, at p. 293, **JAR**, Vol. 20, Tab 51(Z), p. 5571.

<sup>74</sup> *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, at p. 392, **JAR**, Vol. 71, Tab 154(B), p. 20910.

negative consequences experienced by communities dealing with high incidences of street prostitution. The Committee noted that “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.”<sup>75</sup>

41. The Fraser Committee made numerous law reform recommendations, but the only amendment proposed by the government came in the form of Bill C-49, which replaced the s. 195.1 soliciting offence with a “communicating” offence. In government debates leading up to the enactment of the communication offence, a number of Senators and Members of Parliament expressed concerns about increasing vulnerability to violence being experienced by sex workers working on the streets.<sup>76</sup> In response, the Minister of Justice indicated that the legislation was merely directed to the problem of street nuisance and that “the complicated, social problem of prostitution and pornography... will be dealt with in the new year.”<sup>77</sup> When the bill passed the Senate, the Senate Committee noted that “the Minister has indicated that Bill C-49 is a first step to deal with an urgent problem, and that further amendments concerning prostitution will be forthcoming in the new year.” The Committee said they had “serious concerns about Bill C-49” but were “prepared on balance, to approve it without amendment in view of the provisions for review which are included, and having regard to the assurances of the Minister of Justice that further legislation dealing with other aspects of prostitution will be forthcoming.”<sup>78</sup>

42. Despite the assurances of the Minister of Justice, in the years following the implementation of s. 213, the federal government brought forth no additional legislation directed at prostitution and did not address the rest of the Fraser Committee’s recommendations.

43. This inaction persisted despite the fact every government-commissioned report since 1985 has reached the same conclusion as the Fraser Committee: that our prostitution related laws “provide no safe context for its operation.”<sup>79</sup> The most recent pronouncement from the 2006

---

<sup>75</sup> *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, at p. 533, **JAR, Vol. 71, Tab 154(B), p. 21051**.

<sup>76</sup> See, eg. House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49* (7 November 1985), at p. 8:51 (Mme Pepin), **JAR, Vol. 73, Tab 155(I), p. 21754**; *Debates of the Senate* (4 March 1986 to 28 August 1986), at p. 1561 (Hon. P. Derek Lewis), **JAR, Vol. 73, Tab 155(K), p. 21776**.

<sup>77</sup> House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49* (7 November 1985), at p. 8:10 (Mr. Crosbie), **JAR, Vol. 73, Tab 155(I), p. 21713**.

<sup>78</sup> Report of the Standing Senate Committee on Legal and Constitutional Affairs on Bill C-49, at p 35:10, **JAR, Vol. 73, Tab 155(N), p. 21808**.

<sup>79</sup> *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, at p. 533, **JAR, Vol. 71, Tab 154(B), p. 21051**; Street Prostitution: Assessing the Impact of the Law – Synthesis Report, at pp. 88-89, **JAR, Vol. 75, Tab 157, p. 22353**; Federal/Provincial/Territorial/Working Group on Prostitution - *Report*

Standing Committee report noted that: “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 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.”<sup>80</sup>

44. There are numerous other examples from government reports of this recurring and consistent theme of the law’s contribution to the deprivation of security of sex workers and these examples can be found in a list of quotations contained in *Appendix A: Government Debates and Reports: Risk of Harm and Displacement, 1983 – Present*.<sup>81</sup>

#### E. International Evidence

45. Justice Himel noted that “the evidence on this application shows that a number of foreign jurisdictions over the past 20 years have implemented laws decriminalizing prostitution by varying degrees,” with “an intention to minimize harms to prostitutes.”<sup>82</sup> The international evidence demonstrated two additional important points. First, the evidence shows that working indoors with third party assistance is significantly safer than working alone on the streets. Second, the evidence shows that the lifting of criminal prohibitions on bawdy house and living on the avails does *not* inexorably lead to a whole host of societal harms (i.e., involvement of children, organized crime, trafficking, and expansion of the trade).

46. Some government reports from the various jurisdictions provide glowing endorsements. For example, the report of the Queensland Crime and Misconduct Commission indicated that brothels there provide the safest and healthiest environments for sex workers and their clients, compared with those who give or receive prostitution services on the street or in private.<sup>83</sup> Other reports contain more tentative endorsements. For example, government reports in the Netherlands indicate that the new legislative regime is beginning to yield positive benefits: “[c]hanges in the regulated sector are only visible to a limited extent, but the field is certainly in movement.

---

*and Recommendations in respect of Legislation Policy and Practices Concerning Prostitution-Related Activities*, (December 1998), JAR, Vol. 79, Tab 160, p. 23899, 23931; Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*, (December 2006), at pp. 2, 89, 61, JAR, Vol. 82, Tab 164, pp. 24910, 24966, 24994.

<sup>80</sup> Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*, (December 2006), at p. 86, JAR, Vol. 82, Tab 164, p. 24991.

<sup>81</sup> The excerpts do not include any statements made in committee by the witnesses to this case, by other sex workers, and other sex worker associations. Additional references may be found in the Compendium filed with the court of Appeal for Ontario: AGC Electronic Materials > Court of Appeal > Respondent’s Compendium > Volume 1.

<sup>82</sup> *Bedford SCJ, supra*, at para. 473, AR, Vol. I, Tab 3 at p. 124.

<sup>83</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, at p. xii, JAR, Vol. 27, Tab 61(D), p. 7792.

Physical working conditions would appear to be changing for the better.”<sup>84</sup>

47. Whether tentative or glowing, the government reviews all indicate some positive developments in terms of sex worker safety without any corresponding increase in societal harm. A complete listing of the relevant excerpts from these reports can be found in the *Appendix B: Government Reports - International*.<sup>85</sup>

48. In an Appendix to its factum, the Attorney General for Ontario provides an outline of problems and concerns emanating from these international regimes. It must be noted that the majority of these concerns have been expressed by witnesses called by the Attorney General of Canada, who Justice Himel found had “entered the realm of advocacy and given evidence in a manner that was designed to persuade rather than assist.”<sup>86</sup> In light of this critical comment, the Court of Appeal reached the following conclusion on the importance of the international evidence:

While we do not place a great deal of weight on the international experience, we note that this evidence supports the respondents’ position. This evidence shows that legalization and regulation of prostitution has increased the safety of prostitutes with minimal increase in the harm a bawdy-house prohibition is meant to address. The appellants read the evidence from other jurisdictions differently; they suggest that the evidence shows that the demand for prostitution increases with decriminalization, that organized crime continues to be involved, and that decriminalization does nothing to address the problems of child prostitution. The evidence relied upon by the appellants is unpersuasive and does not meet the evidence relied upon by the respondents. The appellants’ evidence rests upon the proposition that prostitution can and should be eliminated, an objective that is not supported by the legislative history of the challenged provisions.<sup>87</sup>

## PART II: POSITION ON ISSUES

49. On December 17, 2012, the Chief Justice stated eight constitutional questions in relation to this appeal and the companion cross-appeal.<sup>88</sup>

50. With respect to the constitutional questions stated on the main appeal, the Respondents respectfully submit that both ss. 210 and 212(1)(j) of the *Criminal Code of Canada* violate s. 7 of the *Charter* and are not saved under s. 1.

---

<sup>84</sup> “Lifting the ban on brothels, Prostitution in 2000-2001”, at p. 3, **JAR, Vol. 48, Tab 112(A), p. 13865**.

<sup>85</sup> Additional relevant excerpts can be found in the compendium filed in the Court of Appeal for Ontario: **AGC Electronic Materials > Court of Appeal > Respondent’s Compendium > Volume 2**.

<sup>86</sup> *Bedford SCJ, supra*, at para. 182, **AR, Vol. I, Tab 3 at p. 51**. See also paras. 352-358, **AR, Vol. 1, Tab 3 at pp. 97-98**.

<sup>87</sup> *Bedford OCA, supra*, at para. 207, n. 9, **AR, Vol. II, Tab 7, p. 85**.

<sup>88</sup> Order of the Chief Justice Stating Constitutional Questions and for Directions, December 17, 2012, **A.R., Vol. III, Tab 34, pp. 80-85**.

**PART III: LAW AND ARGUMENT**

51. The courts below reached the conclusion that the impugned provisions violate s. 7 of the *Charter* after carefully considering and weighing of all the legislative facts and upon the application of the proper constitutional principles for measuring overbreadth and gross disproportionality. The Attorneys-General submit that the courts below erred in three ways: 1) by applying the wrong test for establishing a causal link between the law and the violation of security; 2) by characterizing the legislative objectives too narrowly; and 3) by analyzing the operation of the doctrines of overbreadth and gross disproportionality without proper consideration of the broader legislative objectives and without the appropriate level of deference for legislative choices. The arguments advanced in support of these three errors were all raised and rejected in the court below. It is submitted that the reasons from the Courts below provide detailed, well-reasoned, and correct responses to all the issues and concerns raised by the Appellants and that there is no reason to call into question the conclusion that the impugned provisions violate s. 7 of the *Charter*.

**1. THE THRESHOLD ISSUE: LIBERTY AND SECURITY OF THE PERSON**

52. The threshold question under s. 7 of whether s. 210 (bawdy house), s. 212(1)(j) (living on the avails), and s. 213(1)(c) (communication) engage the Respondents' life, liberty or security of the person has already been addressed by this Honourable Court. In the 1990 *Prostitution Reference*, this Court considered the constitutionality of what are now ss. 210 and 213(1)(c): "With respect to the first component, there is a clear infringement of liberty in this case given the possibility of imprisonment contemplated by the impugned provisions."<sup>89</sup>

53. Beyond consideration of the liberty interest, the courts below found that the impugned provisions were responsible for a clear deprivation of sex workers' security. The Court of Appeal recognized that a 'but-for' causation analysis is inappropriate where legislation is said to have caused the interference with the s. 7 interest, stating: "The language of causation does not aptly capture the effect of legislation. Legislation, including legislation that creates crimes, is not so much the physical cause of a particular consequence as it is part of the factual and social context in which events happen and consequences flow."<sup>90</sup> The Court of Appeal concluded that "[t]he connection between the existence of the criminal prohibitions and the added risk to those engaged in prostitution is, on the facts as found by the application judge, not obscure or tangential."<sup>91</sup>

---

<sup>89</sup> *Prostitution Reference, supra*, at p. 1140, **Resp. Auth, Tab 47.**

<sup>90</sup> *Bedford OCA, supra*, at para. 107, **AR, Vol. II, Tab 7, pp. 47-48.**

<sup>91</sup> *Bedford OCA, supra*, at para 111, **AR, Vol. II, Tab 7, pp. 49-50.**

## 2. CAUSATION

### A. Money and Choice: Two Conceptual Fallacies

54. Two overarching themes emerge from the Appellants' submissions on the question of causation. First, both Appellants argue that a sufficient causal relationship between the impugned laws and the harms suffered by sex workers does not exist because sex workers choose to expose themselves to the risks inherent in prostitution.<sup>92</sup> Secondly, both submit that the Respondents' security of the person claim is really a claim for a constitutional right to engage in a particular economic activity.<sup>93</sup> These claims are wrong and their use taints the entirety of the Appellants' causation argument.

55. The claim that there is no causal connection between the impugned laws and the risk that sex workers face simply because they choose to be sex workers is "a thinly disguised attempt to blame the victim", which Commissioner Oppal rightly condemned as "reprehensible" in his report in the *Missing Women Inquiry*.<sup>94</sup>

56. The Appellants' simplistic choice argument could just as easily have been made in *Morgentaler*. On the Appellants' logic, women seeking therapeutic abortions freely and voluntarily chose to have sex, knowing the risk that they might become pregnant. The law therefore cannot be held responsible for the consequences of their free choices. Any harm arising from the inability to terminate a pregnancy is no fault of the state.

57. Of course, such reasoning would be wrong. Some women fit the above description. Others are raped. Still more live in world where a woman's ability to negotiate her sexual activity is constrained by an assortment of social and cultural factors. The reality in *Morgentaler* was that women found themselves pregnant and desiring abortions for a wide range of reasons. The existence of choice, in varying degrees, was simply irrelevant. What mattered was that for those women who were pregnant, the law denied them the ability to lawfully resort to activities that would protect their personal security.<sup>95</sup> The case at bar is no different.

58. It must be remembered that for those who choose sex work, their choice is to engage in an activity that Parliament has conspicuously deemed lawful. Engaging in a lawful activity, even one sincerely disapproved of by many, cannot strip sex workers of their constitutional right not to be

---

<sup>92</sup> AGC Factum, *supra*, at para. 69; AGO Factum, *supra*, at paras. 9, 19-28.

<sup>93</sup> AGC Factum, *supra*, para. 70; AGO Factum, *supra*, paras. 22, 25.

<sup>94</sup> The Hon. Wally T. Oppal, Q.C., *Forsaken: The Report of the Missing Women Commission of Inquiry* (Victoria: Missing Women Commission of Inquiry, 2012), Vol. IIB, p. 98, **Resp. Auth., Tab 60**.

<sup>95</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at 90 (*per* Beetz J.), **Resp. Auth., Tab 34** ["*Morgentaler*"].

wrongfully deprived of security of the person.<sup>96</sup> Similarly, the fact that sex work is an economic activity is also irrelevant. The Attorney General of Canada argues that the cases relied upon in the courts below can be distinguished because, unlike this case, they were not about “economic activities”.<sup>97</sup> This case is no more about a constitutional right to make money from sex than *Chaoulli* was about constitutionalizing freedom of contract.

### B. The Test: Sufficient Connection

59. The parties agree that the direct source of the physical harms that sex workers suffer come primarily from third parties.<sup>98</sup> The Appellants argue that in these circumstances the law must be a “necessary precondition” or “necessary link” to the harms suffered for the claimant’s security of the person interest to be engaged.<sup>99</sup> Yet the very cases they rely upon belie the claim that this Court has ever established such a strict standard. As this Court stated in *Suresh*:

[T]he 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.<sup>100</sup>

60. Clearly this Court was not indicating that a “necessary precondition” standard was required to engage the s. 7 interest, but merely that in such clear cases, the connection was undeniably existent. The “test,” such as it is, is of a “sufficient causal connection.”<sup>101</sup>

61. The flexible language used by this Court reflects the fact that a causation analysis is necessarily contextual<sup>102</sup> and that different circumstances may require courts to apply different frameworks for understanding the proximity between the state action and an alleged harm. There

<sup>96</sup> *Bedford OCA*, *supra*, at para. 123, **AR, Vol. II, p. 55**

<sup>97</sup> *AGC Factum*, *supra*, at para. 70.

<sup>98</sup> The record does, however, contain evidence of harms to sex workers that are directly attributable to the activities of state agents, such as the police: Affidavit of Valerie Scott, **JAR, Vol. 3, Tab 16, paras. 21-23**; Ontario Civilian Commission on Police Services, *Report of an Inquiry into Administration of Internal Investigations by the Metropolitan Toronto Police Force* (1992), **JAR, Vol. 4, Tab 16(E), pp. 391-395**; Affidavit of Carol-Lynn Strachan, para. 4, **JAR, Vol. 8, Tab 32, pp. 1866-1867**.

<sup>99</sup> *AGC Factum*, *supra*, at para. 62, and headings on pp. 29, 31; *AGO Factum*, *supra*, at para. 14.

<sup>100</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 54, **Resp. Auth., Tab 53** [emphasis added].

<sup>101</sup> See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 60, **Resp. Auth., Tab 2**; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, at para. 75, **Resp. Auth., Tab 1**; *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 143, at para. 15, **Resp. Auth., Tab 6**; *Canada (Prime Minister) v. Khadr* [2010] 1 S.C.R. 44, at para. 19, **Resp. Auth., Tab 7**.

<sup>102</sup> *R. v. Nette*, [2001] 3 S.C.R. 488, at para. 72 [“*Nette*”], **Resp. Auth., Tab 35**.

is no set list of factors that may inform the causal analysis. Amongst the many considerations that may be relevant in a given case is the nature and effect of the state ‘action’ in question.

62. The Appellants’ reliance on cases involving the exercise of statutory (*Burns, Suresh*) or prerogative powers (*Operation Dismantle, Khadr*) is misplaced, because the factual contexts of these types of cases are fundamentally different from the case at bar, which demands a different conceptual framework. The language of “necessary precondition” or “active participation” simply does not make sense where the ‘state action’ in question is legislation. Unlike the exercise of statutory or prerogative powers by state actors, the provisions of a statute produce effects that are, by definition, indirect. One simply cannot ask whether any of the impugned laws constitute ‘necessary preconditions’ for the harms suffered by sex workers. This is an abstract and decontextualized question, and employing this standard would not even capture the hypothetical repeal of sex workers’ self-defence rights posed by the majority of the court of appeal.<sup>103</sup>

63. Rather, in numerous cases where legislative provisions are challenged as giving rise to impediments on a claimant’s security of the person interest, this Court has engaged in a causation analysis that is far removed from that urged by the Appellants.<sup>104</sup> These cases reveal an approach to causation that recognizes that legislative prohibitions impact individuals through complex, indirect and inter-dependent processes and yet may still attract state responsibility.

64. For example, in *PHS*, this court considered whether the criminal prohibition on drug possession, as applied to Insite workers impacted the security of the person interest of Insite clients. This Court reasoned that the possession offence did impinge on their interest because it would restrict their ability to resort to assistance from third parties:

The record supports the conclusion that, without an exemption from the application of the CDSA, the health professionals who provide the supervised services at Insite will be unable to offer medical supervision and counselling to Insite’s clients. This deprives the clients of Insite of potentially lifesaving medical care, thus engaging their rights to life and security of the person. The result is that the limits on the s. 7 rights of staff will in turn result in limits on the s. 7 rights of clients.<sup>105</sup>

65. This reasoning is identical to the claim made by the Respondents with respect to s. 212(1)(j): the living on the avails provision prevents third parties from lawfully providing

---

<sup>103</sup> *Bedford OCA, supra*, at para. 112, **AR, Vol. II, Tab 7, p. 50**.

<sup>104</sup> *Morgentaler, supra*, at 57-62 (*per* Dickson C.J.), 92-100 (*Per* Beetz J.), **Resp. Auth., Tab 34**; *Rodriguez, supra*, at 584, **Resp. Auth., Tab 50**; *PHS, supra*, at paras. 85-94, **Resp. Auth., Tab 5**. Cf. *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 84 [*“Vriend”*], **Resp. Auth., Tab 55** (in a s. 15 challenge, rejecting the argument that the discrimination faced by gays and lesbians was caused by third parties, and so could not be attributed to Alberta’s legislation).

<sup>105</sup> *PHS, supra*, at para. 91, **Resp. Auth., Tab 5**.

services to sex workers that may mitigate their risk of serious physical harm and which may be life-saving.<sup>106</sup> More broadly, *PHS* demonstrates that this Court has recognized that a sufficient connection, in the context of a challenge to a legislative provision, can be found in circumstances that would not meet the threshold advocated for by the Appellants.

66. Contrary to the Attorney General of Canada's submission, the *Adams* decision supports the Respondents' position. In *Adams*, the British Columbia Court of Appeal rejected the argument that state action must be the sole cause of a harm to an individual, instead recognizing that a sufficient causal connection exists where legislation (in this case, a municipal by-law) compounds the vulnerability and exposure to harm experienced by a class of persons with pre-existing vulnerabilities.<sup>107</sup>

### C. Risk, Harm, and State Responsibility

67. The Appellants allege that the Court of Appeal applied an impermissibly low causation standard, fixating on the language of *de minimis* and raising *in terrorem* arguments.<sup>108</sup> What these arguments fail to recognize is the significance of the magnitude of the harms in question. There is an important relationship between the degree of risk that arises by operation of the law and the magnitude of the harm if the risk materializes.<sup>109</sup> Even a relatively minor infringement on the security of the person interest will attract *Charter* scrutiny where legislation makes that harm a virtual certainty. As the nature of a harm increases in severity, the state is properly called on to account for its laws when they increase the risk of that harm materializing. When the harms in question include extreme physical and sexual violence, then a law that materially contributes to the risk that the harms will arise is sufficiently connected to the security interest such that it must comply with the principles of fundamental justice.

68. In rejecting the Appellants' causation arguments, the Court of Appeal concluded that "[w]here the limitation on security of the person is in the nature of an increased risk of serious physical harm or worse, virtually any added risk that is beyond *de minimis* is sufficient to constitute an infringement on security of the person."<sup>110</sup> Given the severity of the harms in play, the multi-causal nature of violence against sex workers, and the fact that it is legislation which is

---

<sup>106</sup> For example, see Affidavit of Terri Jean Bedford, at paras. 25-27, *JAR*, Vol. 2, Tab 11, pp. 51-52.

<sup>107</sup> *Victoria (City) v. Adams* (2009), 313 D.L.R. (4th) 29 (B.C.C.A.), at paras. 86-89, *Resp. Auth.*, Tab 54.

<sup>108</sup> *AGC Factum*, *supra*, at paras. 61-62, 67; *AGO Factum*, *supra*, at paras. 8-10, 29-30.

<sup>109</sup> Conceptually, this is similar to this Court's jurisprudence on informed consent, in which both the magnitude and the probability of harms arising from medical treatment are weighed together: *Hopp v. Lepp*, [1980] 2 S.C.R. 192 at 209-210, *Resp. Auth.*, Tab 12; *Reibl v. Hughes*, [1980] 2 S.C.R. 880, at 884-885, *Resp. Auth.*, Tab 48. *See also R v. Thornton* (1991), 1 O.R. (3d) 480 (C.A.), at 488, *aff'd* [1993] 2 S.C.R. 445, *Resp. Auth.*, Tab 43.

<sup>110</sup> *Bedford OCA*, *supra*, at para. 117, *AR*, Vol. II, Tab 7, p. 53.

being challenged, this approach properly satisfies the “sufficient causal connection” standard.

69. In the substantive criminal law, an act that makes a contribution outside of the *de minimis* range towards another person’s death is sufficient to hold a person responsible for the killing.<sup>111</sup> It would be a bizarre result if, on the same level of contribution towards a killing, it were constitutionally appropriate to impose the extreme stigma of the label “murderer” on a citizen,<sup>112</sup> while excusing the state from even having to comply with the principles of fundamental justice.

70. The Appellants latch on to the language of *de minimis* and suggest that this is a low standard that will invite a flood of litigation, invite “judicial activism,”<sup>113</sup> and call into question much of the *Criminal Code*.<sup>114</sup> Not only does this ignore the reality that every substantive criminal offence is subject to a s. 7 *Charter* challenge on liberty grounds,<sup>115</sup> it also ignores that this Court’s explanation as to what a ‘beyond *de minimis* contributing cause’ actually represents. As this Court explained in *Nette*, the language used by the Court of Appeal is the same as saying that the laws in question are a “significant contributing cause” or a “substantial cause” of the harms in question.<sup>116</sup> Surely if the laws in question represent a “significant contributing cause” of the harms that are inflicted on sex workers, it is appropriate, and indeed necessary, to measure those laws against the principles of fundamental justice.

71. Ultimately, the arguments raised by the Appellants are a recycled version of the failed arguments made in *Vriend*. In that case, the government argued that it was the prejudice of third parties that harmed the equality interest of gays and lesbians, not the omission of sexual orientation from provincial human rights legislation. Therefore, the argument went, the state could not be responsible for the harms. Cory J., for the majority, rejected such reasoning, stating that “[T]he respondents’ contention that the distinction is not created by law, but rather exists independently of the *IRPA* in society, cannot be accepted.”<sup>117</sup>

72. The fact that *Vriend* was concerned with s. 15, rather than s. 7, carries no significance. Any time that the state creates a legislative regime that “substantially orchestrates, encourages or sustains the violation” of *Charter*-protected interests, even by private parties, that legislation must

---

<sup>111</sup> *R. v. Smithers*, [1978] 1 S.C.R. 506, at 519-521, **Resp. Auth, Tab 40**.

<sup>112</sup> *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at 653-654 [“*Vaillancourt*”], **Resp. Auth, Tab 44**.

<sup>113</sup> *AGO Factum*, *supra*, at paras. 30-31.

<sup>114</sup> *AGC Factum*, *supra*, at para. 67.

<sup>115</sup> *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295, at 313-314, **Resp. Auth, Tab 16**; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para. 69, **Resp. Auth, Tab 3**.

<sup>116</sup> *Nette*, *supra*, at paras. 71-72, **Resp. Auth, Tab 35**.

<sup>117</sup> *Vriend*, *supra*, at para. 84, **Resp. Auth, Tab 55**.

be subjected to judicial scrutiny.<sup>118</sup> Based on the factual findings made by Himel J., and upheld by the Court of Appeal, all of the impugned provisions in this case have a sufficient connection with the harms experienced by sex workers. It is therefore necessary to measure those laws against the principles of fundamental justice.

### 3. PRINCIPLES OF FUNDAMENTAL JUSTICE

73. It is a principle of fundamental justice that laws not be arbitrary, vague, overbroad or grossly disproportionate. These principles are grounded in the rule of law and they are all designed to achieve the basic objective underlying governance by the rule of law: to create laws that are capable of providing meaningful guidance for conduct and to ensure that the legal order is predictable and stable. At the outset, it must be recognized that subjecting an individual to contradictory commands is the paradigmatic violation of the rule of law and that any law creating this impossibility of compliance would surely be characterized as arbitrary and inconsistent. Contradictory commands can arise within a single provision or, more likely, by virtue of the interplay of related provisions.

74. In 1985, the communication law was enacted for the purpose of “taking solicitation for the purposes of prostitution off the streets and out of public view.”<sup>119</sup> The command to get off the streets cannot co-exist with a blanket prohibition on working indoors, as one cannot respect the dictates of one law without violating the dictates of the other. It is respectfully submitted that Himel J. was correct in finding that “the impugned provisions acting in concert are arbitrary in that taken together they are inconsistent with the objective.”<sup>120</sup>

75. The Court of Appeal found it “unnecessary to address” the issue of “arbitrary when considered in concert” in light of its finding of invalidity within the bawdy and living on avails provisions standing alone.<sup>121</sup> The Respondents agree that the thorny issue of an arbitrary interplay of offences need not be resolved, as the bawdy house offence can, and should be, invalidated on the basis of overbreadth and gross disproportionality. The invalidation of s. 210 for reasons relating to its own constitutional shortcomings incidentally cures the problem of enacting two provisions that command the impossible.

76. With respect to overbreadth and gross disproportionality, it is submitted that the courts below did not err in finding both impugned offences to be in violation of these principles. There

---

<sup>118</sup> *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 26, **Resp. Auth., Tab 11**.

<sup>119</sup> *Prostitution Reference*, *supra*, at 1135 (*per* Dickson C.J.), **Resp. Auth., Tab 47**.

<sup>120</sup> *Bedford SCJ*, *supra*, at para. 388, **AR, Vol. I, Tab 3, p. 104**.

<sup>121</sup> *Bedford OCA*, *supra*, at para 197, **AR, Vol. II, Tab 7, p. 82**.

remains some debate over whether these two principles are independent, though related, or whether overbreadth is subsumed by the other, in that proof of gross disproportionality is a precondition to a finding of overbreadth. Last year, this Court noted in *Khawaja* that “the authorities continue to suggest that overbreadth and gross disproportionality are - at least analytically – distinct” but that it “need not decide whether overbreadth and gross disproportionality are distinct constitutional doctrines. Certainly, these concepts are interrelated, although they may simply offer different lenses through which to consider a single breach of the principles of fundamental justice.”<sup>122</sup> It is submitted that the debate need not be resolved here for the same reason the debate was not resolved earlier in *PHS Community Services*<sup>123</sup> – a clear finding of gross disproportionality obviates the need to address overbreadth in both cases.

77. However, the Attorney General of Ontario argues that the doctrines should be conflated and that overbreadth must be assessed on the standard of gross disproportionality.<sup>124</sup> The Respondent submits that there is good reason to maintain the independent operation of these two related doctrines. The primary concern with overbroad legislation is that it needlessly captures innocent conduct by overshooting the mark. Invariably, overbroad criminal legislation interferes with the right to liberty, whereas the invocation of gross disproportionality will largely arise in the context of an impairment of security. The harms which gross disproportionality addresses are the adverse side-effects, or collateral consequences, of criminalization.<sup>125</sup> These collateral consequences would usually involve an impact on security, and a grossly disproportionate impact on liberty would usually be subsumed under the s. 12 right to be free from cruel and unusual punishment or treatment. The doctrines are free-standing and independent but subject to overlap. This Court has noted that “the effect of overbreadth is that in some applications the law is arbitrary [i.e., needless interference with liberty] or disproportionate [i.e., adverse side-effects].”<sup>126</sup>

78. It is submitted that overbreadth and gross disproportionality should be assessed independently as free-standing principles. However, in this case the two principles are inextricably connected. The overbroad operation of both provisions constitutes a needless deprivation of liberty, but it is also the breadth of the law which leads to a grossly

---

<sup>122</sup> *R. v. Khawaja*, 2012 SCC 69, at paras. 39-40, **Resp. Auth., Tab 26** [“*Khawaja*”].

<sup>123</sup> *PHS*, *supra*, at para. 134, **Resp. Auth., Tab 5**.

<sup>124</sup> *AGO Factum*, *supra*, at para. 44.

<sup>125</sup> The doctrine arose in the marijuana challenges and in that context the side-effects being considered all involved security issues such as the impact of the criminal record on youth, undue stigma, travel restrictions, and loss of employment opportunities: *Malmo-Levine*, *supra*, at paras. 141-151, **Resp. Auth., Tab 29**.

<sup>126</sup> *Heywood*, *supra*, at 793, **Resp. Auth., Tab 23**.

disproportionate deprivation of security.

**A. The Legislative Objectives**

79. To assess overbreadth and gross disproportionality, it is necessary to first identify the relevant legislative objectives underlying the two impugned offences. For overbreadth, the legislative objective becomes the yardstick to measure the zone of prohibited conduct in order to determine if the conduct actually covered by the provision needlessly interferes with innocent conduct. For gross disproportionality, the objective becomes the counterweight for the balancing exercise to determine if any of the harms caused by the law are grossly disproportionate to the importance of the objective. Under either assessment, the limited objectives of these laws clearly support a finding of overbreadth and gross disproportionality. Both Appellants seek to avoid this dilemma by mythically recasting the objectives to serve more ambitious or important objectives.

80. The courts below made no error in concluding that the objectives of the bawdy house law “are combatting neighbourhood disruption or disorder and safeguarding public health and safety”,<sup>127</sup> and that the living on the avails law “aims to protect vulnerable persons from being coerced, pressured or emotionally manipulated into prostitution.”<sup>128</sup> The Attorneys-General do not accept that these offences are limited to concerns over nuisance and exploitation and both submit that the provisions are “inter-connected”<sup>129</sup> with an “overarching”<sup>130</sup> purpose of “detering prostitution and its commercialization”<sup>131</sup> of the sex trade. They argue that the provisions “operate together”<sup>132</sup> to “control the institutionalization and commercialization of prostitution”<sup>133</sup> and to “promote values of dignity and equality.”<sup>134</sup>

81. This construction of the legislative objectives is an idealized rendering bearing no relationship to the historical record. In the academic literature, there is a current of thought suggesting that these expanded objectives should be adopted and incorporated into the criminal law, but as the Court of Appeal noted: “we agree that a modern, comprehensive legislative scheme dealing with prostitution could reflect the values of dignity and equality, but that is not the legislative scheme currently in place.”<sup>135</sup>

82. In 1990, a majority of this Court clearly rejected the notion that the communication law

<sup>127</sup> *Bedford OCA, supra*, at para. 192, **AR, Vol. II, Tab 7, p. 80.**

<sup>128</sup> *Bedford OCA, supra*, at para. 238, **AR, Vol. II, Tab 7, p. 97.**

<sup>129</sup> *AGC Factum, supra*, at para. 88.

<sup>130</sup> *AGC Factum, supra*, at para. 87.

<sup>131</sup> *AGC Factum, supra*, at para. 101.

<sup>132</sup> *AGO Factum, supra*, at para. 56.

<sup>133</sup> *AGO Factum, supra*, at para. 63.

<sup>134</sup> *AGO Factum, supra*, at para. 63.

<sup>135</sup> *Bedford OCA, supra*, at para. 183, **AR, Vol. II, Tab 7, p. 77**

was part of an overarching plan designed to eradicate the trade and to combat degradation. If a prostitution-related offence enacted in modern times is not seen as incorporating or adopting the contemporary political perspective that all forms of prostitution are inherently degrading and must be eradicated, it is submitted that it would be a great leap to suggest that this political perspective would then animate laws of ancient historical pedigree.<sup>136</sup>

83. One example of the Appellants' mistaken reliance upon theory, and not current reality, in their construction of the legislative objectives is the Attorney General of Ontario's citation of the 1981 *UN Convention on the Elimination of all Forms of Discrimination Against Women*<sup>137</sup> as providing support for an expanded construction of the state objectives. However, a proper reading of the *Convention* shows that it does not support the eradication of prostitution as being inherently degrading and exploitive. Article 6 of the *Convention* speaks to suppressing the "exploitation of prostitution",<sup>138</sup> not suppressing prostitution *per se*. The *Convention* recognizes that the state obligations lie in reducing the harms of sex work and not necessarily reducing or eliminating the sex trade itself.

84. Further, the only evidence from the historical record that the Attorney General of Ontario can point to in support of an expanded legislative objective of fighting "degradation and dehumanization" inherent with the act of selling sex is one brief passage from the current government's response to the 2006 Subcommittee report.<sup>139</sup> One incidental comment does not lay the foundation for the elucidation of government policy and the brief comment that the "government views prostitution as degrading and dehumanizing" must be seen as somewhat disingenuous, for if this truly is government policy, then this would surely be reflected in the criminalization of the act of buying sex.

85. Whether or not there may be good reasons for creating a legal regime designed to fight "commodification, exploitation, objectification, institutionalization and commercialization," this does not accurately reflect the objectives underlying the enactment of the impugned laws. First, there is no evidence in the legislative record from which an inference could be drawn that these objectives were being pursued. Secondly, the impugned offences have a long historical pedigree and, in substance, have remained unchanged in terms of its basic elements for centuries.

---

<sup>136</sup> *Prostitution Reference, supra*, at 1134-1135 (*per* Dickson C.J.), 1210-1211 (*per* Wilson J., dissenting, but not on this point), **Resp. Auth., Tab 47**.

<sup>137</sup> *AGO Factum, supra* at para. 83.

<sup>138</sup> *UN Convention on the Elimination of All Forms of Discrimination against Women*, UN General Assembly Resolution 34/180/1979 (ratified by Canada 10 December 1981), Art. 6, **AGO Auth., Tab 73**.

<sup>139</sup> *AGO Factum, supra*, at para. 84.

Therefore, any analogy to the *Butler* “shifting purpose” analysis for obscenity law is inapt. Obscenity law, unlike bawdy house law, was the subject of statutory reform in the modern era. Further, the obscenity offence has always been predicated on an “evaluative” standard and not clear and specific *actus reus* elements, evidencing that it was anticipated that the objective and legal test would evolve over time. The *Butler* shifting purpose analysis should be limited to open-ended legislative provisions of an evaluative nature. Members of this Court have noted that “it is inappropriate to premise *Charter* analysis upon a modern understanding of legislative purpose which is different from, and perhaps more constitutionally acceptable than, the original purpose.”<sup>140</sup> It has also noted that “confirming a law’s purpose is set on its enactment, and cannot be altered other than by amendment.”<sup>141</sup>

(i) **Bawdy House**

86. In modern times, there has been little or no judicial or legislative discussion of the state objectives underlying the bawdy house offence. Keeping a common bawdy house has been an offence since the enactment of the 1892 *Criminal Code* and the offence has been part of British common law for centuries. At common law, “disorderly houses” were considered a public nuisance. In the 17<sup>th</sup> century, Lord Coke noted that this common nuisance offence was “the cause of many mischiefs, not only to the overthrow of bodies, and wasting of their livelihoods, but to the engendering of their souls.”<sup>142</sup> In the 18<sup>th</sup> century, Hawkins noted that the offence was “a common 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”.<sup>143</sup> Blackstone noted that “all disorderly inns, or ale houses, bawdy-houses, gaming houses... are public nuisances”<sup>144</sup> and Stephen held an identical view.<sup>145</sup>

87. This historical evidence establishes that the bawdy house offence was predicated on two state objectives: preventing a common nuisance and preventing the dissolution of moral values.

<sup>140</sup> *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 77 (*per* Cory and Iacobucci JJ., dissenting), **Resp. Auth., Tab 10**.

<sup>141</sup> *M. v. H.*, [1999] 2 S.C.R. 3, at para. 197 (*per* Gonthier J. dissenting but not on this issue), **Resp. Auth., Tab 13**.

<sup>142</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England* (Buffalo: W.S. Hein, 1986), at p. 204, **Resp. Auth., Tab 58**.

<sup>143</sup> William Hawkins, *1 Pleas of the Crown 1716-1721* (London: Professional Books Ltd., 1973), at p. 196, **Resp. Auth., Tab 59**.

<sup>144</sup> William Blackstone, *Commentaries on the Laws of England* (London: Dawson, 1966) at pp. 823-824, **Resp. Auth., Tab 57**.

<sup>145</sup> James Fitzjames Stephen, *A General View of the Criminal Law of England* 2d ed. (London, Macmillan and Co., 1890), at pp. 104-105, **Resp. Auth., Tab 61**; See also, *R. v. Corbeil*, [1991] 1 S.C.R. 830 at 841-842, **Resp. Auth., Tab 18** [*“Corbeil”*]; *R. v. Marceau* (2010), 77 C.R. (6th) 70 (Que. C.A.) at para. 48-59, **Resp. Auth., Tab 32**.

As was stated by the Alberta Court of Appeal in 1921, “the purpose of the provision in question is obviously to check immorality.”<sup>146</sup> In 1908, it was noted by the court that “the gist of the offence of keeping a common bawdy house is that it is an offence to the public or a public nuisance, offensive to the public and dangerous to the morals of the community.”<sup>147</sup>

88. Although legal moralism played some role in the early law, it is clear the primary objective has always been to curb nuisance in the community. A review of cases from the Old Bailey Session Papers<sup>148</sup> shows that prosecutions for this offence were predicated on the evidence of disruption and nuisance in the community. For example, in the case of Elizabeth Eyle (1693), it is noted that “the evidence swore that oftentimes there was Swearing, Roaring and Damning all the Night Long, drinking to such a pitch, that they would fall out, and cry out Murder.”<sup>149</sup> In the case of Thomas Johnson (1849), it was noted that “the house is a great nuisance to neighbours – complaints have been made of fighting and riotous conduct”.<sup>150</sup> In the case of Caroline Howard (1855), a witness testified that “I have heard the most ridiculous conversation there, and most undoubted bad language – the neighbours have complained – I have been aroused in the night many times by the rows – the house is a nuisance to the neighbourhood, and I have complained of it as such”.<sup>151</sup>

89. In 1915, the historical conflation of bawdy house and the legal moralism of vagrancy law was ended such that the bawdy house offence was firmly grounded in the nuisance provisions of the *Criminal Code* without reference to any connection with the moral outcast known as the vagrant.<sup>152</sup>

90. Finally, it is impossible to construe the objective of the provision as extending to the prevention of “institutionalization and commercialization” when the judiciary has consistently interpreted the provision so as to apply to the conduct of one sex worker using her own home on a habitual and frequent basis for purposes of work without the assistance or participation of others.<sup>153</sup>

<sup>146</sup> *R. v. Jones* (1921), 62 D.L.R. 413 (Alta. C.A.) at 414, **Resp. Auth., Tab 24**.

<sup>147</sup> *R. v. Mercier* (1908), 13 C.C.C. 475 (Yuk. Terr. Ct.) at 485, **Resp. Auth., Tab 33**.

<sup>148</sup> The Old Bailey Session Papers recorded in proto-reporter format the trials taking place in the Central Criminal Court in London from the 1600s. Once an obscure historical source found only in archives, the entirety of the Session Papers have now been digitized and are available online at <http://www.oldbaileyonline.org>. Because the Session Papers lack a formal citation system, the citations provided in this factum are to the unique identifiers used in the online database.

<sup>149</sup> *R. v. Elizabeth Eyle*, 31 May 1693, ref. no. t16930531-45, **Resp. Auth., Tab 20**.

<sup>150</sup> *R. v. Thomas Johnson*, 26 February 1849, ref. no. t18490226-755, **Resp. Auth., Tab 42**.

<sup>151</sup> *R. v. Caroline Howard & Mary Jones*, 2 July 1855, ref. no. t18550702-707, **Resp. Auth., Tab 17**.

<sup>152</sup> *An Act to Amend the Criminal Code* (1915), **JAR, Vol. 66, Tab 145, p. 19395**.

<sup>153</sup> *Corbeil, supra*, at 843-844, **Resp. Auth., Tab 18**; *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.), **Resp.**

(ii) **Living on the Avails**

91. As with the bawdy house offence, there is little judicial or legislative discussion of the objective underlying the offence of living on the avails. Based on the inclusion of living on the avails within the procuring provisions of s. 212(1)(j) and its historical ties to vagrancy law, it is clear that the objective underlying the offence is to prevent the exploitation of sex workers. As the Court of Appeal concluded: "...this offence aims to protect vulnerable persons from being coerced, pressured or emotionally manipulated into prostitution. As we have already said, we do not accept the broader submission of the Attorney General of Ontario that this offence reflects a Parliamentary objective to eradicate prostitution."<sup>154</sup>

92. The Appellants argue that the characterization of the objective is cast too narrowly and does not take into account the state purpose of deterring third parties from developing vested economic interests in sex workers. There is no legislative fact evidence supporting this suggested expansion, and the legislative history of the provision, with its roots in vagrancy law, clearly show that the diverse conduct captured by s. 212 is comprehensively directed to exploitative and parasitic relationships with sex workers. It is submitted that the objective of s. 212 is to protect the worker from the "pernicious and exploitative evil of the pimp"<sup>155</sup> and was not intended to operate as a blanket prohibition on the development of any form of economic relationship with a sex worker.

93. The Attorney General of Ontario is correct in asserting that "a person who develops a vested economic interest in another person's sexual labour has an incentive to facilitate and promote the expansion of prostitution as a business." However, this statement only has relevance if it is accepted that the goal underlying s. 212(1)(j) is to eradicate the trade and to prevent commercialization. The historical link with vagrancy completely undercuts the notion that the law was designed to address any problems with commercialization. Further, the catalogue of other procuring provisions found in s. 212 does not support the inference that this catalogue was designed to address an overarching concern with rampant commercialization of the sex trade. All related offences concern the exploitation of women currently working in the sex trade or the manipulation of others into entering the sex trade.

**B. Overbreadth and Gross Disproportionality**

94. Both courts below correctly applied the law in assessing the claims of overbreadth and

---

**Auth., Tab 45** ["*Worthington*"].

<sup>154</sup> *Bedford OCA, supra*, at para 238; **AR, Vol. II, Tab 7, p. 97.**

<sup>155</sup> *R. v. Downey*, [1992] 2 S.C.R. 10 at 32 (*per Cory J.*), **Resp. Auth., Tab 19** ["*Downey*"].

gross disproportionality. The Attorneys-General do not take issue with the basic approach taken by the courts below, but they do not like the result arrived at despite the fact that there was no error in the approach to the issues. They argue that the conclusions reached by the courts are skewed due to the fact that both courts narrowly construed the legislative objectives, thus diminishing their importance. They also argue that the conclusions are skewed by the failure to afford substantial deference to legislative policy choices. In essence their argument relies upon mythical state objectives to move this Honourable Court to blindly defer to a supposed Parliamentary decision to pursue these unrecognized objectives by any means necessary.

**(i) Overbreadth**

95. Based upon the legislative objectives as articulated by the courts below, the conclusion that the impugned paragraphs operate in an overly-broad manner is a fairly self-evident proposition. It is difficult, if not impossible, to argue that it is reasonably necessary to outlaw non-exploitive relationships in order to effectively sanction exploitive relationships. Similarly, it is difficult to argue that it is reasonably necessary to outlaw discrete, non-intrusive homes in order to effectively sanction disorderly premises which present a community nuisance. Accordingly, the courts below found the living on the avails offence to be overbroad because “a number of non-exploitative arrangements are caught by this provision,”<sup>156</sup> when the provision is “ostensibly aimed at protecting prostitutes from harm.”<sup>157</sup> With respect to the bawdy house offence, the courts below found that the provision was “not reasonably tailored to protect the public”<sup>158</sup> and that it was overbroad in that it “assign[s] criminal liability to those direct participants...who do not contribute to the harms Parliament seeks to prevent.”<sup>159</sup> The Court of Appeal was particularly concerned by the overly-broad extension of the law to prohibit even “a single person discreetly operating out of her own home by herself.”<sup>160</sup>

96. The overbreadth analysis is not a fact-laden exercise, but rather is based largely upon judicial construction of the scope of the elements of the crime.<sup>161</sup> The scope of the offence is then compared with the stated objectives to determine if the scope extends to conduct considered innocent in light of the objectives. It is submitted that the caselaw clearly demonstrates that the reach of the two impugned provisions captures conduct which need not be sanctioned in order to

---

<sup>156</sup> *Bedford SCJ, supra*, at para. 402, **AR, Vol. I, Tab 3, p. 107.**

<sup>157</sup> *Bedford OCA, supra* at para. 254, **AR, Vol. II, Tab 7, p. 103.**

<sup>158</sup> *Bedford OCA, supra*, at para. 203, **AR, Vol. II, Tab 7, p. 84.**

<sup>159</sup> *Bedford SCJ, supra*, at para. 401, **AR, Vol. I, Tab 3, p. 107.**

<sup>160</sup> *Bedford OCA, supra*, at para. 204, **AR, Vol. II, Tab 7, p. 84.**

<sup>161</sup> *Khawaja, supra*, at paras. 41-54, **Resp. Auth., Tab 26.**

achieve the goals of the state.

97. With respect to the bawdy house offence, the provision's constitutional infirmity lies in the failure to require proof of any element in the nature of disorder, nuisance, or exploitation. In 1967, this Court ruled that a place was not a bawdy house unless it was resorted to on a "habitual and frequent" basis.<sup>162</sup> However, habitual use does not serve as a proxy for proof of disorder and community disruption, and the absence of a statutory element requiring proof of disorder or disruption has led to the application of the bawdy house law to situations bearing no relationship to its original objectives. In particular, a review of all reported cases available in Quicklaw, Westlaw, Criminal Spectrum, the Canadian Abridgement, Crankshaw's Case Digests and the C.C.C. index since 1972 (when the "soliciting offence" was enacted) clearly demonstrates that in the vast majority of bawdy house cases there is no evidence of nuisance, in terms of community complaints. Of 38 cases reviewed, only 3 cases had some clear evidence suggesting some element of nuisance, with the nuisance being inferred from complaints from members of the public (*Badali; Klaus; Nguyen*).<sup>163</sup>

98. Further, bawdy house liability does not simply extend to individuals engaged in an organized business venture. The law prohibits sex trade workers from resorting to their home, or designated premises, as a safe haven for conducting their business. The size and sophistication of the operation is immaterial in the eyes of the law, and habitual use of any premise by an individual sex trade worker will attract bawdy house liability.<sup>164</sup> The overbroad bawdy house provision even captures establishments like *Grandma's House*, a charitable society aimed at helping survival sex trade workers in the Downtown Eastside of Vancouver.

99. With respect to living on the avails, the construction of the elements do not include any proof of exploitative conduct and any form of paid assistance is absolutely forbidden, whether it relates to trivial assistance, like bookkeeping, to security-enhancing assistance like bodyguards and drivers. The caselaw clearly demonstrates the breadth of this provision. In 1995, this Court affirmed convictions for escort managers who were not "manipulating young girls"<sup>165</sup>, and in 2001, the Ontario Court of Appeal affirmed convictions for living on the avails for managers of escort services who were seen as "supportive". The Court of Appeal noted:

She provided services that allowed the women to remain off the streets in relative safety. No escort was forced to take a particular job, nor perform any particular

---

<sup>162</sup> *R. v. Patterson*, [1968] S.C.R. 157, at 161, **Resp. Auth., Tab 38**.

<sup>163</sup> For a complete listing of all 38 cases see *Ont. C.A. Resp. Factum, supra*, at para. 186, *AGC Electronic Materials*.

<sup>164</sup> *Corbeil, supra*, at 843-844, **Resp. Auth., Tab 18**; *Worthington, supra*, **Resp. Auth., Tab 45**.

<sup>165</sup> *Downey, supra*, at 18 (*per Cory J.*), **Resp. Auth., Tab 19**.

act, including sexual acts. She provided advice and, in some cases, friendship. Be that as it may, it is my view that the appellant was properly convicted.<sup>166</sup>

100. The overextension of living on the avails to non-exploitative conduct is also demonstrated by sentencing decisions. An 86-year-old offender was sentenced to 15 months in jail in 2006 for charging prostitutes a fee for working at his home. The court in that case noted that “there is no suggestion the accused engaged in violence or that the girls were under duress or were coerced in any manner by the accused.”<sup>167</sup> An accused who operated an escort agency over several years was sentenced to 12 months in 2002, despite the fact that it was noted that “he did not use violence or intimidation and the trial judge found that the escorts joined the service of their own free will.”<sup>168</sup> Finally, an accused who ran an escort service with an escort business license issued by a municipality was sentenced to a conditional discharge in 2005. The court in that case distinguished the accused’s conduct from that of a pimp: “Those who are “pimps” live on the avails of prostitution by having a parasitic relationship with the prostitute... In the case at bar, the element of parasitism is absent”<sup>169</sup>.

101. The Attorney General of Canada asserts that “there is no empirical evidence that the risks of harms to prostitutes, and to the surrounding communities, targeted by s. 210 do not materialize when bawdy-houses are being used for a small number of prostitutes, or only one”<sup>170</sup>. In making this assertion, the Attorney General of Canada attempts to transform the issue into a “complex” matter “that eludes scientific proof”<sup>171</sup> so as to argue that in such circumstances of scientific uncertainty, the courts must defer to Parliament’s difficult choices. It is submitted that overbreadth is not a matter of scientific debate and study. In taking a deferential approach to legislative policy choices, the relevant question for a court to ask is whether Parliament had a reasonable apprehension that it was necessary to prohibit every type of indoor premise, whether large or small, in order to achieve the goal of eliminating nuisance in the community. Similarly, with respect to living on the avails, the relevant question is whether Parliament had a reasonable apprehension that it was necessary to prohibit all forms of paid assistance to ensure that sex workers are not exploited by “pimps.” It is submitted that even with a healthy dose of deference, it would not be a reasonable apprehension for lawmakers to believe that that it is necessary to

---

<sup>166</sup> *R. v. Barrow* (2001), 54 O.R. (3d) 417 (C.A.), at para. 29, leave refused, [2001] S.C.C.A. 431, **Resp. Auth., Tab 15**.

<sup>167</sup> *R. v. Odgers* (2006), 400 A.R. 322 (Prov. Ct.), at para. 8, **Resp. Auth., Tab 36**.

<sup>168</sup> *R. v. Lukacko* (2002), 59 O.R. (3d) 58 (C.A.), at para. 56, **Resp. Auth., Tab 28**.

<sup>169</sup> *R. v. Manion* (2005), 377 A.R. 95 (Prov. Ct.) at paras. 18-19, **Resp. Auth., Tab 30**.

<sup>170</sup> AGC Factum, *supra*, at para. 98.

<sup>171</sup> AGC Factum, *supra*, at para. 102.

outlaw non-exploitive relationships in order to effectively sanction exploitive relationships or that it is reasonably necessary to outlaw discrete, non-intrusive venues in order to effectively sanction disorderly nuisances.

(ii) **Blanket Prohibitions**

102. A blanket prohibition is constitutionally suspect, as it will always fit awkwardly with the principle that justice be individualized and proportionate. It will always attract concerns related to overbreadth. Just like the mandatory minimum sentence, the blanket prohibition lacks nuance and flexibility, but, like the mandatory minimum, there may be constitutionally-sound justifications for resorting to the blanket prohibition. However, in a constitutional landscape with an aversion to the remedy of a constitutional exemption,<sup>172</sup> legislation with flexibility and nuance is the best constructed to resist invalidation.

103. In *PHS*, this Court was able to provide a remedy short of invalidation as the governing legislation provided an exempting provision to legally authorize the harm-reduction project in question.<sup>173</sup> In a similar vein, in the *Canadian Foundation for Children, Youth and the Law*,<sup>174</sup> this Court was able to provide a remedy short of invalidation. The provision in question had sufficient flexibility by the use of a ‘reasonableness’ standard to allow this Court interpret the provision to incorporate restrictions needed to protect the security interest of children.

104. With respect to the impugned provisions in this case, there is neither interpretive flexibility nor an exempting option. It is submitted that the Court of Appeal correctly identified the two circumstances in which it would be constitutionally-sound to defer to Parliament’s choice to use a constitutionally suspect means to achieve its objective: “if a narrower prohibition will be ineffective because the class of affected persons cannot be identified in advance” and “if there is a significant risk to public safety in the event of misuse or misconduct.”<sup>175</sup> The Court of Appeal correctly found that the public safety justification has no application, but it did find the first justification of vulnerability to be “superficially more compelling”<sup>176</sup> (but not sufficient to defeat the claim of overbreadth).

105. The Attorney General of Canada attempts to revisit this issue by asserting in its factum

---

<sup>172</sup> *R. v. Ferguson*, [2008] 1 S.C.R. 96, at paras. 40-74, **Resp. Auth., Tab 22**.

<sup>173</sup> *PHS*, *supra*, at paras. 108-114, **Resp. Auth., Tab 5**. It should be noted that in *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. CA) at paras. 142-145, **Resp. Auth., Tab 37**, the Court of Appeal did not approve of the use of a blanket prohibition with respect to the medicinal use of drugs, and the Court then declared the marijuana possession offence to be invalid unless the Government of Canada enacted an exempting scheme in one year.

<sup>174</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at paras. 19-42, **Resp. Auth., Tab 8**.

<sup>175</sup> *Bedford OCA*, *supra*, at para. 245, **AR, Vol. II., Tab 7, p. 100**.

<sup>176</sup> *Bedford OCA*, *supra*, at para. 247, **AR, Vol. II., Tab 7, p. 101**.

that “there is no bright line between the pimp and a driver and that relationship always has the potential to become explicitly coercive or abusive...it cannot be predicted in advance.”<sup>177</sup>

106. It may be true that abusive and exploitative relationships cannot always be “predicted in advance”, but a blanket prohibition on paid assistance prevents the sex worker from ever making this prediction. A blanket prohibition treats every sex worker as lacking human agency with no ability to make autonomous choices. The paternalism inherent in the blanket prohibition might be justified when employed to protect the chronically-ill<sup>178</sup> or the drug user.<sup>179</sup> These blanket prohibitions were upheld because the inability to make an autonomous choice was impaired by forces beyond control of those being protected by the legislation. In this case, there is no overwhelming and inescapable force, internal or external, which would allow Parliament to paternalistically assume that all sex workers cannot make informed choices, thus warranting a blanket prohibition on all choices relating to the sex trade. It is submitted that Parliament does not have a reasonable apprehension that a blanket prohibition is necessary to prevent exploitation of sex workers.

### (iii) Salutory Effects and Fundamental Justice

107. With respect to bawdy house and overbreadth, it is submitted that the two criteria for resort to a blanket prohibition do not apply here. However, the Attorney General of Ontario argues that “there is a reasoned apprehension that the problems of human trafficking and child exploitation could thrive if the blanket prohibition were relaxed.”<sup>180</sup> This argument confuses salutary benefits of a law with its objectives. The constitutional vices of overbreadth and gross disproportionality are assessed in light of the law’s stated objectives, without consideration of any incidental benefits that the legislation may bring. It is submitted that “the balance of salutary and deleterious effects of the law is a factor to be considered in the context of s. 1 of the *Charter*, not s. 7,”<sup>181</sup> and that “it is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice, and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a

---

<sup>177</sup> AGC Factum, *supra*, at para. 118.

<sup>178</sup> *Rodriguez, supra*, at 605, **Resp. Auth, Tab 50**.

<sup>179</sup> *Malmo-Levine, supra*, at paras. 135-136, **Resp. Auth., Tab 29**.

<sup>180</sup> AGO Factum, *supra*, at para 92.

<sup>181</sup> *PHS Community Services Society v. Canada (Attorney General)*, (2008) 293 D.L.R. (4th) 392 (B.C.S.C.), at para. 130, **Resp. Auth., Tab 14**.

free and democratic society.”<sup>182</sup> The Attorney General of Ontario refers to the bawdy house provision as an “important tool for assisting those investigations.” However, utility is not the same as purpose.

108. If the evidence of salutary benefits was properly assessed as a s. 1 consideration, the Attorneys-General would still be met with the problem of relying solely on the anecdotal evidence of a few police officers to prove on a balance of probabilities the relationship between the bawdy house law and investigations of human trafficking and underage prostitution. In addition, this anecdotal evidence is undercut by the finding that bawdy house investigations are low-priority, and the officers’ admissions that they receive few complaints of exploitation and violence from indoor settings.<sup>183</sup>

109. Both courts below concluded that the objectives underlying the bawdy house provisions are “combatting neighbourhood disruption or disorder and safeguarding public health”;<sup>184</sup> however, the Court of Appeal went one step further by concluding that “legislative concern for public health and safety is wide enough to encompass measures that target human trafficking and child exploitation, both of which may tragically arise through operation of bawdy-houses.”<sup>185</sup> It is submitted that the Court of Appeal erred in conflating concern with objective and by factoring incidental societal benefits into the analysis of state objectives.

110. It is recognized that public safety is a broad term which can encompass many diverse objectives, but the interpretation of public safety must bear some relationship to the provision in question. The current bawdy house law makes no mention of underage prostitutes and trafficked women, whereas the procuring provisions in s. 212 were specifically amended in recent times to take into account these two concerns. The only legislative link between bawdy house and these other concerns is found in legislation enacted in the 1910s to deal with “young girls” and the “white slave trade.”<sup>186</sup> As the Fraser Committee has pointed out, these legislative developments in the 1910s were “largely the result of women involved in the so-called ‘social purity’ movement.”<sup>187</sup> Victorian social or moral purity is the quintessential form of legal moralism and moving into the modern era, these offences have been repealed along with many other similar

---

<sup>182</sup> *R. v. Swain*, [1991] 1 S.C.R. 933, at 977 (*per* Lamer C.J.), **Resp. Auth., Tab 41**; *Malmö-Levine*, *supra*, at paras. 179-182, **Resp. Auth., Tab 29**; *Charkaoui v. Canada (M.C.I.)*, [2007] 1 S.C.R. 350, at para. 21, **Resp. Auth., Tab 9**.

<sup>183</sup> See the discussion and references at para. 30 of this factum.

<sup>184</sup> *Bedford OCA*, *supra*, at para. 192, **AR, Vol. II., Tab 7, p. 80**.

<sup>185</sup> *Bedford OCA*, *supra*, at para. 193, **AR, Vol. II., Tab 7, p. 80**.

<sup>186</sup> AGO Factum, *supra*, at para. 81; AGC Factum, *supra*, at para 38.

<sup>187</sup> Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, at p. 404, **JAR, Vol. 71, Tab 154(B), p. 20922**.

offences concerned with “the protection of girls and young women from the ravages of vice.”<sup>188</sup>

111. Whether or not the Court of Appeal erred in expanding the state objective to include consideration of secondary crimes, it does not appear that the Court of Appeal believed that this expansion of purpose had any impact on the constitutional analysis. Perhaps reflecting on the threadbare evidence in support of this concern or the lack of interest in enforcement of the law, the Court of Appeal concluded that “even taking into account this broader understanding of public health and safety, it is our view that the application judge properly found that the provisions are overly broad.”<sup>189</sup>

**(iv) The Government’s Inflated Objectives**

112. The Respondents recognize that if the expanded objectives of deterring prostitution and commercialization were truly at the heart of these provisions, this would impact the overbreadth analysis. One might argue that the government had a reasonable apprehension that a blanket prohibition would be necessary to achieve this overarching goal. However, even if the objectives are expanded in the manner advanced by the Attorneys General, this would not change the analysis of gross disproportionality. It is ethically unsound to deter and discourage undesirable conduct by increasing the risk of harm. The impairment of security is not a legitimate cost to impose on sex workers in the fight against nuisance, exploitation and, in the view of the Appellants, the eradication of a degrading profession.

**(v) Gross Disproportionality**

113. It is respectfully submitted that once a finding is made that there is a serious deprivation of security, there will be very few legislative objectives which can outweigh, override or justify the deprivation. Laws that impair security strike at the heart of the social contract. In the absence of a crisis, emergency or other compelling scenario, it is difficult to conceive of a reasonable justification for contributing to an increased risk of death.

114. The Attorneys General try to recast the balance by asserting that there are a myriad of factors contributing to violence and that the courts below should have recognized that the state’s contribution is “indirect” and “unquantified.”<sup>190</sup> In addition, they argue that there still remains a risk of harm while working indoors and, even if the indoor location is safer, they argue that many street workers will not have the wherewithal and resources to make the move to a safer venue.

---

<sup>188</sup> Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, at p. 403, JAR, Vol. 71, Tab 154(B), p. 20921.

<sup>189</sup> Bedford OCA, supra, at para. 203, AR, Vol. II, Tab 7, p. 83.

<sup>190</sup> AGC Factum, supra, at para. 108; AGO Factum, supra, at para. 99.

115. These are desperate arguments suggesting that a harmful law should not be invalidated unless the invalidation leads to a perfect result – all street sex workers moving into indoor locations with no risk of harm. Constitutional invalidation is predicated on striking down a law which violates rights and should never be seen as a panacea to solve complex social problems. Nonetheless, the evidence does show a quantifiable and significant improvement in safety when moving indoors. The number of women who will avail themselves of safer options is irrelevant; the *Charter* speaks to “everyone” having the right to security free from arbitrary state interference. It does not require that “everyone” must take measures to protect their security.

116. It is submitted that once a causal link has been shown between the law and a significant deprivation of security, it does not make sense to absolve the state for its contribution on the basis that the contribution is minor. In light of the magnitude of harm to which sex workers are exposed, it should matter little for the gross disproportionality analysis whether the proximate contributor to the harm is the psychopath and that the law is only a minor contributor in preventing sex workers from taking steps to protect themselves. The *Charter* cannot protect a victim from the evil designs of a predator, but it can protect the victim from a law which prevents the victim from taking steps to protect herself.

**(vi) Remedy**

117. It is respectfully submitted that the constitutional flaws identified within the two provisions cannot be cured by any remedy short of invalidation. Accordingly, the Respondents join forces with the Attorney General of Canada, who vigorously argues that reading-in of “circumstances of exploitation” is an unworkable and inappropriate remedy for the living on the avails offence. The Respondents adopt the argument set out in the factum of the Attorney General of Canada, with the exception of agreeing to their assertion that these “prohibitions are part of an interrelated comprehensive scheme.”<sup>191</sup> Such a scheme does not exist. However, invalidation as opposed to reading-in might facilitate the development of a comprehensive and rational scheme. The Court of Appeal was well-intentioned in choosing a less drastic remedy than invalidation, but this remedial option was not available in these circumstances. It is not clear that the revision of the elements of the offence is consistent with Parliament’s objectives (though it should be) and a re-interpretation of the provision is just one possible remedial option available to Parliament upon review of this impugned provision.<sup>192</sup>

---

<sup>191</sup> AGC Factum, *supra*, at paras 131-136.

<sup>192</sup> *Singh v Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at 235-236, **Resp. Auth., Tab 52**; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at 697-699, 701, 707, 709 [“*Schachter*”], **Resp. Auth., Tab 51**; *Vriend*,

118. In light of the diversity of employment arrangements, it is difficult to apply the term “exploitation” in a certain and predictable manner. For reading-in, it is imperative that there be “remedial precision,”<sup>194</sup> if the solution is vague and imprecise, “reading in would in effect remedy one constitutional wrong only to create another.”<sup>195</sup> It is of interest to note that in 2005, Parliament enacted a statutory definition of “exploitation” for the purposes of trafficking in persons offences in s. 279.04. As there is a purported relationship between the sex trade offences and the trafficking offences, one could conclude that Parliament made the determination to not add the element of exploitation to the living on the avails offence. Additionally, the enactment of this definitional provision shows that it is well within parliamentary competence to devise a similar definition. However, it is clear that the definition in s. 279.04 would not apply smoothly in the context of living on the avails, such that a definition tailored to the crime would be needed. This is not a task which should be undertaken by the judiciary. Rather, it should be left to lawmakers to determine if they want to introduce an element of exploitation, if they want to provide a specific definition, and if they would prefer some exemption provision, some regulatory licensing regime, or leave the issue to be dealt with by other provisions of the criminal law. Since the options are so varied for Parliament, there is but one option available for the courts – invalidation.

#### PART IV - COSTS


119. The Respondents make no submissions respecting costs.

#### PART V – ORDER REQUESTED

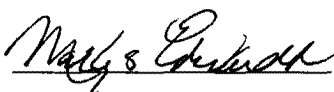
120. The Respondents request that this Honorable Court issue an order dismissing the appeal. The first and third constitutional questions should be answered in the affirmative, and the second and forth should be answered in the negative.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

DONE at Toronto, this ~~28~~ day of April, 2013



Alan N. Young



Marlys A. Edwardh



Daniel Sheppard

Counsel for the Respondents, Terri Jean Bedford, Amy Lebovitch and Valerie Scott

---

*supra*, at para 195 (per Major J., Dissenting), **Resp. Auth.**, **Tab 55**; *Heywood, supra*, at 804, **Resp. Auth.**, **Tab 23**.

<sup>194</sup> *Schachter, supra*, at 705-707, **Resp. Auth.**, **Tab 51**.

<sup>195</sup> *M. v. H., supra*, at para 141, **Resp. Auth.**, **Tab 13**.

**PART VI – TABLE OF AUTHORITIES**

<b>Authority</b>	<b>Cited at Para.</b>
<b>Jurisprudence</b>	
<i>Application under s. 83.28 of the Criminal Code (Re)</i> , [2004] 2 S.C.R. 248	60
<i>Blencoe v. British Columbia (Human Rights Commission)</i> , [2000] 2 S.C.R. 307	60
<i>Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society</i> , 2012 SCC 45	70
<i>Canada (Justice) v. Khadr</i> , [2008] 2 S.C.R. 143	60
<i>Canada (Attorney General) v. PHS Community Services Society</i> , [2011] 3 S.C.R. 134	8, 11, 63, 64, 76, 103
<i>Canada (Prime Minister) v. Khadr</i> [2010] 1 S.C.R. 44	60
<i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i> , [2004] 1 S.C.R. 76	103
<i>Charkaoui v. Canada (Citizenship and Immigration)</i> , [2007] 1 S.C.R. 350	107
<i>Delisle v. Canada (Deputy Attorney General)</i> , [1999] 2 S.C.R. 989	85
<i>Dunmore v. Ontario (Attorney General)</i> , [2001] 3 S.C.R. 1016	72
<i>Hopp v. Lepp</i> , [1980] 2 S.C.R. 192	67
<i>M. v. H.</i> , [1999] 2 S.C.R. 3	85, 118
<i>PHS Community Services Society v. Canada (Attorney General)</i> , (2008) 293 D.L.R. (4th) 392 (B.C.S.C.)	107
<i>R. v. Barrow</i> (2001), 54 O.R. (3d) 417 (C.A.)	99
<i>R. v. Big M Drug Mart</i> [1985] 1 S.C.R. 295	70
<i>R. v. Corbeil</i> , [1991] 1 S.C.R. 830	86, 90, 98
<i>R. v. Downey</i> , [1992] 2 S.C.R. 10	92, 99
<i>R. v. Elizabeth Elye</i> , 31 May 1693, ref. no. t16930531-45 (Old Bailey)	88
<i>R. v. Ferguson</i> , [2008] 1 S.C.R. 96	102

<i>R. v. Heywood</i> , [1994] 3 S.C.R. 761	4, 77, 117
<i>R. v. Caroline Howard &amp; Mary Jones</i> , 2 July 1855, ref. no. t18550702-707 (Old Bailey)	88
<i>R. v. Thomas Johnson</i> , 26 February 1849, ref. no. t18490226-755 (Old Bailey)	88
<i>R. v. Jones</i> (1921), 62 D.L.R. 413 (Alta. C.A.)	87
<i>R. v. Khawaja</i> , 2012 SCC 69	76, 96
<i>R v Lukacko</i> (2002), 59 O.R. (3d) 58 (C.A.)	100
<i>R. v. Manion</i> (2005), 377 A.R. 95 (Prov. Ct.)	100
<i>R. v. Marceau</i> (2010), 77 C.R. (6th) 70 (Que. C.A.)	86
<i>R v Malmo- Levine; R. v. Caine</i> , [2003] 3 S.C.R. 571	4, 77, 106, 107
<i>R. v. Mercier</i> (1908), 13 C.C.C. 475 (Yuk. Terr. Ct.)	87
<i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30	57, 63
<i>R. v. Nette</i> , [2001] 3 S.C.R. 488	61, 70
<i>R. v. Odgers</i> (2006), 400 A.R. 322 (Prov. Ct.)	100
<i>R. v. Parker</i> (2000), 146 C.C.C. (3d) 193 (Ont. CA)	103
<i>R. v. Patterson</i> , [1968] S.C.R. 157	97
<i>R. v. Smithers</i> , [1978] 1 S.C.R. 506	69
<i>R. v. Swain</i> , [1991] 1 S.C.R. 933	107
<i>R v Thornton</i> (1991), 1 O.R. (3d) 480 (C.A.), aff'd [1993] 2 S.C.R. 445	67
<i>R. v. Vaillancourt</i> , [1987] 2 S.C.R. 636	69
<i>R. v. Worthington</i> (1972), 10 C.C.C. (2d) 311 (Ont. C.A.)	90
<i>Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123	4, 18, 52, 74, 82
<i>Reibl v. Hughes</i> , [1980] 2 S.C.R. 880	67
<i>Rodriguez v. British Columbia (Attorney General)</i> , [1993] 3 S.C.R. 519	4, 63, 106

<i>Schachter v. Canada</i> , [1992] 2 S.C.R. 679	117, 118
<i>Singh v Minister of Employment and Immigration</i> , [1985] 1 S.C.R. 177	117
<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] 1 S.C.R. 3	59
<i>Victoria (City) v. Adams</i> (2009), 313 D.L.R. (4th) 29 (B.C.C.A.)	64
<i>Vriend v. Alberta</i> , [1998] 1 S.C.R. 493	63, 71, 117
<b>Secondary Materials</b>	
William Blackstone, <i>Commentaries on the Laws of England</i> (London: Dawson, 1966)	86
Edward Coke, <i>The Third Part of the Institutes of the Laws of England</i> (Buffalo: W.S. Hein, 1986)	86
William Hawkins, 1 <i>Pleas of the Crown 1716-1721</i> (London: Professional Books Ltd., 1973)	86
The Hon. Wally T. Oppal, Q.C., <i>Forsaken: The Report of the Missing Women Commission of Inquiry</i> (Victoria: Missing Women Commission of Inquiry, 2012)	55
James Fitzjames Stephen, <i>A General View of the Criminal Law of England</i> 2d ed. (London, Macmillan and Co., 1890)	86
<i>UN Convention on the Elimination of All Forms of Discrimination against Women</i> , UN General Assembly Resolution 34/180/1979	83

**PART VII - LEGISLATIVE PROVISIONS**

CANADA

CONSOLIDATION

CODIFICATION

*Criminal Code**Code criminel*

R.S.C., 1985, c. C-46

L.R.C. (1985), ch. C-46

Current to December 10, 2012

À jour au 10 décembre 2012

Last amended on November 20, 2012

Dernière modification le 20 novembre 2012

OFFICIAL STATUS  
OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

**Published consolidation is evidence**

**31 (1)** Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

**Inconsistencies in Acts**

**(2)** In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to December 10, 2012. The last amendments came into force on November 20, 2012. Any amendments that were not in force as of December 10, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL  
DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1<sup>er</sup> juin 2009, prévoient ce qui suit :

**Codifications comme élément de preuve**

**31 (1)** Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

**Incompatibilité – lois**

**(2)** Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 10 décembre 2012. Les dernières modifications sont entrées en vigueur le 20 novembre 2012. Toutes modifications qui n'étaient pas en vigueur au 10 décembre 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

**lottery scheme** means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g), whether or not it involves betting, pool selling or a pool system of betting. It does not include

(a) three-card monte, punch board or coin table; or

(b) bookmaking, pool selling or the making or recording of bets, including bets made through the agency of a pool or pari-mutuel system, on any race or fight, or on a single sporting event or athletic contest. (*loterie*)

1999, c. 5, s. 7.

**208** [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 32]

#### Cheating at play

**209** Every one who, with intent to defraud any person, cheats while playing a game or in holding the stakes for a game or in betting is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

R.S., c. C-34, s. 192.

## Bawdy-houses

#### Keeping common bawdy-house

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

#### Landlord, inmate, etc.

(2) Every one who

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

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

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

is guilty of an offence punishable on summary conviction.

#### Notice of conviction to be served on owner

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his

(b) le bookmaking, la vente d'une mise collective ou l'inscription ou la prise de paris, y compris les paris faits par mise collective ou par un système de paris collectifs ou de pari mutuel sur une course ou un combat, ou une épreuve ou manifestation sportive. (*lottery scheme*)

**navire de croisière internationale** Navire à passagers pouvant effectuer des voyages sur les océans d'une durée d'au moins quarante-huit heures, à l'exclusion de tout navire qui est utilisé ou aménagé avant tout pour le transport de marchandises ou de véhicules. (*international cruise ship*)

1999, ch. 5, art. 7.

**208** [Abrogé, L.R. (1985), ch. 27 (1<sup>er</sup> suppl.), art. 32]

#### Tricher au jeu

**209** Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque, avec l'intention de frauder quelqu'un, triche en pratiquant un jeu, ou en tenant des enjeux ou en pariant.

S.R., ch. C-34, art. 192.

## Maisons de débauche

#### Tenue d'une maison de débauche

**210 (1)** Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque tient une maison de débauche.

#### Propriétaire, habitant, etc.

(2) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, selon le cas :

a) habite une maison de débauche;

b) est trouvé, sans excuse légitime, dans une maison de débauche;

c) en qualité de propriétaire, locateur, occupant, locataire, agent ou ayant autrement la charge ou le contrôle d'un local, permet sciemment que ce local ou une partie du local soit loué ou employé aux fins de maison de débauche.

#### Le propriétaire doit être avisé de la déclaration de culpabilité

(3) Lorsqu'une personne est déclarée coupable d'une infraction visée au paragraphe (1), le tribunal fait signifier un avis de la déclaration de culpabilité au propriétaire ou

agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

#### **Duty of landlord on notice**

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.  
R.S., c. C-34, s. 193.

#### **Transporting person to bawdy-house**

**211** Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.  
R.S., c. C-34, s. 194.

## Procuring

### **Procuring**

**212 (1)** Every one who

- (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
- (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
- (c) knowingly conceals a person in a common bawdy-house,
- (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
- (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,

locateur du lieu à l'égard duquel la personne est déclarée coupable, ou à son agent, et l'avis doit contenir une déclaration portant qu'il est signifié selon le présent article.

#### **Devoir du propriétaire sur réception de l'avis**

(4) Lorsqu'une personne à laquelle un avis est signifié en vertu du paragraphe (3) n'exerce pas immédiatement tout droit qu'elle peut avoir de résilier la location ou de mettre fin au droit d'occupation que possède la personne ainsi déclarée coupable, et que, par la suite, un individu est déclaré coupable d'une infraction visée au paragraphe (1) à l'égard du même local, la personne à qui l'avis a été signifié est censée avoir commis une infraction visée au paragraphe (1), à moins qu'elle ne prouve qu'elle a pris toutes les mesures raisonnables pour empêcher le renouvellement de l'infraction.  
S.R., ch. C-34, art. 193.

#### **Transport de personnes à des maisons de débauche**

**211** Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, sciemment, mène ou transporte ou offre de mener ou de transporter une autre personne à une maison de débauche, ou dirige ou offre de diriger une autre personne vers une maison de débauche.  
S.R., ch. C-34, art. 194.

## Entremetteurs

### **Proxénétisme**

**212 (1)** Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

- a) induit, tente d'induire ou sollicite une personne à avoir des rapports sexuels illicites avec une autre personne, soit au Canada, soit à l'étranger;
- b) attire ou entraîne une personne qui n'est pas prostituée vers une maison de débauche aux fins de rapports sexuels illicites ou de prostitution;
- c) sciemment cache une personne dans une maison de débauche;
- d) induit ou tente d'induire une personne à se prostituer, soit au Canada, soit à l'étranger;
- e) induit ou tente d'induire une personne à abandonner son lieu ordinaire de résidence au Canada, lorsque ce lieu n'est pas une maison de débauche, avec l'intention de lui faire habiter une maison de débauche ou pour qu'elle fréquente une maison de débauche, au Canada ou à l'étranger;

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

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

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

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

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

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

#### **Living on the avails of prostitution of person under eighteen**

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

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

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

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

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

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

#### **Presumption**

**(3)** Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-

**f)** à l'arrivée d'une personne au Canada, la dirige ou la fait diriger vers une maison de débauche, l'y amène ou l'y fait conduire;

**g)** induit une personne à venir au Canada ou à quitter le Canada pour se livrer à la prostitution;

**h)** aux fins de lucre, exerce un contrôle, une direction ou une influence sur les mouvements d'une personne de façon à démontrer qu'il l'aide, l'encourage ou la force à s'adonner ou à se livrer à la prostitution avec une personne en particulier ou d'une manière générale;

**i)** applique ou administre, ou fait prendre, à une personne, toute drogue, liqueur enivrante, matière ou chose, avec l'intention de la stupéfier ou de la subjuguer de manière à permettre à quelqu'un d'avoir avec elle des rapports sexuels illicites;

**j)** vit entièrement ou en partie des produits de la prostitution d'une autre personne.

#### **Proxénétisme**

**(2)** Par dérogation à l'alinéa (1)j), quiconque vit entièrement ou en partie des produits de la prostitution d'une autre personne âgée de moins de dix-huit ans est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, la peine minimale étant de deux ans.

#### **Infraction grave — vivre des produits de la prostitution d'une personne âgée de moins de dix-huit ans**

**(2.1)** Par dérogation à l'alinéa (1)j) et au paragraphe (2), est coupable d'un acte criminel et passible d'un emprisonnement minimal de cinq ans et maximal de quatorze ans quiconque vit entièrement ou en partie des produits de la prostitution d'une autre personne âgée de moins de dix-huit ans si, à la fois :

**a)** aux fins de profit, il l'aide, l'encourage ou la force à s'adonner ou à se livrer à la prostitution avec une personne en particulier ou d'une manière générale, ou lui conseille de le faire;

**b)** il use de violence envers elle, l'intimide ou la contraint, ou tente ou menace de le faire.

#### **Présomption**

**(3)** Pour l'application de l'alinéa (1)j) et des paragraphes (2) et (2.1), la preuve qu'une personne vit ou se trouve

house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).

#### **Offence — prostitution of person under eighteen**

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

(5) [Repealed, 1999, c. 5, s. 8]

R.S., 1985, c. C-46, s. 212; R.S., 1985, c. 19 (3rd Supp.), s. 9; 1997, c. 16, s. 2; 1999, c. 5, s. 8; 2005, c. 32, s. 10.1.

### Offence in Relation to Prostitution

#### **Offence in relation to prostitution**

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

- (a) stops or attempts to stop any motor vehicle,
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
- (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

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

#### **Definition of “public place”**

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

R.S., 1985, c. C-46, s. 213; R.S., 1985, c. 51 (1st Supp.), s. 1.

habituellement en compagnie d'un prostitué ou vit dans une maison de débauche constituée, sauf preuve contraire, la preuve qu'elle vit des produits de la prostitution.

#### **Infraction — prostitution d'une personne âgée de moins de dix-huit ans**

(4) Quiconque, en quelque endroit que ce soit, obtient, moyennant rétribution, les services sexuels d'une personne âgée de moins de dix-huit ans ou communique avec quiconque en vue d'obtenir, moyennant rétribution, de tels services est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans, la peine minimale étant de six mois.

(5) [Abrogé, 1999, ch. 5, art. 8]

L.R. (1985), ch. C-46, art. 212; L.R. (1985), ch. 19 (3<sup>e</sup> suppl.), art. 9; 1997, ch. 16, art. 2; 1999, ch. 5, art. 8; 2005, ch. 32, art. 10.1.

### Infraction se rattachant à la prostitution

#### **Infraction se rattachant à la prostitution**

**213 (1)** Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, dans un endroit soit public soit situé à la vue du public et dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre :

- a) soit arrête ou tente d'arrêter un véhicule à moteur;
- b) soit gêne la circulation des piétons ou des véhicules, ou l'entrée ou la sortie d'un lieu contigu à cet endroit;
- c) soit arrête ou tente d'arrêter une personne ou, de quelque manière que ce soit, communique ou tente de communiquer avec elle.

#### **Définition de « endroit public »**

(2) Au présent article, **endroit public** s'entend notamment de tout lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite; y est assimilé tout véhicule à moteur situé dans un endroit soit public soit situé à la vue du public.

L.R. (1985), ch. C-46, art. 213; L.R. (1985), ch. 51 (1<sup>er</sup> suppl.), art. 1.

**FACTUM OF THE APPELLANTS ON CROSS-APPEAL****PART I - OVERVIEW****1. INTRODUCTION**

1. Unlike the result reached with respect to bawdy house and living on the avails, the Court of Appeal upheld the communication provision (s. 213(1)(c)). As all parties before this Court acknowledge, a prohibition on communication clearly violates s. 2(b) of the *Charter*. The Court below, however, felt itself precluded by *stare decisis* from revisiting the conclusion reached in 1990 by this Court that this infringement can be upheld as a reasonable limit. The Court of Appeal also found that the provision did not violate s. 7 of the *Charter*, as it was neither arbitrary, overbroad, nor grossly disproportionate.

2. The Appellants on cross-appeal take the position that s. 213(1)(c) should be invalidated as it operates in a grossly disproportionate manner, in violation of s. 7 of the *Charter*, and further, that the violation of free expression can no longer be characterized as a reasonable limit on freedom in light of a significant change in circumstance and context.

3. Underlying the specific doctrinal issues raised by this cross-appeal is the larger question of when the state will be justified in prohibiting all communicative acts – through speech or conduct – in a certain context or social interaction. In this case the state has commanded that sex workers engaged in lawful work on the streets cannot rely upon any communicative acts in conducting this business in public view. This prohibition was designed to curb the street and social nuisance associated with sex work on the streets. Communication is a fundamental freedom indispensable to the proper functioning of all aspects of our personal, political and social lives. This fundamental freedom should not be readily sacrificed in pursuit of the public good especially when evidence has emerged demonstrating that communicative acts on the street increase the safety of those lawfully engaged in sex work.

4. To override and curtail this lifeblood of social interaction, the state must pursue a pressing and substantial objective in the least restrictive manner. In 1990 this Honourable Court concluded that the prohibition on communication was a reasonable limit on freedom, but the Respondents submit that times have changed and this result can no longer stand. In the normal course of events, *stare decisis* would apply. However, numerous government reports and academic studies not before this Honourable Court during the 1990 *Prostitution Reference* have significantly

changed the legal and factual landscape.<sup>195</sup>

5. There is an abundance of evidence demonstrating that the communication prohibition has been ineffective in that it simply displaces sex workers and has not reduced the overall incidence of street prostitution or street nuisance. In addition, these reports and studies provide new evidence that the displacement effect increases the risk to the safety of sex workers, as does the very prohibition on communicating with prospective clients. In contrast, the only report that was before the Supreme Court in the *Prostitution Reference* was the *Report of the Special Committee on Pornography and Prostitution* (1985) (the “Fraser Report”),<sup>196</sup> which the Court relied on only for very limited purposes.<sup>197</sup>

6. In light of this new evidence, Himel J. did not err in concluding that the balancing test required under s. 1 should be revisited. Moreover, her ultimate conclusion echoed the conclusions of the 1998 Federal/Provincial/Territorial Working Group on Prostitution:

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.*<sup>198</sup>

---

<sup>195</sup> Frank Graves, *Street Prostitution: Assessing the Impact of the Law – Halifax* (Ottawa: Minister of Supply and Service Canada, 1989), **JAR, Vol. 75, Tab 157(A)**; Robert Gemme, *Street Prostitution: Assessing the Impact of the Law – Montreal* (Ottawa: Minister of Supply and Service Canada, 1989), **JAR, Vol. 75, Tab 157(B)**; Sharom Moyer & Peter J. Carrington, *Street Prostitution: Assessing the Impact of the Law – Toronto* (Ottawa: Minister of Supply and Service Canada, 1989), **JAR, Vol. 76, Tab 157(C)**; Augustine Brannigan, Louis Knafla & Christopher Levy, *Street Prostitution: Assessing the Impact of the Law – Calgary/Regina/Winnipeg* (Ottawa: Minister of Supply and Service Canada, 1989), **JAR, Vol. 76, Tab 157(D)**; John Lowman, *Street Prostitution: Assessing the Impact of the Law – Vancouver* (Ottawa: Minister of Supply and Service Canada, 1989), **JAR, Vol. 77, Tab 157(E)**; Research Section, Department of Justice, *Street Prostitution: Assessing the Impact of the Law – Synthesis Report* (Ottawa: Minister of Supply and Services Canada, 1989), **JAR, Vol. 75, Tab 157**; Augustine Brannigan, *Victimization of Prostitutes in Calgary and Winnipeg: Technical Report for the Department of Justice* (1994), **JAR, Vol. 8, Tab 34(D)**; Federal/Provincial/Territorial Working Group on Prostitution, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution- Related Activities* (1998), **JAR, Vol. 79, Tab 160**; and House of Commons, Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws* (2006), **JAR, Vol. 82, Tab 164**.

<sup>196</sup> **JAR, Vols. 70-71, Tabs 154(A)-(B)**.

<sup>197</sup> In particular, the Dickson C.J. noted that the Fraser Report set out a number of potential approaches for Parliament to consider with respect to dealing with street solicitation: *Prostitution Reference, supra* at 1137-1138, **Resp. Auth., Tab 47**. Lamer J. referred to the report for the same purpose, as well as when considering the legislative objectives of the solicitation and communication offences, and to note the approaches taken by some foreign jurisdictions: *Prostitution Reference, supra* at 1192, 1196-1197, 1200, **Resp. Auth., Tab 47**.

<sup>198</sup> Federal/Provincial/Territorial/Working Group on Prostitution, *Report and Recommendations in respect of Legislation Policy and Practices Concerning Prostitution-Related Activities* (1998), at p. 7, **JAR, Vol. 79, Tab 160**,

7. In 1990, this Court was restricted to a facial review of the purpose underlying the law without consideration of the effects of the law. This evidence was not available and, as the Working Group suggested, the s. 1 balancing would need to be revisited to address the thorny question of whether a demonstrably ineffective law can ever constitute a reasonable limit on a fundamental freedom. More significantly, the new evidence is not restricted to ineffectiveness. It goes much further. In the violent world of the street sex trade, it has been shown that communicative acts enable the worker to address safety concerns through screening. Not only does this evidence undercut the conclusion that the provision constitutes a minimal impairment, but it also supports the conclusion that the provision violates s. 7 of the *Charter* by operating in a grossly disproportionate manner.

8. The evidence in this case demonstrates that a prohibition on communication increases the risks of violence for sex workers, and the evidence demonstrates that this increased risk of victimization on the street includes exposure to the horrors of predatory killers. It is respectfully submitted that the harms caused by a law which restricts one of the only safety options for an ‘occupation at risk’ working the streets grossly outweigh the importance of the objective of reducing or eliminating street and social nuisance. The majority of the Court of Appeal did not agree. A powerful and persuasive dissent by two judges noted the paradox of the majority’s holding: that the most vulnerable population of sex workers would receive less protection than those less disadvantaged, and that a modest tool for screening and safety is being denied those facing catastrophic harm.<sup>199</sup> As the dissent noted, the impact on sex workers is not simply restricted to a security impairment, but also extends to a violation to the right to life.<sup>200</sup>

9. The majority of the Court of Appeal concluded that “there was limited evidence to establish the extent to which face-to-face communication with customers will improve the safety of street prostitutes.”<sup>201</sup> However, the conclusion that a prohibition on communication, which causes displacement and prevents screening, increases the risk of harm is not only supported by the evidence, but it accords with common sense. The following brief excerpt from the cross-examination of Detective Morrissey in Edmonton (where Project KARE is investigating over 80 cases of missing women from “high risk” occupations) illustrates the simple logic of the gross disproportionality claim and the troubling reality that the law appears to be willing to sacrifice

---

p. 23873 [Emphasis added].

<sup>199</sup> *Bedford OCA, supra* at paras. 357-360 (per MacPherson J.A., dissenting), AR, Vol. II, Tab 7, pp. 142-143.

<sup>200</sup> *Bedford OCA, supra* at para. 373, AR, Vol. II, Tab 7, pp 147-148.

<sup>201</sup> *Bedford OCA, supra* at para 316, AR, Vol. II, Tab 7, p. 127.

safety and security in the pursuit of reducing street and social nuisance:

Q. Tell me what the precautionary measure would be for someone working the street when a john drives up. What could they do to protect themselves in that scenario?

A. Well, get yourself off the street, number one, but --

Q. Short of that. Short of that.

A. And a safer occupation. But you should make some kind of determination about the sobriety or not of the man who you're about to get in with.

Q. Ho [sic] would you do that?

A. Have a conversation with him.<sup>202</sup>

## 2 THE RELEVANT FINDINGS OF FACT

10. In addition to the recitation of facts found in the Factum of the Respondents on Appeal, the following additional facts are relevant to the constitutional challenge to the communication provision.

### A. The Courts Below

11. Justice Himel made three critical findings of fact specifically with respect to the communication law:

1. "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."<sup>203</sup>

2. "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."<sup>204</sup>

3. "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, 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... 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 occasions, I conclude that the salutary effects of the communicating provision in combating the social nuisance associated with street prostitution are minimal."<sup>205</sup>

<sup>202</sup> Cross-Examination of Jim Morressey, p. 70 ll 13-23, JAR, Vol. 34, Tab 79, p. 9840.

<sup>203</sup> Bedford SCJ, supra, at para. 421, AR, Vol. I, Tab 3, p. 112.

<sup>204</sup> Bedford SCJ, supra, at para. 458, AR, Vol. I, Tab 3, p. 120.

<sup>205</sup> Bedford SCJ, supra, at paras. 380, 498, AR, Vol. I, Tab 3, pp. 102, 128-129 [Internal citations omitted].

12. The Court of Appeal declined to address the issue of whether new evidence warranted a review of the 1990 determination that the impugned provision was a reasonable limit on free expression. However, the Court of Appeal did draw some conclusions about the facts as they related to the gross disproportionality claim. The majority of the Court of Appeal acknowledged that the communication provision contributes to some degree of harm; however, doubt was expressed about the efficacy of communication as a safety tool, as the majority concluded that it was “equally likely” that a customer could “pass muster at an early stage only to turn violent once the transaction is underway.”<sup>206</sup> However, the majority also held:

- a. “[A] street prostitute might be able to avoid a “bad date” by negotiating details such as payment, services to be performed, and condom use up front.”<sup>207</sup>
- b. While other methods exist “face-to-face communication is an important aspect of customer screening.”<sup>208</sup>
- c. If the bawdy house law was to remain constitutionally valid it would be “particularly egregious to deny prostitutes the opportunity to take potentially safety-enhancing measures when out on the street.”<sup>209</sup>
- d. “[T]he communicating provision has some material impact on the respondents’ security of the person because it denies them the opportunity to have face-to-face contact with prospective customers.”<sup>210</sup>

## **B Supporting Evidence**

### **(i) Screening Clients**

13. Many of the women working in the trade perceived a decrease in their level of security after the enactment of the communication laws, which they felt increased the risk of violence they faced.<sup>211</sup> Prior to the enactment of the laws, sex workers could work together: while one woman approached a client, the other could write down a license plate number.<sup>212</sup> The communication laws also stopped women from screening clients and engaging in work only where they felt safe to do so.<sup>213</sup> As a result of the communication laws, women feel pressure to make quick decisions

<sup>206</sup> *Bedford OCA, supra*, at paras. 312, 322, AR, Vol. II, Tab 7, pp. 125, 129-130.

<sup>207</sup> *Bedford OCA, supra*, at para. 312, AR, Vol. II, Tab 7, p. 125.

<sup>208</sup> *Bedford OCA, supra*, at para. 313, AR, Vol. II, Tab 7, p. 125.

<sup>209</sup> *Bedford OCA, supra*, at para. 317, AR, Vol. II, Tab 7, p. 128.

<sup>210</sup> *Bedford OCA, supra*, at para. 315, AR, Vol. II, Tab 7, p. 126.

<sup>211</sup> Affidavit of Valerie Scott, at paras. 8-9, 16-17, 24, JAR, Vol. 3, Tab 16, pp. 295, 297, 299.

<sup>212</sup> Affidavit of Valerie Scott, at para. 8, JAR, Vol. 3, Tab 16, p. 295.

<sup>213</sup> Affidavit of Susan Davis, at para. 16, JAR, Vol. 5, Tab 22, p. 936; “Invisible Tragedy: Aboriginal Women’s Issues & Sex Work”, at p. 7, JAR, Vol. 7, Tab 29(B), p. 1733; Research Section, Department of Justice, *Street Prostitution: Assessing the Impact of the Law – Synthesis Report* (Ottawa: Minister of Supply and Services Canada, 1989), at pp.

without being able to adequately assess risks or potential harm.<sup>214</sup> From the experiential witnesses we find these examples of the increase in risk of harm:

SUSAN DAVIS: The communication provisions of the *Criminal Code* have made survival level sex work more dangerous. Out of a fear of arrest, workers jump quickly into a client's car without taking the time to even do an environmental scan for visible weapons and before defining what the customer expects in the way of service and for how much. Sex workers in a situation where there is potential or actual violence must negotiate their way out. In my home, or any other secure indoor location, the client is in my territory and is unaware of my security arrangements, so the client less likely to attempt an assault.<sup>215</sup>

WENDY HARRIS: "...when they implemented, in 1985, they implemented the communication laws, which meant just - I know they had the best of intentions when they made these laws to protect sex workers, but, unfortunately, it's not working and it didn't work, because that placed you in an even more vulnerable position because, to escape detection, you didn't have then time to take time and evaluate this person in front of you, whether it was a good thing or a bad thing or whether you wanted to - you had to make snap decisions and sometimes those are not the best decisions. So it kind of - it made it more underground than what it already was. That's my observation of it."<sup>216</sup>

JODY PATERSON: "Sex workers on the stroll face tremendous danger. They are working at early hours of the morning without protection. Due to the pressures of the "communication" law, women have to make quick decisions that directly affect their safety. They must decide which customers to accept, and whether or not to get into a car with a particular stranger."<sup>217</sup>

CAROL-LYNN STRACHAN: "Another reason why the police are often a part of the sex trade worker safety problem is that the power to lay charges and tow a customer's car, often results in the girls rushing into the car to avoid police detection. In doing so they fail to properly assess the situation to ensure that they are safe."<sup>218</sup>

14. This theme of foregoing screening and making precipitous and uninformed choices is also articulated by the expert witnesses based upon their research and interviews with sex workers, both indoors and outdoors. For example:

LIBBY DAVIES: "The worst aspect is that it is the threat of enforcement that creates a danger: on the street, feeling the threat of prosecution, women make 5 second decisions as to whether to get in a car or not. This decision is very fast and

---

88-89, JAR, Vol. 75, Tab 157, p. 22353.

<sup>214</sup> Affidavit of Jody Paterson, at para. 6, JAR, Vol. 7, Tab 30, p. 1834.

<sup>215</sup> Affidavit of Susan Davis, at para. 16, JAR, Vol. 5, Tab 22, p. 936.

<sup>216</sup> Cross-Examination of Wendy Harris, p. 81 l. 23 – p. 82 l. 10, JAR, Vol. 7, Tab 28, pp. 1671-1672.

<sup>217</sup> Affidavit of Jody Paterson, at para. 6, JAR, Vol. 7, Tab 30, p. 1834.

<sup>218</sup> Affidavit of Carol-Lynn Strachan, at para. 4, JAR, Vol. 8, Tab 32, p. 1867.

very high risk - there is not even enough time to do a full scan of the car and look for weapons that might be used to attack the street worker.”<sup>219</sup>

PROFESSOR GAYLE MACDONALD: Not only does law enforcement fail to protect sex workers, the criminal law actually puts the sex worker in a more vulnerable position in terms of safety. The communications provision of the *Criminal Code* specifically places 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. It must also be remembered that moving into a safer indoor location is not an available legal option.”<sup>220</sup>

PROFESSOR ELEANOR MATIKA-TYNDALE: “While these strategies are important for maximizing security, many sex workers reported that the time they took, as well as the time it took for fellow workers to note license plate numbers, elevated the risk of police arrest. In our research, sex workers spoke of how they and their clients were reluctant to take the time to fully work out expectations such as agreements on services to be provided, fees, and condom use before they moved to a private location. For sex workers this limited their ability to screen for potential bad dates, aggressors, and other risks in order to increase their security.”<sup>221</sup>

PROFESSOR CECILIA BENOIT: “In addition to a work environment that often entails working alone, at night, and in dimly lit areas, the current federal legislation that makes communicating in a public space illegal limits the street worker's ability to screen out potentially violent and dangerous clients... Due to fear of arrest under the communication law, we found in our study (*Dispelling Myths and Understanding Realities*) that street workers engage in hasty curbside negotiations. As one respondent stated, "Girls working the streets constantly have to worry about what's going to happen if they get into a car and who's going to pick them up ... who knows what happens when you get into a car.”<sup>222</sup>

PROFESSOR AUGUSTINE BRANNIGAN: “The criminal laws pertaining to sex work put women into difficult and risky situations. Women working as prostitutes, feel compelled to make hasty decisions (communicating laws)... An area where major change did occur [post Bill C-49] was in the street workers' "adaptation to the risks of arrest which made the prostitutes more passive in their behaviour on the stroll, more evasive in their conversations with dates, and more paranoid about undercover entrapment by the police." In terms of the perception of women working on the streets:

Just under half [of the prostitutes] reported that generally they felt unsafe, and about half felt that the streets had become more dangerous following

---

<sup>219</sup> Affidavit of Libby Davies, at para. 13, *JAR*, Vol. 9 Tab 37, pp. 2380-2381.

<sup>220</sup> Affidavit of Gayle MacDonald, at para. 13, *JAR*, Vol. 11, Tab 42, p. 2772.

<sup>221</sup> Affidavit of Eleanor Matika-Tyndale, at para. 12, *JAR*, Vol. 12, Tab 45, p. 3094.

<sup>222</sup> Affidavit of Cecilia Benoit, at paras. 18-19 *JAR*, Vol. 14, Tab 48, pp. 3422-3423.

the introduction of the law. This was for a variety of reasons including greater pressure from pimps, as well as a change in the nature and attitude of the dates. These changes, however, may be due as much to socio-economic causes as to the legislation”<sup>223</sup>

(ii) **Displacement Effects**

15. Many of the Cross-Appellants’ witnesses also deposed that enforcement of the communication law led to a negative effect of ‘displacement.’<sup>224</sup> Beyond the prohibition on communicating, the risk of violence is increased because “sadly the prostitution laws and societal censure forces sex workers into dark industrial parks and other "out of sight" areas.”<sup>225</sup> Displacement is not simply the innocuous movement of workers to less-disruptive locations but rather “this pattern of movement shows that attempts at criminalization does not eliminate the sex-trade but only serves to make working more dangerous for workers as workers move to more isolated locales.”<sup>226</sup> Even witnesses for the Attorneys General agreed that negative displacement was occurring in various communities.<sup>227</sup> Professor Brannigan provided a clear description of the negative impact of displacement:

I found that the rate of murder as compared between street workers and other women is disproportionately disparate. The operation of the laws has made the work circumstances of prostitutes increasingly vulnerable: they are forced to unsafe areas where their work has to be secretive, independent and untraceable....Overall, recent developments seem to indicate that the criminal laws have progressively pushed street workers into increasingly unsafe areas. The ongoing discovery of bodies at the 'Pickton farm' points to the continued inefficiency of laws which do substantially more harm than good.<sup>228</sup>

16. In his 1989 evaluation of the communication law, Professor Lowman concluded that the “main effect... was displacement of prostitutes to the other two primary prostitution strolls... not the reduction in the overall amount of street prostitution.”<sup>229</sup> With respect to Vancouver, Professor

<sup>223</sup> Affidavit of Augustine Brannigan, at paras. 3, 6, **JAR, Vol. 8, Tab 34, pp. 1966-1968** [Internal citations omitted].

<sup>224</sup> Affidavit of Darlene Maurganne Mooney, at para. 16, **JAR, Vol. 7, Tab 29, pp. 1689-1690**; Affidavit of Jody Paterson, at paras. 11, 15, **JAR, Vol. 7, Tab 30, pp. 1836-1837**; Affidavit of Carol-Lynn Strachan, para. 9, **JAR, Vol. 8, Tab 32, p. 1869-1970**; Affidavit of Augustine Brannigan, at paras. 4, 14, **JAR, Vol. 8, Tab 34, pp. 1967, 1971-1972**; Deborah Brock & National Action Committee on the Status of Women, *The Impact of Bill C-49 on Street Solicitation: A Summary* (1989), at p. 2, **JAR, Vol. 9, Tab 35(C), p. 2227**; Eleanor Maticka-Tyndale et. al., *Safety, Security and the Well-Being of Sex Workers*, at pp. 22-23; **JAR, Vol. 12, Tab 45(B), p. 3147-3148**; Affidavit of Frances Shaver, at para. 22, **JAR, Vol. 24, Tab 55, p. 6814**.

<sup>225</sup> Affidavit of Jody Paterson, at para. 11, **JAR, Vol. 7, Tab 30, p. 1836**.

<sup>226</sup> Affidavit of Deborah Brock, at para. 12, **JAR, Vol. 9, Tab 35, p. 2206**.

<sup>227</sup> Cross-examination of Oscar Ramos, p. 23 l. 12 – p. 26 l. 14, **JAR, Vol. 36, Tab 87, pp. 10438-10441**; Cross Examination of Kathleen Quinn, at p. 98 l. 6 – p. 101 l. 1, **JAR, Vol. 38, Tab 97, pp. 11156-11159**.

<sup>228</sup> Affidavit of Augustine Brannigan, at paras. 9, 14, **JAR, Vol. 8 Tab 34 at 1969, 1971**.

<sup>229</sup> Lowman, John “Street Prostitution: Assessing the Impact of the Law-Vancouver” *Research Section, Department of Justice*, at p. 199, **JAR, Vol. 17, Tab 51(G), p. 4760**.

Lowman recounts how the 1984 nuisance injunctions unintentionally displaced sex workers from the West End into the residential neighbourhood of Mount Pleasant, and subsequent law enforcement initiatives to move these workers out of this neighbourhood intentionally displaced them into a more hazardous environment. From 1995 through 2001, about 50 women went missing who worked this “orange-light” district, including the 26 women Mr. Pickton was charged with murdering.<sup>230</sup>

17. Beyond experiential and empirical evidence, there is support in government debates and reports for the proposition that a prohibition on communication increases risk. Even when the communication provision was first being proposed in the legislature in 1985, concerns were expressed that this enactment would lead to increased violence. The current Minister of Justice and Attorney General of Canada Rob Nicholson, then the Member of Parliament for Niagara Falls, remarked that “it seems fairly logical to me, that out on the street, or on a dark street or in an alley or in a parking lot, that is perhaps where people are most vulnerable... Do you not agree that maybe the street corner or the alley or the parking lot may be more dangerous... than the bars or the hotels or the small brothels?”<sup>231</sup> Further, various MPs and Senators noted that Bill C-49 did not address any recommendations made just months earlier by the Fraser Committee:

The Fraser commission...said that we should decriminalize prostitution, remove the criminal sanctions, and take a look at our bawdy house laws. It recommended we should ensure that, if we do sweep the streets clean, there is an alternative place for adult prostitutes to work... this fundamental recommendation has been completely ignored by this government.<sup>232</sup>

Because we will not see the prostitutes, violence will certainly increase.... All studies show that violence will increase after passage of such a bill.<sup>233</sup>

[T]he present bill, which has been described by some as a ‘legislative sledge hammer’, goes too far... It must be remembered that, at present, prostitution is not illegal in Canada... [I]t appears that the government has, under pressure, acted hastily and without due consideration for all of the ramifications ...<sup>234</sup>

18. A few years later, in 1989, the Department of Justice’s mandatory three year review of the

<sup>230</sup> Affidavit of John Lowman, at paras. 11-13, **JAR, Vol. 15, Tab 51, p. 4150-4151.**

<sup>231</sup> Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, October 24, 1985, at p. 4:22, **JAR, Vol. 72, Tab 155(E), p. 21495.**

<sup>232</sup> Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, November 7, 1985, at pp. 8:42-8:43 (Mr. Robinson), **JAR, Vol. 73, Tab 155(I), pp. 21745-21746.**

<sup>233</sup> Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, November 7, 1985, at p. 8:51 (Mme. Pepin), **JAR, Vol. 72, 21754.**

<sup>234</sup> Debates of the Senate, December 3, 1985, at pp. 1561, 1563 (The Hon. Derek Lewis), **JAR, Vol. 73, Tab 155(K), p. 21776, 21778.**

new communications law, *Street Prostitution: Assessing the Impact of the Law*, expressed concern that “some prostitutes in all the main study sites stated that they worked under more tense conditions... according to many prostitutes, area restrictions – aimed at removing them from main prostitution strolls – simply forced them to work in more isolation, increasing the danger to them.”<sup>235</sup>

19. In 1994 and 1995, the Federal/Provincial/Territorial Working Group on Prostitution commissioned studies on violence against prostitutes in Halifax, Montreal, Toronto, Calgary, Winnipeg and Vancouver. The conclusions drawn by the Working Group in 1998 were as follows:

In Vancouver, researchers felt that the implementation of s. 213 [the communicating provision] had consolidated the criminal status of street prostitutes, forced them to work in more remote areas and pushed into more adversarial relationships with police. This situation was believed to contribute to the murder of street prostitutes ... In Montreal, there was evidence that enforcement of s. 213 had resulted in prostitutes working in more remote areas, being less careful in choosing from a diminished number of customers and being further entrenched in drug use than had been reported in earlier studies.<sup>236</sup>

20. The Subcommittee On Solicitation Laws in Canada released its report in 2006, reiterating the findings of previous reports and concluding that the communication provision had been ineffective in achieving its legislative objective, and had instead resulted in displacement and increased vulnerability for sex workers.

[N]umerous 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.

...

Section 213's failure to combat street prostitution is well documented... all the evaluation studies carried out by the Department of Justice in support of the Bill C-49 review process, as well as the study conducted in the mid-1990s by the Federal/Provincial/Territorial Working Group on Prostitution, found that section 213 had failed. Its enforcement has not reduced street prostitution activity or even the number of complaints by residents of Canada's large cities. Yet this was

---

<sup>235</sup> Research Section, Department of Justice, *Street Prostitution: Assessing the Impact of the Law – Synthesis Report* (Ottawa: Minister of Supply and Services Canada, 1989), at pp. 88-89, **JAR, Vol. 75, Tab 157, p. 22353**.

<sup>236</sup> Federal/Provincial/Territorial Working Group on Prostitution, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* (1998), at pp. 8-9, **JAR, Vol. 79, Tab 160, p. 23874-23875**.

the goal when section 213 was introduced.<sup>237</sup>

## PART II – QUESTIONS IN ISSUE

21. With respect to the constitutional questions stated by the Chief Justice related to the cross-appeal, the Appellants on Cross Appeal submit that s. 213(1)(c) of the *Criminal Code* violates ss. 2(b) and 7 of the *Charter of Rights and Freedoms*, and that neither violation can be saved under s. 1.
22. More specifically, the Appellants on Cross-Appeal submit that:
1. The Court of Appeal erred in its assessment of gross disproportionality in finding that the legislative objectives underlying s.213(1)(c) extend beyond social and street nuisance concerns;
  2. The Court of Appeal erred in its assessment of gross disproportionality by finding that the harms caused by a prohibition on communication had a limited and marginal impact on the security of sex workers;
  3. The Court of Appeal erred in not finding that there has been a sufficiently significant change in circumstance and context warranting a reconsideration of the issue of whether the communication provision constitutes a reasonable limit on free expression;
  4. Had the Court of Appeal properly reconsidered the s.1 in respect of the s. 2(b) violation, it would have found that the provision no longer constitutes a reasonable limit as a result of it operating in an ineffective and grossly disproportionate manner.

## PART III – STATEMENT OF ARGUMENT

### 1. THE DISSENTING REASONS OF MACPHERSON AND CRONK J.J.A.

23. With respect to gross disproportionality, the dissenting judges present a powerful and persuasive critique of the logical and legal flaws in the reasoning of the majority's decision. There are 7 reasons presented for this compelling dissent and the Appellants on Cross Appeal adopt all seven as grounds to support the cross-appeal. This factum can only supplement those reasons, not improve upon them. The seven reasons are briefly summarized as follows:

#### **Error 1 – Internal Inconsistency**

The majority's analysis and application of gross disproportionality is inconsistent with its analysis and application of the doctrine to the other two impugned offences. In particular the majority invokes the "cruel and unusual" terminology of "abhorrent" and "intolerable" to describe the operation of gross disproportionality when it analyzes the communication offence.<sup>238</sup>

<sup>237</sup> House of Commons, *Report of the Standing Committee on Justice and Human Rights, "The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006), at 62 & n. 206, **JAR**, Vol. 82, Tab 164, p. 24967.

<sup>238</sup> *Bedford OCA, supra*, at paras. 338-344, **AR**, Vol. II, Tab 7, pp. 134-137.

**Error 2 – Overstating the Objective**

The majority overstated the state objectives underlying the communication offence and extended the objectives to ones specifically rejected by this Court in the *Prostitution Reference*, such as the suppression of public drug use and trafficking, violence, and organized crime.<sup>239</sup>

**Error 3 – Discounting the Importance of Communicative Screening**

The majority discounted the importance of communicative screening for ensuing safety and ignored the evidence of numerous experiential witnesses who testified to the importance of this rudimentary screening.<sup>240</sup>

**Error 4 – Underestimating Risk and the Evidence of Displacement**

The majority underestimated the magnitude of the risk of harm facing sex workers by completely disregarded the evidence of the dangers of displacement.<sup>241</sup>

**Error 5 – Disregarding Unique Vulnerability**

The majority misunderstood the significance of the unique vulnerability of street sex workers and mistakenly concluded that “because prostitutes marginalization contributes to their insecurity, the adverse effects of the law are diluted and given less weight.”<sup>242</sup>

**Error 6 – Failure to Apply the Reasoning in the *Insite* case**

The majority failed to properly apply the reasoning of this Court’s decision in *PHS*.<sup>243</sup>

**Error 7 – Failure to take into Account the “world in which street prostitutes actually operate”**

The majority erred in concluding that the invalidation of the bawdy house provision, and re-interpretation of the living on the avails provision, will “cure” the problem with respect to the communication prohibition as many street workers cannot avail themselves of these other options.<sup>244</sup>

24. Some of the identified errors (#1,5,6) relate to flaws in logic, consistency and reasoning and the Cross-Appellants have little to add to the critique. The other factors all revolve around the issues of the proper construction of legislative objectives and the proper assessment of the magnitude of harm facing sex workers deprived of the right to communicate. The Appellants on Cross-Appeal wish to supplement the analysis of these two issues with the following submissions.

**2. A PROPER UNDERSTANDING OF LEGISLATIVE OBJECTIVES**

<sup>239</sup> *Bedford OCA, supra*, at paras. 345-347, AR, Vol. II, Tab 7, pp. 137-138.

<sup>240</sup> *Bedford OCA, supra*, at paras. 348-350, AR, Vol. II, Tab 7, pp. 138-139.

<sup>241</sup> *Bedford OCA, supra*, at paras. 351-353, AR, Vol. II, Tab 7, pp. 139-141.

<sup>242</sup> *Bedford OCA, supra*, at paras. 354-360, AR, Vol. II, Tab 7, pp. 141-143.

<sup>243</sup> *Bedford OCA, supra*, at paras. 361-363, AR, Vol. II, Tab 7, pp. 143-144.

<sup>244</sup> *Bedford OCA, supra*, at paras. 364-371, AR, Vol. II, Tab 7, pp. 144-147.

25. In the Respondents' factum on the main appeal, the Respondents presented arguments to rebut the claim of the Attorneys General that all the impugned provisions operate as a comprehensive package designed to deter prostitution and the commercialization of the trade. The Court of Appeal accepted that the legislative objectives are far more modest than the idealized objectives advanced by the Attorneys General.

26. However, with respect to the offence of communication, the majority of the Court concluded that the application hearing judge placed "too little weight on the legislative objective factor." The majority concluded that Himel J. appeared to place "street prostitution towards the low end of the social nuisance spectrum"; whereas the majority concluded that "this was not an accurate reflection of the evidence."<sup>245</sup> However, the only "evidence" the majority then mentions to elevate the objective in the "social nuisance spectrum" is to note that "street prostitution is associated with serious criminal conduct including drug possession, drug trafficking, public intoxication and organized crime."<sup>246</sup>

27. As the dissenting justices pointed out, "my colleagues inclusion of this other criminal behavior therefore seriously skews their analysis."<sup>247</sup>

28. Even if assuming *arguendo* that street prostitution has these negative associations and that enforcement of the communication law may incidentally serve to reduce the incidence of these secondary crimes, but it is puzzling for the majority of the Court to include other serious crimes as part and parcel of the social and street nuisance objective. First, the majority provides no reason for the clear and dramatic departure of this Court's construction of the legislative objectives in the 1990 *Prostitution Reference*. The language and reasoning of the majority of the members of the Court in the *Prostitution Reference* leave no doubt regarding the improper expansion of the objectives by the Court of Appeal in this case. This Court categorically rejected the notion that the communication law had any objective other than public exposure to street prostitution and social nuisance:<sup>248</sup>

Lamer J. finds that the legislature's objective goes beyond preventing congestion in the streets and sidewalks; it has the additional objective of restricting the entry of young girls into an activity that is degrading to women and is associated with

---

<sup>245</sup> *Bedford OCA, supra*, at paras. 305-306, **AR, Vol. II, Tab 7, p. 122.**

<sup>246</sup> *Bedford OCA, supra*, at para. 307, **AR, Vol. II, Tab 7, p. 123.**

<sup>247</sup> *Bedford OCA, supra*, at para. 347, **AR, Vol. II, Tab 7, p. 138.**

<sup>248</sup> This Court had the opportunity in 1995 to re-visit this conclusion in *R. v. Mara*, [1997] 2 S.C.R. 630, **Resp. Auth., Tab 31**. This appeal involved lap-dancing and the offence keeping a bawdy house for an indecent purpose. The court below appeared to have adopted the conclusion of Lamer J. in the *Prostitution Reference* with respect to the expanded objectives of the sex trade laws. However, on appeal this Court made no comment on the propriety of this expansion.

drugs, crime and physical abuse.

While I do not disagree with my colleague that prostitution is, for the reasons he gives, a degrading way for women to earn a living, I cannot agree with his conclusion that s. 195.1(1)(c) of the Code attempts to address that problem...

Neither prostitution nor solicitation is made illegal. But the high visibility of these activities is offensive and has harmful effects on those compelled to witness it, especially children. This being the legislative approach to prostitution it forecloses, in my view, any suggestion that in s. 195.1(1)(c) Parliament intended to stamp out all the ills and vices that my colleague sees as flowing from prostitution. The provision addresses only one narrow aspect of prostitution namely solicitation in public places.<sup>249</sup>

...

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.<sup>250</sup>

29. As noted in the factum of the Respondents on Appeal, the Court of Appeal erred by taking into account supposed secondary salutary effects in their construction of the objectives of the bawdy house law.<sup>251</sup> This error is repeated with respect to the communication law, and compounded by an erroneous approach to measuring gross disproportionality. As noted in the factum of the Respondents on Appeal, this discussion and analysis of salutary and deleterious effects is reserved for analysis under s. 1 of the *Charter*, not section 7.

30. Assuming, without conceding, that the government could prove on a balance of

<sup>249</sup> *Prostitution Reference, supra*, at 1209-1211 (per Wilson J.), **Resp. Auth., Tab 47**.

<sup>250</sup> *Prostitution Reference, supra*, at 1134-1135 (per Dickson C.J.), **Resp. Auth., Tab 47**.

<sup>251</sup> See paras. 107-111 of the Factum of the Respondents on Appeal.

probabilities that prostitution is associated with drug trafficking and organized crime, this s. 1 factor has no place in the analysis of the principles of fundamental justice. An incidental and windfall benefit does not become a legislative objective simply because there may emerge some evidence, or an assumption, that enforcement of the primary crime is an effective tool for enforcing a secondary crime.

### 3 THE IMPACT ON THE SECURITY OF STREET-BASED WORKERS

31. The majority of the Court of Appeal erred by discounting the importance of communicative screening for ensuing safety and ignoring the evidence of numerous witnesses who testified to the importance of this rudimentary screening.<sup>252</sup> In doing so, the Court of Appeal failed to appreciate the importance of communication as a good in itself. The right to communicate is a fundamental freedom and its value is not defined by reference only to its utility. The Court of Appeal did not factor into the balance that the sex worker is not only deprived of a “limited” tool for safety but is also being deprived of a fundamental right.

32. It is submitted that discounting the importance of communication for increasing the safety of sex work is inexplicable in light of the recognized importance of communication for increasing the safety of sex itself. In 1992, Parliament enacted a new statutory definition of consent and in 1999, this Court interpreted the statutory term “voluntary agreement” to mean “that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity.”<sup>253</sup> The communication provision prevents both the buyer and seller of sex from defining the boundaries of their respectful consents in a legally recognized manner, and thus exposing both to conduct that may well constitute a crime.

33. The majority concluded that the prohibition on communicating has only a limited impact on security for a number of reasons: (a) the customer screening process by way of face-to-face communication is not infallible; (b) the evidence regarding the safety benefits of communication as a screening tool is not as robust as the evidence regarding the benefits of moving indoors and paying support staff; (c) face-to-face communication is not the sole tool prostitutes have to assess the risk of harm, and there are other methods available, such as “intuition”; and (d) the inability to communicate is not the sole and direct cause of the security infringement but merely one of many factors that contributes to the risk faced by prostitutes.<sup>254</sup>

34. While each of these conclusions might arguably be correct in themselves, they do not

---

<sup>252</sup> *Bedford OCA, supra*, at paras. 348-350 (MacPherson J.A., dissenting), **AR, Vol. II, Tab 7, pp. 138-139**.

<sup>253</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 49, **Resp. Auth, Tab 21**.

<sup>254</sup> *Bedford OCA, supra*, at paras. 312-316, **AR, Vol. II, Tab 7, pp. 125-127**.

logically support the broader conclusion they seek to uphold: that face-to-face communication with prospective customers is not essential to enhancing prostitutes' safety. In the case of protecting vulnerable groups such as street prostitutes from harm, where the magnitude of the risk is grave, any reasonable safety tool should be made available, regardless of its perceived fallibility or the availability of other tools.

35. Further, while other risk assessment tools may be available to street prostitutes, it is highly plausible that their effectiveness would be diminished or entirely negated without the use of communication to complement them. The Court of Appeal suggested that "intuition and techniques such as assessing the prospective customer's appearance, checking the backseat of his car...checking for the presence or absence of door handles and lock release buttons...[and] tak[ing] down ... the licence plate numbers of ... cars they get into"<sup>255</sup> are adequate substitutes for communication. However, there is no evidence, and it seems contrary to common sense, to suggest that these techniques could be effectively executed without the use of some degree of verbal communication, or the time that communication grants to the sex worker to meaningfully assess her surrounding circumstances.

36. To compound the error of understating the risk and magnitude of harm, the majority of the Court of Appeal completely disregarded the evidence of the dangers of displacement.<sup>256</sup> By displacing prostitutes into isolated areas, marginalizing them and discouraging them from working together, the enforcement of the communication prohibition substantially increases the risks faced by prostitutes. The majority of the Court of Appeal erred by overlooking the effects of displacement and assigning no weight to the impact of the law in action.

37. When facing severe or catastrophic harm, the law should provide all the necessary tools to prevent the harm. In this context, the law should not take away a tool on the basis of a belief the tool may not be entirely effective. The law cannot simply ignore the catastrophic nature of the harm being faced by sex workers, even if it believes it can only reduce the risk of that harm minimally. As the Court of Appeal said in a different context:

When the gravity of the potential harm is great — in this case "catastrophic" — the public is endangered even where the risk of harm actually occurring is slight, indeed even if it is minimal.<sup>257</sup>

#### 4. FREE EXPRESSION AND REASONABLE LIMITS

---

<sup>255</sup> *Bedford OCA, supra*, at para. 313, **AR, Vol. II, Tab 7, p. 125.**

<sup>256</sup> *Bedford OCA, supra*, at paras. 351-353, **AR, Vol. II, Tab 7, pp. 139-141.**

<sup>257</sup> *Thornton, supra*, at 488, **Resp. Auth., Tab 43.**

38. In the *Prostitution Reference*, this Court concluded that s. 213 violated freedom of expression but represented a reasonable limit upon this fundamental freedom. The application judge in this case distinguished the present case from the *Prostitution Reference* because of “the changed context” in the 20 years since that case was decided, concluding that the communication provision could no longer be saved by s. 1. The application judge’s conclusion was correct.

39. There are three important developments since 1990 which necessitate a reconsideration of the reasonableness of the communication prohibition before this Court: (1) the availability of reports and studies that demonstrate the ineffectiveness of the prohibition in achieving its purpose and the contribution of the prohibition to the displacement and increased risk experienced by sex workers; (2) a recognition in anecdotes, studies and reports about the value of communication as “protective speech” aimed at screening customers and preventing harm, beyond mere “commercial speech”; and (3) new law reform developments in foreign jurisdictions.

40. In light of this new evidence, it is respectfully submitted that the application judge did not err in concluding that the balancing test required under s. 1 should be revisited. The application judge’s conclusion merely echoed the conclusions of the 1998 Federal/Provincial/Territorial Working Group on Prostitution, which stated that, “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.”<sup>258</sup>

41. In 1990, this Court was not presented with any arguments or evidence to raise for consideration the real possibility that communication for the purposes of prostitution might be used as a screening mechanism to protect sex workers or that the prohibition on “communication” could serve to impair a sex worker’s life and security interests. In the *Prostitution Reference*, Dickson C.J. merely characterized the nature of communication for the purposes of prostitution as commercial speech: “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.”<sup>259</sup>

42. Upon the discovery and recognition of the safety-enhancing value of communication, it would be necessary to re-cast the balance under s. 1. All expressive activity is protected under s.

---

<sup>258</sup> Federal/Provincial/Territorial/Working Group on Prostitution, *Report and Recommendations in respect of Legislation Policy and Practices Concerning Prostitution-Related Activities* (1998), at p. 7, JAR, Vol. 79, Tab 160, p. 23873.

<sup>259</sup> *Prostitution Reference*, supra, at 1136 (per Dickson C.J.). See also pp. 1188 (per Lamer J.), 1206 (per Wilson J.), Resp. Auth., Tab 47.

2(b) regardless of its societal value, but in analyzing whether an impugned provision can be saved under s. 1, the courts factor into the equation the relative value of the speech in question – a finding of a reasonable limit has often followed a characterization of speech as having little or no value.<sup>260</sup> The application judge concluded that the new characterization and understanding of the value of speech significantly changed the context of the 1990 s. 1 analysis:

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.<sup>261</sup>

43. In 1990, the international landscape was uniform and this Court was not presented with any legislative alternatives to assist in determining whether our law was a minimal impairment on rights. Accordingly, Lamer J. correctly noted that “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.”<sup>262</sup> However, in the past 20 years numerous different models have emerged which are focused on harm-reduction objectives. Canada’s approach to prostitution is growingly increasingly out of step with other liberal democracies.

44. In determining if a limit is reasonable, courts will often explore the legislative options in place in other jurisdictions. For example, this Honourable Court upheld the prohibition on assisted suicide partly on the basis that other free and democratic societies have also maintained a ban on this conduct,<sup>263</sup> and this Honourable Court invalidated the constructive murder provisions partly on the basis that other Commonwealth jurisdictions had already repealed similar laws.<sup>264</sup>

45. Whether or not Canada is “no longer in step with changing international responses,”<sup>265</sup> the important point to be taken from this evidence is that there now exists a diversity of legislative responses for combating the harms of street prostitution. There is no longer a basis for deferring to Parliament to accept as a reasonable limit a harm-increasing law when there are viable harm

---

<sup>260</sup> *R. v. Lucas*, [1998] 1 S.C.R. 439 at paras. 88-97, **Resp. Auth., Tab 27**; *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para 181 (per L’Heureux-Dube), **Resp. Auth., Tab 39**, *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 759-760, **Resp. Auth., Tab 25**; *RJR-MacDonald Inc. v. Canada (AG)*, [1995] 3 S.C.R. 199 at paras. 71-73 (per La Forest J.), 132 (per McLachlin J.), **Resp. Auth., Tab 49**; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, at para. 94, **Resp. Auth., Tab 4**.

<sup>261</sup> *Bedford SCJ*, *supra*, at para. 471, **AR, Vol. I, Tab 3, p. 122**.

<sup>262</sup> *Prostitution Reference*, *supra*, at 1200, **Resp. Auth, Tab 47**.

<sup>263</sup> *Rodriguez*, *supra* at 581-582, 613, **Resp. Auth., 50**.

<sup>264</sup> *Vaillancourt*, *supra*, at 650, **Resp. Auth., Tab 44**.

<sup>265</sup> *Bedford SCJ*, *supra*, at para. 481, **AR, Vol. I, Tab 3, p. 125**.

reducing options now available for consideration in Canada.

46. Furthermore, it is submitted that an “ineffective” law, or a law which cannot meet its objectives, can never constitute a reasonable limit because it must necessarily fail to balance between salutary and deleterious effects. As the application judge concluded, “the law does not effectively curtail the social nuisance associated with street prostitution,”<sup>266</sup> “the communicating provision so severely trenches upon the rights of prostitutes”, and the “rights infringement is even more severe given the evidence demonstrating the law's general ineffectiveness in achieving its purpose”.<sup>267</sup> Allowing an ineffective law to cure or save a violation of free expression would mean that expressive freedom could then be violated for no apparent reason.

47. It is acknowledged that this Honourable Court has stated on two occasions that there is no free-standing constitutional review of the efficacy of the law, as this would be an unjustified intrusion onto the realm of public policy.<sup>268</sup> However, both cases involved division of powers challenges, and it is clear that the efficacy of law would not be relevant to the jurisdictional question of legislative competence. In the context of judicial review for violations of the *Charter*, this Court has recognized that efficacy of the law is relevant to the s. 1 determination of reasonable limits. In two cases, this Court has entertained arguments relating to the constitutional implications of a failing or ineffective law, but the arguments were rejected on the basis of evidentiary shortcomings in the proof of ineffectiveness and not on the basis that ineffectiveness is irrelevant in a determination of whether rights have been violated, or can be justified.<sup>269</sup>

48. In *Keegstra*, the hate literature provisions of the *Criminal Code* were upheld as a reasonable limit on freedom of expression. The dissenting judges would not uphold the provisions as a reasonable limit, finding that the evidence suggested that these types of hate literature provisions are ineffective in achieving their stated objectives. Dickson C.J., for the majority, addressed this claim of inefficacy, concluding that there was insufficient evidence to support the argument. However, he did recognize that an ineffective law is an arbitrary and irrational one, stating that:

If s. 319(2) can be said to have no impact in the quest to achieve Parliament's

---

<sup>266</sup> *Bedford SCJ, supra*, at para. 498, **AR, Vol. I, Tab 3, p. 128.**

<sup>267</sup> *Bedford SCJ, supra*, at para. 504, **AR, Vol. I, Tab 3, p. 130.**

<sup>268</sup> *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, at para. 57, **Resp. Auth., Tab 46; Ward v. Canada (AG)**, [2002] 1 S.C.R. 569, at para 18. **Resp. Auth., Tab 56;** see also *Malmo-Levine, supra*, at para. 177, **Resp. Auth., Tab 29.**

<sup>269</sup> In *Malmo-Levine* this Court concluded that the evidence submitted with respect to the failure of the law to deter marijuana use did not prove ineffectiveness, but rather just demonstrated civil disobedience. Similarly, in *Keegstra* the evidence of ineffectiveness was not considered probative as it was more in the nature of historical opinion than evaluative studies.

admirable objectives, or in fact works in opposition to these objectives, then I agree that the provision could be described as “arbitrary, unfair or based on irrational considerations” (Oakes, *supra*, at p. 139)... however, the position that there is no strong and evident connection between the criminalization of hate propaganda and its suppression is unconvincing.<sup>271</sup>

49. Finally, if this Honourable Court agrees with the dissenting judges below that the provision is grossly disproportionate, this would undercut any basis for then upholding the provision as a reasonable limit on expressive freedom. However, it is submitted that even if this Court concludes that the majority of the Court of Appeal was correct in finding that the communication provision is not grossly disproportionate, this would not mean that the evidence demonstrating both the tragic dangers of street work and the value of protective communication should not play a significant role in the reconsideration of s. 1. It is agreed by all that s. 213(1)(c) violates the fundamental freedom of expression and it is agreed by all that there are working on the street exposes the sex worker to clear and present dangers. It is implausible to argue that this rights-infringing law could constitute a reasonable limit in light of new evidence showing that the restriction on freedom is taking place in a volatile, unpredictable and violent environment.

#### **PART IV – SUBMISSIONS RESPECTING COSTS**

50. The Appellants on Cross-Appeal make no submissions respecting costs.

#### **PART V – ORDER REQUESTED**

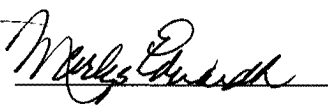
51. The Appellants on Cross-Appeal request an order allowing the cross-appeal and declaring that s. 213(1)(c) violates ss. 2(b) and 7 of the *Charter* and is of no force or effect. The fifth and seventh constitutional questions should be answered in the affirmative, and the sixth and eighth should be answered in the negative.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

DONE at the City of Toronto, this 28 day of April, 2013



Alan N. Young



Marlys A. Edwardh



Daniel Sheppard

Counsel for the Appellants on Cross-Appeal, Terri-Jean Bedford, Amy Lebovitch and Valerie Scott

<sup>271</sup> *Keegstra, supra*, at 768, **Resp. Auth, Tab 25**.

## PART VI – AUTHORITIES CITED

Authority	Cited at Para.
<i>Canada (Attorney General) v. JTI-Macdonald Corp.</i> , [2007] 2 S.C.R. 610	42
<i>R. v. Ewanchuk</i> , [1999] 1 S.C.R. 330	32
<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697	42, 47, 48
<i>R. v. Lucas</i> , [1998] 1 S.C.R. 439	42
<i>R. v. Malmo- Levine; R. v. Caine</i> , [2003] 3 S.C.R. 571	47
<i>R. v. Mara</i> , [1997] 2 S.C.R. 630	28
<i>R. v. Sharpe</i> , [2001] 1 S.C.R. 45	42
<i>R. v. Thornton</i> (1991), 1 O.R. (3d) 480 (C.A.), aff'd [1993] 2 S.C.R. 445	37
<i>R. v. Vaillancourt</i> , [1987] 2 S.C.R. 636	44
<i>RJR-MacDonald Inc. v. Canada (AG)</i> , [1995] 3 S.C.R. 199	42
<i>Reference re Firearms Act (Can.)</i> , [2000] 1 S.C.R. 783	47
<i>Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123	5, 28, 38, 41, 43
<i>Rodriguez v. British Columbia (Attorney General)</i> , [1993] 3 S.C.R. 519	44
<i>Ward v. Canada (AG)</i> , [2002] 1 S.C.R. 569	47

**PART VII – LEGISLATIVE PROVISIONS**

No additional provisions are relied upon.

## Appendix A:

### *Government Debates and Reports: Risk of Harm and Displacement, 1983 – Present*

Mr. Hnatysbyn (Member of Committee):

: ...the difficulty of moving the prostitutes off the street into some other place where it is not considered to be a public place when you think about it, you are kind of saying in one sense, that you do not like all this accompanying violence, harassment, beatings and so on that seems to accompany that profession on the streets. But, you are quite happy to have that take place indoors.

Mr. Bland (Corporation Counsel, City of Vancouver): In fact, our experience in Vancouver was that, when it was indoors the associated problems were not there. I cannot guarantee that for the future, but that was our experience.

Mr. Hnatysbyn: They gave us some pretty graphic slides here. It seems to be a new course of bringing evidence; have a slide show, movie or something. It showed some interior scenes with respect to these things that were pretty grim activities.

Mr. Bland: Our judgment had been based on experience that we would not have much difficulty. First of all, there would be very little of that indoors because the management of those places have a vested interest in preventing it. The experience has been that when it was indoors, questions of actual violence were not great.

House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue No. 84* (13 May 1982), **J.A.R., Vol. 68, Tab 152B, pp. 20218.**

Ms. Tamra Thomson (Ontario Representative on the National Steering Committee):

In addition, we might also look at amending certain of the "bawdy house" offences that would allow a prostitute to run her business in her own home: This would allow her to provide better for her own personal safety. Again, if we are going to get prostitution off the street, then we have to give the prostitutes some place to ply their trade. The idea of allowing a prostitute to run her business in her home is actually a very common occurrence in France, where this is allowed.

House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue No. 88* (26 May 1982), **J.A.R., Vol. 68, Tab 152D, pp. 20295.**

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.

Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, *Volume 2*, **J.A.R., Vol. 71, Tab 154B, pp. 20911.**

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

Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, *Volume 2, J.A.R., Vol. 71, Tab 154B, pp. 21050.*

...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.

Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, *Volume 2, J.A.R., Vol. 71, Tab 154B, pp. 21051.*

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.

Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, *Volume 2, J.A.R., Vol. 71, Tab 154B, pp. 21053.*

...the criminal law's concern with the exploitative aspects of prostitution in the case of adults should be limited to conduct which is forcible or threatens force. The present formulation of the living on the avails clause is, of course, much broader. Indeed, it embraces a set of relationships which include some at least which are not characterized by violence or its threat. The designation "pimp" is one which is clearly used in a very loose and imprecise fashion in Canada. It extends from the most deplorable professional and thoroughly violent individual who exploits in every way possible a single prostitute or a group of prostitutes, to husbands or lovers, who while they benefit from the prostitution of their partner do not subject them to force or threat thereof. In some instances, it is clear that the involvement in prostitution is a reflection of the economic hardship of a couple, and an agreement by the female partner to contribute to the family budget. The point here is not to deflect attention from the totally unacceptable nature of parasitic pimping, or even the undesirability of individuals resorting to prostitution for purely economic reasons. It is to suggest that the present provision is so broadly drawn that it embraces relationships which, it may be said, do not deserve the attention of the criminal law.

Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, *Volume 2, J.A.R., Vol. 71, Tab 154B, pp. 21061.*

Bob Kaplan (MP York Centre): Given the Government's recognition of the problem, I would say that the solution proposed is a bankrupt and hypocritical one. It can be characterized almost literally as a band-aid solution. It is like putting a band-aid over a very serious social problem. People who look at it from their houses, their front porches, will see that the problem disappears from sight, but it will not disappear in fact. Anyone who considers this legislation carefully can predict that the problem of prostitution will become much worse. I recognize that the total amount will be reduced, and that will be a good thing, but the prostitution which will continue will be pushed into a much worse situation.

*House of Commons Debates* (9 September 1985) (*Debate on Bill C-49*), **J.A.R., Vol. 72, Tab 155A, pp. 21285.**

Lucie Pepin (Member, Outremant): According to the National Action Committee on the Status of Women, Bill C-49 is trying to deal with the problem of street prostitution piecemeal, without considering the economic and social climate that fosters this phenomenon. Furthermore, the Bill fails to suggest any legitimate venue where prostitution may take place, thereby increasing the risk of violence for prostitutes.

When the Minister of Justice presented his Bill in committee and we mentioned the risk of violence for prostitutes, and also that the Bill went far beyond street soliciting as such, his answer was that once the prostitutes were banned from the streets, they might have more trouble finding customers but that really was no concern of his.

It is therefore not surprising to find this kind of legislation before the House, since we have the impression that the Minister himself is not terribly concerned about what enforcement of this legislation will do.

*House of Commons Debates* (20 November 1985) (*Debate on Bill C-49*), **J.A.R., Vol. 72, Tab 155A, pp. 21317.**

Mr. Nicholson (Member, Niagara Falls): In your executive summary, number four, you say that if the bill is passed, among other things, it will subject prostitutes to a greater risk of violence. I have a bit of a problem with that. We had a couple of groups in yesterday who according to their experience in the west end of Vancouver and Halifax indicated, and it seems fairly logical to me, that out on the street, or on a dark street or in an alley or in a parking lot, that is perhaps where people are most vulnerable; that they may be less vulnerable in hotels to violence. I am just wondering on what you base that statement. I have heard it a couple of times now that particularly women would be more subject to violence. Do you not agree that maybe the street corner or the alley or the parking lot may be more dangerous, for instance, than the bars or the hotels or the small brothels?

Ms Ridington (Researcher, National Action Committee on the Status of Woman): Exactly. What we are saying is to let them be in the bars and the hotels and the small brothels. They are safer places. If they had that option they would be there. Say you have a small apartment with six women each having an apartment and they are all making their living as prostitutes. You could have a buddy system, if one woman is being attacked, everybody is going to know about it. She is going to be a 101 safer there than she is going to be in a dark alley, for sure.

Mr. Nicholson: Actually, I am pleased to hear you say that, because if Bill C-49 is passed and it has the effect of removing prostitutes from the streets and the alleys and the parking lots, then you would agree to that extent that it is a good thing. It would decrease violence...

Ms. Ridington: No, I would not, because it does not allow them to go into the bars and brothels; it does not allow them to go anywhere. It therefore will increase competition among prostitutes and require them to have pimps to protect them; and where you get into the violence and the drugs and so on is when pimps get involved.

*House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49. Issue No. 4* (24 October 1985), **J.A.R., Vol. 72, Tab 155E, pp. 21495.**

Mr. Nicholson: I would like to ask your opinion about the susceptibility to violence of the prostitutes who remain in the business. If we do not pass legislation of this type and street soliciting continues, do you think the men and women who are prostitutes are more susceptible to violence out on the street corners or in the alleys or in the parking lots than they would be if they were indoors or in escort services? It has been suggested to us that somehow the prostitutes who remain in the business are going to be more

susceptible to violence because, if it is out of sight, it is more difficult to get at. I wonder if you could address your minds to that. Are they more susceptible to violence now than they would be if this is swept off the streets? Or do you think there would be any difference in the amount of violence they may be susceptible to?

Police Chief Stewart: Having spent about four years on the morality squad in the mid-1960s, and now looking at the experience. I would say there is far more violence today than there was on those days. I would attribute it to the casual encounter that takes place on the street corner: the car stops and the prostitute enters. This is like a time bomb situation. Who knows who is meeting whom? At least in a bar or through some other process there is some time to assess one another. Nothing is happening on the street corner.

House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49. Issue No.6* (30 October 1985), **J.A.R., Vol. 73, Tab 155G, pp. 21623.**

Ms. Brenda Cox Graham (Member, National Association of Woman and the Law): If anything causes street solicitation, at least in the short run, it is the criminalization of bawdy houses. Lacking a legal place to sell their legal services, prostitutes move out to the uncertain safety of the streets, where the problems complained of tend to gather. The decriminalization of bawdy houses is not synonymous with approving them in any moral sense: it merely is a more practical approach to the problems of pimping and street soliciting. If women were free to operate discreetly out of their own homes. It would provide them with more safety and mutual support and allow a less public exit from the profession when the opportunity arises.

House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49. Issue No.7* (31 October 1985), **J.A.R., Vol. 73, Tab 155H, pp. 21646.**

Mrs. Pepin: My colleague on the other side is not very convincing. He says that the prostitutes are being subject to more violence because the bill has not been passed. All studies made within the five last years would prove the contrary. It is because of that very violence that women's organizations and the Badgley and Fraser committees opposed to such a bill. There will be as a matter of fact a stepping up of violence which we will not perceive. I would hope that you could give us different arguments, those you gave us are absolutely not valid. Because we will not see the prostitutes' violence will certainly increase, and because the pimps will not be charged, everything will be very easy for them. It will just be impossible to get them. All studies show that violence will increase, after passage of such a bill, and I cannot accept your argument. I would prefer to hear something else.

House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49. Issue No.8* (7 November 1985), **J.A.R., Vol. 73, Tab 155I, pp. 21753.**

Mr. Derek Lewis (Senator): ... the present bill, which has been described by some as "a legislative sledge hammer," goes too far. Whilst the proposed legislation may, in the short run, reduce for a time the numbers involved in street prostitution in some areas, it will not, in fact, eradicate prostitution, which will continue and will be pushed into a much worse situation. It must be remembered that, at present, prostitution is not illegal in Canada. If the present bill is to work it will have the effect of pushing prostitutes further into the hands of pimps, procurers and other criminal elements. The present bill raises some serious questions for all citizens, as it may have adverse consequences for the rights and liberties of all.

*Debates of the Senate* (3 December 1985), **J.A.R., Vol. 73, Tab 155K, pp. 21776.**

According to many prostitutes, area restrictions aimed at removing them from the main prostitution strolls -- simply forced them to work in more isolation, increasing the danger to them.

*Research Section Department of Justice "Street Prostitution: Assessing the Impact of the Law-Synthesis Report (1989), J.A.R., Vol. 75, Tab 157, pp. 22353.*

In January of 1987, The Canadian Association of Elizabeth Fry Societies conducted an informal survey among its members as to the effects of the new s. 195.1. Although there was no consensus among respondents, several of the agencies noted that there was an increase in violence by clients and pimps towards prostitutes.

*Research Section Department of Justice "Street Prostitution: Assessing the Impact of the Law-Synthesis Report (1989), J.A.R., Vol. 75, Tab 157, pp. 22365.*

Perhaps the clearest conclusion of this evaluation is that police enforcement of the new s.195.1 did not suppress the street prostitution in most cities. The main affect was to move street prostitutes from one downtown area to another, thereby displacing the problem.

*Research Section Department of Justice "Street Prostitution: Assessing the Impact of the Law-Synthesis Report (1989), J.A.R., Vol. 75, Tab 157, pp. 22368.*

We followed up these questions by asking respondents whether they had ever personally thought about moving indoors (e.g., escort services, massage parlours, strip clubs, etc.) rather than working the streets. Three quarters (19 of 25) of the respondents indicated that they had considered moving off the streets for a variety of reasons.

Seven respondents remarked that they would like to move off the streets for reasons of safety.

Graves, Frank. *"Street Prostitution: Assessing the Impact of the Law – Halifax (1989), J.A.R., Vol. 75, Tab 157A, pp. 22443.*

Ms. Carolyn Saad (Member of the Criminal Justice Group: - National Association of Woman and the Law): It is clear from the Justice report and it is clear from our discussions with the Canadian Organization for the Rights of Prostitutes, and it is also clear from common sense, that women are being forced off the so-called strolls, the well-lit, well-known streets in various communities, into darkly lit streets where they are not familiar with the area, not familiar with places to go to if there is any trouble.

*Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Justice and the Solicitor General, Issue No. 22 (14 December 1989), J.A.R., Vol. 78, Tab 158G, pp. 23344.*

Ms. Carolyn Saad: Prostitutes are very vulnerable to violence. They now [sic] this, and they have tried to compensate for it themselves, by trying to watch out for each other by making note of customers who have been dangerous in the past and passing this on, by making sure everybody knows a safe place to go if anything frightening happens. What this law does it force them out into unfamiliar territory and isolate them. They are already vulnerable. There is already a tremendous amount of violence against these women. And nobody seems to be interested when prostitutes disappear.

*Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Justice and the Solicitor General, Issue No. 22 (14 December 1989), J.A.R., Vol. 78, Tab 158G, pp. 23345.*

For a variety of reasons, the street is now seen as a more dangerous place to work because of C-49. Prostitutes are viewed as being more of at risk from "bad dates" and from pimps. They are also less likely to work in pairs, thereby losing one of their main protective techniques. A number of agency personnel believe that prostitutes now move more within the city and between major cities, with the result that the unfamiliar environment increases the danger of the work. (T)he women thus cannot afford to be as selective with 'dates'. Therefore, more work is conducted in the home or in costly motel rooms. Others are left to work in dark alleys or out of the way streets which offer no protection. More women who are working for themselves have returned to pimp-run operations (including massage parlours and escort services) and biker clubs for protection and financial help in arrests.

Moyer, Sharon. "*Street Prostitution: Assessing the Impact of the Law – Toronto*" (1989), **J.A.R., Vol. 76, Tab 157, pp. 22764.**

Despite the legislative gray area under which the city licenses what the federal law prohibits, the escort framework provides an attractive work situation in comparison with the street in terms of safety. Dates can be screened to some extent on the telephone. Calls from numbers which were previously a source of trouble are recorded carefully. Taxis can deliver an escort to a specific address and retrieve the escort afterwards. After arriving at an address, the escorts call back to the agency to report their safe arrival. All this mitigates against foul play since the customer's phone number, address and identity are recorded by the agency. This contrasts dramatically with trick pads in which the prostitutes are confined with numerous 'dates' who are not screened or otherwise accountable. In terms of s. 213, both escort and trick pad prostitution bypass the risks of communicating in public, but neither appears to have arisen expressly to achieve this. However, they both have the capacity to become more prevalent in the context of vigorous suppression of the street trade. In terms of safety and potential violence against prostitutes, they present radically different levels of risk to prostitutes. While it would be erroneous to think that escorts face no risks to security, the business front permits hazards to be identified and managed more successfully. In trick pads, presumably the pimps on the premises could act to minimize victimization of the prostitutes, but the latter are confined in a way that makes their easy departure out of the question. Here the hazards of abuse develop because of the absence of a legitimizing framework.

*Victimization of Prostitutes in Calgary and Winnipeg, Technical Report for the Department of Justice (1994), J.A.R., Vol. 8, Tab 34D, pp. 2148.*

There is ample evidence that many of the customers of prostitutes are predatory males who have a penchant for hurting women. Street prostitutes constitute one of the most vulnerable groups because of their high levels of exposure to strangers in situations where provisions for safety are minimal.

*Victimization of Prostitutes in Calgary and Winnipeg, Technical Report for the Department of Justice (1994), J.A.R., Vol. 8, Tab 34D, pp. 2169.*

If the objective of control is to limit the incursions of street prostitution into neighbourhoods which are adversely effected, then the obvious solution would be, first, to increase pressure on strolls which are the source of friction with community values by policing aggressively under s. 213 and, second, to create alternative strolls which would reduce friction and experience minimal police interference. This approach does not change the dangers currently experienced by prostitutes in their current locations and raises a

series of other issues. First, the police have no legislative authority to advise prostitutes to remove themselves from neighbourhoods to new venues where they may communicate in public contrary to s. 213.

Executive re-location does not remove the problem from urban areas, nor address the safety issue. And to the extent that locations could be found which are so remote from communities as to *not* affect them adversely, these would probably be locations in which the vulnerability of the prostitutes would be heightened.

*Victimization of Prostitutes in Calgary and Winnipeg, Technical Report for the Department of Justice (1994), J.A.R., Vol. 8, Tab 34D, pp. 2194.*

Some of these arrangements address the safety of prostitutes quite directly. House or hotel based prostitution can arrange steps to screen clients and provide direct security in threatening situations. As we noted earlier in this report, escorts services can take similar steps. However, just as Canadian police at present have no legislative authority to create zones of tolerance, they have no authority to create locations where the bawdy house laws would be inoperable.

*Victimization of Prostitutes in Calgary and Winnipeg, Technical Report for the Department of Justice (1994), J.A.R., Vol. 8, Tab 34D, pp. 2195.*

The Department of Justice research reported an increase in violence against prostitutes in Vancouver and Calgary. In the Vancouver study, 68 per cent of the sample of street prostitutes interviewed had been victims of a "bad trick" since 1985 and the majority reported that they had been victimized more than once. The Calgary research uncovered a high level of violence against street prostitutes. The researchers made special comment of this in their report:

We were astounded by the recurrent accounts of hookers and hustlers being confronted by armed assailants, stabbed, threatened with death, beaten up and robbed. The interviews suggest that the gravest source of aggression comes from their customers. However, the women also face appalling physical abuse from their pimps and boyfriends. What these responses indicate is a serious level of interpersonal aggression associated with the subculture of street prostitutes.

*Report of the Standing Committee on Justice and Solicitor General concerning the three –year review of section 213 of the Criminal Code, J.A.R., Vol. 78, Tab 158I, pp. 23431.*

The 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. Decisions relating to how street prostitution should be addressed must take into account the potential for increased violence against prostitutes.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23869.*

Before the passage of Bill C-49 in 1985, a number of objections to the legislation were voiced by critics. Many social agencies and women's groups anticipated that women working in the sex trade would be more vulnerable as a result of the law, not only because they were liable to arrest and prosecution, but because they would be more at risk of victimization by pimps and customers. It was suggested that the street prostitution trade would be displaced to new locations that offered less protection (in terms of street

lighting, for example) and that women would be forced to work in less familiar, and hence more dangerous, locations to avoid apprehension.

Statistics from the Canadian Centre for Justice Statistics show that 63 known prostitutes were found murdered between 1991 and 1995 (Canadian Centre for Justice Statistics, 1997). Almost all of the murdered prostitutes were female (60 of the 63). During this period, known prostitutes were the victims in 5% of all female homicides reported (1,118 deaths). At the end of 1996, 54% of homicides involving known prostitutes reported between 1991 and 1995 remained unsolved (34 incidents). In comparison, only 20% of all homicide incidents remained unsolved when they involved victims other than known prostitutes.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23873.*

Interviews conducted in 1988 in Vancouver of women involved in prostitution suggest that street prostitution is generally more dangerous than off-street work (Lowman and Fraser, 1995). A much larger proportion of respondents working on the street reported that they were robbed, sexually assaulted, beaten, strangled, kidnapped, and were more likely to be involved in a situation where a weapon was used, or were the victims of attempted murder. In contrast, the highest incidence of off-street victimization included "refused condom," "threat/intimidation" and "general harassment."

On behalf of the Federal-Provincial-Territorial Working Group on Prostitution, studies on violence against prostitutes were conducted in 1994 and 1995 in Halifax, Montreal, Toronto, Calgary, Winnipeg and Vancouver. The objective of these studies was to understand the impact of the communicating provision (s. 213) on homicide and violence against street prostitutes. The studies documented that the atmosphere on the street in each of the sites had become more tense, although a causal link between enforcement and prostitutes' deaths could not be established.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23874.*

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. In British Columbia, for example, only two of the 50 women who were murdered and identified as sex trade workers since 1982, worked indoors as escorts; six were cabaret dancers (1995).

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23898.*

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.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23899.*

The Vancouver experience revealed that moving prostitutes out of a largely commercial area also resulted in increased street prostitution in residential areas and around schools. While this may be seen as a short term solution to a problem in a particular area, the experience in Vancouver tends to suggest that the long term implications are serious and problematic. In particular, the effects of displacement of prostitutes to unsafe areas may be associated with the high levels of homicides against women involved in prostitution. Any measures that result in simply displacing prostitution from one area of a city to another must be carefully considered in terms of these impacts.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23922.*

...[Current research] 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.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23926.*

There is ample evidence that, since 1985, large numbers of arrests of street prostitutes and customers have had little impact on levels of street prostitution. Rather, enforcement has simply displaced street prostitutes from one area to another. In addition, the costs of enforcing the communicating provision have been onerous for municipalities strapped for money.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23926.*

The Working Group recognizes that the reform of the bawdy-house provisions as was recommended by the Fraser Committee in 1985 could have some benefit both in terms of making the law consistent as well as in reducing certain problems associated with street prostitution especially those of damage to neighbourhoods and violence against prostitutes. This could involve the selective decriminalization of certain offences, with regulatory power resting with interested municipalities.

*Intergovernmental Working Group Report – Federal, Provincial, Territorial working group on prostitution – report and recommendations in respect of legislation, policy and practices concerning prostitution related activities (December 1998), J.A.R., Vol. 79, Tab 160, pp. 23930.*

Violence against persons who engage in prostitution is also well documented in studies based on in depth interviews with people engaging in prostitution. According to some studies, assault of all types, including sexual assault, is commonplace among people who engage in prostitution-related activities, especially those who work on the street. The results of a survey conducted in Vancouver showed that three-quarters of those interviewed had been victims of violence in the six months preceding the survey.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24927.**

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.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24927.**

One of the primary complaints among prostitutes is that the living on the avails of prostitution provision is too broad in scope. These witnesses and others told the Subcommittee that section 212(1)(j) is too broad in scope since it easily encompasses everyone in the prostitute's private and professional life. As a result, they live in constant fear that their roommates or spouses could be accused of living on the avails. The provision also encompasses their employers and security guard, individuals who are essential to ensuring the prostitutes' safety.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24964.**

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.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24966.**

#### (a) Secrecy and Isolation

During our study, we heard that street level prostitutes face the following paradox in order to ensure their safety and at the same time avoid arrest under section 213 of the *Criminal Code*:

Working in an isolated area discouraged attention from police and residents but increased risks from bad dates and other aggressors; working in a well lit, populated area discouraged bad dates but often led to unwanted attention from police and residents.

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. (24967)

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge for Change: A Study of Canada's Criminal Prostitution Laws.* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24967.**

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% 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.<sup>206</sup> 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.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24967.**

Footnote from Subcommittee's Discussion: Section 213's failure to combat street prostitution is well documented. As noted in the previous chapter, all the evaluation studies carried out by the Department of Justice in support of the Bill C-49 review process, as well as the study conducted in the mid-1990s by the Federal/Provincial/Territorial Working Group on Prostitution, found that section 213 had failed. Its enforcement has not reduced street prostitution activity or even the number of complaints by residents of Canada's large cities. See: Department of Justice, *Street Prostitution: Assessing the Impact of the Law*, Ottawa, 1989; Department of Justice, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities*, December 1998. Yet this was the goal when section 213 was introduced. The Hon. John C. Crosbie, then Minister of Justice and Attorney General of Canada, stated as much when he tabled Bill C-49 in committee: "The customer now negotiates and consummates the deal in most cases within the privacy and security of his car. Remove that opportunity and the demand for prostitution services will be substantially diminished. When the customer knows that there is a strong possibility that he may well be arrested and charged with an offence following the passage of this legislation if he attempts this kind of transaction, I can assure you that the demand is going to fall pretty rapidly." - See: House of Commons Legislative Committee on Bill C-49, *An Act to amend the Criminal Code (prostitution)*, Minutes of Proceedings and Evidence Issue No.1, September 19, 1985, 1st Session, 33rd Parliament, 1984-1985.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24967.**

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.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24967.**

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. Here is what Gayle MacDonald told the Subcommittee in this regard: 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.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24970.**

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 a 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 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.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24970.**

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. Witnesses indicated that this prohibition is often disadvantageous for prostitutes who in some cases regard such options as having economic and safety benefits. Prostitutes told us that cohabitation is a good way to save money and can also reduce the risk of abuse and violence by reducing prostitutes' isolation. Some witnesses indicated that the relationship with a manager or employer can also be beneficial. Some people reported feeling more comfortable and safer when a third party is responsible for finding and screening clients for them and providing them with a place to carry on their prostitution activities.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24972.**

The Subcommittee had a mandate seeking to improve the safety of individuals selling sexual services and communities overall. After reviewing the criminal laws pertaining to prostitution with that mandate in mind, members agree that the status quo is unacceptable. 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.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24991.**

Members from the Liberal, New Democratic, and Bloc Quebecois Parties believe that Canada's current quasi-legal approach to prostitution – in which adult prostitution is legal per se, but nearly impossible to practise without breaking the law – should be recognized as contradictory. Much like the conclusion reached by the Fraser Committee 20 years ago, they feel that since adult prostitution is legal in Canada, the conditions under which it can be practised must be stipulated. Moreover, after hearing the testimony, they came to the conclusion that the current situation causes more harm than good. It marginalizes prostitutes, often leaving them isolated and afraid to report abuse and violence to law enforcement authorities. In the view of members from the Liberal and New Democratic Parties, the Canadian government must come to terms with this contradiction and the inefficiency of the law, and engage in a process of law reform that will consider changes to laws pertaining to prostitution, thus allowing criminal sanctions to focus on harmful situations.

House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A study of Canada's criminal prostitution laws* (December 2006), **J.A.R., Vol. 82, Tab 164, pp. 24994.**

Ms. Lucy Angers (Department of Justice – Criminal Law Policy Section): The Working Group noted that there were far fewer charges laid under Section 210 than under Section 213, as a result of a need and a demand from citizens, municipalities and provinces that street prostitution not be practiced in residential neighbourhoods. All of that resulted in prostitution being displaced to other areas. One of the Working Group's findings was that Section 213 probably had not succeeded in resolving the problem of street prostitution, but had certainly succeeded in displacing the problem from one area to another.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 2* (7 October 2003), **J.A.R., Vol. 83, Tab 164C, pp. 25104.**

Ms. Lucy Angers (Department of Justice – Criminal Law Policy Section): I don't know whether you would like me to talk some more about violence or not; I know this is something of particular interest to Ms. Davies. It is a question that is addressed throughout the Committee report, because of the prevalence of violence in the context of street solicitation. The Federal-Provincial-Territorial Working Group on Prostitution based itself on a variety of consultations and research, as well showing that there was a close correlation between violence against prostitutes and the places where prostitutes practiced their trade. Anonymity, isolation and the fact that cars are where prostitution is often practiced—all of these factors have contributed to making street prostitutes more likely to be victims of violence than prostitutes working indoors in houses, for example.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 2* (7 October 2003), **J.A.R., Vol. 83, Tab 164C, pp. 25104.**

Ms. Lucy Angers (Department of Justice – Criminal Law Policy Section): The problem with street solicitation arises because it's obvious. We have complaints; therefore there is more enforcement.

Then, the problem of violence against prostitutes is certainly the problem of these prostitutes who are on the street, who are presumably the ones who are killed and murdered, because they have a higher risk of being victimized.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 2* (7 October 2003), **J.A.R., Vol. 83, Tab 164C, pp. 25119.**

Ms. Lucie Angers (Department of Justice – Criminal Law Policy Section): As you know, when we came here last time to testify, I was here to explain a bit about what had been the work of the federal-provincial-territorial working group on prostitution. It did a lot of consultations from 1992, and finally tabled its report in 1998. You're right in mentioning that one of the problems that was found was that the consultations told us that you have to focus on two issues when you go back to consider the law and all that. They said you have to see how you can reduce harm to the community, the condoms, the syringes, and all that-but you also have to prevent violence against prostitutes.

One thing the working group did find was that none of these objectives were fulfilled when we did study more carefully what were the ramifications of the law. On the nuisance, yes, it certainly did solve some problems in some communities. But as you know, it did displace the problem to other areas.

As you know, one of the problems we found was that the enforcement of the legislation depended on the police being called and being told that there was a problem, and when the problem was "solved", it was after it had been displaced to another community. One thing the working group did find – and that was obviously before the Vancouver incidents – was that more and more the trend was to have the prostitutes going into industrial areas, into areas where they didn't have the protection of having people floating around.

The working group did conclude, as you know – because I know you read the report – that the legislation did not have a serious impact on street prostitution. As you say, there are two different issues, and the one I think you're focusing on now is more the issue of street prostitution.

In terms of where this leads us, there was no consensus in terms of repealing section 213 and all that. As you know, when Minister Crosbie, who was minister at the time, introduced what did become section 213, it was to address the nuisance problem; it wasn't to address the overall prostitution issue. As we discussed last time, depending on who you talk to, some people will tell you it did work from their community perspective. But once again, if you speak to the people who are most affected by this legislation-the prostitutes themselves-it didn't.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 3* (31 January 2005), **J.A.R., Vol. 83, Tab 164G, pp. 25198.**

Ms. Paule Brunelle (Trois Rivières, BQ): I know that in Nevada there are houses where prostitutes feel secure. According to some studies done in Quebec, this would seem to be an interesting option. Prostitutes want to have access to houses where they would be secure from violence and from health hazards.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 4* (2 February 2005), **J.A.R., Vol. 83, Tab 164H, pp. 25216.**

(Mr. Fraser after being asked whether serial killer case (Pickton) in BC could have been avoided by decriminalization of bawdy house provisions)

Mr. Paul Fraser: "But on the general proposition, if the law were such that street prostitution, or soliciting on the street, was discouraged and not encouraged; if it was, as a general proposition, the law to provide exemptions, so people could engage in the activity privately in the way we've been discussing it in reference to England; then I think logically, in that continuum, it would follow that people would be off the street and in a safer environment."

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 4* (2 February 2005), **J.A.R., Vol. 83, Tab 164H, pp. 25217.**

Professor Marie-Andree Bertrand (Professor Emeritus of Criminology, Criminology and Sociology of Law, University of Montreal): Other paid sexual services performed in homes, in massage parlours, or by escorts are not as visible, of course, and do not expose participants to the same risks. I will come to that in a minute...

...I have listened to and read the proceedings of your committee. I know you are concerned about women who die while engaged in this type of activity. In a striking article published recently in *Beyond Criminology: Taking Harm Seriously*, a collection of British articles that just came out, an author with a background in geography shows that the most powerful indicator in determining where the sex worker will die is the place where the activities are carried out. The poorer the place, the fewer social resources there are, the fewer multicultural contacts, the fewer social controls in place, the greater the risk to these individuals with so little social support.

This author, Mr. Dorling, thinks the risk of murder for these individuals is 173 times greater if they are working in a poor place with no social resources, contacts or solidarity than if they work in a wealthier place where homes are occupied by people who are responsible, have plenty of space, and so on.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 7* (14 February 2005), **J.A.R., Vol. 83, Tab 164K, pp. 25270.**

Prof. Christine Bruckert (Dept. of Criminology – University of Ottawa): I'm going to answer the first question first, about the massage parlours. The women we interviewed clearly spoke about making a choice and weighing issues of safety. Most of them highlighted the fact that in the massage parlour there were a number of features that did in fact increase their security: there would be other workers around, there were often neighbours, they often created a virtual bouncer. So there was a certain amount of security. They often spoke of that in comparison to out-call, women going into hotel rooms, where they didn't know what the situation was they were getting into. They were also able to screen them before they came into the establishment. That said, I think it's important to appreciate that it does, arguably, offer a more secure environment than the street. Escorts I'm not sure about. Still, the criminalization affects all women in the trade. The massage parlour is not an absolutely safe space, but is just a relatively better space.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 11* (9 March 2005), **J.A.R., Vol. 83, Tab 164O, pp. 25334.**

Hon. Hedy Fry: Many of us have heard from many witnesses who have suggested that the solicitation part of it – the prostitute's fear of being arrested – makes the prostitute, especially on the street, leap into whatever waiting car there is without thinking, because she wants to get that piece of the transaction done as quickly as possible. She doesn't take the opportunity to be able to ensure that she's safe, and there is no one there to make sure she's going into a car, taking the address or the licence plate, etc. So she's actually out there in a car, and that's where the huge risks are lying. So that's one of the pieces.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 13* (16 March 2005), **J.A.R., Vol. 83, Tab 164Q, pp. 25401.**

Hon. Hedy Fry: On the issue of safety, we have heard from many sex trade workers that because of the soliciting law, it's not so much whether they are fighting on the street or somebody is on the street creating a ruckus, it's because they don't want to be picked up that they jump into a car and don't take the "time to assess the client to make a decision on whether they really want to go. They just don't want the police seeing them doing the act. What happens to them when they get in the cars? We know what happened in east Vancouver. We know what happened in Abbotsford with Picton. The violence may not be seen on the street. So the issue isn't whether it's violence you see. It's the violence, period, that is associated with it. It's the risk for women on the street.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 16* (23 March 2005), **J.A.R., Vol. 84, Tab 164T, pp. 25481.**

Deputy Chief Doug Le Pard (Vancouver Police Department): I'd like to talk a bit about strolls. It's been suggested that safe strolls can be created. I want to be perfectly clear: there is no such thing as a safe stroll. Any time you have a situation where a sex trade worker gets into a stranger's car and enters the stranger's control, she is at high risk. The risk of violence is not at the stroll itself, generally. It is the fact that sex trade workers leave the stroll with a stranger who may be a violent predator. We know that the rate of violence against sex trade workers is extremely high, with a significant number of unreported offences. According to the Department of Justice, the murder risk for sex trade workers is between 60 and 120 times that of the general female population. No matter how safe the conditions at the stroll, the risk once the sex trade worker leaves in a car is extreme.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 18* (30 March 2005), **J.A.R., Vol. 84, Tab 164V, pp. 25545.**

Professor Jacqueline Lewis: The paradoxes that sex workers face became evident in our data analysis. For each paradox the actions taken to maximize security also place sex workers in conflict with the Criminal Code.

The first paradox is security and isolation. Working in isolated, especially dark areas increases risks from bad dates and aggressors whose actions are made invisible by the isolation, and it decreases access to social support and information sharing, but it also decreases police and public attention and the likelihood of arrest.

The second paradox is about taking time to screen clients. Taking time to screen clients increases police attention and the likelihood of arrest. However, it also increases the likelihood of identifying potentially bad dates, aggressors, and other risks.

The third paradox involves working on an in-call basis or from a fixed work location. This form of work is unequivocally illegal as it contravenes section 210 of the Criminal Code of Canada. However, in-call is one of the safest ways to conduct sex work.

House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Issue No. 27* (2 May 2005), **J.A.R., Vol. 84, Tab 164EE, pp. 25761.**

*Appendix B: Government Reports - International*

Country	Safety
Australia	<p>“There is no doubt that Queensland now has a safe and effective legal brothel industry, albeit one that is much smaller than originally envisaged.... Queensland’s brothels provide a safe and healthy option for sex workers who choose to work in the industry and for the clients.”<sup>1</sup></p> <p>“Nevertheless, the review has indicated that, overall, legal brothels in Queensland provide the safest and healthiest environments for sex workers and their clients, compared with those who give or receive prostitution services on the street or in private.”<sup>2</sup></p> <p>“The CMC was told that the impact of licensed brothels on the community had been minimal, and that: brothels provide a healthier and safer environment for brothel clients compared with their illegal counterparts.”<sup>3</sup></p> <p>“...Information received about the safety of sex workers in both legal and illegal industries illustrated the "Success, to date, of the safety provisions within licensed brothels (despite a few concerns regarding workers' safety).”<sup>4</sup></p> <p>“The other safest work environment identified by sex workers was private work in cooperation with others (31 'X). ... Few respondents (9%) identified work as a sole operator as a safe place to work and none identified the streets or bar work as safe places to work.”<sup>5</sup></p> <p>“Findings suggest that legal brothels provide the safest and healthiest work environments for sex workers. Sale operators and street- based sex workers, however, remain at risk in relation to their personal safety, and street- based sex workers show high levels of poor health and health-compromising behaviours.”<sup>6</sup></p> <p>“...Consistently, street-based sex workers reported higher rates of violence compared with the legal sectors of the sex industry. The main perceived benefits of working in a legal brothel were related to improved safety and security. This is confirmed by data showing the low rates of violence experienced by this subgroup within a work situation. However, while the Prostitution Act has been effective in protecting legal brothel sex workers from workplace violence, other sectors of the sex industry continue to experience widespread violence.”<sup>7</sup></p>
Germany	<p>“These risks and dangers are not associated with all forms of prostitution to the same extent, but are primarily determined by the conditions under which the prostitutes are working.”<sup>8</sup></p>

<sup>1</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, *J.A.R.*, Vol. 27, Tab 61(D), p. 7787.

<sup>2</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, *J.A.R.*, Vol. 27, Tab 61(D), p. 7792.

<sup>3</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, *J.A.R.*, Vol. 27, Tab 61(D), p. 7793.

<sup>4</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, *J.A.R.*, Vol. 27, Tab 61(D), p. 7794.

<sup>5</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, *J.A.R.*, Vol. 27, Tab 61(D), p. 7870.

<sup>6</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, *J.A.R.*, Vol. 27, Tab 61(D), p. 7926.

<sup>7</sup> Woodward, Charlotte et. Al. “Selling Sex in Queensland 2003”, a study of prostitution in Queensland, Prostitution Licensing Authority, 2004, *J.A.R.*, Vol. 28, Tab 61(F), p. 8046.

<sup>8</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act), *J.A.R.*, Vol. 57, Tab 119(R), p.

	<p>“Typical risks of victimisation can be observed to varying degrees in prostitution, depending on the conditions under which prostitutes work. ....It is perfectly plausible to expect that creating a legal framework for prostitution will have a positive influence on these types of crimes, especially since the lack of legal rules and legal protection in the "scene" lead to the prostitutes relying on other people for protection.”<sup>9</sup></p> <p>“However, all in all, the results of the empirical study show that only little has been done up until now to improve working conditions.”<sup>10</sup></p> <p>“At best these areas were addressed in the Prostitution Act to the extent that it was assumed that by concentrating on the criminal prosecution of actually punishable matters and shedding light into the grey area of prostitution, as was the intention, it would become easier to combat violent and degrading forms of prostitution such as trafficking in human beings, forced prostitution, prostitution by minors, exploitation of prostitutes and violent crime in the "scene”.”<sup>11</sup></p>
Netherlands	<p>“There are indications of ongoing improvements, since the enactment of the 2000 legislation, but so far these improvements have been minimal.”<sup>12</sup></p> <p>“Prostitutes in the regulated business sectors report levels of hygiene as ‘good’ to ‘very good’ and physical working conditions appear to be changing for the better.”<sup>13</sup></p> <p>“Furthermore, the vast majority of prostitutes in the regulated sector report they ‘often’ or always feel ‘safe’.”<sup>14</sup></p> <p>“According to a 2007 UN Report, the legalized model “enjoys widespread support among the general public”; “women in the legalized and regulated sex sector are now better protected against violence, exploitation or unsafe working conditions since access by health or law enforcement authorities is assured and the activities in the regulated sector are more visible to the authorities. The legalization of brothels has also given brothel operators the opportunity to break criminal ties and with practices they maintained while operating in a situation of tolerated illegality.”<sup>15</sup></p> <p>“Changes in the regulated sector are only visible to a limited extent, but the field is certainly in movement. Physical working conditions would appear to be changing for the better.”<sup>16</sup></p>
New Zealand	<p>“It was hoped that decriminalisation of the sex industry would eliminate exploitative practices such as these, as sex workers came to enjoy the same employment protections as those enjoyed</p>

16715.

<sup>9</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act), J.A.R., Vol. 57, Tab 119(R), p.

16733.

<sup>10</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act), J.A.R., Vol. 57, Tab 119(R), p.

16753.

<sup>11</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act), J.A.R., Vol. 60, Tab 121, p.

17678.

<sup>12</sup> Lifting the ban on brothels, Prostitution in 2000-2001, J.A.R., Vol. 48, Tab 112(A), p. 13865.

<sup>13</sup> Lifting the ban on brothels, Prostitution in 2000-2001, J.A.R., Vol. 48, Tab 112(A), p. 13898.

<sup>14</sup> Lifting the ban on brothels, Prostitution in 2000-2001, J.A.R., Vol. 48, Tab 112(A), p. 13898.

<sup>15</sup> UN Human Rights Council, UN Human Rights Council: Addendum to the Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Mission to the Netherlands, J.A.R., Vol. 47, Tab 110(E), p. 13674-13686.

<sup>16</sup> Lifting the ban on brothels, Prostitution in 2000-2001, J.A.R., Vol. 48, Tab 112(B), p. 13865.

	<p>by workers in other industries. Research indicates that, while this process may have commenced, it is by no means complete.”<sup>17</sup></p> <p>“On the whole, the PRA has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off under the PRA than they were previously.”<sup>18</sup></p> <p>“The PRA has had a marked effect in safeguarding the right of sex workers to refuse particular clients and practices, chiefly by empowering sex workers through removing the illegality of their work.”<sup>19</sup></p>
--	--

Country	Societal Harms
Australia	<p><i>On Organized Crime:</i> “Due to the extensive probity requirements, all licensees have no past or current links with organized crime, and police corruption has been excluded from the legal industry requirements of the Act and the more ethical environment in which the QPS now operates.”<sup>20</sup></p> <p><i>On Expansion of Trade:</i> “Within the last 12 months, however, targeted and innovative police activity has significantly reduced the number of active streetbased workers (alleged to have decreased from 100 active workers to as few as 11 in recent months), without displacement to other locations.”<sup>21</sup></p>
Germany	<p><i>On Organized Crime:</i> “It is difficult to find statistical evidence to either prove that the Prostitution Act has reduced crime or promoted criminal prosecution or that it has instead promoted crime and hindered criminal prosecution...”<sup>22</sup></p> <p><i>On Trafficking:</i> “...no trend can be observed regarding the number of cases of trafficking on human beings following the Prostitution Act”<sup>23</sup></p> <p>“...the hypothesis that amending Sections 180a and 181a of the Criminal Code would make the prosecution of trafficking in human beings and other serious crimes more difficult has not been confirmed by empirical evidence”<sup>24</sup></p>

<sup>17</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, **J.A.R.**, Vol. 62, Tab 125(C), p. 18293.

<sup>18</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, **J.A.R.**, Vol. 62, Tab 125(C), p.18309.

<sup>19</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, **J.A.R.**, Vol. 62, Tab 125(C), p. 18188.

<sup>20</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, **J.A.R.**, Vol 27, Tab 61, p. 7792.

<sup>21</sup> “Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)”, Crime and Misconduct Commission, December 2004, **J.A.R.**, Vol. 27, Tab 61(D), p. 7793.

<sup>22</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act), **J.A.R.**, Vol. 60, Tab, 121, p. 17714.

<sup>23</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act), **J.A.R.**, Vol. 60, Tab, 121, p. 17714.

<sup>24</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act), **J.A.R.**, Vol. 60, Tab, 121, p. 17721.

Netherlands	<p><i>On Organized Crime:</i> “The legalization of brothels has also given brothel operators the opportunity to break criminalities and with practices they maintained while operating in a situation of tolerated illegality.”<sup>25</sup></p> <p><i>On Trafficking:</i> “However, it is likely trafficking in human beings has become more difficult, because the enforcement of the regulations has increased in comparison to the former situation, when all exploitation of prostitution was prohibited.”<sup>26</sup></p> <p>“...it is not easy to establish that a prostitute is not doing the work of her own free will. Because of this it is virtually impossible to pronounce on possible developments in the number of prostitutes working under some degree of coercion.”<sup>27</sup></p>
New Zealand	<p><i>On Children:</i> “Based on the research and the information provided to the Committee, the Committee does not consider the PRA has increased under age involvement in prostitution.”<sup>28</sup></p> <p><i>On Organized Crime:</i> “The Committee considers that the links between crime and prostitution are tenuous. The Committee could not find any evidence of a specific link between crime and prostitution.”<sup>29</sup></p> <p><i>On Trafficking:</i> “The Committee is satisfied, on the basis of information received from NZPC and other NGOs involved with street-based sex workers, that during its period of investigation, there were no internationally trafficked women working as street-based sex workers in New Zealand.”<sup>30</sup></p> <p><i>On Expansion of Trade:</i> “Arguments that decriminalization has increased the numbers of people in the sex industry are largely founded on the flawed assumption that decriminalization would increase the numbers of people involved in prostitution. The Committee is satisfied that such assumptions have been proved to be unfounded.”<sup>31</sup></p> <p>“The PRA has been in force for five years. During that time, the sex industry has not increased in size, and many of the social evils predicted by some who opposed the decriminalisation of the sex industry have not been experienced.”<sup>32</sup></p>

<sup>25</sup> UN Human Rights Council, UN Human Rights Council: Addendum to the Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Mission to the Netherlands, *J.A.R.*, Vol. 47, Tab 110(E), p. 13681.

<sup>26</sup> Prostitution in the Netherlands since the lifting of the brothel ban, *J.A.R.*, Vol. 47, Tab 110(D), p. 13656.

<sup>27</sup> Prostitution in the Netherlands since the lifting of the brothel ban, *J.A.R.*, Vol. 47, Tab 110(D), pp. 13657.

<sup>28</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, *J.A.R.*, Vol. 62, Tab 125(C), p. 18243.

<sup>29</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, *J.A.R.*, Vol. 62, Tab 125(C), p. 18305.

<sup>30</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, *J.A.R.*, Vol. 62, Tab 125(C), p. 18308.

<sup>31</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, *J.A.R.*, Vol. 62, Tab 125(C), p. 18182.

<sup>32</sup> Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, *J.A.R.*, Vol. 62, Tab 125(C), p. 18309.