

Sex Work By Law: *Bedford's* Impact on Municipal Approaches to Regulating the Sex Trade

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The recent Ontario trial decision in Bedford suggests three interrelated principles that municipal law makers should consider when formulating bylaws aimed at regulating sex work. These principles, if upheld on appeal, will inform the constitutionality of both current and prospective bylaws regulating sex work in Canadian cities.

In Bedford, Justice Himel concluded that the constitutionality of laws regulating the sex trade must be determined in a legal context which recognizes the violence faced by sex workers. She confirmed that laws that indirectly make sex work more dangerous and harmful must be consistent with those principles that our legal system, through its courts, have deemed fundamental to a just society. She recognized that in a just society a government is not entitled to jeopardize the health and physical safety of sex workers for the sake of reducing public nuisance. In order to ensure the constitutional validity of proposed bylaws, municipal lawmakers will therefore need to consider the impact their bylaws have on the safety of sex workers.

La récente décision de première instance en Ontario dans la cause Bedford laisse entendre trois principes étroitement liés que les législateurs municipaux devraient prendre en considération lorsqu'ils élaborent des règlements administratifs visant à réglementer le travail du sexe. Ces principes, s'ils sont confirmés en appel, influenceront la constitutionnalité des règlements administratifs actuels et futurs qui réglementent le travail du sexe dans les villes canadiennes.

Dans la cause Bedford, la juge Himel a conclu que la constitutionnalité des lois réglementant le commerce du sexe doit être établie dans un contexte juridique qui reconnaît la violence à laquelle les travailleuses et travailleurs du sexe font face. Elle a confirmé que les lois qui, indirectement, rendent le travail du sexe plus dangereux et mauvais pour ces travailleurs doivent être en accord avec ces principes que notre système juridique, par le biais de ses tribunaux, a jugé essentiels à une société juste. Elle a reconnu que, dans une société juste, un gouvernement n'est pas en droit de compromettre la santé et la sécurité physique des travailleuses et travailleurs du sexe dans un souci de réduire la nuisance publique. Afin de garantir la constitutionnalité des règlements administratifs proposés, les législateurs municipaux devront donc considérer les effets de ces règlements sur la sécurité des travailleuses et travailleurs du sexe.

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Introduction

There is no question that the laws regulating sex work in Canada reveal a conflicted, ambivalent, and at times arbitrary attitude towards the exchange of sex for money. With the recent Ontario trial decision determining that the *Criminal Code* provisions prohibiting bawdyhouses, communication in public for the purposes of prostitution, and living on the avails of prostitution violate the *Charter of Rights and Freedoms*,¹ lack of clarity, at least in the short term, is likely to increase.² What is clear is that municipal lawmakers, in reviewing current bylaws and considering prospective ones that regulate the sex trade, would be well advised to do so in contemplation of the reasoning adopted by the trial court in *Bedford*.

In *Bedford*, Justice Himel found that the bawdyhouse provisions (section 210),³ the living on the avails provision (section 212(1)(j)),⁴ and the communication for the purposes of prostitution provision (section 213(1)(c))⁵ violate section 7 of the *Charter* and could not be saved under section 1.⁶ She also found that section 213(1)(c) unjustifiably violates section 2(b) of the *Charter*.

The reasoning in *Bedford* gives rise to three interrelated principles that municipal lawmakers should take note of when considering bylaws aimed at regulating sex work. First, Justice Himel recognized that determining the constitutionality of these *Criminal Code* provisions requires recognition of the violence faced by sex workers. Second, she confirmed that laws that indirectly make sex work more dangerous and harmful must be consistent with those principles that our legal system, through its courts, have deemed fundamental to a just society. Third, she recognized that in a just society a government is not entitled to jeopardize the health and physical safety of sex workers for the

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

2 *Bedford v Canada*, 2010 ONSC 4264 [*Bedford*].

3 *Criminal Code*, RSC 1985, c C-46 s 210 [*Criminal Code*]. This section allows for the conviction of a person who keeps, is found in, or is an inmate of, a common bawdyhouse. A common bawdyhouse is defined under section 197 of the *Criminal Code* as a place kept or occupied for the purposes of acts of indecency or prostitution. Section 210 will be referred to throughout this discussion as the “bawdyhouse law” or “bawdyhouse provisions.”

4 *Ibid* at s 212(1) (j). This section prohibits any individual from living wholly or in part on the avails of prostitution of another person.

5 *Ibid* at s 213. This section creates the offence of “communicating in a public place for the purposes of prostitution.” While sections 213(1)(a) and (b) address communication that stops traffic or impedes pedestrians, section 213(1)(c) covers anyone who communicates or attempts to communicate in any manner for the purposes of prostitution. Sections 213(1) (a) and (b) were not challenged. Section 213(1) (c) will be referred to here as the “general communication provision.”

6 *Bedford*, *supra* note 2.

sake of reducing public nuisance. These principles, if upheld on appeal, will inform the constitutionality of both current and prospective bylaws regulating sex work in Canadian cities. Municipal lawmakers will need to consider the impact that their bylaws have on the safety of sex workers. They will need to recognize that the community's interest in reducing public nuisance will not justify zoning and licensing bylaws that aggravate the already dangerous working conditions of many sex workers in Canada.

This article is divided into three parts. Part I briefly explores the regulative context in which sex work in Canada currently operates. Part II discusses the *Bedford* decision, illuminating these three significant principles expressed by Justice Himel's reasoning. Part III suggests the implications of these principles for municipal bylaws intended to regulate the sex trade. The aim of this article is to articulate the implications of the reasoning in *Bedford* for the constitutionality of municipal laws. My objective is not to articulate a specific municipal regulatory scheme. A detailed argument with the level of specificity necessary to respond to the local needs and factors at play in a particular municipality should be devised in collaboration with all of the stakeholders in a community and in consideration of the specificity of that community. This is the advantage of a furcated system of law. Local laws should be developed at the local level and responsive to local interests. Moreover, detailed recommendations regarding the municipal regulation of sex work should be developed in full consultation with the sex workers operating in the community in which such laws will apply. The objectives of this piece are more modest: to demonstrate how the principles identified in *Bedford* also apply to municipal law and to argue that, at the local level, in revisiting current regulations or developing new ones (in response to decriminalization for example), these principles require municipal lawmakers to accommodate the safety interests of the sex workers in their communities.

Sex trade in a community gives rise to competing interests and difficult social pressures. If these provisions of the *Criminal Code* are struck down, social pressures are bound to increase. Municipalities are likely to respond with more extensive and explicit regulation. Indeed, this is already occurring in some cities.⁷ As discussed in the section that follows, regardless of the outcome in *Bedford*, municipalities committed to responding to these tensions with

7 See e.g. Edmonton's attempt to enact a new consolidated bylaw that would regulate massage parlours, escort services and erotic entertainers: "City looks at bylaw regulating massage parlours" (13 April 2011), online: CBC News <<http://www.cbc.ca/news/canada/edmonton/story/2011/04/13/edmonton-massage-parlour-bylaw.html>>.

bylaws that are *Charter* compliant ought to consider Justice Himel's reasoning in *Bedford*.

I. Regulating Sex Work in Canada

Public debate in Canada about the law's relationship to the exchange of sex for money has been amplified in recent years. This is unsurprising, given the constitutional litigation currently ongoing in Ontario and British Columbia,⁸ and perhaps also the increased media attention to the alarming number of sex trade workers who are missing or have been murdered in Canada in the last twenty years.⁹

This debate surrounding the law's relationship to commodified sex often portrays either/or choices between criminalization, decriminalization and legalization.¹⁰ The term "decriminalization" tends to be used to connote the repeal of those criminal laws creating offences for activities such as communicating for the purposes of prostitution, or living on the avails of prostitution. The term "legalization" is typically relied upon to suggest a regulatory framework in which, once certain criminal laws are repealed, sex work will become subject to government regulatory regimes. As suggested, these concepts are sometimes characterized as distinct options—as if to imply that the government could opt to decriminalize and leave it at that, or conversely that the government could, upon decriminalization, adopt a legalization model in which the sex work industry becomes subject to a regulatory regime, violations of which will carry regulatory or criminal sanctions. Some commentators and sex work activists advocate for the former, arguing that "legalization models" have created unfavourable work conditions for sex workers in other

8 *Bedford*, *supra* note 2. See also *supra* notes 3-5 (the constitutionality of these *Criminal Code* provisions has also been challenged in British Columbia by the Downtown Eastside Sex Workers United Against Violence Society and a former sex worker, Sheryl Kiselbach. While the Supreme Court of British Columbia denied standing to the applicants in this proceeding, its decision on standing was overturned on appeal and the application was sent back to the trial court to be determined on its merits. See *Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)*, 2010 BCCA 439, leave to appeal to SCC granted, 2011 CarswellBC 723.

9 See e.g. "Advocates doubtful of B.C. missing women's inquiry" (20 January 2011), online: CTV.ca <<http://www.ctv.ca/CTVNews/Canada/20110120/missing-women-inquiry-110120/>>. See also online: Vancouver Sun <<http://www.vancouversun.com/news/Killer+Fraser+Valley+trade+workers+sentenced+life+prison/4261769/story.html>>.

10 See e.g. online media coverage concerning British Columbia's Missing Women's Commission. The public inquiry was ordered by the British Columbia government to investigate police conduct surrounding the Robert Pickton case: "B.C. Inquiry into missing women opening" (19 January 2011), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2011/01/19/bc-missing-women-inquiry.html>>; "Ottawa to appeal prostitution ruling" (9 September 2010), online: CBC News <<http://www.cbc.ca/canada/story/2010/09/29/mcguinty-prostitution.html?ref=rss>>.

jurisdictions.¹¹ In practical terms, this distinction between decriminalization and legalization of sex work is more a matter of amount, extent and nature of regulation than an either/or choice. That is to say, the option for a context in which sex work is not subject to *any* legal regulation does not actually exist. Rather, the term “decriminalization” should be used to suggest legal approaches that regulate sex work in a manner similar to the regulation of other activities that were once, but are no longer, prohibited by the criminal law (such as the sale of alcohol). While decriminalization is often used to advocate for a post-criminalization context in which sex workers are not subject to regulation, such a circumstance is implausible. Indeed, even in the current context of criminalization, significant segments of the sex work industry are already subject to varying degrees of municipal regulation in many Canadian cities.¹² For example, municipal laws licensing body rub parlours and escort services exist in many Canadian cities, despite the continued criminalization of much of the activity engaged in by these businesses.¹³ Given the current regulatory regimes already in place in many cities, it would appear that it is possible for the municipal regulation of sex work not to be contingent on first decriminalizing sex work.¹⁴ Unfortunately, this leaves those involved in the sex work industry with very little leverage to resist oppressive municipal laws. As a result of their vulnerability to criminal liability, municipally regulated sex work businesses are less empowered to protest disproportionate and exorbitant licensing fees, unfair zoning restrictions, as well as onerous and unreasonable regulations regarding employee qualifications, building code requirements, and hours of operation.¹⁵ The fact that most of the activities occurring in these licenced establishments are illegal under the *Criminal Code* also leaves the employees of these businesses less able to advocate for safer working conditions, such as the provision of safer sex supplies (gloves, condoms, lubrication, etc.) and increased screening of potentially dangerous clients.¹⁶ Provided the

11 See e.g. “Legalization vs. Discrimination”, online: Stella <<http://www.chestella.org/stella/?q=en/debate>>.

12 See e.g. Toronto (City of Toronto, bylaw No 514-2002, *Chapter 545, Licensing* (20 June 2002) [City of Toronto]); Vancouver (City of Vancouver, bylaw No 4450, *License By-Law* (23 September 1969) [City of Vancouver]); Calgary (City of Calgary, bylaw No 48M2006, *Dating and Escort Service Bylaw* (17 October 2006) [City of Calgary]); Edmonton (City of Edmonton, bylaw No 12452, *Escort Licensing Bylaw* (1 December 2009) [City of Edmonton]).

13 See e.g. City of Toronto, *ibid*; City of Vancouver, *ibid*.

14 This rather odd circumstance may be, in part, a function of Canada’s constitutional framework. See the discussion at 20, below.

15 For first-hand anecdotal accounts of these effects in Vancouver, Calgary and Edmonton, see Pivot Legal Society Sex Worker Subcommittee, “Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform”, online: Pivot <<http://www.pivotlegal.org/pdfs/BeyondDecrimLongReport.pdf>>.

16 Emily van der Meulen & Elya Maria Durisin, “Why Decriminalize? How Canada’s Municipal and

federal government chooses not to replace them with new ones,¹⁷ removing or striking down these provisions of the *Criminal Code* would alleviate the particular vulnerability to sex workers posed by municipal bylaws that surreptitiously (and often not so surreptitiously) regulate conduct that contravenes the *Criminal Code*. A context in which the activities surrounding sex work are not criminalized would better position sex workers to contest unfair municipal regulations.

However, as suggested above, it is unwise to assume that, were the *Criminal Code* provisions prohibiting activities surrounding sex work repealed or struck down across Canada, municipal regulatory regimes would contract rather than expand. Should the decision in *Bedford* prevail on appeal, or should the impugned *Criminal Code* provisions be repealed or amended by the federal government, the choice is not between decriminalization without regulation and a legalization model. Already, the choice (with or without the *Criminal Code* prohibitions) is degree and type of legislative regulation. A determination that the criminal laws prohibiting the activities surrounding sex work are unconstitutional opens the door not for a circumstance in which sex work operates somehow outside the context of law, but rather for an opportunity to remodel the current regulatory landscape in a more coherent, forthright, and just manner. The reasons for this are twofold. First, as suggested above, the removal of these criminal laws would allow for more forthright business practices and, as a result, regulation of these practices. Moreover, removal of the bawdyhouse provisions would likely change the nature of the services offered in these establishments, the locations where municipally regulated sexual services are offered (i.e., a shift towards regulating home-based businesses) and the type and character of promotion and advertisement by sex work businesses—all of which is likely to instigate reconsideration and expansion of the municipal laws currently in force.

Second, *Bedford* suggests an opportunity to reconsider what constitutes acceptable municipal regulation of sex work because aspects of Justice Himel's reasoning could be applied with respect to the constitutionality of municipal bylaws regulating sex work. For activists, academics, and law reformers who

Federal Regulations Increase Sex Workers' Vulnerability" (2008) 20 CJWL 289.

17 It is conceivable that if the appellate courts uphold the determination of unconstitutionality in *Bedford*, the federal government could respond by simply criminalizing the exchange of sex for money (rather than the current arrangement of prohibiting the activities surrounding the exchange of sex for money but not the actual transaction itself). Determining whether such a response would also contravene the *Charter* would require further consideration. If it did, it would be for reasons other than the reasoning underpinning the *Charter* infringements identified by Justice Himel in *Bedford*.

recognize that the current legal response in Canada to the commodification of sex is seriously and dangerously dysfunctional, there is something hopeful about Justice Himel's reasoning regardless of the ultimate outcome in this case. It is not necessarily the fact that she declared these Criminal Code provisions to be unconstitutional that holds promise. While today's legal regime regulating/prohibiting sex work is likely to change as a consequence of this litigation, it is impossible to predict what that change will bring. The outcome in this case may not stand. The decision has been appealed and the Ontario Court of Appeal, or ultimately the Supreme Court of Canada, may overturn the finding that these provisions (or some of these provisions) are unconstitutional. However, regardless of the outcome on appeal, the three principles emanating from Justice Himel's reasoning described above should inform an analysis of the constitutionality of current municipal bylaws regulating the sex trade in Canadian cities, as well as the constitutionality of any future municipal law efforts in this regard.

Why should municipal lawmakers, regardless of the outcome in the *Bedford* appeal, take heed of these three principles arising from Justice Himel's reasoning? In fact, there are both normative and doctrinal reasons why municipal lawmakers should ensure that current and prospective bylaws are consistent with these principles. First, all lawmakers, municipal and otherwise, should be concerned with ensuring that the laws they enact and enforce are cognizant of, and responsive to, the social context in which such laws operate. To enact laws aimed directly at regulating the conduct of, and which will directly impact the experience of, a particular segment of a community without recognition of the unique violence faced by that portion of the community and the manner in which such laws might heighten those risks, is to ignore that segment of the community's constituency. It is to disregard the membership of that portion of the community in the community. It is anti-democratic. Second, while it is impossible to accurately predict the reasoning of the Ontario Court of Appeal, even if the Court rejects Justice Himel's conclusions regarding the gross disproportionality between the impact of the

Criminal Code provisions and their objective, it is unlikely the Court will reject her conclusions that laws which indirectly make sex work more dangerous must be consistent with those principles that our legal system, through its courts, have deemed fundamental to a just society. More specifically, it is unlikely they will reject the principle that in a just society a government is not entitled to jeopardize the health and physical safety of sex workers for the sake of reducing public nuisance. A conclusion by a higher court that the bawdyhouse and communication provisions do not violate these principles would not necessarily establish the same conclusion with respect to a particular municipal law. Inherent to a gross disproportionality analysis is the exercise of balancing. Balancing social and individual interests in the criminal law context and the municipal law context involve different factors and can result in different conclusions. Indeed, the types of social interests addressed by the criminal law may often be considered to have higher social import than the types of interests addressed by municipal bylaws. If this is true, then it is certainly reasonable to suggest that a gross disproportionality analysis as between the life and physical safety interests of sex workers and the objective of a particular law will likely resolve differently in the municipal and criminal law contexts. As such, and as just suggested, municipal lawmakers should consider the constitutional implications of these three principles articulated in *Bedford* regardless of its outcome on appeal.

II. The *Bedford* Decision

As noted in the introduction, Justice Himel determined that the living on the avails provision, the bawdyhouse provisions and the general communication provision violate section 7 of the *Charter* and could not be saved under section 1.¹⁸ She also found that the general communication provision unjustifiably violates section 2(b) of the *Charter*. This article focuses primarily on her section 7 reasoning with respect to the bawdyhouse provisions and the general communication provision.¹⁹

¹⁸ *Bedford*, *supra* note 2.

¹⁹ This article does not focus on *Criminal Code* section 212(1)(j)—the provision criminalizing individuals who live on the avails of prostitution. The Court in *Bedford* found that the legislative aim of section 212(1)(j) is to prevent the exploitation of prostitutes and the profiting by pimps on prostitution. Courts have interpreted this provision differently based on whether the accused lives with a sex worker or simply provides business services to a sex worker. The Crown is only required to prove exploitation in the former circumstance. In other words, exploitation is presumed if the accused is in a domestic relationship with the sex worker. Based, in part, on the assumption that not all domestic relationships involving a sex worker will be exploitative, Justice Himel found that the living on the avails provision was arbitrary, overly broad and grossly disproportionate to its objective. It may be that the *Charter* difficulties Justice Himel found with this provision in circumstances

Justice Himel found that both the bawdyhouse laws and the general communication provision deprive sex workers of their security of the person and liberty interests, and that they do so in a manner that is not consistent with the principles of fundamental justice.²⁰ Specifically, she found that the bawdyhouse laws are overly broad, arbitrary when applied in conjunction with the communication provision, and grossly disproportionate. She concluded that the general communication provision is grossly disproportionate and arbitrary when considered in conjunction with the effect of the bawdyhouse provisions. While there are many aspects of her decision worth examining,²¹ the focus of this discussion is limited to the three principles emanating from her reasoning that were described in the introduction.

The first principle derives from one of Justice Himel's justifications for revisiting the constitutionality of these provisions twenty years after the Supreme Court of Canada deemed them constitutional in *Reference re Prostitution*.²² She determined that "[t]he section 1 analysis conducted in the *Prostitution Reference* ought to be revisited" given the significant evidence of the violence faced by sex workers that has been gathered in the twenty years since that opinion was released.²³ In drawing this conclusion, she established that assessing the constitutionality of these *Criminal Code* provisions requires recognition of the violence faced by sex workers. The second principle was that laws that indirectly make sex work more dangerous must be consistent with those principles that our legal system has deemed fundamental to a just society. This conclusion stems from her finding that the security of the person interests of current and prospective sex workers are deprived by these provisions. The third principle was that the government is not entitled to jeopardize the health and physical safety of sex workers in order to reduce public nuisance. This principle emanates from her determination that the harmful effects of

where exploitation is not proven could be resolved simply by interpreting the provision to require that exploitation be proven in all cases involving an allegation of living on the avails.

- 20 The liberty deprivation stems from the fact that sex workers who are convicted under these provisions face penal sanctions which include possible incarceration. The security of the person deprivation is discussed below.
- 21 These would include, but are perhaps not limited to, the remedy granted, her treatment of the evidence presented, her analysis regarding the vagueness principle and the arbitrariness principle, and her section 1 *Charter* analysis.
- 22 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 [*Reference re Prostitution*].
- 23 *Bedford*, *supra* note 2 ("[t]he section 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening years" at para 83).

these provisions on sex workers are grossly disproportionate to the objectives for which these laws were enacted.

i. The *stare decisis* issue

In 1990, the Supreme Court of Canada concluded that the bawdy provisions and the general communication provision did not violate section 7 of the *Charter*.²⁴ While the majority found that the provisions had the potential to deprive the liberty interests of those subject to sanctions under them, they determined that this deprivation was in accordance with the principles of fundamental justice. Chief Justice Dickson considered two principles of fundamental justice: vagueness and what would now likely be described as arbitrariness.²⁵ Chief Justice Dickson determined that the wording of the provisions was sufficiently clear, such that the principle regarding vagueness was not compromised.²⁶ He also concluded that the fact that the law criminalizes activities surrounding sex work, but does not actually criminalize prostitution itself, does not offend "the basic tenets of our legal system."²⁷ Despite their advisory nature, reference opinions from the Supreme Court of Canada have been treated as binding by courts in Canada.²⁸ As such, one of the threshold issues in *Bedford* was whether it was legitimate for the Court to reconsider the constitutionality of these *Criminal Code* provisions.

Justice Himel found that there were a number of reasons to justify revisiting the assertion that these provisions of the *Criminal Code* violate section 7 (and section 2(b)) of the *Charter*. She highlighted the fact that the claimants in *Bedford* made arguments based not only on the liberty interest protected under section 7 and the vagueness principle, but also based on section 7's security of the person guarantees and the principles of fundamental justice regarding arbitrariness, over breadth, and gross disproportionality.²⁹

24 *Reference re Prostitution*, *supra* note 22 (the majority also opined that the general communication provision's violation of section 2(b) was justified under section 1 of the *Charter*).

25 In inquiring into the constitutionality of laws which pursue their objectives circuitously, Chief Justice Dickson, for the majority in the *Reference re Prostitution*, did not clearly identify which principle of fundamental justice he was considering ("[t]he issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system") *supra* note 22 at para 19. Today, the issue of whether a circuitous law which deprives individuals of their security of the person interests violates section 7 would likely be considered under the fundamental principle that laws causing such deprivations should not be arbitrary.

26 *Reference re Prostitution*, *supra* note 22.

27 *Ibid* at para 19.

28 Peter Hogg, *Constitutional Law of Canada*, student ed (Toronto: Carswell, 2009) at 260.

29 Security of the person was also raised in *Reference re Prostitution*, but was based on a different argument. The argument was that the provisions infringe sex workers' security of the person interests

Justice Himel also found that the context for considering the constitutionality of these laws has changed. This finding was based on “the breadth of evidence that has been gathered over the course of the intervening twenty years” regarding the level of violence sex workers are subjected to, and the legal reforms regarding prostitution in other jurisdictions.³⁰ Justice Himel’s recognition of the empirical support substantiating the unique and heightened dangers faced by sex workers is important to this discussion. She determined that “as a result of the serial murders of prostitutes in Vancouver’s Downtown Eastside, as well as the work of advocacy groups and academics, new light has been shed upon the violence faced by prostitutes in Canada.”³¹ She justified her decision to revisit the Supreme Court of Canada’s findings, in part, based on this different context. In essence, she concluded that we now know more about the violence faced by sex workers, and a determination as to the constitutionality of criminal code provisions regarding the sex trade should be done in light of this knowledge.³²

As discussed in Part III, judicial recognition of the unique dangers faced by sex workers, and the manner in which laws can heighten this danger, should impact the analysis regarding the constitutionality of municipal laws that regulate the sex trade.

ii. The security of the person/indirect causation issue

The applicants in *Bedford* conceded that the impugned provisions do not directly cause harm to prostitutes. They acknowledged that it is, for the most

by not permitting them to exercise their profession in order to provide for the basic necessities of life. The majority found it unnecessary to address this argument, having found that liberty interests were at stake given the possibility of incarceration as a penalty for violation. Justice Lamer, in his concurring opinion, concluded that section 7 does not concern itself with economic rights such as the right to exercise one’s chosen profession. While not specified as such, there were also arguments concerning arbitrariness (see text accompanying note 23). The *Reference re Prostitution* was decided at an early stage in the development of section 7 jurisprudence. As Justice Himel noted in *Bedford*, *supra* note 2 at para 75, the principles of fundamental justice were not clearly defined at the time the *Reference re Prostitution* opinion was issued. She offers this as one of the other factors justifying a reconsideration of the constitutionality of these provisions.

30 *Bedford*, *supra* note 2 at para 83.

31 *Ibid* at para 71.

32 One might be sceptical of the suggestion that Canadian courts and governments were unaware in 1990 of the violence faced by sex workers. More plausibly, ensuring the personal safety of this extremely marginalized segment of society was not identified as a high political, adjudicative or legislative priority. Whether awareness actually increased between 1990 and 2010, the important point is that Justice Himel recognized that the constitutionality of these laws must be considered in light of this violence.

part, clients who directly inflict violence upon sex workers.³³ Instead, they argued that the provisions “materially contribute to the harm faced by prostitutes by creating legal prohibitions on the conditions required for prostitution to be conducted in safe and secure settings.”³⁴ The Attorney-General of Canada’s response was that there needs to be a direct causal connection between the harm alleged and the state action in order to find a deprivation of the security of the person interest guaranteed under section 7 of the *Charter*. The government argued that there is no causal connection between the provisions and the alleged harm, on the basis that prostitution is itself inherently harmful.³⁵

Relying on the Supreme Court of Canada’s decisions in *Suresh v Canada*,³⁶ *Blencoe v British Columbia (Human Rights Commission)*³⁷ and *Canada (Prime Minister) v Khadr*,³⁸ the Court in *Bedford* rightly concluded that the applicants do not need to demonstrate that the impugned provisions directly deprive individuals of their security of the person interests. Provided there is a sufficient causal connection between the state action and the alleged deprivation of security of the person, the fundamental justice guarantees provided for under section 7 are triggered. The government’s actions do not need to be a necessary precondition to the deprivation of security of the person. The applicants need only show that the government’s actions sufficiently contributed to the deprivation.³⁹

Justice Himel found that the evidence from both parties demonstrated the high risk of violence faced by sex workers in Canada. She also found that two factors in particular affect the level of violence against prostitutes: location or venue of work and individual working conditions.⁴⁰ She determined that the “factors that may enhance the safety of a prostitute include being in close proximity to people who can intervene if needed, taking the time to screen a client...having a more regular clientele, and planning an escape route.”⁴¹ She concluded that “there are ways of conducting prostitution that may reduce the risk of violence towards prostitutes and that the impugned provisions make many of these ‘safety-enhancing’ methods or techniques

33 *Bedford*, *supra* note 2 at para 285.

34 *Ibid.*

35 *Bedford*, *supra* note 2 at para 286.

36 *Suresh v Canada*, [2002] 1 SCR 3 [*Suresh*].

37 *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307.

38 *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44.

39 *Bedford*, *supra* note 2 at para 287.

40 *Ibid* at para 360.

41 *Bedford*, *supra* note 2 at para 301.

illegal.”⁴² Justice Himel concluded that the evidence led by both the applicants and the government clearly established that working indoors is the safest way to conduct sex work.⁴³ Yet, as she noted, sex workers who “attempt to increase their level of safety by working in-call face criminal sanction” pursuant to section 210 of the *Criminal Code*.⁴⁴ She also found that section 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.”⁴⁵ These findings led her to conclude that the impact of these provisions (along with the living on the avails provision) deprives individuals of their security of the person interests by indirectly making sex work more dangerous.⁴⁶ In other words, state action which materially contributes to the heightened dangers faced by sex workers, by precluding the possibility of indoor sex work and by perpetuating working conditions that leave sex workers isolated and even more vulnerable, constitutes a deprivation of security of the person for purposes of section 7 of the *Charter*. There is no reason to limit the application of this principle to the criminal law. As such, if this aspect of Justice Himel’s reasoning is upheld on appeal, then pursuant to section 7 of the *Charter*, current or prospective municipal bylaws that have a similar effect must be consistent with the principles of fundamental justice. That is to say, these bylaws cannot be vague, overly broad, arbitrary or grossly disproportionate.

iii. Legislative objective/gross disproportionality

Under section 7 of the *Charter*, laws which sufficiently contribute to a deprivation of security of the person are only constitutional if those laws are consistent with the principles of fundamental justice. One such principle is the basic tenet that the negative effect of a law on individuals must not be grossly disproportionate to the legitimate objectives pursued by that law.⁴⁷ “Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual.”⁴⁸ The conclusion in *Bedford* that the effects of the bawdyhouse laws and the general communication prohibition are grossly disproportionate turns on Justice Himel’s finding regarding

42 *Ibid* at para 360.

43 *Ibid* at para 361.

44 *Ibid* at para 361.

45 *Ibid*.

46 *Ibid* at para 360.

47 *Suresh*, *supra* note 36.

48 *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519.

the legislative objectives underpinning these provisions. The objective of these laws was to reduce nuisance and vagrancy (and also in the case of bawdy-houses, to protect public health). Pertinent to the argument being made here, these are objectives shared by many municipal regulatory regimes.

The safety, dignity and integrity of women (and men) who exchange sex for money was not the legislative objective underpinning the enactment of either the bawdyhouse provisions or the provisions aimed at criminalizing street-based sex work.⁴⁹ One hopeful aspect of Justice Himel's reasoning in *Bedford* is that it reflects an expectation that the law, with respect to its impact on this particular vulnerable community, must do better. As Justice Himel stated, it was not the Court's role in *Bedford* to "decide whether or not there is a constitutional right to sell sex or to decide which policy model regarding prostitution is better."⁵⁰ True to this, Justice Himel decided neither of these questions. What Justice Himel did decide, however, was that it is not constitutionally acceptable for the state to enact laws for the purposes of reducing behaviour that the public finds to be a nuisance, where doing so will indirectly cause serious harm or death to that (vulnerable) segment of the population which finds itself subject to such nuisance laws.

In response to the constitutional challenge in *Bedford*, government representatives suggested that the laws prohibiting activities surrounding prostitution are actually oriented towards protecting vulnerable women against the risks and dangers arising from the sex trade. Indeed, in both their arguments justifying the law,⁵¹ and in their response to the Court's decision in *Bedford*,⁵² the government has asserted that these laws are necessary to protect the people involved in the sex work industry. In fact, the three major reports on prostitution commissioned by the federal government of Canada in the last twenty years;⁵³ the Supreme Court of Canada's opinion in *Reference re Prostitution*; the Ontario Superior Court of Justice decision in *Bedford*; the

49 *Bedford*, *supra* note 2 at para 243.

50 *Ibid* at para 25.

51 See *Bedford*, *supra* note 2 at para 17.

52 See e.g. comments by Justice Minister Rob Nicholson's parliamentary secretary Bob Dechert the day after *Bedford* was released: "Ottawa to appeal prostitution ruling" (29 September 2010), online: CBC News <<http://www.cbc.ca/canada/story/2010/09/29/mcguinty-prostitution.html?ref=rss>>.

53 Report of the Standing Committee on Justice and Human Rights & Report of the Subcommittee on Solicitation Laws *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*, JUST (39-1) (Ottawa: 13 December 2006); Federal/Provincial/Territorial Working Group on Prostitution, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities*, (December 1998) [Federal/Provincial/Territorial Working Group on Prostitution]; Department of Justice Canada, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (Ottawa: August 1985).

anecdotal evidence of sex workers and police regarding the complaint driven nature of the enforcement of these laws;⁵⁴ and the vastly discrepant rates of enforcement and prosecution between the communications provisions and the bawdyhouse provisions,⁵⁵ all unequivocally support what activists, historians and other scholars have asserted for decades: these laws have never been about the protection of vulnerable sex workers.⁵⁶ More plausibly, the legislative objective of laws regulating sex work are related, to the protection of proprietary interests in land and women, not to an interest in protecting the physical or sexual integrity of sex workers.⁵⁷

The Court's recognition in *Bedford* that the objective of these laws was not the protection of vulnerable sex workers ultimately led Justice Himel to conclude that the harm indirectly perpetuated by these provisions is grossly disproportionate to the provisions' objectives, and therefore the provisions are contrary to section 7 of the *Charter*.

As the Supreme Court of Canada found in *Reference re Prostitution*, the purpose of section 213 of the *Criminal Code*—the prohibition on communication in public for the purposes of prostitution—is to “eradicate the various forms of social nuisance arising from the public display of the sale of sex.”⁵⁸ The purpose of this provision is to prohibit the sale of sexual services from

54 Pivot Legal Society Sex Worker Subcommittee, “Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws”, online: Pivot <<http://www.pivotlegal.org/Publications/Voices/1short2.pdf>>.

55 Federal/Provincial/Territorial Working Group on Prostitution, *supra* note 53 (“[t]he existing laws on prostitution are unequally applied, enabling a ‘two tiered sex trade to emerge [where] more expensive licensed off-street prostitutes operate with virtual impunity,’ while those already most vulnerable and marginalized—street-level prostitutes, particularly Aboriginal and transsexual/transgendered persons, as well as drug addicts—are routinely arrested. Unlike section 213 of the *Criminal Code*, the other provisions pertaining to prostitution (210 to 212) are rarely enforced by police, often passing under the radar of the complaint-driven prosecution process. Given that street prostitution makes up only 5% to 20% of all prostitution-related activities, yet historically accounts for more than 90% of all prostitution-related incidents reported by the police, the bias in application of the law is clear” at 65).

56 The characterization of the law's objective is crucial to the analysis both at section 1 and at section 7 of the *Charter* when considering principles of proportionality. The government is given the opportunity to justify laws that infringe the *Charter* under section 1. A law will be upheld, despite its *Charter* violation, where the government can demonstrate that the objective of the law is pressing and substantial and the impact of the law is proportionate to that objective. However, the government is not entitled to enact a law in pursuance of one objective (i.e., nuisance) and then justify the law when challenged, based on a different objective (i.e., sex worker protection). See text accompanying note 64, below.

57 See e.g. FM Shaver, “The Regulation of Prostitution: Avoiding the Morality Traps” (1994) 9 CJLS 123.

58 *Reference re Prostitution*, *supra* note 22 at para 2.

taking place in the public domain on the basis that allowing it to occur in public perpetuates social nuisances such as noise, litter, adverse effect on businesses and decreased property values.⁵⁹ If there was any other impetus for this law, aside from nuisance, it was certainly not the protection of vulnerable sex workers. Beyond nuisance, it was perhaps aimed at protecting the public from the uncomfortable reality that some women sell sex for money. To quote from Justice Wilson's opinion (with which the majority concurred on this point): "Parliament's concern, I believe, goes beyond street or sidewalk congestion... The legislature clearly believes that public sensitivities are offended by the sight of prostitutes negotiating openly for the sale of their bodies...."⁶⁰

Similar objectives motivated the enactment of the bawdyhouse laws. The Court in *Bedford*, relying on prior Supreme Court of Canada jurisprudence,⁶¹ concluded that the legislative objective of the bawdyhouse provisions is to combat neighbourhood disruption and safeguard public health, safety and morality.⁶² Bawdyhouses were thought to cause a public nuisance "by drawing together dissolute and debauched persons but also in respect of [their] apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness."⁶³ Justice Himel explicitly rejected the Ontario government's suggestion that the objective of the bawdyhouse law is to protect people working in the sex trade:

The AG Ontario argues that the modern objective of the bawdyhouse provisions in general is a concern for the dignity of persons involved in prostitution and the prevention of physical and psychological harm to them. I cannot find any support in the history of s.210(1) for such a conclusion.⁶⁴

59 *Ibid* at para 66.

60 *Reference re Prostitution*, *supra* note 22 at para 68.

61 *R v Rockert*, [1978] 2 SCR 704.

62 *Bedford*, *supra* note 2 at para 239.

63 *R v Patterson*, [1968] SCR 157 at 161, citing Sir William Oldnall Russell, *Russell on Crime*, 12th ed vol 2 (London: Stevens, 1964) at 1440.

64 *Bedford*, *supra* note 2 at para 243. For the purposes of justifying a *Charter* violation under section 1, the government can only rely upon the objective for which the law was actually enacted (*R v Big M Drug Mart*, [1985] 1 SCR 295 [*Big M*]). It is, however, acceptable for the emphasis of the objective to shift (*R v Butler*, [1992] 1 SCR 452). Justice Himel rejected the suggestion that the mischief the impugned laws in *Bedford* are aimed at is the dignity and safety of sex workers. Such a suggestion, she concluded, is more than simply a shift in the emphasis of the law's objective. It is a different objective. One issue which has not yet been addressed at this stage in section 7 *Charter* jurisprudence, is whether the government is entitled to rely upon a new objective at the violation (of section 7) stage of the analysis. Is the *Big M* principle rejecting shifting objectives at the section 1 stage applicable to section 7 reasoning, or do the same policy justifications supporting the rule in *Big M*—where a violation has been found— not pertain to a section 7 analysis, where the question is as to whether a law does violate the *Charter*? A finding that the government is entitled to shift objectives under a section 7 analysis would impact the gross disproportionality analysis adopted by

It is because the legislative objective of these two provisions was to prevent public nuisance, avoid public health hazards, such as (supposed) idleness and sexually transmitted disease, and protect people from the discomfort of witnessing the public sale of sex, rather than a concern for the safety, dignity and integrity of sex workers, that the Court in *Bedford* concluded that the negative effects of these laws (that is, the harm they indirectly cause to sex workers) are grossly disproportionate to their objectives.

The explicit judicial recognition of the violent realities faced by sex workers, in conjunction with Justice Himel's reasoning regarding the gross disproportionality between the harms indirectly caused by these provisions and the objectives for which these laws were enacted, have implications for the constitutional status of (primarily nuisance-based) municipal bylaws which create or aggravate unsafe working conditions for sex workers. As discussed in Part III, if Justice Himel's reasoning with respect to these three principles is upheld on appeal, it should also apply in assessing the constitutionality of municipal laws regulating the sex trade. Moreover, regardless of the outcome on appeal, municipal law should be informed by recognition of the violence faced by sex workers, the manner in which municipal law impacts their uniquely vulnerable working conditions, and the balance between this impact and the community objectives of a particular bylaw.

III. The Municipal Regulation of Sex Work

"In terms of legalization of prostitution I can just tell you that obviously that's something that this government doesn't favour."⁶⁵

"We are not in the business of legalizing brothels, and we have no intention of changing any of the laws relating to prostitution in this country."⁶⁶

Despite comments of this nature by the leaders of the federal government, there is already, in many cities, a great deal of "legalization of prostitution"⁶⁷ in Canada. While the federal government may not be in the business of legalizing sex work, the same cannot be said of a significant number of Canadian

Justice Himel in *Bedford*.

65 "Harper Defends Prostitution Laws" *The Vancouver Sun* (27 January 2007), online: Canada.com <<http://www.canada.com/vancouversun/news/story.html?id=79c4fb0c-0ae7-472f-8e38-ba7e964b90bb&ck=87969>>.

66 Justice Minister Rob Nicholson, speaking to the House of Commons Standing Committee on the Status of Women cited in Hilary White, "No Legalized Brothels for 2010 Olympics—Canadian Justice Minister" (8 February 2008), online: LifeSiteNews.com <<http://www.lifesitenews.com/ldn/2008/feb/08020806.html>>.

67 I am using the term "legalization" here because this is the phrase used in the quote from Prime Minister Harper. It is not used to connote a particular model of legalization.

cities. As suggested in the introduction to this article, a notable number of municipalities across Canada already regulate various types of sex work through a myriad of restrictive and prohibitive municipal bylaws—mostly aimed at off-street sex work.⁶⁸

i. Sex work bylaws in Canadian cities

There are two municipal law mechanisms through which cities most typically regulate sex work in Canada: zoning bylaws and licensing bylaws. Municipalities use these zoning and licensing bylaws to control, discourage or eliminate sex work by charging very high licencing fees, stipulating onerous licensing conditions for these types of businesses, and zoning them out of existence. Vancouver and Toronto, for example, require operators and owners of body rub parlours to be licenced by the city. The licensing fee for a body rub parlour in Vancouver is \$8,108 per year.⁶⁹ The fee for virtually every other business licence in Vancouver is under \$300. The City of Toronto has similarly inflated licensing fees (or more sceptically...sin taxes) for body rub parlours and escort services.⁷⁰ In Toronto, a body rub is defined as including the “kneading, manipulating, rubbing, massaging, touching or stimulating, by any means, of a person’s body or part thereof but does not include medical or therapeutic treatment.”⁷¹ To acquire a body rub attendant’s licence in Toronto costs \$3,287.00 per year.⁷² An owner/operator of a body rub parlour in Toronto is required to pay \$6,572.00 per year.⁷³ The disproportionate licensing fees relative to all other businesses, the definitions given to regulated activities such as body rubbing (non-medicinal, non-therapeutic touching performed exclusively by individuals who are not licensed health care providers), and the requirements for STD testing included in Toronto’s licensing regime dispels any suggestion that the City may have been inadvertently, or even surreptitiously, providing licences for businesses that provide sexual services. Referring to Calgary’s bylaws, the Court in *R v Manion* articulates this same reality:

[t]he City charges a licence fee for escort agencies which is approximately 36 times what is charged other businesses....Those significantly larger fees are charged because the City is of the view that escort agencies must be more closely monitored because

68 See e.g. City of Toronto, *supra* note 12; City of Vancouver, *supra* note 12; City of Calgary, *supra* note 12; City of Edmonton, *supra* note 12.

69 City of Vancouver, *supra* note 12 at Schedule A.

70 City of Toronto, *supra* note 12 at Appendix A.

71 *Ibid* at ss 545-1.

72 *Ibid* at Appendix A.

73 *Ibid*.

of public health concerns. It would require a level of naïveté of which even judges are not capable to fail to conclude that the City's concern for public health issues relating to escort agencies stems from the City's knowledge that on many occasions escort agencies are a vehicle for the delivery of prostitution services.⁷⁴

Unlike with most other types of businesses, these licencing bylaws regulate minutiae such as the precise size and lighting of the rooms, and the type and length of clothing to be worn by all attendants.⁷⁵ Violations can result in fines or revocation of licences. Some cities impose restrictive hours of operation (such as 9:00 a.m. to 9:00 p.m.) that are not imposed on other adult entertainment establishments such as bars and strip clubs.⁷⁶

Municipalities have also tried to eliminate body rub parlours and escort services through zoning bylaws. Some cities have used zoning bylaws *de facto* to prohibit certain types of sex work by creating a city plan, but then not designating any area of the city where body rub parlours or escort services can operate.⁷⁷ In other words, the bylaws stipulate that these businesses must be located in areas zoned for adult entertainment establishments, but then their municipal planning laws do not actually include any such zones.

ii. Constitutive limits on municipal law making

Municipalities that enact bylaws in an effort to control (or eliminate) the sex trade in their communities face two constitutional obstacles: jurisdictional limits on the types of laws that they have the constitutional authority to enact and the limits placed on all lawmakers by the *Charter of Rights and Freedoms*.⁷⁸

74 *R v Manion*, 2005 ABPC 35.

75 See e.g. City of Toronto, *supra* note 12.

76 See e.g. *R v Bonder*, [2004] OJ No 4093 (CJ) [*Bonder*] (bylaw regulating hours of operation 9:00AM to 9:00PM upheld); see also *Pimenova v Brampton (City)*, [2004] OJ No 2450 (Sup Ct) [*Pimenova*] (in *Pimenova* the Court found that although Brampton could regulate hours of operation for body rub parlours, in this case they had been unfairly discriminatory in relation to other adult entertainment establishments).

77 See e.g. *R v Konakov*, [2004] OJ No 114 (CA) [*Konakov*], in which the Ontario Court of Appeal upheld this type of bylaw in the City of Brantford. See also *Ajax Health Centre v Ajax (Town)*, [2005] OJ No 4954 (Sup Ct) [*Ajax Health Centre*]. The courts in both of these cases upheld the municipal regime on the basis that the licensing and zoning laws did not actually conflict. They reasoned that the body rub parlour licence holder could always apply for a site-specific zoning bylaw amendment. One cannot help but question the likelihood of success for such applications. (It is still true, of course, that a licence holder denied a site-specific zoning re-amendment could appeal on the basis that the denial was impermissible administrative discrimination).

78 *Charter*, *supra* note 1. The jurisdiction of municipalities to enact bylaws is, of course, also circumscribed by their enabling statute (municipalities receive their lawmaking authority through delegation from the provinces). In addition, the principles of administrative discrimination place limits on the exercise of municipal law-making authority and enforcement. See *Montreal (City) v Arcade*

The *Constitution Act, 1867* grants legislative authority over criminal law to the federal government.⁷⁹ In *Westendorp v The Queen*, the Supreme Court of Canada concluded that a municipal bylaw which prohibited being in the street for purposes of prostitution was *ultra vires* in the province—the bylaw invaded the exclusive federal power in relation to the criminal law.⁸⁰ It is not within the legislative competence of a provincial government (or by delegation one of its municipalities) to prohibit or punish prostitution. Following the Court's ruling in *Westendorp*, municipal licensing regimes that are found to be prohibitory have been struck down as *ultra vires*.⁸¹ Municipalities do not have the jurisdictional authority to prohibit sex work businesses; this is true regardless as to whether the federal government prohibits the activities surrounding sex work. Municipal laws, the dominant purpose of which are to reinforce criminal law prohibitions through licensing and regulation exceed the jurisdictional authority delegated to municipal lawmakers.

One explanation for the peculiar circumstance in which many municipalities in Canada are licensing activities that are illegal under the *Criminal Code* is the division of legislative jurisdiction between the federal government and the provinces. It is safe to assume that some municipalities that have enacted licensing and zoning bylaws for escort services and body rub parlours have done so in an attempt to reduce or eliminate their presence in that municipality. Prohibiting these activities is not within their legislative authority. Instead, in an effort to eliminate sex work without intruding upon the federal government's criminal law power, they impose licensing regimes with high yearly fees and strict conditions.⁸² In large measure, municipalities have been successful in defending such regimes from legal challenges based either on division of powers or administrative discrimination principles.⁸³ Municipal lawmakers should recognize, however, that reasoning such as was adopted by the Court in *Bedford* may change the nature of the legal challenges that they face. Municipalities, in addition to considering their jurisdictional limits, must consider the impact of municipal bylaws on the protections guaranteed under the *Charter*. As suggested in the section to follow, the reasoning adopted by the Ontario Superior Court of Justice in *Bedford* suggests that some municipalities will need to reconsider how bylaws regulating the sex trade impact those most affected

Amusements, [1985] 1 SCR 368.

79 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

80 *Westendorp v The Queen*, [1983] 1 SCR 43.

81 See *Treesann Management Inc v Richmond Hill*, [2000] OJ No 406 (CA); *Pimenova*, *supra* note 76.

82 See *Strachan (cob Kats) v Edmonton (City)*, [2003] AJ No 437 (QB) [Strachan].

83 See e.g. *Konakov*, *supra* note 77; *Ajax Health Centre*, *supra* note 77; *Bonder*, *supra* note 76; *R v Theofilaktidis*, [2004] OJ No 5968; *Strachan*, *supra* note 82.

by them. In addition, those municipalities that do not currently regulate sex work should be cognizant of the principles emanating from *Bedford* when responding to the regulatory void which will arise if the decision, or aspects of it, are upheld on appeal.

iii. Potential impact of *Bedford* at the municipal level

There are many questions regarding what order of government will, or constitutionally could, respond, and in what manner, if the ruling in *Bedford* is upheld on appeal. That some response can be expected, however, is unquestionable. The fact that many municipalities already regulate sex work, even though many of the activities they license are currently illegal, suggests this is true. Evidence that some response will be inevitable is also found in Justice Rosenberg's decision granting the Attorney General of Canada's motion to extend the stay of Justice Himel's decision.⁸⁴ Justice Himel, upon refusing to order a suspended declaration of constitutional invalidity to remedy the *Charter* breaches she found, did grant a sixty day stay of her decision. The Attorney General of Canada sought and was granted an extension of this stay pending the appeal. Justice Rosenberg noted the Attorney-General's suggestion that "even if some decriminalization was seen as an appropriate response to the danger faced by prostitutes, governments at all levels need time to put a suitable regulatory framework in place."⁸⁵ He commented that:

My principal concern, however, is with the regulatory void, a matter also referred to by the application judge. In that respect, I am concerned about the suggestion from counsel for the responding parties that the stay simply be lifted and to see what would happen.⁸⁶

Ultimately, he accepted the Attorney-General's argument that the decision creates a legislative void with profound implications for the Ontario public. Interestingly, neither Justice Himel nor Justice Rosenberg acknowledged that a great number of cities across Ontario already attempt to regulate aspects of the sex trade. However, even with the current bylaws in these cities, if the determination of unconstitutionality is upheld, a regulatory void will arise and lawmakers will need to respond.

If the *Criminal Code* provisions prohibiting bawdyhouses are struck down, the issue of land use planning, in particular, will become of pressing import to

84 *Bedford v Canada (AG)*, 2010 ONCA 814 [*Bedford* ONCA].

85 *Bedford* ONCA, *supra* note 84 at para 71.

86 *Ibid* at para 83.

municipal lawmakers. Professor Howard Epstein notes that many questions will arise with respect to the municipal regulation of sex work businesses: Will they be treated like any other commercial enterprise, or will a city's official land use plan need to be amended? How will municipal lawmakers determine what areas are compatible with this type of land use? Will off-street sex work be treated as a home-based business? If it is designated as commercial, will it be zoned to a special commercial area or will it be included with other commercial activities? What types of regulations will municipalities enact regarding advertising, signage, hours of operation, conditions of operation and licencing fees?⁸⁷ Of course, given that many municipalities already license and zone adult entertainment establishments, escort services, and body rub parlours, some of these questions are not new.

What is new are the three principles emerging from the reasoning in *Bedford*, which ought to inform consideration of the constitutionality of any municipal bylaw aimed at regulating sex work. Again, these principles are: the constitutionality of a law regulating sex work should be viewed in light of the unique violence faced by sex workers; given this violence, laws which indirectly put sex workers in more danger, by preventing them from pursuing safer working conditions, will violate the *Charter* unless they are consistent with those principles we have identified as most fundamental to our legal system; one of those fundamental principles is that, in a just society, a government is not entitled to jeopardize the health and physical safety of sex workers simply for the sake of reducing public nuisance. As such, in considering municipal plans which zone certain areas for sex work, lawmakers should take into consideration the safety implications for employees of those businesses.

It would be difficult to identify, *a priori*, what zoning bylaws might be deemed grossly disproportionate. Such an assessment would be very particular to the community involved and the interests at stake. What will be important for municipal planners to remember is that, according to the principles established in *Bedford*, they should consider not only the community's interests in, for example, reducing noise pollution in residential areas and maintaining property values, but also the security of the person interests of individuals involved in the sex trade. So, for example, a zoning bylaw which relegates all sex work to a secluded, low traffic industrial area might create life-threatening working conditions (given the heightened danger sex workers face) that, in their effect, grossly outweigh a community's interest in reducing litter, vehicle traffic, and noise pollution in a more populated commercial area.

87 See Howard Epstein, "Zoning Sex Work" [forthcoming in 2011].

Municipal lawmakers should also consider the impact on sex worker safety caused by licensing regimes. Justice Himel noted in *Bedford* that all three of the federal government commissioned reports on sex work concluded that indoor sex work is safer than street-based prostitution.⁸⁸ Municipal laws which make it extremely difficult for sex workers to pursue their trade in off-street and safer work environments could also be susceptible to the gross disproportionality argument accepted in *Bedford*. For example, city bylaws in Toronto and Vancouver, which make it *de facto* impossible for women working on the street to legally shift into working out of their homes or other off-street locations by charging exorbitant fees for body rub parlour licences and by severely limiting the number of licences they issue, could be susceptible to a constitutional challenge. Related to this point, cities that have used zoning bylaws to *de facto* prohibit “bawdyhouses” by creating a city plan, but then not designating any area of the city where body rub parlours or escort services can operate, may also be susceptible to a constitutional challenge under the gross disproportionality analysis in *Bedford*.

This is not to suggest that communities, and more specifically those charged with governing them at the local level, are no longer entitled to enact bylaws regulating sex work which endeavour to ensure compatible land use designations and safe and responsible business proprietorship. Indeed, neither of these objectives is inherently incompatible with the security of the person interests of a community’s sex workers. For example, licencing conditions that would empower women (and men) to insist that employers screen out intoxicated or unclean clients could improve working conditions for sex workers. But what *Bedford* does require is that these community objectives be pursued in a manner that does not amplify the already heightened dangers that many sex workers face on a daily basis.

Conclusion

The reasoning in *Bedford* offers an opportunity to commence, or reinvigorate, discussion concerning how different levels of government might constitution-

88 Further evidence of conflicted and ambivalent “official attitudes” towards the exchange of sex for money is revealed by the prevalence with which governments have struck committees, commissioned reports and received recommendations on prostitution in Canada, only to ignore them. The Federal government alone has, in the past twenty-five years, commissioned three major reports and then proceeded to ignore their recommendations. Ironically, the Court in *Bedford*, in striking the *Criminal Code* provisions regulating sex work, relied significantly on the government’s own empirical research on the indirect harms caused by the *Criminal Code* provisions prohibiting the activities surrounding sex work.

ally regulate aspects of the sex work industry. More importantly, it invites, if not demands, that this discussion be conducted with a view to protecting (or at least not further jeopardizing) the health and safety interests of those members of the community *most* affected both by the sex trade itself and by the legal regimes regulating that trade.

Regardless as to the uncertainties involving the constitutional challenges presently ongoing in Ontario and British Columbia, municipalities should begin considering (and reconsidering) land use and licensing schemes pertaining to sex work in their communities. In undertaking this task, they would be well advised to balance their nuisance and land use concerns against the health and safety interests of the sex workers operating in their communities. Perhaps an optimal approach to achieving this balance would be genuine and thorough engagement with processes of local public consultation—public consultation that involves *all* stakeholders in the community.