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Bedford v. Canada: a paradigmatic case toward ensuring the human and health rights of sex workers

The *Criminal Code* of Canada prohibits certain aspects of sex work: the keeping of a common bawdy-house, living off the avails of prostitution and communicating for the purposes of prostitution in a public place. These legal constraints impede sex workers' ability to practise their profession safely and without risk to their bodily integrity; they also impair their personal autonomy and can lead to their stigmatization. *Bedford v. Canada* is a groundbreaking case, since the applicants and intervening organizations seek to overturn aspects of Canadian law that specifically put the health and human rights of sex workers at risk.

Sex work is not illegal in Canada. Contrary to what some people believe, it is legal for individuals to exchange money for sexual services. Sex work is a legitimate occupation that individuals voluntarily choose as a source of income. It is also a highly politicized form of work that necessarily engages one's bodily integrity. By placing criminal controls on the manner in which sex workers conduct their business, the Canadian state constrains sex workers' right to make fundamental decisions about their own bodies, their sexuality and their personal relationships.

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Bedford v. Canada: a paradigmatic case toward ensuring the human and health rights of sex workers

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Prostitutes of Ottawa/Gatineau Work Educate and Resist (POWER) and Maggie's: the Toronto Sex Workers' Action Project, decided to intervene in the *Bedford v. Canada*[1] appeal because they believe sex workers should enjoy the same human rights, labour rights, health rights as well as dignity and autonomy as other workers in Canada. In intervening, the organizations' aims were to raise the personal autonomy implications of the impugned *Criminal Code* provisions and the equality rights of the communities who engage in sex work.

The *Criminal Code* currently prohibits certain aspects of sex work: the keeping of a common bawdy-house (Section 210); living off the avails of prostitution (Section 212(1)(j)); and communicating for the purposes of prostitution in a public place (Section 213(1)(c)).[2] These provisions affect sex workers' ability to control their work environment, to conduct essential communications with potential and existing clients, and to be in relationships that are supportive of their sex work.

For example, Section 210 is directed at reducing supposed nuisances associated with indoor brothels, but the section as drafted captures any space in which one or more persons regularly engage in sex work.[3] It has been interpreted to include locations like parking garages, parking lots or hotel rooms to which a sex worker has returned twice for the purposes of work. To avoid liability under Section 210, most sex workers choose not to work in familiar locations, including their own homes, because those spaces can be characterized as a bawdy-house if used with any regularity.

Similarly, Section 212(1)(j) provides that anyone who lives wholly or in part on the avails of another person's prostitution is guilty of a criminal offence. The provision has been interpreted as applying to a variety of relationships in which someone is viewed as having a vested financial interest in someone else's sex work. As a result, anyone who is hired by a sex worker to assist them with their work runs the risk of being captured by the provision. This includes receptionists or managers who support sex workers by making appointments and screening clients, and bodyguards or drivers who accompany workers on out-calls. There is also a risk that a sex worker's live-in partner could be viewed as having a vested financial interest in their partner's work and thus charged for living off the avails of a prostitute.

Section 213(c) prohibits individuals from communicating with someone for the purposes of prostitution, through speech or "any other manner," in a public place or in a place open to public view. This provision could be interpreted as prohibiting sex workers from taking basic occupational safety measures, such as screening their clients to assess levels of intoxication or obtaining key personal information from clients. The prohibition against communicating in public view can lead outdoor sex workers to work in more isolated and dangerous spaces to avoid arrest. Indoor workers are also constrained by this provision because many of the places in which they interact initially with clients could be viewed as public, i.e., elevators, hallways and, arguably, the internet.

These *Criminal Code* provisions are currently being challenged for their harmful effects on sex workers' right to life and liberty of the person, as per Section 7 of the *Canadian Charter of Rights and Freedoms*. In addition, POWER and Maggie's believe that the personal autonomy interests of sex workers are harmed because the provisions prevent sex workers from talking about their sexual activities, exerting legitimate control over their bodies and making choices about their personal relationships. These same sex workers often belong to communities to whom the protections of Section 15 apply. Sex workers are women, men who have sex with men, gay or bisexual, racialized, of Aboriginal ancestry, and/or transsexual or transgendered.

The *Criminal Code* provisions subject sex workers to an adverse and differential treatment that exacerbates

the prejudice and disadvantage that sex workers otherwise face due to their membership in these communities. By criminalizing sex work and by exposing sex workers to further risk, the provisions convey the message that sex work has no value. Indeed, the message is that sex workers themselves — their dignity, their autonomy, their safety and even their lives — have no value.

History of the *Bedford* proceedings

In 2007, Terri Jean Bedford, Amy Lebovitch and Valerie Scott filed a constitutional challenge to the three *Criminal Code* provisions, arguing that the impugned sections violated their *Charter* right to life, liberty and security of the person, as per Section 7, because they prevent sex workers from taking any steps to protect themselves in their work. The Attorney General of Ontario and a coalition comprised of the Christian Legal Fellowship, REAL Women of Canada and the Catholic Civil Rights League intervened in support of the federal government, who argued that removing criminal prohibitions would not result in safer sex work because, it claimed, sex work is inherently risky and dangerous. The application involved over 25 000 pages of evidence in 88 volumes, and included witnesses who were past and present sex workers, police officers, social science experts, politicians, social workers and advocates. Justice Susan Himel presided over the hearing in October 2009.

On 28 September 2010, Justice Himel issued her decision in favour of the applicants. She determined that the three *Criminal Code* provisions violated sex workers' Section 7 rights by making safety-enhancing methods illegal. Specifically, she found that Section 210 prevents sex workers from working in their homes, which is the safest place to practise sex work; Section 212(1)(j) prevents sex workers from taking measures to protect themselves, such as hiring an assistant or a bodyguard; and Section 213(1)(c) prevents street-based sex workers from screening clients at an early stage, thus putting them at an increased risk of violence. As to whether the deprivations occurred in accordance with the principles of fundamental justice, Justice Himel found that the provisions were arbitrary, overly broad and disproportionate.

> Criminalizing sex work conveys the messages that it and sex workers themselves have no value.

The applicants had also challenged Section 213(1)(c) as a violation of the right to freedom of expression as guaranteed by Section 2(b) of the *Charter*. Justice Himel agreed, finding that "speech meant to safeguard the physical and psychological integrity of individuals is also at the core of the constitutional guarantee" (to freedom of expression).[4]

Due to the immense harm created to sex workers, Justice Himel declared that the impugned provisions would be invalid within 30 days of her judgment. The invalidity of the impugned provisions has been stayed pending the outcome of the appeal. This means that, despite their being found unconstitutional, the challenged laws remain on the books for the time being.

Both the federal and provincial Attorneys General appealed Justice Himel's decision, alleging, among other grounds, that there was no causal connection between the impugned provisions and the harm that sex workers experience from third parties in the course of their work. Rather, as argued by the Attorney General of Canada, the harms of sex work derive from "a prostitute's drug use, coping abilities, and the violence inherent in all prostitution."[5] Both governments argued in the alternative that any harms that may result from the laws are outweighed in significance by the purposes of the laws, which, according to the Attorney General of Canada, includes preventing the degradation of women and children.[6]

The two Attorneys General also argued that sex work falls outside the scope of the Section 7 guarantee because there is no constitutional protection for "economic" interests. In their view, the impugned *Criminal Code* provisions do not interfere with sex workers' rights to make fundamental life decisions, but with their choice to pursue a particular line of work.[7]

The appeal took place before a five-member panel of the Ontario Court of Appeal from 13 to 17 June 2011. A large number of interested groups participated as interveners on the appeal. The Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women intervened in support of continued criminalization of sex work. A coalition of women's groups, referring to

themselves as the "Coalition for the Abolition of Prostitution," and which included the Canadian Association of Sexual Assault Centres, the Canadian Association of Elizabeth Fry Societies, the Vancouver Rape Relief Society and the Native Women's Association of Canada, intervened to argue that sex work should be criminalized on an asymmetrical basis: customers and managers of sex workers should face penal sanctions, but sex workers themselves should not.[8] The remaining interveners support the decriminalization of sex work: the PACE Society, the Downtown Eastside Sex Workers United Against Violence Society (SWUAV) and the Pivot Legal Society; the British Columbia Civil Liberties Association; the Canadian HIV/AIDS Legal Network and the B.C. Centre for Excellence on HIV/AIDS; the Canadian Civil Liberties Association; and POWER and Maggie's.

The POWER/Maggie's intervention

POWER and Maggie's are two sex worker-led organizations[9] that believe strongly that the criminalization of aspects of sex work leads to violence and stigmatization against the men and women in the occupation, and that there is nothing inherently degrading about sex work.

Both groups were granted intervener status in a motion before Justice O'Connor on 11 March 2011, due to their interest in the proceedings, their expertise and the important perspectives they proposed to raise.[10] Most notably, Maggie's and POWER were the only interveners to say that sex work is a valid and dignified occupation. They also alleged that the impugned provisions have a particularly adverse effect on sex workers who may face intersecting disadvantages based on sex, gender identity, sexual orientation, race, Aboriginal ancestry and/or class.

POWER and Maggie's believe that the impugned laws impair not only the safety of sex workers, but their personal autonomy. Their starting point is that many people choose to engage in sex work voluntarily. The decision to pursue sex work is a choice about one's body, one's sexuality and about whom to have sex with and on what terms. It is the position of POWER and Maggie's that these kinds of decisions are protected by the liberty and security of the person component of Section 7. As stated by the Supreme Court in *Rodriguez v. British Columbia (Attorney General)*, Section 7 protects "the right to make choices concerning one's body, control over one's physical and psychological integrity, and basic human dignity."[11]

At stake is nothing less than the right to decide the terms of one's sexual interactions.

The personal autonomy protected by the *Charter* does not encompass any and all decisions that an individual might make in the course of their life. Nevertheless, it does protect decisions that are "fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[12] POWER and Maggie's believe that this encompasses the decision to engage in sex work, as well as many of the decisions that sex workers make in the course of their occupation. At stake is nothing less than the right to decide and articulate the terms of one's sexual interactions.

Sex workers' personal autonomy interests are especially engaged by Section 213(1)(c), which prohibits sex workers from communicating for the purposes of sex work in a public space. This effectively prohibits sex workers from negotiating the terms of their interactions with clients in the relative safety of a public place. Sex workers cannot tell their clients which sexual services they are prepared or not prepared to provide until the sex worker and her client are out of public view, where the sex worker is most vulnerable to violence.

The two levels of governments and the Coalition for the Abolition of Prostitution characterized sex workers as coerced victims forced to engage in inherently violent and degrading behaviour. POWER and Maggie's believe that, far from being degrading, sex work can be an affirmative choice for those who engage in it. It can restore a sense of autonomy for those who have experienced certain forms of oppression. It can empower women by providing them with financial security and by allowing for "the development of alliances between women, bodily integrity and sexual self-determination."[13] As well, some members of the gay and transgendered communities, whose sexuality and gender expression is frequently marginalized, find that sex work provides acceptance of their

sexuality and gender expression.[14] To disregard these experiences displays a paternalistic attitude at odds with fundamental *Charter* values. Everybody's distinct experience contributes to their own sense of personal dignity.

POWER and Maggie's do acknowledge that some sex workers may be coerced, that some may choose sex work from a particularly restricted set of options and that some will change jobs given the opportunity. However, these experiences do not diminish the personal autonomy interest inherent in a person's decision to engage in sex work. Sex work is analogous to abortion in this respect. A woman's decision about whether or not to have an abortion is a fundamentally personal choice that engages the personal autonomy component of Section 7, even though some women may be coerced or pressured into having an abortion. Some women choose not to have an abortion for moral or religious reasons, and some women who choose to have an abortion later come to regret that choice.

What the abortion example highlights is that Section 7 protects the human capacity to make fundamental decisions about one's own body even — and, indeed, especially — where the choice in question is difficult or complex. As Justice Wilson wrote in *R. v. Morgentaler*:

> The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.[15]

POWER and Maggie's do not accept that the violence or degradation that some sex workers experience is inherent to sex work, as the Attorneys General argued. Rather, much of the violence and degradation that sex workers experience is attributable to the impugned laws, which criminalize the measures that sex workers could be taking to protect themselves, and perpetuate the very stigma that makes sex workers a target for predators.[16]

The impugned provisions also diminish sex workers' access to justice in respect of violent crimes. Sex workers are reluctant to go to the police to report crimes against themselves or other sex workers "out of fear they might be arrested and incur other consequences such as losing custody of their children, losing their lawful employment, and being stigmatized as a result of being found guilty of prostitution-related activity."[17] It is crucial to understand how stigma against sex workers exacerbates the violence and degradation that they experience in the course of their work, and that this stigma affects all sex workers, regardless of whether they work indoors in Toronto's upscale hotels or outdoors in Vancouver's Downtown Eastside.

Contrary to what the Attorneys General argue, sex work cannot simply be reduced to an "economic activity"[18] or "a choice of livelihood."[19] In the governments' view, sex workers should not be invoking *Charter* protections when they can simply choose another occupation to engage in. This perspective ignores the non-economic interests engaged by sex work. The fact that economic interests may be at stake does not mean that the personal autonomy interests also engaged by sex work can be disregarded.[20]

The impugned provisions of the Criminal Code diminish sex workers' access to justice.

The debate about sex work, both inside and outside the courtroom, demonstrates that people have mixed views about sex work. However, the autonomy protected by Section 7 does not differentiate between state-approved choices and those that may be unpopular. An individual has the freedom to make his or her own choices for good or ill.[21] As stated by Justice Wilson in *Morgentaler*, "liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them."[22]

Personal relationships and well-being

The impugned laws also restrict sex workers from making fundamental personal decisions about their rela-

tionships, health and well-being. For example, a sex worker may think twice before entering into a personal relationship, or disclosing a personal relationship to family members, neighbours or service agencies, because of the prospect that his or her partner will be reported to the police as living off the avails, or as a "pimp" and prosecuted under Section 212(1)(j).[23] Supportive relationships that add to a sex worker's safety and dignity, like a fellow sex worker who might provide a safe working environment, support and mentorship, may also be caught by Section 212(1)(j).

Sex workers' decision to access health and social services is hampered by their legitimate fear that they will be reported to the police or to child protective services for merely disclosing their occupation.[24] Despite the laws' purported objective of discouraging sex work, the impugned *Criminal Code* provisions make it more difficult for sex workers to make the decision to change jobs. Many sex workers have criminal records, serving as a barrier to re-employment in many fields.[25]

The impugned provisions cast a wide — and constrictive — net around the lives of all sex workers. However, questions have been raised throughout the proceedings about whether street-level sex workers will benefit from decriminalization to the same extent as sex workers who work inside. POWER and Maggie's believe that all sex workers, regardless of the circumstances in which they work, have their rights infringed by the impugned provisions. If Section 210 (the "bawdy-house" law) is struck down, not all street-level sex workers may want to work indoors. Some prefer the stroll as it is cheaper than paying for a hotel room and involves fewer interactions with third parties, while others may simply not have access to a home or a third-party location in which they could work. Those sex workers still benefit from the striking down of Section 213, as this will give them the ability to communicate lawfully with clients about the terms of their work in the relative safety of a public space.

The Coalition for the Abolition of Prostitution proposed an asymmetrical approach, in which the clients, employees and managers of sex workers would continue to be criminalized, but sex workers themselves — referred to by the Coalition as "prostituted persons" — would not.

POWER and Maggie's oppose an asymmetrical approach because it will not lessen or eliminate risks to sex workers: sex workers will still be prevented from screening their clients, since it will be illegal for clients to engage in these communications; sex workers will still be prevented from working indoors because the bawdy-house law will apply to clients and others found on the premises; and sex workers will still be prohibited from hiring a bodyguard or driver, since these persons would be caught by the living on the avails provision.

Criminalization of sex work and sexual health

The criminalization of certain aspects of sex work also engages the security of the person component of sex workers' Section 7 rights by hindering their ability to take certain measures to care for their sexual health and to prevent HIV transmission. Sex workers in all sectors of the industry are known to practise safer sex and are eager to protect themselves and their clients from sexually transmitted infections (STIs) and HIV infection.[26] The impugned provisions hinder sex workers' ability to reduce their risks related to HIV and STIs by criminalizing the ways in which sex workers can negotiate safer sex and effectively screen clients, and by inhibiting their access to sexual health services and their ability to carry condoms freely.

Section 213(1)(c) of the *Criminal Code,* which prohibits communication for the purposes of prostitution, captures communication necessary to negotiate, and agree upon, safer sex practices. Sex workers have expressed how, when rushed to move to a private location under the threat of the enforcement of Section 213(1)(c), they become hesitant to negotiate agreements around condom use.[27] Not only do sex workers not wish to be seen communicating about sex work in public, but talking about safer sex and condoms in itself could be characterized as a type of communication prohibited under Section 213.

Prohibiting sex workers from working in indoor locations also affects the ways in which they are able to care for their sexual health. Not only does working indoors provide sex workers with a safer environment and more time to negotiate safer sex, but brothels as organizations can establish and enforce procedural mechanisms around condom use and safer sex practices.[28] For instance, sex workers in brothels with firm policies relating to condom use are in a better position to turn away clients who refuse to use condoms because they have the support of the institution and others working within it. The brothel setting also allows for more time to screen the clients for sores or other indications of STIs.[29]

The Section 210 bawdy-house provisions push workers outside and

often result in sex workers working in isolation where they cannot benefit from established institutional practices around safer sex. Section 212(1)(j) (the living off the avails provision) is engaged when a third party, potentially also working out of a brothel, assists a sex worker in screening clients or promoting safer sex practices.

The criminalization of certain aspects of sex work hinders sex workers' ability to prevent HIV transmission.

The criminalization of sex work can also make the mere possession of condoms problematic for sex workers. In many instances, the police undermine a sex worker's ability to engage in safer sex practices by confiscating condoms or citing the possession of condoms as evidence of their engaging in an illegal activity.[30] Evidence before the court about the sex work trade in New Zealand included comments from sex workers that, since the decriminalization of sex work in that country, they can now carry condoms and lubrication, whereas previously they feared that these safer sex tools were being used as evidence for a conviction.[31]

Access to adequate and non-judgmental health-care services is essential for the health of any sexually active person. Access to HIV and STI testing and education programs, treatment and safer sex paraphernalia are particularly relevant to sex workers as a profession. Evidence before Justice Himel explained how the decriminalization of sex work would provide opportunities for sexual health providers to do outreach inside brothels or other indoor sex work locations.[32] As it stands, the illicit and underground nature of sex work creates a huge gap in the delivery of sexual health services to this target population.

The criminalization of sex work also severely hinders the ability of sex workers to access needed health services due to stigma. Due to well-founded fears of being judged, sex workers can be reluctant to disclose relevant information to their health-care providers, which in turn can preclude them from receiving appropriate health care.[33] The fear of being judged and mistreated by health-care professionals can result in sex workers not accessing sexual health services at all.

Sex work and equality

It has long been recognized that the rights protected by the *Charter* do not exist in isolation, but rather influence and reinforce one another.[34] POWER and Maggie's believe that the Section 15 principles of equality are imperative in interpreting the scope and content of the Section 7 violations. As Justice L'Heureux-Dubé wrote in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*:

> All *Charter* rights strengthen and support each other (see, for example, *R. v. Lyons,* [1987] 2 S.C.R. 309 at p. 326; *R. v. Tran,* [1994] 2 S.C.R. 951 at p. 326) and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7….
>
> …Thus, in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.[35]

This case raises issues of equality, as most sex workers fall into the categories of disadvantage represented by the enumerated or analogous grounds under Section 15 of the *Charter*. In particular, the majority of sex workers are women,[36] and the majority of male sex workers identify as either gay or bisexual[37] or experience homophobia because they are assumed to be gay.[38] The evidence submitted at the Superior Court level indicates that a relatively large proportion of street-level sex workers are racialized,[39] of Aboriginal ancestry[40] and/or transsexual or transgendered.[41] POWER and Maggie's work with a diverse group of sex workers, and their members are those who confront discrimination based on these grounds. Moreover, sex workers face intersecting forms of disadvantage. That is to say, they are disadvantaged in more than one respect. Sex

workers struggle with the very forms of prejudice and disadvantage that Section 15 of the *Charter* was enacted to redress.

While the principles of equality should infuse all aspects of the Section 7 analysis, equality is itself a "principle of fundamental justice" to which any deprivation of life, liberty or security of the person must accord in order to comply with Section 7. As Justice Wilson wrote, "a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice."[42] In this connection, the Ontario Court of Appeal has held that "the equality rights created by s. 15 are principles of fundamental justice."[43]

Sex workers struggle with the very forms of prejudice and disadvantage that the *Charter* was enacted to redress.

It is a basic principle of equality that governments should be prevented from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating group disadvantage and prejudice. Perpetuation of disadvantage typically occurs when the law treats an historically disadvantaged group in a way that exacerbates their disadvantage.[44] The impugned laws violate this equality principle by singling out sex workers for adverse treatment that is not accorded to workers in other occupations, thereby exacerbating the various and intersecting disadvantages that sex workers otherwise face.

As Justice Himel found, while sex work carries the risk of violence towards sex workers, it could be made safer.[45] However, rather than enacting or supporting measures to protect sex workers, the government has criminalized the very activities that could improve sex workers' safety. To quote from the decision:

> With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(j), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(c) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.
>
> In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.[46]

Sex workers are uniquely singled out for criminalization as a legislated response to the risks of their occupation. No other lawful occupation that carries the risk of violence — such as professional sports, policing,[47] security and corrections, and hospital work[48] — is subject to government measures that increase the risks to the worker. To the contrary, these professions are regulated to protect the worker as much as possible within their chosen occupation.[49] The differential treatment accorded to sex workers in this regard was described by the Applicants' experts as follows:

> Sex Work is a job in which society recognizes its workers to be at risk. However, rather than implementing job security measures, as we might do for other industries, society's response is to do away with the profession.[50]
>
> It is my belief that we as a society should not tolerate anybody having to work in a workplace that is unregulated, out of sight, unplaced and completely unsafe, particularly when the demand for the service that they sell comes from mainstream society. We would not tolerate those conditions for any other group of workers except sex workers.[51]

The adverse and differential treatment of sex workers exacerbates the stigma, prejudice and disadvantages that sex workers otherwise face. Specifically, by criminalizing the measures that would help protect sex workers from violent crimes, the impugned laws heighten and compound sex workers' vulnerability to violence for reasons related to sex-

ism,[52] transphobia,[53] homophobia[54] and/or racism.[55] As one report puts it, "exploitation can happen across the spectrum of sex work, but it is more prevalent when individuals have fewer options and are more vulnerable. Race, gender, class, socio-economic status and culture are also very influential on an individual's experience."[56]

Instead of enacting measures to protect sex workers, the government has criminalized the very activities that could improve their safety.

As stated earlier, the impugned laws also diminish sex workers' access to justice in respect of violent crimes since they are reluctant to report crimes committed against themselves or other sex workers. This effect is particularly acute for racialized sex workers, notably Aboriginal women,[57] whose access to justice is already compromised due to systemic racism on the part of the police and who are notoriously and tragically overrepresented among sex workers who have been assaulted or murdered.[58]

The impugned laws also facilitate employment discrimination against sex workers. Although discriminatory practices in the sex trade are common,[59] the impugned laws discourage sex workers from accessing human rights protections "for fear that a complaint will turn into an investigation of procuring or bawdy-house offences."[60] This has an especially acute effect on sex workers struggling with intersecting forms of disadvantage, who are most likely to experience discrimination. By discouraging human rights complaints from sex workers, the impugned laws help perpetuate a climate in which discrimination against already-marginalized sex workers is permitted to continue with impunity.

POWER and Maggie's argued that the impugned laws violate the principles of equality and, thus, the principle of fundamental justice by subjecting sex workers to adverse and differential treatment. Where the equality provisions of the laws are concerned, the Section 7 deprivations are rendered all the more grave. The security of the person deprivations occasioned by the laws regulating sex work are experienced differently and more acutely by sex workers struggling with various and intersecting forms of disadvantage.

Conclusion

In intervening before the Court of Appeal, POWER and Maggie's sought to remind the court that sex workers are people just like everyone else. Sex workers deserve the same guarantees to equality, dignity, security of the person and personal autonomy as all other Canadians. The *Charter* challenge raised questions for POWER and Maggie's such as: what communities are most affected by these laws? How far-ranging are these effects? What does criminalization allow us to believe and practise towards sex workers? POWER and Maggie's envision a world where sex work is valued, rather than being an object of violence and shame. While striking down these particular criminal laws may not cure the stigma about sex work, it would at least provide sex workers with the types of protections afforded to other workers in Canada. Our *Charter* promises nothing less.

— Karin Galldin, Leslie Robertson and Charlene Wiseman

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[1] *Bedford v. Canada*, 2010 ONSC 4264 (Ontario Superior Court of Justice).

[2] The impugned provisions state as follows:

> 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.
>
> (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.
>
> (3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the

owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

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

212. (1) Every one who

...

(j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

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

...

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

[3] To constitute a bawdy-house, premises must have been used "frequently or habitually" for the purposes of prostitution: *R v. Patterson,* [1968] S.C.R. 157 at paras. 162–63.

[4] *Bedford v. Canada, supra*, at para. 462.

[5] Factum of the Appellant, The Attorney General of Canada, 1 March 2011, at para. 166. On-line: http://mypage.uniserve.ca/~lowman/.

[6] Factum of the Appellant, The Attorney General of Ontario, 1 April 2011, at para. 67. On-line: http://mypage.uniserve.ca/~lowman/.

[7] See, for example, Factum of the Attorney General of Ontario, *supra*, at para. 49, and Factum of the Attorney General of Canada, *supra*, at para. 62. On-line: http://mypage.uniserve.ca/~lowman/.

[8] The Coalition also includes the Canadian Association of Sexual Assault Centres, Action ontarienne contre la violence faite aux femmes, La Concertation des luttes contre l'exploitation sexuelle, Le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society.

[9] POWER is an Ottawa-area advocacy organization comprised of past and current sex workers who are men, women, LGBT, Aboriginal and/or racialized, from the exotic dance, out-call, in-call, erotic massage, and street level sectors of the sex industry. Maggie's is a Toronto-based advocacy and service provision organization that works with about 1000 sex workers annually, including those working on- and off-street, the large majority of whom are women. Maggie's is also the first government-funded sex worker agency in the world.

[10] The intervener status of seven of the proposed interveners was granted on consent of the parties. However, Maggie's proposed intervention was opposed by the federal and Ontario Attorneys General because Maggie's had initially sought to raise a fresh Section 15 equality challenge to the impugned *Criminal Code* provisions before the Court of Appeal. Justice O'Connor denied Maggie's intervention on the basis that an intervener cannot raise new issues on appeal. However, recognizing Maggie's longstanding interest and expertise in the issues, Justice O'Connor allowed Maggie's to join one of the other intervener groups; hence, Maggie's and POWER intervened in the coalition.

[11] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at pp. 587–588, per Sopinka J.

[12] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66. See also: *R v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 166; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 85.

[13] "Making Work", Joint Application Record, Vol. 9, Tab 35D, p. 2239. On-line: http://mypage.uniserve.ca/~lowman/.

[14] *Street Prostitution: Assessing the Impact of the Law,* Joint Application Record, Vol. 8, Tab 34C, p. 2038. On-line: http://mypage.uniserve.ca/~lowman/.

[15] *R. v. Morgentaler, supra*, at para 239.

[16] Shaver Affidavit at para. 38, Joint Application Record, Vol. 24, Tab 55, p. 6819; Gillies, *Bound by Law*, Joint Application Record, Vol. 6, Tab 24A, p. 1141. On-line: http://mypage.uniserve.ca/~lowman/.

[17] Report of the Subcommittee on Solicitation Laws, Joint Application Record, Vol. 9, Tab 37F, p. 2472. On-line: http://mypage.uniserve.ca/~lowman/. See also *Bedford v. Canada*, 2010 ONSC 4264, *supra*, at para. 35: "She (Amy Lebovitch) experienced one notable instance of violence at this location, when she was tied up and raped by a client. Ms. Lebovitch did not report this incident to the police, out of fear of police scrutiny and the possibility of criminal charges."

[18] Factum of the Appellant, The Attorney General of Canada, *supra*, at para. 110.

[19] Factum of the Appellant, The Attorney General of Ontario, *supra*, at para 49.

[20] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at pp. 1003–4; *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844, at para 61.

[21] *R. v. Jones*, [1986] 2 S.C.R. 284 at pp. 318–9, as quoted in *Morgentaler, supra,* at p. 166, per Wilson J.

[22] *Morgentaler, supra,* at p. 167.

[23] Fraser Report, Volume 2, Joint Application Record, Vol. 71, Tab 154B, p. 20897. On-line: http://mypage.uniserve.ca/~lowman/.

[24] Report of the Subcommittee on Solicitation Laws, Joint Application Record, Vol. 9, Tab 37F, p. 2466. On-line: http://mypage.uniserve.ca/~lowman/.

[25] Ibid., at p. 2473.

[26] C. Bruckert and F. Chabot, *Challenges: Ottawa area sex-workers speak out,* POWER, 2010, p. 34. See also L. Shaver, *Safety, security and the well-being of sex workers: A report submitted to the House of Commons Subcommittee on Solicitation Laws*, Sex Trade Advocacy and Research, 2006; and L.A. Jeffrey and G. MacDonald, *Sex workers in the Maritimes talk back*, UBC Press, 2006.

[27] Maticka-Tyndale Affidavit, Joint Application Record, Vol. 12, Tab 45, at p. 3094. On-line: http://mypage.uniserve.ca/~lowman/.

[28] *Bedford v. Canada*, 2010 ONSC 4264, *supra*, at para 325. See also B. Brents and K. Hausbeck, "Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy," *Journal of Interpersonal Violence* 270 (2005).

[29] *Bedford v. Canada*, 2010 ONSC 4264, *supra*, at para 211. See also: "Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy," *supra*.

[30] *Challenges: Ottawa area sex-workers speak out, supra*, at p. 59.

[31] Justice Himel made reference to these comments made to the Prostitution Law Review Committee: see *Bedford v. Canada*, 2010 ONSC 4264, at para. 192.

[32] House of Commons Subcommitee on Solicitation Laws Evidence 2005-03-30, Testimony of Mandip Kharod, Joint Application Record, Vol. 84, Tab 164v at p. 25578. On-line: http://mypage.uniserve.ca/~lowman/.

[33] "Voices of Dignity: A call to End the Harms Caused by Canada's Sex Trade Laws," Joint Application Record, Vol. 24, Tab 55M, p. 7150. On-line: http://mypage.uniserve.ca/~lowman/. See also *Challenges: Ottawa area sex-workers speak out, supra*, at p. 86.

[34] *Morgentaler, supra,* at p.175.

[35] *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46, at paras. 112 and 115, per L'Heureux-Dube (also see paras. 113–114, 117).

[36] Between 75 and 85 percent of individuals selling sexual services in Canada are women (*Bedford*, para. 165). See also: "Safety, Security, and the Well Being of Sex Workers", Exhibit "B" to the Affidavit of Dr. Eleanor Maticka-Tyndale, Joint Application Record, Vol. 12, Tab 45–46, p. 3132. On-line: http://mypage.uniserve.ca/~lowman/.). It is estimated that approximately 10–25 percent of those involved in street prostitution are men ("Traditional Data Distort our View of Prostitution", Exhibit "C" to Affidavit of Frances Shaver, Vol. 24, Tab 55, p. 6877. On-line: http://mypage.uniserve.ca/~lowman/.).

[37] "Respondents also differed from the general population in regard to sexual orientation: 60.7% classified themselves as heterosexual, 31.9% as bisexual, 5.5% as homosexual and 1.8% as two-spirited. Further, males were far more likely than their female counterparts to identify themselves as homosexual (19.4% versus 1.9%) or bisexual (47.2% versus 29.4%)." ("Dispelling Myths and Understanding Realities: Working Conditions, Health Status, and Exiting Experiences of Sex Workers", Exhibit B to the Affidavit of Cecilia Benoit, Application Record, Vol. 13, Tab 48, pp. 3504–05. On-line: http://mypage.uniserve.ca/~lowman/.)

[38] Balancing Perspectives, Joint Application Record, Vol. 5, Tab, 228, p.1076. On-line: http://mypage.uniserve.ca/~lowman/.

[39] "About 40% of all sex workers are women of colour" (Decriminalizing Sex work, Joint Application Record, Vol. 3, Tab 16, p. 476. On-line: http://mypage.uniserve.ca/~lowman/.)

[40] Surveys of sex workers in cities across Canada consistently establish that Aboriginal women are over-represented among sex workers relative to the numbers in the general population (e.g., Report of the Subcommittee on Solicitation Laws, Joint Application Record, Vol. 9, Tab 37F, p. 2420; Amnesty International, Stolen Sister, Joint Application Record, Vol. 7, Tab 29C, pp. 1771–72. On-line: http://mypage.uniserve.ca/~lowman/. See also *Bedford v. Canada,* 2010 ONSC 4264, at paras. 90 and 165.

[41] "20 per cent of those involved in street prostitution are transgendered or transvestites" (*Bedford v. Canada*, 2010 ONSC 4264, at para. 165)

[42] *Morgentaler, supra*, at p.175. See also *Reference re. ss. 193 and 195.1(1)(c) of the* Criminal Code *(Man.),* [1990] 1 S.C.R. 1123, at p. 1130 per Wilson K. (in dissent).

[43] *Pacificador v. Philippines* (1993), 14 O.R. (3d) 321 at p.337. See also: *R. v. Andrew,* 1986 CanLII 966 B.C S.C. at paras. 23–24.

[44] *R. v. Kapp*, [2008] 2 S.C.R. 383 ¶25; *Withler v. Canada (Attorney General),* 2011 SCC 12 (CanLII), at paras. 30 and 35.

[45] See *Bedford v. Canada*, 2010 ONSC 4264, at paras. 300–318, 421.

[46] *Bedford v. Canada*, 2010 ONSC 4264 at paras. 359–362. See also paras. 327–343, 385, 387, 421, 422, 427–428, 429–421, 432, 434.

[47] *Bedford v. Canada,* 2010 ONSC 4264, at para. 294.

[48] "Safety, Security and the Well-Being of Sex Workers", Joint Application Record, Vol. 24, p. 7100 (slide presentation). On-line: http://mypage.uniserve.ca/~lowman/.

[49] For example, a regulation under *Ontario's Health and Safety Act*, R.S.O. 1990, c.0.1 protects the health and safety of health-care workers and is tailored to the unique risks they face. See Health Care Residential Facilities, O. Reg 67/93. In the federal jurisdiction, there are specific regulations protecting workers in occupations where there is a high risk of physical injury, including: aviation (SOR/87); oil and gas work (SOR/87-612); and mining (SOR/90-97). Both the Ontario and federal health and safety statutes require employers to take various precautions to reduce the risk of violence to regulated workers. See OHSA Part III.0.1 and Canada OHS Regulations, SOR/86-304, Part XX.

[50] Shaver Affidavit at para. 38, Joint Application Record, Vol. 24, Tab 55, p. 6819.

[51] Patterson Affidavit at para. 18, Joint Application Record, Vol. 7, Tab 30, p. 1838.

[52] *R v. Ewanchuk*, [1991] 1 S.C.R. 330, at paras. 68–70.

[53] "Transsexuals…face very serious forms of discrimination within our society, including routine acts of violence and hatred" (*Hogan v. Ontario (Health and Long-Term Care),* [2006] O.H.R.T.D. No. 34, at para. 459. See also paras. 330, 331, 406)

[54] *Egan v. Canada,* [1995] 2 S.C.R. 513, at paras. 173–174.

[55] "Aboriginal women between the ages of 25 and 44, with status under the Indian Act, are five times more likely to die of violence than other women of the same age." (Mooney Affidavit at para 18, Joint Application Record, Volume 7, Tab 29, p. 1690. On-line: http://mypage.uniserve.ca/~lowman/.).

[56] *Balancing Perspectives,* Joint Application Record, Vol. 5, Tab 23B, p. 1070. On-line: http://mypage.uniserve.ca/~lowman/.

[57] Aboriginal women are subject to both over-policing due to racist stereotypes that "native women are immoral and sexually promiscuous," as well as under-policing because "aboriginal people are often seen as less worthy victims." Thus, "the problems which aboriginal women face in their interactions with police are magnified by the perception that sex workers are also less worthy victims." (Mooney Affidavit at paras. 20–21, Joint Application Record, Vol. 7, Tab 29, p. 1691.) See also: *Bedford* at para. 174; Comments from Kara Gillies, Joint Application Record, Vol. 6, Tab 24C, p. 1428; Report of the Subcommittee on Solicitation Laws, Joint Application Record, Vol. 9, Tab 37F, p. 2420. On-line: http://mypage.uniserve.ca/~lowman/.

[58] "Missing native women invisible," Joint Application Record, Vol. 7, Tab 29 D, p. 1821; "Creating Options", Joint Application Record, Vol. 38, Tab 96D, p. 11032; Report of the Sub-committee on Solicitation Laws, Joint Application Record, Vol. 9, Tab 37F, p. 2420. On-line: http://mypage.uniserve.ca/~lowman/.

[59] "Many women reported discriminatory and racist hiring or management practices on the part of employers. Racialized women described being outright denied employment, relegated to unpopular shifts or receiving a minimal number of clients. Many participants spoke of race-based quotas whereby management limits the number of women of colour, black women and Aboriginal women hired in general or assigned to each shift or location. All three transsexual women interviewed stated that the vast majority of escort agencies and massage parlous refuse to hire transsexual/transgendered women and that those that do frequently pay these workers a lower rate than genetic/biological women. These forms of discrimination are in clear breach of federal, provincial and territorial human rights codes" (Gillies, Bound by Law, Joint Application Record, Vol. 6, Tab, 24A, p. 1346).

[60] Ibid. For the same reasons, sex workers' access to other employment protections, such as employment standards, occupational health and safety and labour relations would likely be impeded, even to the extent that these protections apply to sex work.