Canadian Court Strikes Down Prostitution-Related Laws

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Oct 6th, 2010 12:26 PM

TORONTO—In late September, three sex workers prevailed in Ontario Province's Superior Court of Justice—the equivalent of a United States federal circuit court—against the Attorney General of Canada, the Attorney General of Ontario and three Christian organizations, with Justice Susan Himel ruling that Canadian law can no longer criminalize brothels (termed "bawdy houses" in Canada), street-walking or other methods of offering prostitution services, and pimping or living off the proceeds of prostitution.

"Prostitution is not illegal in Canada," Justice Himel wrote in the preface to her decision. "However, Parliament has seen fit to criminalize most aspects of prostitution. The conclusion I have reached is that three provisions of the *Criminal Code* that seek to address facets of prostitution (living on the avails of prostitution, keeping a common bawdy-house and communicating in a public place for the purpose of engaging in prostitution) are not in accord with the principles of fundamental justice and must be struck down. These laws, individually and together, force prostitutes to choose between their liberty interest and their right to security of the person as protected under the *Canadian Charter of Rights and Freedoms*. I have found that these laws infringe the core values protected by section 7 and that this infringement is not saved by section 1 as a reasonable limit demonstrably justified in a free and democratic society."

The sections to which Justice Himel referred are similar to the Bill of Rights of the U.S. Constitution, and were enacted in Canada in 1982. Section 7 simply states, "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"—sort of a combination of our Constitution's Preamble and the Fifth Amendment's "due process" clause—while Section 1 barely limits that broad grant of freedom: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In a sense, Section 1 is the mirror of our Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

But while the merits of the case may seem simple by those standards, Justice Himel nonetheless spends 176 pages analyzing every aspect of the case, beginning with her own role in the proceedings.

"It is important to state at the outset what this case is not about," Justice Himel writes. "[T]he court has not been called upon to decide whether or not there is a constitutional right to sell sex or to decide which policy model regarding prostitution is better. That is the role of Parliament. Rather, it is this court's task to decide the merits of this particular legal challenge, which is whether certain provisions of the Criminal Code are in violation of the *Charter*... **The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it**. As this Court has said on a number of occasions, 'it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.'" [Emphasis in original]

The court next discusses the applicants (plaintiffs): Terri Jean Bedford, a child abuse sufferer who became a prostitute, then a madam, then a dominatrix, then the mistress of a school for cross-dressers; Amy Lebovitch, the only plaintiff currently working as a prostitute, who had a good childhood and entered prostitution "in order to make money quickly and gain independence"; and Valerie Scott, a prostitution rights activist who's been an exotic dancer, a street hooker and a call girl, and who helped found the now-famous Maggie's, "a drop-in and phone centre for people working in prostitution in Toronto."

Justice Himel next tackles the question of standing: the legal right of the plaintiffs to bring their lawsuit—and particularly the question raised by the respondents as to whether Bedford's and Scott's stated intentions to return to prostitution if the laws are struck down are sufficient to give them either "private interest standing" or "public interest standing," a "special interest" in striking down the laws in question. (No one questions that Lebovitch has private interest standing, since she's a working prostitute.) The justice concludes that all three plaintiffs have both types of standing.

Turning to the evidence itself, Justice Himel notes that over 25,000 pages of evidence, including affidavits from "current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally" have been presented, while the respondent (defendant) and the interveners (the Attorney General of Ontario and the Christian groups) have presented similar affidavits from "current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally [including famous anti-prostitution activists Drs. Melissa Farley and Janice Raymond], experts in research methodology, and a lawyer and a researcher at the [U.S.] Department of Justice."

"The respondent submitted affidavits from nine police officers who have experience in enforcing prostitution-related provisions or in investigating crimes against prostitutes," the court notes. "Prostitution was generally described as being a harmful activity with links to drugs, violence, organized crime, child exploitation, and human trafficking (one officer called prostitution a form of 'slavery'). Prostitutes were characterized as victims, commonly poverty-stricken, abused, and drug-addicted. ... The respondent presented affidavits from a social worker and three advocates concerned about the negative effects of prostitution. These witnesses almost exclusively focused on street prostitution and its impact on the community, such as: increased traffic, the presence of used condoms and needles, foul language, explicit sexual behaviour, and harassment of community members."

Most in dispute, however, were the "experts" presented by both sides. As might be expected, "Both parties alleged that certain experts were biased, that conclusions were generalized beyond the sample studied, that studies were methodologically flawed (for example, for using former prostitutes as researchers or only interviewing prostitutes from a particular social class or venue), and that conclusions were not properly drawn from the research."

In trying to sort out which experts were most reliable, Justice Himel used a variation of the U.S. Supreme Court's *Daubert* test, which takes into account the acceptance of the expert's views in the scientific community at large, the biases of the expert, and the total reasoning that underlies the expert's stated opinion. Much of Justice Himel's opinion deals with such expert testimony and its reliability.

Along the way, the justice discusses the nature of prostitution activities in Canada, violence against sex workers (which the justice notes is "primarily inflicted by male clients against female prostitutes"), the effects of the current laws, and how such statutes arose from Canada's vagrancy laws. She also considered the 1985 *Fraser Report*, in which a government committee recommended that "the adult prostitute be given leeway to conduct his or her business in privacy and dignity, by moving indoors in small numbers in order to better protect safety," and that "adults engaging in prostitution could and should be counted on to be responsible for themselves, and therefore should be entitled to give their earnings to whomever they wish provided no coercion or threats were present." She also looked at several later studies: the 1989 *Street Prostitution: Assessing the Impact of the Law Synthesis Report*; the 1994 *Victimization of Prostitutes in Calgary and Winnipeg* study; the 1998 *Federal, Provincial and Territorial Deputy Ministers Working Group on Prostitution* report; and the 2006 *House of Commons Standing Committee on Justice and*

Human Rights Subcommittee on Solicitation Laws report, all of which, if they dealt with the issue at all, noted that brothels and incall services provided the most protection for prostitutes against violence and created the least problems for law enforcement. The justice also heard from several international "experts" on prostitution, pro and con, and studied reports on the subject from several European and Asian countries, as well as the brothel situation in Nevada.

"I find that some of the evidence tendered on this application did not meet the standards set by Canadian courts for the admission of expert evidence," the justice later states of the respondents' primary "expert" witnesses. "I found the evidence of Dr. Melissa Farley to be problematic. Although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions. For example, Dr. Farley's unqualified assertion in her affidavit that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence ... Dr. Farley's choice of language is at times inflammatory and detracts from her conclusions. ... Accordingly, for these reasons, I assign less weight to Dr. Farley's evidence. Similarly, I find that Drs. Raymond and Poulin were more like advocates than experts offering independent opinions to the court. At times, they made bold, sweeping statements that were not reflected in their research."

Justice Himel then moves to consider some of the philosophical questions attendant to prostitution, including, perhaps most importantly, "Is morality a constitutionally valid legislative objective?"

"I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the *Charter*," Justice Himel concludes. "To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."

The court also notes that, "Adult prostitution has never been a crime in Canada. Rather, Parliament has chosen to control prostitution indirectly, by making many of the acts related to prostitution illegal. ... The 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."

The justice then considers the history and effects of the three statutes challenged here—the anti-bawdy house law, the "living on the avails of prostitution" (pimping) law and the law prohibiting solicitation—and finds that all of them "deprive the applicants of liberty" and "deprive the applicants of security of the person," both forbidden under Section 7 of the *Canadian Charter of Rights and Freedoms*. She notes (as did the Fraser Report) that, "Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens," and that "The current special status of prostitution in the *Criminal Code* does not appear to have given society the protection it seeks from the harmful consequences of prostitution, nor to have given prostitutes the right to dignity and equal treatment in society." [Some emphasis removed]

In short, Justice Himel's opinion in this case represents an exhaustive examination of the Canadian anti-prostitution laws, finding them not only "in breach of the principles of fundamental justice" but vague, overbroad and disproportionate to the state's legitimate interests as well.

"I am satisfied that the applicants have met their onus and have proven on a balance of probabilities that the impugned provisions infringe the *Charter* rights of the applicants," Justice Himel finally concludes. "The respondent has not been able to demonstrate that the infringement of those rights is justified under s.1 of the *Charter*. Accordingly, I declare that the bawdy-house provision, the living on the avails of prostitution provision, and the communicating provision (ss. 210, 212(1)(*j*), and 213(1)(*c*) of the *Criminal Code*) violate s. 7 of the *Charter*, and cannot be saved by s. 1, and are, therefore, unconstitutional. I further declare that the communicating provision (s. 213(1)(*c*) of the *Criminal Code*) violates s. 2(*b*) of the *Charter*, and cannot be saved by s. 1, and is, therefore, unconstitutional."

Under a section titled "Remedy," Justice Himel notes that most of the challenged statutes are rarely enforced anyway, but should nonetheless be repealed since "the law as it stands is currently contributing to danger faced by prostitutes." However, the justice agreed to stay her conclusions for 30 days (until October 28) "to enable the parties to make fuller submissions to me on this question or to seek an order for a stay of my judgment."

What effect Justice Himel's decision will have on the prostitution laws of the U.S. remains to be seen, but her analysis of the anti-prostitution rhetoric by conservative and religious groups and their so-called "experts" has been nicely "hung out to dry" by the justice's opinion here ... and found extremely wanting. Attorney Jonathan Turley has noted that "these laws are presumptively unconstitutional after *Lawrence v. Texas*." Whether the prostitution laws will be able to take better advantage of that decision than have anti-obscenity laws will have to wait for further legal proceedings in the U.S.