Canada (AG) v Bedford: Canada's Prostitution Laws Found Unconstitutional

This article was written by a law student for the general public.

Introduction

In the landmark decision of *Canada (Attorney General) v Bedford*[1] on December 20, 2013, the Supreme Court of Canada ruled that some of Canada's prostitution laws are unconstitutional. The Court found that the laws violated sex workers' rights to the security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*.[2] The Court gave the government time to change the laws by allowing them to stay in place for up to one year. If there is no change, the unconstitutional prostitution laws will be struck down. This one-year delay gives Canadians a unique opportunity to think about, debate, and tell Members of Parliament what kind of prostitution laws they want. It is possible, however, that any new laws may be challenged in court again.

Reports showed sharply contrasting views of the decision on the day it was released. In particular, plaintiff Valerie Scott stated, "[p]eople said that when women got the right to vote, equal pay, equal rights, and same sex marriage — all of those things, every single one, people said the sky would fall in. It did not. Society is the better for it and society will be the better for sex workers having proper civil and occupational rights."[3] A contrasting view came from Kim Pate of the Association of Elizabeth Fry Societies: "It's a sad day that we've now had confirmed that it's OK to buy and sell women and girls in this country. I think generations to come — our daughters, their granddaughters and on — will look back and say, 'What were they thinking?'"[4]

Prostitution is currently legal in Canada, but many actions associated with prostitution are considered crimes. Three of these crimes were found to be unconstitutional by the Court:

1) Communicating in public for the purpose of prostitution;[5]

2) Living in, owning, leasing, occupying or being inside of a 'common bawdy house';[6] and

3) 'Living off the avails of' prostitution.[7]

A common bawdy house is a place that is used for prostitution.[8] 'Living off the avails of' prostitution means someone who makes a living from or lives off the money that prostitutes earn.

The following Featured Court Ruling explains why the Supreme Court found these three

prostitution laws unconstitutional. The Supreme Court also commented in detail about how section 7 of the *Charter*[9] should be interpreted by the courts.

Facts

Background

Terri Jean Bedford, Amy Lebovitch, and Valerie Scott are either current or former sex workers. They applied to the Ontario Superior Court of Justice for an order declaring that the above laws were unconstitutional. They argued that these laws created unsafe working conditions for prostitutes, and thus violated their rights to the security of the person under section 7.

Procedural History

At trial, and after considering 25,000 pages of evidence, the judge found the laws against keeping a common bawdy house, living on the avails, and communicating in public for the purposes of prostitution laws to be unconstitutional. The judge decided that all three of those laws violated sex worker's rights to security of the person.

The government appealed the decision to the Ontario Court of Appeal, where it found that the 'bawdy house' and 'avails' laws were unconstitutional. However, they found the law about 'communicating' to be constitutional. One of the justices on the appeal court dissented in part and would have found the 'communicating' law unconstitutional as well.

The majority of the Court also found that the trial judge had overstepped her authority since she disagreed with an earlier Supreme Court decision in the *Prostitution Reference* case.[10] The Supreme Court also decided that appeal courts did not have to show deference to trial judges on facts about society and legislation. Usually, appeal courts must be deferential to the facts found at trial.

Both sides appealed the Court of Appeal decision to the Supreme Court.

Issues

The Supreme Court considered the following issues:

1. Can a trial judge consider Charter arguments not raised in a previous case about the same law?
2. Must appeal courts defer to facts found at trial about society and legislation?
3. How should courts determine whether laws cause violations of section 7 rights?
4. Is the 'common bawdy house' law constitutional?
5. Is the 'living off the avails' law constitutional?
6. Is the 'communicating in public for the purposes of prostitution' law constitutional?

Decision

The Supreme Court ruled that a trial judge may consider *Charter* arguments not raised in a previous case about the same issues. It also found that facts about society and legislation determined at trial court must be given deference by higher courts. Finally, the Court found all three of the prostitution laws – common bawdy house, living of the avails, and communicating in public for the purposes of prostitution - to be unconstitutional.

Court's Analysis

Issue 1: Can a trial judge consider *Charter* arguments not raised in a previous case about the same law?

The Supreme Court decided that, in some situations, a trial judge may consider *Charter* arguments not raised in a previous case about the same law.

If a higher court has already made a decision about a legal issue, then a lower court generally must decide that legal issue in the same way. This is the principle of *stare decisis*.[11] The lower court is 'bound' by that decision. This is true of all cases, including reference cases. Here, the Supreme Court ruled that new arguments about a subject already decided by higher courts are new issues. Because they are new issues, the trial court can make a different decision than the higher court about the same subject. In addition, significantly new circumstances or evidence may render the same argument about the same subject a new issue. In those circumstances, a lower court is also not bound by a higher court. In other words, the constitutionality of a law is more important than the principle of *stare decisis*. A lower court does not need to follow the decision of a higher court, even the Supreme Court of Canada, if the result would be unconstitutional.

In this case, the Supreme Court found that the trial judge was allowed to make a different decision about Canada's prostitution laws than the Supreme Court did in the *Prostitution Reference* case. New arguments about the laws and section 7 of the *Charter* meant that there was a new legal issue for the judge to decide.

Issue 2: Must appeal courts defer to facts found at trial about society and legislation?

The Supreme Court decided that appeal courts must defer to facts found at trial about society and legislation.

Generally, appeal courts do not change facts found at trial unless the trial judge finds a fact that had no supporting evidence, and that finding affects the outcome. This is because the trial court can examine and test the evidence at length. If appeal courts did the same fact finding, there would be a lot of time wasted on repeating work already completed at trial. Likewise, if appeal courts had one standard for facts about society and legislation and another for other facts, then appeal courts would have an impossible task. Facts about society and legislation are usually linked with other facts. Appeal courts could not untangle the two types of facts, nor verify them. They must rely on the trial court’s judgment because

the facts have been presented directly there.

Issue 3: How should courts determine whether laws cause violations of section 7 rights?

The Court clarified two important points about determining whether, and how, laws cause violations of section 7 rights. The first point was about causation, or how the court determines whether the law caused the violation of someone's section 7 rights. The second was about the principles of fundamental justice, or how courts must classify different ways in which laws can violate rights.

Sub Issue 3.1: Causation

The Attorney General in this case argued that the laws against living off the avails, keeping a common bawdy house and communicating for the purposes of prostitution cannot cause violations of section 7 rights because Parliament is free to make laws as they see fit. Therefore, anyone who sells sex accepts the risks of breaking those laws.

The Supreme Court rejected these arguments. The court reasoned that some people may have no real choice other than selling sex because of desperate financial circumstances, addiction, or force. Even if all prostitutes had freely chosen their work, the laws in question create the possibility of harm that violates their right to security of the person. For example, the prohibition against communicating in public for the purposes of prostitution prohibited prostitutes from screening clients in public before getting in a car or meeting in a private area. Screening clients before going into a private area is a way for prostitutes to help check if their potential client is drunk or possibly dangerous. Prohibiting this practice violated their section 7 rights because sex workers must choose between an important safety measure and obeying the law.

Sub Issue 3.2 Principles of fundamental justice

Section 7 of the *Charter* states that "[e]veryone 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."[12] The Court stated that the purpose of section 7 is to ensure that laws that impact the rights to life, liberty and security of the person do not conflict with our basic values. The 'principles of fundamental justice' are a way to understand these basic values about justice.

The Court noted that one of these principles is a principle against arbitrariness, overbreadth and gross disproportionality. A law is arbitrary when there is no real connection between the effect of the law and its goal. A law is overbroad when the effect of the law goes too far and interferes with activities that are not part of its goal. A law is grossly disproportionate when the effect of the law is much harsher than the benefits of achieving its goal.

Issue 4: Is the 'common bawdy house' law unconstitutional?

The Supreme Court found the common bawdy house law unconstitutional. Unlike the

Ontario Court of Appeal, the Supreme Court supported the trial court's decision about the facts involving bawdy houses. The trial court found that the goal of this law was to address some of the effects of prostitution on communities rather than to address prostitution itself. The finding was that while the law did help keep brothels out of communities, it also prevented sex workers from working safely. It noted that the safest method of prostitution is "in-call" prostitution, where sex work occurs in a place controlled by sex workers. The Court concluded that the 'common bawdy house' law prevents sex workers from hiring security and receptionists, resorting to safe houses, and taking other safety measures. Therefore, the law puts sex workers at risk and violates their section 7 rights. As such, it was declared unconstitutional.

Issue 5: Is the 'avails' law unconstitutional?

The law against living off the avails of prostitution was likewise found to be unconstitutional. The Supreme Court accepted the facts about this law found at trial. It was found at trial that this law's purpose was to protect sex workers against exploitative relationships. The Supreme Court found that this law was overbroad. It noted that while the law satisfied this purpose, it also stopped sex workers from hiring people that would make their work safer, such as security guards. It did this because any person that sex workers might hire to keep them safe would be breaking the law against living off the avails of prostitution.

Issue 6: Is the 'communication' law unconstitutional?

Again, the Supreme Court accepted the facts found at trial where the objective was found to be preventing a public nuisance, namely public displays of the negotiation about sex work. While the law does prevent that nuisance, the court also found it to prevent safety measures such as screening of clients and negotiating condom use.

The Supreme Court found that the effect of the law was grossly disproportionate because the law had grave consequences to sex workers compared to the benefits of the goal of avoiding nuisance in communities.

The Supreme Court also ruled that the majority of the Court of Appeal erred in their decision on this point, misunderstanding the objective of the law as noted in the *Prostitution Reference* case. The Court of Appeal also wrongly substituted its own judgment on the evidence for the trial court's judgment. The Supreme Court also found that the Court of Appeal erred by ignoring some important facts found at trial and substituting these facts with speculation.

The court gave Parliament time to write new laws by allowing all three laws to stay in place for up to one year.

Significance of the Ruling

It is hard to overstate the impact of this decision. Not only were three of Canada's prostitution laws declared invalid, the Supreme Court gave new direction on how courts

should deal with prior decisions and section 7 rights claims.

On June 4, 2014, Minister of Justice Peter McKay introduced a bill in response to this decision.[13] He stated that the bill would make prostitution illegal in Canada for the first time by criminalizing the purchase of sex.[14] For example, selling sex would still be legal under the proposed law, but buying it would now be illegal. Reactions were polarized. The Pivot Legal Society argued that the new prostitution laws would both be unconstitutional and make sex work more dangerous.[15] They argued that it would be unconstitutional because the proposed law would make a legal activity dangerous in the same way the old laws did. In contrast, professor Michael Plaxton of the University of Saskatchewan College of Law suggested that the law may be constitutional and more carefully written than the laws struck down in *Bedford*.[16]

This decision gives Canadians a unique opportunity to think about, debate, and tell Members of Parliament what kind of prostitution laws they want. Prostitution is the so-called oldest profession, and Canada has an opportunity to take a new approach. The Minister of Justice has stated that the proposed bill is a new "Canadian Model" dealing with sex work.[17] This has led to a lot of debate in society and in Parliament. Regardless of what law, if any, Parliament passes, any new laws may be challenged in court again.

[1] *Canada (Attorney General) v Bedford*, 2013 SCC 72, 2013 SCC 72 (Canlii).

[2] *Canadian Charter of Rights and Freedoms*, *s 7*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11.

[3] "Supreme Court strikes down Canada's prostitution laws", *CBC News* (20 December 2013) online: CBC News < http://www.cbc.ca/news/politics/supreme-court-strikes-down-canada-s-prostitution-laws-1.2471572>.

[4] *Ibid*.

[5] *Criminal Code*, RSC 1985, c C-46, s 213(1)(c).

[6] *Ibid*, s 210.

[7] *Ibid*, s 212(1)(j).

[8] *Ibid*, s 197 "common bawdy-house".

[9] *Charter*, s 7.

[10] *Reference re ss 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 SCR 1123, 1990 CanLII (SCC).

[11] *Black's Law Dictionary*, 9th ed, sub verbo "stare decisis".

[12] *Charter*, s 7.

[13] "Prostitution bill would make it illegal to buy, sell sex in public", *CBC News* (4 June 2014) online: CBC News < http://www.cbc.ca/news/politics/prostitution-bill-would-make-it-illegal-to-buy-sell-sex-in-public-1.2664683>. [Prostition Bill – CBC News].

[14] *Ibid*.

[15] Peter Wrinch, "*The new sex work legislation explained*", Pivot Legal Society (4 June 2014) online: Pivot Legal Society < http://www.pivotlegal.org/the_new_sex_work_legislation_explained>

[16] Michael Plaxton, "First Impressions of Bill C-36 in Light of Bedford", University of Saskatchewan (6 June 2014) online: Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447006>

[17] Prostitution Bill - *CBC News*, see note 13.