

TOP FIVE 2014

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

CANADA (ATTORNEY GENERAL) v BEDFORD, 2013 SCC 72, [2013] 3 SCR 1101.

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<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do>

Facts

Prostitution is not illegal in Canada, but a number of activities related to prostitution were against the law. Three sex workers brought an application in the Ontario Superior Court of Justice challenging the constitutionality of several of Canada's prostitution laws. Specifically, they challenged s. 210 of the *Criminal Code of Canada*, which prohibits operation or attendance at a bawdy-house; s. 212(1)(j), which prohibits living on the avails (proceeds) of prostitution; and s. 213(1)(c), which prohibits communicating in public for the purpose of prostitution.

The applicants' argument was that these laws increased the risk of death and bodily harm faced by sex workers because they made it more difficult for them to take steps to ensure their safety, like working indoors, hiring security guards or "screening" potential clients by talking to them in safe public places before being alone with them. Therefore, they argued, these laws deprived sex workers of their right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
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.

Procedural History

The Superior Court of Justice found all three *Criminal Code* provisions to be unconstitutional in violation of s. 7 of the *Charter*. The Ontario Court of Appeal (ONCA) unanimously denied the appeal with regard to ss. 210 and 212(1)(j). But with regard to the communication provision, s. 213(1)(c), the majority sided with the government and found that it was constitutional. The minority dissented with that finding.

Issues

1. Do the *Criminal Code* provisions infringe the applicants' right to security of the person under s. 7 of the *Charter*?
2. If security of the person is infringed, is it in accordance with the principles of fundamental justice?
3. If the infringement is not in accordance with the principles of fundamental justice, can it be justified under s. 1 of the *Charter*?

Decision

Appeal denied; cross-appeal granted. The SCC granted a declaration that the provisions are void as unconstitutional, but suspended the declaration's effect for one year to allow Parliament to enact new legislation.

Ratio

A unanimous Supreme Court of Canada (SCC) agreed with the ONCA in finding that the "bawdy-house" and "avails" provisions infringed on the applicants' s. 7 rights. Moreover, the Court also overturned the ONCA finding with respect to the "communication" provision. In this decision, the Court found the latter provision was also in violation of the *Charter*, that none of the violations were in accordance with the principles of fundamental justice and that none of the three provisions could be saved under s. 1 of the *Charter*. The laws, which are designed to limit the nuisance that prostitution imposes on the community, go too far

and impose a disproportionate risk on the health and safety of sex workers. As such, the *Criminal Code* provisions are not consistent with the principles of fundamental justice.

Reasons

The SCC found that the right to security of the person is infringed because these laws prevented people who are engaged in a risky -- but legal -- activity from taking steps to protect themselves from the risks. The SCC drew an analogy between the *Criminal Code* provisions and a law that prevents motorcyclists from wearing helmets. Such a law has the effect of increasing the danger of an already hazardous activity.

Next, the SCC considered whether the *Criminal Code's* infringement on the right to security of the person were in keeping with fundamental justice. The principles of fundamental justice are the basic values underpinning the constitution. According to the SCC, a law is contrary to these basic constitutional values when the state seeks to attain its objective in a fundamentally flawed way. The SCC pointed to three attributes of fundamental justice that might be engaged in this case. The first is **arbitrariness**, where there is no connection between the goal of the law and its effect. The second is **overbreadth**, where the law goes too far and interferes with conduct that has nothing to do with the goal of the law. Third, **gross disproportionality** occurs where the effect of the law is far more severe than is necessary to meet the state's objective.

The SCC found that s. 210, the bawdy house provision, violates security of the person since it forces prostitutes into the streets rather than a fixed indoor location. Such a provision is not in accordance with fundamental justice since the impact on the applicants' security of the person is grossly disproportionate to its objective, which is to protect communities from the nuisance of "sex shops". Regulating against such nuisances cannot come at the expense of the health, safety and lives of prostitutes, whose work is legal.

The SCC also found that s. 212(1)(j), the living on the avails provision, infringes the applicants' right to security since it prevents prostitutes from hiring bodyguards, drivers and receptionists. The purpose of the avails law is to protect prostitutes from exploitative pimps. Prohibiting safety and security services goes too far in pursuit of the law's objective, and so the SCC found the law to be overbroad and therefore not in accordance with the principles of fundamental justice.

Finally, the SCC found that s. 213(1)(c), the communication provision, infringes security because it prevents prostitutes from screening clients and pushes them to work in isolated areas. The negative impact of this provision on the safety and lives of street prostitutes is grossly disproportionate to the possible nuisance that these prostitutes could cause by communicating for business purposes, and it is therefore not in accordance with fundamental justice.

The SCC concluded that the *Criminal Code* provisions violate s. 7 of the *Charter* and are not justified under s. 1 of the *Charter*. It noted that the government had "not seriously argued" that the provisions, if found to infringe s. 7, could be justified under s. 1.

DISCUSSION

1. What was the basic argument made by the applicants on behalf of sex workers?
2. Does it surprise you that prostitution is legal in Canada? If so, why do you think you had a different impression?
3. How do you think the analysis in this case would change if prostitution were illegal?
4. Does the ability of the court system to use of s. 7 of the *Charter* to change legislation undermine Parliamentary democracy? Can you think of other laws that may be challenged through the courts as infringing s. 7 of the *Charter*?
5. Social research shows that prostitution is a profession that often attracts people who have histories of being victims of violence and sexual abuse.
 - a. How might this make them vulnerable to manipulation and further abuse by managers ("pimps") and clients?
 - b. Should the government's response be to increase the legal protection of sex workers, or should the government focus on creating supportive social programs for at-risk people to provide them a safer alternative to earning a living? Are they mutually exclusive options? Explain your answer.