



A Summary of the Supreme Court of Canada's Decision in *Bedford v. Canada*

Background

The three applicants, Terri Jean Bedford, Amy Lebovitch and Valerie Scott, all current or former sex workers, argued that three laws in the Criminal Code regulating sex work were unconstitutional as they violated their rights under Section 7 of the *Canadian Charter of Rights and Freedoms* to 'life, liberty and security of the person'. The challenged laws were those prohibiting operating or being found in a 'bawdy house' (s. 210), 'living off the avails' of a prostitute' (s. 212(1)(j)), and communicating for the purposes of prostitution (s. 213(1)(c)).

The Ontario Superior Court of Justice first heard the case, and the judge, Justice Himel, found all three provisions to be unconstitutional. The case was then heard by the Court of Appeal, where the panel of four judges disagreed with the Justice Himel, instead only finding the 'bawdy house' and 'living off the avails' laws to be unconstitutional, while upholding the communicating law. The Court of Appeal did not strike down the 'living off the avails' provision entirely, but instead modified it, adding that it only applies where there is exploitation. Finally, the Supreme Court of Canada (SCC) heard the case, and on December 20th, **all nine judges unanimously agreed that all three laws were unconstitutional**. Nothing will change immediately though, as the SCC gave Parliament one year to rewrite new laws, should they choose to.

The Supreme Court Decision

The SCC decided that all three laws infringe on sex worker's rights under section 7 by depriving them of 'security of the person' in a way that is not in accordance with the '**principles of fundamental justice**'. Three ways that a law can violate a principle of fundamental justice is if:

- 1) The impact it has on people is '**grossly disproportionate**' to the purpose of the law,
- 2) It is '**overbroad**' and catches too many unrelated activities or actions, or
- 3) If the law is '**arbitrary**', having no connection with the purpose of the law.

If a law violates a principle of fundamental justice, then the government has an opportunity under section 1 of the *Charter* to argue the infringement on rights is justifiable and within reasonable limits. In this case, none of the violations met the section 1 requirements so the laws were struck down. Starting from the position that prostitution is legal in Canada, the SCC declared that the three laws:

"Do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks."

The 'Bawdy House' Law

The SCC agreed with the Ontario Superior Court of Justice that the evidence shows that "indoor work is far less dangerous than street prostitution" and that out-call work is not as safe as in-call work. **The SCC judges found that the 'bawdy house' law increased sex worker's risk in three ways:**

- 1) By preventing them from working in fixed indoor locations (described as safer, allowing for regular clients, and the establishment of safeguards, like security and monitoring),
- 2) By interfering with health checks and preventative health measures, and
- 3) By preventing safe houses, where street-based sex workers can take clients.

The purpose of the 'bawdy house' law was to prevent community disruption or harm to a community in the form of nuisance. The SCC found that the negative impacts of the law on sex worker's were 'grossly disproportionate' to that purpose. The SCC stated:

"Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes."

The 'Living off the Avails' Law

The SCC agreed with the Justice Himel that the evidence shows that hiring drivers, receptionists, and bodyguards could increase the safety of sex workers, but that the law prevents sex workers from doing this. The purpose of the law prohibiting 'living off the avails of a prostitute' was to target pimps and 'parasitic, exploitative conduct'. The SCC agreed with the Ontario Superior Court of Justice and Court of Appeal that the law was

overbroad, capturing a number of non-exploitative relationships, and grossly disproportionate, **negatively impacting the safety and security of sex workers more than it was protecting them from harm.**

The Communicating Law

The SCC found that the communicating law **prevented sex workers from screening clients, having time to set terms (including for condom use), and significantly increased the risks they face.** Further, they found that the law **displaced sex workers** from familiar areas where they might be supported by friends or regular customers, to more isolated areas increasing their vulnerability. The purpose of the communicating law was to combat the nuisance caused by street prostitution. The SCC disagreed with the Court of Appeal's decision to uphold the communicating provision because those judges:

- 1) Did not give enough weight to the evidence of sex workers and experts on how essential face-to-face communication is to sex worker's safety,
- 2) Ignored how the communicating law displaces sex workers to secluded, less secure locations, and
- 3) Relied speculated about the impact of the communicating law instead of relying on the evidence.

The SCC ruled that Justice Himel had been correct in finding that the negative impact on the safety of street-based sex workers is grossly disproportionate to the nuisance caused by street prostitution. The SCC stated:

"If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established."

The Role of Choice and Third Parties

The lawyers representing the Government tried to argue that sex workers could avoid harm by simply choosing not to engage in prostitution, and that 'third parties' such as johns and pimps are the real source of the harm they experience, not the laws. The SCC disagreed, stating:

"While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so...street prostitutes, with some exceptions, are a particularly marginalized population."

The SCC further disagreed about the role of third parties, stating that prostitution is a legal activity, and that:

"The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that threat."

What now?

The Supreme Court tried to balance concern from Canadian society about an entirely unregulated prostitution industry, with the risks to sex workers related to the current laws, and decided to give Parliament one year to draft new laws around prostitution, should they choose to. The SCC stated:

"Concluding that each of the challenged provisions violates the *Charter* does not mean that Parliament is precluded from imposing limits on where and how prostitution is conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes."

This means that nothing changes immediately, and that **the three laws that were declared to be unconstitutional will remain in effect** until Parliament passes new laws, or the 1 year time period passes. Police may continue to enforce the laws and sex workers can still be charged for violating them, though these charges could be challenged based on the decision of the SCC that the laws are unconstitutional.

Parliament may create entirely new laws, or may adopt a legal framework modeled after another country's, such as the 'Nordic Model' from Sweden, which criminalizes only the clients of sex workers and the purchase of sexual services, or a decriminalized model like in New Zealand, where sex work is legal except in situations of coercion, or even a fully criminalized model like in some parts of the United States. It is hoped that Parliament will not make new laws that violate the same *Charter* rights as the current laws, that put sex workers health and safety at risk, and that **sex workers are meaningfully involved in developing the new legal framework.**

If you have any questions about the *Bedford v. Canada* decision, email sallan@cfenet.ubc.ca

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