

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**TERRI JEAN BEDFORD, AMY LEBOVITCH
and VALERIE SCOTT**

Applicants
(Respondents in Appeal)

-and-

ATTORNEY GENERAL OF CANADA

Respondent
(Appellant in Appeal)

-and-

ATTORNEY GENERAL OF ONTARIO

Intervener
(Appellant in Appeal)

**FACTUM OF THE INTERVENERS,
CHRISTIAN LEGAL FELLOWSHIP, REAL WOMEN OF CANADA AND THE
CATHOLIC CIVIL RIGHTS LEAGUE**

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario
M5X 1A4

Robert W. Staley (27115J)
Derek J. Bell (43420J)
Ranjan K. Agarwal (49488H)

Telephone: (416) 863-1200
Facsimile: (416) 863-1716

Lawyers for the interveners, Christian Legal
Fellowship, REAL Women of Canada and the
Catholic Civil Rights League

TO: DEPARTMENT OF JUSTICE
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400
Toronto, Ontario
M5X 1K6

Michael H. Morris

Telephone: (416) 973-9704
Facsimile: (416) 952-4518

Lawyers for the respondent (appellant in appeal),
Attorney General of Canada

AND TO: MINISTRY OF THE ATTORNEY GENERAL
10th Floor
720 Bay Street
Toronto, Ontario
M5G 2K1

Jamie Klukach

Telephone: (416) 326-4639
Facsimile: (416) 326-4656

Lawyers for the intervener (appellant in appeal),
Attorney General of Ontario

AND TO: ALAN N. YOUNG
Barrister & Solicitor
Osgoode Hall Law School
4700 Keele Street
Room 428
Toronto, Ontario
M3J 1P3

Telephone: (416) 736-5595
Facsimile: (416) 736-5736

Lawyer for the applicant (respondent in appeal),
Terri Jean Bedford

AND TO: NEUBERGER ROSE LLP
1392 Eglinton Avenue West
Toronto, Ontario
M6C 2E4

Stacey Nichols

Telephone: (416) 364-3111
Facsimile: (416) 364-3271

Lawyers for the applicant (respondent in appeal),
Valerie Scott

AND TO: RON MARZEL
Barrister & Solicitor
1170 Sheppard Avenue West, Unit 10
Toronto, Ontario
M3K 2A3

Telephone: (416) 485-5200
Facsimile: (416) 485-1610

Lawyer for the applicant (respondent in appeal),
Amy Lebovitch

AND TO: HIV & AIDS LEGAL CLINIC (ONTARIO)
65 Wellesley Street East, Suite 400
Toronto, Ontario
M4Y 1G7

Renée Lang

Telephone: (416) 340-7790
Facsimile: (416) 340-7248

Lawyer for the interveners,
HIV/AIDS Legal Network and B.C. Centre for Excellence on HIV/AIDS

AND TO: SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West, Suite 1100
Toronto, Ontario
M5G 2G8

Cynthia Peterson

Telephone: (416) 979-6440
Facsimile: (416) 591-7333

Lawyers for the interveners,
POWER (Prostitutes of Ottawa/Gatineau Work Educate Resists) and Maggie's:
The Toronto Sex Worker's Advocacy Project

AND TO: PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
250 University Avenue
Suite 501
Toronto, Ontario
M5H 3E5

Andrew Lokan

Telephone: (416) 646-4300
Facsimile: (416) 646-4301

Lawyers for the intervener,
Canadian Civil Liberties Association

AND TO: FARADAY LAW
860 Manning Avenue
Toronto, Ontario
M6G 2W8

Fay Faraday

Telephone: (416) 389-4399
Facsimile: (647) 776-3147

Lawyer for the interveners,
Canadian Association of Sexual Assault Centres and others

AND TO: HUNTER LITIGATION CHAMBERS
Suite 2100 – 1040 West Georgia Street
Vancouver, British Columbia
V6E 4H1

Brent Olthuis

Telephone: (604) 891-2400
Facsimile: (604) 647-4554

Lawyers for the intervener,
B.C. Civil Liberties Association

AND TO: ARVAY FINLAY BARRISTERS
1350 – 355 Burrard Street
Vancouver, British Columbia
V6C 2G8

Joseph Arvay

Telephone: (604) 689-4421
Facsimile: (604) 687-1941

Lawyers for the interveners, PACE Society, Downtown Eastside Sex Workers
United Against Violence and PIVOT Legal Society

TABLE OF CONTENTS

PART I: OVERVIEW.....	1
PART II: FACTS	3
A. The Intervenors	3
B. The Moral Purpose of the Impugned Laws	4
1. Living on the Avails.....	5
2. Common Bawdy-House.....	7
3. Communicating for the Purpose of Prostitution	8
C. Canada as a Moral and Religious Society Today	10
D. The Impugned Laws Protect Human Dignity	11
E. The Application Judge's Findings on Legislative Objective	13
PART III: LAW AND ARGUMENT.....	14
A. Causal Connection: Justice Himel erred in finding that the impugned laws infringed the respondents' section 7 rights.	14
B. Moral Objective: The legislative objective of the impugned provisions is morality, which is consistent with Charter values.....	16
C. Grossly Disproportionate: Justice Himel erred in finding that the impugned laws are grossly disproportionate.....	17
D. Arbitrary: Justice Himel erred in finding that living on the avails provision and the impugned laws taken together are arbitrary.....	18
E. Overbroad: Justice Himel erred in finding that the bawdy-house and living on the avails provisions are overbroad.	19
F. Conclusion	19
PART IV: ORDER REQUESTED	20

PART I: OVERVIEW

1. The decision of the Honourable Madam Justice Himel in this case directly challenges Parliament's ability to legislate in areas that reflect a shared belief that certain acts are immoral. There is no question that there are other objectives of the impugned laws, but the only fair reading of the legislative history of these provisions is that morality is at their core. The Supreme Court of Canada found that Parliament has the discretion to pass laws that reflect the values of society.

2. Parliament has held the view that prostitution is immoral consistently since 1890. This moral view is not based on mere prudish sensibilities nor is it legal moralism: it is a fundamental societal value rooted in other constitutional values such as the protection of human dignity and the suppression of exploitation.

3. Prostitution fundamentally demeans the dignity of the prostitute and the client. It perpetuates a fundamentally offensive and abusive gender imbalance and it exposes prostitutes to physical and psychological harm. It degrades the community. In short, Canadians have good reason to abhor prostitution and they have every reason and justification to discourage people from engaging in the sex-trade, either as sex-workers, customers, pimps and madams or as service-providers.

4. The purpose of the laws at issue on this appeal (communication, keeping a bawdyhouse and living on the avails) is to protect and promote the conception of morality. The communication provision was enacted to protect Canadians (especially children) from exposure to prostitution. The bawdy-house provision similarly ensures that there are no permanent establishments where prostitution can take place or be frequented with regularity and protects

Canadians who might live near bawdy-houses from being exposed to the social and physical dangers of prostitution. The living on the avails provision ensures that persons who seek to profit from prostitution as a form of business are subject to criminal sanction. Although Parliament has not criminalized prostitution *per se* (thereby deciding not to victimize the prostitute twice), it has sought to ensure that prostitution is not elevated to a legitimate business or allow others to profit from its abusive practices.

5. The Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada intervene in this appeal to advance the argument that the impugned laws are constitutional given their purpose of protecting public morality.

6. Though Justice Himel correctly found that morality is a valid constitutional objective, she erred in finding the impugned laws unconstitutional:

- (a) The impugned laws do not infringe the respondents' security of the person rights. Prostitutes have the choice to stop being prostitutes or to work independently from a fixed location, which is safer. If prostitutes choose unsafe conditions or to break the law, it is their choice that exacerbates the risk of harm, not the impugned laws.
- (b) The purpose of the impugned laws is to protect public morality, which is consistent with values underlying the *Charter of Rights and Freedoms*¹, including the protection of human dignity and the suppression of exploitation.

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*].

- (c) The impugned laws are not grossly disproportionate, arbitrary or overbroad. To the extent the laws criminalize people providing services to prostitutes or prostitutes who refuse to work independently or off-street, there is nothing inconsistent between the laws and the purpose of protecting public morality.

PART II: FACTS

A. The Interveners

7. On March 11, 2011, the Court of Appeal for Ontario granted leave to the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada (together the "Interveners") to intervene in this proceeding as a friend of the court.² The Interveners were also granted leave to intervene by this Court in the application below, and made written and oral submissions on the purpose and constitutionality of the impugned laws.³

8. The Interveners accept the facts as set out in paragraphs 10 to 53 of the factum of the Attorney General of Canada. The Interveners also rely on the following additional constitutional and legislative facts.

² Order of Mr. Justice O'Connor, dated March 11, 2011.

³ Reasons for Judgment of Madam Justice Himel, dated September 28, 2010 ("Application Decision"), page 10, ¶22-24, Appeal Book (the "Appeal Book"), Tab 5, page AB33.

B. The Moral Purpose of the Impugned Laws

9. Historically, Canada's prostitution laws have been grounded in morality. Early laws were enacted to reflect a concern by legislators and society that girls and young women required protection from immoral sexual activity generally and prostitution specifically.⁴

10. Following the enactment of the first *Criminal Code* in 1892, legislators formally codified protections for women and girls from immoral sexual activity, exploitation and vice.⁵ *Title IV, Offences against Religion, Morals and Public Convenience*, contained provisions aimed at protecting against illicit sexual activity and general offences against morality.⁶

11. Criminal laws frequently reflect and uphold societal values and morals, which are often derived from religious principles; they work to bind and protect society.⁷ Indeed, "morality" has been described by the Supreme Court of Canada as one of the traditional public purposes underlying the criminal law.⁸

⁴ Affidavit of Lucie Angers, sworn March 20, 2008 ("Angers Affidavit"), page 2, ¶5-6, Joint Application Record ("JAR"), Volume 64, page 18,741; Angers Affidavit, Exhibit "8", JAR, Volume 64, page 18,790; *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* ("Fraser Committee Report"), Volume 2, JAR, Volume 71, page 20,921; *Debates of the Senate* (18 May 1909), JAR, Volume 66, page 19,331.

⁵ Angers Affidavit, page 5, paras.13-14, JAR, Volume 64, pages 18,744-18,745; Affidavit of Eleanor Maticka-Tyndale, sworn March 29, 2007 ("Maticka-Tyndale Affidavit"), Exhibit "B", JAR, Volume 12, page 3,137.

⁶ Angers Affidavit, Exhibit "9", JAR, Volume 64, pages 18,794-18,813.

⁷ House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 83 (11 May 1982), JAR, Volume 68, page 20,208; Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965) at 11-13, 114, Interveners' Book of Authorities, Tab 1; Louis Henkin, "Morals and the Constitution: The Sin of Obscenity" (1963) 63 Colum L. Rev 391 at 409, Interveners' Book of Authorities, Tab 2.

⁸ *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 at 50, per Rand J, Interveners' Book of Authorities, Tab 3; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 ¶41, 49-51, Interveners' Book of Authorities, Tab 4.

1. Living on the Avails

12. Section 212(1)(j) provides that "every one...who lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence...."⁹

13. In 1890, the *Criminal Code* was amended to add the offence of "procuring defilement of [a] girl", which is the predecessor to the living on the avails provision:

Every one who, being the parent or guardian of any girl or woman, (1) procures such girl or woman to have carnal connection with any man other than the procurer, or (2) orders, is party to, permits or *knowingly receives the avails of*, the defilement, seduction or prostitution of such girl or woman, if such girl or woman is under the age of fourteen years, is guilty of felony....¹⁰ [emphasis added]

14. Although the legislative history is silent on the purpose of the provision, insight can be gleaned from its placement in the *Criminal Code* under the heading "Offences Against Public Morals and Convenience". This part of the *Criminal Code* also includes prohibitions on gross indecency and incest, two other provisions firmly rooted in morality.¹¹

15. In 1913, this provision was further amended to prohibit human trafficking and exploitation arising from prostitution.¹² This amendment made it an indictable offence for any male person to live "wholly or in part on the earnings of prostitution." In introducing this amendment, the then-Minister of Justice described the legislative purpose underlying this provision as follows:

⁹ *Criminal Code*, RSC 1985, c C-46, s 212(1)(j).

¹⁰ *An Act to further amend the Criminal Law*, SC 1890, 53 Vict, c 37, s 9, JAR, Volume 65, Tab 140, page 19,068.

¹¹ *An Act to further amend the Criminal Law*, *ibid*, ss 5, 8, JAR, Volume 65, Tab 140, page 19,068; *R v Schmidt*, [1948] OR 198 (CA) at 211-212 rev'd on other grounds [1948] SCR 333, Interveners' Book of Authorities, Tab 5.

¹² *An Act to amend the Criminal Code*, SC 1913, 2-3 Geo V, c 13, s 9, JAR, Volume 66, Tab 144, page 19,346-7.

Section 9 deals with what is generally spoken of as the white slave traffic. The purpose of it is to make, in some respects, more severe and generally more easily enforceable the provisions of the law imposing punishment upon people who traffic in vice. ... They prescribe penalties for the keeping of bawdy houses, for the procuring of women for prostitution, and upon persons who seek to derive profit from the propagation of vice, more particularly by the prostitution of women.¹³

16. The Minister of Justice's comments are noteworthy for two reasons. First, the reference to "white slave traffic" is a euphemism for prostitution and human trafficking. In the early 1900s, Europe, Russia and the United States of America enacted treaties or legislation to prohibit the "white slave traffic", which itself was clearly rooted (as specifically stated in several of the treaties and laws) in a concern about the "procuring of women or girls for immoral purposes."¹⁴ Second, Minister Doherty referred on two occasions to punishing those who traffic in "vice". "Vice" has only one meaning in the English language, which is "grossly immoral conduct".¹⁵

17. Subsequent amendments in 1972 and 1982 were gender neutrality amendments and *Hansard* gives no further assistance as to the purpose of those amendments other than describing them as "technical" amendments.¹⁶ Everything in the legislative history indicates that morality is the overarching concern of this provision. Therefore, Justice Himel's finding that this provision "is aimed at preventing the exploitation of prostitutes and profiting from prostitution

¹³ *Debates of the House of Commons* (20 May 1913 to 6 June 1913), JAR, Volume 66, Tab 144A, page 19,359.

¹⁴ *International Agreement for the Suppression of the "White Slave Traffic"*, 18 May 1904, 1 LNTS 84, art 1, Interveners' Book of Authorities, Tab 6; *White-Slave Traffic Act*, ch 395, 36 Stat 825 (1910), Interveners' Book of Authorities, Tab 7; *International Convention for the Suppression of the White Slave Traffic*, 4 May 1910 as amended by *Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic*, 4 May 1949, 98 UNTS 102, Interveners' Book of Authorities, Tab 8.

¹⁵ *The Concise Oxford Dictionary of Current English*, 9th ed, *sub verbo* "vice", Interveners' Book of Authorities, Tab 9.

¹⁶ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 8, Thursday, June 1, 1972 and Friday, June 2, 1972, Complete Proceedings on Bill C-2, JAR, Volume 67, Tab 150D, page 19,969.

by pimps"¹⁷ speaks more to the *effect* of the law than its principal purpose as gleaned from the legislative history itself. The principal purpose of this law was to protect societal values and to prevent violations of commonly held views of morality.

2. Common Bawdy-House

18. Section 210(1) makes it an indictable offence to keep a "common bawdy-house".¹⁸ A "common bawdy-house" is defined as "a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency."¹⁹ Section 210(2) makes it a summary offence to be an inmate of a common bawdy-house, to be found without lawful excuse in a common bawdy-house, or to permit a place to be let or used for the purposes of a common bawdy-house.²⁰

19. As Justice Himel finds in her reasons, the original purpose of the prohibition on common bawdy-houses was to protect public morality.²¹ Between 1886 and 1953, common bawdy-houses were associated with vagrancy and immorality. For example, they were first prohibited as a matter of public morals and public convenience.²²

20. The Supreme Court of Canada and courts in Alberta and the Yukon have held that the purpose of the prohibition on common bawdy-houses is "obviously to check immorality" and to

¹⁷ Application Decision, page 67, ¶259, Appeal Book, Tab 5, page AB90.

¹⁸ *Criminal Code*, RSC 1985, c C-46, s 210(1).

¹⁹ *Criminal Code*, RSC 1985, c C-46, s 197(1).

²⁰ *Criminal Code*, RSC 1985, c C-46, s 210(2).

²¹ Application Decision, page 58, ¶229, Appeal Book, Tab 5, page AB81.

²² *An Act respecting Offences against Public Morals and Public Convenience*, RSC 1886, c 157, JAR, Volume 65, Tab 139, page 19,061.

prohibit acts that are "dangerous to the morals of the community".²³ In *R v Rockert*, Justice Estey held that "the mischief to which these offences were directed was not the betting, gaming and prostitution *per se*, but rather the harm to the interests of the community in which such activities were carried on in a notorious and habitual manner."²⁴ As of 1985, this view of morality remained the same. As set out in the Fraser Committee Report, 62 percent of Canadians thought that prostitution was immoral, 84 percent found it to be unacceptable, and 92 percent thought it should be illegal.²⁵

21. Justice Himel acknowledged morality as being "one of the original objectives" of the bawdy-house provisions, but as discussed below, erroneously found that "the subjective moral component of the objective" was invalid.²⁶

3. Communicating for the Purpose of Prostitution

22. Section 213(1)(c) prohibits, as an indictable offence, stopping or attempting to stop any person or communicating or attempting to communicate with any person in a public place or in any place open to public view for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute.²⁷

²³ *R v Rockert*, [1978] 2 SCR 704, Joint Book of Authorities ("JBA"), Volume 5, Tab 102; *R v Jones* (1921), 62 DLR 413 at 414, JBA, Volume 4, Tab 67; and *R v Mercier* (1908), 13 CCC 475 at 485, JBA, Volume 4, Tab 83.

²⁴ *R v Rockert*, *ibid* at 712.

²⁵ Fraser Committee Report, Volume 2, JAR, Volume 71, Tab 154B, page 20,921.

²⁶ Application Decision, pages 60-61, ¶239, 242, Appeal Book, Tab 5, pages AB83-84.

²⁷ *Criminal Code*, RSC 1985, c C-46, s 213(1)(c).

23. Justice Himel held (and in light of the Supreme Court of Canada's findings in the *Prostitution Reference*, she could not have found otherwise) that the purpose of this provision is to control "the social nuisance associated with street prostitution."²⁸

24. The "social nuisance" of street prostitution is broader than the impact it has on traffic or safety—it includes public morality. In 1985, the then-Minister of Justice described the legislation's objective:

The purpose of this bill is to help the citizens of this country who live in certain of our major urban areas and the police forces of the country to regain the streets because they have lost control of the streets and neighbourhoods in certain urban areas of this country.

...

The problems that arise when soliciting do not arise only from the presence of prostitutes and customers in public locations but from the conduct in which they engage while they are there. *Our proposals are intended to remove the opportunity for them to carry out their business in public and to prevent such conduct from occurring in public.*

...

The residents of neighbourhoods into which street soliciting has moved complain that their property values are lowered, they are harassed by prostitutes or customers, there is noise and confusion and *their children are exposed to the practice of buying and selling of sex as part of their daily routine.* These are the incidents of nuisance from which we must protect the public and that is why we are asking the House to deal with this Bill.²⁹ [emphasis added]

25. That nuisance is a *social* nuisance: exposing children to the purchase of sex, for example. It is not merely physical nuisance, like loitering. In the same legislative debates,

²⁸ Application Decision, page 73, ¶278, Appeal Book, Tab 5, page AB96.

²⁹ *House of Commons Debates* (5 November 1984 to 25 July 1986), JAR, Volume 72, Tab 155A, page 21,280, 21,282.

another Cabinet minister described street soliciting as a "blight" that "has invaded *residential neighbourhoods, which is helping to destroy juveniles* in particular" [emphasis added].³⁰

C. Canada as a Moral and Religious Society Today

26. Religion continues to be an important aspect of modern Canadian society: 92 percent of Canadians have either had religious groups perform at least one significant rite, such as a wedding, baptism or funeral, in the past, or expect to turn to a religious group for such a rite in the future. As of 1998, more than 80 percent of Canadians asserted a belief in a god.³¹ Religion has also been shown to influence the political decisions of Canadians: research has consistently shown voting preferences to be invariably associated with religious affiliation, which is as strong, or at least as strong, as social class or ethnicity.³²

27. Though Canadians' shared morality is no longer informed by a single set of religious values, its disapproval of prostitution remains intact through the shared beliefs of all of the major religions. All four of Canada's major religions consider prostitution to be immoral. Judaism and Christianity teach that expressions of human sexuality should reflect a concern for faithfulness in relationships.³³ As such, Christians see prostitution as dishonouring both participants and God.

³⁰ *House of Commons Debates* (5 November 1984 to 25 July 1986), Joint Application Record, Volume 72, Tab 155A, page 21,299.

³¹ Reginald W. Bibby, W.E. Hewitt & Wade Clark Roof, "Religion and Identity: the Canadian, American and Brazilian Cases" (1998) 39 *Int Journal of Comparative Sociology* 237 at 240-241, *Interveners' Book of Authorities*, Tab 10.

³² Stewart Crysdale & Les Wheatcroft, eds, *Religion in Canadian Society* (Toronto: Macmillan, 1976) at 434, *Interveners' Book of Authorities*, Tab 11.

³³ B.J. Oropeza, "What is Sex? Christians and Erotic Boundaries" in C.K. Robertson, ed, *Religion & Sexuality: Passionate Debates* (New York: Peter Lang Publishing, 2006) at 30-35, *Interveners' Book of Authorities*, Tab 12; John M. Holland, ed, *Religion & Sexuality: Judaic-Christian Viewpoints in the USA* (San Francisco: The Association of Sexologists, 1981) at 24, 35-37, *Interveners' Book of Authorities*, Tab 13; Simcha Fishbane, *Deviancy in Early Rabbinic Literature: A Collection of Socio-Anthropologic Essays* (Boston: Brill, 2007) at 85-91, *Interveners' Book of Authorities*, Tab 14

Both Hinduism and Islam recognize the need to protect marriage and the family; prostitution and other extramarital sexual behaviours are condemned as immoral and illicit.³⁴

28. This fact cannot be underemphasized: prostitution is disapproved of by every major religion. The position advanced by the Interveners is not a fleeting view of a prudish minority or legal moralism.

29. Public prostitution has been consistently viewed as a detrimental and, at times, intolerable form of corruption, both by community members and lawmakers. The Fraser Committee Report found that the exchange of sex for money was considered morally wrong and unacceptable by 62 percent of Canadians.³⁵ In general, people view the sale of sex as immoral, dehumanizing and inherently wrong.³⁶ Despite numerous studies, commissions and public discussions on the subject, the fact that the communication laws remain intact is a reflection of the important role of the criminal law in protecting Canadians' shared morality.³⁷

D. The Impugned Laws Protect Human Dignity

30. The shared values of Canadian society as described above have been and continue to be rooted in the fact that prostitution violates the human dignity of both prostitutes and those who are witnesses to it by encouraging the exploitative treatment of women and by commodifying the human body.

³⁴ Arnold M. Rose, "Hindu Values and Indian Social Problems" (1967) 8 *The Sociological Quarterly* 329 at 332, Interveners' Book of Authorities, Tab 15; Bruce Dunne, "Power and Sexuality in the Middle East" (1998) 206 *Middle East Report* 8 at 9, Interveners' Book of Authorities, Tab 16.

³⁵ Fraser Committee Report, Volume 1, JAR, Volume 70, page 20,836; Fraser Committee Report, Volume 2, JAR, Volume 71, pages 20,915, 21,031.

³⁶ Cross Examination of Frances M. Shaver, held July 7, 2008, Exhibit "1", JAR, Volume 25, page 7,331

³⁷ Maticka-Tyndale Affidavit, Exhibit "B", JAR, Volume 12, page 3,137; Cross Examination of John Lowman, held May 25-26, 2009, Exhibit "10", JAR, Volume 23, page 6,717; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 83 (11 May 1982), JAR, Volume 68, pages 20,104, 20,120.

31. The evidence shows that the existence of prostitution encourages gender inequalities and the mistreatment of women. Women who live in areas frequented by prostitutes commonly report feeling violated. Residents, including children and the elderly, report instances of unwanted propositions for sex and sexual harassment by clients frequenting their neighbourhoods. Similarly, women also endure verbal and psychological abuse from those involved in the sex trade.³⁸ Such behavior works to offend the inherent human dignity of everyone involved, resulting in damage to their self-esteem and fear for their psychological and physical well-being. Where such acts take place in public, society in turn is harmed by effectively forcing citizens to witness it.

32. The evidence also shows that prostitution destigmatizes and may even encourage the rape, sexual assault or sexual harassment of women who partake in prostitution and, indeed, women in general. The women who fall victim to these associated acts are robbed of their dignity through the objectification of, or loss of control over, their own bodies.³⁹ Sixty-eight percent of prostitutes across nine countries showed signs of Post Traumatic Stress Disorder.⁴⁰

33. Prostitution offends the dignity of all people in society by creating a culture of sexual commodification wherein individuals are objectified as mere bodies that may be bought, sold, or

³⁸ Cross-Examination of Ronald Weitzer, held March 6, 2009 ("Weitzer Cross-Examination"), page 78, q. 264, JAR, Volume 31, page 9,049; Affidavit of Cheryl Parrott, sworn March 26, 2008, page 16, ¶37-38, JAR, Volume 39, page 11,200; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 83 (11 May 1982), JAR, Volume 68, pages 20,086-20,087; Fraser Committee Report, Volume 2, JAR, Volume 71, page 20,867; House of Commons, *Minutes of Proceedings and Evidence of the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, Issue No. 19 (31 March 2005), JAR, Volume 84, page 25,615.

³⁹ Affidavit of JoAnn McCartney, sworn March 17 2008, page 6, paras. 16, 20, JAR, Volume 35, page 10,058-10,059; Affidavit of Richard Poulin, sworn April 4, 2008 ("Poulin Affidavit"), page 20, para. 53, JAR, Volume 40, page 11,398; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 83 (11 May 1982), JAR, Volume 68, pages 20,086-20,087; House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49*, Issue No. 4 (24 October 1985), JAR, Volume 72, pages 21,509-21,512; Weitzer Cross-Examination, Exhibit "6", JAR, Volume 32, page 9,280.

⁴⁰ Affidavit of Dr. Melissa Farley, sworn May 1, 2008, page 18, paras. 32-34, JAR, Volume 49, pages 14,238.

traded. As a result, the basic principles of human dignity are eroded, including autonomy, self-worth and equality.⁴¹

E. The Application Judge's Findings on Legislative Objective

34. Justice Himel rejected the argument that the impugned laws have, as their purpose, the protection of public morality. In respect of the living on the avails and communication provisions, Justice Himel ignored the significant legislative history of these provisions, which demonstrates that morality is the underlying purpose of these provisions. In respect of the bawdy-house provision, she incorrectly rejected morality as a legitimate legislative purpose.⁴²

35. Nonetheless, Justice Himel correctly found that morality is a constitutionally-permissible objective of the criminal law:

It is clear that Parliament is entitled to legislate in order to protect societal values where there is a reasonable apprehension that harm will result if the legislature fails to act. It is also the case that Parliament may pass criminal laws which are based on a notion of right and wrong.

...

These decisions recognize that a law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values. While the avoidance of harm is not a principle of fundamental justice, the Court recognized that there is a state

⁴¹ Affidavit of Libby Davies, sworn April 3, 2007 ("Davies Affidavit"), Exhibit "F", JAR, Volume 9, page 2,437; Affidavit of Michelle Holm, sworn April 4, 2008, page 8, para. 14, JAR, Volume 35, page 10,244; Poulin Affidavit, page 55, para. 136, JAR, Volume 40, page 11,433; Poulin Affidavit, Exhibit "C", JAR, Volume 42, page 12,294; Affidavit of Kathleen Quinn, sworn March, 2008 ("Quinn Affidavit"), page 12, para. 30, JAR, Volume 38, page 10,936; Affidavit of Renna Weinberg, sworn March 20, 2008, pages 5-6, para. 9, JAR, Volume 37, pages 10,870-10,871.

⁴² Application Decision, page 61, ¶242, Appeal Book, Tab 5, page AB84.

interest in the avoidance of harm to those subject to its laws which may justify parliamentary action.⁴³

PART III: LAW AND ARGUMENT

36. The Interveners accept that the issues in dispute in these appeals are as set out by the Attorney General of Canada in his factum at paragraph 54. The Interveners make specific arguments on the issue of whether the application judge erred in declaring that the impugned laws violate section 7 of the *Charter*.

A. **Causal Connection: Justice Himel erred in finding that the impugned laws infringed the respondents' section 7 rights.**

37. In order to evaluate whether the impugned laws are arbitrary, overbroad or grossly disproportionate with their purpose, it is first necessary to identify the actual infringement. There is no dispute that the impugned laws infringe prostitutes' liberty right. But that is not where the lines are drawn in this case: the evidence all turned on the risk of harm to the prostitutes' security of the person the impugned laws are alleged to have aggravated.

38. The most important and controlling error of Justice Himel's section 7 analysis is that she ignored the intervening event that breaks the chain of causation between the impugned laws and any alleged harm. As stated by the Attorney General of Ontario at paragraphs 47 to 49 of his factum, that intervening act is *choice*. The respondents frame this choice at paragraph 128 of their factum as an "unacceptable dilemma" between breaking the law or taking no protective steps at all. But it is plainly apparent that those are not the only two choices available to prostitutes.

⁴³ Application Decision, page 55, ¶221-2, 225, Appeal Book, Tab 5, page AB78.

39. Prostitutes have, in fact, four choices: *first*, they do not have to be prostitutes at all;⁴⁴ *second*, they can practice prostitution in a manner that is much safer (*i.e.*, working indoors with regular customers and rarely advertising);⁴⁵ *third*, they can practice prostitution in a manner that involves risky activities; and *fourth*, they can break the law.⁴⁶

40. The first of the four choices avoids the alleged harm altogether.⁴⁷ The second of the four choices is a safe alternative. Only the third and fourth choices engage section 7, but there was no evidence whatsoever that the impugned laws *force* prostitutes to make either choice.

41. At its absolute highest, the *only* effect of the impugned laws (beyond imprisonment for the communications and bawdy-house offences) is that prostitutes must choose between four courses of action, one of which is entirely risk-free (not being a prostitute), and another of which has been found to be safer (working indoors with regular customers and rarely advertising). It is only where the prostitute *chooses* the riskier route that she is exposed to the type of harm alleged in this case. It is that choice made by prostitutes that is the intervening event that breaks the causation chain, and makes the alleged harm suffered by prostitutes insufficiently connected to the impugned laws.

⁴⁴ As the Supreme Court held in the *Prostitution Reference*, section 7 does not include a right to exercise any chosen profession, including prostitution. See *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123 at 1179 ¶72, per Lamer J, JBA, Volume 6, Tab 125.

⁴⁵ Maticka-Tyndale Affidavit, JAR, Volume 12, Tab 45, page 3091. Justice Himel made a finding that "[w]orking independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada: Application Decision, page 79, ¶300, Appeal Book, Tab 5, page AB102.

⁴⁶ If the respondents were arguing, for example, that they really had no choice but to engage in the profession, it was their onus to prove that with evidence. See *Victoria (City) v Adams* (2009), 313 DLR (4th) 29 (BCCA) ¶73, Interveners' Book of Authorities, Tab 17.

⁴⁷ The Attorney General of Canada has filed a number of affidavits from former prostitutes that made the decision to leave prostitution. See generally Exhibit Book, Volume 1.

B. Moral Objective: The legislative objective of the impugned provisions is morality, which is consistent with *Charter* values.

42. Justice Himel correctly held in this case that "a law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values."⁴⁸ As noted by the Supreme Court less than five months ago: "Criminal law may target conduct that Parliament reasonably apprehends as a threat to our central moral precepts.... Moral disapprobation is itself sufficient to ground criminal law when it addresses issues that are integral to society."⁴⁹

43. The disapprobation of prostitution and its harms are not simply views held by religious or socially conservative Canadians—these are core values, reflected in the criminal prohibitions on prostitution-related activities that discourage prostitution. This is not "legal moralism" as asserted by the respondents; it is Canadians' preference.

44. Though Justice Himel was correct to find that morality can be a proper legislative objective, she erred in failing to find morality to be one of the objectives underlying each of the impugned laws.

45. As discussed in paragraphs 9 to 25 above, the purpose of the impugned laws is to enforce social morality and prevent immorality, which are fundamental conceptions integral to promoting and protecting the values of Canadian society. The purpose of the impugned laws is not to legislate on the basis of a "particular", fleeting, or prudish conception of morality, but rather on the basis of *fundamental* conceptions, which are integral to promoting and protecting our values in Canadian society. The moral disapproval of prostitution-related conduct reflects an

⁴⁸ Application Decision, page 56, ¶225, Appeal Book, Tab 5, page AB79.

⁴⁹ *Reference re Assisted Human Reproduction Act*, *supra* note 8, ¶50, Interveners' Book of Authorities, Tab 5.

understanding of the social and physical harms caused by these actions. The protection of individuals and Canadian society is a fundamental conception underlying the impugned laws.⁵⁰

46. The moral concerns underlying the impugned laws are consistent with *Charter* values. The impugned laws prohibit conduct that causes significant harm or risk of harm to Canadian society, including physical violence, drug trafficking, organized crime and human trafficking. These harms undermine Canadians' fundamental morals and values, as they corrupt society, encourage a cycle of violence and lead to sexual exploitation, and denigrate neighbourhoods where prostitution is found. Moreover, legitimizing prostitution by allowing others to legally profit from it makes it more difficult to destigmatize trafficking and other exploitive activities.

47. The protection of human dignity⁵¹ and suppressing exploitation⁵² are values protected by the *Charter*. The moral purpose of the impugned laws is consistent with these values.

C. Grossly Disproportionate: Justice Himel erred in finding that the impugned laws are grossly disproportionate.

48. A law is only grossly disproportionate if the infringement on a person's liberty or security of the person so outweighs its legislative objective that the law is "abhorrent" to Canadians.⁵³

49. The infringement caused by the impugned laws on respondents' right is limited to potential imprisonment. As the Supreme Court held in *R v Malmo-Levine*, the "the mere

⁵⁰ *R v Jones* (1921), 62 DLR 413 at 414, JBA, Volume 4, Tab 67; *R v Mercier* (1908), 13 CCC 475 at 485, JBA, Volume 4, Tab 83.

⁵¹ *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at 353-54 ¶77-79, JBA, Volume 1, Tab 3.

⁵² *Prostitution Reference*, *supra* note 44 at 1193-94 ¶94-95, JBA, Volume 6, Tab 125; *R v Keegstra*, [1990] 3 SCR 697 at 746 ¶65, JBA, Volume 4, Tab 69; *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res 34/180, UN GAOR, 34th Sess, Supp. No 46, UN Doc A/34/46 (1979) 193.

⁵³ *R v Malmo-Levine*, [2003] 3 SCR 571 ¶159, JBA, Volume 5, Tab 87.

availability of imprisonment...does not violate the s.7 principle against gross disproportionality."⁵⁴

50. Though Canadians might find the violence against prostitutes to be abhorrent, it is not the impugned laws that cause this violence. It is violent individuals and prostitutes' own choice to either work in unsafe conditions or to break the law. In the absence of an infringement to respondents' security of the person, the infringement need not be justified.

D. Arbitrary: Justice Himel erred in finding that living on the avails provision and the impugned laws taken together are arbitrary.

51. To be arbitrary, a law must be fundamentally inconsistent with its purpose.⁵⁵ Justice Himel erred in focusing her analysis on the *side-effects* of these provisions, which she found criminalizes service-providers (such as security guards, personal drivers and assistants who answer telephone calls). That was incorrect—the law must be fundamentally inconsistent with its purpose for it to be arbitrary.

52. The prohibition on earning a living from someone else's sex-work (either directly by living on the avails or indirectly by operating a bawdy-house) is, in fact, *consistent* with the objective of enforcing social morality. To the extent the law captures individuals providing services to prostitutes, there is nothing inconsistent about criminalizing their conduct in an effort to advance the objective of protecting social morality. Prostitution is wrong and should be discouraged—individuals should not be allowed to profit from a prostitutes' sex-work, thereby legitimizing the prostitution "business".

⁵⁴ *Ibid* ¶169, JBA, Volume 5, Tab 87.

⁵⁵ *Chaoulli v Quebec (AG)*, [2005] 1 SCR 791 ¶134, per Binnie, Lebel JJ, ¶233, per Major J and McLachlin CJC, JBA, Volume 1, Tab 10; *Abarquez v Ontario* (2009), 95 OR (3d) 414 (CA) ¶47, leave to appeal ref'd [2009] SCCA No 297, JBA, Volume 1, Tab 2.

E. Overbroad: Justice Himel erred in finding that the bawdy-house and living on the avails provisions are overbroad.

53. The doctrine of overbreadth requires that a law be no broader than necessary to accomplish its purpose.⁵⁶

54. In respect of the bawdy-house provision, Justice Himel concluded that the law captures independent operators, who do not contribute to neighbourhood disorder or threats to public safety. The bawdy-house provision is not overbroad to the extent it is intended to discourage prostitution as immoral—regardless of whether sex-workers operate from brothels or their homes, the act itself is morally wrong.

55. In respect of the living on the avails provision, Justice Himel concluded that the law appears to capture non-exploitive service providers, to the extent these individuals render services to sex-workers. Again, the purpose of the living on the avails provision is to protect social morality. The law is necessarily broad so as to capture any individuals involved in the prostitution "business" as a reflection of society's moral disdain for prostitution.

F. Conclusion

56. The effect of Justice Himel's decision is to grant a significant preference to the rights of individuals who choose to engage in prostitution with all of its inherent dangers, contrary to or at great expense to Canadian society. If Justice Himel's decision is upheld, all members of society will likely be exposed to the effects and abuses of regularly-practiced prostitution and its indecencies. Unfortunately, those members of society who live in poorer communities, and who are often ill-equipped to relocate, will likely be most impacted by the overturning of these laws;


⁵⁶ *R v Heywood*, [1994] 3 SCR 761 at 792-794, JBA, Volume 4, Tab 63.

they will be least likely to avoid the exposure of their children to prostitution. These, and other, complex consequences of the behaviours associated with prostitution should be left to Parliament, which is best positioned to investigate and represent the interests of all parties. As discussed above, Parliament has examined the issue of prostitution on multiple occasions and has legislated in accordance with human dignity and suppression of exploitation, values that support the moral purpose of the impugned legislation.

PART IV: ORDER REQUESTED

57. The Interveners respectfully request an order granting these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of May 2011.



BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario
M5X 1A4

Robert W. Staley (27115J)
Derek J. Bell (43420J)
Ranjan K. Agarwal (49488H)

Telephone: (416) 863-1200
Facsimile: (416) 863-1218

Lawyers for the interveners,
Christian Legal Fellowship, REAL Women
of Canada and the Catholic Civil Rights
League

SCHEDULE "A"

Jurisprudence

Abarquez v Ontario, (2009), 95 OR (3d) 414 (CA), leave to appeal ref'd [2009] SCCA No 297

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

Chaoulli v Quebec (AG), [2005] 1 SCR 791

R v Heywood, [1994] 3 SCR 761

R v Jones (1921), 62 DLR 413

R v Keegstra, [1990] 3 SCR 697

R v Malmö-Levine, [2003] 3 SCR 571

R v Mercier (1908), 13 CCC 475

R v Rockert, [1978] 2 SCR 704

R v Schmidt, [1948] OR 198 (CA) rev'd on other grounds [1948] SCR 333

Reference as to the Validity of Section 5(a) of the Dairy Industry Act, [1949] SCR 1

Reference re Assisted Human Reproduction Act, 2010 SCC 61

Reference re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 SCR 1123

Victoria (City) v Adams (2009), 313 DLR (4th) 29 (BCCA)

Secondary Authorities

Reginald W. Bibby, W.E. Hewitt & Wade Clark Roof, "Religion and Identity: the Canadian, American and Brazilian Cases" (1998) 39 Int. Journal of Comparative Sociology 237

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Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965)

Bruce Dunne, "Power and Sexuality in the Middle East" (1998) 206 Middle East Report 8

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Louis Henkin, "Morals and the Constitution: The Sin of Obscenity" (1963) 63 Colum. L. Rev. 391

John M. Holland, ed., *Religion & Sexuality: Judaic-Christian Viewpoints in the USA* (San Francisco: The Association of Sexologists, 1981)

B.J. Oropeza, "What is Sex? Christians and Erotic Boundaries" in C.K. Robertson, ed., *Religion & Sexuality: Passionate Debates* (New York: Peter Lang Publishing, 2006)

Arnold M. Rose, "Hindu Values and Indian Social Problems" (1967) 8 The Sociological Quarterly 329

International Statutes / Treaties

International Agreement for the Suppression of the "White Slave Traffic", 18 May 1904, 1 LNTS 84

International Convention for the Suppression of the White Slave Traffic, 4 May 1910 as amended by *Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic*, 4 May 1949, 98 UNTS 102

White-Slave Traffic Act, ch 395, 36 Stat 825 (1910)

SCHEDULE "B"

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.

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.

Criminal Code, RSC 1986, c C.45

197. (1) In this Part,

...

“common bawdy-house” means a place that is

(a) kept or occupied, or

(b) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency; ...

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.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

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.

(2) Despite paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of two years.

(2.1) Notwithstanding paragraph (1)(j) and subsection (2), every person who lives wholly or in part on the avails of prostitution of another person under the age of eighteen years, and who

(a) for the purposes of profit, aids, abets, counsels or compels the person under that age to engage in or carry on prostitution with any person or generally, and

(b) uses, threatens to use or attempts to use violence, intimidation or coercion in relation to the person under that age,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years but not less than five years.

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).

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 offence punishable on summary conviction.

(2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

Convention on the Elimination of All Forms of Discrimination Against Women, GA Res 34/180, UN GAOR, 34th Sess, Supp No. 46, UN Doc A/34/46 (1979) 193.

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

TERRI JEAN BEDFORD and others
Applicants

-and-
ATTORNEY GENERAL OF CANADA
Respondent

Court File No. C52799 and C52814

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**FACTUM OF THE INTERVENERS
CHRISTIAN LEGAL FELLOWSHIP, REAL
WOMEN OF CANADA AND THE
CATHOLIC CIVIL RIGHTS LEAGUE**

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario
M5X 1A4

Robert W. Staley (27115J)
Derek J. Bell (43420J)
Ranjan K. Agarwal (49488H)

Telephone: (416) 863-1200
Facsimile: (416) 863-1716

Lawyers for the interveners,
Christian Legal Fellowship, REAL Women of
Canada and the Catholic Civil Rights League