

**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 LEOVITCH
VALERIE SCOTT**

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

- and -

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PART I – STATEMENT OF FACTS

A. Overview

1. Parliament chose to prohibit public communications for the purpose of prostitution in an attempt to curtail the multiple harms associated with street prostitution. There is clearly a reasoned apprehension of harm justifying Parliament's action. Street prostitution is the most visible and harmful form of prostitution. It leads to real community harms and is inherently dangerous for prostitutes. Many of those working on the street are among the most disadvantaged and marginalized members of Canadian society. They suffer from high rates of drug addiction, mental health problems and other afflictions such as fetal alcohol spectrum disorder. They are economically desperate. Even if it were possible to screen out dangerous customers through lengthy face-to-face public communications, their drug use and mental health challenges would make such screening of questionable value. Moreover, their financial predicaments tend to lead to risk taking. It stretches credulity to suggest that the dangers of street prostitution could be alleviated by facilitating its practice.

2. The claimants are asking this Court to strike s. 213(1)(c) of the *Criminal Code* as unconstitutional. Such action would not diminish the harms faced by street prostitutes. It would likely foster growth in street prostitution, putting more marginalized members of society at risk of violence and causing significant harm to those communities where prostitution would proliferate.

3. Section 213(1)(c) (the communicating provision) is a reasonable alternative chosen to target the important objectives of the government which include eliminating the various forms of social nuisance stemming from the public display of the sale of sex. Any effect on prostitutes' security is both causally remote and indirect. When the provision's important objectives are balanced against the negligible impact the law has on street prostitutes' safety, it survives constitutional scrutiny – both under s. 7 and s. 2(b) of the *Charter*.

B. Facts

4. The factual record in this case does not support the claimants' contention that the communicating provision increases risk of violence to street prostitutes by prohibiting

communicative acts that would enable prostitutes to screen out dangerous customers. Indeed, the evidence shows that the ability to communicate in public would have, at best, only a minimal effect on the personal security of street prostitutes. The record also highlights the significant negative impact street prostitution can have on the surrounding community.

(1) Street prostitutes cannot effectively screen for dangerous clients

5. Communications that take place in public for the purpose of engaging in prostitution have not been shown to be effective in enhancing the personal security of street prostitutes. Street prostitutes suffer from a unique constellation of social problems – such as drug addiction, economic desperation, and mental health problems – that tend to cloud both their judgment and their ability to screen effectively for dangerous clients.

6. Street prostitutes tend to have extremely high rates of drug addiction. An Australian study of street prostitutes in Queensland found that 91% reported having used amphetamines; the same percentage reported using heroin. The study also found that more than two thirds of street prostitutes had injected illicit drugs in the past week.¹ The Canadian evidence in this case showed that street prostitution and drug addiction are almost always inextricably linked. Some street prostitutes turn to selling sex to finance their drug habits; others turn to drugs to help cope with the effects of prostitution.² As one police affiant explained:

[D]rug abuse and addiction and street-level prostitution go hand-in-hand. One woman I encountered had been turned out by her parents at the age of 12 to sell sex on the street in order to finance her parents' respective drug habits. She herself eventually started using drugs as a coping mechanism and continued to be involved in the sex trade to support her own addiction. Almost without exception those street-level sex trade workers that I dealt with reported dependencies on illicit drugs. In my experience, older sex trade workers tended to have crack cocaine addictions while younger women tended to abuse crystal methamphetamine. Almost all of these women attributed their continued involvement in the sex trade as being necessary in order to finance their drug habits.³

7. The high addiction rate among street prostitutes makes it difficult for them to screen johns effectively. Drug use not only tends to affect their judgment, but it also leads to financial

¹ *Selling Sex in Queensland 2003*, J.A.R., Vol. 28, Tab 61F, pp. 8032 & 8035.

² *Affidavit of Det. Sgt. Page*, J.A.R., Vol. 34, Tab 81, p. 10016-7 at para. 27, 29; *Affidavit of Det. McCartney*, J.A.R. Vol. 35, Tab 82, p. 10055-6 at para. 9; *Affidavit of Det. Const. Ramos*, J.A.R., Vol. 35, Tab 86, p. 10394 at para. 16. See also *Affidavit of J. Paterson*, J.A.R., Vol. 7, Tab 30, p. 1834 at paras. 4-6; *Affidavit of M. Farley*, J.A.R., Vol. 49, Tab 113, p. 14246 at paras. 60-62.

³ *Affidavit of Corp. Joyal*, J.A.R. Vol. 36, Tab 88, p. 10553-4 at para. 28.

desperation that is linked to risk taking. As the Australian study explained, “Many authors have found links between drug use, inconsistent condom use, decreased ability to negotiate with clients and an increased risk of violence.”⁴ Canadian researchers have reported similar links between risk taking and financial desperation. One study found that financial desperation “may be a far more accurate determinant of who is likely to experience violence” while engaged in prostitution than venue, age or level of education.⁵ This was consistent with the evidence of the police affiants. One officer working in the Downtown Lower East Side of Vancouver witnessed first-hand how drug addicted prostitutes would work at any cost to fuel their addictions. As he explained, “On one occasion my partner was repeatedly approached by a prostitute while he was on an undercover operation and she was prepared to accept \$3.97 for oral sex.”⁶ As another affiant put it, “The decision does not focus on safety, but on financial need.”⁷ Another police affiant aptly captured how addiction and economic desperation lead to risk taking:

Because most of the street-level sex trade workers that I spoke to suffered from drug addictions and prostituted in large part to support these addictions, it was common for these women to have erratic working hours which revolved around them using drugs and then selling sex to get their next fix. In my experience, sex trade workers in this situation are utterly incapable of recording license plate numbers of johns or taking other basic measures to ensure their safety. Their only concern is getting in the john’s vehicle, going somewhere to consummate the deal and then returning with money to buy more drugs.⁸

8. The evidence in this case also showed that many street prostitutes suffer from mental health problems or other health-related issues that make effective screening difficult. One B.C. study found that more than half of street prostitutes had mental health difficulties. Sixteen per cent had been diagnosed as suffering from fetal alcohol spectrum disorder (FASD); many more would have gone undiagnosed. As one affiant explained, “Some of these women are operating at the intellectual level of a five or six year old, and have been taught the most basic skills so they can work as prostitutes.”⁹

⁴ *Selling Sex in Queensland 2003*, J.A.R. Vol. 28, Tab 61F, p. 8047.

⁵ *T. O’Doherty, “Off-Street Commercial Sex: An Exploratory Study”*, J.A.R., Vol. 20, Tab 52A at p. 5856-5867. See also *Cross-examination of E. Maticka-Tyndale*, J.A.R., Vol. 12, Tab 46, pp. 3254-3255.

⁶ *Affidavit of Det. Const. Ramos*, J.A.R., Vol. 35, Tab 86, p. 10394 at para. 16.

⁷ *Affidavit of J. Paterson*, J.A.R., Vol. 7, Tab 30, p. 1834 at para. 6.

⁸ *Affidavit of Corp. Joyal*, J.A.R., Vol. 36, Tab 88, p. 10554 at para. 29. This evidence was also consistent with that heard by the Court in *R. v. Pickton*, [2006] B.C.J. No. 3672 (Sup. Ct.) at paras. 20-21; *R. v. Pickton*, 2009 BCCA 300 at para. 101.

⁹ *Affidavit of J. Paterson*, J.A.R., Vol. 7, Tab 30, p. 1835 at para. 7.

9. Simply put, drug addiction, mental health problems, and financial desperation drive the manner in which street prostitutes provide sexual services. Even if it were possible to predict which johns will become violent,¹⁰ there is no evidence that street prostitutes could make effective use of public communications to enhance their safety. The majority of the Court of Appeal recognized this fact:

While it is fair to say that a street prostitute might be able to avoid a “bad date” by negotiating details up front, it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway. It is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk.¹¹

(2) Community harms associated with prostitution

10. The record in this case also emphasized the serious impact that street prostitution can have on communities. Both community and police affiants discussed how the harms associated with street prostitution are neither “low end” nor trivial nuisances. Community affiants expressed concern about discarded condoms, syringes and crack pipes being found in their neighbourhoods – sometimes in parks and schools and sometimes by children.¹² Others mentioned that residents are afraid to go out at night for fear of being propositioned or exposed to violence from pimps or johns.¹³ As one police affiant explained, “The presence of street prostitution in a neighbourhood makes women afraid to walk home at night, for fear of being harassed by johns, or witnessing sex acts, drug injecting, or the violence that goes hand in hand with drug abuse.”¹⁴ Another affiant spoke of the harms associated with exposure to prostitution – and the normalization of that practice: “Prostitution occurring in plain view communicates a

¹⁰ One witness said this was always unpredictable. *Affidavit of N. Falle*, J.A.R. Vol. 33, Tab 67, p. 9467 at para. 61.

¹¹ *Judgment of the Court of Appeal [OCA Judgment]*, Appellants’ Record, Vol. II, Tab 7 at para. 312. See also, *ibid.* at para. 313.

¹² *Affidavit of C. Parrott*, J.A.R., Vol. 39, Tab 99, pp. 11196-7, at paras. 29-31; *Affidavit of Dennis St. Aubin, Presentation to House of Commons Subcommittee*, J.A.R., Vol. 39, Tab 101A, p. 11376-7; *Affidavit of Det. Sgt. Page*, J.A.R., Vol. 34, Tab 81, p. 10015 at para. 25; *Affidavit of Det. Cowan*, J.A.R. Vol. 35, Tab 84, p. 10272-3 at para. 25.

¹³ *Affidavit of Dennis St. Aubin, Presentation to House of Commons Subcommittee*, J.A.R., Vol. 39, Tab 101A, p. 11377.

¹⁴ *Affidavit of Det. Sgt. Page*, J.A.R., Vol. 34, Tab 81, p. 10016 at para. 26.

damaging message to young boys and girls – that men can simply buy sex with no social or personal repercussions.”¹⁵

11. The majority of the Court of Appeal accepted that the community harms relating to street prostitution were significant:

While street prostitution poses real and grave dangers to prostitutes themselves, it also has a profound impact on members of the surrounding community. It is not simply that men are subject to unwanted solicitation by prostitutes, or that women are subject to unwanted solicitation by would-be customers. Street prostitution is associated with serious criminal conduct including drug possession, drug trafficking, public intoxication, and organized crime.¹⁶

PART II – POINTS IN ISSUE

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

13. It is the position of AG Ontario, Respondent on the Cross Appeal, that s. 213(1)(c) does not infringe s. 7 and that although it infringes s. 2(b), it is fully justified under s. 1 of the *Charter*.

PART III – BRIEF OF ARGUMENT

A. Section 213(1)(c) does not violate s. 7 of the Charter

(1) The communicating provision does not engage the claimants’ s. 7 security interests

14. The state must cause a significant deprivation of a protected interest, sufficient to engage s.7.¹⁸ The government cannot be held accountable for the dangers associated with street prostitution for two reasons. First, the state’s connection to the security risks faced by street

¹⁵ *Affidavit of Det. Const. Holm*, J.A.R., Vol. 35, Tab 83, p. 10250, at para. 27; see also p. 10244 at para. 14.

¹⁶ *OCA Judgment*, *supra* at para. 307.

¹⁷ *Order of Chief Justice Stating Constitutional Question(s) and for Directions (dated Dec. 17, 2012)*, Appellants’ Record, Vol. III, Tab 34 at pp. 80-85.

¹⁸ AG Ontario’s Factum on Appeal at paras. 11-31.

prostitutes is too remote to engage s. 7. As the majority of the Court of Appeal explained, “we are not persuaded that the communicating provision is a dominant, *or even a significant*, factor among the many social, economic, personal and cultural factors that combine to place survival sex workers at a significant risk on the street.”¹⁹ Despite finding that the law had, at most, a minor impact on prostitutes’ security interests, the Court concluded that the provision interfered with the claimants’ security interests. The Court failed to recognize that this finding supports the conclusion that the communicating provision does *not* engage the claimants’ security interests under s. 7. The state should not be assigned responsibility for harms that are speculative or insignificant.

15. Second, as discussed further below, s. 213(1)(c) seeks to prevent all street solicitation. Compliance with the law is the best safeguard against the harms attendant upon this particularly risky form of prostitution. Parliament has chosen to address the various harms associated with street prostitution by making it, in the words of Chief Justice Dickson, “impossible to negotiate in public for the sale of sex.”²⁰ Far from contributing to the harms of street prostitution, this law prohibits and seeks to discourage this dangerous activity.

(2) The important objectives specifically targeted by the communicating provision

16. The Ontario Court of Appeal accepted that the objective of the communicating provision was that identified by Dickson C.J. in the *Prostitution Reference*, namely “to eradicate the various forms of social nuisance arising from the public display of the sale of sex.”²¹ The claimants take issue with the Court of Appeal’s finding that the legislation is concerned with the broad spectrum of social nuisances associated with street prostitution, including drug use, drug trafficking, public intoxication and organized crime.²² They suggest this was an inappropriate departure from Chief Justice Dickson’s decision in the *Prostitution Reference*. The majority’s understanding of the harms targeted by the provision was consistent with the *Prostitution Reference*. Characterizing those harms as falling toward the “low end of the social nuisance spectrum”, is not consistent with that decision or more recent authority, such as *R. v. Labaye*.

¹⁹ *OCA Judgment*, *supra* at para. 321 [emphasis added].

²⁰ *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at paras. 18 & 19 [*Prostitution Reference*].

²¹ *OCA Judgment*, *supra* at para. 284, citing *Prostitution Reference*, *supra* at paras. 2-3.

²² *OCA Judgment*, *supra* at para. 307.

17. While the deterrence of street-based nuisance, such as traffic congestion, noise, pollution and oral harassment of non-participants, was part of the objective recognized by Chief Justice Dickson in the *Prostitution Reference*, his understanding of the “social nuisance” targeted by the provision went beyond that. He emphasized that the law also seeks to prevent the “general detrimental effects on passers-by or bystanders, especially children.”²³ He did not, as the claimants suggest, cast the social nuisances targeted by the provision as low end or trivial. To the contrary, he found “the curtailment of street solicitation is in keeping with the interests of many in our society for whom the nuisance-related aspects of solicitation constitute *serious problems*.”²⁴ This is consistent with Chief Justice McLachlin’s recognition in *R. v. Labaye* of the harm associated with public exposure to indecent acts:

This harm is conceptually akin to nuisance. Nevertheless, to call this the “eyesore” basis of criminalization of indecent acts is to trivialize the harm. The harm is not the aesthetic harm of a less attractive community, but the loss of autonomy and liberty that public indecency may impose on individuals in society, as they seek to avoid confrontation with acts they find offensive and unacceptable. ***The value or interest protected is the autonomy and liberty of members of the public, to live within a zone that is free from conduct that deeply offends them.***²⁵

18. Many of the social harms the communicating provision seeks to curtail have roots in “the exploitation, degradation and subordination of women” that Chief Justice Dickson recognized were “part of the contemporary reality of prostitution.”²⁶ While he found that the communicating law did not aim to solve these harms “in any direct manner”, he did accept both that it sought to prevent public exposure to these serious problems and that “sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim.”²⁷

19. The legislative record shows that one of Parliament’s concerns when enacting s. 213(1)(c) was the harmful normalizing effect of open displays of prostitution on the public, especially children.²⁸ The Fraser Committee, which provided input to Parliament on the

²³ *Prostitution Reference*, *supra* at para. 3.

²⁴ *Prostitution Reference*, *supra* at para. 11 [emphasis added].

²⁵ *R. v. Labaye*, [2005] 3 S.C.R. 728 at para. 40 [emphasis added]. See also, *ibid.* at para. 41.

²⁶ *Prostitution Reference*, *supra* at para. 2.

²⁷ *Prostitution Reference*, *supra* at paras. 2-3.

²⁸ See e.g. *House of Commons Debates*, September 9, 1985, Bill C- 49 at Second Reading, J.A.R. Vol. 64, Tab 127 at pp.18891-3 (Minister of Justice) & p. 18894 (MP Kaplan). See also *Affidavit of L. Angers*,

communicating provision prior to its passage,²⁹ emphasized the connection between the normalizing effect of exposure to prostitution and the impact on women's equality in society:

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.³⁰

20. Finally, AG Ontario also submits that an indirect objective of the communicating provision is to deter potential prostitutes from entering the dangerous profession and to encourage active street prostitutes to exit the trade. As Dickson C.J. explained, the communicating provision is ultimately aimed at the “eradication of public communication with respect to prostitution.”³¹ A law that prohibits public solicitation by implication takes aim at the practice of street prostitution and seeks its abolition. This position is consistent with the Parliamentary record. During the debates leading to the passage of the communicating provision, legislators were clearly concerned about the harms experienced by street prostitutes. The Minister of Justice emphasized the “terrible risk” of “exploitation and violence by customers and pimps” that prostitutes experience.³² The Fraser Report also insisted that “prostitution-related activities should not take place in public places because of the offence involved and the proven dangers to prostitutes which the street life produces.”³³

J.A.R., Vol. 64, Tab 127, pp. 18751-18760; *Prostitution Reference*, *supra* at para. 3.

²⁹ The Fraser Committee's proposal concerning street solicitation was consistent in large part with what Parliament enacted. See *Report of the Special Committee on Pornography and Prostitution (The Fraser Report)*, Vol. 2 (Canada 1985), J.A.R. Vol. 71, Tab 154B, p. 21200.

³⁰ *Report of the Special Committee on Pornography and Prostitution (The Fraser Report)*, Vol. 1 (Canada 1985), J.A.R. Vol. 70, Tab 154A, pp. 20837; *R. v. Mara*, [1997] 2 S.C.R. 630, at para. 34. This is also consistent with Parliament's obligations under the *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. See AG Ontario's Factum on Appeal at paras. 82-83.

³¹ *Prostitution Reference*, *supra* at para. 11. Chief Justice Dickson did not accept that the provision's objective could be understood as directly targeting the “the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution”: *Prostitution Reference*, *supra* at para. 2. It is Ontario's position that the Parliamentary record supports a finding that this was at least an indirect or ancillary objective of the law.

³² *House of Commons Debates, September 9, 1985, Bill C-49 at Second Reading*, J.A.R. Vol. 72, Tab 115A, p. 21283 (Minister of Justice).

³³ *Report of the Special Committee on Pornography and Prostitution (The Fraser Report)*, Vol. 2 (Canada

(3) The Court of Appeal was correct to find that the communicating provision is not grossly disproportionate to its objectives

21. This court has placed a heavy burden on claimants seeking to invalidate laws on the basis of gross disproportionality. For a claim to be successful, the state's actions or legislative responses to a problem must be so extreme that they are *per se* disproportionate to any legitimate government interest.³⁴ Assessments of gross disproportionality involve a weighing exercise where one side of the scale gives weight to the provision's objectives and the other measures the impact the law has on the claimant's s. 7 interests. As the majority of the Court of Appeal explained, "Gross disproportionality is not established when the scale is balanced, or even when it tips in favour of the claimant, but rather where there is a marked and serious imbalance in the two sides."³⁵ The majority was correct to conclude that the claimants had not met their burden with respect to the communicating provision. The claimants now argue that the Court erred in finding that "there was limited evidence to establish the extent to which face-to-face communication with customers will improve the safety of prostitutes."³⁶ In the absence of comprehensive studies demonstrating the safety-enhancing features of communication, they rely on anecdotal evidence and "common sense" to claim that the provision negatively affects prostitutes; however, neither the evidence in this case nor common sense work in the claimants' favour.

22. As discussed above, the legislative objectives targeted by the communicating provision are important and must be given their due weight. Street prostitution causes real harms to communities through street-based nuisances, normalizes the subordination and commodification of women, and puts prostitutes themselves at real risk of harm. Section 213(1)(c) seeks to address all of these harms, both directly and indirectly.

23. On the other side of the scale, prohibiting communications with customers has, at most, a negligible impact on the safety of street prostitutes. The evidence in this case does not support

1985), J.A.R., Vol. 71, Tab 154B, p. 21053.

³⁴ *R. v. Malmø-Levine*, [2003] 3 S.C.R. 571 at para. 143; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 47; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para. 133; *OCA Judgment*, *supra* at para. 298.

³⁵ *OCA Judgment*, *supra* at para. 299.

³⁶ Factum of the Appellants on Cross Appeal at para. 9.

the argument that permitting further communications would allow street prostitutes to better screen for dangerous johns. The drug addiction, mental health problems, and economic desperation associated with street prostitution leads to risky decision-making and impedes effective screening for danger. Moreover, common sense does not support the claimants' argument that longer conversations with potential customers could reveal dangerous motives. Dangerous johns are not likely to reveal their violent tendencies when seeking sexual services from prostitutes. As the majority in the Court below found, "it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway."³⁷

24. The claimants also argue that the communicating provision endangers street prostitutes by displacing them into "out of sight areas" which are more isolated and thus more dangerous. In reality, sexual transactions with street prostitutes tend to take place in isolated settings. The factual record in this case shows that at least some johns choose street prostitutes over those working indoors because it allows them to retain both their anonymity and control of the interaction.³⁸ As such, even if a prostitute could solicit on a busy street in the downtown core, a john might well still drive to an isolated spot free from surveillance for the sex act itself. Given the potential personal consequences of being caught having sex in public, sex with street prostitutes will likely occur in isolation. The dangers the claimants suggest are the result of displacement are inherent to street prostitution and cannot be traced to the impugned law.

25. Moreover, as the majority of the Court of Appeal noted, communications prohibited by s. 213(1)(c) are not the only means available to prostitutes seeking to protect themselves from would be violent johns. The law does not prevent a prostitute from having a friend record a john's license plate number. It does not preclude her from communicating by cellphone where a john has taken her. Finally, it does not prohibit her from telling a john, once inside a vehicle, that a friend has recorded his license plate to deter any potential violence. As the majority found:

The evidence before the application judge also indicated that, while face-to-face communication is an important aspect of customer screening, it is not the only method prostitutes use to assess the risk of harm. One of the respondents' experts who has done extensive research on street prostitution testified that most of the prostitutes she

³⁷ *OCA Judgment, supra* at para. 312. See also *Affidavit of N. Falle*, J.A.R. Vol. 33, Tab 67, p. 9467 at para. 61; *R. v. Pickton*, 2009 BCCA 300 at para. 101.

³⁸ *Affidavit of Det. Cowan*, J.A.R., Vol. 35, Tab 84, pp. 10272-3 at para. 25; *Affidavit of Alexis Kennedy*, J.A.R., Vol. 46, Tab 107, pp. 13254 at para. 60.

interviewed also relied on their intuition to decide whether or not to accept a job. Street prostitutes also employ techniques such as assessing the prospective customer's appearance, checking the backseat of his car, and checking for the presence or absence of door handles and lock release buttons. Many street prostitutes also reported that they work with friends who take down the licence plate numbers of the cars they get into. This evidence suggests that actual face-to-face communication is not the sole tool that street prostitutes rely on to assess the risk of harm.³⁹

26. Ultimately, the best assurance of safety is compliance with the law.

27. The claimants have failed to establish that the effects of the law are grossly disproportionate to the state's objectives. The violence and harms associated with street prostitution stem from the actions of johns and pimps and non-compliance with s. 213(1)(c). Decriminalizing street solicitation is not the answer. Instead of safeguarding women from the harms of street prostitution, this could potentially lead to its expansion, ultimately exposing more to its inherent and substantial risks.

B. The communicating provision is a justified infringement of s. 2(b) of the Charter

(1) There is no reason to revisit this Court's decision in the *Prostitution Reference*: The communicating provision remains a reasonable limit on the claimants' s. 2(b) rights

28. In the courts below, both AG Ontario and AG Canada conceded that the communicating provision is a *prima facie* infringement of s. 2(b) of the Charter. This concession was consistent with this Court's decision in the *Prostitution Reference* and with the expansive definition of expression that this Court has ascribed to s. 2(b), which includes any activity that conveys or attempts to convey meaning.⁴⁰ The argument should properly remain focused on whether this infringement is justifiable under s. 1.

29. The claimants argue that a "change in context" justifies reconsideration of the *Prostitution Reference*. They claim new evidence shows that the law: (1) endangers prostitutes by prohibiting "protective speech", (2) is ineffective, and (3) shows Canada is out of step with

³⁹ *OCA Judgment*, *supra* at para. 313.

⁴⁰ *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at para. 42; *Prostitution Reference*, *supra* at paras. 1 (per Dickson C.J.C.) and 75 (per Lamer J.).

the international trend towards decriminalizing prostitution.⁴¹ This Court recently emphasized in *Ontario (Attorney General) v. Fraser* that “overturning a precedent of this Court is not a step to be lightly undertaken.”⁴² Justice Rothstein, in his concurring reasons, reviewed the factors this Court will consider when deciding whether to overturn its previous decisions. No single factor is determinative. The Court must seek to strike a balance between the values that inform the principle of *stare decisis* – namely certainty, consistency, predictability and institutional legitimacy – and the need to overturn decisions that are no longer seen as correct.⁴³ The *Prostitution Reference* need not be reconsidered. The claimants’ first argument in support of revisiting that decision is an attempt to recast the s. 2(b) argument as a s. 7 claim. Their arguments that the law is ineffective and out of step with international law are not supported by the weight of the evidence and, in any event, do not shift the landscape so as to undermine this Court’s s. 1 analysis in the *Prostitution Reference*.

(a) The expressive activity prohibited by s. 213 is neither “fundamental” nor “core”: its purpose is economic and security-related assertions must be considered under s. 7

30. In the *Prostitution Reference*, Chief Justice Dickson characterized the nature of the expression targeted by the communicating provision as follows:

[T]he activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.⁴⁴

The type of expression limited by the communicating provision has not changed since the *Prostitution Reference*. The expression has, at its core, an economic purpose: transacting to exchange money for sexual services.

31. Even if it could be said that part of the activity was directed at screening clients for safety, the safety-driven communications are entirely incidental to the economic transaction that is the primary goal of the prohibited expression. The communicating provision only prohibits public communications that are directed at the economic transaction of sex for money. This type

⁴¹ Factum of the Appellants on Cross Appeal at para. 39.

⁴² *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 at paras. 56-57 (per McLachlin C.J.C. and Lebel J.) [*Ontario v. Fraser*].

⁴³ *Ontario v. Fraser*, *supra* at paras. 129-139.

⁴⁴ *Prostitution Reference*, *supra* at para. 5.

of activity does not engage the “core values” protected by s. 2(b) of the *Charter*.

32. Arguments that the law contributes to risks of harm are properly addressed under s. 7, not under s. 2(b). Sections 2(b) and 7 protect entirely different rights and interests; they are not interchangeable. Section 2(b) of the *Charter* seeks to protect “core values” of expression, which include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.⁴⁵ The right to life, liberty and security of the person is protected under s. 7 and forms a distinct *Charter* right. In a similar vein, the Supreme Court has held that questions about the “punishment debate” should properly be considered under s. 12 of the *Charter* and not s. 7.⁴⁶ The claimants’ attempt to recast the communications as safety-enhancing cannot justify revisiting the *Prostitution Reference*.

(b) The claim of “ineffectiveness” is not borne out by the weight of the evidence

33. The claimants submit that the law is ineffective because it has not eliminated or significantly reduced street prostitution. It is difficult to assess with any confidence the provision’s impact, in terms of reducing the number of street prostitutes or johns. The law was passed after this Court’s decision in *Hutt v. The Queen*⁴⁷ rendered the previous law against street solicitation virtually unenforceable. Street prostitution did not suddenly become illegal after s. 213(1)(c) was passed. The new law simply replaced a prohibition on street solicitation that was difficult to enforce with a prohibition on public communications for the purpose of prostitution that was designed to be enforceable.

34. Moreover, the effectiveness of the communicating provision cannot be measured solely by its impact on the overall number of street prostitutes or johns; it is also important to measure whether the law helps to reduce community harms associated with street prostitution. Without s. 213(1)(c), the most public emanations of prostitution – and associated harms– would flourish

⁴⁵ See e.g. *Montreal v. 2952-1366 Que.*, [2005] 3 S.C.R. 141 at para. 74. See also *Irwin Toy v. Quebec*, *supra* at paras. 40-46; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 21-23.

⁴⁶ *R. v. Malmø-Levine*, *supra* at paras. 104, 124, 149, 161. To find that s. 2(b) protects “safety-enhancing” communications, as the claimants allege, would be akin to finding that s. 2(b) extends to carrying a gun for self-protective purposes. This cannot be the kind of expressive act that lies near the core of the s. 2(b) guarantee.

⁴⁷ [1978] 2 S.C.R. 476.

unchecked. The majority of the Court of Appeal accepted the provision has helped to reduce community harms:

We do not accept the application judge's view of the evidence that the provision has not been effective in reducing social nuisance and harms to neighbourhoods. There was evidence in this case, not rejected by the application judge, that enforcement of the communicating prohibition has been effective in protecting residential neighbourhoods from the harms associated with street prostitution. Residents of vulnerable neighbourhoods provided dramatic evidence of the harms associated with street prostitution including noise, impeding traffic, children witnessing acts of prostitution, harassment of residents, problems associated with drug use by prostitutes, unsanitary acts, violence, unwelcome solicitation of women and children by customers, and unwelcome solicitation of male residents by prostitutes. Police sweeps through the affected neighbourhoods using the communicating provision help reduce these harms.⁴⁸

The alleged ineffectiveness of the law does not justify revisiting this Court's decision in the *Prostitution Reference*.

(c) Canada's approach to prostitution is not "out of step" with other jurisdictions

35. Although some jurisdictions have decriminalized aspects of prostitution since the *Prostitution Reference* was decided, street prostitution remains illegal in most of the developed world. In Australia, for example, street prostitution remains illegal in every state but New South Wales, where it is permitted in certain areas such as safe streets and safe houses.⁴⁹ Street solicitation is also illegal in the United States, United Kingdom, France, and Ireland, among other jurisdictions. Many of these jurisdictions mirror Canada's approach: prostitution itself is legal but street solicitation is not. The conclusion of Justice Lamer (as he then was) in the *Prostitution Reference* remains valid today: "it cannot be said that Canada's response to the problem is out of step with international responses."⁵⁰ There has been no shift in the international approach to street prostitution that would justify revisiting that decision.

⁴⁸ *OCA Judgment, supra* at para. 289. See also *Affidavit of C. Parrott*, J.A.R., Vol. 39, Tab 99, pp. 11207-8 at paras. 59-60 & 11213 at para. 71; *Affidavit of Donna Cowan*, J.A.R., Vol. 39, Tab 100, p. 11341-2 at para. 16; *Affidavit of Dennis St. Aubin, Presentation to House of Commons Subcommittee*, J.A.R., Vol. 39, Tab 101A, p. 11368 at para. 11.

⁴⁹ See Appendix A in AG Ontario's Factum on Appeal.

⁵⁰ *Prostitution Reference, supra* at para. 105.

(2) Even if the *Prostitution Reference* were revisited, s. 213(1)(c) would remain justified under s. 1

36. The objectives targeted by s. 213(1)(c) have not changed since the *Prostitution Reference*. They remain both pressing and substantial. The law is still rationally connected to its objectives. The claimants suggest both that the law can no longer be said to be minimally impairing and that the evidence now shows that the law's deleterious effects are outweighed by any salutary benefits.

37. Section 213(1)(c) minimally impairs the claimants' rights to free expression. As this Court has repeatedly recognized, a law need not be perfect to pass constitutional muster:

It is the role of the legislature to choose among competing policy options. There are often different ways to deal with a particular problem... However, I am mindful that while it may "be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted" there is often "no certainty as to which will be the most effective" ... *Provided the option chosen is one within a range of reasonably supportable alternatives, the minimal impairment test will be met...*⁵¹

38. The communicating provision is appropriately tailored to meet its objectives. A complete ban on communications for the purpose of prostitution is necessary to combat the various social harms targeted by the provision, including the public's exposure to the sale of sex. The prohibition targets both the supply and demand side of public solicitation in an attempt to eradicate street prostitution. The claimants' contention that the law is ineffective because it has not significantly reduced street prostitution is simply not borne out by the evidence.⁵² In any event, this Court has been appropriately reticent to accept arguments of this type, explaining, "The so-called 'ineffectiveness' is simply another way of characterizing the refusal of people in the appellants' position to comply with the law."⁵³

39. Moreover, as discussed above, Canada is not out of step with international responses to street prostitution.⁵⁴ There has not been a clear trend towards decriminalization of prostitution

⁵¹*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 101 [citations omitted; emphasis added]. See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 160; *R. v. Bryan*, 2007 SCC 12 at para. 42; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para. 77; *Prostitution Reference*, *supra* at paras 9-10.

⁵² See paras. 33-34, *supra*.

⁵³ *R. v. Malmö-Levine*, *supra* at para. 178.

⁵⁴ See para. 35, *supra*.

generally. Most jurisdictions that have decriminalized aspects of prostitution continue to prohibit street prostitution and confine legalization to highly regulated brothels. At least some of the jurisdictions that have eased restrictions on street prostitution have revisited and reversed those experiments.⁵⁵ In any event, those jurisdictions that permit some limited form of street prostitution do not seek to pursue the objectives that Parliament has taken on with s. 213(1)(c). Canada's decision to do so, in light of the harms known to be associated with street prostitution, must be accorded deference. The fact that a less intrusive scheme may be imagined – or may even exist in a different jurisdiction with different legislative objectives – does not mean that the right is not minimally impaired. The option chosen by Parliament falls within “a range of reasonable alternatives” for addressing this complex social problem.

40. Finally, the deleterious effects that can be attributed to the communicating provision do not outweigh its important salutary benefits. As discussed above, the impact of s. 213(1)(c) on street prostitutes' safety is negligible. The assertion that enhanced communications would help prostitutes predict which johns will become violent is, at best, highly speculative. On the other hand, the communicating provision benefits the public. It allows police to complete street sweeps through neighborhoods affected by prostitution and reduce the harms associated with the public emanations of its practice,⁵⁶ including the normalizing effect of exposure to the subordination and commodification of women. Police also use the provision as a tool to keep prostitutes away from pimps, to remove them from the prostitution environment and the streets, and to help exit prostitution more generally.⁵⁷

⁵⁵ For example, Amsterdam chose to shut down its Tippelzones in 2003 and the Queensland Crime and Misconduct Commission recommended against adopting safety zones or houses as result of the increase in social nuisance problems – and prostitution generally – linked to these practices. See Crime and Misconduct Commission, *Regulating Prostitution An Evaluation of the Prostitution Act (QLD), 2004*, J.A.R., Vol. 27, Tab 61D, pp. 7883-7885; 7798 [pages missing from J.A.R. are included in AG Ontario's Book of Authorities; available on-line at <http://www.cmc.qld.gov.au/research-and-publications/publications/crime/regulating-prostitution-an-evaluation-of-the-prostitution-act-1999-qld.pdf>].

⁵⁶ See *supra* note 48.

⁵⁷ See *Affidavit of Det. McCartney*, J.A.R., Vol. 35, Tab 82, p. 10056-7 at para. 11-13; *Affidavit of Det. Morrissey*, J.A.R., Vol. 34, Tab 78, p. 9763-4 at para. 31-34; *Affidavit of Det. Cons. Ramos*, J.A.R., Vol. 35, Tab 86, p. 10398-401 at paras. 29-41; *Affidavit of Det. Cons. Holm*, J.A.R., Vol. 35, Tab 83, p. 10244-6 at para. 16-18; *Affidavit of Corp. Joyal*, J.A.R. Vol. 36, Tab 88, p. 10555 at para. 33.

41. Section 213(1)(c) is a constitutionally valid criminal prohibition. It survives scrutiny under s. 7 and is a justifiable infringement of s. 2(b) of the *Charter*.

PART IV: SUBMISSIONS ON COST

42. The Attorney General of Ontario makes no submissions on cost.

PART V: ORDER REQUESTED

43. It is respectfully requested that the cross appeal be dismissed. Alternatively, it is requested that any declaration of invalidity be suspended for a further period of 18 months.

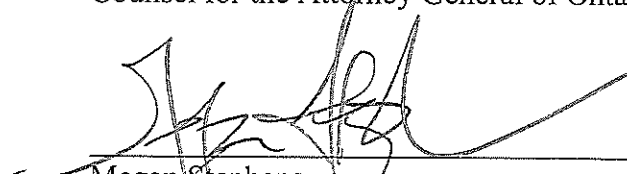
ALL OF WHICH is respectfully submitted this 30th day of May, 2013 by



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PART VI: AUTHORITIES CITED

	Para(s)
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<i>R. v. Malmö-Levine</i> , [2003] 3 S.C.R. 571.....	21, 32, 38
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<i>Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123	15-20, 28-30, 35, 37
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PART VII: STATUTORY PROVISIONS

None.