

TOP FIVE 2012

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, 2012 ONCA 186

Date Released: March 26, 2012 <http://www.ontariocourts.ca/decisions/2012/2012ONCA0186>.

Facts

Prostitution itself is not illegal in Canada, but a number of related activities are against the law. Three women, each of whom had been sex workers, brought an application in the Superior Court of Justice arguing that some of Canada's prostitution laws were unconstitutional. In particular, the individuals challenged s. 210 of the *Criminal Code of Canada*, which prohibits the operation of common bawdy-houses; 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 argued that the laws deprived sex workers of their right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*. They argued that the laws increased the risk of death and bodily harm that sex workers face by making it more difficult for them to take steps that can better ensure their safety. Additionally, they argued that the communicating provision violated the right to freedom of expression under s. 2(b) of the *Charter*.

Criminal Code of Canada

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

- (a) is an inmate of a common bawdy-house,
- (b) is found, without lawful excuse, in a common bawdy-house, or
- (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house is guilty of an offence punishable on summary conviction.

212. (1) Every one who

- (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.,



213. (1) Every person who in a public place or in any place open to public view

- (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an indictable offence punishable on summary conviction.

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.
2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
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 held that all three of the laws were unconstitutional because they infringed upon the right to “life, liberty and security of person” and the freedom of expression. The federal and provincial governments appealed the decision to the Court of Appeal for Ontario (ONCA).

Issues

Given that prostitution is not illegal, what should be the purpose of the laws that regulate sex work?

How effectively are these laws accomplishing their intended objectives?

How fairly are these laws balancing the needs of sex workers and the broader community?

Decision

Appeal denied unanimously, in part. The majority found in favour of the government with regard to one of the laws in question, but a minority dissented to this finding and the Court was in unanimous agreement with the respondents with respect to the remaining impugned provisions.



Ratio

In this case, the ONCA considered whether three Canadian prostitution laws violated the right to life, liberty and security of the person, in addition to the right to freedom of expression under sections 7 and 2(b), respectively, of the *Charter*. The *Criminal Code of Canada's* prohibitions on the operation of bawdy-houses and living on the avails of prostitution violate s. 7 of the *Charter*, as they infringe on individuals' right to security of the person and are not in accordance with the principles of fundamental justice. Upon applying a s. 1 *Oakes* analysis to these infringements, the ONCA found that neither provision could be upheld as a reasonable limit under s. 1. By contrast, the *Code's* prohibition on communication for the purpose of prostitution in public does not violate ss. 7 or 2(b) of the *Charter* and as such can be upheld.

Reasons

The Court was unanimous on all issues but one. First it applied the rules of precedent in deferring to a previous SCC decision (see *Prostitution Reference*, [1990] 1 SCR1123) which established that the communicating provision (s. 213(1)(c)) is a justified limit on the freedom of expression.

The Court was also unanimous in ruling that each of the challenged *Code* provisions infringed the right to security of the person guaranteed by s.7 of the *Charter*. Provisions

that infringe s.7 rights can be upheld as long as the infringements are found not to violate the "principles of fundamental justice" (for example, they infringements cannot be arbitrary, overbroad or grossly disproportionate to their objectives). Therefore, the majority considered whether the impugned provisions were in accordance with these fundamental principles.

The Court concluded that the bawdy-house prohibition was too broad because it captured conduct that was unlikely to serve the law's purpose of combating neighbourhood disruption and ensuring public health and safety. For instance, the provision prohibits a single sex worker from discretely doing business at home. The majority further stressed that the impact of the bawdy-house provision was overly disproportionate to the public health and safety objective because evidence suggests that the safest way for a sex workers to operate is to work indoors.

The Court concluded that the living on the avails provision was overbroad and disproportionate because it criminalizes non-exploitive relationships between sex workers and other people. For example, the law prevents them from hiring bodyguards, drivers, or other people who could help keep them safe. The Court held that while the provision is aimed at protecting sex workers from harm, it actually prevents them from taking measures that could reduce harm.



The Court found that neither the bawdy-house provision nor the living on the avails provision could be justified as a reasonable limit under s.1 of the *Charter*.

In contrast, the ONCA was divided on the question of whether the infringement posed by the communicating provision violated the principles of fundamental justice.

Majority Opinion

The majority (three of the five judges on the panel) held that the communicating provision did not violate these principles. In their view, the communicating provision was meant to eliminate forms of social nuisance arising from the public display of the sale of sex. The majority noted that the provision is not arbitrary or overbroad – it is rationally related to the objective of protecting neighbourhoods from the harms often linked to prostitution, such as drug possession, organized crime and public intoxication. The majority rejected the argument that the law increased danger to sex trade workers by forcing them to rush negotiations with customers. While face-to-face communications was an important aspect, it was not the only method sex trade workers use to assess the risk of harm.

Minority Opinion

According to the minority, the communicating provision did violate s. 7, not because it is broad or arbitrary, but rather because it is grossly disproportionate to the provision's intended aim of combating social nuisance. To support its finding, the minority referenced the Superior Court judge's conclusion that the communicating provision has the effect of endangering many sex workers because those who work on the street are at a high risk of becoming victims of physical violence.

This decision was appealed to the Supreme Court of Canada and heard in June 2013. Current case information is available at <http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=34788>

DISCUSSION

1. Were you surprised to learn that prostitution is legal in Canada? If so, why do you think you had a different impression?
2. One of the arguments put forth by the government was that the *Criminal Code* provisions do not create a risk to sex workers; rather the risk is inherent in the nature of prostitution itself. Do you agree with this argument? Why or why not?
3. The Court found that the bawdy-house and living on the avails provisions were too broad because they targeted sex workers and their support workers. Who do you think they were intended to target??
4. Do you agree with the majority or the minority's conclusion about the constitutionality of the 'communicating provision' (s. 213(1)). Explain your answer?
5. Although it is legal, prostitution is a profession that often attracts people who have been victims of violence and sexual abuse and who are vulnerable to manipulation by people who exploit them. How should governments address this fact: by increasing the legal protection of sex workers as working people or by creating supportive social programs for at-risk people to give them safer alternatives for earning a living?