

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

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

Respondents in appeal  
(Applicants)

- and -

**ATTORNEY GENERAL OF CANADA**

Appellant in appeal  
(Respondent)

- and -

**ATTORNEY GENERAL OF ONTARIO**

Appellant in appeal  
(Intervener)

- and -

**PACE SOCIETY, THE DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY (SWUAV), PIVOT LEGAL SOCIETY, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN HIV/AIDS LEGAL NETWORK, BC CENTRE FOR EXCELLENCE ON HIV/AIDS, PROSTITUTES OF OTTAWA/GATINEAU WORK EDUCATE AND RESIST, CANADIAN 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, LA CONCERTATION DES LUTTES CONTRE L'EXPLOITATION SEXUELLE, LE REGROUPEMENT QUÉBÉCOIS DES CENTRES D'AIDE ET DE LUTTE CONTRE LES AGRESSIONS À CARACTÈRE SEXUEL, VANCOUVER RAPE RELIEF SOCIETY, CHRISTIAN LEGAL FELLOWSHIP, CATHOLIC CIVIL RIGHTS LEAGUE, REAL WOMEN**

Interveners

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**FACTUM OF THE INTERVENER  
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

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## **PART I: INTRODUCTION**

1. The Attorneys General of Canada and Ontario (respectively, the “AGC” and the “AGO”) have appealed to this Honourable Court from the judgment of Justice Himel (the “Application Judge”), finding ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code* (collectively, the “Impugned Provisions”) inconsistent with the Constitution of Canada.

*Bedford v. Canada*, 2010 ONSC 4264, 102 O.R. (3d) 321 (“Reasons of Himel J.”);

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 210, 212(1)(j), 213(1)(c);

*Canadian Charter of Rights and Freedoms* (“*Charter*”), ss. 2(b) and 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11;

*Constitution Act, 1982*, s. 52(1)

2. The British Columbia Civil Liberties Association (the “BCCLA”) intervenes to assist the Court in its analysis of the s. 7 liberty interest. In addition to guaranteeing freedom from physical restraint, the *Charter*’s guarantee of liberty protects a sphere of autonomy, in which individuals may make for themselves inherently personal decisions. The state may invade that core of personal autonomy only if it does so in accordance with the principles of fundamental justice. The BCCLA submits that the Impugned Provisions infringe sex workers’<sup>1</sup> liberty in this fashion and, largely for the reasons identified by the Application Judge (as amplified below), they do so contrary to the principles of fundamental justice.
3. It must be noted at the outset that the AGC seeks to characterize this case as turning on a claimed “constitutional right to engage in prostitution”. He starkly asserts that, “The only right in issue is the economic entitlement to engage in prostitution.”

AGC’s Factum, *e.g.*, paras. 5, 62-63

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<sup>1</sup> The BCCLA prefers the terms “sex worker” and “sex work”, respectively, to “prostitute” and “prostitution”, as the former terms recognize a greater sense of dignity in, and avoid unwarranted stigmatization of, persons engaged in a lawful occupation.



4. As the Respondents rightly point out, the appeal involves no such asserted right. Parliament has not criminalized sex work outright, and the Court is not required in this appeal to deal with the thorny issues that would arise were such legislation enacted.<sup>2</sup>

Respondents' Factum, *e.g.*, paras. 3, 17

5. Sex work remains legal. The challenge to the Impugned Provisions must be understood in that critically important context.

6. In terms of the s. 7 analysis, the Application Judge rested on the threat of imprisonment to find that the Impugned Provisions constitute a real or imminent deprivation of liberty. In the BCCLA's submission, the liberty analysis is not exhausted by acknowledging that a provision carries the penalty of imprisonment.

Reasons of Himel J. at para. 281

7. With respect, a liberty analysis referencing only the physical fetters of imprisonment overlooks the additional and important ways in which the Impugned Provisions interfere with the core autonomy of sex workers. Consideration of the broader liberty protection is necessary in order to identify the constitutional infirmities of the Impugned Provisions, which are of critical importance to the Court's constitutional analysis, including its approach to remedy.<sup>3</sup>

See, *e.g.*, *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 84 (Gonthier and Binnie JJ.)<sup>4</sup> [**Joint Auth., Vol. 4, Tab 78**]

8. Sex workers engaged in their lawful occupation are entitled to the benefit of a broader liberty protection, encompassing core aspects of their personal autonomy. Unique among

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<sup>2</sup> In that very different hypothetical, the BCCLA – which is on record for the proposition that capable adults are entitled to exercise full autonomy over their bodies – could be expected to advance materially different arguments than it does in this Factum.

<sup>3</sup> It also necessarily affects the s. 1 analysis, although the BCCLA notes that the justificatory analysis is essentially a cursory one in the circumstances: Respondents' Factum, para. 199.

<sup>4</sup> In that case, Justices Gonthier and Binnie jointly held that, although “the availability of imprisonment ... is sufficient to trigger s. 7 scrutiny ... Malmo-Levine's position [that the criminalization of marijuana is an unacceptable infringement of personal liberty] requires us to address whether broader considerations of personal autonomy, short of imprisonment, are also sufficient to invoke s. 7 protection.” [Emphasis added.]

human occupations, sex work involves continual and highly personal choices regarding (a) the use of one's body and (b) the manner in which one engages in sexual activity. This Court properly considers these factors in its constitutional analysis, as elements of personal autonomy. Such an analysis does not invite or require consideration of an asserted constitutional or economic "right to engage in prostitution".

9. Nor does the autonomy analysis deny or ignore the general social and economic disadvantages that many sex workers face. The concept of autonomy does not connote an unconstrained or de-contextualized freedom to act. Rather, recognizing that all human choice is fettered by circumstance (including factors that may practically constrain choice or compel a certain path of action), the argument is that the state cannot create further constraints by invading the protected sphere of personal autonomy, contrary to the principles of fundamental justice. Indeed, in the present context, the BCCLA submits that the Impugned Provisions' incursions into the protected sphere engaged in this case in fact perpetuate the marginalization of sex workers and exacerbate the risk of violence they face. The Impugned Provisions violate core aspects of sex workers' autonomy, contrary to s. 7.

## **PART II: STATEMENT OF FACTS**

10. The BCCLA accepts the Application Judge's factual findings. To the extent necessary, the BCCLA will refer to those factual findings below.

## **PART III: ISSUES AND LAW**

11. The BCCLA endorses the Respondents' submission, grounded in Wilson J.'s reasons in the *Prostitution Reference*, that "the legality of prostitution must be recognized in any s. 7 analysis". The rights at issue are those of persons engaged in a lawful occupation.

*Reference re ss. 193 and 195(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1217 [**Joint Auth., Vol. 6, Tab 125**]. See also the reasons of Lamer J. (as he then was), *ibid.*, at 1162, 1191;

Respondents' Factum, para. 4

12. The BCCLA submits that those engaged in this occupation repeatedly make profoundly personal decisions regarding the use of their bodies and the manner in which they engage in sexual activity. Those matters go to the heart of individual autonomy and find protection under the liberty interest in s. 7. The state may only interfere with those autonomous choices where it has a legitimate legislative purpose and duly respects the principles of fundamental justice.

A. The Liberty Interest in Section 7

13. Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
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*Charter, s. 7*

14. The three interests included in s. 7 – life, liberty and security of the person – are distinct from one another. Each has independent meaning and content.

*Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 204-05 (Wilson J.)

15. The threshold question in a s. 7 analysis – whether there is a real or imminent deprivation of the protected interest<sup>5</sup> – involves different considerations depending on the interest or interests at issue. While the Respondents’ security of the person arguments turn on a showing of harm (or risk thereof), a liberty claim is made out by establishing simply that the state has invaded “the irreducible sphere of personal autonomy wherein individuals may make inherently private choices”.

*Godbout v. Longueuil (City of)*, [1997] 3 S.C.R. 844 at para. 66 (La Forest J.)

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<sup>5</sup> “A court conducting an analysis under s. 7 must first determine whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination thereof. Next, the court must identify the relevant principle or principles of fundamental justice and, finally, determine whether the deprivation is in accordance with this principle or principles.” (*R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 at para. 66 (Iacobucci and Major JJ.))

16. The Application Judge found that the Impugned Provisions constitute a threshold violation of the Respondents' security of the person. The BCCLA submits, in addition and on the present record, that the Impugned Provisions infringe liberty interests enshrined in s. 7, and do so in a profound manner. In the final analysis, the BCCLA agrees with the Respondent and the Application Judge below that the infringement is contrary to the principles of fundamental justice.

Reasons of Himel J., at paras. 359-62

1. *Liberty and Personal Autonomy*

17. In *Morgentaler*, Justice Wilson stated the following regarding the scope of liberty under s. 7 of the *Charter*:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

[...]

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.

*R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 166-67 (Wilson J.) [**Joint Auth., Vol. 4, Tab 86**]

18. The Supreme Court of Canada has most frequently addressed the physical aspect of liberty – as necessarily engaged where there is risk of imprisonment. The broader ambit

of liberty reflected in Justice Wilson's reasoning has, however, been endorsed in several decisions, culminating in its acceptance as sound law.

See: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. at para. 80 (La Forest J.);<sup>6</sup>

See also: *B. (R.)*, *ibid.*, at para. 214 (Iacobucci and Major JJ.); *Godbout v. Longueuil*, *supra*, at para. 64 (La Forest J.);<sup>7</sup> *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 49 (Bastarache J.) [**Joint Auth., Vol. 1, Tab 3**];<sup>8</sup> *R. v. Malmo-Levine*; *R. v. Caine*, *supra*, at para. 85 (Gonthier and Binnie JJ.) [**Joint Auth., Vol. 4, Tab 78**]

19. The BCCLA submits that the impugned provisions manifestly interfere with the sphere of personal autonomy protected by the s. 7 liberty interest. In the first place, the Supreme Court's recent jurisprudence in the labour context establishes that a person's work is generally regarded as a factor of great importance to his or her individual flourishing. Secondly, with respect to the lawful occupation under consideration, sex workers are continually engaged in highly personal choices surrounding their own bodies and their personal engagement in sexual activity. Thirdly, the prohibition in s. 212(1)(j) [living on the avails] constrains the sex worker's ability to choose the form his or her domestic relations will take, and to have that choice respected by the state.

*R. v. Grilo* (1991), 2 O.R. (3d) 514 at 521-22, 64 C.C.C. (3d) 53 (C.A.) [**Joint Auth., Vol. 3, Tab 60**];

See also: *Nova Scotia (A.G.) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325 at para. 43 (Bastarache J.)

20. Thus, the Impugned Provisions affect those matters so "fundamentally or inherently personal ... that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence".

*Godbout v. Longueuil*, *supra*, at para. 66;

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<sup>6</sup> "In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."

<sup>7</sup> "[T]he right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein the state is, in normal circumstances, precluded from entering."

<sup>8</sup> "Members of this Court have found that 'liberty' is engaged where state compulsions or prohibitions affect important and fundamental life choices."

See also: *R. v. Malmo-Levine*; *R. v. Caine*, *supra*, at para. 85 [**Joint Auth., Vol. 4, Tab 78**]

2. *General Importance of Work to an Individual*

21. The Court returned to the concept of human dignity as a bedrock *Charter* value in the 2007 *Health Services* judgment. Chief Justice McLachlin and Justice LeBel held:

Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly [*sic*] the *Charter*: *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103. All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(*d*) of the *Charter*.

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work (see *Alberta Reference [Reference re Public Service Employee Relations Act (Alta.)]*, [1987] 1 S.C.R. 313, at p. 368, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 93). As explained by P.C. Weiler in *Reconcilable Differences* (1980):

Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them .... [p. 33]

*Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at paras. 81, 82 [**Joint Auth., Vol. 2, Tab 22**]

22. Likewise, with respect to s. 2(*b*) of the *Charter*, the Court has held:

Free expression is particularly critical in the labour context. As Cory J. observed for the Court in *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, “[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations” (para. 25). The values associated with free expression relate directly to one’s work. A person’s employment, and the conditions of their workplace, inform one’s identity, emotional health, and sense of self-worth: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *KMart*, *supra*.

Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life.

*R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156 at paras. 33-34 (McLachlin C.J.C. and LeBel J.)

23. These recent authorities recognize that an individual's work, considered at a holistic level, plays a fundamental role in his or her life. The BCCLA does not argue from this that all interests related to 'work' fall within a zone of constitutionally-protected liberty. Patently, the state has a valid and compelling interest in the regulation of various aspects of the workplace. It can accomplish a great deal of employment-related regulation without offending constitutional rights; only a particular sub-set of work-related matters qualify, in the words of Wilson J., as "a critical component of the right to liberty". The analysis is by necessity fact-specific.

*Morgentaler, supra*, at 166-67 [**Joint Auth., Vol. 4, Tab 86**]

24. The facts of the present case fall within that sub-set. For persons engaged in the lawful business of sex work, the choices: (a) to work from secure indoor premises, in changing and unfamiliar indoor premises or, alternatively, outside [s. 210]; (b) to employ additional assistance and support [s. 212(1)(j)]; and, if working in a public place or in a place open to public view, (c) to converse and negotiate with potential customers [s. 213(1)(c)]; are "intensely personal considerations" that lie in that "narrow sphere of personal autonomy wherein the state is [...] precluded from entering", contrary to the principles of fundamental justice.

*Godbout, supra*, at paras. 64, 67 (La Forest J.)

3. *Inherently Personal Choices Particular to Sex Work*

25. Although speaking there in terms of security of the person, Justice Sopinka's discussion of personal autonomy in *Rodriguez* provides valuable guidance in the present context. In that case, Sopinka J. suggested that personal autonomy includes, among other things, "the right to make choices concerning one's own body".

*Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519 at 588 [**Joint Auth., Vol. 6, Tab 129**]

26. An individual's choices concerning his or her body must, the BCCLA submits, fall within those fundamental and inherently personal decisions that receive *prima facie* protection under the liberty interest. It is difficult to conceive of decisions touching more centrally on individual dignity, on which concept the personal autonomy component of s. 7 liberty is based.

27. Among choices related to the body, individual decisions regarding sexual activity – even if including an element of remuneration – must also be regarded as falling within the sphere of personal decisions integral to individual autonomy and dignity. There can, indeed, be few more intensely personal issues than the decision to use one's person for a sexual purpose.

28. On the facts found – and legal conclusions expressed – by the Application Judge, the Impugned Provisions interfere in a significant manner with a sex worker's ability to manage his or her own sex life. By way of example:

- a. s. 210 [bawdy house] prohibits sex workers from working with other sex workers out of a common place (Reasons of Himel J. at paras. 6, 244-53, 399-400);
- b. s. 212(1)(j) [living on the avails] prohibits sex workers from hiring other persons to assist them *qua* sex worker (Reasons of Himel J. at paras. 6, 264-72, 379, 402); and
- c. s. 213(1)(c) [communicating for the purpose] criminalizes discussion serving to screen potential clients (Reasons of Himel J. at paras. 6, 275-78, 409).



29. Comparable restraints, applied in respect of other lawful conduct, would undoubtedly be recognized as giving rise to a *prima facie* deprivation of liberty.<sup>9</sup> The issue in such a hypothetical case, as here, is whether the deprivation is accomplished in accordance with the principles of fundamental justice.

4. *Domestic Arrangements*

30. Finally, the prohibition in s. 212(1)(j) violates the right to personal autonomy in domestic affairs. As explained by Justice Arbour in *Grilo*, that provision targets parasitic relationships and – for a person living with a sex worker – there must be an element of ‘exploitation’. It is not, the Court made clear, otherwise a criminal offence to marry or live with a sex worker.

*Grilo, supra*, at 521-22 [**Joint Auth., Vol. 3, Tab 60**];

Reasons of Himel J. at paras. 268-69, 402

31. Keeping in mind, however, that s. 212(3) places an evidential burden on the person living with a sex worker to disprove that he or she is living on the avails, it is not entirely clear when and how ‘exploitation’ might be determined in a conjugal setting. The reasons in *Grilo*, in fact, appear premised on the notion that the person married to or living with the sex worker will also be working for remuneration. In this connection, Arbour J.A. referred to the fact that criminal consequences would not attach to “the pooling of resources and the sharing of expenses or other benefits which would normally accrue to all persons in similar situations.”

*Grilo, ibid* [**Joint Auth., Vol. 3, Tab 60**];

See also: *R. v. Downey*, [1992] 2 S.C.R. 10 [**Joint Auth., Vol. 3, Tab 51**]

32. What *Grilo* does not address in detail is the situation in which a person engaged in sex work might be the primary or sole ‘bread-winner’ in a family: for instance, where the partner or spouse is charged with domestic duties or unemployed (perhaps by choice). It is doubtful that the courts would consider such a ‘dependent by choice’ analogous to the child or disabled parent mentioned in *Grilo*. It appears more likely that the court would

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<sup>9</sup> The BCCLA notes, as well, that the issues identified in paragraph 28 of this Factum also give rise to breaches of other constitutional rights not here under review.

characterize him or her as “the idle parasite” at whom s. 212(1)(j) is aimed, than as a person to whom a “legal or moral claim to support” is owed.

*Grilo, ibid.*, at 522 [**Joint Auth., Vol. 3, Tab 60**];

See also *R. v. Barrow* (2001), 54 O.R. (3d) 417 at paras. 28-29, 155 C.C.C. (3d) 362 (C.A.) [**Joint Auth., Vol. 2, Tab 29**]

33. To the extent that *Grilo* addresses the topic, it suggests the dependent by choice can make no legal or moral claim of support. In this regard, Arbour J.A. held:

There may not be a parasitic relationship when people contribute, for instance, in proportion to their means, unless one partner makes little or no contribution because he chooses to live as a parasite.

*Grilo, ibid.* at 521 [emphasis added] [**Joint Auth., Vol. 3, Tab 60**]

34. It follows that s. 212(1)(j) would prohibit relationships between sex workers and ‘shiftless’ spouses or partners. Those are apparently not, in Parliament’s assessment, “normal and legitimate living arrangement[s]”, and the latter are exposed to criminal liability.

*Grilo, ibid* [**Joint Auth., Vol. 3, Tab 60**]

35. Moreover, what is also clear is that – for those partners or spouses who do earn remuneration – they cannot do so by assisting, or engaging in a joint venture with, the sex worker. Section 212(1)(j) prohibits the latter from living with his or her bodyguard, accountant, manager, *etc.* This amounts to Parliament’s dictating what relationships are ‘off the table’ for persons engaged in sex work. As such, it represents a profound interference with the sex worker’s choice surrounding his or her intimate and familial relationships.

36. In brief, to the extent that the living on the avails provision constrains a person engaged in sex work in his or her freedom to choose alternative domestic arrangements – for instance, living with a partner who is ‘idle’ or who otherwise earns no remuneration – it interferes in a matter of fundamental personal choice and violates the s. 7 liberty interest.

See *Nova Scotia (A.G.) v. Walsh, supra*

5. *Conclusion: Impugned Provisions Infringe Section 7 Liberty*

37. The facts of this appeal squarely engage the personal autonomy aspect of liberty. Sex work is a legal occupation, involving highly personal choices concerning the individual's own person, the sexual activity he or she engages in, and his or her domestic arrangements.

38. Parliament's regulation of sex work through the criminal law, as reflected in the Impugned Provisions, interferes with the inherently personal choices of sex workers. In that same connection, the law fails to respect the dignity of those persons. In a series of passages cited by the Application Judge, the authors of the *Fraser Report* recognized this fundamental disconnect:

[B]ecause there are special laws [surroundings prostitution], this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens.

[...]

The current special status of prostitution in the *Criminal Code* does not appear ... to have given prostitutes the right to dignity and equal treatment in society.

[...]

[W]hile we talk of prostitution being free of legal sanction, we in reality use the law indirectly and capriciously to condemn or harass it[.]

[...]

The law on prostitution, as presently constituted, has not achieved what is presumably its theoretical object, that of reducing prostitution (or even of controlling it within manageable limits). Moreover, it operates in a way which victimizes and dehumanizes the prostitute.

Reasons of Himel J. at para. 328, quoting *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution: Summary* (Ottawa: Minister of Supply and Services Canada, 1985) (the "Fraser Report") at 392, 393, 533

39. It cannot be ignored that, on the facts, sex workers are predominantly women (75 – 85%). They are often persons from historically marginalised or disadvantaged groups: there is a disproportionately high prevalence of First Nations women amongst sex workers; 20% of street sex workers are transgender or transvestite persons; and the causes of prostitution

have been identified as including economic disadvantage, childhood sexual abuse and drug use.

Reasons of Himel J. at paras. 119, 141, 165, 174, citing the Fraser Report and the Standing Committee on Justice and Human Rights and Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada, 2006) (the "Subcommittee Report")

40. In addition, the vast majority of enforcement efforts (over 90% of incidents reported by police) occur in respect of street sex workers, who appear to be among the most marginalised and most vulnerable members of the group. Parliament's regulation of the liberty of the sex worker therefore has a doubly invidious effect.

Reasons of Himel J. at para. 165, 174, citing the Subcommittee Report

41. Liberty as protected under s. 7 of the *Charter* includes not only freedom from physical restraint, but also a zone of autonomy that individuals are entitled to expect that the state will respect. Any incursion by the state inside that zone is a *prima facie* deprivation of liberty, calling for application of the relevant principles of fundamental justice. On the facts at bar, the infringement with autonomy is not only manifest, but it also tends to perpetuate the marginalization of sex workers.

B. Principles of Fundamental Justice

42. Although the Respondents develop their arguments as to principles of fundamental justice primarily in respect of the violation of their security of the person, the principles they rely on – namely: arbitrariness; overbreadth; gross disproportionality; and rule of law – are equally relevant to the violation of liberty discussed in this Factum.

Respondents' Factum, paras. 165-73 [arbitrariness], 174-91 [overbreadth], 192-98 [gross disproportionality] and 208-11 [rule of law]

43. The BCCLA endorses and adopts the Respondents' cogent submissions in each of these regards. Without repeating the points raised by the Respondents, the BCCLA submits that the ineffectiveness and, indeed, harmfulness of the Impugned Provisions must

permeate the entire “principles of fundamental justice” analysis. That is, those factors ought not to be treated as relevant only to specific principles.

44. The Impugned Provisions single out sex work, but do not require any proof of harm, abuse or undue influence in order to make out the respective offences. The BCCLA agrees that harms arising in sexual relationships, including harms both physical and emotional, are appropriately – and indeed ought to be – addressed by the law. However, as the Application Judge correctly held, harms arising in the context of sex work are effectively addressed through existing *Criminal Code* provisions.

Reasons of Himel J. at paras. 527-34;

See also, *e.g.*: *Criminal Code*, *supra*: ss. 264.1 [uttering threats]; 265 [assault]; 267 [assault with a weapon or causing bodily harm]; 268 [aggravated assault]; 269.1 [torture]; 271 [sexual assault]; 272 [sexual assault with a weapon, *etc.*]; 273 [aggravated sexual assault]; 279 [kidnapping]; 279.01 [trafficking in persons]; 279.02 [material benefit from trafficking]; 346 [extortion]

45. Harms specific to minors are also expressly addressed through other provisions of the *Code*.

Reasons of Himel J. at para. 516;

See also, *e.g.*: *Criminal Code*, *ibid.*, *e.g.*: ss. 151 [sexual interference]; 152 [invitation to sexual touching]; 153 [sexual exploitation]; 170 and 171 [procuring/permitting sexual activity]; 172 [corrupting children]; 172.1 [luring a child]; 173(2) [indecent exposure to person under 16]; 279.011 [trafficking in a minor]; 280 [abduction of person under 16]

46. The Impugned Provisions’ infringements on autonomy are not counterbalanced by any identifiable concern with harm. Nor do they account for the matter of consent.
47. As the Application Judge found, the Impugned Provisions “constrain the independent choices of prostitutes in relation to their personal safety”. Thus, apart from failing to address harm, the Impugned Provisions are harmful unto themselves, increasing the risk of violence faced by sex workers.

Reasons of Himel J. at para. 426

48. These frailties, which the BCCLA says are endemic to the Impugned Provisions, are properly considered in respect of each principle of fundamental justice raised on the appeal.

C. Section 1 Justification

49. The BCCLA also endorses the Respondent's submissions concerning s. 1. The Appellants have shown no error, let alone a reversible error, in the Application Judge's s. 1 analysis. The Impugned Provisions are unconstitutional.

Respondents' Factum, paras. 199-207

D. Remedy

50. Subsection 52(1) of the *Constitution Act, 1982* provides that, "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

*Constitution Act, 1982*, s. 52(1)

51. The BCCLA submits that the Appellants have failed to show that the Application Judge erred in her approach to remedy.

Reasons of Himel J. at paras. 508-39;

AGC's Factum, paras. 180-86

52. The BCCLA further submits, however, that the extent of the inconsistency between the Impugned Provisions and the Constitution is greater than found by the Application Judge. As argued above, the Impugned Provisions violate the personal autonomy protected under the s. 7 guarantee of liberty, contrary to the principles of fundamental justice, and are not demonstrably justified reasonable limits.

53. Accordingly, to the extent of that infringement, the Impugned Provisions are of no force or effect. The BCCLA submits that this additional scope of inconsistency is a relevant consideration in the assessment of remedy. In any event, it properly forms part of this Court's analysis as part of the 'dialogue' between the judiciary and the legislature.

Insofar as the Impugned Provisions violate autonomy under s. 7, it is preferable that Parliament be informed prior to drafting replacement provisions.

**PART IV: ORDER REQUESTED**

54. The BCCLA submits that the appeal should be dismissed. It requests, in keeping with the 11 March order of Associate Chief Justice O'Connor, that it not be made subject to any order as to costs.

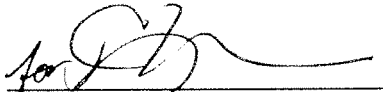
ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver in the Province of British Columbia this 4<sup>th</sup> day of May, 2011.


SIGNED BY:



**Brent B. Olthuis**



**Megan Vis-Dunbar**



**Stephanie L. McHugh**

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

## SCHEDULE A: LIST OF AUTHORITIES

- B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R.
- Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307
- Godbout v. Longueuil (City of)*, [1997] 3 S.C.R. 844
- Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391
- Nova Scotia (A.G.) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325
- R. v. Barrow* (2001), 54 O.R. (3d) 417, 155 C.C.C. (3d) 362 (C.A.)
- R. v. Downey*, [1992] 2 S.C.R. 10
- R. v. Grilo* (1991), 2 O.R. (3d) 514, 64 C.C.C. (3d) 53 (C.A.)
- R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757
- R. v. Marmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571
- R. v. Morgentaler*, [1988] 1 S.C.R. 30
- R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156
- Reference re ss. 193 and 195(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123
- Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519
- Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177



## SCHEDULE B: CONSTITUTIONAL AND STATUTORY PROVISIONS

1. *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11
2. *Constitution Act, 1982*, s. 52(1)
3. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 210, 212(1)(j), 213(1)(c)

### ***Canadian Charter of Rights and Freedoms, s. 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11***

#### LEGAL RIGHTS

*Life, liberty and security of person*

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

#### ***Constitution Act, 1982, s. 52(1)***

*Primacy of Constitution of Canada*

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

#### ***Criminal Code, R.S.C. 1985, c. C-46, ss. 210, 212(1)(j), 213(1)(e)***

*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.

#### GARANTIES JURIDIQUES

*Vie, liberté et sécurité*

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

*Primauté de la Constitution du Canada*

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

*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.

*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 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.

*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 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.

*Procuring*

**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.

[...]

*Presumption*

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

**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.

*Definition of "public place"*

(2) In this section, "public place" includes any place to which the public have access as of

*Proxénétisme*

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

[...]

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

[...]

*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 habituellement en compagnie d'un prostitué ou vit dans une maison de débauche constitue, sauf preuve contraire, la preuve qu'elle vit des produits de 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 :

[...]

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

right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

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.

