

IN THE SUPREME COURT OF CANADA

BETWEEN

ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO

Appellants / Respondents on Cross-Appeal
(Appellants on Appeal)

AND

TERRI JEAN BEDFORD, AMY LEOVITCH, VALERIE SCOTT

Respondents / Appellants on Cross-Appeal
(Respondents on Appeal)

AND

DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY, PACE SOCIETY AND PIVOT LEGAL SOCIETY; THE ATTORNEY GENERAL OF QUEBEC; SECRETARIAT OF THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; EVANGELICAL FELLOWSHIP OF CANADA; CANADIAN HIV/AIDS LEGAL NETWORK, BRITISH COLUMBIA CENTRE FOR EXCELLENCE IN HIV/AIDS AND HIV & AIDS LEGAL CLINIC ONTARIO; CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES, NATIVE WOMEN'S ASSOCIATION OF CANADA, CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES, ACTION ONTARIENNE CONTRA LA VIOLENCE FAITE AUX FEMMES, CONCERTATION DES LUTTES CONTRE L'EXPLOITATION SEXUELLE, REGROUPEMENT QUÉBÉCOIS DES CENTRES D'AIDE ET DE LUTTE CONTRE LES AGRESSIONS À CARACTÈRE SEXUEL AND VANCOUVER RAPE RELIEF SOCIETY; CHRISTIAN LEGAL FELLOWSHIP, CATHOLIC CIVIL RIGHTS LEAGUES AND REAL WOMEN OF CANADA; DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS; INSTITUT SIMONE DE BEAUVOIR; AWCEP ASIAN WOMEN FOR EQUALITY SOCIETY, OPERATING AS ASIAN WOMEN COALITION ENDING PROSTITUTION; ABORIGINAL LEGAL SERVICES OF TORONTO, INC.

Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. The Ontario Court of Appeal agreed with the application judge, Justice Himel, that all three impugned *Criminal Code* provisions create real risks to the safety and lives of sex workers. The majority of the Court of Appeal held that these risks are not “obscure or tangential,” and that the laws exacerbate a risk of “physical harm” in a way that “compromises personal integrity and autonomy and strikes at the core of the right to security of the person.”¹
2. The majority erred, however, in overturning Justice Himel’s findings of fact about the harmful effects of s. 213(1)(c) of the *Criminal Code* (“Communication Law”) on street-based sex workers, including that it displaces them to unsafe locations and interferes with their ability to take essential safety precautions and access police protection. In doing so, the majority failed to give Justice Himel’s findings due deference and disregarded direct and expert evidence about the lived experiences of sex workers under the Communication Law, characterizing the evidence from sex workers as merely “anecdotal”.²
3. The majority’s error pervaded its analysis of the principles of fundamental justice with respect to the Communication Law. Appropriately analyzed, the evidence of street-based sex workers and experts supports the correct conclusion: the Communication Law cannot be upheld because it is grossly disproportionate and overbroad.

STATEMENT OF FACTS

4. The Interveners Downtown Eastside Sex Workers United Against Violence Society, PACE Society and Pivot Legal Society (“Coalition”) rely on the statement of facts set out by the Respondents. Justice Himel found as fact that the Communication Law creates unsafe conditions for street-based sex workers by preventing screening of clients and by displacing sex workers to more dangerous areas.³ She also noted the evidence and found that sex workers are not able to access police protection because of their criminalization

¹ *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, at para. 111, **AR, Vol. II, Tab 7, pp. 49** [“*Bedford OCA*”].

² *Bedford OCA*, *supra*, at para. 311, **AR, Vol. II, Tab 7, pp. 124-125**.

³ *Bedford v. Canada*, 2010 ONSC 4264, at paras. 300-301, 361-362, 409, and 500-502 **AR, Vol. I, Tab 3, pp. 84, 98-99, 109 and 129** [“*Bedford SCJ*”].

and are less likely to report incidents of violence or abuse (“bad dates”) to police for fear of arrest.⁴

PART II – POSITION ON APPELLANTS’ AND CROSS-APPELLANTS’ QUESTIONS

5. The Coalition supports the Respondents’ positions on the Appeal and Cross-Appeal, and focuses its submissions on the Communication Law’s violation of s. 7 of the *Charter*.

PART III – ARGUMENT

A. The majority erred by interfering with Justice Himel’s findings of fact about the effects of the Communication Law.

6. The majority erred by interfering with Justice Himel’s findings of fact about the vulnerabilities of street-based sex workers exacerbated by the Communication Law, and by concluding that Justice Himel over-emphasized the impact of the Communication Law on the right to life and security of the person.⁵ This error drove the majority’s conclusion that the Communication Law does not violate principles of fundamental justice.
7. Justice Himel found that the Communication Law exacerbates the risk of violence and harm faced by street-based sex workers. The majority, however, characterized the direct, experiential evidence that Justice Himel relied upon as “anecdotal” and conducted a *de novo* assessment of the evidence, overstepping its appellate role.⁶ Justice Himel committed no error of fact, and her findings are due deference because she was best able to receive and weigh all of the evidence.
8. The majority wrongly diminished Justice Himel’s findings about the effectiveness of strategies that street-based sex workers would use to increase their safety if not constrained by the Communication Law.⁷ The record amply supports the finding that the Communication Law impairs sex workers’ ability to take very basic safety precautions, and that negotiating with a client and examining a client and his vehicle are critical and effective ways to increase the safety of street-based sex workers.⁸ The evidence shows that during these interactions, sex workers can decrease risk by: assessing the appearance, behaviour and demeanour of a client, including checking for signs of intoxication;

⁴ *Bedford SCJ, supra*, at para. 500, **AR, Vol. I, Tab 3, pp. 129**. See also paras. 35, 36, 125, 143, 154, 313, 328, 336, 341, 475,

⁵ *Bedford OCA, supra*, at paras. 305, 310-324, **AR, Vol. II, Tab 7, pp. 122, 124 - 130**.

⁶ *Bedford OCA, supra*, at paras. 129 – 130, 311, **AR, Vol. II, Tab 7, pp. 57-58, 124**.

⁷ *Bedford OCA, supra*, at paras. 320-21, 348- 353, **AR, Vol. II, Tab 7, pp. 129, 138 - 141**. *Bedford SCJ, supra*, para. 361, **AR, Vol. I, Tab 3, p. 98-99**.

⁸ See **Schedule “A”** to this factum, “1. Impairment of ability to take basic safety precautions”

checking for dangerous items or features of a vehicle; reviewing a “bad date sheet”⁹; discussing the services that a sex worker may offer and the services sought; discussing price and terms of payment; discussing the location and venue where the service will be provided (indoor, outdoor, vehicle); and working in pairs with other sex workers who can observe the client, assist with the screening process, share information about bad clients, and record license plate numbers.¹⁰ The majority of the Court of Appeal affirmed that the evidence before Justice Himel set out ways sex workers can assess risk during screening of clients, and that these methods are affected by the Communication Law.¹¹

9. The record contains extensive evidence from sex workers and expert witnesses demonstrating that screening is a meaningful safety measure.¹² In the *Voices for Dignity* report, a sex worker describes the importance of having time to screen clients:

The communicating law makes me worried because I do not have time to make sure that the car I get into is safe, and that the person is not dangerous. ... A car drove up to me and asked me if I was working, and I said, "Yes." He told me that he had the money to pay and I got into a car. He strangled me, threatened me, and sexually assaulted me, then left me on a corner close to the waterfront. If I had had more time, I may not have gotten into the car with him.¹³

10. The majority acknowledged that, in addition to face-to-face communication, sex workers use such techniques as listening to intuition, assessing a client’s appearance and vehicle, and working with others to record license plates.¹⁴ These techniques cannot be carried out absent some form of communication. Indeed, the moment a sex worker says “hello” to an intended client in public, she will have broken the law.¹⁵ The Communication Law thereby prevents the use of a broad range of safety measures.
11. The Vancouver Police Department’s orientation manual, also in the record, supports Justice Himel’s finding about the importance of screening. It contains a section titled “*Officer Survival*”, which directs police officers to screen the inside of a vehicle when

⁹ “Some prostitutes’ rights organizations keep lists of bad dates and distribute them to street prostitutes.” *Bedford SCJ, supra*, at para. 32, **AR, Vol. I, Tab 3, p. 18**.

¹⁰ *Bedford SCJ, supra*, at para. 301, 361, **AR, Vol. I, Tab 3, p. 84, 98-99**. See **Schedule “A”** to this factum, “1. Impairment of sex workers’ ability to take basic safety precautions”

¹¹ *Bedford OCA, supra*, at paras. 313, 320 **AR, Vol. II, Tab 7, pp. 125-126, 129**.

¹² As noted by MacPherson, JA. *Bedford OCA, supra*, at para. 348, **AR, Vol. II, Tab 7, p. 138**.

¹³ *Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws*, Pivot Legal Society, at 11, **JAR, Vol. 24, Tab 55(M), p. 7141** [“Voices”].

¹⁴ *Bedford OCA, supra*, at para. 313, **AR, Vol. II, Tab 7, pp. 125-126**.

¹⁵ *Bedford OCA, supra*, at paras. 281, 283, **AR, Vol. II, Tab 7, pp. 112-113**. *Bedford SCJ, supra*, at paras. 277-278, **AR, Vol. I, Tab 3, p. 77-78**. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 pp. 1160-1161, **Coalition Authorities, Tab 10** [*Prostitution Reference*].

detaining an individual suspected to have violated the Communication Law: “Check the inside of the vehicle for weapons; prostitutes are frequently the victims of violent attacks, these weapons could be used against you.”¹⁶ *The Communication Law prevents sex workers from taking the very basic safety precautions that police are trained to employ.*

12. The evidence further supports Justice Himel’s finding that the Communication Law endangers sex workers by displacing them into more dangerous, isolated locations.¹⁷ Without the Communication Law, street-based sex workers would be able to work in well-lit locations, near agencies that provide health and social services and with others who can record license plate numbers and descriptions, rather than working in isolation so as not to attract police attention.¹⁸ Sex workers described the impact of the law:

Because of police, we end up moving to places that are darker and more secluded. It's more dangerous for girls. For example, we are forced to work in the industrial area at the foot of Victoria. It's really bad because it's so dark down there.¹⁹

When girls work on the street they aren't safe. Girls don't use the buddy system and don't record the license plate numbers for their friends because if they wait on the streets they could get arrested.²⁰

13. The Missing Women Commission of Inquiry (“MWCI”) report affirms the connection between the Communication Law and violence against vulnerable women:²¹

I conclude that there is a clear correlation between law enforcement strategies of displacement and containment in the period leading up to and during my terms of reference and increased violence against prostitutes. The fear of police harassment or arrest leads prostitutes to rush transactions, jump into cars quickly, and move to dark or more isolated areas. The rushed transaction denies the sex worker the time to innately sense whether a client is a “bad trick,” and moving to a darker, isolated area puts her in a more dangerous environment.²²

14. Finally, the record amply supports Justice Himel’s finding that, because of the Communication Law, sex workers are less likely to report violence to police or go to

¹⁶ John Lowman, *Street Prostitution: Assessing the Impact of the Law - Vancouver* (Ottawa: Minister of Supply and Service Canada, 1989), at p. 128, **JAR, Vol. 17, Tab 51(G), pp. 4725.**

¹⁷ *Bedford SCJ, supra*, at paras. 331, 500-503, **AR, Vol. I, Tab 3, pp. 93, 129-130.** See **Schedule “A”** to this factum, “2. Displacement of Sex Workers”

¹⁸ House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*, (December 2006) at 62-63, **JAR, Vol. 82, Tab 164**, pp. 24967-70.

¹⁹ *Voices, supra*, at 11, **JAR, Vol. 24, Tab 55(M)**, pp. 7141.

²⁰ *Voices, supra*, at 29, **JAR, Vol. 24, Tab 55(M)**, pp. 7159.

²¹ The Hon. Wally T. Oppal, Q.C., *Forsaken: The Report of the Missing Women Commission of Inquiry* (Victoria: Missing Women Commission of Inquiry, 2012), **Executive Summary, pp. 15-16, 66-68, Vol. 1, pp. 106-112, Coalition Authorities, Tab 11, 12** [“Missing Women Commission”].

²² Missing Women Commission, *supra*, **Vol. 1, pp. 110, Coalition Authorities, Tab 12.**

them for help, for fear of arrest and discriminatory treatment.²³ As a result, police are less able to protect sex workers or deter predators like Robert William Pickton.²⁴

15. The record of evidence from sex workers is clear. Their experience of criminalization undermines their ability to access police protection. Sex workers said:

I have never gone to the police for help. With all of these prostitution laws, they would probably just look down on me. They might even charge me.²⁵

There is a man on the bad date sheet, named Randy, who sets fire to the girls with lighter fluid and they know what he looks like and his tattoos, and they can't find him. Yeah right. They aren't trying. They figure hookers are dirt, they treat us worse than dirt. They could have found the Pickton guy way sooner...²⁶

16. The MWCI report reinforces the finding that enforcement of the Communication Law undermines access to police protection:

The relationship between police and sex trade workers is generally marked by distrust, which is fostered by the adversarial relationship created by the law.²⁷

17. The majority erred by dismissing and minimizing the significance and weight of the testimony of sex workers about the strategies they employ while working in a dangerous criminalized environment. The majority stated:

There was anecdotal evidence from prostitutes that they often felt rushed in their negotiations with potential customers, and would quickly get into the customers' cars to avoid detection by the police. To the extent that the application judge relied on that evidence, informed by her own common sense, to find that screening customers is essential to enhancing the safety of street prostitutes, we think her conclusion reaches well beyond the limits of the evidence.²⁸

18. This conclusion is wrong. There was extensive evidence from sex workers and experts about the safety strategies that sex workers in outdoor settings could take absent the impugned law.²⁹ Justice Himel explicitly accepted this evidence.³⁰

19. The majority impermissibly relied on stereotype and speculation to de-emphasize evidence of the grievous impact of the Communication Law on street-based sex workers:

²³ *Bedford SCJ, supra*, at para. 500, **AR, Vol. I, Tab 3, p. 129**. See Schedule "A" to this factum, "3. Impairment of access to police protection"

²⁴ *R. v. Pickton* 2010 SCC 32, [2010] 2 SCR 198 **Coalition Authorities, Tab 8**; *R. v. Pickton*, 2009 BCCA 299 (BCCA), at paras. 6-118 **Coalition Authorities, Tab 7**. See also: *R. v. Bakker* [2005] B.C.J. No. 1577, 2005 BCPC 289 (BC Prov Court) **Coalition Authorities, Tab 3**, *R. v. Leopold* [2001] B.C.J. No. 1209, 2001 BCCA 396 (BCCA) **Coalition Authorities, Tab 5**.

²⁵ *Voices, supra*, at 18, **JAR, Vol. 24, Tab 55(M), pp. 7148**.

²⁶ *Voices, supra*, at 25, **JAR, Vol. 24, Tab 55(M), pp. 7155**.

²⁷ Missing Women Commission, *supra*, **Vol. 1, pp. 107, Coalition Authorities, Tab 12**.

²⁸ *Bedford OCA, supra*, at para. 311, **AR, Vol. II, Tab 7, pp. 124-125**.

²⁹ Some of this evidence was noted by the majority: *Bedford OCA, supra*, at para. 313, **AR, Vol. II, Tab 7, pp. 125-126**. See also MacPherson JA, at paras. 348-353, 360.

³⁰ *Bedford SCJ, supra*, at paras. 128, 300-301, **AR, Vol. I, Tab 3, pp. 38, 84**.

While it is fair to say that a street prostitute might be able to avoid a “bad date” by negotiating details such as payment, services to be performed, and condom use up front, it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway. It is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk.³¹

20. This passage is unsupported by evidence (of equal likelihood) and also relies on stereotypes of street-based sex workers as desperate addicts who lack ordinary skills of perception and a rational self-interest in safety and survival. The notion that safety measures must be infallible is also inconsistent with the majority’s earlier comments about self-defence. Self-defence is not always effective, but the majority reasoned that a law that would deprive prostitutes of the defence of self-defence would “expose them to added risk of physical harm and thereby interfere with their security of the person.”³²
21. Justice MacPherson, in dissent, accepted Justice Himel’s conclusion that the Communication Law puts sex workers at risk. He found:
- Any measure that denies an already vulnerable person the opportunity to protect herself from serious physical violence, including assault, rape and murder, involves a grave infringement of that individual’s security of the person. The infringement caused by the communicating provision is especially significant in light of the reality that many prostitutes have few alternative means of protecting themselves. Putting aside the fiction that all prostitutes can easily leave prostitution by choice or practise their occupation indoors, the communicating provision closes off valuable options that street prostitutes do have to try to protect themselves.³³
22. Justice MacPherson took the correct approach, properly recognizing the dignity and expertise of street-based sex workers, and concluded that the Communication Law “chokes off self-protection options for prostitutes who are already at enormous risk.”³⁴ He referred to affidavit evidence relied on by Justice Himel that provided “critical insight into the experience and knowledge of people who have worked on the streets, and who have been exposed to the risk of violence first-hand” and concluded that Justice Himel’s findings, based on a clear and compelling record, should not lightly be set aside.³⁵ These findings about the harms arising from the Communication Law must stand and be given weight in considering the gross disproportionality and overbreadth of the law.

³¹ *Bedford OCA, supra*, at para. 312, **AR, Vol. II, Tab 7, p. 125.**

³² *Bedford OCA, supra*, at para. 112, **AR, Vol. II, Tab 7, p. 50.**

³³ *Bedford OCA, supra*, at para. 360, **AR, Vol. II, Tab 7, p. 143.**

³⁴ *Bedford OCA, supra*, at para. 359, **AR, Vol. II, Tab 7, pp. 142-143.**

³⁵ *Bedford OCA, supra*, at para. 350, **AR, Vol. II, Tab 7, p. 139.**

B. The effect of the Communicating Law is grossly disproportionate to the state’s interest in preventing public nuisance

23. Minimizing the harms suffered by street-based sex workers led the majority to err in its assessment of whether the effect of the Communication Law is grossly disproportionate to the state’s interest in reducing public nuisance.³⁶ The majority also applied the wrong legal standard for gross disproportionality, and incorrectly applied *Canada (Attorney General) v. PHS Community Services*.³⁷

i. The majority applied the wrong standard for gross disproportionality

24. As stated by the dissent, the majority applied the correct standard for assessing gross disproportionality in its analysis of s. 210 and s. 212(1)(j), but not in its analysis of the Communication Law.³⁸ Relying on s. 12 of the *Charter*’s cruel and unusual punishment context, the majority incorrectly injected “abhorrent” and “intolerable” as touchstones of grossly disproportionate legislation when considering s. 213(1)(c). Assuming for the sake of argument that these touchstones are to be considered, it must be found both “abhorrent” and “intolerable” to sacrifice the lives and safety of already marginalized individuals to keep the streets free of nuisance.

ii. The majority erred in its application of *Insite*

25. The majority incorrectly applied the *Insite* decision to the question of whether the effect of the Communication Law is grossly disproportionate to its legislative objective. In *Insite*, this Court declared unconstitutional a Minister’s decision to refuse an exemption to laws that impede the operation of a health service that saves lives and improves the health of vulnerable individuals:

Insite saves lives. Its benefits have been proven. There has been no discernable negative impact on the public safety and health objectives of Canada during its eight years of operation. The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.³⁹

³⁶ *R. v. Malmo Levine, R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 [*Malmo-Levine*], paras. 143, 169, 203, **Coalition Authorities, Tab 6**. The error arose in part because the majority recast the legislative objective of the Communication Law as targeting serious criminal conduct associated with “trafficking, public intoxication, and organized crime.” *Bedford OCA, supra*, para. 307, **AR, Vol. II, Tab 7, p. 123**. *Prostitution Reference, supra*, pp. 1134-1135, **Coalition Authorities, Tab 10**. We rely on the submissions of the Respondents on this point: Respondents’ Factum pp. 27-29; *Bedford OCA, supra*, paras. 345 to 347, **AR, Vol. II, Tab 7, pp. 137-138**.

³⁷ *Canada (Attorney General) v. PHS Community Services*, 2011 SCC 44, [2011] 3 S.C.R. 44 [*Insite*]

³⁸ *Bedford OCA, supra*, at paras. 338-344, **AR, Vol. II, Tab 7, p. 134-137**. The Coalition relies on the reasoning of the dissent.

³⁹ *Insite, supra*, at para. 133.

26. Here, the majority held that the impact of the Communication Law on sex workers' safety is not comparable to the impact of the restriction on drug possession in *Insite*.⁴⁰ This is an error in reasoning; these cases are highly analogous. Both cases required assessment of the validity of *Criminal Code* provisions that prevented safety measures necessary for the health and well being of highly vulnerable populations. In both, the prohibition was a significant (not exclusive) factor that increased risk to health and safety. In both, extensive first hand and expert evidence demonstrated the efficacy of those safety measures to reduce the harms and save lives. The reasoning applied in *Insite* parallels this case and leads to the same conclusion: the effects of the Communication Law are grossly disproportionate to its objectives.

iii. The Communication Law is grossly disproportionate and overbroad

27. Justice MacPherson correctly noted that if the bawdy house and living on the avails provisions cannot survive the balancing required by the gross proportionality analysis, the Communication Law “with its equally serious – *and perhaps worse* – effects on prostitutes’ right to life and security of the person, should not survive it either.”⁴¹

28. Three examples assist in perceiving the grossly disproportionate effects of this law. First, with the Communication Law in force, a sex worker will relocate from a busy, well-lit street where people are within earshot, to work alone in a dark and dangerous secluded area, such as an industrial area or under a bridge, where there is no one to notice who she is with or assist if she is being harmed.⁴² Second, a sex worker may not report an assault by a client to police because she is worried about police harassment, disregard, arrest, or being “tagged” as a sex worker in a police database.⁴³ With the crime unreported, others may be at risk of assaults by the same offender, and other perpetrators are not deterred. Third, a sex worker may not take a few moments to draw out conversation with a potential client so she can take a look at recent bad date sheets. An observation she makes – the colour of the car, a license plate number, a tattoo – may empower her to avoid a known offender.⁴⁴

⁴⁰ *Bedford OCA, supra*, at para. 315, **AR, Vol. II, Tab 7, p. 126-127.**

⁴¹ *Bedford OCA, supra*, at para. 344, **AR, Vol. II, Tab 7, p. 137.**

⁴² *Voices, supra*, at 17, **JAR, Vol. 24, Tab 55, pp. 7147.**

⁴³ *Voices, supra*, at 23-24, **JAR, Vol. 24, Tab 55, pp. 7153-7154.**

⁴⁴ Affidavit of Frances Shaver, at paras. 13 – 15, **JAR, Vol. 24, Tab 55, pp. 6811 - 6812.**

29. An assessment of whether a law is grossly disproportionate is not a simple balancing exercise. The aim of the impugned provision must be viewed in light of its effects, and, in this case, this exercise implicates concerns of fundamental human dignity and personal security. As Wilson J. noted in her dissenting judgment in the *Prostitution Reference*, the legislative response to the lawful activity of prostitution is “far too drastic.”⁴⁵ The evidence in this case, such as the women who went missing and were murdered in the years that followed the *Reference*, affirms that characterization. Preventing nuisance may be legitimate but cannot trump a risk of serious harm and death.
30. Justice MacPherson correctly recognized that the pre-existing vulnerability of street-based sex workers exacerbates the harmful effects of the Communication Law. This group is “most harmed when screening is forbidden.”⁴⁶ It is grossly disproportionate to elevate matters of convenience, property, propriety and order over threats to the life and security of vulnerable members of our community.
31. The grossly disproportionate effects of the Communication Law can also be seen as overbroad.⁴⁷ The law is not tailored to its goal: it is a blanket prohibition that captures *innocuous* communication by any sex worker standing on a sidewalk or in any public place, regardless of whether she or he is actually causing a nuisance. Its effects are also counterproductive: it curtails *desirable* public communication. Limiting critical safety techniques, and placing sex workers at greater risk of harm carries “a great cost to families, law enforcement, and communities.”⁴⁸ Finally, the Communication Law is unnecessary to achieve the stated objectives. Reducing particular types of nuisance, such as excessive noise or impeding traffic,⁴⁹ can be achieved through existing laws that specifically target that conduct.

C. Striking down s. 210 does not render s. 213(1)(c) constitutional

32. The decision of the majority to uphold the Communication Law was based in part on its prediction of the effect of striking down the bawdy house provision. The majority

⁴⁵ *Prostitution reference, supra*, at p. 1223, **Coalition Authorities, Tab 10.**

⁴⁶ *Bedford OCA, supra*, at para. 358, **AR, Vol. II, Tab 7, p. 142.**

⁴⁷ The Coalition relies on the Respondent’s discussion of the doctrine of overbreadth. Whether a sister or a separate doctrine from gross disproportionality, overbreadth is one measure of a law’s proportionality. Respondent’s factum pp. 25-26; *Insite, supra*, para. 133; *Malmo-Levine, supra*, para. 143; *R. v. Heywood* [1994] 3 S.C.R. 761, p. 792-793.

⁴⁸ *Bedford SCJ, supra*, at para. 434, **AR, Vol. 1, Tab 3, p. 114.**

⁴⁹ *Bedford OCA, supra*, at paras. 281-284, **AR, Vol. 2, Tab 7, pp. 112-114; Bedford SCJ, supra, at paras. 277-8, **AR, Vol. 1, Tab 3, pp. 77-78.****

speculated that, with s. 210 struck down, “street prostitutes” would have the “option to work indoors”.⁵⁰ There is neither precedent nor principled justification for the majority’s innovation: striking down s. 210 as a remedy for the constitutional deficiencies of s. 213(1)(c). The proper remedy is to strike down the Communication Law.⁵¹

33. Striking only s. 210 is also an insufficient remedy for the safety risks caused by the Communication Law. The Coalition represents street-based sex workers in the Downtown Eastside, a neighbourhood of which this Court has recently taken notice.⁵² From the perspective of those whose “living conditions... would shock many Canadians”⁵³, it is an error to assume they can always access secure indoor locations for their interactions with clients all or some of the time.⁵⁴ Justice Himel correctly found that the Communication Law will continue to harm street-based sex workers who do not have the option of working indoors.⁵⁵ The majority acknowledged the evidence that street-based sex workers are a marginalized group who suffer the greatest danger in their work.⁵⁶ The majority’s remedy, however, exposes the most vulnerable to great risk and is contrary to the dignity, security and equality of those the Coalition represents.

PART IV – COSTS

34. The Coalition does not seek costs and requests that none be awarded against it.

PART V – ORDER REQUESTED

35. The Coalition requests that it be granted leave to make oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated the _____ day of May, 2013

Katrina Pacey, Joseph J. Arvay, Elin Sigurdson, Lisa Glowacki, M. Kathleen Kinch and Maia Tsurumi
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Society and Pivot Legal Society

⁵⁰ *Bedford OCA supra*, at para. 317, **AR, Vol. 2, Tab 7, 127-128.**

⁵¹ *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 49 – 51 **Coalition Authorities, Tab 9.**

⁵² *Insite, supra*, at paras. 4, 7-8; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 **Coalition Authorities, Tab 2.**

⁵³ *Insite, supra*, at para. 8.

⁵⁴ Cross-examination of Susan Davis, at p. 51-52, ll. 1-21, 1-2, **JAR, Vol. 5, Tab 23, pp. 1221-1222,**

⁵⁵ *Bedford OCA*, at paras. 318, 360 and 366, **AR, Vol. 2, Tab 7, p. 128, 143, 145.** See also *Bedford SCJ*, at paras. 189, 196, **AR, Vol. 1, Tab 3, pp. 52, 53-54,**

⁵⁶ *Bedford OCA, supra*, at paras. 207, 320-321 **AR, Vol. 2, Tab 7, p. 85, 129.**

PART VI - TABLE OF AUTHORITIES

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SCHEDULE “A” - SELECTED REFERENCES TO THE RECORD

1. Impairment of sex workers’ ability to take basic safety precautions (Reasons of Himel J. para. 301)

Affidavit of Eleanor Maticka-Tyndale, at paras. 12-13, **JAR, Vol. 12, Tab 45, p. 3094-95** [“Maticka-Tyndale Affidavit”].

Maticka-Tyndale, Eleanor, et al., “Managing Risk and Safety on the Job: The Experiences of Canadian Sex Workers”, (2005) 17 *Journal of Psychology & Human Sexuality* 147, at 161-162, **JAR, Vol. 12, Tab 46(D), pp. 3330-3331** [“Managing Risk”].

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House of Commons, Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*, (December 2006), at 64-65, **JAR, Vol. 82, Tab 164, p. 24969-70** [“Challenge of Change”].

a. Assessing clients

Cross examination of Valerie Scott, at p. 69 ll. 22-25, p. 70 ll. 1-25, **JAR, Vol. 4, Tab 17, pp. 635 – 636** [“Scott Cross Examination”].

Affidavit of Kara Gillies, at para. 7, **JAR, Vol. 6, Tab 24, pp. 1300 – 1301** [“Gillies Affidavit”].

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Affidavit of Gayle MacDonald, at paras. 13 – 14, **JAR, Vol. 11, Tab 42, pp. 2772** [“MacDonald Affidavit”].

Affidavit of Frances M. Shaver, at paras. 13 – 14, 17, **JAR, Vol. 24, Tab 55, pp. 6811-6812** [“Shaver Affidavit”].

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b. Checking Vehicles

Affidavit of Amy Lebovitch, at para. 2, **JAR, Vol. 2, Tab 13, pp. 164**.

Affidavit of Susan Davis, at para. 16, **JAR, Vol. 5, Tab 22, pp. 936**, [“Davis Affidavit”].

Maticka-Tyndale Affidavit, *supra*, at para. 10 – 12, **JAR, Vol. 12, Tab 45, pp. 3094**.

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Voices, *supra*, at 11, **JAR, Vol. 24, Tab 55, pp. 7141**.

c. Reviewing bad date sheets

Shaver Affidavit, *supra*, at para. 14, **JAR, Vol. 24, Tab 55, pp. 6811.**

d. Discussing Services

Bowen, Raven, “From the Curb: Sex Workers’ Perspectives on Violence and Domestic Trafficking”, March 2006, at 43-44, **JAR, Vol. 5, Tab 22C, pp. 1157 – 1158.**

Maticka-Tyndale Affidavit, *supra*, at paras. 10 – 12, **JAR, Vol. 12, Tab 45, pp. 3094.**

Challenge of Change, *supra*, at 64-65, **JAR, Vol. 82, Tab 164, pp. 24969-70.**

e. Discussing payment

From the Curb, *supra*, at 43-44, **JAR, Vol. 5(C), Tab 22A, pp. 1157 – 58.**

Challenge of Change, *supra*, at 64-65, **JAR, Vol. 82, Tab 164, pp. 24969-70.**

f. Discussing location and venue

From the Curb, *supra*, at 43-44, **JAR, Vol. 5(C), Tab 22A, pp. 1157 – 58**

g. Working together and sharing information

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Scott Cross Examination, *supra*, at p. 69, ll. 1-21, **JAR, Vol. 4, Tab 17, pp. 635.**

2. Displacement of Sex Workers (Reasons of Himel J. para. 380)

Scott Cross Examination, *supra*, at p. 69, ll. 1-21, **JAR, Vol. 4, Tab 17, pp. 635.**

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3. Impairment of access to police protection (Reasons of Himel J. para. 500)

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