

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT/RESPONDENT
(Appellant)

– and –

TERRI JEAN BEDFORD, AMY LEOVITCH and VALERIE SCOTT

RESPONDENTS /APPELLANTS
(Respondents)

– and –

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

INTERVENERS

FACTUM OF THE INTERVENER

(THE EVANGELICAL FELLOWSHIP OF CANADA, INTERVENER)
(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)

**EVANGELICAL FELLOWSHIP OF
CANADA**

130 Albert Street, Suite 1810
Ottawa, Ontario K1P 5G4

SUPREME ADVOCACY LLP

397 Gladstone Avenue
Ottawa, ON K2P 0Y9

**EVANGELICAL FELLOWSHIP OF
CANADA**

130 Albert Street, Suite 1810
Ottawa, Ontario K1P 5G4

Georgiale A. Lang

Donald Hutchinson

Tel.: (613) 233-9868

Fax: (613) 233-0301

Email: hutchd@efc-canada.com

**Counsel for the Intervener, The Evangelical
Fellowship of Canada**

SUPREME ADVOCACY LLP

397 Gladstone Avenue
Ottawa, ON K2P 0Y9

Eugene Meehan, Q.C.

Marie-France Major

Tel: (613) 695-8855

Fax: (613) 695-8580

Email : emeehan@supremeadvocacy.ca

mfmajor@supremeadvocacy.ca

**Ottawa Agent for Counsel for the
Intervener, The Evangelical Fellowship of
Canada**

AND BETWEEN:

ATTORNEY GENERAL OF ONTARIO

APPELLANT/RESPONDENT
(Appellant)

– and –

TERRI JEAN BEDFORD, AMY LEOVITCH and VALERIE SCOTT

RESPONDENTS/APPELLANTS
(Respondents)

– and –

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

INTERVENERS

ATTORNEY GENERAL OF CANADA

The Exchange Tower
130 King Street West, Suite 3400
Toronto, Ontario, M5X 1K6

Michael H. Morris

Gail Sinclair

Nancy Dennison

Tele.: (416) 973-9704

Fax: (416) 952-4518

**Counsel for Appellant/Respondent on
Cross Appeal, Attorney General of Canada**

ATTORNEY GENERAL OF ONTARIO

720 Bay St, 10th Floor
Toronto, Ontario, M5G 2K1

Jamie C. Klukach

Christine E. Bartlett-Hughes

Megan Stephens

Tele.: (416) 326-4600

Fax: (416) 326-4656

Email: jamie.klukach@ontario.ca

**Counsel for Appellant/Respondent on
Cross Appeal, Attorney General of Ontario**

**OSGOODE HALL LAW SCHOOL OF
YORK UNIVERSITY**

4700 Keele Street
North York, Ontario, M3J 1P3

Alan Young

Tele.: (416) 736-5595

Fax: (416) 736-5736

Email: AYoung@osgoode.yorku.ca

**Counsel for the Respondent/Appellant on
Cross-Appeal, Terri Jean Bedford**

ATTORNEY GENERAL OF CANADA

Bank of Canada Building - East Tower
234 Wellington Street, Room 1212
Ottawa, Ontario, K1A 0H8

Christopher M. Rupar

Tele.: (613) 941-2351

Fax: (613) 954-1920

Email: christopher.rupar@justice.gc.ca

**Ottawa Agent for Counsel for
Appellant/Respondent on Cross Appeal,
Attorney General of Canada**

BURKE-ROBERTSON

441 MacLaren Street, Suite 200
Ottawa, Ontario, K2P 2H3

Robert E. Houston, Q.C.

Tele.: (613) 236-9665

Fax: (613) 235-4430

Email: rhouston@burkerobertson.com

**Ottawa Agent for Counsel for
Appellant/Respondent on Cross Appeal,
Attorney General of Ontario**

SACK GOLDBLATT MITCHELL LLP

500 - 30 Metcalfe Street
Ottawa, Ontario, K1P 5L4

Fiona Campbell

Tele.: (613) 235-5327

Fax: (613) 235-3041

Email: fionacampbell@sgmlaw.com

**Ottawa Agent for the
Respondent/Appellant on Cross-Appeal,
Terri Jean Bedford**

MARZEL LAW

265 Rimrock Road, Suite 200
Toronto, Ontario, M3J 3C6

Yaron Marzel**Stacey Nichols**

Tel.: (416) 485-5800

Fax: (416) 485-1610

Email: marzel@lernermarzel.com

**Counsel for the Respondent/Appellant on
Cross-Appeal, Amy Lebovitch**

SACK GOLDBLATT MITCHELL LLP

1100 - 20 Dundas St. W.
Toronto, Ontario, M5G 2G8

Marlys A. Edwardh**Daniel Sheppard**

Tel.: (416) 979-4380

Fax: (416) 979-4430

Email: medwardh@sgmlaw.com

**Counsel for the Respondent/Appellant on
Cross-Appeal, Valerie Scott**

**HUNTER LITIGATION CHAMBERS
LAW CORPORATION**

1040 West Georgia Street
Suite 2100

Vancouver, British Columbia, V6E 4H1

Brent B. Olthuis**Megan Vis-Dunbar**

Tel.: (604) 891-2400

Fax: (604) 647-4554

E-mail: bolthuis@litigationchambers.com

**Counsel for Intervener, British Columbia
Civil Liberties Association**

SACK GOLDBLATT MITCHELL LLP

500 - 30 Metcalfe Street
Ottawa, Ontario, K1P 5L4

Fiona Campbell

Tel.: (613) 235-5327

Fax: (613) 235-3041

Email: fionacampbell@sgmlaw.com

**Ottawa Agent for Counsel for the
Respondent/Appellant on Cross-Appeal,
Amy Lebovitch**

SACK GOLDBLATT MITCHELL LLP

500 - 30 Metcalfe Street
Ottawa, Ontario, K1P 5L4

Fiona Campbell

Tel.: (613) 235-5327

Fax: (613) 235-3041

Email: fionacampbell@sgmlaw.com

**Ottawa Agent for Counsel for the
Respondent/Appellant on Cross-Appeal,
Valerie Scott**

MICHAEL J. SOBKIN

90 blvd. de Lucerne

Unit #2

Gatineau, Quebec, J9H 7K8

Tel.: (819) 778-7794

Fax: (819) 778-1740

E-mail: msobkin@sympatico.ca

**Ottawa Agent for Counsel for Intervener,
British Columbia Civil Liberties
Association**

PROCUREUR GÉNÉRAL DU QUÉBEC

1200, Route de l'Église, 2^{ème} étage
Québec, Québec G1V 4M1

Sylvain Leboeuf

Julie Dassylva

Tel.: (418) 643-1477

Fax: (418) 644-7030

Email: sleboeuf@justice.gouv.qc.ca

**Counsel for the Intervener, Attorney
General of Quebec**

FAY FARADAY

JANINE BENEDET

860 Manning Ave.

Toronto, Ontario, M6G 2W8

Tel.: (416) 389-4399

Fax: (647) 776-3147

E-mail: fay.faraday@faradaylaw.com

**Counsel for the Interveners, Canadian
Association of Sexual Assault Centres,
Native Women's Association of Canada,
Canadian Association of Elizabeth Fry
Societies, Action ontarienne contre la
violence faite aux femmes, Concertation des
luttres contre l'exploitation sexuelle
Regroupement québécois des centres d'aide
et de lutte contre les agressions à caractère
sexuel and Vancouver Rape Relief Society**

NOËL & ASSOCIÉS

111, rue Champlain

Gatineau, Québec J8X 3R1

Pierre Landry

Tel.: (819) 771-7393

Fax: (819) 771-5397

Email: p.landry@noelassociés.com

**Ottawa Agent for Intervener, Attorney
General of Quebec**

BORDEN LADNER GERVAIS LLP

World Exchange Plaza

100 Queen Street, suite 1100

Ottawa, Ontario, K1P 1J9

Nadia Effendi

Tel.: (613) 237-5160

Fax: (613) 230-8842

**Ottawa Agent for Counsel for the
Interveners, Canadian Association of
Sexual Assault Centres, Native Women's
Association of Canada, Canadian
Association of Elizabeth Fry Societies,
Action ontarienne contre la violence faite
aux femmes, Concertation des luttres
contre l'exploitation sexuelle
Regroupement québécois des centres
d'aide et de lutte contre les agressions à
caractère sexuel and Vancouver Rape
Relief Society**

PIVOT LEGAL LLP

121 Heatley Avenue
Vancouver, British Columbia, V6A 3E9

Katrina Pacey

Tel.: (604) 255-9700 Ext: 103
Fax: (604) 255-1552
E-mail: katrina@pivotlegal.org

Counsel for Intervener, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence and PACE Society

COOPER & SANDLER

1900-439 University Avenue
Toronto, Ontario, M5G 1Y8

Jonathan A. Shime**Renée Lang**

Tel.: (416) 585-9191
Fax: (416) 408-2372
E-mail: jshime@criminal-lawyers.ca

Counsel for Intervener, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS and HIV & AIDS Legal Clinic Ontario

BENNETT JONES LLP

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

Robert W. Staley**Ranjan K. Agarwal**

Tel.: (416) 777-4857
Fax: (416) 863-1716
E-mail: staleyr@bennettjones.ca

Counsel for Intervener, Christian Legal Fellowship, Catholic Civil Rights Leagues and REAL Women of Canada

MCMILLAN LLP

50 O'Connor Street, Suite 300
Ottawa, Ontario, K1P 6L2

Jeffrey W. Beedell

Tel.: (613) 232-7171 Ext: 122
Fax: (613) 231-3191
E-mail: jeff.beedell@mcmillan.ca

Ottawa Agent for Counsel for Intervener, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence and PACE Society

SUPREME ADVOCACY LLP

397 Gladstone Avenue
Ottawa, ON K2P 0Y9

Eugene Meehan, Q.C.**Marie-France Major**

Tel: (613) 695-8855
Fax: (613) 695-8580
Email : emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for Intervener, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS and HIV & AIDS Legal Clinic Ontario

BENNETT JONES LLP

1900 - 45 O'Connor Street
World Exchange Plaza
Ottawa, Ontario, K1P 1A4

Sheridan Scott

Tel.: (613) 683-2302
Fax: (613) 683-2323
E-mail: scotts@bennettjones.com

Ottawa Agent for Counsel for Intervener, Christian Legal Fellowship, Catholic Civil Rights Leagues and REAL Women of Canada

MCCARTHY TÉTRAULT LLP
Suite 1300, 777 Dunsmuir Street
Vancouver, British Columbia, V7Y 1K2

Michael A. Feder
Tel.: (604) 643-5983
Fax: (604) 622-5614
E-mail: mfeder@mccarthy.ca

**Counsel for Intervener, Secretariat of the
Joint United Nations Programme on
HIV/AIDS**

ARVAY FINLAY
1320 - 355 Burrard Street
Vancouver, British Columbia, V6C 2G8

Joseph J. Arvay, Q.C.
Cheryl Milne
Tel.: (604) 689-4421
Fax: (888) 575-3281
E-mail: jarvay@arvayfinlay.com

**Counsel for Intervener, David Asper
Centre for Constitutional Rights**

DESROSIERS, JONCAS, MASSICOTTE
480, boul. St-Laurent, B-503
Montréal, Quebec, H2Y 3Y7

Walid Hijazi
Tel.: (514) 397-9284
Fax: (514) 397-9922
E-mail: walidhijazi@hotmail.com

**Counsel for Intervener, Institut Simone de
Beauvoir**

OSLER, HOSKIN & HARCOURT LLP
340 Albert Street
Suite 1900
Ottawa, Ontario, K1R 7Y6

Patricia J. Wilson
Tel.: (613) 787-1009
Fax: (613) 235-2867
E-mail: pwilson@osler.com

**Ottawa Agent for Counsel for Intervener,
Secretariat of the Joint United Nations
Programme on HIV/AIDS**

NORTON ROSE CANADA LLP
45 O'Connor Street
Ottawa, Ontario, K1P 1A4

Martha A. Healey
Tel.: (613) 780-8638
Fax: (613) 230-5459
E-mail: martha.healey@nortonrose.com

**Ottawa Agent for Counsel for Intervener,
David Asper Centre for Constitutional
Rights**

**DEVEAU, BOURGEOIS, GAGNÉ,
HÉBERT & ASSOCIÉES, SENCRL**
867, boulevard Saint-René Ouest
Suite 8
Gatineau, Quebec, J8T 7X6

Frédéric Langlois
Tel.: (819) 243-2616
Fax: (819) 243-2641
E-mail: flanglois@deveau.qc.ca

**Ottawa Agent for Counsel for Intervener,
Institut Simone de Beauvoir**

FOY ALLISON LAW GROUP
207 - 2438 Marine Drive
West Vancouver, British Columbia
V7V 1L2

Gwendoline Allison
Tel.: (604) 922-9282
Fax: (604) 922-9283
E-mail: gwendoline.allison@foyallison.com

**Counsel for Intervener, AWCEP Asian
Women for Equality Society, operating as
Asian Women Coalition Ending
Prostitution**

**ABORIGINAL LEGAL SERVICES OF
TORONTO INC.**
415 Yonge Street
Suite 803
Toronto, Ontario, M5B 2E7

Christa Big Canoe
Emily Hill
Tel.: (416) 408-4041 Ext: 225
Fax: (416) 408-4268

**Counsel for Intervener, Aboriginal Legal
Services of Toronto Inc.**

**GOWLING LAFLEUR HENDERSON
LLP**
160 Elgin Street
Suite 2600
Ottawa, Ontario, K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

**Ottawa Agent for Counsel for Intervener,
AWCEP Asian Women for Equality
Society, operating as Asian Women
Coalition Ending Prostitution**

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**FACTUM OF THE INTERVENER,
THE EVANGELICAL FELLOWSHIP OF CANADA (EFC)**

PART I – OVERVIEW AND FACTS

A. Overview

1. All human life has inestimable worth. This proposition is the bedrock of civilized nations, and of Canada's constitutional order. While this appeal deals with Canada's laws in regard to prostitution, at its heart are questions concerning the charter value of the dignity of human life and Parliament's actions to prohibit behaviour that is regarded as opposed to human dignity, that is morally unacceptable and thus criminal.
2. Prostitution is not carried out in isolation. It affects more than those who choose to practice or purchase the services. It affects those who are prostituted against their will; supports a network of interconnected criminal activity; and forms societal attitudes that devalue a category of people. While varying degrees of legalization and criminalization of prostitution have been implemented throughout the world, what remains a constant is the harmful nature of the industry itself. In spite of attempts at regulation, the harms associated with prostitution have proliferated.
3. Alleged benefits advanced as reasons for the legalization of prostitution have not borne out in countries that have decriminalized the industry. Harm to those marketed and sold as prostitutes continues in spite of attempts to bring the industry above ground.¹ Decriminalization does not prevent violence against prostitutes, nor significantly improve their working conditions.
4. In particular, The Evangelical Fellowship of Canada (the "EFC") submits that:
 - a. The right to life, liberty and security of the person includes freedom from exploitation.

¹ Prostitution Law Review Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington, NZ: Ministry of Justice, 2008)[*NZ Reform Act*] [Book of Authorities ("BA") Tab 16]; *Report by the German Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes 79* (2007[*German Impact of the Act*]) [BA Tab 19]; Mary Sullivan & Sheila Jeffreys, *Legalising Prostitution is not the Answer: The example of Victoria, Australia* www.catwa.org.au/files/images/?Legalisation_not_the_answer.pdf [Sullivan & Jeffreys][BA Tab 22]

- b. Prostitution and human trafficking are interconnected.
- c. There is a high correlation between the legalization of the sex industry and an increase in human trafficking for the purposes of sexual exploitation.
- d. Attempts at legalization have not resulted in benefits to either society or the individuals engaged in prostitution.
- e. The benefits ascribed to the legalization of prostitution are disproportionate to the harm to Canadian society, and as such the impugned provisions are in accordance with principles of fundamental justice.

5. The EFC adopts the facts as set out in the Appellant, the Attorney-General of Canada's Factum.

B. Charter Values and Rights

6. Perhaps the most fundamental value is the sanctity of human life. This value was articulated forcefully in *Rodriguez*, the Canadian touchstone for the principle:

the sanctity of life ... is one of the three *Charter* values protected by s. 7 ... human life is sacred or inviolable (which terms I use in the non-religious sense described by Dworkin ... to mean that human life is seen to have a deep intrinsic value of its own).²

7. The *Rodriguez* court made clear that integral with the *Charter* value of the sanctity of human life is that "Respect for human dignity underlies many of the rights and freedoms in the Charter" and that "respect for human dignity is one of the underlying principles upon which our society is based."³

8. As a correlate to the sanctity of human life, human dignity inheres in a person simply by virtue of their membership in the human family. In *R. v. Oakes* Dickson C.J.C. phrased the principle as "respect for the inherent dignity of the human person"⁴ Human dignity is not

² *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at p. 584 and 585 [BA Tab 3].

³ *Rodriguez* at p. 592 [BA Tab 3].

⁴ [1986] 1 S.C.R. 103 at p. 136 [BA Tab 1].

‘earned’ through an existentialist exercise of autonomous decisions or granted by the state. It exists regardless of one’s capacities and has been recognized by the state.⁵

9. These values validly receive Parliamentary consideration:

In truth the Criminal Law is fundamentally a moral system. It may be crude, it may have faults, it may be rough and ready, but basically it is a system of applied morality and justice. It serves to underline those values necessary or important to society.⁶

10. The EFC submits that legalization of the activities prohibited by Parliament in the *Criminal Code* relating to prostitution will lead to increased incidents of exploitation, commercialization and commodification of human beings, negatively impacting the rights of women and children. Human dignity, including freedom from exploitation or degradation, compels the consideration of those who would be rendered more vulnerable from the removal of the protections the current law provides.

11. While it is commonly advanced that Canada’s prostitution laws are not aimed at the eradication of prostitution, the Ontario Court of Appeal concluded that the impugned provisions have the valid legislative objective of eradicating consequences associated with prostitution.⁷

12. The prevention of exploitation of women and the desire to avoid community upheaval as associated with the sex industry are substantial objectives. Further, this Court has previously affirmed that Parliament’s decision to criminalize prostitution-related activities is a valid method of expressing society’s disapprobation of acts associated with same.⁸

13. Cumulatively, the provisions reflect the unwillingness of Canada to facilitate prostitution. While Parliament has chosen not to criminalize prostitution itself, this does not signify that all

⁵ From the Jewish and Christian perspective, this is the direct result of “the human person as the image of God” – see University of Toronto Professor David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 5 1998), at pp. 167-8 and 172 [BA Tab 15]. This is a view also shared by many ‘non-religious’ worldviews – see Butler, Habermas, Taylor and West, *The Power of Religion in the Public Sphere* (New York: Columbia University Press: 2011) , at p. 37 [BA Tab 5].

⁶ Law Reform Commission of Canada, Report No.3 “Our Criminal Law” (1976) at p 16 [BA Tab 12].

⁷ *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at para 169 [Record].

⁸ *Reference re: SS. 193 and 195.1(1) of the Criminal Code*, (1990) 1 SCR 1123 [BA Tab 2].

related acts are to be condoned or even accepted. They remain legitimately subject to criminal sanction. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Canada)* said that Parliament was to be given flexibility in terms of policy choices. Further, that

The role of this Court is not to second-guess the wisdom of policy choices made by our legislators. Prostitution, and specifically, the solicitation for the purpose thereof, is an especially contentious and at times morally laden issue, requiring the weighing of competing political pressures. The issue for this Court to determine is not whether Parliament has weighed those pressures and interests wisely, but rather whether the limit they have imposed on a *Charter* right or freedom is reasonable and justified.⁹

In issues regarding heavily contested and moral implications, the court concluded that Parliament was to be given deference in choice of options. This was affirmed by this court in *Rodriguez*.¹⁰ If respect is accorded to Parliament's choice not to criminalize prostitution, equal respect should be given to the fact that Parliament *has* chosen to criminalize keeping a bawdy-house, living off the avails and communicating.

14. The legalization of prostitution or decriminalization as proposed by the respondents would negatively impact and change the culture of Canada; a nation founded on Judeo-Christian principles, whose tenets of faith decries the corruption and exploitative profiteering inherent in a legalized sex market. With the enhancement of Canada's culture through immigration, Canadians represent a variety of faith groups, with similar historic moral convictions; including Muslims, Buddhists and Sikhs, which together with Christians make up between 76 to 80% of Canada's population according to Statistics Canada.¹¹

15. Canadian law has its foundation in morality, interconnected to its history of religious principles. Respect for human life, and its inherent worth, is an underlying theme. It is well established that criminal laws are enacted to protect societal values, and have a historical basis in religious principles.

⁹ *Reference re: SS. 193 and 195.1(1) of the Criminal Code*, (1990) 1 SCR 1123 at para 102 [BA Tab 2].

¹⁰ *Rodriguez* at p. 564 [BA Tab 3].

¹¹ Canada, Statistics Canada, *2001 Census of Canada*, Religion: Canada, Provinces and Territories (Ottawa: Ministry of Supply and Services, 2001) [BA Tab 6].

16. It is submitted that *Charter* values and rights, and how they inform Parliament's jurisdiction over criminal law must be understood within the context of Canada's moral and philosophical past and present.

PART II – POSITION ON ISSUES

17. The EFC respectfully submits that the benefits derived from the impugned provisions far outweigh the benefits to individual prostitutes of a legal prostitution regime, and the limitations imposed by the impugned provisions are reasonable and in accordance with the values of Canadian society as a whole.

PART III – STATEMENT OF ARGUMENT

A. The link between prostitution and human trafficking

18. While the criminalization of behaviors relating to prostitution varies throughout the world, human trafficking has been universally condemned. In recognition of this world-wide denunciation, the United Nations passed and ratified the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, among whom Canada was a signatory.¹² In it, trafficked persons were recognized to be victims of a crime, whether or not force was used against them. Further, the protocol called upon countries to enact or strengthen measures to discourage the demand for trafficked persons fostering the sexual exploitation of women and children.

19. There is a clear link between human trafficking and prostitution. A common argument for the decriminalization of prostitution is respect for the autonomy of individuals who are not forced into the industry and should not face restrictions. Yet scholarly research demonstrates that a significant portion of sex workers have been manipulated or forced into the trade for the purposes of sexual exploitation.¹³ As demand for sexual services outstrips the supply, pimps and brothel owners have demonstrably turned to human trafficking to fill the void. Human trafficking

¹² Supplementation to the Convention Against Transnational Organized Crime, GA Res 55/25, UNGAOR, 2000 [BA Tab 24].

¹³ Special Committee on Pornography and Prostitution ("Fraser Committee"), *Pornography and Prostitution in Canada* (Ottawa: Ministry of Justice, 1985) [BA Tab 21].

disproportionately victimizes women including many who have not reached the age of maturity.¹⁴

20. Prostitution in Canada has exhibited long- held links with the multi-billion dollar human trafficking industry, which is second in profitability only to the drug trade. A study conducted by the Royal Canadian Mounted Police in 2010 concluded that human trafficking is predominantly linked to prostitution fronts, such as brothels and escort agencies which facilitate and coach women and girls' entry into Canada for the purposes of sex work.¹⁵

21. Terms of employment in advertisements are often misleading as to the monetary gains and nature of the work. For trafficked persons, strict control and exploitative work becomes a common pattern. Exit from the sex industry is generally difficult, particularly given the level of control pimps have over their victims' economic security. Threats of deportation or violence against family members place trafficked prostitutes in an untenably vulnerable position. Human trafficking prosecution often requires the testimony of the women and girls victimized, which is difficult to obtain.¹⁶ In situations where human trafficking prosecution is found to be difficult, prosecutions under the bawdy-house and living off the avails provisions of the *Criminal Code* are available. The link between prostitution and human trafficking has not been contested by the Respondents, thus it is imperative that an analysis of the intersection of the two be understood.

B. The correlation between the legalization of prostitution related activities and an increase in human trafficking

22. Studies have demonstrated a high correlation between the legalization of prostitution related activities and an increase in human trafficking. Many researchers posit that legalization of the industry and thus, its legitimization is a precursor to the expansion of the trade.¹⁷ The demand for sex workers is not met by the indigenous population for the most part, but fulfilled

¹⁴ RCMP Criminal Intelligence Human Trafficking National Coordination Centre, *Human Trafficking in Canada* (Ottawa: Royal Canadian Mounted Police, 2010) [BA Tab 18]; Committee on Sexual offenses Against Children, *Sexual offences against children* (the Badgely Report) (Ottawa: Library of Parliament, 1987) [BA Tab 9].

¹⁵ RCMP [BA Tab 9].

¹⁶ RCMP [BA Tab 9].

¹⁷ Sullivan & Jeffreys [BA Tab 23].

by forcible recruitment into the industry via trafficking. Among the countries and regions that have demonstrated this phenomenon are the Netherlands, Germany, Denmark and Victoria, Australia.¹⁸

23. Studies in the Netherlands, where prostitution is legal, have shown that the demand for prostitutes is mainly satisfied by foreign women.¹⁹ Of the 250 licensed brothels on record, 80% of the workers are foreign women, many lacking legitimate immigration documents.²⁰ In Denmark, where independent operation of prostitutes was legalized in 1999, an estimated 2,250 persons were sold into prostitution in 2004. Germany, which amended its laws in 2002 to allow for legalized brothels witnessed an estimated 32,800 incidents of human trafficking in 2004, and has become home to one of the largest prostitution markets in Europe.²¹

24. Conversely, attempts to apply stricter legislation regarding prostitution correlates strongly with an overall drop in human trafficking. Referred to as the “Swedish model” for the 1999 reforms in Sweden prohibiting the purchase of sexual services, it appears stricter criminal penalties have been utilized to act as a block to human trafficking.²²

25. While data remains hard to quantify due to the secretive nature of the industry, conclusions have been extrapolated from United Nations incident reports, federal incident reports and case studies.²³ In 2004, Sweden, with a population of 3.3 million more than neighbouring, legalized Denmark had only 500 incidents of human trafficking.²⁴ In spite of having a population only 10x smaller than Germany, it had 62x less incidents of human trafficking. Situation reports

¹⁸ Catharine A. MacKinnon, “Trafficking, Prostitution, and Inequality” (2001) 46:2 Harvard Civil Rights-Civil Liberties Law Review 271 [MacKinnon] [BA Tab 14]; Donna M Hughes, “The ‘Natasha’ Trade: The transnational shadow market of trafficking in women” (2000) 53:2 Journal of International Affairs 625 [BA Tab 11].

¹⁹ Andrea Di Nicola & Paolo Rispini, “Learning from Clients” in Andrea Di Nicola, ed, *Prostitution and human trafficking: focus on clients* (New York: Springer, 2009) 227 [Di Nicola] [BA Tab 10].

²⁰ Alice Leuchtang, “Human Rights, Sex Trafficking and Prostitution” (2003) 63:1 The Humanist 11[BA Tab 13].

²¹ Seo-Young Cho, Axel Dreher & Eric Neumayer, “Does Legalized Prostitution Increase Human Trafficking?” (2013) 41:1 67 [Cho, Dreher & Neumayer] [BA Tab 20].

²² MacKinnon [BA Tab 14].

²³ Andrea Cauduro, “Review of the Research Studies on the Demand for Prostitution in the European Union and Beyond” in Andrea Di Nicola, ed, *Prostitution and Human Trafficking: focus on clients* (New York; Springer, 2009) 5 [BA Tab 7]; Cho, Dreher & Neumayer [BA Tab 20].

²⁴ Di Nicola [BA Tab 10].

from the police and the government of Sweden have explained this discrepancy via the new reforms which have discouraged the establishment of human trafficking in Sweden. Even allowing for a generous margin of error, studies indicate a drop in overall prostitution and trafficking following the stricter prohibitions.

C. The lack of benefits to sex workers in the industry as a result of legalization

26. Given the potentially serious implications involved in striking down the impugned provisions, a thorough weighing exercise of potential harms versus benefits on both sides of the issues is paramount. This is not per se an issue about sexual morality, but one of genuine harm. While an in- depth analysis was undertaken by the Ontario Court of Appeal (OCA) relating to the communication for prostitution provisions of the *Criminal Code*, an analysis of s.210 and s.212(1)(j) were not afforded the same treatment.

27. It has repeatedly been argued that the decriminalization of prostitution will lead to increased safety of those working in the sex trade. It is submitted that this theory is based largely on speculation. The actual practice of prostitution in legalized venues has demonstrated that harm to prostitutes' remains, despite legalization.

i. The global models

28. Attempts to legalize prostitution have shown that the promised benefits are illusory. Three years after the decriminalization of prostitution related activities, the German government issued a report stating that the changes in the law had failed to deliver any tangible benefit to workers in the sex industry. Crimes against prostitutes did not appear to have decreased, workers wanting to leave the industry were not facilitated, and working conditions did not appear to have improved.²⁵ A report issued by the government of New Zealand following five years of their own reforms similarly concluded that the new legal status of the industry had not significantly improved the lives of sex workers.²⁶

²⁵ German Impact of the Act [BA Tab 19].

²⁶ NZ Reform Act [BA Tab 16].

29. Analysis of the industry in a legal context does not significantly change the day to day experience of sex workers. Pimps and brothel owners maintain or increase their level of power over their workers.²⁷ Customers still reject or coerce unsafe sex. Numerous reports have documented that even in allegedly safe “inside” prostitution condom usage is rejected by clients with physical, financial or other forms of coercion.²⁸ In Victoria, Australia, violent incidents are still a part of the industry and the goal of increased safety and security for prostitutes has not been achieved.

D. The harms to sex workers as a result of legalization

30. Not only have the purported benefits regarding the legalization of prostitution fallen short of reducing harm to prostitutes, the movement has generated new ones. Legalization appears to increase the size of the illegal prostitution industry.²⁹ This was demonstrated in Victoria, Australia, where legal brothel owners began lobbying the government for better enforcement against the illegal industry that had grown following the new legislation.³⁰ Prostitutes who do not wish or are unable to comply with regulatory standards that accompany the legalized industry reject the legal model. Having increased in size overall, due to the increased demand due to legalization, the same industry again operates outside regulatory scrutiny.

31. The level of control that prostitutes exercise over their work can also be adversely affected by legalization. Once a “legal” sex worker submits to brothel management terms, their level of autonomy diminishes. Pimps are legitimized as valid entrepreneurs and exercise a greater degree of control than they had previously. In Munich, Germany the legal sex market increased competition among brothels and heightened the pressure on prostitutes to engage in

²⁷ Coalition Against Trafficking in Women, “Trafficking, Prostitution and the Sex Industry: The Nordic Legal Model” (2010) online: <http://www.catwinternational.org/Home/Article/138-trafficking-prostitution-and-the-sex-industry-the-nordic-legal-model> (CATW) [BA Tab 8].

²⁸ Chris Bruckert & Frédérique Chabot, “Challenges: Ottawa area sex workers speak out”, POWER (Prostitutes of Ottawa-Gatineau, Work, Educate and Resist) (December 2010) online: http://www.powerottawa.ca/POWER_Report_Challenges.pdf [Bruckert & Chabot] [BA Tab 4]; Jody Raphael & Deborah L. Shapiro, “Violence in Indoor and Outdoor Prostitution Venues” (2004) 50:2 Violence Against Women 126 [BA Tab 17].

²⁹ MacKinnon [BA Tab 14].

³⁰ Mary Lucille Sullivan, *Making Sex Work: A Failed Experiment with Legalized Prostitution* (North Melbourne, Vic, Australia: Spinifex, 2007) [BA Tab 23].

risky sex behavior. Control and autonomy, in spite of assertions to the contrary, are not necessarily strengthened.

32. Further, decriminalization makes it more difficult to assist and rescue victims of trafficking. Operating out of legal massage parlours, brothels and escort agencies inhibits the ability of police officers to enforce anti-trafficking laws.

33. Given the overall lack of benefits that is demonstrated from the legalization of prostitution, the harm that striking down the impugned provisions would cause are disproportionate in comparison. Failure to adequately weigh the larger societal and personal harms against the harms advanced by the respondents would not be in accordance with principles of fundamental justice.

Conclusion

34. Human dignity and respect for human life are fundamental Canadian values. The decision of this Honourable Court in this case will have long-standing and wide-ranging implications for all Canadians. The Evangelical Fellowship of Canada submits that any benefits awarded to the legalizations of prostitution are disproportionate to the harm of those involved in prostitution and to Canadians.

PART IV – COSTS

35. The EFC seeks no costs and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

36. The EFC seeks permission to present oral argument not exceeding 10 minutes, and submits that the appeal should be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS DAY OF MAY, 2013.

Georgiale A. Lang
Donald Hutchinson
Counsel for the Intervener, The Evangelical Fellowship of Canada

PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTORY PROVISIONS

Criminal Code, R.S.C., 1985, c. C-46, ss.210, 212(1)(j)

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

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

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

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

212. (1) Every one who

(j) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Code criminel, L.R.C. (1985), ch. C-46, ss.210, 212(1)(j)

210. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque tient une maison de débauche.

(2) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, selon le cas :

a) habite une maison de débauche;

b) est trouvé, sans excuse légitime, dans une maison de débauche;

c) en qualité de propriétaire, locateur, occupant, locataire, agent ou ayant autrement la charge ou le contrôle d'un local, permet sciemment que ce local ou une partie du local soit loué ou employé aux fins de maison de débauche.

(3) Lorsqu'une personne est déclarée coupable d'une infraction visée au paragraphe (1), le tribunal fait signifier un avis de la déclaration de culpabilité au propriétaire ou locateur du lieu à l'égard duquel la personne est déclarée coupable, ou à son agent, et l'avis doit contenir une déclaration portant qu'il est signifié selon le présent article.

(4) Lorsqu'une personne à laquelle un avis est signifié en vertu du paragraphe (3) n'exerce pas immédiatement tout droit qu'elle peut avoir de résilier la location ou de mettre fin au droit d'occupation que possède la personne ainsi déclarée coupable, et que, par la suite, un individu est déclaré coupable d'une infraction visée au paragraphe (1) à l'égard du même local, la personne à qui l'avis a été signifié est censée avoir commis une infraction visée au paragraphe (1), à moins qu'elle ne prouve qu'elle a pris toutes les mesures raisonnables pour empêcher le renouvellement de l'infraction.

212. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

j) vit entièrement ou en partie des produits de la prostitution d'une autre personne.