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CANADA (ATTORNEY GENERAL) V. BEDFORD: THE WORLD'S OLDEST PROFESSION STRUGGLES TO CARVE OUT A FUTURE FOR ITSELF

John J. Kappel*

ON June 13, 2013,¹ the Supreme Court of Canada heard oral argument in *Canada (Attorney General) v. Bedford*. Final argument in front of the Supreme Court was the culmination of a four-year legal battle to change Canada's prostitution laws. The Supreme Court's forthcoming decision has the potential to strike down up to three laws that criminalize acts related to prostitution² and may cause a dramatic change in the prevalence, nature, and safety of prostitution throughout Canada. The first section of this article provides procedural background for the case and information about the parties; the second section outlines each of the challenged statutes and the practical effect of each statute; and the third section addresses the two lower courts' decisions with respect to each statute.

I. PARTIES AND PROCEDURAL BACKGROUND

The case originated in the Ontario Superior Court of Justice.³ Terri Jean Bedford, Amy Lebovitch, and Valerie Scott (the applicants), three women who have worked as prostitutes in various capacities,⁴ applied for declaratory relief⁵ in the Superior Court, requesting from the Court an order declaring that three Canadian criminal statutes violated the *Canadian Charter of Rights and Freedoms (The Charter)*.⁶ The three challenged statutes criminalize conduct relating to and associated with the sale of sex, but actually selling or buying sex is not, in itself, illegal in Canada.⁷

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1. *Docket*, SUPREME COURT OF CANADA, www.scc-csc.gc.ca/case-dossier/info/docket-regi-eng.aspx?cas=34788 (last visited Sept. 26, 2013).

2. *See infra* II.

3. *Bedford v. Canada (Att'y Gen.)*, 2010 ONSC 4264 (Can. Ont. Sup. Ct. J.).

4. *Canada (Att'y Gen.) v. Bedford*, 2012 ONCA 186, paras. 10–12 (Can. Ont. C.A.).

5. *Bedford v. Canada (Att'y Gen.)*, 2010 ONSC 4264, para. 4 (Can. Ont. Sup. Ct. J.).

6. *Id.*

7. *Id.* para. 3.

A. PARTIES IN THE SUPERIOR COURT

The initial dispute was between the three applicants and the Attorney General of Canada who supported the three challenged statutes as conforming to *The Charter*.⁸ The Attorney General of Ontario intervened on behalf of and with essentially the same legal arguments as the Attorney General of Canada.⁹ In addition, three interest groups: the Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League intervened on behalf of the Attorney General of Canada with arguments rooted in policy and legislative objectives.¹⁰ The intervenors' arguments were based on the assertion that disapproval of prostitution by the Canadian population at large makes limiting prostitution a legitimate legislative objective that can be pursued by criminalizing conduct tangential to prostitution without offending *The Charter*.¹¹

The intervention of all three groups was opposed by the applicants who appealed the intervention to the Ontario Court of Appeals.¹² Finding that the intervenors had "a real, substantial, and identifiable interest in the subject matter of the application and an important perspective different from the parties," the Court of Appeals allowed the intervention of all three organizations.¹³

B. DECISION OF THE SUPERIOR COURT

A seven day trial was held in the Ontario Superior Court in October of 2009.¹⁴ On September 28, 2010, after eleven months of deliberation, the Superior Court released its judgment in the matter.¹⁵ In a massive 132-page opinion, the Superior Court found that all three challenged statutes were in violation of *The Charter*¹⁶ and consequently struck down all three.¹⁷ Likely understanding the dramatic effects that might be caused by such a radical change in the law, the application judge decided to stay the Superior Court's decision for two months so that the decision could be appealed to the Ontario Court of Appeals.¹⁸

Two months later, the Ontario Court of Appeals heard a motion to stay the judgment of the Superior Court until the Court of Appeals could hear and decide the appeal.¹⁹ At the hearing, the Court of Appeals extended the stay until its decision on the motion to stay was reached.²⁰ On De-

8. *Id.* paras. 8–13.

9. *Id.* para. 19.

10. *Id.* para. 22–23.

11. *Id.* paras. 23–24.

12. *Id.* para. 22.

13. *Id.*

14. *Id.* at 1.

15. *Id.*

16. *Id.* para. 3.

17. *Id.*

18. See *Canada (Att'y General) v. Bedford*, 2010 ONCA 814, para. 3 (Can. Ont. C.A.).

19. *Id.* at 1.

20. *Id.* para. 3.

cember 2, 2010,²¹ the Court of Appeals released a forty-two page decision staying the Superior Court's judgment until the Court of Appeals could hear the appeal.²² The court favored the Attorney General's argument that the legislative void created by the sudden absence of the three stuck laws would be detrimental to the public interest over the applicants' argument that the stay would perpetuate the harm caused by the statutes.²³

C. PARTIES ON APPEAL

When the case was brought up on appeal, all three applicants were present as respondents²⁴ and the Attorney General of Ontario joined the Attorney General of Canada as appellant.²⁵ In addition to the original group of intervenors, twelve more organizations were allowed to intervene in the appeal.²⁶ The majority of the intervenors supported the decision of the application judge in its entirety and a minority opposed the decision completely or partially.²⁷ Most notably, the appeal drew the attention of the Canadian Civil Liberties Association,²⁸ which intervened in support of the Superior Court's decision.²⁹

D. DECISION OF THE COURT OF APPEALS

The Court of Appeals heard the Attorney General's appeal over five days in June of 2011.³⁰ Evidently not to be one-upped by the Superior Court, after only nine months of deliberation³¹ the Court of Appeals released its own equally massive 132-page majority opinion along with a sixteen page partial dissent.³² The three judge majority partially agreed with the application judge and held that two of the three challenged statutes were a violation of *The Charter*.³³ The majority disagreed with the application judge with respect to the validity of the third statute, holding that it should not be struck down.³⁴ The two judge minority was in essentially complete agreement with the application judge's decision to strike down all three laws.³⁵ This created an effectively unanimous court affirming the application judge's decision against two of the three chal-

21. *Id.* at 1.

22. *Id.* para. 5.

23. *Id.* para. 4.

24. Canada (Att'y Gen.) v. Bedford, 2012 ONCA 186, paras. 10–12 (Can. Ont. C.A.).

25. *Id.* para. 46.

26. *Id.* para. 47.

27. *Id.*

28. The Canadian Civil Liberties Association "promote[s] respect for and observance of fundamental human rights and civil liberties, and [works to] to defend, extend, and foster recognition of these rights and liberties." *About CCLA*, CANADIAN CIVIL LIBERTIES ASSOCIATION, <http://ccla.org/about-us/> (last visited Sept. 26, 2013).

29. Canada (Att'y Gen.) v. Bedford, 2012 ONCA 186, at 2 (Can. Ont. C.A.).

30. *Id.*

31. *Id.* at 1.

32. *Id.*

33. *Id.* paras. 5–6, 8.

34. *Id.* paras. 7–8.

35. *Id.* para. 333 (MacPherson J.A., dissenting in part).

lenged statutes and just a bare majority upholding the third.³⁶

Doubtlessly recognizing the landmark nature and enormous potential ramifications of the case, the Supreme Court granted both sides leave to appeal and extended the stay on the judgments of both of the lower courts until the Supreme Court hears the appeal and cross-appeal.³⁷

II. YES, YOU CAN SELL SEX, BUT THERE IS A CATCH OR THREE

Selling and buying sex is, in and of itself, legal in Canada.³⁸ But the Canadian Parliament has elected to pass several laws that criminalize conduct related to prostitution.³⁹ The first such law challenged in *Bedford* outlaws brothels and their equivalents; the second makes it illegal to profit from someone else's acts of prostitution; and the third makes it illegal to publicly solicit prostitution.

A. NO BROTHELS, BORDELLOS, OR BAWDY-HOUSES PLEASE

The Canadian Criminal Code provides, in pertinent part, that it is illegal for anyone to keep,⁴⁰ be an inmate of,⁴¹ or be found without a lawful excuse in a "common bawdy-house."⁴² It is also illegal for an owner, landlord, lessor, etc. to knowingly permit a place under his or her control to be used for the purposes of a "common bawdy-house."⁴³ A "common bawdy-house" is defined as a place that is "kept or occupied"⁴⁴ or "resorted to by one or more persons⁴⁵ for the purpose of prostitution or practice of acts of indecency."⁴⁶

1. *You Live in a What?!*

This provision makes it illegal to operate a conventional brothel or its equivalent. This means that any effort by several prostitutes to collaborate and create a well-known, established, and secure location to service clients is illegal. Notably, this provision also makes it illegal for a lone prostitute to own a designated location where the prostitute services his or her clients.⁴⁷ This includes even the prostitute's home.⁴⁸ If a prostitute were to sell sex out of his or her home, the prostitute's home would legally become a "common bawdy-house" within the meaning of the stat-

36. *Id.*

37. Application for Leave, No. 34788, Oct. 25 2012 (Can.).

38. Canada (Att'y Gen.) v. Bedford, 2012 ONCA 186, para. 2 (Can. Ont. C.A.).

39. *Id.*

40. Criminal Code, R.S.C. 1985, c. C-46 § 210(1) (Can.).

41. *Id.* § 210(2)(a).

42. *Id.* § 210(2)(b).

43. *Id.* § 210(2)(c).

44. *Id.* § 197(1)(a).

45. *Id.* § 197(1)(b).

46. *Id.* § 197(1).

47. Canada (Att'y Gen.) v. Bedford, 2012 ONCA 186, para. 14 (Can. Ont. C.A.).

48. *Id.*

ute and the prostitute would be guilty of a crime.⁴⁹ Consequently, a prostitute who wishes to provide services to his or her client must do so either at the client's residence or a hotel room; the Court describes this as "out-call work."⁵⁰

B. NO ASSISTANCE FOR YOU AND NO AVAILS FOR EVERYONE ELSE

The Canadian Criminal Code provides, in pertinent part, that it is illegal for anyone "[to live] wholly or in part on the avails of [the] prostitution of another person."⁵¹ This particular provision was likely designed to outlaw pimping or other behavior that exploited another person by using them as a prostitute.⁵² The Court of Appeals noted, however, that this provision also imposes criminal penalties on anyone who provides services to prostitutes because they are prostitutes.⁵³ This would include bodyguards, drivers, agents, assistants, etc. This means that the law that was designed to prevent the exploitation of prostitutes actually has the effect of imposing criminal penalties on people who are not exploiting prostitutes, but are in actuality providing services to prostitutes that help them and, in some cases, services that make selling sex considerably safer.⁵⁴

C. AND ABSOLUTELY NO SUGGESTIVE REMARKS ABOUT SAILORS

The Canadian Criminal Code provides, in pertinent part, that it is illegal for anyone who "stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute in a public place or in any place open to public view."⁵⁵ A "public place" is defined to include any place to which the public has an implied or express invitation or right of access;⁵⁶ this includes a motor vehicle that is in a public place or in a place open to public view.⁵⁷

This prohibition on public solicitation of the sale of sex by either a would-be buyer or a would-be seller creates an effective ban on street prostitution.⁵⁸ The extension of the definition of public place to include any motor vehicle in a public place or even simply in any place visible to the public makes it all but impossible for prostitutes to offer their services to anyone that they encounter in public even though actually selling sex to someone that a prostitute meets in a public place is not itself illegal.⁵⁹

49. *Id.*

50. *Id.* para. 16.

51. Criminal Code, R.S.C. 1985, c. C-46 § 212(1)(j) (Can.).

52. *Canada (Att'y Gen.) v. Bedford*, 2012 ONCA 186, para. 19 (Can. Ont. C.A.).

53. *Id.*

54. *Id.*

55. Criminal Code, R.S.C. 1985, c. C-46 § 213(1)(c) (Can.).

56. *Id.* § 197(1).

57. *Canada (Att'y Gen.) v. Bedford*, 2012 ONCA 186, para. 15 (Can. Ont. C.A.) (citing Criminal Code, R.S.C. 1985, c. C-46 § 213(2) (Can.)).

58. *Id.* para. 18.

59. *See id.*

III. LIFE, LIBERTY, AND THE SECURITY OF THE PERSON

The combined effect of the three aforementioned laws criminalizing conduct related to prostitution was not well received by people who sell sex for a living.⁶⁰ The result was a constitutional challenge to all three statutes by the applicants in *Bedford*. The basis for the challenge was rooted in sections 1, 2, and 7 of *The Charter*.⁶¹

A. LEGAL BUT EXTREMELY RESTRICTED . . .

When sections 210, 212, and 213 of the Criminal Code are considered simultaneously, it becomes apparent that while selling sex in the abstract is completely legal in Canada, actually doing so is unreasonably difficult. Section 210 outlaws brothels and everything even remotely similar so that a prostitute cannot simply wait in a fixed location for clients to come to him or her; section 212 prevents a prostitute from hiring anyone to assist him or her in finding clients; and section 213 outlaws soliciting the sale of sex in public.⁶² The ultimate effect is that a prostitute must rely on clients privately contacting him or her to provide services in the client's home or in a hotel room.⁶³

B. . . . IS EXTREMELY UNACCEPTABLE

It is the position of the applicants that the condition created by these three statutes deprives them of their right to life, liberty, and security of the person (section 7 of *The Charter*),⁶⁴ that the deprivation is not in accordance with principles of fundamental justice (section 1 of *The Charter*),⁶⁵ and that the communicating provision in section 213 is a violation of their freedom of expression (section 2 of *The Charter*).⁶⁶

When evaluating the applicants' claims that the three statutes violated *The Charter*, the application judge considered eighty-eight volumes of evidence totally over 25,000 pages.⁶⁷ Most of the evidence was in the form of affidavits of people that had first-hand experience with prostitution or were considered experts on the subject.⁶⁸ The evidence included information about prostitution in other countries including: Australia, New Zealand, and the United States (focusing on Nevada).⁶⁹

60. *See id.* paras. 15–19.

61. *Id.* para. 20.

62. *Id.* paras. 15–19.

63. *Id.*

64. *Id.* para. 20.

65. *Id.*

66. *Id.* The Superior Court conducted a section 2 analysis for section 213, but the Court of Appeals determined that precedent from the Supreme Court indicated that section 213 was not in violation of section 2 of *The Charter*. *Id.* para. 86. The Court of Appeals concluded that *stare decisis* prevented either lower court from revisiting the question. *Id.*

67. *Id.* para. 23.

68. *Id.* paras. 23–24.

69. *Id.* para. 24.

C. AN UNACCEPTABLE INTERFERENCE WITH THE SECURITY OF
THE PERSON

After reviewing the enormous amount of evidence presented to the Court, the application judge reached four specific findings of social and legislative fact that the Court of Appeals agreed with: (1) “prostitution is inherently dangerous for prostitutes;”⁷⁰ (2) “there are ‘safety enhancing’ measures that prostitutes can take to mitigate the risk of physical harm;”⁷¹ (3) “each of the challenged Criminal Code provisions criminalizes at least one ‘safety enhancing’ measure that prostitutes could take to reduce the danger of physical harm;”⁷² and (4) “the criminalization of measures that could make prostitution safer has the effect of increasing the risk of physical harm to prostitutes who engage in prostitution.”⁷³

Both lower courts agreed that this grouping of facts indicated that prostitutes are prevented “from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them.”⁷⁴ Prostitutes are essentially forced to decide “between their liberty and their security of the person.”⁷⁵ While it may be a “client who inflicts violence upon a prostitute, . . . the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.”⁷⁶ This led both courts to conclude that the three challenged provisions denied the applicants their right to security of the person under section 7 of *The Charter*.⁷⁷

D. TWO-THIRDS OF A VIOLATION OF FUNDAMENTAL JUSTICE

Having found that all three provisions violate section 7 of *The Charter*, both courts then asked whether the violations were in accord with the abstract notion of fundamental justice. Both courts found that the “bawdy-house” provision, while made with a legitimate purpose, was overbroad and therefore violated the principles of fundamental justice and should therefore be struck.⁷⁸ Similarly, the “living on the avails” provision was found to be overbroad by the Court of Appeals and overbroad and arbitrary by the Superior Court, causing both courts, although for somewhat different reasons, to find that the statute violated the principles of fundamental justice and should therefore be struck.⁷⁹ The Superior Court found the “communicating” provision to be grossly disproportionate and held it to violate the principles of fundamental justice as a re-

70. *Id.* para. 126.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* para. 101 (quoting *Bedford v. Canada* (Att’y Gen.), 2010 ONSC 4264, para. 362 (Can. Ont. Sup. Ct. J.)).

75. *Id.* (quoting *Bedford v. Canada* (Att’y Gen.), 2010 ONSC 4264, para. 362 (Can. Ont. Sup. Ct. J.)).

76. *Id.*

77. *Id.* para. 142.

78. *Id.* para. 172.

79. *Id.* para. 221.

sult.⁸⁰ The Court of Appeals disagreed and did not find the "communicating" provision to be arbitrary, overbroad, or grossly disproportionate.⁸¹ As a result, the Court of Appeals overturned the Superior Court's decision and upheld the provision instead.⁸²

E. THE SUPREME COURT'S FORTHCOMING DECISION

Given the considerable time that both of the lower courts spent deliberating, there is little chance of getting quick decision—or a short opinion—from the Supreme Court. Given that the lower courts struck down the "bawdy-house" and "living on the avails of" provisions unanimously, it seems likely that one or both will be similarly struck by the Supreme Court. Considering the close split in the Court of Appeals, it seems entirely possible that the Supreme Court may strike down the "communicating in public" provision as well. Even if only one of the three statutes were held to be unconstitutional by the Supreme Court, the result would likely create a significant change in the lives of prostitutes and possibly Canadian society as a whole.

80. *Id.* para. 229.

81. *Id.* para. 323.

82. *Id.* para. 324.