Court file no. 34788

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF ONTARIO

Appellants
(Respondents on Cross-Appeal)

- and -

TERRI JEAN BEDFORD
AMY LEBOVITCH
VALERIE SCOTT

Respondents
(Appellants on Cross-Appeal)

- and -

ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

FACTUM OF THE APPELLANT
ATTORNEY GENERAL OF ONTARIO

J. Klukach/C. Bartlett-Hughes/M. Stephens
Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario
M5G 2K1
Tel: (416) 326-4600
Fax: (416) 326-4656
jamie.klukach@ontario.ca
Counsel for the Appellant AG Ontario

Robert Houston, Q.C.
Burke-Robertson
#200-441 MacLaren Street
Ottawa, Ontario
K2P 2H3
Tel: (613) 236-9665
Fax: (613) 235-4430
rhouston@burkerobertson.com
Ottawa Agent for the Appellant AG Ontario

M. Morris/G. Sinclair/N. Dennison
Attorney General of Canada
#3400-130 King Street West
Toronto ON M5X 1K6
Tel: (416) 973-9704
Fax: (416) 952-4518
mochael.morris@justice.gc.ca
Counsel for the Appellant AG Canada

Christopher M. Rupar
Attorney General of Canada
#1212-234 Wellington Street
Ottawa, ON K1A 0H8
Tel: (613) 941-2351
Fax: (613) 954-1920
christopher.rupar@justice.gc.ca
Ottawa Agent for the Appellant AG Canada

Alan N. Young
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, ON M3J 1P3
Tel: (416) 736-5595
Fax: (416) 736-5736
ayoung@osgoode.yorku.ca
Counsel for Terri Jean Bedford

Fiona Campbell
Sack Goldblatt Mitchell LLP
#500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: (613) 235-5327
Fax: (613) 235-3041
fcampbell@sgmlaw.com
Ottawa Agent for Terri Jean Bedford

Yaron Marzel/Stacey Nichols
Marzel Law
#200-265 Rimrock Road
Toronto, ON M3J 3C6
Tel: (416) 485-5800 x233
Fax: (416) 485-1610
marzel@lernermarzel.com
Counsel for Amy Lebovitch

Fiona Campbell
Sack Goldblatt Mitchell LLP
#500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: (613) 235-5327
Fax: (613) 235-3041
fcampbell@sgmlaw.com
Ottawa Agent for Amy Lebovitch

Marlys A. Edward/Daniel Sheppard
Sack Goldblatt Mitchell LLP
#1100-20 Dundas Street West
Toronto, ON M5G 2G8
Tel: (416) 979-4380
Fax: (416) 979-4430
medwardh@sgmlaw.com
Counsel for Valerie Scott

Fiona Campbell
Sack Goldblatt Mitchell LLP
#500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: (613) 235-5327
Fax: (613) 235-3041
fcampbell@sgmlaw.com
Ottawa Agent for Valerie Scott

Kenneth Madsen
Criminal Justice Branch, Crown Law Division
3rd Floor, 940 Blanshard St.
Victoria, British Columbia V8W 3E6
Tel: (250) 387-5153
Fax: (250) 387-4262
Counsel for Intervener AG British Columbia

Robert Houston, Q.C.
Burke-Robertson
#200-441 MacLaren Street
Ottawa, ON K2P 2H3
Tel: (613) 236-9665
Fax: (613) 235-4430
Ottawa Agent for Intervener AG British Columbia

Silvain Leboeuf
Procureur général du Québec
1200, route de l'Église, 2e étage
Québec (Québec) G1V 4M1
Tel: (418) 643-1477 poste 20733
Fax: (418) 644-7030
Counsel for Intervener AG Quebec

Pierre Landry
Noël & Associés
111, rue Champlain
Gatineau (Québec) J8X 3R1
Tel: (819) 771-7393
Fax: (819) 771-5397
Agent for Intervener AG Quebec

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PART I: STATEMENT OF FACTS

A. Overview

1. Laws that prohibit particular conduct will, by their very nature, restrict the freedom of some people to do things that they would like to do. For such persons, a *Charter* remedy lies only when the law interferes substantially and unjustifiably with a constitutionally protected individual interest. Otherwise, redress for grievances arising from the law's impact on individuals lies through the workings of democratic process.

2. The claim for relief in this case rests on novel use of s. 7 of the *Charter* in circumstances where legislation does not directly or substantially impact on protected individual interests. Nevertheless, the Courts below found that a causally remote and indirect effect of the impugned laws on the claimants' security of the person was sufficient to engage s. 7. That conclusion bloats the scope of the s. 7 right, extending it far beyond previous recognition. And it swings open the gate for judicial review of legislative policy-making. The higher engagement threshold consistently endorsed by this Court narrows the risk of judicial micromanagement of legislative agendas.

3. If this unprecedented expansion of the engagement threshold for s. 7 is embraced, then it must be offset by greater deference in the principles of fundamental justice analysis to safeguard against the invalidation of laws that contribute only minimally to rights deprivations without due regard for the importance of their objectives. This approach must take full account of all of a law's legitimate purposes. It must account for the extent to which the law actually contributes to the deprivation. And, it must incorporate appropriate deference to legislative decisions - particularly where they pertain to areas of complex social policy. The Court of Appeal failed to apply this approach.

B. Facts

4. The appellant, the Attorney General of Ontario, adopts and relies upon the facts as summarized in the factum of the appellant, AG Canada, and also relies on the additional facts referred to herein in Part III and set out in Appendices A and B.

PART II: POINTS IN ISSUE

5. On December 17, 2012, the Chief Justice stated eight constitutional questions concerning whether ss. 210, 212(1)(*j*) and 213(1)(*c*) of the *Criminal Code* infringe s. 7 of the *Canadian Charter of Rights and Freedoms,* whether s. 213(1)(*c*) infringes s. 2(b) of the *Charter* and, if so, whether any infringement would be justified under s. 1 of the *Charter*.[1]

6. It is the position of the Appellant, AG Ontario, that sections 210, 212(1)(*j*) and 213(1)(*c*) of the *Criminal Code* are constitutional. AG Ontario will address the constitutionality of s.213(1)(*c*) in the respondent's factum on cross appeal.

[1] *Order of Chief Justice Stating Constitutional Question(s) and for Directions* (dated Dec. 18, 2012), Appellants' Record, Vol. III, Tab 34 at pp. 80-85.

PART III: BRIEF OF ARGUMENT

A. Section 7 security of the person is not engaged by sections 210 and 212(1)(j)

7. The claimants would like to earn their living through prostitution but they do not pursue this livelihood because of criminal laws which prohibit them from establishing brothels and hiring security personnel. The claimants acknowledge that these laws do not directly impact on their security interests. Non-governmental actors (*i.e.,* clients and pimps) are the direct cause of the risk of harm inherent in the commercial practice of prostitution. However, they claim that the effect of the impugned laws is to deny access to safety-enhancing measures and that this constitutes sufficient interference with their security interests to attract *Charter* scrutiny.

8. The question is whether s. 7 security interests are engaged in the circumstances of this case, where the law has a limiting effect on the vocational safety options available to persons who choose a dangerous line of work. The Court of Appeal answered yes. That conclusion marks a dramatic lowering of the high standard of "sufficient causal connection" which has developed in the jurisprudence of this Court for determining when s. 7 of the *Charter* is engaged by state action. The Court of Appeal has dropped the bar so low as to permit virtually *any* factual contribution by the state to suffice.

9. Causal responsibility sufficient to trigger s. 7 is not present in the circumstances of this case because the state's connection to the security risks faced by prostitutes is too remote. That causal remoteness is the product of two key factors. First, the risk to personal security is posed by the independent actions of third parties; and second, that risk presents only in consequence of an individual's choice to engage in the risky activity. As well as lacking in precedential support, the low engagement threshold set by the Court of Appeal lacks principled grounding for the attribution of causal responsibility.

10. There are compelling reasons for maintaining a high threshold for s. 7 engagement. It is consistent with the guiding principle of deference for Parliament's decisions in areas of complex social policy. An engagement threshold that permits claims based on strained theories of remote factual causation will drastically expand the scope of judicial review. Considering whether the law can be justified requires judges to wade into social policy and qualitatively appraise the efficacy of Parliamentary responses.

(1) The Court of Appeal's finding that the provisions engage section 7 security interests is unsupported by precedent

11. The Court of Appeal broke new ground to find that s. 7 was engaged in this case. So far, the right not to be unjustifiably deprived of personal security has taken shape as a right to be free from serious and substantial state interference - which occurs when the state bears a high degree of causal responsibility for the harm. This standard holds regardless of whether the interference with personal security interests is caused by legislation or by the conduct of state agents. The causal connection between the impugned provisions and the occupational risks faced by prostitutes lacks that strength.

12. In cases where this Court found that legislation deprived individuals of their right to security of the person, the legislation played a strong causal role in bringing about the harm. In *Rodriguez*, "a criminal code provision directly deprived Mrs. Rodriguez of the ability to terminate her life"; and "in the same vein, the Morgentaler case dealt with direct state interference with a woman's bodily integrity".[2] In *Chaoulli*, it was established that "many Quebec residents face delays in treatment that adversely affect their security of the person and that they would not sustain but for the prohibition on medical insurance."[3] Recently, in *PHS Community Services*, the Court characterized the criminal proscriptions which prohibited addicts from possessing drugs at a supervised injection site as "directly" engaging their rights to life and to security of the person.[4]

13. The requirement of a strong causal connection has translated to cases involving non-legislative state action that contributes indirectly to harms caused directly by non-state actors. In *Blencoe*, the test was articulated as one of "sufficient causal connection" between state action and the deprivation of s. 7 security. The Court found it unnecessary to decide whether delay in human rights proceedings "seriously exacerbated" the prejudice caused by the actions of non-governmental actors because the interests at stake were not protected by s. 7. Still, the Court emphasized that "a

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[2] *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 at paras. 69-70 [*Blencoe*].

[3] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para. 111 [*Chaoulli*].

[4] *Canada (Attorney General) v. PHS Community Services Society,* [2011] 3 S.C.R. 134 at para. 92 [*PHS*]. It was the Minister's refusal to exercise his discretion to grant an exemption to the safe injection site that was ultimately determined to be the direct interference with personal security that breached s. 7.

significant connection between the harm and the impugned state action" would be required to invoke the *Charter*.[5]

14. *Blencoe* was followed by *Burns* and *Suresh*, which underscored the strength of the causal relationship required to engage s. 7 in relation to foreseeable consequences brought about by non-governmental actors. In *Burns*, Canada's extradition of the claimants to face possible death penalty was sufficient to trigger s. 7 because it "would be a *necessary link* in the chain of causation to that potential result."[6] Similarly, in *Suresh*, deportation from Canada to a risk of torture was found to be a *necessary precondition* to the deprivation of s. 7 rights even though it "would be effected by someone else's hand." The Court stated: "Without Canada's action, there would be no risk of torture."[7]

15. *Khadr* was different because the actions of state agents were *not* a necessary precondition to the deprivation caused directly by U.S. authorities. Mr. Khadr's detention would have continued without Canada's participation. Rather, the impugned state conduct was Canada's active assistance in building the case against Mr. Khadr on the charges underlying his detention. This "active participation" in the activities of U.S. agents was contrary to Canada's international human rights obligations. Khadr was detained by the United States on war crimes charges. He was interrogated by Canadian officials about events central to those charges. The statements were "extracted" under "oppressive circumstances" and provided "significant evidence" in support of the charges. This Court found that "the causal connection *demanded* by *Suresh* between Canadian conduct and the deprivation of liberty and security of person" was established.[8]

16. *Khadr* did not relax the high standard set in *Burns* and *Suresh* for *Charter* engagement. The active assistance provided by Canada to U.S. authorities with awareness of the illegality of the detention was accessorial in nature. This correlated to a high degree of responsibility for the harmful result.[9]

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[5] *Blencoe*, *supra* at paras. 60 & 70-71.

[6] *United States v. Burns*, [2001] 1 S.C.R. 283 at para. 54.

[7] *Suresh v. Canada*, [2002] 1 S.C.R. 3 at paras. 52-55.

[8] *Canada v. Khadr*, [2010] 1 S.C.R. 44 at paras. 14-21 [emphasis added].

[9] *R. v. Dooley*, [2009] O.J. No. 5483 (C.A.) at paras. 117-123.

17. These principles do not support a finding of sufficient causal connection between the impugned provisions and a deprivation of security of the person in the instant case. These provisions are not the direct cause of the harm. They do not operate as a necessary precondition to the risk of harm faced by prostitutes. Those risks exist regardless; the actors directly posing the risk are not dependent on these criminal provisions as an essential facilitator of their harmful actions. These laws do not effectively "deliver up" prostitutes to those who would inflict harm upon them. Nor is this a situation of the state providing active assistance to the prostitute's antagonist. These criminal proscriptions do not assist or encourage the actions of those who endanger prostitutes so as to fix the government with shared responsibility for their actions. The strong degree of complicity that implicated state action in *Khadr* is not present here.

18. The Court of Appeal distinguished these decisions as pertaining to "the constitutionality of *actions taken by state actors* that indirectly compromised an individual's s. 7 interests" as opposed to *legislative action* having that same effect.[10] This Court has made no such distinction. It is not a principled distinction toward appraising whether state action, be it legislative or through conduct, contributes *sufficiently* to a deprivation of personal security to attract *Charter* scrutiny. The test of "sufficient connection" posits a legal inquiry, not merely a factual one. In either case, the crux of the inquiry is whether the state's role in bringing about the deprivation is sizeable enough to fix it with legal responsibility.[11]

(2) The relevance of choice to determining whether section 7 is engaged

19. The decision to engage in an inherently dangerous activity is independent action by a responsible actor which weakens the connection between state action and the consequential harm.[12] Personal autonomy lies at the heart of the right to security of the person. A unifying feature in cases

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[10] *Judgment of the Court of Appeal [OCA Judgment*], Appellants' Record, Vol. II, Tab 7 at paras. 106-109 [emphasis added]. Notably, the Application judge did not rely on this distinction in finding that s. 7 was engaged by the indirect contribution of the provisions to s. 7 security deprivation. Instead, she purported to apply the test of sufficient causal connection developed in the jurisprudence of this Court. However, she misconstrued *Khadr* as lowering the strict standard developed in earlier cases. *Reasons of Himel J.*, Appellants' Record, Vol. I, Tab 3 at paras. 287-292 [*Reasons of Himel J.*].

[11] *R. v. Nette*, [2001] 3 S.C.R. 488 at paras. 44-48.

[12] *R v. Goldhart,* [1996] 2 S.C.R. 463 at paras. 42-45 (per Sopinka J) illustrates the principle that the independent exercise of choice or free will by an individual operates to distance government action in the legal causation analysis. See also *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 at paras. 29, 31, 38, 39 & 41.

where state action was found to engage s. 7 was the powerlessness of the claimants to avoid or change the circumstances in which their security interests arose. The interference by government subsisted in the *removal* of decision-making power over the individual's physical or psychological integrity:

- In *Rodriguez,*[13] the impugned law directly interfered with the claimant's ability to make choices relating to a physical condition over which she had no control.

- In *Morgentaler,*[14] the legislation denied reasonable and timely access to therapeutic abortion, "forcing" a woman to carry a foetus to term or delaying her ability to abort it. There was no way for a pregnant woman to avoid the law's interference with her physical and psychological integrity.

- In *Chaoulli,*[15] provincial health care legislation prohibited private insurance that would permit citizens to obtain timely treatment for life-threatening health conditions over which they had no control.

- In *PHS Community Services,*[16] state action interfered with the ability of addicts to safely inject, "their need to inject" being "a material part of their illness".

- In *Canadian Foundation,*[17] removal from the protection of the criminal law's assault provisions engaged the security interests of children; membership in the affected group, obviously being something over which the claimants lacked control.

20. The Court of Appeal accepted that the impugned laws interfere with the claimants' security of the person "by *forcing* them to choose between the substantial added risk to personal safety that comes with compliance with those provisions and the risk of incarceration that comes with non-compliance with those same provisions."[18] This fails to account for the choice of the individual to engage in prostitution. The impugned laws may *affect* that choice but they do not force individuals to endanger themselves. Relying on *PHS,* the Court of Appeal found "a parallel between the circumstances of drug addicts who, because of a criminal prohibition, cannot access a venue where they can safely self inject … and prostitutes who, because of criminal prohibitions, cannot work at

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[13] *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519 at para. 128 [*Rodriguez*].

[14] *R v. Morgentaler*, [1988] 1 S.C.R. 30 at paras. 24 & 35 [*Morgentaler*].

[15] *Chaoulli*, *supra* at paras. 111-112.

[16] *PHS*, *supra* para. 27.

[17] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para 3 [*Canadian Foundation*].

[18] *OCA Judgment*, *supra* at para. 98 [emphasis added].

venues using methods that maximize their personal safety".[19] The Court overlooked a critical distinction: Unlike the drug addict, the person who decides to engage in prostitution has the ability to remove herself from the circumstances which ground the s. 7 claim.[20]

21. The claimants, Ms. Bedford and Ms. Scott, have worked as prostitutes in the past. They wish to resume such work - Ms. Bedford as a dominatrix at an indoor location and Ms. Scott by operating an indoor brothel. They would like to hire staff to assist in running these enterprises. Their ability to implement these choices is hindered by the exposure to criminal liability that would ensue. The claimant, Ms. Lebovitch, works as a prostitute. She would like to be able to do so in her home without the risk of criminal jeopardy.[21]

22. Personal choices to engage in particular commercial activities are not protected under s. 7.[22] As acknowledged by the Court of Appeal, a person's choice to engage in prostitution is an economic decision that "is not akin to the kinds of decisions that have been characterized as so fundamentally and inherently personal and private as to fall under the right to liberty."[23] The security deprivation asserted by the claimants arises only in consequence of that choice. The impugned laws may have a chilling effect on the choice of prostitution as a livelihood but this pertains to a personal freedom that is *unprotected*. They do *not* deny individual choice or control over personal security. The claimants' grievance is essentially one of personal hardship to which the protection of the *Charter* does not extend.[24]

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[19] *OCA Judgment*, *supra* at para. 116.

[20] The choice to be a prostitute may, for some, be circumscribed and influenced by unfortunate personal circumstances. Still, the claimants do not urge a view of prostitution as analogous to an illness-like addiction. One side of the highly polarized policy debate on how best to address the problems of prostitution, characterizes prostitution as a culture of victimization that preys on vulnerable individuals who are without meaningful choice. This speaks to the justification of laws that have the effect of discouraging its commercialized expansion.

[21] *Reasons of Himel J.*, *supra* at paras. 26, 31, 33, 37, 43, 55 & 120.

[22] See *Siemens v. Manitoba*, [2003] 1 S.C.R. 6 at paras. 45-46; *Blencoe, supra* at para. 86; *R. v. Banks*, [2007] O.J. No.99 (C.A.) at paras. 77-81.

[23] *OCA Judgment*, *supra* at paras. 92-94 - in the context of rejecting the broader s. 7 liberty claim advanced by some of the interveners.

[24] *R. v. Malmo-Levine,* [2003] 3 S.C.R. 571 at paras. 85-87 [*Malmo-Levine*]; *R. v. Clay*, [2003] 3 S.C.R. 735 at para. 32 [*Clay*]; *Cochrane v. Ontario (Attorney General),* [2008] O.J. No. 4165 (C.A.) at para. 31 [*Cochrane*], leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 105; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at paras. 55-60 & 72 [*Prostitution Reference*].

(3) The absence of criminal law restrictions on other commercial activities does not substantiate a deprivation of the personal security of prostitutes

23. The Court of Appeal rejected the argument that the choice to engage in prostitution weakens the connection between the impugned provisions and the risk of harm associated with its practice, rendering it too remote to engage s. 7 security interests. The Court reasoned that individual choice was irrelevant in this context because:

> [i]t implies that those who choose to engage in the sex trade are, for that reason, not worthy of the same constitutional protection as those who engage in other dangerous but legal enterprises. Parliament has chosen not to criminalize prostitution. In the eyes of the criminal law, prostitution is as legal as any other non-prohibited commercial activity. A claim that a criminal law prohibition increases the risk of physical harm to persons who engage in prostitution must, for the purpose of security of the person analysis, be examined in the same way as any other claim that a criminal law prohibition increases the risk of physical harm to persons engaged in any other lawful commercial activity. [5]2

24. This reasoning misconceives the point - which is premised, not on qualitative appraisal of prostitution as "less worthy" activity but, rather, on *general* causation principles that attribute significant weight to expressions of free will. There is no suggestion that the choice to be a prostitute should be treated any differently than other vocational choices for the purpose of security of the person analysis. It is of no moment that the choice to become a prostitute may be influenced by restrictions imposed by the criminal law while other occupational choices are free of such encumbrances. Redress for perceived social injustice resulting from this kind of inequity is outside s. 7's mandate.[26]

25. Framing the s. 7 claim in terms of the law's indirect interference with an individual's ability to safely practice a chosen vocation is the veiled assertion of a positive right to vocational safety with a correlative state obligation to respect that right evenhandedly.[27] This Court has been very

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[25] *OCA Judgment*, *supra* at paras. 122-123.

[26] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Carswell, 2011) at p. 47-15 [*Constitutional Law of Canada*].

[27] See Elaine Craig, "Sex Work By Law: Bedford's Impact on Municipal Approaches to Regulating the Sex Trade" (2011-2012) 16 Rev. Const. Stud. 2011-2012. The author discusses how the principles identified in this case impose a constitutional requirement for municipal lawmakers to accommodate the safety interests of the sex workers in their communities.

circumspect about expanding the scope of s. 7 to include positive rights; although in *Gosselin*, this possibility was left open.[28]

26. Later in *Dunmore*, the Court determined that in exceptional circumstances, s. 2(d) of the *Charter* could impose a positive obligation on government to protect trade union freedoms by prohibiting their infringement by private actors. The Court recognized that state responsibility in respect of the freedom to associate is generally characterized as "negative" in nature, meaning that the *Charter* does not obligate the state to take affirmative action to facilitate the exercise of fundamental freedoms. An exception was identified in unique circumstances where the state prohibited the activity solely because of its associational nature. The exclusion of agricultural workers from a protective legislative regime was found to substantially contribute to the violation of the protected freedom. The Court stressed, however:

> This does not mean that there is a constitutional right to protective legislation *per se*; it means legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom[29].

27. The Court of Appeal's view of the criminal law as underinclusive of prostitutes was central to its determination that their s. 7 security rights were engaged. That perspective is evident in the "self defence" hypothetical relied on by the Court to illustrate the connection between the impugned laws and the security deprivation. The Court reasoned as follows:

> Suppose Parliament enacted a provision declaring that the self-defence provisions in the *Criminal Code* were not applicable to anyone assaulted while engaged in prostitution. Prostitutes under attack or apprehending an attack from a customer would have a choice. They could defend themselves and face prosecution for assaulting their attacker or submit and risk serious personal injury. No one would suggest that a law that placed prostitutes in that position did not expose them to added risk of physical harm and thereby interfere with their security of the person.[30]

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[28] *Gosselin v. Quebec*, [2002] 4 S.C.R. 429 at paras. 81-82.

[29] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at paras. 13, 16 & 19-23. *Dunmore* was relied on by the claimants in the Court below as supportive of *Charter* engagement based on state contribution to "proximate harms caused by private actors" Appellant's Record, Court of Appeal for Ontario, *Respondent's Factum, supra* at para. 140-141. See also *Baier v. Alberta,* [2007] 2 S.C.R. 673 and *Delisle v. Canada,* [1999] 2 S.C.R. 989 [*Delisle*].

[30] *OCA Judgment*, *supra* at para. 112.

28. The exclusion of prostitutes from protection afforded by the criminal law's provision of a right to self defence might well furnish the kind of unique context discussed in *Dunmore*. The legality of prostitution would have no bearing on the effect of such a law; it would be underinclusive, regardless. But the analogy does not hold in the circumstances of this case. The impugned provisions do not substantially impact on the exercise of a constitutional freedom by excluding prostitutes from protective legislation that benefits other groups.

(4) Implications of lowering the threshold for *Charter* engagement

29. There are good reasons for maintaining the high threshold for s. 7 engagement consistently demanded by this Court. Relaxing this requirement will overextend the scope of s. 7 to include deprivations that vary widely in their relative gravity. This will change, fundamentally, the meaning of the right to be free from *state*-caused interference with important, protected personal interests.

30. Relaxing the requirement of a strong causal connection between state action and the alleged infringement will open up many more cases for judicial review. This will lead to valuable court time being spent on dispensing with predictably unmeritorious s. 7 claims. The Court of Appeal was unconcerned about this inevitable consequence, commenting that

> [a] finding that legislation limits a claimant's security of the person does not determine the constitutionality of the legislation nor affect its operation. That finding only subjects the challenged legislation to a principles of fundamental justice analysis.[31]

This ignores the reality that the justification analysis under s. 7 inescapably requires courts to define and qualitatively appraise the policy objectives and decisions of legislative bodies. A high engagement standard promotes the deference principle that guides judicial review. That principle is an essential safeguard against the possibility of misuse of the *Charter* as an instrument of judicial activism. Broadening the basis for judicial review increases that possibility.

31. Life, liberty and security of the person are distinct elements to the s. 7 right. They are independent interests which must be given independent significance.[32] A claim that security of the person is engaged by state action is distinct from a claim that the same state action also engages liberty and they must be kept analytically distinct. The threshold question of whether state action

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[31] *OCA Judgment*, *supra* at para. 119.

[32] *Morgentaler, supra* at para. 13.

engages s. 7 is a substantive issue that must be resolved before principles of fundamental justice analysis can ensue. Establishing that one of the interests protected by s. 7 is engaged by state action should not give *carte blanche* to claim other infringements without having to prove that those other interests are also engaged by that state action. In this regard, the Court of Appeal was misguided in its view that the concern about overextending the scope of s. 7 was "particularly misplaced" in respect of legislation creating criminal offences. The Court reasoned that since criminal proscriptions will always engage the liberty interest, they will inevitably be subjected to justification analysis.[33] Moreover, this reasoning does not answer concerns relating to the hazards of increased opportunities for judicial review flowing from excessive litigation.

B. A lower engagement threshold should be offset by greater deference in the "principles of fundamental justice" analysis

32. Academics and judges have recognized that, in public law adjudication, there is a close, balanced relationship between the scope of guaranteed rights and the standard of justification required under s. 1 of the *Charter*.[34] When *Charter* rights are interpreted generously, there is a tendency for courts to relax the standard of justification under s. 1. Conversely, when *Charter* rights are interpreted purposively, courts tend to hold government to a stricter standard of justification.[35] The same interactive relationship exists between the justification standard and the seriousness of the deprivation. It is generally accepted that, "the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied it is reasonable."[36]

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[33] *OCA Judgment*, *supra* at para.120. The Court of Appeal's reasoning on this point is belied by its earlier determination that the s. 7 challenge to ss. 210 and 213(1)(c) was *not* decided by this Court in the *Prostitution Reference* because it raised different substantive legal issues relating to an independent interest that was not considered in that case: *OCA Judgment*, *supra* at paras. 52 & 64-70.

[34] See, *e.g., Constitutional Law of Canada*, *supra* at p. 38-6; Peter W. Hogg, "Interpreting the *Charter of Rights*: Generosity and Justification" (1990) 28 Osgoode Hall L. J. 817; Aileen Kavanagh, "Special Issue – The Role of the Courts in Constitutional Law: Judicial Restraint in the Pursuit of Justice" (2010) 60 Univ. Of Toronto L.J. 23 at p. 30. See also *Saskatchewan (Human Rights Commission*) *v. Whatcott,* 2013 SCC 11 at para. 1 [*Whatcott*]: "All rights guaranteed under the *Canadian Charter of Rights and Freedoms* are subject to reasonable limitations. This balancing of rights and limitations gives rise to a tension..."

[35] *Constitutional Law of Canada*, *supra* at p. 38-6.

[36] *R. v. Ministry of Defence, ex parte Smith,* [1996] Q.B. 517 at p. 554 (per Sir Thomas Bingham M.R.).

33. The relationship between s. 1 of the *Charter* and s. 7 rights is, however, markedly different from other *Charter* rights. Section 7 of the *Charter* is internally qualified. It does not protect against *any* government interference with the right to life, liberty or security of the person; it only protects against a deprivation that is *not done in accordance with the principles of fundamental justice*. Because of this internal qualification, a s. 7 infringement will only ever be justifiable in the most exceptional of cases.[37] Although this Court has suggested that it "may not be impossible",[38] a majority of the Court has never upheld a breach of s. 7 under s. 1 of the *Charter*.

34. The problem with using s. 1 to justify a s. 7 breach is inherent to both the language of the *Charter* and the nature of the principles of fundamental justice assessment. As Justice Wilson pointed out in the early s. 7 jurisprudence of this Court, it is difficult to conceive of a law that violates the principles of fundamental justice as being "reasonable" or "demonstrably justified in a free and democratic society."[39] Put somewhat differently, whenever it is found that the deprivation of a s. 7 interest is inconsistent with the principles of fundamental justice, this will be seen as a serious interference with a right that would require very significant justification.

35. On a more pragmatic level, deciding whether government interference with a s. 7 interest was done in accordance with the principles of fundamental justice already involves an assessment very similar to the s. 1 justification. This is particularly true where, as here, the complaint is that legislation is arbitrary, overly broad or grossly disproportionate. In cases like this, where this Court has chosen to engage in a s. 1 analysis after finding a s. 7 breach, the discussion tends to mirror and repeat the analysis of the principles of fundamental justice.[40] This is not surprising given the clear

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[37]See, *e.g., R. v. D.B.,* [2008] 2 S.C.R. 3 at para. 89; *B.C. Motor Vehicle Reference* (1985), [1985] 2 S.C.R. 486 at para. 83 (per Lamer J.) [*Re B.C. Motor Vehicle Act*], in *obiter*, (although this was arguably limited to infringements of s. 7 for "administrative expediency") and *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 99.

[38]*Charkaoui v. Canada*, *(Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para. 66 [*Charkoui*].

[39]This point was made by Justice Wilson writing in *obiter* in her concurring reasons in *Re B.C. Motor Vehicle Act, supra* at para. 104 and in *Prostitution Reference, supra* at para. 156.

[40]See, *e.g., PHS*, *supra* at para. 137; *Chaoulli*, *supra* at para. 155. Where the legislation is said to violate a different stand alone principle of fundamental justice (e.g., the failure to meet the basic requirements of procedural justice), the s. 1 justification analysis may allow for consideration of new issues that have not been accounted for under s. 7: see, *e.g., Charkaoui*, *supra* at paras. 66-128.

parallels between the principles of arbitrariness and rational connection;[41] overbreadth and minimal impairment;[42] and gross disproportionality and the s. 1 proportionality of effects assessment.[43] The significant overlap between the principles of fundamental justice analysis and s. 1 justification make it difficult to conceive of a case where the Court would uphold a violation of those principles of fundamental justice under s. 1.

36. Given this symmetry between s.1 and the principles of fundamental justice analysis under s. 7, the practical wisdom of adopting a more flexible justification standard when the scope of rights is cast broadly should translate to s. 7 justification when the engagement threshold is broadly construed. Put another way, if an indirect and factually remote causal connection between government action and a s. 7 deprivation is accepted as sufficient to engage s. 7, then a concomitant need arises for greater deference in the principles of fundamental justice analysis. The burden of establishing that government has interfered with individual rights in a constitutionally impermissible manner must be a meaningful one. This is especially true where, as here, Parliament has made difficult policy decisions pertaining to a complex social issue. Relaxation of the threshold for engagement of s. 7 that is not offset by corresponding flexibility in the justification analysis would upset the vital balance between rights and limitations that lies at the heart of the *Charter.* It would

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[41] See, *e.g., Chaoulli, supra* at para. 155 (per McLachlin C.J. and Major J.): "[W]e question whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test".

[42] See *R. v. Heywood,* [1994] 3 S.C.R. 761 at para. 69 [*Heywood*]: "Overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis." See also *R. v. Demers,* [2004] 2 S.C.R. 489 at para. 46 [*Demers*] and *R. v. Sharpe,* [2001] 1 S.C.R. 45 at para. 18 [*Sharpe*] where McLachlin C.J., writing for the majority, finds it unnecessary to even consider the s. 7 issue because it "wholly replicates the overbreadth concerns that are the central obstacle to the justification of the s. 2(b) breach." Most recently, see *Whatcott, supra* at para. 107.

[43] Gross disproportionality addresses "the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is *grossly* disproportionate to the state interest the legislation seeks to protect": *Clay*, *supra* at para. 38. The final step in the proportionality analysis assesses whether "the overall effects of the law on the claimants [are] disproportionate to the government's objective": *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 73. Despite the clear similarities in language and concepts used in both assessments of proportionality, it is important to note that this Court has been reluctant to accept that the final step of *Oakes* is akin the gross disproportionality analysis under s. 7. See, *e.g., Malmo-Levine, supra* at paras. 94-98 & 179-182; *R. v. Mills,* [1999] 3 S.C.R. 668 at paras. 66-67 [*Mills*].

also risk undermining the proper relationship between the legislative and judicial branches as set out in our Constitution.[44]

37. In cases such as this, where legislation addresses a complex issue of social policy and can only be said, at most, to interfere indirectly with the claimants' s. 7 interest, deference should be incorporated into the justification assessment in two ways. First, the overbreadth analysis should incorporate a proportionality assessment. A strict necessity standard for overbreadth fails to account for the extent to which the legislation actually contributes to the deprivation. It may be a workable standard when the contribution is direct and substantial; but if the s. 7 engagement threshold is lowered to require only *de minimis* causation, then a test of strict necessity becomes problematic and unsatisfactory. Second, in areas of complex social policy - particularly where there are no definitive answers for how best to address associated vexing problems - the reasonable apprehension of harm standard should apply to assessing whether the legislation is arbitrary or overly broad on a standard of gross disproportionality.

(1) The overbreadth analysis must incorporate a proportionality assessment

38. There is significant overlap between the three principles of fundamental justice at play in this case: arbitrariness, overbreadth and gross disproportionality. The extent to which these principles have become intermingled, particularly overbreadth and gross disproportionality, has led to some confusion.[45] As Chief Justice McLachlin recently acknowledged, it is not clear whether overbreadth and gross disproportionality are "distinct constitutional doctrines" or whether they "simply offer different lenses through which to consider a single breach of the principles of fundamental justice."[46] There are principled reasons to merge the gross disproportionality and overbreadth assessments.

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[44]See, *e.g., Vriend v. Alberta,* [1998] 1 S.C.R. 493 at paras. 136-139.

[45]The Ontario Court of Appeal acknowledged the confusion in its judgment but chose to approach overbreadth and gross disproportionality as two distinct doctrines: see *OCA Judgment*, *supra* at paras. 150-151. This decision was not consistent with the previous trend at the Court of Appeal whereby the Court had used gross disproportionality as the measure of overbreadth: see *Cochrane, supra* (overbreadth was treated as the overarching principle of fundamental justice that should be assessed against the measures of arbitrariness and gross disproportionality); *R. v. Dyck,* 2008 ONCA 309 at paras. 91-98; *R. v. Lindsay,* 2009 ONCA 532 at para. 21, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 540; *United States of America v. Nadarajah,* 2010 ONCA 859 at paras. 14-16, affirmed on appeal, 2012 SCC 70 (constitutionality of the anti-terrorism offences addressed in *Khawaja, infra*).

[46]*R. v. Khawaja*, 2012 SCC 69 at para. 40 [*Khawaja*]. Ultimately, the Court did not decide whether they were distinct constitutional doctrines and considered both in a single step: paras. 56-64.

First, the strict necessity standard adopted by the Court of Appeal in this case arguably misstates the test from *Heywood*; the doctrine of overbreadth as set out in *Heywood* incorporated a balancing of state and individual interests and proportionality considerations. Second, in cases such as *R. v. Malmo-Levine* and *R. v. Clay*, this Court explicitly chose to set gross disproportionality as the standard against which overbreadth should be measured. Finally, even if this Court were to find that overbreadth and gross disproportionality should remain as distinct doctrines, assessing overbreadth on a standard of gross disproportionality is essential in cases, such as this, where there is only a weak and indirect connection between the impugned government legislation and the s. 7 deprivation. The strict necessity standard for overbreadth leaves no scope for considering the extent to which the impugned legislation actually interferes with an individual's s. 7 interests; this could result in the constitutional invalidation of legislation with important objectives despite the fact that the law's impact on individual rights is relatively insignificant.

39. Justice Cory's decision in *R. v. Heywood* has been read by some, including the Ontario Court of Appeal in this case, as giving rise to a distinct doctrine of overbreadth which leaves no room for proportionality assessments but asks only whether the impugned provision was "necessary" to achieve the legislative objectives. A more comprehensive reading, however, supports an understanding of overbreadth as always incorporating questions of proportionality by requiring consideration of both the legislative objectives and the impugned provision's effects on individuals. For example, in explaining what an overbreadth analysis would require, Justice Cory explicitly recognized the connection between arbitrariness, overbreadth and proportionality:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. ***The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.***[47]

40. Moreover, as Justice Cory explained, "Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of ***the balancing of the State interest against that of***

[47] *Heywood*, *supra* at para. 49 [emphasis added].

the individual."[48] This type of balancing is at the heart of any proportionality assessment.[49] He emphasized that deference had an important role to play in this process:

> In analyzing a statutory provision to determine if it is overbroad, ***a measure of deference must be paid to the means selected by the legislature***. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, ***legislatures must have the power to make policy choices***. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the *Charter* has a wide scope. ...
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> However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that ***the legislation infringes life, liberty or security of the person*** in a manner that is ***unnecessarily broad, going beyond what is needed to accomplish the governmental objective***.[50]

41. This Court's decision in *R. v. Clay* was not a departure from *Heywood* but simply more explicit recognition that the overbreadth analysis requires consideration of proportionality. In that case, Justices Gonthier and Binnie, writing for the majority, reviewed *Heywood* and explained :

> Overbreadth in that respect addresses the potential infringement of fundamental justice ***where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect***.[51]

42. Cory J. in *Heywood,* the majority in Clay also emphasized the need for deference in this assessment, finding that the "appropriate degree of deference ... is built into the applicable standard of 'gross disproportionality' as explained in *Malmo-Levine* and *Caine*".[52] In *Malmo-Levine*, the standard of gross disproportionality was described in the following terms:

> [T]he standard under s. 7, as under s. 12, remains one of *gross* disproportionality. In other words, ***if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective*** of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.[53]

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[48] *Heywood, supra* at para. 50 [emphasis added].

[49] See, *e.g., Sharpe, supra* at paras. 97 & 102.

[50] *Heywood*, *supra* at paras. 51-52 [emphasis added].

[51] *Clay*, *supra* at para. 38 [emphasis on grossly in original; remaining emphasis added].

[52] *Clay*, *supra* at para. 39.

[53] *Malmo-Levine, supra* at para. 169.

43. Since the release of *Clay* and *Malmo-Levine*, there has only been one case where the Court found that legislation was overly broad and thus an infringement of s. 7, without giving explicit consideration to the proportionality issue.[54] In *R. v. Demers*, the majority found that the provisions in Part XX.1 of the *Criminal Code* are overbroad because they allow a permanently unfit accused to be continually subject to the criminal process even if he is not a significant threat to public safety. The specific language of disproportionality does not appear in the Court's reasoning. Importantly, however, in *Demers* there was a *direct causal connection* between the legislative provisions and the s. 7 deprivation. The provisions left those accused who were permanently unfit and could never stand trial subject to indefinite appearances before the Review Board and to the exercise of its powers. Once the Court found that the means chosen were not "the least restrictive of the unfit person's liberty" and were not "necessary to achieve the state's objective",[55] this was tantamount to finding the provisions grossly disproportionate in their effect on accused who were permanently unfit when considered in light of their objectives.

44. Assessing overbreadth on a standard of gross disproportionality is essential where, as here, there is only a weak and indirect link between the impugned legislation and the s. 7 deprivation. The extent to which the legislation actually contributes to the s. 7 deprivation must be balanced against the state interest that the legislation seeks to protect. If the impact of the legislation on the s. 7 deprivation is not factored into overbreadth analysis, legislation that has only minimal impact on the rights deprivation could be found to violate the *Charter* even if its objectives are of significant

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[54] *Demers, supra* at paras. 37-43. The Supreme Court of Canada has addressed the question of overbreadth in three other cases since its decision in *Malmo-Levine, supra.* First, the Court did not accept that s. 43 of the *Criminal Code*, which allows for the use of corrective force against children, was overbroad in *Canadian Foundation*, *supra* at paras. 45-46. In that case, the analysis was very limited but turned on the appropriate interpretation given to the provision. More recently, in *PHS*, *supra* at para. 143, the Court was prepared to consider whether the Minister's refusal to grant an exemption to Insite was consistent with the principles of arbitrariness, gross disproportionality or overbreadth. Having found it to be both arbitrary and grossly disproportionate, the Court decided it did not need to consider whether it was also overly broad. Finally, as mentioned above, in *Khawaja, supra* the Court acknowledged that it was not clear whether overbreadth and gross disproportionality remained distinct constitutional doctrines, but chose not to resolve this issue.

[55] *Demers*, *supra* at para. 43.

importance. This is simply irreconcilable with the key role that proportionality has assumed in public law adjudication in Canada, and in constitutional democracies around the world.[56]

(2) The complexity of the social policy issue must be factored into the principles of fundamental justice assessment

45. The question of how the state should approach the vexing problems of prostitution has been one that legislators have struggled with for centuries. Different jurisdictions have reached different conclusions. The decision to adopt any one model – be it complete criminal prohibition on the sale of sex, the criminalization of only certain activities related to prostitution such as public solicitation or running brothels, asymmetrical criminalization, or decriminalization coupled with regulation – is fraught with controversy. There is no agreement among either legislators or academics on the appropriate legislative response to prostitution and its associated harms.[57]

46. The Canadian Parliament has repeatedly studied and considered different possible legislative responses to the intractable problems associated with prostitution. Time and again, Parliament has chosen not to remove those prohibitions that restrict the practice of prostitution. It has also chosen not to criminalize prostitution outright. Instead, Parliament has chosen to criminalize what it has found to be the most harmful and public emanations of prostitution, including both institutional, commercial prostitution (*e.g.,* keeping a bawdy house and living off the avails of prostitution) and public acts of prostitution (*e.g.,* keeping a bawdy house and communicating for the purpose of prostitution).

47. Given the complexity of this social policy issue, there is a need to accord deference to government's legislative judgment when assessing whether any s. 7 deprivation is in accordance with

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[56]See Grégoire C.N. Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23 Can. J.L. & Juris. 179 at p. 179: "To claim that constitutional law has entered the age of balancing – that it embraces a discourse and practice of balancing – is no exaggeration."

[57]The Australian legislative experience illustrates nicely the difficulty in achieving consensus about how best to address prostitution's harms. Australia is divided into six states and two territories, each of which has chosen to adopt a different legislative response to prostitution. These run the gamut from near full decriminalization (as in New South Wales where street prostitution is permitted in parts of the state) to full criminal prohibition (in South Australia). Each jurisdiction continues to tinker with its legislation, attempting to better refine its policy responses to prostitution. Appendix A to this factum summarizes the eight legal regimes governing prostitution in Australia. Appendix B summarizes the expert reports identifying concerns associated with different legislative regimes.

the principles of fundamental justice. As this Court has found, the legislature is not required to meet a scientific standard of certainty to justify its decision to act to prevent harm. Where determinative scientific evidence does not exist, a court can rely "on logic, reason and some social science evidence" to determine whether there is a "reasoned apprehension of harm" justifying Parliament's action.[58] Chief Justice McLachlin has explained that this standard is appropriate because "[c]omplex human behaviour may not lend itself to scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of."[59] This Court recently reaffirmed the need for deference in these types of cases in *Whatcott*: "[P]erfection is not required. Rather the legislature's chosen approach must be accorded considerable deference... We must ask whether Parliament has chosen one of several reasonable alternatives."[60]

48. This Court has routinely applied the "reasoned apprehension of harm" standard to different aspects of the s. 1 justification. Even in the absence of determinative scientific evidence, a reasoned apprehension of harm has been found sufficient to show that a government objective was pressing and substantial;[61] that the law was rationally connected to its objective;[62] and that the law was minimally impairing.[63] Given the significant parallels between the s. 1 justification and the principles of fundamental justice analysis, it is not surprising that both this Court and the Court of Appeal for Ontario have applied the reasoned apprehension of harm standard to complex issues of

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[58] See *Harper v. Canada (Attorney General),* [2004] 1 S.C.R. 827 at paras. 77-78 [*Harper*]. See also *R. v. Butler,* [1992] 1 S.C.R. 452 at paras. 101-109 [*Butler*]; *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at para. 74 [*Irwin Toy*]; *Malmo-Levine*, *supra* at para. 133; *Sharpe*, *supra* at para. 89.

[59] *Sharpe, supra* at para. 89.

[60] *Whatcott, supra* at para. 78 [citations omitted].

[61] See, *e.g., Irwin Toy Ltd., supra* at paras. 74-75 (concerning provincial legislation prohibiting commercial advertising directed at persons under the age of 13); *Harper, supra* at para. 93 (concerning limits on third party spending during federal elections).

[62] See, *e.g., Butler, supra* at paras. 104-105 (concerning the definition of obscenity in the *Criminal Code*); *Sharpe, supra* at paras. 84-89 (concerning the *Criminal Code* prohibition on possessing child pornography); *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paras. 153-158 (concerning the ban on cigarette advertising).

[63] See, *e.g., Irwin Toy, supra* at para. 88; *Whatcott, supra* at paras. 130-135 & 145-146 (concerning a provision in the Saskatchewan Human Rights Code prohibiting hate speech).

social policy when assessing whether the deprivation of a s. 7 interest was consistent with the principles of fundamental justice, including arbitrariness[64] and gross disproportionality.[65]

49. In a case such as this, where the social science evidence is not determinative, deference must be factored into the principles of fundamental justice assessment using the standard of "reasoned apprehension of harm". This Court's explanation of why deference is warranted at the rational connection stage is equally applicable to assessing claims of arbitrariness in the principles of fundamental justice context:

> Deference may be appropriate in assessing whether the rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.[66]

50. When assessing arbitrariness, the proper question for the Court is whether the criminal prohibition is rationally connected to a reasonable apprehension of harm. The majority's assessment of this question in *Malmo-Levine* highlights how deference applies in this analysis:

> Our colleagues LeBel and Deschamps JJ. consider the marihuana prohibition to be disproportionate to the societal problems at issue, and, thus arbitrary. This, we think, puts the threshold of judicial intervention too low. LeBel J. writes that "***it cannot be denied that marihuana can cause problems of varying nature and severity to some people or to groups of them" (para. 280). That being the case, we think the Charter allows Parliament a broad, though certainly not unlimited, legislative capacity to respond***. Marihuana is a psychoactive drug whose "use causes alteration of mental function" according to the trial judge. This alteration creates a potential harm to others when the user engages in "driving, flying and other activities involving complex machinery". Chronic users may suffer "serious" health problems. Vulnerable groups are at particular risk, including adolescents with a history of poor school performance, pregnant women and persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies. ***These findings of fact disclose a sufficient state interest to support Parliament's intervention should Parliament decide that it is wise to continue to do so, subject to a constitutional standard of gross disproportionality, discussed below.***
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> The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana ... and, through Parliament, the continuing view that its use should be deterred. ***The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm***. In particular, criminalization seeks to take

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[64] See *Malmo-Levine, supra* at paras. 133 & 135-136. See also *Cochrane, supra* at paras. 26-29.

[65] See *Malmo-Levine, supra* at paras. 174 & 177-178; *Cochrane, supra* at paras. 31-34.

[66] *Canada (Attorney General) v. JTI-Macdonald Corp.,* [2007] 2 S.C.R 610 at para. 41 [*JTI*].

> marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. ***In light of these findings of fact it cannot be said that the prohibition on marihuana possession is arbitrary or irrational, although the wisdom of the prohibition and its related penalties is always open to reconsideration by Parliament itself.***[67]

51. The reasonable apprehension of harm standard also has a key role to play when assessing whether a law is overly broad on a standard of gross disproportionality. As discussed above, the overbreadth analysis necessarily requires a balancing of the state interest against that of the individual. It is only where the adverse effect of the impugned provisions on the individual is grossly disproportionate to the state interest the legislation seeks to protect that the legislation will be said to be inconsistent with the principles of fundamental justice. This will require that legislative objectives be given their full weight in the analysis. In determining whether the legislative objective is pressing and substantial at the s. 1 justification stage, this Court has found that the government "does not need to provide evidence of actual harm to demonstrate that each objective is pressing and substantial."[68] Logic, reason and social science evidence can be relied upon to find that Parliament had a pressing and substantial objective that it was seeking to address. As this Court explained in *Irwin Toy*, the government must be "afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence."[69] A similar approach is required when assessing the full weight that should be given to the legislative objectives targeting a complex social problem such as prostitution.

52. Even if this Court were to find that necessity is the appropriate measure of overbreadth (and not gross disproportionality), any assessment of whether the means chosen were necessary to achieve the state objective would need to be rooted in the reasoned apprehension of harm standard. The question the Court must ask itself is whether the prohibition "is one of the reasonable alternatives that could have been selected by the legislature" and whether it deprives the claimants' s. 7 interests "no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account."[70]

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[67] *Malmo-Levine, supra* at paras. 135-136 [citations omitted; emphasis added].

[68] *Harper, supra* at para. 93.

[69] *Irwin Toy, supra* at para. 74. See also *Butler*, *supra* at paras. 103-106.

[70] *Whatcott, supra* at para. 146 citing *Sharpe, supra* at para. 96 [emphasis in original].

C. The impugned prohibitions accord with the principles of fundamental justice

53. The Court of Appeal committed several errors in its s. 7 reasoning that ultimately skewed its analyses on the principles of fundamental justice. Despite accepting a weak and indirect connection between the legislation and the claimants' security interests, the Court failed to incorporate sufficient deference in its ensuing assessment of the principles of fundamental justice. Specifically, the Court adopted an unduly narrow interpretation of the objectives underlying the impugned provisions. It also failed to both consider the extent to which the legislation actually interfered with the claimants' security interests in the overbreadth analysis and incorporate the reasonable apprehension of harm standard into the principles of fundamental justice assessment generally. Had that been done, the ultimate conclusion that the bawdy house and living on the avails provisions breached s. 7 of the *Charter* would have been different.

(1) The Court of Appeal construed the objectives of the prostitution provisions too narrowly

54. To give full protection to the societal interests that underlie the legislation at issue, it is important to recognize all of its legitimate purposes. Characterization of the objectives fundamentally influences the outcome of the justification analysis under s. 7. Defining the objectives of legislation too narrowly heightens its susceptibility to a declaration of invalidity.[71]

55. The Court of Appeal in this case construed the objectives of the impugned provisions narrowly, and concluded that there were no overarching objectives associated with the prostitution provisions in the *Criminal Code*.[72] In so doing, the Court failed to accept those purposes which are readily revealed through traditional sources for determining the objectives of legislation.

56. Properly understood, the *Criminal Code*'s prostitution provisions operate together to:

- discourage and reduce prostitution, particularly its most harmful and public emanations, including the establishment of commercialized and institutionalized prostitution;
- protect those engaged in prostitution, including children; and
- reduce societal harm from exposure to prostitution and its related activities, including the harm to both core societal values and the proper functioning of society.

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[71] *Constitutional Law of Canada, supra* at pp. 38-19 to 38-22.

[72] *OCA Judgment, supra* at paras. 156-170.

57. Although society's understanding of the harms associated with prostitution has evolved, those harms have been consistently rooted in the effect exposure to prostitution has on the functioning of society and its core values, precisely because of the exploitative manner in which women and children are treated in prostitution.[73]

(a) Discerning the full purposes of "ancient" legislation

58. This Court has repeatedly held that the objectives of legislation crystalize at the time of enactment. However, fulsome statements of the legislative objective may not exist when dealing with legislation enacted early in the history of Canada or even into the years pre-dating the *Charter.* Moreover, the objectives may be framed in antiquated language. That does not mean, however, that the purpose originally animating the legislation cannot be linked to an important modern day objective.[74]

59. To better understand the original objectives as well as Parliament's understanding of the ongoing rationale for retention of the legislation, sources beyond government's explicit articulation of the purpose of the provision at the time of enactment should be carefully considered. Whether the legislation was enacted recently or in the distant past, this Court has recognized that the following sources may assist with the identification of the objectives:[75]

- The intention of Parliament at the time of enactment as stated in legislative debates and Cabinet documents;[76]
- The stated intention of Parliament at the time of any amendment;[77]
- The wording of the legislation and the operation of the provision within its broader legislative scheme;[78]

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[73]Ruth Sullivan, *Sullivan on the Construction of Statues*, 5th ed. (Markham: Lexis Nexus, 2008) [*Sullivan*]; *Butler*, *supra* at paras. 85-86; *R. v. Zundel*, [1992] 2 S.C.R. 731 at para. 46 [*Zundel*].

[74]*R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 90 [*Big M. Drug Mart*]; *Irwin Toy*, *supra* at para. 48; *Malmo-Levine*, *supra* at para. 64; *Zundel*, *supra* at para. 46; *Rodriguez*, *supra* at paras. 142-143.

[75]*Sullivan*, *supra* at pp. 268-70.

[76]*M. v. H.*, [1999] 2 S.C.R. 3 at para. 87 [*M. v. H.*]; *Irwin Toy*, *supra*; *Big M. Drug Mart*, *supra*; *Re Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 238; *Medovaarksi v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at para. 12.

[77]*Zundel*, *supra* at para. 45.

[78]As this Court noted in *R. v. Big M, supra* at para. 80*:* "The object [of legislation] is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in

- The effects of the provision;[79]
- Government reports;[80]
- Government responses to reports;[81] and,
- International instruments and treaties to which Canada is a signatory.[82]

60. Where the legislative record is limited, comments pointing to a corollary or ancillary purpose that has taken on enhanced significance over time are particularly valuable.[83] When society's understanding of the objectives addressed by legislation has evolved but still relates with some specificity to the original objectives animating the provision, Parliament is not required to re-enact legislation with a new statement of objectives.[84]

61. In *Big M Drug Mart,* this Court articulated the shifting purpose doctrine which recognized that Parliament cannot assign objectives, nor invent new constitutionally valid objectives based on the perceived current utility of the impugned provisions.[85] However in *Zundel,* the Court

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the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. ***Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus its validity***" [emphasis added]. See also *Delisle*, *supra* at paras 17, 19-20; *M. v. H.*, *supra* at paras. 90, 100; *Irwin Toy v. Quebec*, *supra* at paras. 15- 21; *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721 at para. 21 [*Toronto Star*].

[79] *Big M Drug Mart*, *supra* at para. 90.

[80] *M. v. H.*, *supra* at paras. 85 & 89; *Toronto Star*, *supra* at paras. 23-24.

[81] *Lavoie v. Canada*, [1995] F.C.J. No.608 at paras.62-64; aff'd: [2002] 1 S.C.R. 679.

[82] *Nemeth v. Canada (Justice)*, [2010] 3 S.C.R. 281 at para. 34; *Clay*, *supra* at para. 20; *Sharpe*, *supra* at para. 175; *R. v. Zingre*, [1981] 2 S.C.R. 392; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at paras. 30-32; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 30; *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 at paras. 20 & 69-81.

[83] *Irwin Toy*, *supra* at para. 48.

[84] See *Butler*, *supra* and *Zundel*, *supra*. See also *R. v. Levkovic*, [2008] O.J. No. 3746 (S.C.J.) at para. 112 [*Levkovic*]; overturned on other grounds (2010), 103 O.R. (3d) 830 (C.A.); on reserve S.C.C.; *R. v. Lucas*, [1998] 1 S.C.R. 439 at paras. 42-47

[85] In *Big M. Drug Mart*, *supra* the original objective animating the impugned provision and the purpose advanced for constitutional analysis under s. 1, bore no relation to each other. The government sought to justify a federal prohibition against Sunday shopping on the basis that its objective was labour protection, a purpose that was not even within its jurisdiction. The basis for justification, therefore, rested on an impermissible shift in purpose: paras. 78-93, 141. See also *Irwin Toy*, *supra* at para. 48 and *Butler*, *supra* at paras. 84-85.

acknowledged that "the application and interpretation of objectives may vary over time."[86] A shift in emphasis is permissible if the specific objective animating the provision at the time of enactment is related to the modern articulation of that objective. When evaluating a *Criminal Code* provision aimed at protecting the public from harm, the modern understanding of that harm cannot be divorced from the type of harm originally targeted.

62. The Court of Appeal erred in applying the shifting purpose doctrine to limit the objectives of the bawdy house provision. The Court's flawed analysis also drove its conclusion that there were no overarching objectives associated with the *Criminal Code*'s prostitution provisions.[87]

(b) The objectives specifically targeted by the bawdy house provision

63. The Court of Appeal held that the objectives of the bawdy house provision were twofold: to combat neighbourhood disruption or disorder and to safeguard public health and safety.[88] Unlike the application judge, however, the Court of Appeal recognized that the public health and safety objective should be understood as broadly reflecting a concern about controlling human trafficking and child exploitation, a concern it found would have been within the contemplation of Parliament as the scope of the bawdy house provisions was gradually extended.[89] The Court did not accept that the bawdy house provision was targeted at controlling the institutionalization and commercialization of prostitution or promoting values of dignity and equality.[90] As discussed below at paras. 75-80, this conclusion is not supported by the clear and obvious effect achieved by the provision, particularly when considered in conjunction with the living on the avails prohibition. It is also not consistent with the provision's legislative history.

64. Early commentary on the purpose of the bawdy house provision identified two aspects of the conduct that could lead to societal harm: nuisance and the creation of social disorder. As far back as 1739, William Hawkins identified one of the key concerns underpinning the bawdy house prohibition as being harm to the functioning of society caused by exposure to prostitution:

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[86] *Zundel*, *supra* at paras. 45- 46.

[87] *OCA Judgment*, *supra* at paras. 179-192.

[88] *OCA Judgment, supra* at paras. 179 & 192-193.

[89] *OCA Judgment*, *supra* at paras. 179-189 & 202.

[90] *OCA Judgment, supra* at paras. 179-191.

> That it comes under the cognizance of the Temporal Law, as Common Nuisance, ***not only in respect*** of its endangering the Public Peace, by drawing together dissolute and debauched persons, ***but also in respect of its apparent Tendency to corrupt the Manners of both Sexes by such an open Profession of Lewdness***.[91]

65. More than two centuries later, this Court reiterated this concern in *R. v. Rockert*:

> Viewed in historical perspective, the keeping of a brothel or a common bawdy-house was a common nuisance, and as such, was indictable as a misdemeanour at common law. It was treated as a public nuisance, "not only in respect of its endangering the public peace by drawing together dissolute and debauched persons but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness"; Russell on Crime, 12th ed. Vol. 2, p. 1440. It consisted of maintaining a place to the disturbance of the neighbourhood or for purposes which were injurious to the public morals, health, convenience or safety.[92]

While this Court recognized in *Rockert* that bawdy houses are "injurious to public morals", this harm can be traced, through the commentaries of both Hawkins and Russell, to the "open display" of prostitution and its corruptive effect on social interaction between the sexes.

66. The bawdy house provisions are concerned with preventing the same type of "moral harm" that is addressed by the obscenity provisions. In *Butler,* the Court recognized that preventing moral corruption – the original objective of the obscenity provisions – was not distinct from the modern day objective of preventing the proliferation of antisocial attitudes, antithetical to *Charter* values such as dignity and equality.[93] In *Zundel,* this Court reviewed *Butler* and confirmed that the consistent purpose underlying the obscenity provisions was to address "the effect of pornographic materials on individuals and the resultant impact on society."[94]

67. At no stage in its history does the bawdy house prohibition attempt to address private morality. The focus animating the bawdy house prohibition, both at common law and in statute, has been harm to the public through exposure to prostitution. Underlying the provision is the recognition that the practice of prostitution is inherently harmful to our core societal values, including dignity and equality.

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[91] William Hawkins, *Pleas of the Crown, 1716-1721*, Vol. 1. (London: Professional Books, Ltd.) at p. 196 [emphasis added]. See also *Affidavit of L. Angers*, J.A.R,. Vol. 64, pp. 18744-45 at paras. 13-14.

[92] *R. v. Rockert*, [1978] 2 S.C.R. 704 at p. 712.

[93] *Butler*, *supra* at para. 85.

[94] *Zundel*, *supra* at paras. 45-46; *Butler*, *supra* at para. 85; *Levkovic*, *supra* at para. 112.

68. Finally, in refusing to accept that the bawdy house prohibition was aimed at preventing the institutionalization and commercialization of prostitution, the Court of Appeal suggested that the only support for this objective was a "descriptive" line in the 1985 *Report of the Special Committee on Pornography and Prostitution (The Fraser Report*).[95] In fact, the *Fraser Report* concluded that the *Criminal Code* "addresses" the "problem" of the institutionalization and commercialization of prostitution through the bawdy house provision. A fair reading evinces the committee's intention to identify this as an objective of the provision.[96] Morever, as discussed below at paras. 75-80, this is also supported by consideration of the obvious impact of the provisions.

(c) The objectives specifically targeted by the living on the avails provision

69. The Court of Appeal held that the objective of the living on the avails provision is "to prevent the exploitation of prostitutes by pimps."[97] This characterization of the objective is narrower than that accepted by this Court in *R. v. Downey,* and also ignores the plain language of the provision which does not require an additional element of exploitation. It also fails to appreciate how the provision seeks to curtail the commercialization of prostitution and promote values of dignity and equality.

70. In *Downey,* this Court traced the legislative history of the living on the avails provision and characterized its purpose as being "specifically aimed at those who have an economic stake in the earnings of a prostitute."[98] The Court did not suggest that only overt exploitation by pimps is targeted by the provision. Indeed the cases referenced by the Court in *Downey* do not identify exploitation as a necessary element of the offence of living on the avails.[99]

71. In *R. v. Grilo,* the Ontario Court of Appeal held that persons living in an intimate domestic relationship with a prostitute would not be considered to be "living on the avails" of prostitution unless there was an element of exploitation. This, however, was a clear exception to the general rule

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[95] *OCA Judgment*, *supra* at paras. 179-189.

[96] *Pornography and Prostitution in Canada: Vol. 2 Report of the Special Committee on Pornography and Prostitution (Fraser Report) 1985*, J.A.R. Vol. 71 , Tab 154 B, p. 20922 [*Fraser Report*].

[97] *OCA Judgment*, *supra* at para. 220. Although the Court did recognize at para. 239 of its judgment that the provision's purpose was both "to prevent pimps from exploiting prostitutes and from profiting from the prostitution of others," its analysis only ever focused on the prevention of overt exploitation by pimps.

[98] *R. v. Downey,* [1992] 2 S.C.R. 10 at para. 40 [*Downey*].

[99] *Downey, supra* at para. 40 citing *R. v. Grilo*, [1991] O.J. No. 413 (C.A.) [*Grilo*] and *R. v. Celebrity Enterprises Ltd.* (1997), 41 C.C.C. (2d) 540 (B.C.C.A.).

that exploitation need not be shown to prove the offence. As Arbour J.A. explained, "living on the avails is directed at the idle parasite who reaps the benefits of prostitution without any legal or moral claim to support from the person who happens to be a prostitute."[100]

72. Consideration of other subsections in s. 212 further supports the inference that Parliament did not intend that s. 212(1)(*j*) should require an additional showing of exploitation. Not all offences in s. 212 require proof of exploitation. For example, ss. 212(1)(*a*) and 212(1)(*d*), the two procuring provisions, do not require proof of exploitation. Neither provision requires that an accused overpower the will of the victim; culpability is established if the accused induces or persuades the victim.[101] The Court of Appeal focused solely on s. 212(1)(*h*), which was enacted at the same time that the living on the avails provision was revised.[102] Subsection s. 212(1)(*h*) targets the exercise of control, direction or influence over the movements of any woman or girl in such a manner as to show that he is aiding, abetting or compelling her prostitution. The very fact that Parliament drafted the provision in s. 212(1)(*h*) to capture specific types of exploitation but did not include any reference to exploitative conduct in s. 212(1)(*j*) strongly suggests that Parliament did not intend "circumstances of exploitation" to be a necessary element of the offence in s. 212(1)(*j*).

73. Section 212(1)(*j*) also works in conjunction with the presumption in s. 212(3) to further Parliament's protective objectives. It specifically seeks to protect prostitutes from coercive and abusive pimps, by relieving the victimized prostitute from having to testify against her abuser. Reading in the requirement of exploitation undermines Parliament's objectives. It will almost certainly mean prostitutes will be forced to testify to rebut claims of non-exploitation.

74. Parliament clearly intended the living on the avails provision to target those who have an economic stake in the earnings of a prostitute. A person who develops a vested economic interest in another person's sexual labour has an incentive to facilitate and promote the expansion of prostitution as a business. That person may present a barrier to the prostitute exiting prostitution, even if the conduct is not overtly exploitative. The most vulnerable may be susceptible to more

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[100] *Grilo, supra* at para. 29.

[101] *R. v. Bennet*, [2004] O.J. No. 1146 (C.A.) at para. 53; *R. v. Deutsch*, [1986] 2 S.C.R. 2 at paras. 24 & 36.

[102] *OCA Judgment*, *supra* at para. 237.

subtle manipulation.[103] The protective objective of the prohibition against living on the avails of prostitution is engaged in such circumstances. Moreover, when interpreted in accordance with its plain wording and this Court's decision in *Downey,* the living on the avails provision works with the bawdy house provision to deter the practice of prostitution by creating an additional barrier to the establishment and expansion of commercialized prostitution, thus reducing public exposure to prostitution.

(d) The obvious impact of the interaction of the provisions

75. In refusing to accept that the prostitution provisions work together to discourage prostitution and particularly the institutionalization and commercialization of prostitution, the Court of Appeal also failed to consider both whether this objective was consistent with the obvious impact of the provisions and important nuances in the majority's decision in the *Prostitution Reference.*[104] The provisions impugned in this case all work together to limit the public's exposure to prostitution (*e.g.,* by prohibiting communicating for the purpose of prostitution and bawdy houses), restrict access to fixed places where sex can be purchased (*e.g.,* by prohibiting bawdy houses), and restrict the ways in which prostitution can be commercialized (*e.g.,* by prohibiting living on the avails). One obvious effect of this overall scheme is thus to curtail prostitution, a fact implicitly acknowledged by Chief Justice Dickson in the *Prostitution Reference.*[105]

76. In the *Prostitution Reference,* while Dickson C.J. did not fully endorse the broad statement of objectives of the impugned provisions set out by Lamer J. (as he then was), he explicitly recognized that the communicating and bawdy house prohibition operate to create a legal environment which makes the selling of sex very difficult, even, in his view, "impossible."[106] A legislative scheme which makes it difficult to engage in the activity must be recognized as having at least an ancillary purpose of discouraging that activity. Indeed, Dickson C.J. did not exclude this as an *indirect* effect of the prostitution provisions.[107]

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[103] *Downey*, *supra* at para. 32.

[104] *OCA Judgment*, *supra* at paras. 122, 165-170, 184-85; *Big M Drug Mart*, *supra* at para. 80; *Delisle*, *supra* at paras. 17-24.

[105] It is important to note that the only provisions being challenged in that case were the communicating and the bawdy house prohibitions. Most of the discussion focused on the legislative objectives animating the communicating provision.

[106] *Prostitution Reference*, *supra* at paras. 2 & 18 (per Dickson C.J.).

[107] *Prostitution Reference, supra* at para. 2 (per Dickson C.J.).

77. Moreover, while Justice Lamer, writing on his own in concurring reasons, articulated perhaps the strongest rationale for discouraging prostitution and its harmful public emanations,[108] Dickson C.J. accepted that "exploitation, degradation and subordination of women" are "part of the "contemporary reality of prostitution." Indeed, the Chief Justice did not exclude the possibility that s. 213(1)(*c*) might be seeking to address this contemporary reality indirectly.[109]

78. The objective of preventing harm to prostitutes and those exposed to public displays of prostitution is closely linked to the goal of discouraging prostitution, precisely because of the degradation inherent to prostitution. Both this Court and the Ontario Court of Appeal have recognized the harm associated with prostitution in recent years.[110] On several occasions subsequent to the decision in *Mara,* this Court has recognized that the commodification of sexual services in public is harmful to our societal values of dignity and equality.[111]

79. There is a logical connection between the promotion of values such as dignity and equality and the prohibitions against the open practice of prostitution. Prohibiting the most harmful and public displays of prostitution can serve to limit those harms. However, while the Court of Appeal accepted that Parliament could enact legislation to safeguard values which are integral to a free and democratic society, it did not agree that the prostitution provisions seek to promote these values.[112]

80. Contrary to the view of the Court of Appeal, the history of the provisions demonstrates that they are animated by concern that the *open display* of prostitution in public has a *harmful effect* on the functioning of society. This concern, evident in early discussions regarding the purpose of the bawdy house provisions reviewed above, goes beyond an attempt to impose a certain standard of

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[108] In the *Prostitution Reference, supra* at paras. 95-97, Justice Lamer cited with approval the views of the Ontario Advisory Council on the Status of Women's Report on Prostitution and Pornography: "Prostitution functions as a form of violence against women and young persons. It is certainly a blatant form of exploitation and abuse of power.... Prostitution is related to the traditional dominance of men over women.... Prostitution is a symptom of the victimization and subordination of women and of their economic disadvantage." The Court of Appeal also adopted this position in *R. v. Mara, infra* at para. 33.

[109] *Prostitution Reference*, *supra* at paras. 2, 18-19 (per Dickson C.J). See also *Prostitution Reference*, *ibid.* at paras. 125-126 (per Wilson J.) .

[110] *R. v. Mara*, [1996] O.J. No. 364 (C.A.) at paras. 32-35; *R v. Mara*, [1997] 2 S.C.R. 630 at paras. 34-35.

[111] *R. v. Labaye*, [2005] 3 S.C.R. 728 at para. 67; *R. v. Kouri*, [2005] 3 S.C.R. 789 at para. 22.

[112] *OCA Judgment*, *supra* at para. 190.

sexual morality. Indeed, the legislative history of the impugned provisions reflects ongoing concern about the negative societal effects flowing from exposure to prostitution.

(e) The legislative history shows Parliament targeted several overarching objectives with the prostitution provisions

81. The following excerpts from the legislative history of the various prostitution-related provisions also suggest Parliament was concerned with preventing harm both to prostitutes and to the public more generally and was also specifically concerned with protecting the dignity of women and children.

- In 1913, Parliament amended the *Criminal Code* to prohibit the procurement of girls and women into prostitution and the concealment of women and girls in bawdy houses. It implicitly recognized that these acts were harmful to the women and children targeted. Indeed, in the House of Commons Debates preceding the enactment of these amendments, reference was made to the "white slave trade" acknowledging, in the language of that era, that prostitution was harmful to the girls and women involved.[113]

- In 1915, Parliament increased the penalty for being an inmate in a bawdy house. Parliament recognized that the objective of the provision was to create a means whereby "young girls" in such institutions could be "placed under control and guidance and direction for a sufficiently long period of time to bring about a reformation." The longer period of incarceration was seen as necessary to prevent owners from preying upon these "unfortunate" girls and returning them to the bawdy house immediately upon their release.[114]

- In 1985, when the communicating provision was passed, the legislative debates reveal that the Minister of Justice was concerned with protecting children from exposure to prostitution. He was specifically concerned that exposure to prostitution normalizes the practice of prostitution. The provision targeted both reducing the number of young persons entering prostitution and helping young persons leave prostitution by removing them from the streets. Explicit reference was also made to imposing sanctions on customers, with a view to reducing demand.[115]

- In 1987, Parliament increased the penalty for engaging the services of a child prostitute. The House of Commons Debates reveal that the key concern was protecting children from sexual abuse and exploitation. In 1997, the *Criminal Code* was amended to create a five year

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[113] *House of Commons Debates, with respect to An Act to Amend the Criminal Code, S.C. 1913, (2-3 Geo. V.) c. 13*, J.A.R., Vol. 66, Tab 144, pp. 19343 & 19346-48.

[114] *House of Commons Debates, with respect to an Act to Amend the Criminal Code, S.C. 1915 (5 Geo. V.) c. 12,* J.A.R., Vol. 66, Tab 144, pp. 19393-95.

[115] *House of Commons Debates Minister of Justice September 9, 1985, Bill C- 49 at Second Reading*, J.A.R., Vol. 70, Tab 152, p. 21284; *Affidavit of L. Angers, JAR,* Vol. 64, Tab 127, pp. 18752-18754 at paras. 35-37.

mandatory minimum sentence for the offence of living on the avails of the prostitution of a person under 18 years.[116]

- In 2005, Parliament amended the *Criminal Code* to create the offence of human trafficking. In introducing the proposed provision, the Parliamentary Secretary to the Minister of Justice recognized the "scourge" of the "global slave trade" and emphasized that the provision would build on existing provisions to protect vulnerable persons.[117]

- In 2009, Parliament amended the *Criminal Code* to create the offence of trafficking in persons under the age of 18. The offence included a mandatory minimum sentence of 5 years' imprisonment. This amendment was enacted in response to our international obligations and Canada's perceived lenient treatment of human traffickers.[118]

(f) Canada's international commitments and obligations

82. Canada is a signatory to a variety of international conventions and treaties that are relevant to understanding the modern context of the harms relating to prostitution and the objectives targeted by the prostitution provisions. These instruments demonstrate Canada's ongoing commitment to the protection of human dignity and equality and illuminate the legal and cultural context within which legislative changes to the prostitution provisions have taken place.[119] They also assist our understanding of how the prostitution provisions advance core societal values.

83. *The UN Convention on the Elimination of All Forms of Discrimination against Women,* which was ratified in 1981, is particularly important in that Canada had committed itself to its

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[116] *House of Commons Debates with respect to an Act to Amend the Criminal Code and Canada Evidence Act, 1987, c. 24*, J.A.R. Vol. 73, Tab 156, pp. 21810, 21815-16, 21824-6, 21837, 21840, 21848; *Affidavit of L. Angers*, J.A.R. Vol. 64, Tab 127, p. 18749 at para. 26, Ex. 19 and 20 and pp. 18873-87.

[117] *House of Commons Debates with respect to "An Act to amend the Criminal Code and the Canada Evidence Act, S.C. 2005, c. 43*," J.A.R. Vol. 82, Tab 163 at pp. 24737-40 & 24749 [emphasis added].

[118] MP Joy Smith initiated the bill and explained in the House of Commons Debates that the *Report of the Canada-US Consultation Prepared for the World Congress III Against Sexual Exploitation of Children and Adolescents* had specifically recommended that Canada adopt a mandatory minimum penalty for the offence of child trafficking. See *House of Commons Debates,* 40th Parl, 2nd session, No. 04 (January 29, 2009) at 1005 (Joy Smith).

[119] *1926 Slavery Convention*, League of Nations, UN Protocol 1953 (ratified by Canada 7 July 1955); *UN Convention on the Elimination of All Forms of Discrimination against Women*, UN General Assembly Resolution 34/180/1979 (ratified by Canada 10 December 1981) at Articles 2-6; *UN Convention against Transnational Organized Crime*, Annex II, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime," UN General Assembly Resolution 55/252000 (ratified by Canada 13 May 2002) at Articles 2-5.

objectives just before the current communicating provision was enacted in 1985. Parties to the convention undertook

> to take all appropriate measures, including legislation ***to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other parties which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypical roles for men and women***.

The Convention's objective is consistent with Parliament's concern for protecting children from exposure to prostitution and the normalizing effect of such exposure, as evident in the legislative debates leading to the enactment of s. 213(1)(*c*). As recognized by Dickson C.J. in the *Prostitution Reference*, the communicating provision works together with the bawdy house prohibition to make sex work very difficult.

(g) Governmental response to the 2006 subcommittee report on solicitation laws

84. The current rationale for retaining the prostitution provisions is captured in the Response of the Government of Canada to the Report of the House of Commons Subcommittee of the Standing Committee on Justice and Human Rights. In the 2006 Subcommittee report on solicitation laws, committee members could not reach a consensus on reform of the prostitution laws. There was a deep divide, reflecting two divergent perspectives on prostitution: one which viewed prostitution as a form of violence and inherently exploitative; and one which viewed prostitution as a matter of sexual autonomy. The response of the Government stated:

> Undeniably, those involved in prostitution are at a significantly greater risk of abuse and exploitation; strong and consistent responses to this serious social problem are required. ***This Government views prostitution as degrading and dehumanizing***, often committed and controlled by coercive individuals against those who are frequently powerless to protect themselves from abuse and exploitation. ***Prostitution harms all of Canadian society, and Canadian women in particular. This Government condemns any conduct that results in exploitation or abuse, and accordingly does not support any reforms, such as decriminalization, that would facilitate such exploitation. Commodification and exploitation of women is never acceptable.***
>
> For these reasons, this Government ***continues to address prostitution by focusing on reducing its prevalence.*** This involves prevention, education and awareness initiatives, supporting programs that encourage those involved in the sex trade toward exit programs, ***and focusing on consistent enforcement of the criminal law.***

> We thank the Committee and the Subcommittee for its report, which ***seeks to assist in preventing the exploitation of vulnerable persons, an objective this Government equally supports.***[120]

85. This response is also consistent with the conclusion of the *Fraser Report,* twenty years earlier, which recognized the relationship between the practice of prostitution and women's historical experience of inequality with men.[121]

(2) The Court of Appeal erred in finding that the bawdy house prohibition deprived the claimants of their security interests in a manner that did not accord with the principles of fundamental justice

86. In deciding that the bawdy house prohibition was overly broad and grossly disproportionate, the Court of Appeal erred in several ways. First, the Court adopted an unduly narrow interpretation of the provision's objectives, undermining the ensuing analysis. Second, the Court failed to incorporate sufficient deference to Parliament's legislative choice on this difficult social policy issue. Instead of asking whether Parliament had chosen "one of several reasonable alternatives",[122] the Court's decision turned, effectively, on its conception of another "reasonable alternative" - namely, permitting single prostitutes to work alone from their own homes. Had the Court properly incorporated deference into its principles of fundamental justice assessment by both applying the reasonable apprehension of harm standard and measuring overbreadth on a gross disproportionality standard, it would have reached a different conclusion.

(a) The Court of Appeal's unduly narrow interpretation of the bawdy house objectives skewed its ensuing analysis

87. In this case, the Court of Appeal cast the objectives of the bawdy house provision narrowly. As discussed above, the Court did not accept that there were any overarching legislative objectives

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[120] *Government Response to the Sixth Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A Study of Canada's Criminal Prostitution Laws; Letter of The Honourable Robert Nicholson (Min of Justice) to Art Hanger, Chair of the Standing Committee on Justice and Human Rights*, J.A.R., Vol. 82, Tab 164A, pp. 25030-31 [emphasis added].

[121] As explained in the *Fraser Report*, J.A.R. Vol. 71, Tab 154B, at p. 20837*: "*We agree with the argument that the phenomena of pornography and prostitution are at least reflections (if not causes) of perceptions that women are inferior, and that men can expect women to be available to service their sexual needs. We know that many individual men do not share these perceptions. It is, however, clear that the maintenance of these attitudes towards women over the centuries has played a significant role in the historical allocation to women of subordinate roles in the social, political and economic order."

[122] See *Whatcott, supra* at para. 78 citing *R. v. Edwards Books,* [1986] 2 S.C.R. 713 at pp. 781-783 and *Irwin Toy*, *supra* at para. 74. See also *JTI*, *supra* at para. 43.

associated with the prostitution provisions in the *Criminal Code*[123] or that the bawdy house provision sought to control the institutionalization and commercialization of prostitution or promote values of dignity and equality.[124] The Court limited its objectives to combating neighbourhood disruption and safeguarding public health and safety.[125] Although the Court indicated that the concern for public health and safety could be understood more broadly as reflecting a concern about human trafficking and child exploitation, this did not play a significant role in its justification assessment. Had the Court properly incorporated greater deference into its principles of fundamental justice analysis, it would have found the bawdy house prohibition constitutionally permissible, even with these narrower objectives.

(b) The Court of Appeal failed to incorporate deference into its principles of fundamental justice assessment

88. Despite having cast the threshold for s. 7 engagement at an unprecedented low level, the Court of Appeal did not balance this off with a corresponding strengthening of the principles of fundamental justice analysis. By framing the question as "whether a blanket prohibition on all bawdy-houses is necessary to achieve Parliament's objectives",[126] the Court left no room for considering the extent to which the legislation actually interfered with the applicants' s. 7 interests and failed to incorporate the reasoned apprehension of harm standard.

89. Although the Court of Appeal agreed that the reasonable apprehension of harm standard could be appropriate "in cases where the government is answering a claim that its legislation is inconsistent with the principles of fundamental justice",[127] it failed to consider it when making that very assessment. In this case, where the complexity of the policy questions "did not lend itself to scientific demonstration",[128] Parliament's decision should have been accorded deference.

90. The Court envisioned a "reasonable alternative" to the blanket prohibition - allowing a single prostitute to work out of her own home. This drove its conclusion that the means chosen by Parliament were unreasonable. This approach was laid bare in these conclusive comments:

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[123] *OCA Judgment, supra* at paras. 156-170.

[124] *OCA Judgment, supra* at paras. 179-191.

[125] *OCA Judgment, supra* at paras. 179 & 192-193.

[126] *OCA Judgment, supra* at para. 199.

[127] *OCA Judgment, supra* at para. 140.

[128] *Sharpe, supra* at para. 89.

> We should not be taken as holding that any bawdy-house prohibition would be unconstitutional. It would be open to Parliament to draft a bawdy-house provision that is consistent with the modern values of human dignity and equality and is directed at specific pressing social problems, while also complying with the *Charter*.[129]

91. This approach improperly put the Court in the role of micromanaging Parliament's legislative agenda. Once the Court accepted that one purpose of the bawdy house prohibition was to safeguard public health and safety, including a concern about human trafficking and child exploitation – harms that are neither insignificant nor trivial and, on the Court's own findings, "may tragically arise through the operation of bawdy houses"[130] – it was not for the Court to enter the legislative fray*:*

> ***Once it is demonstrated, as it has been here, that the harm is not de minimis, or in the words of Braidwood J.A., the harm is "not [in]significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job.*** Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do. A "serious and substantial" standard of review would involve the courts in micromanagement of Parliament's agenda. The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected...[131]

92. Even if it is possible for single prostitutes to work out of their homes without causing neighbourhood disruption or harm to public health and safety,[132] there would still be a real risk that such premises could contribute to the problems of child exploitation and human trafficking by providing more isolated and private settings in which these activities could thrive below the radar of law enforcement. The average age of entry into prostitution in Canada is somewhere between 13 and 16 years.[133] While some of these children may work on the streets, many end up working in

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[129] *OCA Judgment, supra* at para. 217.

[130] *OCA Judgment, supra* at para. 193.

[131] *Malmo-Levine, supra* at para. 133 [emphasis added].

[132] The Court's optimism about the attractive safety features of this practice overlooks the considerable dangers inherent to prostitution, regardless of its venue and hence, the likely reluctance of many prostitutes to work from their homes because it would make them and family members with whom they live vulnerable to threatening clients. And, apart from the threat of danger, it seems reasonable to expect that, given the nature of their vocation, many prostitutes would prefer to avoid the potential nuisances and disruption to the privacy of their personal lives that could predictably occur as a result of working where they live. The "home field" advantage, described by the Court at para. 134, may be a boon in the world of sports, but is less desirable when concerns about safety risks, anonymity and privacy are present by virtue of the nature of one's vocation.

[133] Government affiants put the average age of entry between 13 and 14: see *Affidavit of S. Joyal,* J.A.R., Vol. 36, Tab 88, p. 10553 at para. 88; *Affidavit of J. McCartney,* J.A.R., Vol. 35, Tab 32, p. 10055

illegal bawdy houses, as do trafficked women and children.[134] Because sex work tends to take place indoors, in private locations, police find it very difficult to investigate underage prostitution and human trafficking. The blanket prohibition on bawdy houses is an important tool for assisting those investigations.[135] There is a reasoned apprehension of harm that the problems of human trafficking and child exploitation could thrive if the blanket prohibition were relaxed to allow single operators to work out of their homes.

93. Given these serious risks, the Court of Appeal should have deferred to Parliament's decision to impose a blanket prohibition. As Sharpe J.A. explained in *Cochrane,* "Legislatures frequently enact blanket prohibitions on things or activities that may be used or conducted safely because of the risk that severe harm can result from misuse or misconduct."[136]

94. As AG Canada explains, there was also a reasonable basis to conclude that the prohibition on all bawdy houses is necessary to avoid harms to the community.[137] There is no reason to believe that these harms would not continue if the prohibition were lifted to allow a prostitute to work alone out of her home. Given that prostitution is inherently risky, both those prostitutes working alone from their homes and their neighbours could be subject to the risk of violent attack by johns.[138]

95. Had the Court of Appeal properly considered the reasonable apprehension of harm standard, it should have concluded, for the reasons discussed above, that the bawdy house prohibition was not overly broad, even on the strict necessity standard it applied. It would have been most appropriate, however, for the Court to cast the question on overbreadth as whether the adverse effects of the

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at para. 8; *Affidavit of G. Bowers,* J.A.R.*,* Vol. 35, Tab 85, p. 10287 at para. 8 and p. 10295 at para. 32; *Affidavit of R. Poulin,* J.A.R.*,* Vol. 40, Tab 102, p. 11386-11387 at para. 24; *Affidavit of J. Morrisey,* J.A.R.*,* Vol. 34, Tab 78, p. 9758 at para. 12. The claimants' affiant put the average age of entry at between 16 and 18: *Affidavit of F. Shaver,* J.A.R.*,* Vol. 24, Tab 55E, p. 6933.

[134]This is consistent with the evidence that only approximately 10-20% of prostitutes work on the street, while 80-90% operate either in-call (in brothels, massage parlours, independently) or out-call (visiting client's homes, at hotels, etc): *Affidavit of F. Shaver,* J.A.R.*,* Vol. 24, Tab 55, p. 6809, at para. 8.

[135]See, *e.g., Affidavit of R. Cowan,* J.A.R.*,* Vol. 35, Tab 84, p. 10266-10271 at paras. 12-23; *Affidavit of G. Bowers,* J.A.R.*,* Vol. 35, Tab 85, p. 10300-10301 at paras. 43-46; *Affidavit of M. Holm,* J.A.R.*,* Vol. 35, Tab 83, pp. 10248-10249 at paras. 23-24; *Affidavit of J. Morrisey,* J.A.R.*,* Vol. 34, Tab 78, pp. 9760-9761 at paras. 21-23 and p. 9788 at para. 42.

[136]*Cochrane, supra* at para. 34 [emphasis added].

[137]See *Factum of AG Canada*, *supra* at para. 99. See also *Affidavit of M. Holm,* J.A.R.*,* Vol. 35, Tab 83, p. 10250 at para. 27 attesting to the way the harms in brothels can spill over into the community.

[138]See *Cross-examination of Natasha Falle,* J.A.R.*,* Vol. 33, Tab 64, pp. 9571-9575 at Q340-354.

bawdy house prohibition on the claimants' s. 7 interests were grossly disproportionate to the state interest in combating neighbourhood disorder or disruption and safeguarding public health and safety. As noted by this Court, this standard incorporates a substantial measure of deference to the legislature's assessment of the risk to public safety and the need for the impugned law.[139] The Court of Appeal's gross disproportionality analysis did not incorporate this necessary deference.

96. Although the Court paid lip service to the need to give full weight to the objectives of the bawdy house provision, it failed to do so. Even accepting the Court's narrow casting of the law's purpose, those objectives target the harms posed by bawdy houses to prostitutes themselves and to the communities in which they are located. For the reasons discussed above, Parliament had a reasonable basis to conclude that a blanket prohibition was the best way to achieve these pressing and substantial objectives.

97. In finding the impact of the bawdy house provision "extreme", the Court pointed to evidence suggesting that street prostitutes were subject to significantly higher rates, and more severe forms, of violence than those working indoors.[140] However, the Court glossed over the fact that the legislation itself has only a minimal and indirect impact on the security interests of prostitutes. The direct cause of the harm to prostitutes are non-state actors: violent johns and pimps. Although the Court may have been willing to accept that "the inability to quantify the added risk to prostitutes flowing from the legislation is no bar to a finding of added risk *sufficient to engage security of the person*",[141] the actual extent to which the legislation interferes with the security interest needed to be factored into the assessment of gross disproportionality.

98. Moreover, the Court erred in its approach to assessing how much of the harms associated with prostitution could properly be attributed to the bawdy house prohibition. The Court compared the rate and nature of violence experienced by prostitutes working in bawdy houses to those who worked on the street. This was not the appropriate comparison. If the Court was trying to isolate the extent to which the prohibitions contributed to the interference with the security interests of prostitutes, it should have compared the rate and degree of harm experienced by prostitutes working in legal bawdy houses in other jurisdictions with prostitutes working in compliance with Canadian

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[139] See, *e.g., Clay, supra* at paras. 37-40 and *Cochrane, supra* at para. 31.

[140] *OCA Judgment*, *supra* at para. 207.

[141] *OCA Judgment, supra* at para. 117 [emphasis added].

law, in the out-call sector. Had it done so, it would have found that the rates and types of violence experienced by prostitutes working in these two sectors was not that different.[142]

99. Finally, even assuming that it was appropriate to compare the harms suffered by street prostitutes and prostitutes working in legal bawdy houses, the Court improperly attributed too much responsibility for the harms suffered by street prostitutes to the bawdy house prohibition. There are a myriad of factors that contribute to the victimization of street prostitutes; not all of the harms can be attributed to choice of venue. The evidence in this case suggested that many street prostitutes suffer from drug addiction,[143] are financially desperate,[144] and some face cognitive or mental health challenges.[145] These vulnerabilities can lead to risky decision making. There was also evidence that even in those jurisdictions that have legalized brothels, a large number of women have chosen not to move indoors to legal brothels, or, in some cases, are unable to do so because of rules and regulations governing brothel work.[146] Although the Court of Appeal acknowledged the reality that

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[142]Compare T. O'Doherty, *"Off-Street Commercial Sex: An Exploratory Study,"* J.A.R., Vol. 20, Tab 52A, pp. 5846 and 5856-5858 (a Canadian study of violence and victimization among off-street out call prostitutes) with C. Woodward, *Selling Sex in Queensland 2003: A Study of Prostitution in Queensland*, J.A.R., Vol. 28, Tab 61F, p. 8038 (comparing rates and types of violence between Australian prostitutes working in legal brothels, working in private and working on the street) and R. Perkins and F. Lovejoy, *"Healthy and unhealthy lifestyles of female brothel workers and call girls (private sex workers) in Sydney," (1996)*, J.A.R., Vol. 30, Tab 64M, p. 8771 (comparing rates and types of violence between Australian prostitutes working in brothels and those working out-call).

[143]See, *e.g., Affidavit of J. Patterson,* J.A.R., Vol. 7, Tab 3, pp. 1835, 1837-1838 at paras. 6 and 17; *Affidavit of A. Kennedy,* J.A.R., Vol. 46, Tab 107, pp. 13243, 13247, 13249 at paras. 20, 34 & 38-39; *Affidavit of S. Joyal,* J.A.R., Vol. 36 Tab 88, pp. 10553-10554 at paras. 28-29; *Affidavit of J. McCartney,* J.A.R., Vol. 35, Tab 32, pp. 10055-10056 at paras. 7 & 9-10; *Affidavit of E. Dizon,* J.A.R., Vol. 37, Tab 91, p. 10679 at para. 30; *Affidavit of O. Ramos,* J.A.R., Vol. 35, Tab 86, pp. 10394-10395 at paras. 16-18; *Affidavit of M. Holm,* J.A.R., Vol. 35, Tab 83, p. 10241 at para. 10(c); *Affidavit of G. Bowers,* J.A.R., Vol. 35, Tab 85, pp. 10288-10290 at paras. 11, 13 & 16.

[144]*Affidavit of J. Patterson,* J.A.R., Vol. 7, Tab 30, p. 1835 at paras. 6-7; *Affidavit of A. Kennedy,* J.A.R., Vol. 46, Tab 107, p. 13243 at para. 20; *Affidavit of G. Bowers,* J.A.R., Vol. 35, Tab 85, pp. 10289-10290 at paras. 15-16; *Cross-examination of E. Maticka-Tyndale,* J.A.R., Vol. 12, Tab 46, pp. 3254-3255 at Q299-301; *T. O'Doherty, "Off-Street Commercial Sex: An Exploratory Study*," J.A.R., Vol. 20, Tab 52A, pp. 5856-5857.

[145]*Affidavit of J. Patterson,* J.A.R., Vol. 7, Tab 30 at para. 6; *Affidavit of O. Ramos,* J.A.R., Vol. 35, Tab 86, p. 10394 at para. 17; *Affidavit of M. Holm,* J.A.R., Vol. 35, Tab 83, pp. 10241 at para. 10(c); *Affidavit of G. Bowers,* J.A.R., Vol. 35, Tab 85, p. 10297 at para. 35.

[146]This evidence is summarized in the chart at Appendix B to this factum. See, *e.g.,* M. Farley, *"Prostitution and Trafficking in Nevada" (2006)*, J.A.R., Vol. 32, Tab 65G, pp. 9271 and 9278 (only 10% of all prostitution in Nevada is conducted legally; approximately 24% of prostitutes reported continuing to work on the streets); *Crime and Misconduct Commission, Regulating Prostitution An Evaluation of the Prostitution Act (QLD) (2004)*, J.A.R., Vol. 27, Tab 61D, pp. 7832, 7879-7880, 7797, 7882 and 7792-7793

street prostitutes might be unable to work in legal bawdy houses "run by others", it found that street prostitutes could move indoors if they were allowed to work from their own homes, despite the absence of any compelling evidence to ground that conclusion.[147] In fact, the evidence from jurisdictions where brothels have been legalized suggests there is good reason to be skeptical that the removal of the bawdy house prohibition would have any impact on harms suffered by prostitutes as a group.[148]

100. Simply put, the bawdy house prohibition has only a minimal effect on the security interests of prostitutes. The minimal adverse effects of the provision cannot be said to be grossly disproportionate to the important state interests that the legislation seeks to protect.

(3) The Court of Appeal erred in finding that the living on the avails prohibition deprived the claimants of their security interests in a manner that was not in accordance with the principles of fundamental justice

101. The Court of Appeal committed similar analytical errors in determining that the living on the avails prohibition was overly broad and grossly disproportionate. The Court adopted an unduly narrow interpretation of the objectives of s. 212(1)(*j*) and failed to accord deference to Parliament's legislative decision by applying the "reasoned apprehension of harm" standard and by incorporating gross disproportionality into its overbreadth assessment.

102. The Court of Appeal defined the objective of the living on the avails prohibition as being "to prevent the exploitation of prostitutes by pimps."[149] It did not accept that it was part of a bigger

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(the lure of street prostitution has not been offset by the existence of safe legal brothels; street-based prostitution continues to be active in parts of Brisbane); *United Nations General Assembly, Report of the Special Rapporteur on violence against women, its causes and consequences,* J.A.R., Vol. 47, Tab 110E, p. 13681 (a substantial number of women who could work in the legal sector have shifted to the unregulated sector to avoid taxation); *Selling Sex in Queensland, 2003,* J.A.R., Vol. 28, Tab 61F, pp. 8006, 8029, 8032, 8035 and 8047 (Many street-based prostitutes reported high rates of drug use; they would not likely have been able to work in legal brothels because of their drug policies).

[147] *OCA Judgment, supra* at paras. 210-211. See also *OCA Judgment*, *supra* at para. 368 (per MacPherson J.A.).

[148] In Queensland, Australia, just 10% of prostitution is believed to occur in legal brothels: *Crime and Misconduct Commission, Regulating Prostitution An Evaluation of the Prostitution Act (QLD), (2004)*, J.A.R., Vol. 27, Tab 61D, pp. 7792-7793. See also, *ibid.* at pp. 7797, 7879-7880, 7797 and 7882. In New South Wales and Victoria, illegal prostitution appear to have escalated despite the availability of legal options: *Crime and Misconduct Commission, Regulating Prostitution An Evaluation of the Prostitution Act (QLD), (2004)*, J.A.R., Vol. 27, Tab 61D, pp. 7796. Much of this evidence is summarized in Appendix B.

[149] *OCA Judgment, supra* at para. 220.

scheme aimed at controlling the commercialization of prostitution or promoting values of dignity and equality. As discussed above,[150] this narrow interpretation is not consistent with past jurisprudence. The living on the avails provision does not just target overtly exploitative relationships. It also seeks to prevent persons from profiting from the business of prostitution, consistent with Parliament's objectives of discouraging the commercialization of prostitution and preventing the potential for more subtle forms of exploitation by allowing persons to live parasitically off the earnings of prostitutes.

103. The Court of Appeal failed to apply the reasonable apprehension of harm standard to its assessment of overbreadth. Ontario adopts the submissions of AG Canada, showing the rational basis for Parliament's decision to extend the prohibition to anyone who lives parasitically on the avails of prostitution.[151]

104. The Court also failed to assess overbreadth on a standard of gross disproportionality. The Court should have considered whether the adverse effect of the living on the avails provision on the applicants' security interests was grossly disproportionate to the state interest in discouraging the commercialization of prostitution and preventing the exploitation of prostitutes. The Court's analysis was imbalanced from the outset by its failure to give full weight to all of the provision's pressing objectives. Moreover, the Court improperly attributed too much responsibility for the harms suffered by prostitutes to the provision. Although the provision may limit a prostitute's ability to hire a regular bodyguard or driver, there are similar protective measures available which do not run afoul of the law. For example, if a prostitute retained different taxi drivers to transport and wait while she met with clients, no individual taxi driver could be said to be living on the avails as he would not have an economic interest in, and would not be living parasitically on, the earnings of the prostitute. The fact that some protective measures are not precluded by the law was not factored into the Court's gross disproportionality assessment.

105. Finally, should this Court choose to accept the Court of Appeal's finding that "in circumstances of exploitation" should be read into s. 212(1)(*j*), thus allowing prostitutes to hire protective personnel such as bodyguards or receptionists that could screen clients, this would need to be factored into the assessment of whether the bawdy house prohibition was inconsistent with the

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[150] See discussion *supra* at paras. 69-74. See also *Factum of AG Canada*, *supra* at paras. 110-114.

[151] *Factum of AG Canada*, *supra* at para. 117-119.

principles of fundamental justice. More specifically, when assessing the impact of the bawdy house prohibition on the security interests of the claimants, the Court would need to consider that they would no longer be precluded from hiring protective personnel when working out-call.

PART IV: SUBMISSIONS ON COSTS

106. The Attorney General of Ontario makes no submissions at to costs.

PART V: ORDER REQUESTED

107. It is requested that the appeal be allowed. Alternatively, it is requested that any declaration of constitutional invalidity be suspended for a further period of 18 months.

ALL OF WHICH is respectfully submitted this 20th day of March, 2013 by

Jamie Klukach
Counsel for the Attorney General of Ontario

Christine Bartlett-Hughes
Counsel for the Attorney General of Ontario

Megan Stephens
Counsel for the Attorney General of Ontario

PART VI: AUTHORITIES CITED

Para(s)

PART VII: STATUTORY PROVISIONS

None.

Appendix A:
The Regulation of Prostitution in Australia

Animating philosophy	Basic Tenets of the Model
New South Wales	

Decriminalization	• Brothels are regulated by local councils and subject only to standard business requirements. They are responsible for deciding where brothels can be located and develop policies for managing brothels in their areas.
	• Escort agencies are unregulated and do not require planning approval.
	• Sole operators may require council approval - premises used by only one person can be considered a brothel.
	• Street-based prostitution is legal in certain areas (including safe streets and safe houses).
	• Illegal activities under the *Summary Offences Act* 1988 include:
	  • living on the earnings of a prostitute (brothel owners and managers are exempt);
	  • causing or inducing prostitution;
	  • using premises or allowing premises to be used for prostitution when they are held out as available for massage, saunas, steam baths, exercise of photographic studios;
	  • advertising premises for prostitution or for prostitutes;
	  • soliciting near or within view of a dwelling, school, church or hospital.

Victoria	

Partial legalization	• Prostitution is regulated by the *Prostitution Control Act 1994,* the *Prostitution Control Regulations 1995* and the *Health (Infectious Diseases) Regulations 2001*.
	• Since 1995, prostitution is controlled through a combination of planning processes and licensing system:
	  • The Business Licensing Authority issues licenses to operators of brothels and escort agencies and administers the Act's licensing and registration provisions.
	  • The Act creates a dual licensing system for 6-room brothels. Small owner-operated brothels need not be licensed and can operate legally within the planning requirements of local authorities.
	  • Before approval will be given for a brothel, applicants must satisfy a number of criteria, based on: whether there is any other brothel in the neighbourhood; the effect of the brothel's operation on children in the neighbourhood; whether the land is within 200 metres of a place of worship, school, kindergarten, children's services centre or other place regularly frequented by

	children and, if so, what effect it will have on the community; other land use in the same neighbourhood involving similar hours of operation and creating similar amounts of traffic and noise; the amenity of the neighbourhood; the provision of off-street parking; the proposed size of off-street parking; landscaping of the site; access to the site; the proposed size of the brothel and number of people proposed to be working in it; proposed method and hours of operation. • Private escort workers must be registered. • Escorts from brothels are permitted. • It is an offence for a prostitute to work while infected with an STI. • Brothels or escort agencies without a licence or an exemption are illegal. • Street-based prostitution is illegal.
Queensland	
Partial legalization	The *Prostitution Act 1999* authorizes an individual to apply for a brothel license or a certificate to manage a brothel on behalf of the licensee. The Act also imposes certain restrictions on brothels: • a new process exists whereby a building can be declared "a prohibited brothel" through application to a Magistrates Court. • once a brothel has been declared a prohibited brothel, the declaration is published in a newspaper, notices are given to the occupier, the owner and the registered mortgagee, and a notice is fixed at the entrance of the building. • anyone found on the premises following the declaration can be charged with an offence under the Act. The Act increases the financial penalty for public soliciting.
South Australia	
Full prohibition/ criminalization	All prostitution activity is illegal. The *Summary Offences Act 1953* specifically prohibits the following activities: • permitting premises to be frequented by prostitutes • soliciting in a public place • living off the earnings of prostitution • keeping, managing or assisting in a brothel • receiving money in a brothel in respect of payment for prostitution • permitting premises to be used as a brothel The South Australian Parliament debated adopting a legalized framework for prostitution using a "negative licensing model" in 2001. The Bill was defeated.

Western Australia	

Criminalization/ containment (informal)	• Prostitution is governed by the *Police Act 1892,* the *Criminal Code Act, Compilation Act 1913* and the *Prostitution Act.*
	• Although prostitution is not illegal in itself, the following acts associated with it are:
	  • keeping premises for the purposes of prostitution
	  • procuring a person to become a prostitute
	  • permitting a female under 21 years to be in a brothel
	  • living off the earnings of prostitution
	  • permitting premises to be used as a brothel
	  • being the occupier of a house frequented by prostitutes
	  • consorting with prostitutes
	  • soliciting in a public place
	• Since 1975, the Western Australia sex industry has operated with the informal 'sanction' of police via the 'containment policy', which is an informally established arrangement between police and brothel owners. The policy is enforced by police in the metropolitan area and allows about 13-15 premises (including an escort agency and massage parlour) to operate on condition that they adhere to the requirements of the Police Department, which include registering workers, prohibiting alcohol or drugs on the premises, regular health checks and no juvenile prostitution.
	• In 2003, a Bill to regulate prostitution and introduce brothels was defeated in Parliament.

Tasmania	

Criminalization	• It is not illegal to provide sexual favours for monetary gain. Virtually all of the activities associated with prostitution are prohibited (under the *Criminal Code Act 1924* and the *Police Offences Act 1935*) including:
	  • soliciting in a public place
	  • living off the earnings of prostitution
	  • keeping a brothel or bawdy house
	  • procuring a person for prostitution
	  • permitting premises to be used for prostitution.
	• As of January 2007, Cabinet was reviewing a Parliamentary Committee report that recommends adopting a legalized framework with a licensing regime that would give local government input into the location of brothels. "There is no indication yet that Government will endorse the recommendations made in the report."

Australian Capital Territory	

Partial legalization	• The *Prostitution Act 1992* allows for two forms of legal prostitution:
	  • Commercial brothels, which must register and pay a licensing fee of $200 per year. Brothels must be located in one of two light industrial areas. Sexual services may be provided on-site or through escort services. There is no limit on the number of rooms.
	  • Private sole operators also must register and pay a $200 annual fee. Registration entitles workers to provide sexual services from their homes. If they are providing an escort service, they may work with one other person.
	• Street-based prostitution is illegal.

Northern Territory	

Partial legalization	• Under the *Prostitution Regulation Act 1991,* escort agency businesses must apply to the NT Licensing Commission for an operating licence. Applicants are assessed for their personal character, including criminal history. Those who are ineligible to apply include:
	  • persons under 18 years of age
	  • persons who are not resident in the Northern Territory
	  • persons who have been found guilty of a disqualifying offence
	  • persons who have an associate (spouse, de facto partner, homosexual partner, business partner or business associate) who had been found guilty of a disqualifying offence.
	• Both the operator and manager of an escort agency must be licensed. The agency must operate according to the licence conditions (e.g. providing workers with a safe work environment) and all sex workers working for the agency have to be certified by police as free from any disqualifying offences. Advertising of prostitution services is restricted.
	• Sole operators cannot provide sexual services in their homes. Were they to do so, their homes would be considered brothels, which are prohibited under the Act. Sole operators can provide escort services (or outcalls to hotels). They do not have to be licensed as an escort agency.
	• Street-based prostitution is illegal.

Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD),* 2004, Vol. 27, Tab D, JAR, pp. 7837-7840
IBISWorld Industry Report, 11 January 2007, *Sexual Services in Australia,* Vol. 2, Tab 176D, Suppl. JAR, pp. 26868-26870

Appendix B:
Continuing Harms Associated With Prostitution In Jurisdictions That Have Legalized Aspects of Prostitution

The Legalization of Brothels Has Little Impact on the Prevalence of Street Prostitution		
Jurisdiction	**Data/Relevant Information**	**Pinpoint Reference**
Nevada	Prostitutes reported feeling safer working in street prostitution than in legal Nevada brothels, where they were not permitted to reject customers. Some commented that on the street they could refuse dangerous-appearing or intoxicated customers and that often a friend would make a show of writing down the john's license plate number, which they considered a deterrent to violence.	M. Farley, "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder", JAR, Vol. 49, Tab 113B, p. 14308
	Even where brothels operate legally, approximately 24% of prostitutes reported that they continue to work on the streets.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9278
New Zealand	The Prostitution Law Review Committee erroneously states that the *Prostitution Reform Act* 2003 has had little impact on the numbers of people working in the sex industry: it is not possible to say whether it has or has not on the basis of the research. A number of factors suggest that sex industry in New Zealand is likely larger than indicated in the Report. One study done since the Review indicates that, in Christchurch, the number of street prostitutes has neither increased nor decreased	Affidavit of John Pratt, JAR, Vol. 62, Tab 125, pp. 18031-2, p.18043; *Report of the Prostitution Law Review Committee,* 2008, JAR, Vol. 62, Tab 125C, p. 18258; Suppl. JAR, Tab 178, pp. 26926, 26934, 26950-1
	New Zealand prostitutes reported having been involved in many different kinds of prostitution, including escort, strip club, phone sex, internet prostitution, peep show, bar prostitution, street prostitution, brothel prostitution, and prostitution associated with a military base. (Farley, 2003a)	M. Farley, "Bad for the Body, Bad for the Heart", JAR, Vol. 49, Tab 113F, p. 14406
Australia	Research has not shown that legal prostitution decreases illegal (street and brothel) prostitution. Following legalization of prostitution in Victoria, the number of legal brothels doubled but the greatest expansion was in illegal prostitution. In one year alone (1999), there was a 300% growth of illegal brothels (Sullivan & Jeffreys, 2001).	M. Farley, "Bad for the Body, Bad for the Heart", JAR, Vol. 49, Tab 113F, p. 14406

Victoria, Australia	The lure of street prostitution has not been offset by the existence of safe legal brothels. Those with problematic drug or alcohol use have no legal option but to work on the streets. Prostitutes can earn more money on the streets because they are not required to split their earnings. By 2001, street prostitution in parts of Melbourne had become so invasive that a committee of enquiry was convened to attempt to tackle the problem. (Home Office, 2004).	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7832
Queensland, Australia	Street-based prostitution continues to be active in parts of Brisbane. Residents and business owners continue to complain to the police about needles and condoms found in their yards or that prostitutes are servicing clients on their properties.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7880
	Street-based prostitutes reported high rates of drug use. Over half of the sample in *Selling Sex in Queensland* reported having injected an illicit drug in the preceding week. Many of these prostitutes reported engaging in sex work to pay for drugs. These prostitutes would not likely be able to work in the legal brothels. Indeed, some specified that the legal brothels' drug policies were the reason they did not work in the licensed system.	*Selling Sex in Queensland 2003,* JAR, Vol. 28, Tab 61F, pp. 8032, 8035, 8047

The Legalization of Brothels Has Led to An Increase in the Total Number of Brothels (Both Legal and Illegal)

Jurisdiction	Data/Relevant Information	Pinpoint Reference
Victoria, Australia	Since legalization in Victoria, the sex industry has expanded, the illegal industry has been 'pushed underground', criminal involvement has increased and the industry is now more dangerous (Sullivan & Jeffreys 2002)	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7831
	In 1995, the Attorney General of Victoria reported that the brothel legislation had not prevented the growth of a substantial illegal sex industry. The number of unlicensed brothels in Melbourne was estimated to have tripled in 12 months (Home Office, 2004).	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7832

New South Wales, Australia	There was evidence that safety zones led to an increase in street solicitation in surrounding areas and that there was significant drug use in safe houses. The provision of safety zones does not necessarily decrease street prostitution but merely provides an area where sexual services take place. Based on this evidence, the Crime and Misconduct Commission recommended that Queensland not implement safe houses or safety zones.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, pp. 7798; 7784

Prostitutes Continue to Operate Outside the Legal Regime

Jurisdiction	Data/Relevant Information	Pinpoint Reference
Nevada	A significant number of prostitutes (at least 24%) reported continuing to operate outside the legal regime.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9278
	If a woman tests positive for HIV, she is fired from the legal brothel and will likely become involved in illegal prostitution either in bars or hotels in the small towns or in Las Vegas, where all prostitution is illegal.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9283
	Only 10% of all prostitution in Nevada is conducted legally.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9271
The Netherlands	Although prostitutes working legally have the opportunity to accrue pension funds, they fail to take advantage of this option, fearing that the designation would pursue them for the rest of their lives. (A. Schippers, http://www.rnw.nlfsocietylhtmlfcritics020102.html (last visited Apr. II, 2006); S. Daley, New Rights for Dutch Prostitutes, But No Gain, N.Y. TIMES, Aug. 12, 2001, at 15).	M. Farley, "Prostitution, Trafficking, and Cultural Amnesia", JAR, Vol. 49, Tab 113C, p. 14351
	An important aim of the 2000 legislation was to get the criminal element out of prostitution to improve the rights and the lives of prostitutes. Results have been disappointing. The benefits for prostitutes and owners of licensed brothels have, until now, been small. There is a large and growing grey sector that escapes regulation.	Affidavit of Lotte Van de Pol, JAR, Vol. 47, Tab 110, p. 13501

	Many prostitutes come from outside the European Union and cannot get a work permit, so they work in the illegal sector. It is estimated that more than half of prostitution business is probably unlicensed, and therefore illegal. In this illegal sector, working conditions tend to be much worse than in the licensed, legal sector.	Affidavit of Lotte Van de Pol, JAR, Vol. 47, Tab 110, p. 13521
	Women continue to operate in the unregulated grey sector. A substantial number of women who could work in the legal sector have shifted to the unregulated sector to avoid taxation.	United Nations General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences*, JAR, Vol. 47, Tab 110E, p. 13681
Germany	Despite attempts to unionize women in Germany's legal prostitution industry, prostitutes have not only avoided unions but have avoided registering with the government. They continue to engage in illegal prostitution in part because they believed that the remote areas where prostitution is zoned put them at increased risk of physical danger (Taubitz, 2004).	M. Farley, "Bad for the Body Bad for the Heart", JAR, Vol. 49,Tab 113F, p.14401
	Under the 2002 *Prostitution Act,* prostitutes are entitled to employment contracts and benefits but only "several hundred women have registered for these benefits."	Affidavit of J. Raymond, JAR, Vol. 55, Tab 119, p. 16056.
Australia	In New South Wales and Victoria, illegal prostitution appears to have escalated, despite the availability of legal options.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7796
Victoria, Australia	Licensing controls have meant that single prostitutes cannot legally work from home because they cannot afford the permits, rents or licence for commercial premises (Perkins 1991). In legal brothels, women report no longer having the power to choose clients, work hours or pay rates.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7831
	The licensing system in Victoria has been criticized for being too restrictive, the application process too onerous, and compliance costs too high. As a result, non-compliance is common and a two-tiered industry of legal (licensed) and illegal (unlicensed) brothels has developed (Gordan, 2005).	*Report of the Prostitution Law Review Committee,* 2008, JAR, Vol. 62, Tab 125C, p. 18231

Queensland, Australia	Illegal prostitution activities in Queensland have continued unabated since the implementation of the *Prostitution Act.* It is estimated that the ratio of illegal operators (of brothels and escort agencies) to legal ones is 100 to 1. There is no reliable way to confirm that estimate. The majority of sexual services in Queensland - approximately 75% - are provided as escort or outcall services. Most of these services are currently provided by operators and workers illegally. Studies have shown that there are serious financial incentives for prostitutes to continue to operate outside the legal brothel sector.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, pp. 7879-7880; 7797; 7882; 7792-7793.
	When asked why they were not working in a legal brothel, street-based prostitutes were most likely to report that they did not want to give a percentage of their earnings away (62.5%) or that the drug policy in the brothels precluded this (8.3%). Those who were working privately off-street, were most likely to report that they preferred working elsewhere (41.7%), that they did not want to give a percentage away (29.1%), or that they would have less flexibility if they chose to work in the licensed system (6.3%). The report concluded that street-based prostitutes have not gained from the changes that have been implemented.	*Selling Sex in Queensland 2003,* JAR, Vol. 28, Tab 61F, pp. 8029, 8006
	The Crime and Misconduct Commission noted that the nature of the industry makes policing difficult. Escort services are often run by parties in other states and even overseas.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7880.

Prostitutes Continue to Suffer Violence Within Legal Brothels

Jurisdiction	Data/Relevant Information	Pinpoint Reference
Nevada	In 2004, a prostitute at a Nevada brothel filed civil lawsuits against a john who assaulted her and against a pimp because he failed to call police and because the panic button in her room was not working (Associated Press, 2004)	M. Farley, "Bad for the Body, Bad for the Heart", JAR, Vol. 49, Tab 113F, p. 14408

	In a 2007 study of Nevada prostitution and trafficking: • 27% of women reported having been pressured or coerced into an act of prostitution in the legal brothels; • 24% had been physically assaulted in legal prostitution; and • 15% had been threatened with a weapon in the legal brothels.	Affidavit of Melissa Farley, JAR, Vol. 49, Tab 113, p.14262; M. Farley "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9279.
	Signs were posted outside brothels stating that johns are required to use condoms, but there is no enforcement of this policy. Regardless of whether brothels have policies regarding condom use, johns request or demand that women not use condoms.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9283
	Women in brothels earn more money if they perform sex acts without condoms. Many women in the legal brothels reported not using condoms. One brothel advertised that condoms were not used for some sex acts.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9283
	Women working in legal brothels report being controlled and monitored by electronic surveillance. They are often not permitted to leave the brothel without an escort. Lock down rules are often in force preventing women from leaving.	B.G. Brents & K. Hausbeck, "Violence and Legalized Brothel Prostitution in Nevada", JAR, Vol. 20, Tab 51Z, pp. 5562-5563
New Zealand	83% of study respondents experienced some type of violence in prostitution. Among those working in brothels, 8% reported having been raped and 21% reported having been physically assaulted. (Plumridge and Abel, 2001)	M. Farley, "Bad for the Body, Bad for the Heart", JAR, Vol. 49, Tab 113F, p. 14407
	It does not seem possible to justify the claims made in the 2008 Report that the *Prostitution Reform Act* 2003 has had a marked effect in safeguarding the rights of sex workers or even, indeed, that safe sex practices are very much the norm.	Affidavit of John Pratt, JAR, Vol. 62, Tab 125, p. 8053
The Netherlands	A brothel owner in the Netherlands complained about an ordinance requiring that brothels have pillows in the rooms: "You don't want a pillow in the [brothel] room. It's a murder weapon". (Daley, 2001).	M. Farley, "Bad for the Body, Bad for the Heart", JAR, Vol. 49, Tab 113F, p. 14409

	The new prostitution legislation of 2000 has not meant that prostitutes are now more safe. The ability to work indoors, the decriminalization of prostitution and the legalization of sex work have not removed the risk of being beaten, abused or coerced.	Affidavit of Lotte Van de Pol, JAR, Vol. 47, Tab 110, p. 13526
	Checks and monitoring of prostitution are no guarantee that women are not working under duress. Criminal investigation has revealed threats, violence, fear and dependence. The idea that a clean, normal business sector has emerged is an illusion. In the licensed window prostitution sector in the red-light districts of Amsterdam, Alkmaar and Utrecht, human traffickers, pimps and bodyguards had free reign for years.	A.H. Van Wijk, "Beneath the Surface", National Police Service, Criminal Investigations Department, 2008, JAR, Vol. 47, Tab 111D, p. 13831
Germany	In Germany, 59% of respondents stated that they did not think that legal prostitution made them any safer from rape and physical assault.	M. Farley, "Prostitution and Trafficking in Nine Countries", JAR, Vol. 49, Tab 113B, pp. 14297, 14300
Australia	Dutch, South African, and Australian pimps have commented on the extreme physical violence that johns inflict on women in prostitution. Australian women in prostitution are advised to take classes in hostage negotiation.	M. Farley, "Prostitution, Trafficking and Cultural Amnesia", JAR, Vol. 49, Tab 113C, p. 14352
	A bouncer in a legal brothel reported that when women ring the buzzer, he breaks the door open, but there is really no way to prevent violence. According to this bouncer, johns beat women with some regularity (Jeffreys, 2003)	M. Farley, "Bad for the Body, Bad for the Heart", JAR, Vol. 49, Tab 113F, p. 14410
	There is evidence that some licensed brothel managers actively encourage sex without condoms. Some threaten dismissal if there is reluctance to comply with a client's wishes (Home Office 2004)	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7831
Queensland, Australia	A significant portion of prostitutes working in legal brothels in Queensland reported having experienced unwanted sexual experiences as part of their work: 10.9% agreed that a man had attempted sexual intercourse when they didn't want him to by using force but intercourse did not occur; 5% reported having had sexual intercourse when they didn't want to because they were overwhelmed by continual	*Selling Sex in Queensland 2003,* JAR, Vol. 28, Tab 61F, p. 8038

	argument and pressure; 4% reported having had sexual intercourse when they didn't want to because someone used force. 3% of respondents working in legal brothels reported having been raped more than once by a client.	
	67.3% of prostitutes working in legal brothels in Queensland reported having been offered extra money by clients for sex without a condom. The Crime and Misconduct Commission recommended that the *Prostitution Act* be modified to create the offence of offering to have sex without a condom to supplement the existing offence of providing intercourse without a condom.	*Selling Sex in Queensland 2003,* JAR, Vol. 28, Tab 61F, JAR, p. 8034; Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7799
	In Brisbane, since July 2000, the proportion of prostitutes reporting a physical assault by a client was just as high as before implementation of the *Prostitution Act.*	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7867
Victoria, Australia	Research showed that workers were entering into highly problematic 'contracts' or agreements with management about the extent of their duties, to the point that they have little room to refuse a client. Prostitutes' safety ends up depending on the benevolence of the manager rather than any consistent framework.	A. Quadara, "Sex Workers and Sexual Assault in Australia", JAR, Vol. 27, Tab 61E, pp. 7969-7970

The Legalization of Prostitution Has a Normalizing Effect on Attitudes Towards The Purchase of Sex

Jurisdiction	Data/Relevant Information	Pinpoint Reference
Nevada	Although rarely stated explicitly, the acceptance of legal prostitution is rooted in the idea that men are entitled to sex on demand. As a Nevada politician explained, legal prostitution is "a community service to meet natural needs." "The men need a release, they deserve relief," said a pimp who ran a legal brothel. A prevailing attitude of johns is that prostitution in a legal brothel is "not cheating, it's more like going to the grocery store, like stopping at a convenience store and getting a Slurpy."	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9299

New Zealand	Prostitutes continue to be stigmatized even after regimes have been decriminalized.	Cross-examination of Lauren Casey, JAR, Vol. 26, Tab 59, pp. 7469-7470
The Netherlands	In 2002, the Tippelzone in Amsterdam became impossible to handle because, on busy nights, the number of prostitutes working the zone could be 150; it was originally designed to accommodate a maximum of 80. The zone was seen as "generating opportunities for prostitution and perhaps making the profession attractive." The large number of prostitutes led to dangerous situations and intolerable competition among prostitutes. The level of trafficking of women in the area was found to be alarming. The Tippelzone was closed in 2003 (van Soomeren 2004).	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, pp. 7883-7884.
	Prostitutes continue to be subject to stigmatization, despite the legalization of the profession.	Affidavit of Lotte Van de Pol, Vol. 47, Tab 110, pp. 13531-13532, para. 82-83
Germany	In Germany, 1.2 million clients visit prostitutes daily. 18% of German men regularly pay for sex.	J. Wohlfarth, "Ancaje juridico y social de la prostitucion en Allemania", *Las cuidades y la prostitucíon,* Madrid, June 2004, JAR, Vol. 56, Tab 119J, p. 16555 "Stolen Youth: Child Prostitution Plagues German-Czech Border" *DW-World. De Deustche Welle,* October 29 2003, JAR, Vol. 57, Tab 119N
Australia	In Australia, researchers have found that the legalization of prostitution produces a "prostitution culture" with increases in illegal and legal prostitution, organized crime, demand for prostitution, child prostitution, and trafficking of women for the purpose of prostitution.	M. Farley, "Prostitution, Trafficking and Cultural Amnesia", JAR, Vol. 49, Tab 113C, p. 14350
	The revenues associated with the sexual services industry in Australia have increased from an estimated $1,760.8 million at the end of 2001-2 to $2,111.1 million by the end of 2006-7. Revenue increased by 6.1% in 2005-6 and was expected to be even higher in 2006-7. The major reason for the	IBISWorld Industry Report, 11 January 2007, *Sexual Services in Canada,* Supp. JAR, Vol. 2, Tab 176D, pp. 26875-26879

	expected increase was the hosting of the Commonwealth games in Melbourne "widely considered Australia's brothel and table dancing capital". The Games were followed by the Formula 1 Grand Prix, which was known as another boon for the industry. "Over the period, clubs have effectively marketed themselves to a wide audience - companies tend to hire drive-around advertisement boardings - which have helped normalise sexual services in the eyes of many (especially the young males they seek to attract)." Despite the apparent normalization of the purchase of sexual services, the IBISWorld Industry Report concludes, "There is significant moral stigma attached to prostitution whether conducted in a brothel or on the street."	
	The Australian Centre for the Study of Sexual Assault concluded that there is a pervasive social stigma associated with sex work, even when it is not criminalized.	A. Quadara, "Sex Workers and Sexual Assault in Australia", JAR, Vol. 27, Tab 61E, pp. 7953
New South Wales, Australia	There is evidence of a considerable rise in the number of sex workers, of brothels (as the behaviour is now seen as condoned) and of STIs among men, a possible indicator of risky sexual behaviour.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, tab 61D, p. 7833

Countries With Legalized Prostitution Are Regarded As Sex Tourism Destinations

Jurisdiction	Data/Relevant Information	Pinpoint Reference
Nevada	Johns in the legal brothels also come from other countries. One pimp mentioned that his customers came from the UK, Canada and Asia. Often these men are assumed to have more money than regular johns, so the brothels advertise on the internet to countries out of the US. Half of the johns in a legal brothel near Las Vegas were from other countries. Floor managers at another brothel reported that the johns included men from Japan, Germany and China. Another pimp told us that his legal brothel's biggest spenders were men who found the brothel on the internet.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9300

The Netherlands	The Netherlands and Germany top the list of johns' foreign sex tourism.	J. MacLeod *et al.* "Challenging Men's Demand for Prostitution in Scotland", JAR, Vol. 50, Tab 113Q, p. 14600
	Open and visible prostitution has become one of the main tourist attractions of the city. In combination with the open availability and use of soft drugs, this has earned the city a reputation as being a relaxed and tolerant city, or, in the opinion of others, a criminal one.	Affidavit of Lotte Van de Pol, JAR, Vol. 47, Tab 110, p. 13527
Germany	The Netherlands and Germany top the list of johns' foreign sex tourism.	J. MacLeod *et al.* "Challenging Men's Demand for Prostitution in Scotland", JAR, Vol. 50, Tab 113Q, p. 14600
	The Child Centre for Children at Risk in the Baltic Sea Region reported that the commercial sexual exploitation of children in the German-Czech border districts began to flourish in 1996 and has increased substantially in the years since. A key reason for the increasing demand is that larger numbers of tourists specifically request children.	Child Centre for Children at Risk in the Baltic Region, *Children in Street Prostitution. Report from the German-Czech Border,* JAR, Vol. 57, Tab 119M, pp. 16694-5.

Organized Crime Continues to Operate in Legal Brothels

Jurisdiction	Data/Relevant Information	Pinpoint Reference
Nevada	Eastern European organized criminals have been involved in Las Vegas escort prostitution for a number of years. There is evidence of organized crime involvement in strip club prostitution, escort prostitution, legal brothel prostitution, pornography production in those locations, and in domestic and international trafficking of women for the purpose of prostituting in a range of locations throughout Nevada.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, pp. 9291, 9297
The Netherlands	Violence against women and the coercion of women appear to have increased since the 1990s, when the Red Light District was taken over by organized crime.	Affidavit of Lotte Van de Pol, JAR, Vol. 47, Tab 110, p. 13524

	The Sneep gang (comprised of approximately 35 men) had prostitutes working in the licensed sector of the Red Light district. Women working for them were subject to forced abortions and breast enlargement. At least 78 women are known to have been victimized by this gang.	Supplemental Affidavit of Lotte Van de Pol, JAR, Vol. 47, Tab 111, pp. 13717-13719
Australia	There is evidence that it has not proved possible to restrict ownership of brothels to the extent that had been hoped. They remain in the hands of cartels. (Home Office 2004)	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7831
Queensland, Australia	Forty percent of prostitutes who responded to the Crime and Misconduct Commission's sex worker survey reported that they had been affiliated with organized crime groups at some stage during their careers in the sex industry. Sixty-five percent reported such affiliation after the implementation of the *Prostitution Act* (legalizing brothels). The activities that these groups had been involved in included importing drugs (59%), selling drugs (58%), using drugs (58%), illegal immigration (8%), child prostitution (4%), illegal brothels/escort agencies (58%) and other activities such as dealing in stolen property and emotional abuse, sexual harassment and rape of sex workers (27%). Criminal liaisons were reported by workers in licensed brothels (35%), sole operators (48%), massage parlours (67%), illegal brothels (100%), escort agencies (67%), bar and hotel work (33%) and on the streets (100%).	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7847
	It has been impossible to restrict criminals from owning brothels in Queensland.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7871
New South Wales, Victoria and Tasmania, Australia	Anecdotal evidence suggests that these states have much higher rates of organized crime involved in prostitution. Not only is there more involvement in illegal prostitution *per se*, there is greater involvement in other illegal activities such as illicit drug use, child prostitution, stolen property, etc.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7847

Trafficking of Women and Children Into Brothels Remains a Problem in Legalized Regimes

Jurisdiction	Data/Relevant Information	Pinpoint Reference
Nevada	According to an interview with a Nevada Brothel Association lobbyist, 90% of legal brothel prostitutes are not Nevada residents. Both law enforcement sources and survivors of Nevada legal prostitution report that most women in the legal brothels are pimped into them. Together, these two facts suggest that a majority of women in the Nevada legal brothels have been domestically trafficked. Interviews with women working in legal brothels were consistent with these reports. 71% of the women had moved from another state to Nevada for the purpose of prostitution. 58% reported that they had previously prostituted in other US states.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9287
	Domestic and transnational trafficking occur throughout Nevada, with women and girls trafficked into both legal and illegal brothels. International trafficking to and from Las Vegas and other locations in Nevada is an increasing concern of local and federal law enforcement, the Department of Labor, and social service agencies.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9288
	At least 27% of study respondents in the legal brothels believed that there were undocumented immigrants in the legal brothels.	M. Farley, "Prostitution and Trafficking in Nevada" (2006), JAR, Vol. 32, Tab 65G, p. 9289
New Zealand	Sex trafficking may occur within or across international borders, thus women may be trafficked domestically or internationally. 22% of prostitutes reported having been domestically trafficked from one region of New Zealand to another. 6% had been internationally trafficked from another country to New Zealand.	M. Farley, "Preliminary Report: New Zealand Prostitution", JAR, Vol. 50, Tab 113P, p. 14582
The Netherlands	The exploitation of minor girls and trafficked women also appears to take place mainly in grey sector sex establishments. In 2002, an official evaluation of the lifting of the brothel ban found a lack of supervision and poor accessibility for social and health workers in the grey sector, as the result of which these prostitutes are vulnerable to	United Nations General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences*, JAR, Vol. 47, Tab 110E, p. 13682

	exploitation. Their position has worsened rather than improved. Four years later, authorities are still struggling to get control of the grey sex sector, especially the escort agencies.	
	In 2004, there were 405 cases of trafficked women reported to the Dutch Foundation Against Trafficking Women. The vast majority of these related to sexual exploitation of women.	United Nations General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences*, JAR, Vol. 47, Tab 110E, p. 13678
	Lifting the ban on brothels was supposed to remove prostitution from the criminal sphere, but in Amsterdam's red-light district, trafficking of women has flourished.	R. Hopkins, "Slave Trade in the Wallen [Red Light District]", JAR, Vol. 47, Tab 110G, p. 13699
	A study focusing on human trafficking in the licensed prostitution sector estimated that 50-90% of women were working against their will in three Dutch cities. Based on the most conservative estimate of 50%, this amounts to 4,000 victims of human trafficking per year in Amsterdam alone.	A.H. Van Wijk, "Beneath the Surface", National Police Service, Criminal Investigations Department, 2008, JAR, Vol. 47, Tab 111D, p. 13837
	Trafficking of women into prostitution did not diminish following legalization.	Written responses of L. Van de Pol to written questions, Supp. JAR, Vol. 2, Tab 177, p. 26908
Germany	German statistics suggest that there are over 400,000 prostitutes in the country, 90% of whom come from foreign countries.	J. Wohlfarth, "Ancaje juridico y social de la prostitucion en Allemania", *Las cuidades y la prostitucíon,* Madrid, June 2004, JAR, Vol. 56, Tab 119J, pp. 16555, 16560
	The United Nations Office on Drugs and Crime Report (2006) ranked Germany very high as a destination country for human trafficking.	United Nations Office on Drugs and Crime, *Trafficking in Persons: Global Patterns* (2006), JAR, Vol. 57, Tab 119K, p. 16649.

Australia	A UN Save the Children report (1999) found that Victoria and New South Wales were the two worst states for the abuse of children through prostitution. The trafficking of East Asian women for the purposes of prostitution was also found to be a growing problem.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7831
	In 1998, there were nearly 4,000 children abused in prostitution in Australia. Victoria, which legalized prostitution in 1984, had the highest numbers of child prostitutes (1998 ECPAT (Australia) report: *Youth for Sale: Australia's National Inquiry into the Commercial Exploitation of Children and Young People in Australia*).	Affidavit of M. Sullivan, JAR, Vol. 52, Tab 116, pp. 15115-15116
	In 2005, Korean police arrested crime syndicate members who had trafficked 37 women into brothels in Australia, New Zealand and Canada as punishment for failures to pay alleged debts.	M. Farley & S. Seo, "Prostitution and Trafficking in Asia", JAR, Vol. 49, Tab 113I, p. 14484
Victoria, Australia	Both child prostitution and sex trafficking into Victoria have increased significantly (Childwise 1997; Maltzahn 2004)	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7832

Funding for Exit Programs for Prostitutes is Reduced Post-Legalization

Jurisdiction	Data/Relevant Information	Pinpoint Reference
The Netherlands	The very fact of decriminalization may make funding harder to get. In Victoria (Australia), Ireland, the Netherlands and Sweden, "much promised funding for projects to assist women out of prostitution ... never translated into action. It would seem that once prostitution is legalised governments want to pretend the problem has gone away". (Bindel and Kelly, 2003)	*Report of the Prostitution Law Review Committee,* 2008, JAR, Vol. 62, Tab 125C, p. 18221
	Only 6% of municipalities indicated that attention was being given to helping women exit prostitution. This was despite the fact that Parliament had passed a resolution in 2004 urging the government to stimulate or facilitate exit programmes.	A.L. Daalder, "Prostitution in the Netherlands After the Lifting of the Ban on Brothels", JAR, Vol. 47, Tab 110D, p. 13660

Australia	Concerns were raised that the Prostitution Advisory Council had failed to provide adequate oversight of interventions to encourage workers to leave the industry such as exit and diversion programs. There was a perception that the existence of licensed brothels may have inadvertently encouraged sex workers into the industry. There is limited empirical evidence on these issues.	Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD)*, 2004, JAR, Vol. 27, Tab 61D, p. 7794