

Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases

JULA HUGHES, VANESSA MACDONNELL AND KAREN PEARLSTON*

It has been argued that the *Charter of Rights and Freedoms* ushered in a progressive new era in Canadian law. This argument usually implies that the common law remains a largely conservative or stabilizing force in Canadian law, and that principled change under the *Charter* holds more promise than the incrementalism of the common law method. But progressives may also be concerned that principled constitutional change carries its share of risks, including the risk that rapid, large-scale constitutional change could be met with backlash from government and from citizens, and that the interests sought to be advanced through constitutional litigation might ultimately be worse off. In this paper we argue that courts may at times be justified in adopting an incremental approach to constitutional cases, but only if that approach is infused with the *Charter* value of substantive equality. We then analyze the Ontario Court of Appeal's decision in (*Attorney General*) *v Bedford*, a constitutional challenge to the prostitution provisions of the *Criminal Code*, through the lens of an equality-centred approach to incrementalism. We conclude that the Court of Appeal's judgment fails to deliver on the *Charter*'s equality guarantee in important ways. In particular, the majority leaves intact the one provision that specifically targets street sex workers, leaving the most vulnerable sex workers at risk of criminal prosecution and without a remedy. A proper application of common law

Certains ont soutenu que la *Charte canadienne des droits et libertés* marquait l'avènement d'une nouvelle ère progressiste dans le droit canadien. Selon cet argument, on pourrait en déduire que la common law demeure dans une large mesure une force conservatrice ou, du moins, stabilisante en droit canadien, et que des changements fondés sur des principes de la *Charte* semblent plus prometteurs que la méthode de l'évolution graduelle propre à la common law, également connue sous le nom de « incrémentalisme ». Toutefois, les progressistes peuvent également craindre qu'un changement constitutionnel fondé sur des principes comporte sa part de risques, notamment celui qu'un changement constitutionnel rapide et à grande échelle subisse un contrecoup de la part du gouvernement et des citoyens et que les intérêts que l'on cherche à promouvoir et défendre par le truchement du contentieux constitutionnel se retrouvent dans une situation pire qu'avant. Dans cet article, nous soutenons que les tribunaux judiciaires auraient, dans certains cas, raison d'adopter une méthode de modification graduelle envers les affaires constitutionnelles dont ils sont saisis, mais uniquement si cette méthode est imprégnée du principe de l'égalité réelle selon la *Charte*. Nous analysons ensuite la décision rendue par la Cour d'appel de l'Ontario dans (*Procureur général*) *c Bedford*, une contestation constitutionnelle des dispositions du *Code criminel* relatives

* Julia Hughes and Karen Pearlston are Associate Professors at the University of New Brunswick Faculty of Law. Vanessa MacDonnell is an Assistant Professor at the University of Ottawa Faculty of Law (Common Law Section). Thank you to our colleagues Leslie-Ann Jeffrey and Gayle MacDonald, who participated in a "first impressions" panel on *Canada (Attorney General) v Bedford*, 2012 ONCA 186, 109 OR (3d) 1 [*Bedford CA*] with us which helped shape our views of the case. Thank you also to the anonymous reviewers for useful comments and suggestions; to James Strickland and Helen Selassie for research assistance; and to the Law Foundation of Ontario for research funding. This paper was completed in January 2013. In December 2014, the Supreme Court of Canada rendered its decision in *Canada (Attorney General) v Bedford*, 2013 SCC 72. The Court invalidated the three provisions at issue in the case under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*. Parliament then responded by introducing Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2013 (assented to 6 November 2014). We were only able to include minimal references to the Supreme Court's decision in editing proofs and not able to account for the Bill.

method, informed by the *Charter* values of equality and inclusion, would have led the Court of Appeal to a different result, while still grounding the case in the legitimacy of the common law.

à la prostitution, selon la perspective d'une approche graduelle axée sur l'égalité. Nous en avons conclu que le jugement de la Cour d'appel n'avait pas, dans une large mesure, réussi à respecter la garantie d'égalité prévue par la *Charte*. La majorité laisse en particulier intacte la disposition qui vise justement les travailleuses du sexe de la rue, faisant ainsi en sorte que les plus vulnérables d'entre elles courent le risque d'être poursuivies au criminel et ce, sans recours. Une application adéquate de la méthode de common law, éclairée par les valeurs d'égalité et d'intégration garanties par la *Charte*, aurait incité la Cour d'appel à rendre une décision différente, tout en fondant la cause sur la légitimité de la common law.

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Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases

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I. INTRODUCTION

It is often said that the *Canadian Charter of Rights and Freedoms* ushered in a progressive new era in Canadian law. When this assertion is made, the speaker is usually implying that the common law remains a largely conservative or stabilizing force in Canadian law, and that principled change under the *Charter* holds more promise than the incrementalism of the common law method. But progressives also know that principled constitutional change carries its share of risks, including the risk that rapid, large scale constitutional change will be met with backlash from government and from citizens, and that the interests sought to be advanced through constitutional litigation may ultimately be worse off.¹

Almost from the beginning, courts have relied on the common law method in *Charter* adjudication.² There are good reasons for this. Concerns over the legitimacy of judicial review would be greatly heightened if judges did not exercise a degree of restraint consistent with the limitations of their office. Moreover, history has shown that the common law is capable of bringing about progressive change, albeit more incrementally than strict adherence to principle might dictate.³

When a constitutional case is replete with references to *stare decisis*, however, one is often left to wonder whether the Court is relying on the common law method to avoid giving constitutional rights their full scope. While it is tempting to simply retreat to arguments in favour of a principled approach to constitutional adjudication, in this paper we suggest a third way. We argue that courts are justified in adopting an incremental approach to constitutional cases, but only if that approach is

1 Reva Siegel & Robert Post, "Roe Rage: Democratic Constitutionalism and Backlash" (2007) 42 Harv CR-CLL Rev 373.

2 See e.g. *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [Insite].

3 See *infra* note 18.

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infused with the *Charter* value of substantive equality. An equality-centred approach to incrementalism takes advantage of the common law's considerable strength in advancing an anchored, purposive and progressive constitutional jurisprudence, while also being faithful to the promise of the *Charter*.

Under this revised approach to incrementalism, courts deciding constitutional cases would be required to be more sensitive to the demands of equality than the common law, with its focus on liberty, has historically mandated. This would mean that courts would need to pay particular attention to the voices of marginalized claimants.⁴ They would need to critically assess prior precedents through an equality lens to identify any deficiencies in the manner in which those cases were litigated and decided, and decline to apply the doctrine of *stare decisis* if a precedent failed to deal sufficiently with the equality dimensions of a case. Courts would also need to interrogate the legislative purposes put forward by government as justifications for infringing constitutional rights, and ensure that those purposes were not based on discriminatory or moralistic views about the subjects of the legislation. And finally, to the extent that a single constitutional case called for significant constitutional change, courts would be required to structure their response so that in bringing about incremental change, the most acutely vulnerable constitutional interests were given priority.

In this paper we assess the Ontario Court of Appeal's decision in *Canada (Attorney General) v Bedford*⁵ through the lens of an equality-centred approach to incrementalism. In *Bedford*, sex workers challenged three prostitution provisions of the *Criminal Code*⁶ under sections 7 and 2(b) of the *Charter*⁷. The case raised issues of great significance and potential reach. The Court of Appeal was asked to consider recognizing a new dimension of freedom of expression in the form of protective speech; to confront, once again, the limits that section 7 of the *Charter* places on the use of the criminal law power, against the backdrop of recent jurisprudential developments that have been more receptive to the enforcement of these limits than had previously been the case; and to clarify how the principles of fundamental justice interact with each other and with the section 1 analysis. *Bedford* was also a case with substantial equality dimensions. The applicants were sex workers who were articulating in their own voices their experiences of criminalization and victimization, supported by a network of experts who provided wide-ranging social science evidence on the issues before the Court.

4 On the significance of voice, in this context, see Leslie Anne Jeffrey and Gayle MacDonald, *Sex Workers in the Maritimes Talk Back* (Vancouver: UBC Press, 2007). We will refer to considerations of voice throughout.

5 2012 ONCA 186, 109 OR (3d) 1 [*Bedford CA*].

6 RSC 1985, c C-46.

7 Section 7 provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 2(b) provides that "everyone has the following fundamental freedoms ... freedom of ... expression ...". Note that only the communication provision was challenged under section 2(b).

It is somewhat surprising, then, that the majority's decision in *Bedford* is cloaked in the language of *stare decisis* and incrementalism. The Court purported to rest its decision on a straightforward application of precedent, placing particular reliance on the Supreme Court of Canada's decision in the *Prostitution Reference*.⁸ The disconnect between the very significant issues requiring resolution in *Bedford* and the familiar language of the common law sets up a tension that runs throughout the majority's reasons for judgment. This tension surfaces in small but significant technical errors that the Court commits in its use of the common law method, giving rise to the impression that its invocation of the tools and techniques of the common law is serving as rhetorical cover for the much larger constitutional shifts taking place in the judgment.

In some respects, of course, the Court of Appeal rose to the challenge. It not only struck down one of the impugned provisions and significantly narrowed a second, it also supplied an innovative framework for addressing the interaction between a subset of the principles of fundamental justice. It gave effect to the previously marginalized voices of sex workers by affirming much of the application judge's positive treatment of the affidavit and expert evidence that founded the constitutional challenge. The Court of Appeal's judgment also contains serious deficiencies from the standpoint of equality, however. The majority left intact the one provision that specifically targeted street sex workers, leaving the most vulnerable sex workers without a remedy and at risk of criminal prosecution. A proper application of common law method, informed by the *Charter* values of equality and inclusion, would have led the Court of Appeal to a different result while still grounding the case in the legitimacy of the common law.⁹

II. Common Law Incrementalism and the Need for an Equality-Centred Approach

The Supreme Court of Canada has spoken at some length about the advantages of incremental (as opposed to principled) change in constitutional cases.¹⁰ The

8 *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 4 WWR 481 [*Prostitution Reference*].

9 For a discussion of the Supreme Court's repeated failure to recognize the equality dimension of cases, see Sanda Rodgers, "Misconceptions: Equality and Reproductive Autonomy in the Supreme Court of Canada" (2006) 33 Sup Ct L Rev 271. In *Bedford CA*, *supra* note 5, the interveners PACE, SWUAV and PIVOT argued that "non-discrimination" is a principle of fundamental justice. They suggested that the three impugned provisions were inconsistent with this principle because they "impos[e] a greater burden on women involved in sex work, especially those living in poverty and with disabilities." Referring specifically to the communication provision, they stated that "[t]he Communication Provision historically has been the most rigorously enforced of the Laws. It targets street-based sex workers, who are among the most vulnerable women in the sex industry and who often, and particularly as a result of the Bawdy House Provision, have no other options for sex work other than street level" (paras 37-45).

10 By contrasting incremental and principled change we do not mean to suggest that incremental change is not principled. On the contrary, our view is that incremental change has great potential for bringing about principled change. In this context, we refer to principled change as being constitutional change that focuses solely on the merits of a constitutional issue without regard to the destabilizing effect on the law and on legal institutions that large-scale change might bring about.

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Court has suggested that incremental change is simpler¹¹ and more economical.¹² It respects the resource constraints of the justice system and the parties by requiring a more limited evidentiary record,¹³ contributes to the stability of the law¹⁴ and permits reasonable reliance upon a certain legal state of affairs.¹⁵ From a broader policy perspective, it is also less likely to have unforeseen consequences.¹⁶

Stare decisis can be understood not only as a way of protecting scarce judicial resources and promoting finality, but also as a central mechanism for ensuring that like cases are treated alike. This likeness in treatment adds perceptible fairness and legitimacy to judicial decisions and stabilizes the law as a body of doctrine.¹⁷ Moreover, the common law method has demonstrated over the centuries that it is highly capable of accommodating and, indeed, promoting progressive change.¹⁸ The courts have therefore come to rely upon this feature of the common law method in deciding constitutional claims under the *Charter*.¹⁹

From the Court's perspective, another advantage of an incremental approach is that it is less likely to inspire charges of judicial activism. One of the chief critiques of judicial review is that it leads courts to usurp the law reform role of legislatures. In an environment in which the legitimacy of judicial review is highly contested, courts may invoke *stare decisis*, the principle which most embodies the judicial commitment to incrementalism at common law, as evidence that a more traditional, less innovative and less reformatory approach is at work in a constitutional case.

Incrementalism also has its costs. It is an approach that, by definition, puts off aspects of a constitutional or doctrinal problem to another day. It leaves in place a state of affairs that must have been demonstrated to be somewhat flawed, and in this respect upholds questionable norms and values. Because incrementalism tends to be naturally protective of the *status quo*, it is majoritarian in a way that an approach guided purely by constitutional principle is not. It also gives less than full recognition to the interests of minority rights holders, whose interests are at stake in many, if not most, constitutional cases.²⁰ In addition, incrementalism may subdivide social movements into winners and losers, namely, those benefitting from

11 *R v Salituro*, [1991] 3 SCR 654, 131 NR 161 [*Salituro*].

12 *British Columbia (Attorney General) v Christie*, 2007 SCC 32, 1 SCR 873 [*Christie*].

13 *Ibid.*

14 *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609 [*Henry*].

15 *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429.

16 *Salituro*, *supra* note 11.

17 *Henry*, *supra* note 14.

18 The incremental development of a right to privacy against state agents at common law was continued under the *Charter*, see e.g. *Entick v Carrington*, [1765] EWHC KB J98, cited in *Hunter v Southam*, [1984] 2 SCR 145. For a similar argument made in the administrative law context, see *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, and the secondary literature cited therein.

19 See e.g. *Gosselin*, *supra* note 2; *Insite*, *supra* note 2.

20 *Salituro*, *supra* note 11; *Christie*, *supra* note 12. See also *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 Sup Ct L Rev (2d) 501 at 514.

incremental change and those who would have required further change in order to achieve their goals.²¹ In *Bedford*, for example, the majority's incremental approach divided indoor and outdoor sex workers.

Incrementalism also has powerful rhetorical force. Since all change can be characterized as either incremental (change the law is prepared to support) or not incremental (change the law is not prepared to support), the boundary between incremental and sweeping change often lies in the eye of the beholder. A court making significant change may be tempted to seek rhetorical cover behind the language of incrementalism in order to avoid both academic and public backlash.

A great deal has been written about the phenomenon known as "backlash."²² The basic premise is that judicial opinions that effect principled rather than incremental change risk harming the very interests they seek to vindicate by precipitating a popular backlash to the Court's decision. There is some disagreement in the literature about whether this form of backlash can be substantiated as a factual matter. Siegel and Post, for example, argue that much of the supposed backlash that resulted from the United States Supreme Court's judgment in *Roe v Wade* can actually be attributed to other factors.²³ At the very least, it is likely true that the spectre of backlash influences judicial decision-making. Courts may be more likely to adopt an incremental approach in a highly controversial or political case (descriptors that apply to most constitutional cases), or to at least couch a principled decision in the language of incrementalism in order to reduce the likelihood that the decision will generate backlash. In this way, the concern over "backlash" can be viewed as part of the Court's broader concern for legitimacy.²⁴

We also know, however, that the effect of excluding a constitutional challenge on *stare decisis* grounds is significant, in that it has the effect of denying the claimant a full consideration of her case on its merits. In this context, it is particularly important for the Court's application of the doctrine of *stare decisis* to be sound. Otherwise, a claimant is improperly deprived of her opportunity to be heard. In its most recent standing case, the Supreme Court emphasized that courts ought to promote rather than foreclose access to the courts in *Charter* cases, and that all aspects of a case must be carefully considered before concluding that the requirements for public interest standing have not been met.²⁵ We suggest that a similar approach is required when applying the doctrine of *stare decisis*.

21 See Saul Levmore, "Interest Groups and the Problem with Incrementalism" (2009-2010) 158 U Pa L Rev 815.

22 See Siegel & Post, *supra* note 1; Michael Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis" (1994) 81 Journal of American History 81 [Klarman, "Backlash Thesis"]; Cass Sunstein, "Backlash's Travels" (2007) 42 Harv CR-CLL Rev 435.

23 Siegel & Post, *ibid.*

24 *Ibid.*

25 *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, 352 DLR (4th) 587. See also Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44 UBC L Rev 255.

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A. An Equality-Centred Approach to Incrementalism

We argue that there is substantial value in adopting an incremental approach to constitutional cases, particularly where the issue is highly contested. However, any such approach must be firmly anchored in constitutional rights and values, particularly in section 15's guarantee of substantive equality. Indeed, the major flaw in the majority's incremental approach in *Bedford* is that it ignored the substantive equality dimensions of the case, both in deciding whether it was barred from considering the section 2(b) challenge to the communication provision and in reviewing the communication provision for compliance with section 7. If the majority had viewed these issues through the lens of substantive equality, as it was asked to do, the outcome of the case may well have been different.

Equality considerations underpin both incremental and principled change. Precedent plays an important role in securing equality before the law as it ensures that like cases are treated alike. We might think of this as the formal equality guarantee of *stare decisis*.²⁶ Principled change is often driven by a concern for the substantive equality interests of constitutional rights holders. This observation is not limited to section 15 cases, as virtually all constitutional rights guarantees have equality dimensions.²⁷

How do we reconcile these dual equality demands in constitutional cases? We suggest that infusing the common law's commitment to incrementalism with a commitment to substantive equality produces a variant of common law incrementalism that takes advantage of the values of stability and progressive change, while also being alive to the potentially adverse impact of incremental change on the most vulnerable. We suggest that in practice, this means three things. First, courts must pay attention to social and historical context in evaluating constitutional claims.²⁸ While courts have repeatedly emphasized the importance

26 This formal variant of equality is a basic component of rule of law systems.

27 A slightly different way of conceptualizing the relationship between the formal equality guarantee of the rule of law and the substantive equality demands of the *Charter* would be to say that the rule of law is a more substantial principle that also encompasses section 15 concerns. As Justice Laskin wrote in *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649, 82 OR (3d) 721, 277 DLR (4th) 274, "[T]he rule of law has many dimensions, or in the words of the Supreme Court of Canada is "highly textured." The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected. Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights..." Cited to CanLII at paras 141-42.

28 This is consistent with Drieger's modern principle of statutory interpretation which says that words "are to be read in their *entire* context." (emphasis in original): Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2008) at 460. Though she notes that it is "a current controversy in statutory interpretation," Sullivan argues that "social context" forms part of the "entire context" of a statute and that "[c]ourts have been relying on social context to determine the mischief that legislation is intended to cure since before *Heydon's Case*. This entails identifying the problems addressed by legislation, the causes of those problems and the context in which the solution will be played out." *Ibid*.

of a contextual approach to constitutional analysis,²⁹ a narrow approach to context can produce unjust results. Equality demands that courts take the constitutional claims of marginalized individuals and groups seriously by paying close attention to their experiences. It also demands that courts view with a critical eye legislation that purports to regulate individuals more harshly because of their marginalization or status. This requires courts to view legislative history through a critical lens and to interrogate the justifications offered by government for infringing constitutional rights.

Second, when applying the doctrine of *stare decisis*, courts must be aware of the possibility that earlier cases may not have taken sufficient account of equality. In other words, *stare decisis* should be applied in a manner that is sensitive to the patterns of inequality and prejudice that underlie our jurisprudence.³⁰ Accordingly, courts should not be too quick to oust on *stare decisis* grounds constitutional claims brought by marginalized claimants arguing either that the law regulates them in a punitive manner because of their marginalization or that it impacts them differentially for the same reason. *Stare decisis* is thus only properly applied in constitutional cases where it is clear that the constitutional issues were determined in the earlier case in their proper (critical) context.

Third, when courts are asked to bring about large-scale constitutional change, as they were asked to do in *Bedford*, they should adopt an approach to incrementalism that is alive to the equality dimensions of the case. In any given case there are usually multiple possible incrementalist outcomes available to the court.³¹ In choosing how incremental change will occur, substantive equality requires courts to prioritize the constitutional interests of the most vulnerable. In other words, the constitutional interests most in need of vindication should be tackled first. We explore these issues in greater depth in the next section, through a case study of the Ontario Court of Appeal's decision in *Bedford*.

29 *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 103 AR 321, per Wilson J.

30 For a discussion of these kinds of views in the context of sexual assault cases, see Natasha Bakht, "N.S. and Women's Equality", online: Blogging for Equality <<http://www.bloggingforequality.ca>>. Courts have only recently begun to take cognizance of these patterns: see *R v S (RD)*, [1997] 3 SCR 484, 161 NSR 241; *R v Williams*, [1998] 1 SCR 1128, 159 DLR (4th) 493. For an argument that they still have not, see Bakht, *ibid*; Rodgers, *supra* note 9. On this issue, the *res judicata* jurisprudence of the Supreme Court of Canada, particularly in human rights cases, might prove instructive. To the extent that *stare decisis* and civil litigation finality doctrines such as *res judicata* and issue estoppel serve related purposes of judicial economy and legal certainty, a balance has to be struck in both circumstances between these purposes and the interests of substantive justice in a particular case. See *British Columbia (Workers' Compensation Board) v Figliola* 2011 SCC 52 at para 58, Cromwell J (dissenting in part), [2011] 3 SCR 422; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513.

31 For a similar argument in the context of the fulfillment of affirmative constitutional obligations, see Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002); Robert Alexy, "On Constitutional Rights to Protection" (2009) 3 *Legisprudence* 1.

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III. An Equality-Centred Approach to Incrementalism in *Bedford*

A. The Case

In *Bedford*, three sex workers challenged the bawdy-house,³² living on the avails,³³ and communication³⁴ provisions of the *Criminal Code*. A majority of the Court of Appeal concluded that the bawdy-house provision unjustifiably infringed the applicants' section 7 rights. The majority also concluded that the prohibition on living on the avails of prostitution unjustifiably infringed the claimants' section 7 rights "to the extent that it criminalizes non-exploitative commercial relationships between prostitutes and other people."³⁵ However, it disagreed with the application judge that the prohibition on communicating for the purpose of prostitution violated sections 7 and 2(b) of the *Charter*. Justice MacPherson, dissenting in part, with Justice Cronk, concurring, would have invalidated all three of the impugned provisions under section 7.

Bedford was a case with important equality dimensions. The applicants were sex workers whose affidavit evidence provided first-hand accounts of their experiences of criminalization and victimization. These accounts were supported by the affidavit evidence of a network of experts³⁶ and a large volume of documentary evidence, including the evidence of 300 witnesses and over 100 sex workers heard by the Standing Committee on Justice and Human Rights' Subcommittee on Solicitation during hearings into the regulation of prostitution in Canada between 2003 and 2006.³⁷ This evidence had not been before the courts in the *Prostitution Reference*, the last major case in which these issues had been canvassed. This evidence provided important context to the constitutional questions before the Court.

32 *Criminal Code*, *supra* note 6, ss 210 (1), 210 (2) make it an indictable offence to operate a common bawdy-house or a brothel and a summary conviction offence to be an "inmate of a common bawdy-house"; to be "found, without lawful excuse, in a common bawdy-house"; or for a person in possession of premises to "knowingly permit[] the place...to be...used for the purposes of a common bawdy-house." Section 197(1) of the *Code* defines a common bawdy-house as "a place that is (a) kept or occupied, or (b) resorted to by one or more persons, for the purpose of prostitution or the practice of acts of indecency." The Court of Appeal's decision in *Bedford CA*, *supra* note 5 did not invalidate the indecency-related component of the bawdy-house provisions (paras 14, 44).

33 *Criminal Code*, *supra* note 6, s 212(1)(j) makes "liv[ing]...on the avails of prostitution" a criminal offence.

34 Section 213(1) of the *Criminal Code*, *ibid*, prohibits "communicat[ion] ... for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute."

35 *Bedford CA*, *supra* note 5 at para 6.

36 There was also extensive testimony from law enforcement: see *Bedford v Canada*, 2010 ONSC 4264, 109 OR (3d) 1 [*Bedford* trial].

37 These hearings culminated in a report, entitled Report of the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada – Publishing, 2006), which advocated for the decriminalization of sex work in Canada.

A preliminary question for the Court was whether the constitutional challenge was barred by the doctrine of *stare decisis*, and in particular by the Supreme Court's earlier decision in the *Prostitution Reference*. The majority concluded that the section 7 challenge could proceed on the basis that when the *Prostitution Reference* was decided, arbitrariness and gross disproportionality had not yet been recognized as principles of fundamental justice.³⁸ Moreover, the *Prostitution Reference* had dealt only with the "physical liberty interest" protected by section 7.³⁹ In the instant appeal, the majority noted, substantial arguments had also been advanced with respect to security of the person.⁴⁰

The claimants argued that the provisions deprived sex workers of their life, liberty and security of the person in a manner that was not in accordance with the principles of fundamental justice that prohibit overbreadth, arbitrariness and gross disproportionality. The crux of the argument with respect to all three principles of fundamental justice was that the provisions increased the dangers faced by sex workers in a manner inconsistent with section 7. The bawdy-house provisions forced sex workers to engage in "out-call work" rather than working from an "indoor location"⁴¹ where they were better able to ensure their own safety. The living on the avails provision prohibited sex workers from engaging the services of security guards or other persons to evaluate prospective customers and to intervene if a dangerous situation materialized. The communication provision made it a criminal offence for sex workers to "screen"⁴² clients in a public place before accompanying them to a private location where the threat of violence would be much higher.⁴³ The communication provisions also resulted in sex workers operating alone rather than in groups and in "isolated and dangerous areas" to avoid detection by police.⁴⁴ In other words, the very operation of the provisions placed sex workers in a position where they could only work in the most dangerous of circumstances: by engaging in out-call work without first communicating with the customer for screening purposes. This, the claimants argued, rendered the provisions arbitrary, overbroad and grossly disproportionate.

The majority began its section 7 analysis by examining the bawdy-house provisions. It held that the provisions implicated both the liberty and the security of the person of sex workers. The majority based its finding with respect to the liberty interest on the possibility of imprisonment, rejecting the broader submission that the liberty of sex workers was engaged by the obstacle the law posed to the "personal life choice" to engage in sex work.⁴⁵ "The decision to engage in a particular

38 *Bedford CA*, *supra* note 5 at para 68.

39 *Ibid* at para 65.

40 *Ibid* at para 66.

41 *Ibid* at para 16 (internal quotation marks removed).

42 *Ibid* at para 4 (we will use the term "screen" throughout).

43 *Ibid* at paras 98-100.

44 *Ibid* at para 352, MacPherson JA, dissenting.

45 *Ibid* at para 92.

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commercial activity,” the majority explained, was not an interest protected by section 7.⁴⁶ With respect to the section 7 interest in security of the person, the majority’s analysis was more expansive. It held that the provisions violated the security of the person of sex workers because

the relevant *Criminal Code* provisions, individually and in tandem, increase the risk of physical harm to persons engaged in prostitution, a lawful activity. They increase the harm by criminalizing obvious, and what on their face would appear to be potentially somewhat effective, safety measures An added risk of physical harm compromises personal integrity and autonomy and strikes at the core of the right to security of the person.⁴⁷

In determining whether the deprivation of section 7 interests was in accordance with the prohibitions on arbitrariness, overbreadth and gross disproportionality, the Court of Appeal was first required to determine the purpose of the provisions. The majority rejected the Attorney General of Ontario’s submission that the goal of the bawdy-house provisions was to “discourag[e], and even eradicat[e] prostitution,”⁴⁸ finding instead that the provision’s objective was “safeguarding the public peace *and* protecting against the corruption of morals.”⁴⁹ Since moral considerations were not a legitimate basis upon which to deprive an individual of his or her liberty and security of the person, the majority proceeded on the more limited objective of “safeguarding the public peace,” which, following the application judge, the Court of Appeal referred to as the “social nuisance” concern.⁵⁰

Turning to the principles of fundamental justice, the majority concluded that the bawdy-house provisions were not arbitrary because there was “some” connection between the provisions and the law’s objective.⁵¹ It concluded, however, that the provisions were both overbroad and grossly disproportionate. The provisions were overbroad because they included “conduct that does not contribute to the social harm sought to be curtailed,”⁵² including the practice of sex workers working on their own in an apartment or house, and the appellants had not established that “a blanket prohibition on all bawdy-houses [was] necessary to achieve Parliament’s objectives.”⁵³ The provisions were grossly disproportionate because of the extreme impact of the law on the applicants’ section 7 interests:

46 *Ibid* at para 94.

47 *Ibid* at para 111.

48 *Ibid* at para 165.

49 *Ibid* at para 189 [emphasis in the original].

50 *Ibid* at para 31 [emphasis in the original].

51 *Ibid* at paras 194-96.

52 *Ibid* at para 198.

53 *Ibid* at para 199.

the evidence in this case suggests that there is a very high homicide rate among prostitutes and the overwhelming majority of victims are street prostitutes. As well, while indoor prostitutes are subjected to violence, the rate of violence is much higher, and the nature of the violence is more extreme, against street prostitutes than those working indoors. The bawdy-house provisions prevent prostitutes from taking the basic safety precaution of moving indoors to locations under their control, which the application judge held is the safest way to sell sex.⁵⁴

Moving to the living on the avails provision, the Court began by noting that the goal of the provision was to “prevent the exploitation of prostitutes by pimps.”⁵⁵ While it the provision was not arbitrary,⁵⁶ the Court found that it was overbroad because it “capture[d] conduct that is in no way exploitative,” including contracting for the service of persons who might help to make sex work safer, such as a bodyguard or receptionist.⁵⁷ The provision was grossly disproportionate for much the same reason.⁵⁸ After a brief section 1 analysis, the Court concluded that rather than striking down the provision, as the application judge had done, it would instead “read words of limitation into the text of s 212(1)(j) so that the prohibition is against living on the avails of prostitution *in circumstances of exploitation*.”⁵⁹

Finally, the majority turned to the communication provision. The purpose of this provision, it noted, citing the reasons of Chief Justice Dickson and Justice Wilson in the *Prostitution Reference*, was “to target the social nuisance associated with street prostitution, including noise, street congestion and interference with innocent bystanders.”⁶⁰ The majority concluded that this legislative objective was more robust than the application judge had acknowledged. In particular, the majority stated that communication for the purpose of engaging in prostitution often brought with it “serious criminal conduct, including drug possession, drug trafficking, public intoxication, and organized crime.”⁶¹ In direct contradiction to the majority in the *Prostitution Reference*, the *Bedford* majority was prepared to include the prevention of these harms within the scope of the objective of the communication provision, thus giving the legislative objective considerable added significance. It also rejected the application judge’s conclusion that “the communicat[ion] provision has been ineffective in reducing the social harms associated with prostitution.”⁶² In any event, the majority view was that “to the extent that the law may have been ineffective

54 *Ibid* at para 207.

55 *Ibid* at para 220.

56 *Ibid* at para 221.

57 *Ibid*.

58 *Ibid* at para 253-54.

59 *Ibid* at para 222 [emphasis in the original].

60 *Ibid* at para 279, citing Dickson CJ in the *Prostitution Reference*, *supra* note 8 at 1135-37.

61 *Bedford CA*, *supra* note 5 at para 307.

62 *Ibid* at para 308.

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to some degree in achieving its purpose, the role of that ineffectiveness in the gross disproportionality analysis is limited because deference is to be accorded to Parliament's choice of means to achieve its objective."⁶³

In terms of the effect of the provision on sex workers, the applicants argued that the major effect of the provision was to "forc[e] [sex workers] to forego screening customers at an early and crucial stage of the transaction."⁶⁴ This increased the chance that sex workers would encounter violence in the course of their work. Although the application judge accepted this view of the evidence, the majority overturned her finding on appeal. The majority noted that the only evidence in support of this position was "anecdotal," buttressed by the "common sense" observations of the application judge.⁶⁵ Moreover, the majority expressed doubt that communication alone could play a significant role in keeping sex workers safe. The majority noted that a quick screening of a customer at the outset of the encounter would not necessarily prevent sex workers from facing harm during an encounter. What was more, the threat of harm might not be enough to deter sex workers in any event, owing to the pressures created by addiction or poverty.⁶⁶ The dissent pointed out that the majority "turns the question of pre-existing disadvantage on its head. They reason that because prostitutes' marginalization contributes to their insecurity, the adverse effects of the law are diluted and should be given *less* weight."⁶⁷

After agreeing with the application judge that the provision was neither arbitrary nor overbroad, the majority reiterated the "onerous standard" required to establish gross disproportionality.⁶⁸ An important contextual factor in assessing gross disproportionality was the fact that the Court of Appeal had struck down the bawdy-house and living on the avails provisions.⁶⁹ This, the majority suggested, meant that the impact of the communication provision would be lessened, since street workers would no longer be required to operate on the street.⁷⁰ Arguments about the effectiveness of the provision were therefore irrelevant, "because it remains to be seen whether [in light of the invalidation of the other two provisions] the law will be effective in the future in achieving Parliament's objective."⁷¹

63 *Ibid*, citing *R v Malmo Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at paras 176-78 [*Malmo-Levine*].

64 *Bedford* trial, *supra* note 36 at para 421.

65 *Bedford CA*, *supra* note 5 at para 311.

66 *Ibid* at paras 310-324.

67 *Ibid* at para 357, MacPherson JA dissenting [emphasis in the original].

68 *Ibid* at para 300.

69 This finding is a curious one, given that the majority does not consider the significance of the other prostitution provisions in its constitutional analysis of the bawdy-house and living on the avails provisions. On the contrary, the court's analysis operates in silo-mode with respect to those sections.

70 *Bedford CA*, *supra* note 5 at paras 366-67, MacPherson JA dissenting. This point is open to debate. Several interveners pointed out that for street prostitutes there may be additional obstacles to moving off the street. It may well be incorrect to infer that the invalidation of the bawdy-house and living on the avails provisions would significantly reduce the relevance of the communication provision in the life of sex workers.

71 *Ibid* at para 309.

In sum, the majority found that in assessing whether the communication provision accorded with the prohibitions on arbitrariness, overbreadth and gross disproportionality, the application judge “underemphasiz[ed] the importance of the legislative objective and overemphasiz[ed] the impact of the communicat[ion] provision on the respondents’ security of the person.”⁷² This led her to conclude erroneously that the provisions were grossly disproportionate.

B. The Dissent

Justice MacPherson, with whom Justice Cronk concurred, authored a brief but powerful dissent. The dissent began by pointing out the many internal contradictions in the majority’s reasoning, particularly in relation to the majority’s application of the standard of gross disproportionality as a principle of fundamental justice. They disagreed that the “serious criminal conduct”⁷³ that sometimes accompanied prostitution was relevant to the section 7 inquiry.⁷⁴ They also objected to the majority’s dismissal of the evidence that suggested that communication was “an essential tool for safety.”⁷⁵

The dissent was particularly concerned by the majority’s approach to the “pre-existing vulnerability” of sex workers.⁷⁶ Justice MacPherson argued strenuously that sections 15 and 28 of the *Charter* played important contextual roles in determining whether the communication provision deprived sex workers of their security of the person in a manner that was grossly disproportionate to the state’s legislative objective. As he explained,

persons engaged in prostitution are overwhelmingly women. Many are aboriginal women. Some are members of lesbian and gay communities. Some are addicted to drugs and/or alcohol, both of which are forms of disability. Since gender, race, sexual orientation and disability are all enumerated or analogous grounds under s. 15 of the *Charter*, the s. 7 analysis must take into account that prostitutes often hail from these very groups.⁷⁷

Informed by the section 15 lens, the outcome of the weighing process mandated by the section 7 gross disproportionality analysis looked quite different. “The communicating provision,” the dissent concluded, “chokes off self-protection options for prostitutes who are already at enormous risk.”⁷⁸ For this reason, the

72 *Ibid* at para 280.

73 *Ibid* at para 307.

74 *Ibid* at para 346.

75 *Ibid* at para 348.

76 *Ibid* at paras 357-60.

77 *Ibid* at para 356.

78 *Ibid* at para 359.

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harm and risk to prostitutes was grossly disproportionate to the objective sought to be achieved by the communication provision.

C. The Use of Common Law Reasoning in *Bedford CA*

There is a striking disconnect between the conservative common law techniques that the majority invokes to frame its judgment in *Bedford* and the considerable progressive legal change that the Court ultimately endorses. Though the Court of Appeal does not say so, *Bedford* is situated at an important point in the evolution of the section 7 jurisprudence. The courts have struggled for some time to develop a coherent account of how the principles of fundamental justice prohibiting arbitrariness, overbreadth and gross disproportionality operate when they appear together in a case. The courts have also had difficulty settling on a precise set of constitutional prerequisites for the state's use of the criminal law power under section 7.⁷⁹ Finally, the Supreme Court has delivered inconsistent rulings over time on how to understand how the Court's analysis at the section 7 stage interacts with its analysis under section 1.⁸⁰ All three of these issues were before the Court of Appeal in *Bedford*. In this case, then, the Court was asked to change the law not only in the narrow sense of using well established *Charter* principles to strike down the three impugned provisions, but also in the broader sense: the structure of the legal analysis under section 7 is evolving, and *Bedford* was one of less than a handful of cases in which the scope and boundaries of the new structure were being explored.⁸¹

The Court of Appeal responded by not only changing the law, but also by shifting in an important sense how we think about how the *Charter* regulates the criminal law. In *Insite*,⁸² the Supreme Court had acknowledged the potential overlap between the principles prohibiting overbreadth and arbitrariness, but elected not to define the principles conclusively or to determine whether they should be collapsed into a single inquiry.⁸³ The Court of Appeal resolved this issue in *Bedford* by considering the principles of arbitrariness, overbreadth and gross disproportionality in sequence. In doing so, the Court essentially reconstructed the *Oakes* analysis at the stage of determining whether the deprivations of liberty and security of the person were in accordance with the principles of fundamental justice, and imposed

79 See *Malmo-Levine*, *supra* note 63; *Insite*, *supra* note 2. For a general review of the pre-*Insite* cases, see Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 10th ed (Toronto: Emond Montgomery, 2010) at 45-109.

80 Vanessa MacDonnell, "R v Sinclair: Balancing Individual Rights and Societal Interests Outside of Section 1 of the *Charter*" (2012) 38:1 Queen's LJ 137 at 145-51 [MacDonnell, "*Sinclair*"]; Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45:1 Osgoode Hall LJ 169 at 184; Kent Roach, "Common Law Bills of Rights as Dialogue Between Courts and Legislatures" (2005) 55:3 UTLJ 733 at 764-65; Jamie Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on R. v. Mills" (2001) 38:4 Alta L Rev 1051 at 1065-66.

81 See e.g. *Insite*, *supra* note 2.

82 *Ibid.*

83 *Ibid* at para 134.

a requirement of proportionality on the federal government's use of the criminal law power.⁸⁴ Along the way, the Court defused most of the remaining arguments against recognizing proportionality as a principle of fundamental justice by showing that these three principles, when analyzed in sequence, largely tracked the pressing and substantial connection, minimal impairment and proportionality stages of the *Oakes* test.⁸⁵ The result is an analysis that is deeply logical and creates much-needed parity between section 7 and the other provisions of the *Charter*, for which proportionality is the constitutional prerequisite for the exercise of government power that infringes *Charter* rights.

The conceptual shift that takes place under section 7 in *Bedford* is nothing short of momentous. Despite this, the Court of Appeal insisted that it was proceeding incrementally, plumbing the depths of precedent and relying on the principle of *stare decisis* in reaching its decision on the constitutional questions. Indeed, on the surface, the majority's judgment reads as a model of disciplined common law reasoning. The Court of Appeal employs the doctrine of precedent to carefully parse out which aspects of the case are properly within its scope of review and which aspects lay beyond it.

In this section we turn a critical eye to this veneer of incrementalism and focus on two aspects of the judgment that might have been decided differently had the Court of Appeal adopted an equality-centred approach to incrementalism. We begin with the Court's decision not to address the section 2(b) challenge to the communication provision on the grounds that the doctrine of *stare decisis* precluded it, before moving on to a discussion of the implications of ignoring the social and historical contexts in which the communication provision was enacted. We end this section with a discussion of two places in the reasons for judgment where the Court seems to get it right.

D. Incomplete and Slanted Approach to the *Prostitution Reference*

In *Bedford*, the Court was asked to revisit legal questions that had been decided by the Supreme Court more than two decades earlier in the *Prostitution Reference*. In the *Prostitution Reference* and in two companion cases, *R v Stignatta*⁸⁶ and *R v Skinner*,⁸⁷ the Supreme Court heard arguments about the constitutionality of the bawdy-

84 See Vanessa A MacDonnell, "The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*" (2012) 17 *Rev Const Stud* 53 [MacDonnell, "Protective Function"]; MacDonnell, "*Sinclair*", *supra* note 80 at 149. After identifying the objective of the legislation in a manner analogous to the "pressing and substantial" phase of the *R v Oakes*, [1986] 1 SCR 103, 40 OR (2d) 660 [*Oakes*] inquiry, the Court of Appeal in *Bedford CA*, *supra* note 5 continued to channel *Oakes* by inquiring into arbitrariness (a stand-in for rational connection), overbreadth (minimal impairment) and gross disproportionality (proportionality). Vagueness, which is not discussed, is an analog of the prescribed by law requirement. For similar analyses, see Hamish Stewart, "*Bedford v Canada: Prostitution and Fundamental Justice*" (2011) 57 *Crim LQ* 197 at 213; Choudhry, *supra* note 20 at 530-31.

85 The principal argument for the existing approach in *Malmo-Levine*, *supra* note 63 concerned the need to adopt similar standards under section 12 of the *Charter*, *supra* note 6 (cruel and unusual punishment) and section 7 when a sentence was being reviewed. See MacDonnell, "Protective Function", *supra* note 84 at 72.

86 [1990] 1 SCR 1226, 108 AR 44 [*Stagnatta*].

87 [1990] 1 SCR 1235, 98 NSR (2d) 181 [*Skinner*].

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house and communication provisions. The Court canvassed a range of issues, but a majority, led by Chief Justice Dickson, ultimately decided a much smaller number of discrete points, leaving many of the larger policy issues to another day.

Beginning with the section 2(b) challenge, the Court in the *Prostitution Reference* was unanimous in characterizing the speech targeted by the communication provision as commercial and in holding that section 2(b) extended to protect commercial speech, though they located the interest at the guarantee's periphery.⁸⁸ Adopting the reasoning of Justice Wilson, the majority then concluded that the communication provision infringed freedom of expression. The majority parted company with Justice Wilson, however, in concluding that the infringement could be justified under section 1. Both Chief Justice Dickson and Justice Wilson determined that the purpose of the communication provision was to address the nuisance of street solicitation (variously described as a "public" or a "social" nuisance).⁸⁹ This nuisance included traffic disruption and the attempted solicitation of passers-by, but did not include the other social ills that were argued to be associated with prostitution, such as organized crime and drug trafficking.⁹⁰ Justice Lamer would have characterized the purpose of the provision more broadly, including within the aims of the provision the dangers and criminality associated with prostitution, as well as the nuisance of street solicitation (within which he seems to have included what he viewed as the relationship between street solicitation and the recruitment of young people into prostitution).⁹¹ This broader view of the objectives of the communication provision was expressly rejected by both Chief Justice Dickson and Justice Wilson. At the proportionality stage, the majority relied upon its characterization of the section 2(b) interest as peripheral to the values guaranteed by freedom of expression to conclude that the rights infringement was proportional to the state's purpose.

Responding to the section 7 challenge, all judges agreed that the impugned provisions were not unconstitutionally vague. Justice Lamer, writing for himself, was alone in discussing the potential extension of the scope of the liberty and security of the person interests under section 7 to economic interests, but he ultimately concluded that the scope of section 7 did not include the right to engage in one's chosen profession, nor did it lead him to conclude that the law violated section 7.⁹² Justice Wilson, writing in dissent, would have grounded a section 7 violation in the fact of the section 2(b) infringement, reasoning that it could not be in accordance with the principles of fundamental justice for the state to deprive an individual of his or her liberty on the basis of an unconstitutional law.⁹³

88 *Prostitution Reference*, *supra* note 8 at 1139 per Chief Justice Dickson, at 1188 per Justice Lamer and at 1205 per Justice Wilson.

89 *Ibid* at 1135 per Chief Justice Dickson and at 1211 per Justice Wilson.

90 *Ibid* at 1134 per Chief Justice Dickson and at 1210 per Justice Wilson.

91 *Ibid* at 1193 per Justice Lamer.

92 *Ibid* at 1179 per Justice Lamer. The majority rested its analysis on the deprivation of liberty created by the prospect of imprisonment. *Ibid* at 1140 per Chief Justice Dickson.

93 *Ibid* at 1221 per Justice Wilson.

In determining the precedential weight of the *Prostitution Reference*, the Court of Appeal in *Bedford*, following the Supreme Court in *Henry*,⁹⁴ proceeded on the assumption that the tools of the common law were equally applicable where constitutional questions were in issue as when the court was being asked to decide non-constitutional questions. In fact, the Court was unanimously of the view that “a robust application of *stare decisis* is particularly important in the context of *Charter* litigation.”⁹⁵ Were the courts not to insist upon the application of these principles in *Charter* cases, the Court reasoned, the constitution would become “not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.”⁹⁶ This meant that neither evolving “evidence and legislative facts” nor shifting “values, attitudes and perspectives” provided a basis “alone” for revisiting past decisions of the Supreme Court.⁹⁷ On this view of *stare decisis*, the application judge was wrong to conclude that the Court’s holding in the *Prostitution Reference* was questionable in light of the new “social, political and economic”^{97.1} context in which the issues were being mooted, the presence of new evidence, and the “evolving international legal context.”⁹⁸

It is of some significance that the Court in *Bedford* erroneously treats the *Prostitution Reference* as binding, despite its advisory nature.⁹⁹ Had the Court wanted to engage with the section 2(b) issues raised by the *Prostitution Reference*, it could

94 *Supra* note 14.

95 *Bedford CA*, *supra* note 5 at 83 [emphasis added]. This is contrary to the views of the Supreme Court of Canada, the United States Supreme Court, the High Court of Australia and academic commentary. See Joseph J Arvai, Sheila M Tucker & Alison M Latimer, “*Stare Decisis* and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?” (2012) 58 Sup Ct L Rev (2d) at 65, citing *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 6 March 2013), (Scarborough: Thomson Carswell, 2006) at 87, citing *Brown v Board of Education*, 347 US 483 (1954) and *Queensland v Commonwealth*, (1977), 139 CLR 585. The Supreme Court of Canada disagreed with the Court of Appeal on this point: see *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42 [*Bedford SCC*].

96 *Bedford CA*, *supra* note 5 at para 84.

97 *Ibid* at para 83.

97.1 *Bedford* trial, *supra* note 36 at para 83.

98 *Bedford CA*, *supra* note 5 at para 73.

99 Hogg, *supra* note 95 at 8-18. In *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 25, 161 DLR (4th) 385, the Court emphasized that the function of courts in reference cases is to advise government, not to engage in a disposition of rights. Although the decision in the *Prostitution Reference*, *supra* note 8 was released concurrently with two appeals, *Stagnitta*, *supra* note 86 and *Skinner*, *supra* note 87, the companion cases were not discussed in *Bedford CA*, *supra* note 5, nor would they likely have been of any assistance to the Court of Appeal. *Stagnitta* involved the prosecution of a sex worker who was charged under the communication provision after an encounter with an undercover male police officer posing as a potential customer. The case proceeded on the basis of a very sparse agreed statement of facts. *Skinner* involved a customer who was charged with communicating for the purpose of engaging in prostitution after he solicited sex from an undercover police officer. The constitutional analysis took place in the *Prostitution Reference*, and the perspective of the sex workers was almost entirely absent from the evidentiary record in the companion cases. The Canadian Organization for the Rights of Prostitutes intervened in the *Prostitution Reference* and in *Stagnitta*, but not in *Skinner*. The facts in the companion cases included affidavit evidence from two sex workers. However, these affidavits were primarily concerned with the question of whether sex work contributed to “urban decay.” They also supported the position that communication for the purposes of prostitution was not a nuisance. The authors thank Joseph Magnet, counsel for the Canadian Organization for the Rights of Prostitutes, for supplying them with this information.

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have very easily concluded that the presence of a “case or controversy” provided sufficient grounds to deal with the issue. Instead, the Court relied upon a technically incorrect interpretation of *stare decisis* to conclude that it was barred from hearing the freedom of expression challenge. The Court’s treatment of the *Prostitution Reference* is open to question, even accounting for the more “nuanced” approach to precedent articulated in *Henry*.¹⁰⁰ For this reason, it is possible to assume that the Court refused to exercise a power that it actually possessed, that is, the power to consider the constitutionality of the communications provision under section 2(b). Should it have refused? Was the Court upholding the common law values of *stare decisis* and incrementalism at the expense of principled constitutional argument? Or is this insistence on following precedent a mere smokescreen?

On one reading of *Bedford*, Queen Gertrude’s “the lady doth protest too much, methinks”^{100.1} might be found apposite. *Bedford* is, of course, not merely the result of a straightforward application of precedent. But the Court’s invocation and use of the concept of precedent does raise complex questions. As Justice Ferguson of the Ontario Superior Court has observed,

There is a chicken and egg aspect to cases where *stare decisis* is an issue. Unless a judge, having heard the argument, holds a view contrary to the precedent case or has no particular view, then it is unlikely that the judge will find it necessary to comment on *stare decisis* – the judge can simply follow the precedent.¹⁰¹

The application judge in *Bedford* clearly held a view contrary to the “precedent case,” and it was her departure from precedent that sparked the discussion of *stare decisis* in her reasons for judgment and in the Court of Appeal. The application judge’s approach is thus consistent with Lord Denning’s view that “the doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff.”¹⁰² By contrast, the Court of Appeal’s approach followed what in an earlier case it took to be the view of Justice Brandeis that “[i]t is usually more important that a rule of law be settled, than that it be settled right.”¹⁰³ In taking this approach, the Court of Appeal affirmed the central role of binding

100 *Bedford CA*, *supra* note 5 at para 58.

100.1 William Shakespeare, *Hamlet* at Act III, scene II.

101 *B (KN) v Wu*, 137 ACWS (3d) 962 (available on CanLII) (Ont Sup Ct).

102 *Ostime v Australian Mutual Provident Society* (1959), [1960] AC 459 HL (Eng) at 489 [Ostime].

103 *Di Santo v Commonwealth of Pennsylvania*, 273 US 267 at 270 (1927) [*Di Santo*], Brandeis J dissenting. Both *Ostime*, *supra* note 102 and *Di Santo* are cited by the Court of Appeal in *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Co* (2005), 76 OR (3d) 161 at para 118, 255 DLR (4th) 633. It is worth noting that Justice Brandeis stated in *Di Santo* that “[d]isregard of the *McCall* case would not involve unsettlement of any constitutional principle or of any rule of law, properly so called. It would involve merely refusal to repeat an error once made in applying a rule of law—an error which has already proved misleading as a precedent.” He goes on to say: “In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behoves us to reject, as guides, the decisions upon such questions which prove to have been mistaken” at 270.

precedent in constitutional adjudication, both as a methodological tool and as a means of preserving equality before the law.

In reaching its conclusion on the *stare decisis* point, the Court of Appeal was faithful to the formal equality demands of the common law but failed completely to give effect to the *Charter's* substantive equality demands. In addition to committing a technical error, the Court's use of the *Prostitution Reference* precedent is incomplete and slanted. For example, the Court of Appeal held that it was not open to the application judge to examine whether the communication provision infringed the section 2(b) rights of the applicants because a majority of the Supreme Court had ruled in the *Prostitution Reference* that the prohibition was a justifiable limit on the speech rights of sex workers. The Court of Appeal then concluded that the application judge was not foreclosed from hearing the section 7 argument because the law had shifted considerably since the time of the *Prostitution Reference*. Much the same argument could have been made with respect to the section 1 component of the freedom of expression claim, where the bulk of the majority's analysis in the *Prostitution Reference* was concentrated. While the section 2(b) jurisprudence has remained relatively stable over the past two decades, there have been important changes in the section 1 jurisprudence since the time of the *Prostitution Reference*.¹⁰⁴

Additionally, a majority of the Court of Appeal held that the application judge erred in her characterization of the legislative purpose of the communication provision, despite the fact that her findings in this regard were consistent with the views of all but Justice Lamer (as he then was) in the *Prostitution Reference* on that point. By contrast, as the dissent in *Bedford* pointed out, the Supreme Court in the *Prostitution Reference* expressly rejected the purpose ascribed to Parliament by the majority.

This selective approach to *stare decisis* undermines the majority's assertion that its approach and ultimate conclusions were strictly dictated by precedent. It is also problematic from a substantive equality perspective. By refusing to recognize the significantly different context in which the *Bedford* case arose, the Court lost the benefit of the robust evidentiary record presented to the Court. Instead, it relied upon an advisory opinion that was given in the absence of a full evidentiary record. *Bedford* thus illustrates the danger of treating an advisory opinion as binding.¹⁰⁵

104 See e.g. Choudhry, *supra* note 20; Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 51 Sup Ct L Rev (2d) 25.

105 This is why advisory opinions are referred to as involving "abstract review". See Vicki C Jackson & Mark Tushnet, *Comparative Constitutional Law*, 2d ed (New York: Foundation Press, 2006) at 551-84. See also Hogg, *supra* note 95 "In the *Reference Appeal* (1912), [...] the Privy Council held that the Court's answer to a question posed on a reference was 'advisory' only and of 'no more effect than the opinions of the law officers'. It follows that the Court's answer is not binding even on the parties to the reference, and is not of the same precedential weight as an opinion in an actual case. This is certainly the black-letter law. But there do not seem to be any recorded instances where a reference opinion was disregarded by the parties, or where it was not followed by a subsequent court on the ground of its advisory character. In practice, reference opinions are treated in the same way as other judicial opinions," at 8-18. On the evidentiary point, see Hogg, *ibid*, where he notes that "[p]roof of facts in a reference is peculiarly difficult, because a reference originates in a court that is normally an appellate court: there is no trial, and no other procedure enabling evidence to be adduced," at 8-21.

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Moreover, the Court of Appeal's near-automatic acceptance and even amplification of the legislative purpose articulated in the *Prostitution Reference* meant that the Court of Appeal did not critically examine the history of the communication provision and the origins of social nuisance offences generally. In the *Prostitution Reference*, of course, counsel for the various levels of government had no interest in highlighting this history, which is shot through with moralistic assumptions and fraught with discrimination.

In sum, the Court of Appeal failed to take note of the limitations of the precedent upon which it was relying. In addition to being of a merely advisory nature, the *Prostitution Reference* did not engage in a critical manner with the history of the communication provision, nor were the experiences of sex workers meaningfully available from the record upon which the *Prostitution Reference* proceeded. By refusing to adjudicate the section 2(b) challenge to the communication provision, the Court of Appeal in *Bedford* denied the claimants a fair hearing of the constitutional issues presented to it.¹⁰⁶

E. Reading the *Prostitution Reference* in light of *Bedford*

Listening to the voices of the applicants in *Bedford*, as an equality-centred approach to incrementalism requires us to do, it becomes apparent that the characterization of the speech interest in the *Prostitution Reference* may have been erroneous, or at the very least too narrow. It appears that the judges in the *Prostitution Reference* were imagining the criminalized communication as a bargaining process for favourable contractual terms in a commercial transaction. What emerges from the evidence in *Bedford* is that a core function of communication is to screen "bad dates." In other words, it is self-protective.¹⁰⁷ Criminalization not only prevents this screening but it also pushes sex workers into remote and even more risky spaces.

It is worth pointing out that in the *Prostitution Reference*, there was no evidence of the commercial nature of the speech before the Court or any evidence

106 The application judge noted in her judgment that the applicants had made submissions about the different evidentiary context in order to ground their argument for re-considering the section 2(b) issue decided in the *Prostitution Reference*: see *Bedford* trial, *supra* note 36 at para 72.

107 See *Bedford* CA, *supra* note 5 at para 43, citing *Bedford* trial, *supra* note 36 at para 471. Writing in the section 7 context, the dissenters in *Bedford* CA explained at paragraphs 359-60 that "[t]he communicating provision chokes off self-protection options for prostitutes who are already at enormous risk. The evidence in the record about the violence faced by street prostitutes across Canada is, in a word, overwhelming. One does not need to conjure up the face of Robert Pickton to know that this is true. Any measure that denies an already vulnerable person the opportunity to protect herself from serious physical violence, including assault, rape and murder, involves a grave infringement of that individual's security of the person. The infringement caused by the communicating provision is especially significant in light of the reality that many prostitutes have few alternative means of protecting themselves. Putting aside the fiction that all prostitutes can easily leave prostitution by choice or practise their occupation indoors, the communicating provision closes off valuable options that street prostitutes do have to try to protect themselves." The Supreme Court of Canada picked up on these themes in its decision in *Bedford* SCC, *supra* note 95.

that might have assisted the Court in contextualizing the section 2 (b) inquiry. The companion cases of *Skinner* and *Stagnitta* do not cure this defect, but they are instructive in terms of understanding the factual matrix upon which the *Prostitution Reference* might have proceeded.

Skinner involved a charge against a male client arising out of a communication with a female undercover police officer. Thus, there was no sex worker involved in the *Skinner* case and no evidence before the court that would have assisted it in understanding the impact of the communication provision on sex workers. *Stagnitta* involved the prosecution of a sex worker who had been charged following a communication with a male undercover police officer who was posing as a potential customer. This case might have offered some insight into the perspective of sex workers. However, the case proceeded on an agreed statement of facts, which limited the record considerably. It is worth considering the communication as summarized by the Supreme Court in *Stagnitta* in full and contextualizing it through the lens of the record in *Bedford*.

The Court began its description of the encounter as follows:

According to the agreed statement of facts, Detective Dave Pyke of the Edmonton City Police Department was driving along the west curb of 104th Street north of Jasper Avenue in Edmonton on the 9th of May, 1986 at 10:40 p.m. He was acting in an undercover capacity. He stopped his car and the appellant, Ms. Stagnitta, walked north on the sidewalk twenty feet past his car, turned around and walked back. The Detective opened the passenger window of his car and the appellant leaned in.¹⁰⁸

The Court did not explicitly consider this portion of the statement of facts in its analysis. Looking at this evidence informed by the much more fulsome record in *Bedford*, we can see that Ms. Stagnitta engaged in self-protective conduct from the beginning. She walked past the car, which would have allowed her to see whether there were additional people in the vehicle. She gave herself some space to see the car (and its driver) from the front. She would have had an opportunity to see the licence plate, and maybe even to check it against a record of dangerous “bad dates.” It becomes apparent from the next portion of the agreed statement of facts that she did, in fact, glean important information from this inspection:

The appellant asked Detective Pyke whether he was a police officer and he replied that he was not. The two discussed briefly the possibility that the Detective worked for the Edmonton City Police.¹⁰⁹

108 *Stagnitta*, *supra* note 86 at 1229.

109 *Ibid* at 1230.

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What followed revealed that she was not worried at the possibility that the client might be a police officer. After Detective Pyke commented that there were too many police cars around, Ms. Stagnitta got into the Detective's car, despite clearly having suspicions that he was associated with the police. The conversation continued and the Detective eventually said to the appellant, "Okay, I'm the Chief of Police."¹¹⁰ It was only after this revelation that the parties entered into the discussion that the Court would later characterize as commercial. This further suggests that, up until this point, Ms. Stagnitta was engaging in self-protective rather than commercial speech. She was able to evaluate the risk posed by this potential client on the basis of the information she had gathered through a visual inspection of the car and its occupant and by having a conversation, first from outside the vehicle and then from the passenger seat. This stage-by-stage approach is consistent with what the record in *Bedford* reveals to be self-protective expression.

The Supreme Court of Canada does not account for, or even advert to, this dimension of the communication in its analysis. For example, Justice Lamer generalized the nature of these communications as follows:

Most often this type of communication involves an offer and an acceptance. The offer is in respect of certain sexual services and the acceptance occurs when a price has been agreed upon for the service.¹¹¹

The majority characterized the communication in a similar manner.¹¹² Such a characterization can only be supported by isolating a small portion of the exchange between Detective Pyke and Ms. Stagnitta, in which the following occurred:

The appellant told the Detective that she would "[s]how him a good time" and, with her left hand, grabbed his private parts.

The appellant asked the Detective, "How much money do you have?", to which the Detective replied that he had \$500. She said, "Okay, let's go", and the Detective said that he had a hotel room. The Detective asked what he would get for his money to which the appellant responded, "A good time".¹¹³

110 *Ibid.*

111 *Prostitution Reference*, *supra* note 8 at 1188.

112 Chief Justice Dickson explained that "[h]ere, the 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." See *Prostitution Reference*, *supra* note 8 at 1136.

113 *Stagnitta*, *supra* note 86 at 1230.

It is somewhat ironic that this portion of the communication took place in the relative privacy of an undercover police car, a space that required a deeming provision to bring it within the scope of the offence.¹¹⁴

The Supreme Court of Canada has articulated a distinctly privileged set of core values that animate section 2(b) of the *Charter*: self-fulfilment, participation in social and political decision making and the communal exchange of ideas.¹¹⁵ The protected sphere of section 2(b) seems to be characterized as being of a higher, more civic order than that of section 7, which secures more elemental human rights.¹¹⁶ The majority of the Court of Appeal in *Bedford* had no difficulty severing the applicants' freedom of expression interests from their section 7 rights.¹¹⁷ This analytical move has class implications, suggesting that freedom of expression is reserved for the politically and economically enfranchised.

However, it should be noted that the Supreme Court's section 2 jurisprudence is not universally class-based. The Court has recognized that vulnerable and disadvantaged people exercise their freedom of expression rights differently than more privileged people, and has emphasized the need to protect expressive media traditionally used by and accessible to the vulnerable and disadvantaged.¹¹⁸ Also, the Court recognized the equality dimension of fundamental freedoms early on in its *Charter* jurisprudence, stating in *UFCW, Local 1518 v K Mart Canada Ltd* that

A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*.¹¹⁹

We argue that the Court of Appeal should have recognized that freedom of expression may serve different or additional purposes for vulnerable and disadvantaged speakers. These purposes should not fall outside of the protective scope of the *Charter* merely by reason of their class locus.

The courts have recognized that self-fulfillment is a core purpose of section 2(b). Self-protection may be its poor cousin, but it should not be regarded as less worthy for that reason. Arguably, only individuals with economic safety and

114 See *Criminal Code*, *supra* note 4, s 213(2).

115 *R v Keegstra*, [1990] 3 SCR 697 at 802-5, 114 AR 81 at 193-97, McLachlin J [cited to SCR].

116 See *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 193, [2005] 1 SCR 791, Binnie and LeBel JJ.

117 For an argument against this approach, see Kerri A Froc, "Will 'Watertight Compartments' Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms" in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds, *Feminist Constitutionalism: Global Perspectives* (New York: Cambridge University Press, 2012) 132 [Froc, "Watertight Compartments"].

118 *UFCW, Local 1518 v K Mart Canada Ltd*, [1999] 2 SCR 1083 at para 28, 176 DLR (4th) 607 [cited to SCR].

119 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336, 60 AR 161 at para 93 [*Big M*] [cited to SCR]. At the time the litigation in *Big M* was initiated, section 15 was not in force. However, it seems unlikely that the coming into force of the constitutional equality guarantee should have operated to deprive fundamental freedoms of their equality dimension.

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security—those who are not living a marginalized existence—are capable of separating expression related to self-fulfillment and social and political decision-making from their immediate economic expression and activity. The closer individuals are to a subsistence living, the more these forms of expression merge. We agree with the application judge that self-protective speech acquires further constitutional gravitas because of its relationship to the section 7 life and security of the person interests.¹²⁰ Self-protective speech should thus easily fall within the scope of section 2(b), and should be placed near the core of protected speech rights.¹²¹

There is a second way in which the extensive record in *Bedford* helps us to understand the sections 2(b) and 7 issues first raised in the *Prostitution Reference*. The description of sex workers working the street in the *Prostitution Reference* fails to capture their extreme vulnerability. While Chief Justice Dickson acknowledged the harsh economic and working conditions of women engaged in street sex work, the extent of their marginalization and the intersectionality of the discrimination they face remained largely invisible.¹²² It is difficult to imagine speech that more poignantly invokes the values of dignity, social justice and equality than the self-protective expression of speakers who, on the record, are marginalized on the intersectional grounds of gender, gender identity, sexual orientation, poverty, Aboriginality, disability and victimization.

If we commit to taking seriously the perspective of sex workers, we must rethink the exercise in which the courts engage both under section 1 (in respect of the section 2(b) right) and at the second stage of the section 7 analysis. When a constitutional infringement is made out, many of the findings relevant to the section 2(b) analysis remain relevant to the subsequent section 1 analysis. Under the proportionality branch of the section 1 analysis, the Court considers whether the rights infringing measure is rationally connected to its purpose, whether it is minimally impairing and whether, considering its effects, the measure is proportionate.¹²³ The final stage of this analysis is of particular significance where the harm to individual rights flowing from the measure is great. In the *Prostitution Reference*, Chief Justice Dickson explained that the balance struck at this final stage “must be in keeping with the principles of a democratic society and the rights, freedoms and interests of its members.”¹²⁴ Applying this standard to the harm resulting from the criminalization of communication, which the Court had characterized as a mere “commercial transaction”, Chief Justice Dickson concluded that the impact of the impugned provision on *Charter* rights was minimal. This conclusion cannot stand if we characterize the communication as protective speech in light of the evidentiary

120 *Bedford CA*, *supra* note 5 at para 43, citing *Bedford* trial, *supra* note 36 at para 471. See also Froc, “Watertight Compartments”, *supra* note 117.

121 *Ibid.* The application judge would have done just this.

122 *Prostitution Reference*, *supra* note 8 at 1134-35.

123 *Oakes*, *supra* note 84.

124 *Prostitution Reference*, *supra* note 8 at 1138.

record in *Bedford*, and even less so if we are willing to critically examine the history of the communication provision and the social nuisance purpose that the courts have attributed to it.¹²⁵

F. Suppressed Histories

In the *Prostitution Reference*, the Supreme Court touched upon the history of sex work in Canada and the laws prohibiting it, but did not critically assess that history in discussing the legislative purpose of the communication law. Instead, all three opinions agreed that the objective was to counter the ostensible social nuisance caused by street-based sex work. The application judge and the Court of Appeal adopted this characterization in *Bedford* without further critical analysis.

In this section we argue that characterizing the legislative purpose as eradicating a social nuisance either misrepresents or ignores history, thereby masking or aiding in the legitimization of underlying rights violations. Some of this history involves the long story of stigma and discrimination that was explicit in earlier formulations of the law and, as such, it receives some limited acknowledgment in the jurisprudence. However, the more recent history of government involvement in creating the “problem” of street prostitution by pushing sex workers out of indoor venues in the 1970s remains entirely unacknowledged by the courts, as indeed it must if the “social nuisance” formulation is to survive.

In the *Prostitution Reference*, only Justice Lamer’s concurring opinion delved into the history of the prostitution laws.¹²⁶ He noted that prostitution had, for most of Canadian history, been one of the status-based vagrancy offences; that the vagrancy-based prostitution offence was repealed and replaced in 1972 by a prohibition on soliciting; and that the soliciting prohibition was subsequently interpreted by the Supreme Court in *R v Hutt* to require “pressing or persistent” conduct.¹²⁷ He explained that “[i]n light of this decision, law enforcement officials indicated that the control of street prostitution was made very difficult if not impossible.”¹²⁸ This state of affairs led to the appointment in 1983 of the Special Committee on Pornography and Prostitution (the Fraser Committee). In 1985, that Committee “concluded that prostitution was a social problem that required both legal and social reforms.”¹²⁹ Although the Committee’s recommendations were broader, the legislative response

125 In addition, whenever a case presents a significantly different factual matrix than an earlier precedent, as does *Bedford*, it is possible to argue that the precedent does not apply because the case is simply distinguishable on the facts.

126 *Prostitution Reference*, *supra* note 8 at 1138. Justice Dickson, for the majority, merely remarked that, “[t]he legislative history of the present provision and, in general, of legislation directed to street solicitation is both long and complicated.” The dissenting judges, Justices Wilson and L’Heureux-Dubé, did not address the history of the offence.

127 *R v Hutt*, [1978] 2 SCR 476 at 483, 82 DLR (3d) 95 [*Hutt*] [cited to SCR].

128 *Prostitution Reference*, *supra* note 8 at 1192.

129 *Ibid.*

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was confined to the 1985 repeal of the soliciting law and its replacement by the prohibition on communication.

This brief discussion of the legislative history of the communication provision was quoted in full by the application judge in *Bedford*.¹³⁰ She also introduced her discussion of the history, interpretation and purposes of the three challenged provisions with a short history of Canadian prostitution law up to the 1970s excerpted from the *Fraser Report*, as well as a discussion of the “Evidence Contained in Government Debates and Reports.”¹³¹ None of this material deals with government’s role in creating the street prostitution “problem” that the communication provision was meant to address.

The opinion of the majority of the Court of Appeal gives even shorter shrift to history. With respect to the communication provision, the majority stated that “s. 213(1)(c) was enacted in 1985 in the wake of the apparent failure of the predecessor provision to address problems associated with street prostitution.”¹³² It also adverted to the Supreme Court’s interpretation of the soliciting law in *Hutt*.¹³³ The majority’s historical discussion of the other challenged provisions is somewhat more fulsome.¹³⁴ This can be explained in part by the fact that the living on the avails and bawdy-house provisions have a longer history. Although they have been interpreted and amended, they have never been repealed and replaced. In contrast, the laws regulating street-based sex workers have been repealed and replaced twice. While this distinction may explain why history seems to begin in 1985 when courts interpret the communication provision, it also facilitates the burial of the problematic history of the law in this area. This masks how the law, in its current form, harms women (and queer and trans people, who are also disproportionately represented among street-based sex workers).¹³⁵ The courts treat the legal history as if there was a decisive break with the past when the current provision was promulgated in 1985. To be sure, the communicating law represented something novel in that it criminalizes the communicative behavior of both sex workers and their customers. But criminalizing clients does nothing to erase the historical continuity in the treatment of sex workers. By adverting to the old vagrancy laws, the opinions in the *Prostitution Reference* and in *Bedford* harken back to the “bad old days” of status-based offenses and formal inequality as if those days are long past. Worse, by accepting that the 1972 solicitation law, as interpreted in *Hutt*, led to a

130 *Bedford* trial, *supra* note 36 at para 273.

131 *Ibid* at para 227 and paras 135-77. See Canada, *Report of the Special Committee on Pornography and Prostitution*, vol 2 (Ottawa: Minister of Supply and Services Canada, 1985) [*Fraser Report*].

132 *Bedford* CA, *supra* note 5 at para 281.

133 *Ibid*.

134 *Ibid* at paras 174-78 and 223-36.

135 “Between 75 per cent and 85 per cent of those selling sexual services in Canada are women...As well, 20 per cent of those involved in street prostitution are transgendered or transvestites.” *Bedford* trial, *supra* note 36 at para 165. Further, “the majority of male sex workers have sex with other men and either identify as gay or bisexual, or experience homophobia because they are assumed to be gay,” *Bedford* CA, *supra* note 5 (Factum of the Interveners POWER and Maggie’s at para 14).

harmful and unmanageable increase in the social nuisance of street prostitution, our courts, beginning in the *Prostitution Reference* in 1990, have buried the fact that street sex work, as it is currently configured in Canada's major cities, is in many respects the product of law enforcement practices and of policy choices by government.

Canada's prostitution laws have their antecedents in the English common law, but with a peculiarly Canadian inflection due to the convergence of nineteenth and early twentieth-century social purity movement campaigns that aimed to produce a clean, white and orderly Canada.¹³⁶ The social purity movement's energy was mainly focused on protecting women and girls from being procured. In 1892, the movement succeeded in having many of its concerns passed into law in Canada's first *Criminal Code*.¹³⁷

In contrast, the law relating to prostitutes themselves, whether indoor or outdoor, was found amongst the vagrancy and nuisance provisions,¹³⁸ where social purity campaigners were content to leave them. According to John McLaren,

Although the reformers were convinced that working class girls and women were all too often being led into prostitution by rogues and bounders, they were still inclined to believe that some of the blame had to be attached to the lax moral values of that class. Whether the danger was potential or realized, the "victim" was someone who probably had been inclined to sexual irresponsibility. Viewed in this light it was necessary to show the female the error of her ways, by moral guidance and reproof where she had not yet gone astray, and by criminal law sanction where she had joined the ranks of the "fallen."¹³⁹

Vagrancy laws were status offences. They were aimed at punitively controlling poor people who were judged to be idle and dissolute, without visible means of

136 On the Canadian social purity movement, see Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto: University of Toronto Press, 2008).

137 *Criminal Code, 1892*, SC 1892 c 29, s 220.

138 There was an exception for "Indian" women, in relation to whom there was a separate prostitution law. *Ibid*, s 220.

139 John McLaren, "Chasing the Social Evil: Moral Fervour and the Evolution of Canada's Prostitution Laws, 1867-1917" (1986) 1 CJLS 125-165 at 139 [McLaren, "Chasing a Social Evil"]. This assessment was echoed by the authors of the *Fraser Report*, whose observation that "[t]he dual elements in the thinking of lawmakers of the prostitute as both moral and legal outcast, and the need to protect respectable women from the wiles of perverse males, has continued to influence the law and its enforcement through the 20th century," was quoted by the application judge in *Bedford*. See *Fraser Report*, *supra* note 131 at 404, quoted in *Bedford* trial, *supra* note 36 at para 227. John McLaren was among the authors of the *Fraser Report*. See also Constance Backhouse, "Nineteenth-Century Canadian Prostitution Law Reflection of a Discriminatory Society" (1985) 18:36 *Histoire sociale/ Social History* at 387 for a discussion of the legal and policy oscillation between outright punishment of sex workers and coercive attempts to rescue, rehabilitate and reform them. The social purity movement was also alarmed about a host of other sexual practices, including masturbation and homosexuality. See Gary Kinsman, *The Regulation of Desire*, 2d revised ed (Montreal: Black Rose, 1996) at 114-120.

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support, unable to make a good account of themselves and, in the case of women, engaged in the sex trade.¹⁴⁰ In post-Confederation Canada, “[b]oth prostitutes and those who ran or frequented common bawdy-houses were dubbed vagrants, social nuisances to be penalized and controlled when public concern or outrage needed to be dispelled.”¹⁴¹

When the *Criminal Code* was revised during the 1953-54 session of Parliament,¹⁴² several offences were moved out of the vagrancy section and into other sections of the *Code*, and almost all of the remaining vagrancy offences were rewritten so that the gravamen of the offence was revised “From ‘Being’ Vagrant to ‘Committing’ Vagrancy.”¹⁴³ In contrast, prostitution remained a status offence, now known as “Vagrancy C” because it appeared in section 164(1)(c) of the *Criminal Code*:

Every one commits vagrancy who... (c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself...¹⁴⁴

By the 1960s, Vagrancy C had attracted feminist protest. The 1970 *Report of the Royal Commission on the Status of Women in Canada* criticized it thoroughly for its status basis and gendered nature, and recommended repeal.¹⁴⁵ In 1971, Lynne Smith also called for repeal. She argued that although the gendered nature of Vagrancy C

140 See Prashan Ranasinghe, “Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972” (2010) 48 *Osgoode Hall LJ* 55 at 59.

141 McLaren, “Chasing a Social Evil,” *supra* note 139 at 127 [footnotes omitted]. By 1927, vagrancy and nuisance, along with the procurement section (now including living on the avails) and a host of other offences, were grouped together in the part of the *Criminal Code* dealing with “Offences Against Religion, Morals, and Public Convenience,” *Criminal Code*, RSC 1927, c 36, Part V. “[L]oose, idle or disorderly persons” were subject to a fifty dollar fine or imprisonment with or without hard labour for up to six months. *Ibid*, s 239. These provisions included female outdoor sex workers: “[e]veryone is a loose, idle or disorderly person or vagrant who... being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself.” *Ibid*, s 238(i).

142 *Criminal Code*, SC 1954, c 51 [*Criminal Code* 1954].

143 Ranasinghe, *supra* note 140 at 71. The general language in the vagrancy section of the revised *Code* was changed from “Every one is a loose, idle or disorderly person or vagrant who committed a particular enumerated offence within the section” to “Everyone commits vagrancy who...” *Ibid* at 73. Ranasinghe argues that “this discursive shift signalled that vagrancy had become an offence of action, not status.” *Ibid*. The shift resulted from a concern on the part of Parliamentarians that the wording of section 238(a) (“Vagrancy A”), which was aimed at idle persons without apparent means of support, would catch too many unemployed men of good character. *Ibid* at 74-8.

144 *Criminal Code*, 1954, *supra* note 142, s 164. Ranasinghe explains that the revision broadened the scope of the offence: “the offence of ‘being a common prostitute or night walker, wander[ing] in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and [not giving] a satisfactory account of herself,’ was rewritten to read, ‘being a common prostitute or night walker who is found in a public place and does not, when required, give a good account of herself’... A common prostitute or night walker could now be called upon to ‘give a satisfactory account of herself’ in virtually any space, whether it be public or private.” See Ranasinghe, *supra* note 140 at 71.

145 Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Minister of Supply and Services Canada, 1977) at 369-71.

was problematic because it rendered womanhood an element of an offence,¹⁴⁶ merely making the provision gender-neutral would not suffice. In her view,

the section is used not to control vagrancy, but to control prostitution, which is not a crime. The vagueness of the term “good account” leaves wide discretion in the hands of the police, and the classification of certain women as “common prostitutes” or “nightwalkers” has pernicious effects on their lives, especially since the Crown is allowed to use previous convictions and even evidence gathered from previous *acquittals* to establish that element of the offence.¹⁴⁷

Vagrancy C was repealed and replaced in 1972 as part of the law reform wave that followed the 1963 publication of the *Report of the Committee on Homosexual Offences and Prostitution* in England, usually referred to as the Wolfenden Report.¹⁴⁸ The Report stated that, “[t]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”¹⁴⁹ However, prostitution was not conceptualized as having any private dimension. Instead, according to Gary Kinsman, the Wolfenden Report

[look] the visibility of street-walkers to be an affront to public order and decency. It was the prostitute—not the customers, they argue[d]—who did the parading; “the simple fact is that the prostitutes do parade themselves more habitually and openly than their prospective clients.” The Report also argued:

We feel that the right of the normal decent citizen to go about the streets without affront to his or her sense of decency should be the prime consideration and should take precedence over the interests of the prostitute and her customers.¹⁵⁰

146 Lynn Smith, “Criminal Code-Bill of Rights-Whether Offence of Vagrancy by Common Prostitute Constitutes Discrimination by Sex: *R v Lavoie*,” (1971) 6 UBC L Rev 442 at 446.

147 *Ibid* at 448, citing *R v Fiddler* (1964), 43 CR 245, 46 WWR 676 (BC County Ct). The case is also cited by Ranasinghe, *supra* note 140 at 79, n 115 as an example of a case in which the court “continued to follow in the same line of reasoning as had earlier cases, by focusing on—and heavily scrutinizing—the accused’s ‘course of conduct’ in order to gauge her character.”

148 UK, *The Report of the Committee on Homosexual Offences and Prostitution* (London: Her Majesty’s Stationary Office, 1957) [*Wolfenden Report*].

149 *Wolfenden Report*, *ibid* at 24, quoted in Kinsman, *supra* note 139 at 214. Gary Kinsman explains that the framework adopted by the Wolfenden Committee was the distinction between public and private spheres. The Wolfenden Committee is best known for recommending the decriminalization of homosexual acts between consenting adults in private, while continuing to criminalize those that occurred in public or were thought to be a threat to the public order.

150 Kinsman, *supra* note 139 at 219, citing the *Wolfenden Report*, *supra* note 148 at 87, 85.

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Following the Wolfenden Report, the federal government altered the terms of criminalization for street-based sex workers. Vagrancy C was repealed and replaced by a prohibition on solicitation:

195.1 Every person who solicits any person in a public place for the purpose of prostitution is guilty of an indictable offence punishable on summary conviction.¹⁵¹

The new soliciting provision was gender-neutral, but “a gender-neutral statute could not significantly alter the *application* of the law, and as time would tell, it continued to be overwhelmingly women who were arrested.”¹⁵²

The new law also appears to have permitted police to arrest street-based sex workers with almost as much latitude as they had under the Vagrancy C provision. That changed in 1978 with the Supreme Court’s decision in *R v Hutt*, in which the court instructed police that the offence of solicitation required “pressing or persistent” conduct, not mere presence or availability on the street. In the course of his majority reasons, Justice Spence compared the repealed language of Vagrancy C to the soliciting offence in section 195.1 of the Code. He noted that while Vagrancy C had

made it an offence for such common prostitute to be in a public place even if absolutely immobile and silent unless she could give a good account of herself... s. 195.1 requires the person to solicit. I am of the opinion that this history of the legislation indicates that Parliament wished to require some acts on the part of the person which would contribute to public inconvenience.¹⁵³

This restriction on the ability of police to arrest persons whom they deemed to be prostitutes absent evidence of pressing and persistent conduct is where the courts’ legislative history begins in the *Prostitution Reference* and in *Bedford*. However, where those judgments assume that the interpretation of the soliciting law in *Hutt* led to difficulties in controlling the street sex trade and, impliedly, to a spread of the

151 *Criminal Code*, RSC 1970, c C-34 s 195.1, as amended by SC 1972 c 13 s 15. Ranasinghe comments that section 195.1 “decoupled prostitution from morality, though it justified the use of the criminal law by constructing prostitution as a ‘social nuisance.’” Ranasinghe, *supra* note 121 at 88. Unfortunately, he provides no substantiation for this observation.

152 Deborah R Brock, *Making Work, Making Trouble: The Social Regulation of Sexual Labour*, 2d ed (Toronto: University of Toronto Press, 2009) at 32-3. According to Brock, the new soliciting prohibition was consistent with the Wolfenden approach, which “demonstrated what they believed to be a protectionist stance toward women in refusing to liberalize legislation governing brothels,” while at the same time continuing to penalize the public display of street prostitution. *Ibid* at 31. Brock contrasts the Wolfenden approach to that taken by the Royal Commission on the Status of Women, which sought the elimination of the double standard for sexual conduct and recognition of the social conditions of inequality in which prostitution was practiced.

153 *Hutt*, *supra* note 127.

“social nuisance” associated with it, sociologists who have examined the historical context tell a different story. Their story is one in which *Hutt*, and the police response to it, helped to set the stage for the urban moral panics of the 1970s, leading to the eventual adoption of the communication provision which the majority upheld in *Bedford* and to the current configuration of street prostitution as a “social nuisance,” a characterization which figures prominently in the analysis in *Bedford*.

According to John Lowman, Vancouver police stopped enforcing the soliciting law after *Hutt*, but Toronto police “continued to obtain convictions by arguing that a sex worker approaching a series of customers in different encounters constituted ‘pressing and persistent’ conduct...”¹⁵⁴ After Vancouver police, urged by pressure groups, used the same tactic, the matter came before the courts. The trial judge’s holding that the “cumulative effect” of the accused’s approaches “supplied the element of persistence” was rejected by the Court of Appeal and then by Supreme Court in 1981 in *R v Whitter*.¹⁵⁵ After the Supreme Court’s judgment, Toronto police also stopped enforcing the law:

Many commentators—including the Canadian Association of Chiefs of Police chaired by Vancouver Police Chief Don Winterton and a *Maclean’s* editorial—blamed jurisprudence for turning Canadian streets into “sexual supermarkets”.¹⁵⁶

However, the historical evidence indicates that the perceived expansion in street sex work in the late 1970s, at least in Vancouver and Toronto, was not a consequence of the Supreme Court’s decision in *Hutt*, but rather the result of law enforcement action that forced sex workers out of indoor venues and onto the streets.

According to Lowman, during the 1950s and 1960s, most sex work in Vancouver and Toronto was conducted indoors, with female sex workers meeting clients in hotels and nightclubs, “facilitated by bell hops, desk clerks and taxi drivers.”¹⁵⁷ In Toronto, sex work was also conducted in body rub and massage parlours on Yonge Street. As a consequence, “[u]ntil the late 1970s the street trade in both Vancouver and Toronto appears to have been relatively limited and contained, and rarely made newspaper headlines.”¹⁵⁸ All of this changed when the indoor venues were closed, forcing workers into the street trade.¹⁵⁹ In Vancouver, “it was the 1975 police action against two cabaret clubs where prostitutes met their customers that played the biggest part in expanding the street trade.”¹⁶⁰

154 John Lowman, “Deadly Inertia: A History of Constitutional Challenges to Canada’s *Criminal Code* Sections on Prostitution” (2011) 2 *Beijing Law Review* 33 at 36 [Lowman, “Deadly Inertia”].

155 *R v Whitter* [1981] 2 SCR 606 at 609, 129 DLR (3d) 577.

156 Lowman, “Deadly Inertia,” *supra* note 154 at 36.

157 *Ibid.*

158 *Ibid.*

159 *Ibid.*

160 *Ibid.*

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Becki Ross' work confirms and expands upon Lowman's observations. Her study demonstrates that the location of the sex work stroll in the dangerous isolation of the Downtown East Side of Vancouver was neither accident nor a natural occurrence. Instead, it was a product of changes to police enforcement practices combined with business-oriented urban renewal campaigns and government action, aided by moral panic and by racist tropes both old and new.¹⁶¹ According to Ross, after they were pushed out of the hotels and night clubs where they had plied their trade for many years, "a heterogeneous, racially diverse community" of 200 sex workers, "some of whom were queer themselves," began to work on the streets of the densely populated West End, which by this time was the hub of gay male Vancouver and the focus of business-led gentrification efforts.¹⁶² In response to the visible street solicitation in the neighbourhood, a group called Concerned Residents of the West End (CROWE) emerged. CROWE's anti-prostitution campaign tracked well with the views of politicians at all levels and from all parties that street prostitution destroyed neighbourhoods and could not be permitted in residential areas.¹⁶³ Sex workers fought back, forming the Alliance for the Safety of Prostitutes (ASP) in 1981.¹⁶⁴ ASP was active in advocacy and in forming community. That community was lost after the mid-1980s, when sex workers were forced out of the West End and relocated to "an isolated, poorly-lit industrial zone in Vancouver's East End where they began to go 'missing' in ever greater numbers."¹⁶⁵

According to Deborah Brock, Toronto sex workers were similarly pushed out of their indoor venues and on to the streets in the 1970s, when Yonge Street's growing reputation as a "sin strip" (due to a concentration of gay bars and sex-related establishments, including massage parlours) helped to lay the groundwork for a cleanup in support of a commercial development plan to be anchored by the Eaton Centre. Initial resistance to the cleanup agenda, including from sex workers, "who stated that closing the massage parlours would put women back on the streets," evaporated in a moral panic after a 12-year-old boy "was found dead on a roof beside... a Yonge Street massage parlour."¹⁶⁶ The cleanup proceeded; sex workers who had worked inside of the Yonge Street establishments were forced outdoors; and the stroll moved east to Cabbagetown, then still a predominantly working class residential area.

161 Becki L Ross, "Sex and (Evacuation from) the City: The Moral and Legal Regulation of Sex Workers in Vancouver's West End, 1975–1985" (2010) 13.2 *Sexualities* 197 at 209-10.

162 *Ibid* at 199-200.

163 *Ibid* at 201. This rhetoric overrode the fact that the stroll was centered on Davie Street, the commercial strip running through the West End.

164 *Ibid* at 205. Following a failed effort to control both sex workers and their clients using a municipal bylaw, the Attorney General of British Columbia applied to restrain sex work related activities in the West End on the basis that it was a public nuisance. In July 1984, Allan McEachern, then Chief Justice of the Supreme Court of British Columbia, granted an interim injunction which enjoined the respondents in the broadest possible terms from offering sex for sale in public areas. *Ibid* at 204-5.

165 *Ibid* at 211.

166 See Brock, *supra* note 152 at 34-37.

Whether or not the Supreme Court's judgments in *Hutt* and *Whitter* rendered the solicitation law unenforceable, it is clear that police in two major cities reacted by suspending enforcement. But the inability (or refusal) to enforce the solicitation laws did not, as claimed, lead to an explosion of street prostitution. Rather, the prevalence of street-based sex work in Toronto and Vancouver grew suddenly in the 1970s after police forced sex workers out of their accustomed indoor locations.¹⁶⁷

G. History and the Challenge to the Communication Provision

How might recognition of this history have altered the analysis in *Bedford*?¹⁶⁸ In our view, it would render untenable the majority's suggestion that the vulnerabilities of sex workers are of their own making. It would also destabilize the social nuisance justification for the communication provision.¹⁶⁹ In thinking about how the history of the stroll assists us in determining the significance of the vulnerability of sex workers to the constitutional analysis, a helpful analogy can be drawn to the Supreme Court's decision in *Insite*. In *Insite*, the Court considered a section 7 challenge to the federal Health Minister's decision not to renew an exemption from the provisions of the *Controlled Drugs and Substances Act*¹⁷⁰ for a safe injection site operating in the Downtown East Side of Vancouver. The Court explained in its judgment that the conditions which led to drug use were in part the result of government policy decisions. This meant that the so-called "social problem" of addiction did not stem from the bad decisions of addicts. A similar argument avails in this context, where sex workers often have intersecting vulnerabilities, some or all of which have a proven link to government policy choices.

Taking the history of the stroll seriously raises fundamental questions about whether curtailing "social nuisance" is a legitimate government purpose. It would also tend to undermine the Court of Appeal's decision to weigh social nuisance more heavily than the vulnerabilities of street-based sex workers, especially when the consequences of this suppressed history have recently been thrust into prominence by the conviction of Robert Pickton and the subsequent recognition of

167 While these academic historical analyses postdate the *Prostitution Reference*, some of the underlying material may have been available to the Court at the time. Whatever the evidence before the courts in the various cases, it is clear that neither the Supreme Court of Canada in the *Prostitution Reference* nor the Court of Appeal in *Bedford* seriously engage with these facts and their implications. We would contend that the outcome would have been different if there had been a critical engagement with this history.

168 Although Sullivan suggests that "the technique of tracing legislative evolution must be used with caution," she appears to be referring to a simple review of changes in the wording of a statute: see Sullivan, *Sullivan on the Interpretation of Statutes*, *supra* note 28 at 480. What we are advocating for here is a more fulsome analysis of the "social" and historical context of the statute, of which statutory amendments form a part. *Ibid* at 460.

169 *Bedford CA*, *supra* note 5 at paras 319-21.

170 SC 1996, c 19.

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the numerous failures of the various police departments involved.¹⁷¹ In the absence of a critical engagement with this history, the Court of Appeal provides continued legal support for the penal approach to sex workers for what are framed as their moral choices but which are most often a consequence of government policy and economic need exacerbated by the lack of a better choice.¹⁷²

The communication law singles out street prostitution as a nuisance while failing to criminalize other forms of intrusive solicitation, such as street-based or door-to-door religious proselytizing or telemarketing.¹⁷³ Therefore, “because it explicitly criminalized nuisances associated with prostitution rather than creating an independent standard of nuisance applicable to all public behavior, [it] is still a status offence.”¹⁷⁴ Viewing the communication provision as part of the longer history of status offences provides crucial context for deciding the constitutional questions before the Court in *Bedford*. Most obviously, it undermines the Court of Appeal’s conclusion that the eradication of “social nuisance” is a valid legislative purpose.

Finally, the majority of the Court of Appeal not only ignores the urban gentrification concerns that underpin the communication provision; it also takes a curious approach to its overall analysis of the constitutionality of the communication provision. The majority begins by narrowing the scope of the inquiry by concluding that the doctrine of *stare decisis* prevents the section 2(b) argument from being heard. It then tackles the other two impugned provisions, striking down the first and judicially amending the second. Only at this stage does the analysis return to the communications provision. This is done so that the benefit of the new legal matrix can be used to evaluate the constitutionality of the communications provision. It is in this context that the Court articulates its incrementalist “wait-and-see” stance.

Assuming the desirability of an incrementalist approach does not prescribe the ordering of the analysis, however. If the Court had applied an equality analysis to the structural question of which issue should be tackled first, it would have recognized that the most vulnerable group of sex workers are those who work on the streets. It would also have recognized that not all sex workers will be able to

171 In the recent *Report of the Missing Women Commission of Inquiry*, Commissioner Wally T Oppal identifies “the criminal regulation of prostitution and related law enforcement strategies” as one of “three overarching social and economic trends” that contributed to the marginalization of the women and thus to their “condition of endangerment and vulnerability to predation”. The other two are “retrenchment of social assistance programs” and “the ongoing effects of colonialism.” See Wally T Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry*, Executive Summary (British Columbia: Library and Archives Canada, 2012) at 12, online: < http://www.ag.gov.bc.ca/public_inquiries/docs/Forsaken-ES.pdf >.

172 By “better” choice we do not necessarily mean a “choice” not to engage in sex work but rather a choice to make an adequate living without subjecting oneself to criminalization or violence, including the violence of the criminal justice system.

173 John Lowman, “You Can Do It, But Don’t Do It Here: Some Comments on Proposals for the Reform of Canadian Prostitution Law” in J Lowman et al, eds, *Regulating Sex: An Anthology of Commentaries on the Findings and Recommendations of the Badgley and Fraser Reports* (Burnaby, BC: School of Criminology, Simon Fraser University, 1986) 193 at 208.

174 *Ibid* at 212.

work indoors, and that those who remain on the streets will be the most vulnerable of the vulnerable. In other words, the substantive equality interests of those who are specifically targeted by the communication provision are most in need of protection. For this reason, the communications provision should have been addressed first. Doing so would not only have avoided the perverse result that the dissenters point to—that is, that the most vulnerable population is left wholly without assistance of the court, while those comparatively better situated claimants succeed in further improving their situation. It also reminds us that one of the core purposes of constitutional review is to ensure that the benefit of constitutional rights accrue equally to minoritarian interests.

In response to suggestions by some of the interveners that other forms of ostensibly woman-protective criminalization may represent appropriate incremental change in this area,¹⁷⁵ we would note that many of the vulnerabilities that emerge from a contextualized evaluation of the record in *Bedford* would not be cured by the asymmetrical criminalization of sex work. The cloak of illegality that such a system would continue to place over sex work would continue to pose a danger to the lives and safety of the workers. Several studies have indicated that one such law in Sweden, enacted in 1999, has failed to reduce the number of sex workers or their clients. On the contrary, it has further stigmatized and marginalized sex work, leading to police crackdowns and driving indoor workers underground while leaving the most vulnerable on the streets. Sex workers who have continued to work outdoors reportedly face more dangers than they did prior to asymmetrical criminalization. Most of the “nice and kind” clients have followed the inside workers, leaving the outside workers to deal with men who demand more degrading activities, pay less and are more likely to be violent or refuse to use condoms.¹⁷⁶ In addition, the threat of arrest has forced women to accompany clients to isolated locations, increasing the risk to them and driving down their income because of the additional travel time required.¹⁷⁷ Finally, it is worth noting that this is neither what the applicants in *Bedford* requested as relief, nor is asymmetrical criminalization something that the court had any remedial authority to bring about.

175 Factum of the Intervener Women’s Coalition at paras 36-54.

176 Petra Ostergren, “Sex Workers Critique of Swedish Prostitution Policy”, online: <http://www.petraostergren.com/pages.aspx?r_id=40716>. See also Ann Jordan, “The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering” (April 2012) at 10, online: American University Washington College of Law, Centre for Human Rights & Humanitarian Law <<http://rightswork.org/wp-content/uploads/2012/04/Issue-Paper-4.pdf>>.

177 Bob Wallace, “The Ban on Purchasing Sex in Sweden: the So-Called ‘Swedish Model’” (20 June 2011) at 15, online: Prostitution Licensing Authority, Queensland <<http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/documents/THE%20BAN%20ON%20PURCHASING%20SEX%20IN%20SWEDEN%20-%20THE%20SWEDISH%20MODEL.pdf>>. According to Wallace, “[t]his problem was described by a street sex worker in Norway, where it is also illegal to purchase sex: ‘Now the men drive us out of town to find an empty space with no one in sight. It often takes more than an hour before we’re back. Before we would go down to the harbour and be done in 15 minutes.’”

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IV. Getting it Right

We conclude with a few words on two aspects of the Court of Appeal's judgment that reflect an equality-centred approach to incrementalism. The first is the Court's decision to remedy the section 7 violation caused by the living on the avails provision by reading in an exploitative purpose requirement. Narrowing, but not eliminating, the criminalization of living on the avails of prostitution preserves, and may even enhance, the protective purpose of the provision. The prohibition remains intact to the extent that it protects sex workers from exploitation. Where it exceeds this purpose, however, and in doing so increases the danger faced by sex workers, the provision is inoperative. Rather than taking the more radical step of invalidating the entire provision, which would address one source of danger but create another, the Court takes an incremental approach that is sensitive to the experiences of sex workers.¹⁷⁸

The Court's invalidation of the bawdy-house provision can also be viewed as an example of an equality-centred approach to incrementalism, though this example is less straightforward. In analyzing the constitutionality of the bawdy-house provision, the Court correctly applies the legal standard of gross disproportionality and concludes that the "social nuisance" caused by bawdy-houses cannot justify the deprivation of the section 7 rights of sex workers. In weighing these interests, the Court is appropriately alive to the interests and experiences of sex workers. On the other hand, the Court also recognizes the eradication of social nuisance as a legitimate legislative purpose.

Inherent in the concept of an equality-centred approach to incrementalism is the idea that in bringing about progressive change, some interests may have to wait. If the Court of Appeal had declared all three provisions to be of no force or effect, there would be no way to distinguish between principled and incremental change. As we have just noted, however, the Court of Appeal opted to read down the living on the avails provision. An incremental approach to the issues in *Bedford* that was responsive to the demands of equality would have invalidated the communication provision, narrowed the avails provision and struck down the bawdy-house provision, based as it is on the same problematic social nuisance justification that underlies the communication provision.

V. CONCLUSION

Whether one takes an incremental or a principled approach to the issues before the Court of Appeal in *Bedford*, it is clear that an application of the law that was truly alive to equality demands would have required the Court of Appeal to take the

178 The Supreme Court of Canada chose this more radical step: see *Bedford*, SCC, *supra* note 95 at paras 168-69.

further step of decriminalizing communication. Any principled basis for denying the sections 2(b) and 7 challenges to the communication provision disappears when the constitutional issues are viewed from this perspective. What is more, a proper application of *stare decisis* does not foreclose consideration of the section 2(b) claim, either as part of the relevant context or on its own. This is because of the advisory nature of the *Prostitution Reference*, the subsequent changes to the constitutional analysis under section 1 and the fundamentally different factual record.

It is thus clear that the common law method is capable of bringing about progressive legal change in circumstances where the scope of change is potentially very large. In such cases, managing the pace of change is very important. Adopting an incremental approach informed by the substantive equality values of the *Charter* would have several benefits. It would reduce the likelihood of backlash, ensure that courts maintain their institutional legitimacy, and, perhaps most importantly, would ensure that the impact of progressive change is not borne by the most vulnerable.¹⁷⁹

179 *Siegel and Post*, "Roe Rage," *supra* note 1.